BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

COTTRELL COMMUNITY PLANNING ORGANIZATION, PAT MEYER, MIKE COWAN, PAT HOLT, RON ROBERTS, KRISTY MCKENZIE, MIKE KOST, RYAN MARJAMA, MACY AND TANNER DAVIS, LAUREN COURTER, and IAN COURTER,

Petitioners,

and

MULTNOMAH COUNTY RURAL FIRE PROTECTION DISTRICT NO. 10, PLEASANT HOME COMMUNITY ASSOCIATION, ANGELA PARKER, dba HAWK HAVEN EQUINE, 1000 FRIENDS OF OREGON, OREGON ASSOCIATION OF NURSERIES, MULTNOMAH COUNTY FARM BUREAU, and GRESHAM-BARLOW SCHOOL DISTRICT 10J,

Intervenor-Petitioners,

v.

MULTNOMAH COUNTY,

Respondent,

and

PORTLAND WATER BUREAU,

Intervenor-Respondent.

LUBA No. 2023-086

RESPONDENT'S CONSOLIDATED RESPONSE BRIEF PURSUANT TO OAR 661-010-0035(2)

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Exhibit M.10

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I. STANDING

Multnomah County (the "County") has standing as the respondent in this case.

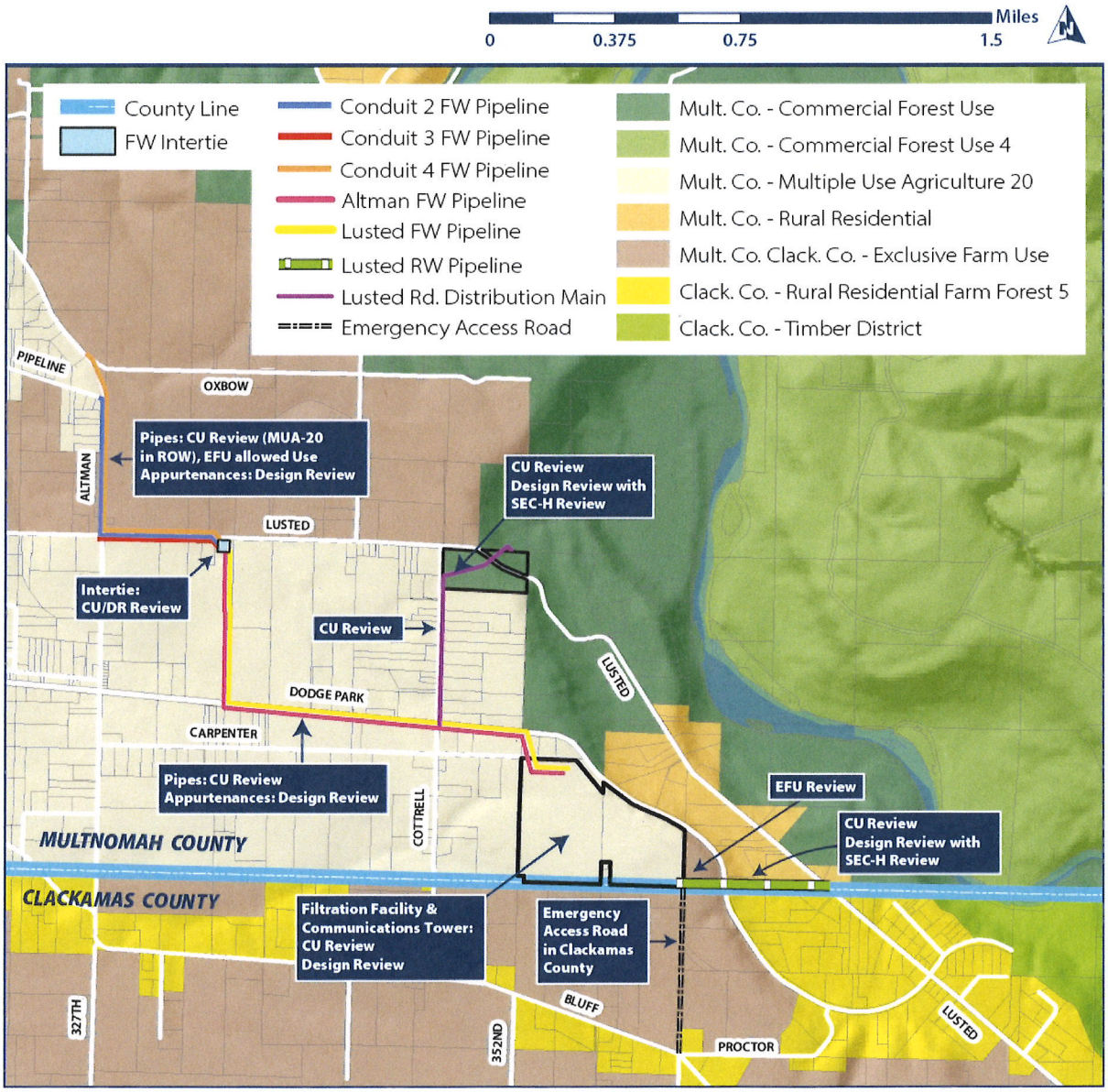
The County accepts the statement of standing by: Petitioners Cottrell Community Planning Organization, Pat Meyer, Mike Cowan, Pat Holt, Ron Roberts, Kristy Mckenzie, Mike Kost, Ryan Marjama, Macy and Tanner Davis, Lauren Courter, and Ian Courter (collectively, "CPO"); Intervenor-Petitioners Multnomah County Rural Fire Protection District No. 10 ("RFPD10"); Intervenor-Petitioners Pleasant Home Community Association and Angela Parker, DBA HawkHaven Equine (collectively, "PHCA"); Intervenor-Petitioners 1000 Friends Of Oregon ("Friends"); Intervenor-Petitioners Oregon Association of Nurseries and Intervenor-Petitioners Multnomah County Farm Bureau (collectively, "OAN"); and Intervenor-Petitioners Gresham-Barlow School District 10 ("GBSD"). CPO, RFPD10, PHCA, Friends, OAN, and GBSD are collectively referred to as "Petitioners."

II. STATEMENT OF THE CASE

A. NATURE OF THE LAND USE DECISION

The County rejects Petitioners' various statements of the Nature of the Land Use Decision as lacking specificity about the portions of the decision being challenged.

Intervenor-Petitioner Portland Water Bureau ("PWB") applied to construct a filtration facility and related pipelines and appurtenances (collectively, the "project"). Petitioners challenge only a portion of the Hearings Officer's final decision approving the project: T3-2022-16220 issued by the County on November 29, 2023 (the "decision").



Rec-8026.

The decision approves multiple consolidated land use permit applications, the majority of which are in a Goal 3 exception (non-resource) zone named Multiple Use Agriculture–20 ("MUA-20"). Rec-10, 139. The many applications are shown in the map above from Rec-8026. The consolidated approvals include, without limitation:

- Two Community Service Conditional Use Permits for Utility Facilities in MUA-20 for:
  - (1) the filtration facility, and
  - (2) the pipelines, where located in MUA-20; and
- (3) Review Use for Utility Facility in Exclusive Farm Use ("EFU") zoned land, for the raw water pipeline tunnel 150-200 feet beneath the south edge of the EFU property. Rec-7693.

The three permits enumerated in the list above are the only permits in the decision that have been challenged in this proceeding. For example, the Conditional Use Permit for Radio Transmission Tower on MUA-20 land at the filtration facility site, the Commercial Forest Use zone permit, Design Review permits, various Environmental Concern for Wildlife Habitat permits, Geologic Hazard permit, and Lot of Record Verification approvals have not been challenged by any of the Petitioners and should be affirmed.

B. RELIEF SOUGHT

The County requests that LUBA affirm the County's decision in full. As explained further in the Conclusion below, if LUBA requires a remand of the decision to the County, we expressly request that LUBA give definitive direction in any such remand in compliance with ORS 197.835(11)(a) and (b).

C. SUMMARY OF ARGUMENTS

1. Construction Is Not the Land Use Under Review

In the decision, the Hearings Officer expressly and correctly applied the standard rules for interpreting code provisions under *Portland General Electric Company v. Bureau of Labor & Industry*, 317 Or 606, 859 P2d 1143 (1993), *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009), and their progeny (*PGE/Gaines*). The findings examine the text and context of Multnomah County Code ("MCC")[1] to determine that, in the County and under the MCC, "[t]he text and context of the code is plain and unambiguous and simply does not provide any textual support for a claim that temporary construction activities required for a permanent use are also subject to the approval criteria for the long-term use." Rec-138; Rec-35-36 (incorporating findings).

Moreover, *PGE/Gaines* context includes considering that the interpretation opponents seek would be a massive departure from existing land use law and practice. Nor is this a case of first impression. In particular, in *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011), LUBA recognized that construction is regulated differently and that the "focus of [land use regulation] is clearly the permanent" use and, therefore, 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

[1] All sections of the MCC and Multnomah County Comprehensive Plan ("MCCP") cited herein are included in the Joint Response Appendix ("APP- ").

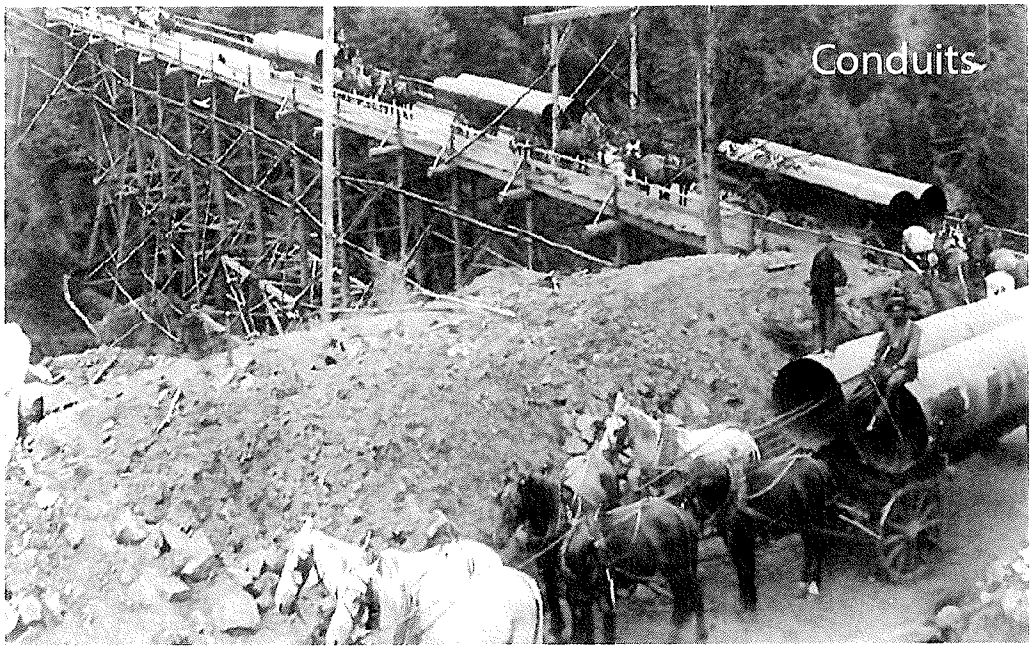
authorized use." *Id.* at 172. Petitioners' arguments to the contrary are unavailing.

2. The Project is Not Itself Services

Friends argues that the project is *itself* "public services" that are not programmed for the area. Friends Brief, 4. As applied to this case, Friends' interpretation of the approval criterion would read: "the water pipelines [the proposed use] will not require the water pipelines [public services] other than the water pipelines [those] existing or programmed for the area." Friends' argument is circular and wholly unsupported by the text and context of the MCC.

D. SUPPLEMENTARY STATEMENT OF FACTS

The Bull Run water system was constructed in the late 1800s. Rec-8022. Twenty-four miles of pipelines were laid to create a gravity-fed supply of clean water from the Bull Run River for the region. Rec-8022.



Pipeline construction in late 1800s. Rec-8022.

Today, the Bull Run Water System provides safe and reliable drinking water to nearly one million people, including the City of Sandy and five other wholesale water districts in the project area. Rec-8025; 3737. The large-diameter, gravity-fed pipelines (the "conduits") have run through this area of the County for 129 years (since becoming operational in 1895). Rec-8022.

PWB has made many improvements to the system in this area over those 129 years, including replacement of the original wooden pipelines, installation of additional conduits, and the construction of two existing treatment facilities in the area. Rec-8022; 8038; 7731. The existing Lusted Hill Treatment Facility ("Lusted Hill") is located one-half mile north of the proposed filtration facility (shown on the map below) and is designed to reduce corrosion of lead pipes found in some household and building plumbing. Rec-8022. The existing

Hudson Intertie is in the southeastern portion of the study area and services the existing conduits. Rec-8038; 7735. Neither of those existing treatment facilities has conflicted with local uses in the area. Rec-7245. Instead, one neighbor described Lusted Hill as "not noticeable at all." Video, Exhibit J.51, FLASH DRIVE, minute 5:40.

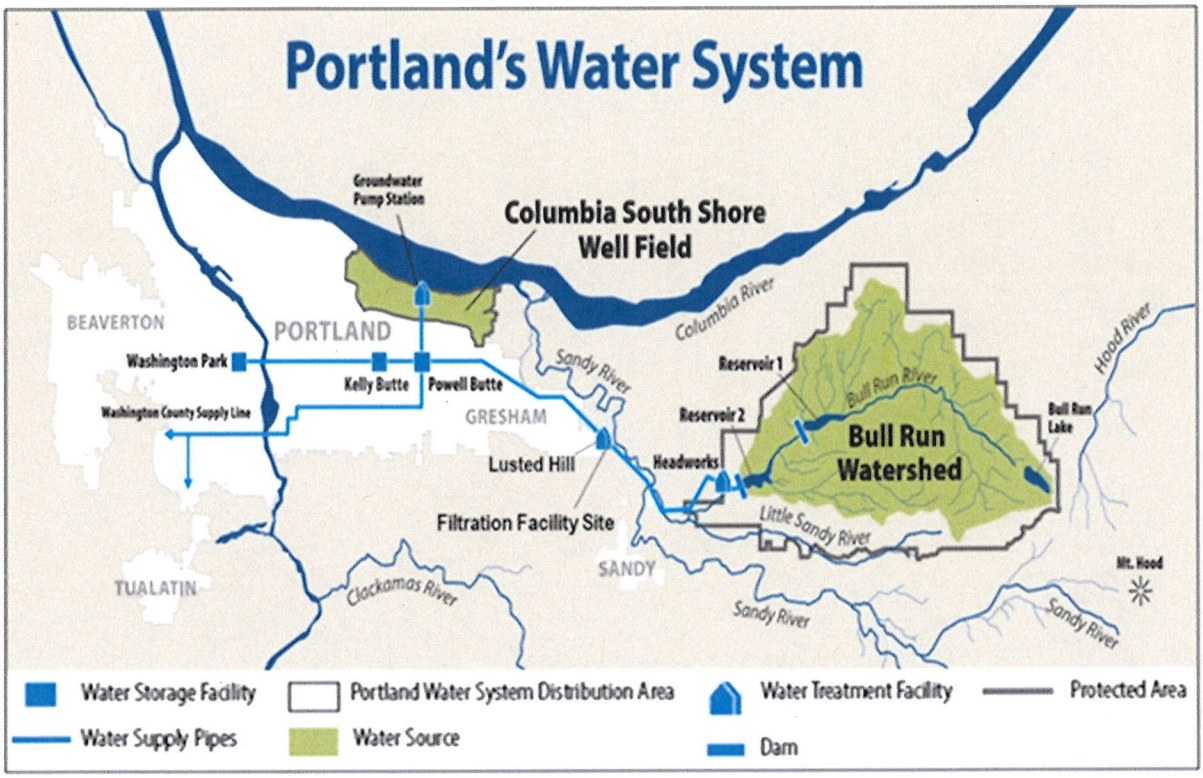


Figure 3. Portland's Water System Showing Proposed Filtration Facility Site

Rec-8023.

In 1975, the City of Portland purchased the 94-acre property off Carpenter Lane where the filtration facility will be located. Rec-7991. The location was selected for the facility because of its proximity to existing water infrastructure and its hydraulic gradeline that allows continued gravity flow of water. Rec-7991, 8024. The size of the facility site, which allows for a buffer

between the facility and adjacent properties, was also a consideration. Rec-7949.

The project includes a filtration facility designed to filter up to 135 million gallons of water per day, along with raw water pipelines, a finished water intertie, and finished water pipelines to connect the facility to PWB's existing water system in this area. Rec-8025. The project also includes a local distribution main to allow for continued service to PWB's existing local water customers and wholesale water districts. Rec-8025. Filtration facility buildings are designed to blend in with existing farm and forest land and incorporate design themes based on the observed visual characteristics of residential, nursery and agricultural, and public facilities in the study area. Rec-7837.

Like PWB's existing facilities in the project area, the filtration facility is designed with multiple engineered safety features and will be staffed by certified and trained operators to make sure systems are operated in manner that protects public health and the environment. Rec-2095. The operating facility is expected to have 26 full-time employees (with just 10 on the largest, morning shift) and see a maximum of 16 chemical delivery trucks entering and exiting the site in a 5-day week. Rec-7992, 2096.

PWB must build a filtration facility and pipelines to protect public health and comply with federal and state safe drinking water regulations, including the U.S. Environmental Protection Agency (EPA)'s treatment requirements to

remove *Cryptosporidium* (a disease-causing microorganism) from the water supply. Rec-8023. The City of Portland entered into a Bilateral Compliance Agreement with the Oregon Health Authority (OHA) to have the new facilities in operation and begin delivering filtered Bull Run water by September 2027. Rec-8024. Both EPA and OHA have determined that the project is necessary to protect public health, comply with federal and state drinking water regulations, and continue providing reliable, safe drinking water to nearly one million people. Rec-8023-8024.

Additional facts are provided where relevant to the analysis below.

III. LUBA'S JURISDICTION

The County agrees LUBA has jurisdiction over the decision.

IV. ARGUMENT

A. CONSTRUCTION IS NOT THE LAND USE UNDER REVIEW: RESPONSE TO CPO'S SECOND ASSIGNMENT OF ERROR; GBSD'S FIRST ASSIGNMENT OF ERROR; AND PHCA'S FIRST SUBASSIGNMENT OF ERROR.

1. Preservation

The County agrees that this argument was preserved, except where otherwise noted below.

2. Standard of Review

CPO argues that the Hearings Officer's code interpretation "is inconsistent with the express language and purpose for these standards. ORS 197.829(1)(a) and (b)." CPO Brief, 15. GBSD incorporates CPO

argument, also concluding that it "requires remand under ORS 197.829." GBSD Brief, 5. PHCA identifies ORS 197.835(8) and ORS 197.829(1)(d).[2] PHCA Brief, 11.

As explained in Section V below, the County agrees with Petitioners that ORS 197.829 should apply to this case. However, LUBA has generally held that ORS 197.829 applies to governing bodies, and not "to interpretations by other local decision makers, such as hearings officers." *Waverly Landing Condo. Owners' Assoc. v. City of Portland*, 61 Or LUBA 448, ___ (2010) (slip op at 7). Instead, "review of the hearings officer's interpretation in this case is governed by ORS 197.835(9)(a)(D), which requires that LUBA determine whether the hearings officer '[i]mproperly construed the applicable law.'" *Id.* LUBA may also reverse or remand a decision under ORS 197.835(8) if not in compliance with applicable land use regulations.

Under ORS 197.835(8) or ORS 197.835(9)(a)(D), LUBA "uses an appellate lens to review the local government" decision and will affirm a hearings officer, even if "debatable," if "the hearings officer's interpretation is more consistent with the text of [the code] than [opponents'] interpretation" or "at least as supportable as [opponents'] contrary view." *Waverly,* 61 Or LUBA

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[2] It is unclear why PHCA cites to subsection (d), related to implementation of state statute, goal, or rule through local provisions. That focus does match the inapplicable caselaw PHCA cites about "interpretation of state law (and local law that implements state law)[.]" PHCA Brief, pgs. 11-12. Regardless, ORS 197.829(1)(d) is inapplicable because no approval criterion in this case implements state law.

at ___ (slip op at 7); *Schaefer v. Or. Aviation Bd.*, 312 Or App 316, 322, 495 P3d 1267 (2021) ("appellate lens"); *see also Patel v. City of Portland*, 77 Or LUBA 349, ___ (2018) (slip op at 12) (summarizing a holding of *Gould v. Deschutes County*, 67 Or LUBA 1, 7 (2013), as "where different interpretations are equally plausible, and context supports a hearings officer choice of interpretation, LUBA will defer to the hearings officer's interpretation").

3. The Hearings Officer's Code Interpretation Correctly Construed Applicable Law

To determine if the Hearings Officer "properly construed the law, [LUBA will] consider the text and context of the code and give words their ordinary meaning" under the standard rules for interpreting code provisions under *PGE/Gaines*. *Dahlen v. City of Bend*, ___ Or LUBA ___, ___ (2021) (LUBA No 2021-013, June 14, 2021) (slip op at 5-6). The goal of code interpretation is "to discern the intent of the body that promulgated the law" – in this case, the Board of County Commissioners. *City of Eugene v. Comcast of Or. II, Inc.*, 263 Or App 116, 127 (2014), *affirmed* 359 Or 528 (2016).

The Hearings Officer expressly applied the *PGE/Gaines* methodology in his findings,[3] noting that "the same analysis applies to the County Code as would apply to statutes." Rec-36.

First, the findings explain the general framework of analysis:

> "Under *PGE/Gaines*,[1] the 'first level of analysis, the text of the statutory provision itself, is the starting point for interpretation and is the best evidence of the legislature's intent,' followed by the context found in related code provisions. *PGE*, 317 Or at 610-11. When considering the text, we cannot 'insert what has been omitted, or omit what has been inserted.' ORS 174.010; *PGE,* 317 Or at 611."
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> "[1] These rules apply to local codes as well. 'The proper construction of a municipal ordinance is a question of law, which we resolve using the same rules of construction that we use to interpret statutes.'" *Waste Not of Yamhill Cty. v. Yamhill Cty.*, 305 Or App 436, 457, 471 P3d 769 (2020)."

Rec-136.

Second, the findings evaluate the text of the MCC:

> "The express text of the code does not regulate or apply approval criteria to temporary construction activities. MCC 39.4305 ('Uses') commences with the following language: 'No … land shall be used and no building … shall be hereafter erected … in this base zone except for the uses listed in MCC 39.4310 through 39.4320 when found to comply with MCC 39.4325 through 39.4345….' (Emphasis

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[3] References in this brief to findings from Rec-136-148 are incorporated by Rec-35-36: "I adopt and incorporate Applicants Final Rebuttal, September 28, 2023, Pages 1-13 [Rec-136-148] into this decision (except as noted below [related to *Waveseer*])." Rec-35-36. Adopted or incorporated findings are equally valid findings. *Gonzalez v. Lane County*, 24 Or LUBA 251, 259 (1992).

added.) This introduction to the MUA-20 zone[2] expressly defines the land altering activities that are subject to the MUA-20 approval criteria: namely, the uses listed in MCC 39.4310 through 39.4320. The next question is whether temporary construction activities are a use listed in MCC 39.4310 through MCC 39.4320. They are not. MCC 39.4320 identifies the conditional uses regulated by approval criteria and states that the 'following uses may be permitted when found by the approval authority to satisfy the applicable standards of this Chapter.' The first use on the enumerated list is 'Community Service Uses listed in MCC 39.7520[.]' The code section continues with a defined list of uses that are subject to the approval criteria of the MUA-20 zone. Temporary construction activities for a permanent use are not on the list either as a separate use or as a use related to the permanent use. Temporary construction activities for a permanent use are simply not listed as a use that is subject to the approval criteria.

"The cross reference for Community Service Uses to MCC 39.7520 leads to the specific chapter that regulates Community Service Uses in all zones. There, the code continues that the 'Community Service approval shall be for the specific use or uses approved.' MCC 39.7505(A). MCC 39.7510 then states that the conditions and restrictions which may be imposed by the approval authority apply to the Community Service use itself and MCC 39.7515 explicitly states that the approval criteria apply to the Community Service use. Lastly, and most importantly, MCC 39.7520 specifically lists the Community Service uses. "Utility facilities" is listed as a conditional Community Service use under MCC 39.7520(A)(6) subject to the applicable approval criteria. Again, as in the MUA-20 zone, there is no language in any of the listed Community Service uses that includes construction activities to build the use as either an element of the use or as a separate use category that also must meet the approval criteria that otherwise apply to the permanent use."

> "[2] Similar language is found in other zones for the project, but this section will focus on the MUA-20 zone as it is the focus of most of the arguments – particularly because most of the opposition testimony is related to construction generated from the filtration facility site."

Rec-136-37.

Third, the findings summarize the context in which that code arises:

> "As important *PGE/Gains* context, there <u>are</u> temporary construction uses that are called out as uses to be regulated by the code. For example, MCC 39.4320 also identifies as a conditional use 'Large Fills as provided for in MCC 39.7200 through 39.7220[.]' Large Fills are a temporary[3] construction use, and MCC 39.7200 through 39.7220 expressly regulate how the fill can be conducted. The permit standards in MCC 39.7215 further require specific information about construction, such as how access and traffic will be managed and submittal of a traffic management plan. Other parts of the MCC also expressly regulate construction. For example, one of the approval criteria for the Geologic Hazards permit requires that 'soil disturbance shall be done in a manner which will minimize soil erosion, stabilize the soil as quickly as practicable, and expose the smallest practical area at any one time *during construction*.' MCC 39.5090(H) (emphasis added). The requirements of the Erosion and Sediment Control permits are another example. MCC 39.6225."
>
> "[3] Large fills must 'not impede future uses' of the property after the temporary use is finished and reclamation for those future uses is required. MCC 39.7200(E); MCC 39.7215(A), (B)(11)."

Rec-137.

Next, the findings provide a legal analysis of that context in which the code arises:

> "All of these provisions show that the County knew how to call out and regulate construction when that was the intended result. *See Bert Brundige, LLC v. Dep't of Revenue*, 368 Or 1, 3, 485 P3d 269 (2021) (quoting *PGE*, 317 Or at 611) ('the use of a term in one section of a statute and not in another is evidence of a purposeful omission'). Where the context 'shows that the [enacting body] knows how to' regulate in a certain way, other sections of the code must be interpreted in light of that context. *Id.* at 11.[4] The scope of the use subject to the approval criteria must be viewed in light of the general rule in land use that it is the permanent use regulated, not the construction of that use (which is regulated by construction-level review during the building permit and other subsequent processes).[5] Where the County wanted to regulate construction through its zoning code, it knew how to do so. It is a massive leap to conclude that, based on silence, the County intended to regulate construction of some Community Service uses under the same approval criteria as the permanent use."
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> "[4] *See, e.g., State v. Turnidge*, 359 Or 364, 480 n 69, 374 P3d 853, 923 (2016) ('That conclusion is bolstered by the fact that the legislature knows how to use the term 'proximate cause,' when that is what it means, and it has done so in a small handful of statutes.')"
>
> "[5] Land use reviews and building-permit level reviews are different things. The regulation of construction generally occurs at the time of building permit. 'Although building codes and zoning regulations are traceable to the police power, building codes are designed to protect the public welfare from a wholly different standpoint from that of zoning laws. Building codes deal with the safety and structure of

> buildings; **they regulate details of construction**, use of materials, and electrical, plumbing and heating specifications, all contingent upon the type of occupancy. ... Zoning ordinances, on the other hand, regulate use of buildings, structures and lands as between various purposes; the location, height, number of stories of buildings and structures; the size of lots and open space requirements, etc.' *Taschner v. City Council*, 31 Cal App 3d 48, 60, 107 Cal Rptr 214, 224-25 (1973) [emphasis added]. 'In land use law generally, the possibility that a proposal could fail if construction-level standards are not met subtracts nothing from the nature of a prior *use* approval for the proposal.' *Lands Council v. Wash. State Parks & Recreation Comm'n*, 176 Wash App 787, 798, 309 P3d 734, 740 (2013) (emphasis of 'use' in original). Unless the zoning code expressly seeks to regulate construction-level standards, the general structure of this area of law dictates that land use law is not intended as a regulation of construction."

Rec-137-138.

This section of findings concludes:

> "The text and context of the code is plain and unambiguous and simply does not provide any textual support for a claim that temporary construction activities required for a permanent use are also subject to the approval criteria for the long-term use. Such an interpretation would be patently inconsistent with the text and context of the MCC and would insert words into the code that have been omitted in violation of ORS 174.010 and *PGE/Gaines*."

Rec-138.

The findings continue for additional pages that, for the sake of brevity, we will not set forth in their entirety here. Rec-140-141, 143-147. Additional

sections of the analysis in the findings are provided below where relevant to respond to opponents' arguments.

a) Opponents' interpretation would be a massive departure from well-established land use practice

We reiterate that the interpretation opponents seek would be a massive departure from land use law as we know it. This fact is established in the record. *See* Rec-3437 ("it is the applicant team's experience … with all Oregon land use jurisdictions … that they have not previously interpretated general land use review approval criteria … to require evidence about construction"). This fact is also established by caselaw and practice. "In land use law generally, the possibility that a proposal could fail if construction-level standards are not met subtracts nothing from the nature of a prior *use* approval for the proposal." *Lands Council*, 176 Wash App at 798 (emphasis of "use" in original).

If this were not the case, virtually every application that came before LUBA would have been remanded for a lack of substantial evidence in the record, as normally there is no evidence whatsoever requested or provided regarding construction activities. For example, although the applicant in this case voluntarily provided a Traffic Impact Analysis responsive to concerns about traffic during construction (the "Construction TIA", starting at Rec-4201), the applicant's transportation expert noted that a "Construction TIA is an unusual request - normally a TIA is only prepared for ongoing operations of a

project." Rec-1968. Opponents' transportation expert similarly noted that there is an "absence of detailed data for construction site uses" – which is consistent with a Construction TIA being rare. Rec-3354. If Construction TIAs were regularly requested as part of land use in Oregon or anywhere in the country, there would be "detailed data for construction site uses" in the way there is for permanent uses. Instead, it is highly abnormal to prepare a Construction TIA because construction is not part of the land use under review for which TIAs are prepared.

This well-established practice – that construction is not the use under consideration in land use law – is context that can be considered under *PGE/Gaines*. As in *State v. Miller*, 309 Or 362, 368, 788 P2d 974 (1990), "[n]ever has this court interpreted any [local code] to require such proof." *Id.* (declining to infer that the legislature departed from well-established rule to not require proof of a culpable mental state in DUII cases); *see also Baker v. City of Lakeside*, 343 Or 70, 76, 164 P3d 259 (2007) (stating that the court is "hesitant" to read a statute to "depart from a procedural rule that has been an accepted part of Oregon practice for more than 100 years"). That context further supports the Hearings Officer's interpretation of the MCC that these approval criteria were not intended to be applied to construction activities necessary for the approved use.

4. Opponents' Lack of *PGE/Gaines* Analysis Is Not Compelling

We turn then to the opponents' arguments regarding interpretation under *PGE/Gaines*. CPO agrees that the "methodology" to apply is *PGE/Gaines*, CPO Brief, 15, but then avoids actually applying *PGE/Gaines* for 7 pages, instead making a number of broad, red herring arguments first. Those diverting arguments are addressed below in subsection IV.A.6.

The Hearings Officer expressly applied the *PGE/Gaines* methodology in his findings, at great length and in great detail. LUBA's review must determine if "the hearings officer's interpretation is more consistent with the text of [the code] than [opponents'] interpretation" or "at least as supportable as [opponents'] contrary view." *Waverly,* 61 Or LUBA at ___ (slip op at 12); *see also Neighbors for Livability v. City of Beaverton*, 168 Or App 501, 507, 4 P3d 765 (2000) (LUBA does not review land use decisions per se; it reviews "the arguments that the parties make about land use decisions."). However, opponents do not provide a *PGE/Gaines* analysis for LUBA to weigh against the extensive analysis in the findings of the decision.

a) <u>A building "erected" must still be "for the uses listed" in the zone.</u>

Opponents do not make an earnest effort to provide LUBA with a full text, context, and legislative history analysis under *PGE/Gaines*. The closest

approximation of a *PGE/Gaines* analysis is found in CPO Brief 23-24, where CPO argues that the single word "erected" is dispositive of this issue. It is not.

Notably, no party in front of the Hearings Officer focused on, or even quoted, the word "erected" at all. *See, e.g.,* Attorney Richter argument starting at Rec-832 (no mention of "erected"); Attorney Richter argument starting at Rec-3384 (no mention of "erected"); Attorney Kleinman argument starting at Rec-1389 (no mention of "erected"); Attorney Kleinman argument starting at Rec-2841 (no mention of "erected"); Attorney Kleinman argument starting at Rec-3557 (no mention of "erected"); Attorney Mulkey argument starting at Rec-3338 (no mention of "erected"). This argument is not preserved, as the Hearings Officer had no opportunity to consider it.

Moreover, in emphasizing the word "erected", CPO Brief, 23, CPO avoids quoting the code context provided by the next part of the sentence: "no building or structure shall be hereafter erected, altered or enlarged in this base zone except for the uses listed in MCC 39.4310 through 39.4320[.]" MCC 39.4305 (emphasis added). That is, the building or structure "erected" must be so erected "for the uses" allowed in the zone. A building cannot be erected detached from an allowed use in the zone. The same is true of altering or enlarging an existing structure – that change in a building must be attached to a future operating use, so that the County can determine if the change is being made "for [a] use" allowed in the zone. If a building is to be erected (or altered

or enlarged) other than "for [a] use" allowed in the zone, the application must be denied. That does not make "erection" the "use." To the contrary, "erection" must be different than "use" in order to be activity that prepares for, or has the goal or object of, the allowed use in the zone.[4] CPO cannot prevail on an argument that ignores the context of the code. *See Suchi v. SAIF*, 238 Or App 48, 54-55, 241 P3d 1174 (2010) (rejecting interpretation focused on the first part of a sentence only, as "[i]t is an elementary principle of statutory construction in this state that we examine the meaning of a phrase in its context.").

CPO further argues that "a use requiring some form of … building cannot exist without first being constructed or 'erected.'" CPO Brief, 23. That does not, however, make that building into the "use" – as is clear from the fact that buildings can change use categories over their lifetime.

b) <u>The Hearings Officer correctly found that the definition of "development" does not make construction the use.</u>

CPO continues this argument by quoting a portion of the MCC's definition of "development," without any real argument about why it is relevant. CPO Brief, 23-24. Perhaps that is because the findings thoroughly dispose of any potential argument that the 2018 change to the definition of

[4] The plain meaning of the word "for" includes "having as goal or object" and "in order to be, become, or serve as<originally built *for* a church>." "for," *Merriam-Webster's Unabridged Dictionary*, https://unabridged.merriam-webster.com/unabridged/for. Accessed 8/3/2024.

development was intended to have such a sweeping substantive effect. Rec-35-36.

We first provide a review of the record related to this topic. At the time of the Pre-Application Conference, as expected for a land use pre-application conference, there was no request for information about construction from land use planning staff, Rec-5458-5480, nor from transportation planning, Rec-5448-5457. Land use planning staff asserted for the first time in their Staff Report prior to the hearing (Rec-3905-4050) that:

> "[t]he County's code states that the terms 'development' and 'use' are synonymous. This would seem to mean that the act of improving land is part of the use. When reviewing the use, significant impacts created by the development/construction need to be considered."

Rec-3951. However, a close reading of the code does not provide that the two terms are interchangeable, instead saying that: "*[a]s the context allows or requires*, the term 'development" *may be* synonymous with the term 'use' and the terms 'use or development' and 'use and development.'" MCC 39.2000 (emphasis added).

In response, in the Applicant's Pre-Hearing Statement (Rec-3429-3438), PWB disagreed, citing to the code context and *PGE/Gaines* interpretation of the MCC, and pointed out that the County had never applied its code this way before. Rec-3437. At no point during the proceedings did staff or any other

participant provide any evidence in the record that the County had applied its code that way before.

Land use planning staff responded to the Applicant's Pre-Hearing Statement in Exhibit I.45 (at Rec-2790), which, in its entirety, argues:

> "Construction Impacts:
>
> "The applicant discusses construction activities starting on page 8 and mentions the construction of the Lattice tower at their Lusted Hill Facility (Staff Exhibit B.11). Various improvements to the Lusted Hill Facility site have occurred over a number of years: 1983, 1991, 1995, 1996/1997, 2006, 2012, 2017, 2019, 2022 and now as part of this application in 2023. These improvements to the site did not occur in a single land use project, but incrementally with various land use reviews.
>
> "In 2018, Multnomah County amended its definition of Development in its zoning code. The prior definition read '**Development** – Any act requiring a permit stipulated by Multnomah County Ordinances as a prerequisite to the use or improvement of any land, including a building, land use, occupancy, sewer connection or other similar permit, and any associated grading or removal of vegetation.'
>
> "The current definition reads '**Development** – Any act requiring a permit stipulated by Multnomah County Ordinances as a prerequisite to the use or improvement of any land, including, but not limited to, a building, land use, occupancy, sewer connection or other similar permit, and any associated ground disturbing activity. As the context allows or requires, the term 'development' may be synonymous with the term 'use"' and the terms 'use or development' and 'use and development.'

> "If planning staff has *failed to realize a significant change in the definition has occurred* in past decisions, it does not preempt the County from correctly applying its code as part of this land use application."

Rec-2790 (emphasis added).

After reviewing these arguments and those of opponents, the Hearings Officer agreed with the applicant, adopting portions[5] of the Applicant's Final Written Argument as findings. Rec-35. The Hearings Officer also noted that "County Transportation Staff disagree with the Planning Staff as to this code interpretation … perhaps [indicating that] the County position has changed." Rec-35.

In that context, the Hearings Officer found that staff had not presented a substantive interpretation of the code:

> "[The] blatant lack of any direction in the code to apply approval criteria to the temporary construction activity has, understandably, meant that the county has never applied its code this way. *See* Exhibits I.70, I.71, I.72, and I.73 [Rec-2265-2291, 2195-2264, 2128-2194, 2100-2127].
>
> ….
>
> "[S]taff have not attempted to perform an interpretation of the code using text, context, and

[5] The Hearings Officer did not adopt the "legal argument of the Applicant [on] interpretation of *Waveseer of Or., LLC v. Deschutes County*, 308 Or App 494, 501 (2021)." Rec-36. Any portion arguably related to *Waveseer* has therefore been removed (with appropriate brackets or ellipsis) from this and other quoted text of the findings in this brief. Portions quoted in this brief are incorporated as findings by Rec-35-36.

> legislative history as required by *PGE/Gains*. There is no interpretation of how the definition of 'Development' applies in the code nor any application to the facts of this case. There is no determination that the definition of the term is relevant or applicable to this proceeding."

Rec-143.

The findings continue by reviewing the legislative history of the code language staff had found so dispositive:

> "[S]taff defend that they may have 'failed to realize a significant change in the definition has occurred in past decisions' and that is why the county has never required an applicant to provide evidence related to temporary construction. That 'significant change' occurred, the [staff] statement asserts, 'In 2018 [when] Multnomah County amended its definition of Development in its zoning code.'
>
> "But the legislative history of the code change in 2018 that amended the definition of Development makes very explicit that it was a reorganization – not a substantive change. The Staff Report to the Planning Commission, provided in Exhibit J.74 [Rec-479-482], states that the code project:
>
> Eliminates redundant text without changing existing regulations, resulting in a more concise zoning code (approximately half the length of the existing code);
>
> This Project differs from most proposals brought before the Planning Commission and the Board in that the majority of the Project is an administrative exercise of merging existing code without substantive changes. However, the Planning Commission's review (and, subsequently,

Rec-143-144.

Those highlighted excerpts in the findings are from the 2018 Staff Report recommending that the County Planning Commission adopt the code package that added "As the context allows or requires, the term 'development' may be

synonymous with the term 'use'" to the code. Rec-479-482. In adopting that 2018 code package, as the findings explain:

> "[T]he legislative history is explicit that the project completed a reorganization 'without changing existing regulations' and was merely 'an administrative exercise of merging existing code without substantive changes' other than one that retained 'more permissive' standards. **How can it be that the County made a 'significant change' as staff say – a massive one, to suddenly require analysis of temporary construction activities – through a code project that would not 'chang[e] existing regulations'?**
>
> "Of course, that cannot be true."

Rec-144 (bolding in original).

Instead, the Hearings Officer applied *PGE/Gaines* and found:

> "[T]he definition of Development is irrelevant in this case.[10] Even if it were relevant, under a *PGE/Gains* analysis, it would only further support the forgoing analysis.
>
> ....
>
> "The term 'Development' is not used in the MUA-20 zone or the conditional use approval criteria for Community Service uses. It is not present as text to either describe the 'uses' that are regulated by the zone and it is not a term present in the conditional use approval criteria. Again, the MUA-20 code, and the conditional use criteria use the term 'use' and then specifically list the uses that are subject to the approval criteria. The term 'Development' does not appear in the list of uses or in relation to the list of uses. As addressed above, the code does not express any requirement to subject temporary construction activities to the approval criteria that apply to a

permanent use. Thus, the code cannot be reasonably interpreted through the definition of Development to create a separate use category for construction activities. To now insert the defined term 'Development' into the code where it presently does not exist and use that insertion to effectively create a new use category that is subject to the same approval criteria as the permanent use, violates the rules for statutory construction under *PGE/Gaines*[.]"

"[10] Interestingly, County Transportation notes 'that construction impacts in and of themselves are not code criteria for County Transportation to review objectively to recommend approval or denial of any proposal.' [Rec-736.] Thus, at least as to traffic and impacts on the County's transportation system, the County's expert does not interpret the relevant local enactments as sweeping broadly into construction. Instead, conditions related to construction from County Transportation resulted from the applicant's voluntary efforts to address community concerns and agreement to memorialize those efforts as conditions. That is, '[t]he applicant has been willing to provide substantial construction information with the understanding that this is information that can help mitigate the construction traffic' even though not related to compliance with applicable approval criteria. [Rec-736.] County Transportation's disagreement with Land Use Planning further shows that the County has never applied their code this way before."

Rec-144-145.

The findings further explore the definition of Development:

"The reference to the 'context' in the last sentence of the 'Development' definition does not support any counter interpretation. Note that, contrary to staff's statement [at Rec-3951], the County's code does not 'state that the terms 'development' and 'use' are synonymous.' Instead, the last sentence of the

> definition states 'as the context allows or requires, the term 'development' **may be** synonymous with the term 'use'....' (Emphasis added.) To be consistent with *PGE/Gaines*, the term context must mean the context of the code provisions. As detailed above, the context of the code provisions is that in no place throughout the consistent structure of the MUA-20 zone or the conditional use criteria for Community Service uses does the code ever imply or express that the temporary construction activities are a 'use' and subject to the approval criteria of a permanent listed use. Instead, in 'merging existing code without substantive changes' [Rec-479-482], a definition of 'development' related to where the county does regulate construction explicitly was merged into the definition of 'use'. This is why the context of the code provisions is critical, and the only logical interpretation of the 'context' in the last sentence of the definition is a reference to the context of the code provisions where the definition is used."

Rec-145.

As explained in the findings, based on the text, context, and legislative history, the term "development" is irrelevant to the question of whether the "use" to be evaluated under the approval criteria includes the construction phase activities for that ultimate use. For those same reasons, we ask that LUBA reject any attempt by Petitioners to now revive the line of argument that "development" and "use" are synonymous.

c) Opponents cannot achieve their policy objectives through mere interpretation, as statements of policy cannot justify departing from the text of the code itself.

CPO next argues that the "purpose and policy of the Community Service uses and the language of the criteria themselves" compel a conclusion that construction phase activities are part of the ultimate use to be reviewed. CPO Brief, 24. The reference to "purpose and policy" appears to be a reference to CPO's (incorrect) statement of the standard of review, discussed above in Section IV.A.2. ORS 197.829(1)(b), (c) (LUBA to review a local government interpretation to see if it is "inconsistent with the purpose [or] underlying policy" of the regulation). Under the correct standards of review, ORS 197.835(8) and ORS 197.835(9)(a)(D), LUBA will "consider the text and context of the code and give words their ordinary meaning" under the standard rules for interpreting code provisions under *PGE/Gaines*. *Dahlen,* ___ Or LUBA at ___ (slip op at 5-6).

CPO's purpose and policy argument permeates this assignment of error, generally following the circular pattern that any interpretation of the code that allows construction of the project would be bad for farmers and bad for rural residents, and the purpose of the code is to protect farmers and rural residents,

so any interpretation that allows the construction of the project must be incorrect.[6] The factual basis of this hyperbole is not supported by the record.[7]

Under *PGE/Gaines*, statutory (or code) policy statements are considered context, but that context cannot overcome plain text. For example, in *DLCD v. Jackson County*, 151 Or App 210, 218, 948 P2d 731 (1997), DLCD argued that Goal 3, and the purpose statement of an administrative rule implementing Goal 3 on EFU land, had an "overriding policy that 'agricultural lands shall be preserved and maintained for farm use.'" That context, DLCD argued, required the court to adopt its interpretation of the rule, and reject the proposed golf course expansion, because the proffered interpretation would be more protective of agricultural lands. *Id.* at 218. The situation here is the same: CPO points to broad policy statements in the Comprehensive Plan (similar to Goal 3) and the code policy statement implementing that plan (similar to the

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[6] *See, e.g.*, CPO Brief, 18 ("the County's interpretation would allow construction-related consequence that would destroy the character of the area and natural resources and put farmers out of business."); 20 (arguing that impacts from a subdivision "are not germane to whether construction impacts in a zone where protecting farm use and natural resources are an expressly stated and avowed purpose of the zone."); 20 (citing "significant impacts to multiple farm operations in the area"); *etc.*

[7] *See, e.g.*, Rec-150-152 ("Opponents fear gridlock from construction traffic, but that is simply not what the objective evidence in the record shows. Level of Service requirements 'serve as a gauge to allow the [County] to objectively measure the performance, or lack thereof, of its transportation system.' [The Construction TIA found] 'that the collective construction traffic will have minimal impacts on intersection and roadway operations, including during needed roadway closures for pipeline construction[.]' … County Transportation staff have reviewed the reports, and the opponents' criticisms of the reports, and validated the applicant's approach and conclusions.")

administrative rule implementing Goal 3) for the proposition that "the intent is to protect farm and rural uses" and therefore construction must be part of the use. CPO Brief, 24, 5-6. However, as the Court of Appeals explained in *DLCD*,

> "Statutes and rules often contain statements of general policy, like the statement that DLCD cites in this rule. Such expressions *can* serve as contextual guides to the meaning of particular provisions of the statutes or rules, as much as any other parts of the enactment can. At the same time, the use of expressions of policy as context is subject to the same limitations as any other proffered type of context: they are instructive only insofar as they have a genuine bearing on the meaning of the provision that is being construed. Moreover, when legislative or administrative expressions of policy are offered as context, courts must be cautious not to *make* policy in the guise of interpretation, or to allow agencies or other parties to achieve through a court's interpretation policy objectives that the enactment as promulgated was not meant to or failed to embody. *See Friends of Oregon v. Wasco County Court*, 299 Or 344, 703 P.2d 207 (1985). It goes without saying that broad policy considerations are not necessarily integrated into every enactment that relates generally to the subject matter that the policy underlies, or to every regulation that is promulgated by an agency whose responsibilities include the implementation of the policy."

151 Or App at 218 (emphasis in original).

Thus, *DLCD* directs that policy statements "are instructive only insofar as they have a genuine bearing" on the interpretive question at hand. Here, whether an interpretation is protective of farmers/rural residents, or not, has no

bearing on whether construction phase activities are to be evaluated under the permanent use approval criteria *for every zone* – including those zones that are *not* designed to protect farmers/rural residents. The identical language ("except for the uses listed") is used in each zone,[8] including those that do not protect farmers/rural residents, and in no zone does the code direct that construction of the use is the use itself. Adopting the policy argument of CPO would be allowing them to "achieve through … interpretation policy objectives that the enactment as promulgated was not meant to … embody." 151 Or App at 218.

Moreover, as in *DLCD,* the project is not a farm use, so the code "defines a specific situation where a specific nonfarm use that the rule generally restricts or prohibits may be allowed." 151 Or App at 219. That is to say, the opponents' argument "is weakened by the fact that [the code to be interpreted in this case] creates an exception to the limitations that" are otherwise imposed on rural lands. *Id.* The project is not a farm use, and it is not applying to be a farm use. The project is on MUA-20 – Goal 3 exception land – not on EFU land. Rec-139. Therefore, while the policy statements cited by the opponents are context under *PGE/Gaines*, they are not such compelling context that they override the analysis as opponents assert. *See DLCD,* 151 Or App at 220 ("[T]hose arguments come to little more than postulations by DLCD that the existence of

[8] MCC 39.4065; MCC 39.4215; MCC 39.4305; MCC 39.4355; MCC 39.4405; MCC 39.4455; MCC 39.4505; MCC 39.4555; MCC 39.4605; MCC 39.4655; MCC 39.4702; MCC 39.4750; MCC 39.4820; MCC 39.4850; MCC 39.4870.

the preservation policy of Goal 3 means, *ipso facto*, that [the rule] must be construed in the way that DLCD regards as more consonant with that [agricultural protection] policy than other interpretations might be."); *Burke v. DLCD*, 352 Or 428, 441-42, 290 P3d 790 (2012) ("a statement of legislative findings, without more, is a slim reed on which to rest an argument that the operative provisions of a statute should be taken to mean something other than what they appear to suggest").[9] For these reasons, CPO's purpose and policy arguments should be rejected.

d) *Western Land & Cattle* is irrelevant.

Finally, it is worth untangling CPO's argument regarding *Western Land & Cattle, Inc. v. Umatilla County*, 58 Or LUBA 295, *aff'd* 230 Or App 202 (2009). CPO Brief, 22. The brief quotes language that is not in *Western*, but instead in a later case citing *Western* that CPO does not cite, *Burgermeister v. Tillamook County*, 73 Or LUBA 291 (2016). Neither *Western* nor *Burgermeister* has relevance here. Each case involves a situation where an applicant obtained a "similar use determination" approving a use that was

[9] At CPO Brief, 24-25, CPO also makes a slightly different argument that the language "siting and development" in Comprehensive Plan Policy 2.45 should have required the County to apply the approval criteria to the construction prior to the authorized use. Of course, the definition of "development" in the MCC is not applicable to the Comprehensive Plan. Furthermore, it is a quite a stretch to say that a policy provision that requires staff to "support" certain community facilities is *PGE/Gaines* context that requires interpretation of the code to include construction-phase activities as part of a permanent use.

explicitly listed in another zone, but was not explicitly listed in the zone of the subject property. LUBA, as well as the Court of Appeals affirming LUBA, held that – where a local code has provisions allowing a similar use determination – a local government does not have to prohibit the use on the subject property just because it is explicitly listed in another zone. 58 Or LUBA at 301; 230 Or App at 212; 73 Or LUBA slip op at 8-9. PWB has not applied for a similar use determination and there is no argument that the construction phase for a permanent use is explicitly listed in another zone. CPO draws the broad conclusion that "PWB cannot interpret silence to mean intent," pointing again to their policy arguments but not explaining how that relates to *Western* (or *Burgermeister*). The findings have 11 pages of analysis on the text of various provisions of the code, in their context, as required by *PGE/Gaines*. Rec-136-141, 143-147. The Hearings Officer did not rely on mere silence, and certainly not in the specific context under which *Western* and *Burgermeister* arise.

Overall, CPO's few arguments that actually address the *PGE/Gaines* analysis are not compelling. The County asks that the Board affirm the Hearings Officer's interpretation, as it is "more consistent with the text of [the code] than [opponents'] interpretation[.]" *Waverly*. 61 Or LUBA at ___ (slip op at 7).

5. This is Not a Case of First Impression: *Citizens Against LNG* and *McLaughlin*

At CPO Brief, 25-29, CPO objects to the Hearings Officer's analysis of caselaw in the findings, which provide:

> "*a.* Citizens Against LNG *Holds That Temporary Construction Activity Is Not 'A Use in Itself' Governed by The Land Use Regulations*
>
> "In *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011), LUBA reviewed an approval of a proposed pipeline with a permanent 50-foot-wide easement and an additional 45-foot-wide temporary construction easement. *Id.* at 171 n.2. Petitioners argued that the text of the code only allowed easements '50 feet or less in width' for a pipeline use. *Id.* at 171. Thus, the petitioners claimed that, because the construction activity itself was subject to the approval criteria applicable to the permanent use and inherently could not meet those approval criteria, the use itself was not permitted. *Id.* at 172. That is, the petitioners argued that because 50 + 45 feet is greater than the '50 feet or less in width' permanent use category in the code, the application objectively had to be denied. LUBA disagreed, even though LUBA found that the code was silent regarding temporary construction use. *Id.* at 172. Instead, LUBA recognized that construction is regulated differently and that the 'focus of the [land use regulation] is clearly the permanent' use and, therefore, 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.' *Id.* at 172.

"The case in front of you now is indistinguishable from LUBA's holding in *Citizens Against LNG*. Like in *Citizens Against LNG*, the 'focus of the [approval criteria in the MCC] is clearly the permanent' use of the land for the Project. In the MUA-20 zone and under the Community Service use criteria specifically, the code refers only to the permanent use that is regulated by the approval criteria and is silent on temporary construction of that permanent use. In no place does the MCC express or imply a requirement to subject the temporary construction activities to the approval criteria that apply to the permanent use. Thus, under *Citizens Against LNG*, an interpretation that subjects temporary construction activities to the same approval criteria as the permanent use would be inconsistent with the text and context of the code. *PGE*, 317 Or at 610.

....

"[LUBA] reaffirmed *Citizens Against LNG* in *McLaughlin v. Douglas County*, ____ Or LUBA ___ (2021) (April 13, 2021, LUBA No. 2020-004). In that case, LUBA agreed that 'some impacts are inevitably associated with pipelines and that the allowance of pipelines in the relevant zones as conditional uses reflects a legislative determination that those inevitable impacts are also allowed.' Accordingly, LUBA affirmed county findings that 'all pipelines would create a linear clearcut, and all pipelines would have [temporary extra work areas.] Therefore, that could not be the type of impact that the legislature and drafters had in mind. **The same can be said of construction related impacts, such as trenching, blasting, power hammering etc.**' *Id. [emphasis added;] See also Davis v. Polk County*, 58 Or LUBA 1, 7 (2008) (county findings denying a CUP for a race track due to a lack of harmony with other uses because the race track would be unable to prevent any dust from leaving the property were inadequate where

> numerous listed conditional uses would necessarily generate dust). Here, the construction related impacts of the project are inherent to all conditional uses, and were 'not the type of impact that the legisla[tive] drafters had in mind.'"

Rec-138-139.

CPO first argues that *Citizens Against LNG* and *McLaughlin* relate to forestlands, and therefore the cases are irrelevant because none of the project crosses forestlands (the main facility is in MUA-20, an exception zone, Rec-139). However, it is undeniably relevant for the Hearings Officer, and LUBA, to examine LUBA's analysis and reasoning when faced with similar issues of interpretation, regardless of the zone in which those issues arose. This is not a case of first impression in like circumstances.

Moreover, the Hearings Officer considered and rejected a very similar argument by CPO's counsel in his findings:

> "Ms. Richter next argues that the case is about forestry zoned lands, and that the Clackamas County case is about EFU land – 'a much more strict and statutorily controlled farmland protection scheme.' Forestry zones are also strict, statutorily controlled zones – as evidenced by OAR 660-006-0025, so the argument doesn't even make internal sense related to the EFU zone in Clackamas County. For Multnomah County, if we accepted her logic, construction should be even less relevant to review in the MUA-20 zone, given that the MUA-20 zone is explicitly a 'non-resource' and 'exception lands' base zone to which Goal 3 does not apply. MCC Chapter 4.B.[6] Moreover, *Citizens Against LNG* was recently reaffirmed in *McLaughlin* [for] a project that does cross EFU zones. This argument is a red herring."

> "[6] Caselaw relevant to the Farm Impacts Test is addressed under the analysis of MCC 39.7515(C) below."

Rec-139.

CPO's argument now on appeal makes no more sense than the variant of that argument did to the Hearing Officer in rejecting it below.

Second, CPO argues that these cases answer the wrong question, which CPO summarizes as: whether the construction is *part of* the use. But that question framing avoids the key holdings. In *Citizens Against LNG*, LUBA held *both* that the temporary construction easement is not part of the listed use in the code – the question CPO now focuses on – *and* that construction does not need to be evaluated under the code standard that applies to the listed use. Why? Because construction of an allowed or permitted use is fundamentally not regulated as a land use. The "focus of the [land use regulation] is clearly the permanent" use and therefore 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." 63 Or LUBA at 172. This is the key distinction: construction is "necessary to construct the authorized use," it is not the use itself, and therefore the approval criteria that would apply to the authorized use do not apply to the construction of that use. *Id.*; *see also Lands Council*, 176 Wash App at 798 ("In land use law generally, the possibility that a proposal could fail if construction-level standards are not met subtracts nothing

from the nature of a prior *use* approval for the proposal." (Emphasis of "use" in original.)).

As to the "fact" CPO asserts that the "county did consider" construction under the compatibility criterion in *McLaughlin*, CPO, again, misrepresents the caselaw. CPO Brief, 26. Immediately after the short quotation CPO points to, the decision makes clear that the county found the pipeline "compatible" based on the finding of fact that "[o]nce installed, the Pipeline will not have any noise, odor, or visual impacts[.]" *McLaughlin*, slip op at 45. Thus, the "county concluded that, given the lack of visual, odor, vibration, and noise impacts" from the pipeline "[o]nce installed," "the pipeline is compatible" with the uses in the area. *Id.* That is, regardless of any passing mention of construction,[10] the actual finding upheld by LUBA does not consider the construction phase but only the pipeline "[o]nce installed[.]"

Finally, CPO attacks *Davis* – cited by LUBA in both *Citizens Against LNG* and *McLaughlin* – and makes an overly broad summary of the findings in order to make them easier to attack. The findings made by the Hearings Officer do not say that "considering construction impacts would have the effect of prohibiting all utility facilities[.]" CPO Brief, 27. The citation in the findings to

[10] It is not even clear here that the findings *are* discussing construction, rather than using "installation" as a synonym for the change in land use resulting from adding a pipeline.

Davis is a "*see also*" reference,[11] followed by: "the construction related impacts of the project are inherent to all conditional uses, and were 'not the type of impact that the legisla[tive] drafters had in mind.'" Rec-140. *Davis* is in line with, and provides additional support for, the actual findings made by the Hearings Officer. Considering the code context of other uses subject to the same approval criterion is a valid interpretational methodology under *PGE/Gaines*. *Tarr v. Multnomah County*, 81 Or LUBA 242 (2020) (slip op at 37); *Davis*, 58 Or LUBA at 7.

Further, the block quote at CPO Brief, 27, does not support CPO's argument. The question asked by LUBA in that block quote from *Davis* is still whether the "proposed conditional use," and not the construction of that use, meets the applicable approval criterion.

6. Opponents' Other Arguments

As noted above, CPO brief avoids *PGE/Gaines* for 6 pages, making a number of distracting, but ultimately ineffective, arguments.

a) Additional Caselaw: *Stephens* and *West Hills*

CPO points to *Stephens v. Multnomah County*, 10 Or LUBA 147 (1984), saying that "LUBA referred to these identical criteria … as 'unequivocal statements' that certain conditions must be maintained[.]" CPO Brief, 17. This

[11] *See The Bluebook: A Uniform System of Citation (20th ed.)*, page 59 ("*See also* Cited authority constitutes *additional* source material that supports the proposition." (Italics added.)).

is false. In *Stephens,* LUBA held that the *finding* made by the county needed to be "unequivocal", not that the approval criteria themselves are unequivocal. In *Stephens*, 10 Or LUBA at 152, the only two uses of the word unequivocal are "an unequivocal finding" and "if this finding [is] unequivocal[.]" CPO misrepresents the case.

Regardless, this is irrelevant to their argument that the construction of a use should be considered under the approval criteria that apply to the permanent, operating use. In compliance with *Stephens,* the Hearings Officer's findings are unequivocal – stating, for example, that "[t]he text and context of the code is plain and unambiguous and simply does not provide any textual support for a claim that temporary construction activities required for a permanent use are also subject to the approval criteria for the long-term use." Rec-138. CPO just does not like what those unequivocal findings say.

Next, CPO points to the unpublished[12] decision in *West Hills & Island Neighbors, Inc. v. Multnomah County*, __ Or LUBA __ (LUBA No. 83-018, June 29, 1983), *aff'd* 68 Or App 782, *rev den* 298 Or 150 (1984). In *West Hills*, the County evaluated a landfill proposal and found that the landfill would be consistent with the character of the area "in terms of the condition of the land after the use is ended" when the "land will be reclaimed for forest use[.]" *West*

[12] It is unclear what effect, if any, being unpublished has on the precedential effect of LUBA opinions. In other courts, unpublished opinions are not precedential. *See, e.g.,* Ninth Circuit Rule 36-3. There does not appear to be a similar rule at LUBA.

Hills, slip op at 13. LUBA held that "the county may [not] measure consistency of the use with the character of the area against the day when the landfill no longer is operating and is covered over and replanted." *Id.*, slip op at 14. In so doing, LUBA agreed with petitioner's argument that the consistency requirement "must refer to the life of the use, not the character of the land after the use is gone." *Id.*, slip op at 12.

Nothing in *West Hills* purports to subject construction of the landfill to the consistency (or any other) approval standard for the operating use. Instead, LUBA holds that it is "the use" when it is "operating," and not when that operation has ended, that is to be reviewed in the land use decision applying these same approval criteria. *West Hills* supports an interpretation of the MCC that it is the operating use, and not the construction phase prior to operation, that is to be evaluated under the approval criteria.

CPO places all its emphasis on the use of the word "always" in one sentence of *West Hills*: "[t]he use must always be 'consistent with the character of the area'." CPO Brief, 17.[13] From that one word, CPO concludes there "is no other way to interpret LUBA's use of the term 'always'" than to sweep construction activities into the operating use to be evaluated. *Id.* However, that ignores the word "use" in the sentence. Indeed, the problem in *West Hills* was not that the County considered "the impacts only of one component phase of a

[13] PHCA's brief also mentions this case, emphasizing this same quotation, although they do not attempt to draw any conclusions from it. PHCA Brief, 15.

use," as CPO states, but instead that it considered the *wrong* phase, the phase after the use "no longer is operating." *West Hills*, slip op at 12.

In the present appeal, CPO asks LUBA to interpret the code to *also* consider the wrong phase, namely the phase *before* the use starts "operating." It would be error to consider either the phase before operating or the phase after operating. The Hearings Officer was correct to examine the "operating" use under *West Hills*.

b) Irrelevant Commentary

In another argument, CPO complains that the Hearings Officer made side comments that, in his many years of work in land use, it has always been the impacts of the operating use, and not the construction phase of that use, considered in a county's review of a land use application. CPO Brief, 19-20. First, as explained above in Section IV.A.3(a), that fact – that the interpretation opponents seek would be a massive departure from established land use law – is established elsewhere in the record, and by caselaw and practice.

CPO does not cite to any caselaw in this section, but just argues that this commentary is "irrelevant," "not germane," and relates to "nothing in the test" under *PGE/Gaines*. CPO Brief, 19-20; *see also* CPO Brief, 28 ("not a recognized" interpretive method). This is true in the other Petitioners' briefs as well. PHCA Brief, 16 ("irrelevant"); Friends Brief, 23 ("hearings officer's

personal experience with construction traffic and participation in other land use proceeds is [not] relevant").

For the sake of argument, let us assume that it is irrelevant to *PGE/Gaines,* as opponents assert. Irrelevant commentary is a common occurrence in local government findings. For example, in *Angius v. Washington County*, 52 Or LUBA 222 (2006), a hearings officer noted that he was "familiar with" stormwater systems "in other areas" that were successful under similar high water table conditions as those the project faced. *Id.* at 239. Petitioners argued to LUBA that "the hearings officer's personal experiences are outside the record, and cannot be relied upon." *Id.* at 239-40. LUBA agreed that findings must be based on evidence in the record, but concluded that "the challenged comment is merely an additional basis to reach the main conclusion" that the high water table would not be an issue. Because "that main conclusion is supported by the record[, a]ny error in citing an additional basis outside the record to support that conclusion is, at most harmless error." *Id.* at 240. The same is true in this case. *See* Section IV.A.3(a) above.

The legal question under *Angius* is not whether the Hearings Officer made irrelevant commentary, but instead whether the relevant findings he did make are supported by substantial evidence in the record. *See Mitchell v. Washington County*, 37 Or LUBA 452, 468 (2000) (decision was "not supported by substantial evidence" when hearings officer independently

devised an alternative drainage system in his findings, with no evidence in the record related to the new alternative, and then relied on that alternative in findings). The fact itself that "Oregon land use jurisdictions ... have not previously interpretated general land use review approval criteria ... to require evidence about construction" has another basis in the record. Rec-3437. This fact is also established by caselaw and practice. *See* Section IV.A.3(a) above. Other than complaining about irrelevant statements, no one contends that the Hearings Officer's *PGE/Gaines* analysis is not supported by substantial evidence. Where a local government makes an irrelevant finding, LUBA may consider it "mere surplusage, and the fact that the finding may be erroneous or not supported in the record is not grounds for reversal or remand." *Allen v. City of Portland*, 15 Or LUBA 464, 472 (1987).

Because there is substantial evidence in the record, in addition to caselaw and practice relevant to the Hearings' Officer's *PGE/Gaines* analysis, Section IV.A.3(a), "the challenged comment is merely an additional basis to reach the main conclusion" that construction is not the operations-phase land use to be evaluated. Any error by the Hearings Officer in citing that additional basis "is, at most, harmless error." *Angius*, 52 Or LUBA at 240. Boiled down, CPO's argument is that this irrelevant commentary is, well, irrelevant. That argument has no bearing on whether the extensive *PGE/Gaines* analysis in the findings is

correct nor on whether construction should be evaluated under the approval criteria for permanent uses.

c) Line Drawing and Code Requirements for Construction Timelines

CPO next turns to a series of confusing paragraphs trying to infer that the Hearings Officer's code interpretation is *merely* that construction is "temporary and that this temporary nature makes them nothing more than an inconvenience." CPO Brief, 20. Some of these statements are more than confusing, they are directly misleading. For example, CPO claims the Hearings Officer did not "grapple" with testimony that farm operations fear significant impacts from construction. CPO Brief, 20. This is false. The findings provide over 150 pages of analysis responding to farmer concerns, including concerns about construction. APP-1-168.

Related to line drawing, CPO states that the Hearings Officer "made no effort to interpret how long construction impacts must extend" and that the Hearings Officer did not adopt by reference the PWB argument related to MCC 39.1185(B)(2). CPO Brief, 20-21. Neither is true – the Hearings Officer expressly adopted "Pages 1-13." Rec-36. Pages 11-12 (Rec-146-47) provide:

> "Opponents and staff claim that this project has more than the typical construction timeline so it should be regulated as a use.[12] Staff Report, page 47. But there is no code language that says, 'if construction is long' then it is a 'use' and subject to permanent use approval criteria, even though it is not included or listed as a 'use.' … Further, even if 'takes too long'

were the test for when construction becomes subject to permanent use approval criteria, the test as advocated by opponents and staff completely ignores the code allowances for the length of construction. MCC 39.1185(B)(1) states that construction must commence within 2 years of the date of the final decision and (B)(2) states that construction must be completed within 4 years of the date construction commences. Thus, the code assumes that the temporary construction use can continue for a period of at least 4 years. This time period is not unusual; instead, it is expressly permitted by the code. These timelines have specifically been included as conditions of approval in this case (staff's proposed conditions 1 and 2), and the project does not extend beyond the code standards for length of construction. The applicant has accepted these conditions of approval and will commence and complete construction within the timelines required by the MCC.

....

"If line drawing is necessary, the only test [in the MCC itself] is the requirement of MCC 39.1185(B) related to completion of construction within 4 years of the date construction commences. As noted, these timelines have specifically been included as conditions of approval in this case (staff's proposed conditions 1 and 2), and the applicant has accepted these conditions of approval and will commence and complete construction within the timelines required by the MCC. Therefore, even if construction could be 'too much' and trigger consideration under permanent use approval criteria contrary to *Citizens Against LNG*, this project does not exceed the only 'too much' threshold discernable from the provisions of the code itself."

"[12] Note that it does not have an a-typical construction timeline relative to other water treatment facilities that would be allowed as community service uses at this

> site. Exhibit I.79 [at Rec-2081]. At about 4 years (see Land Use Planning's condition 1.b), it is extremely typical of water treatment facility construction and within the timeline that would have been contemplated when the code was enacted."

CPO's arguments add nothing of substance. CPO Brief, 20-21.

7. Inadequate Findings or Substantial Evidence Challenge

PHCA drops a single sentence to assert that "it" (undefined) "contains inadequate findings unsupported by substantial evidence." PHCA Brief, 17. Nothing more. A single, bald assertion is not a legal argument. This argument is insufficiently developed for LUBA's review. *Meyer v. City of King City*, __ Or LUBA__ (LUBA No. 2024-004, May 31, 2024) (slip op at 21) (*citing Deschutes Development v. Deschutes County*, 5 Or LUBA 218, 220 (1982)). Here, there is an extensive analysis of the *PGE/Gaines* interpretation of the code in the findings. Moreover, there is no evidence needed to support a *PGE/Gaines* legal analysis, so it is unclear how it could be unsupported by substantial evidence.

B. RESPONSE TO FRIENDS' FIRST ASSIGNMENT OF ERROR: THE PROJECT IS NOT ITSELF "SERVICES"

1. Preservation

Friends adequately preserved this argument.

2. Standard of Review

In a catch-all statement of the standard of review, Friends asserts that the decision lacks adequate findings, is not supported by substantial evidence, and

misconstrues applicable law. Friends Brief, 3. While Friends properly describes the various standards of review, they do not present a focused findings or substantial evidence challenge. To the extent that these arguments are buried in the first assignment error, they are not sufficiently developed for review.

3. Argument

MCC 39.7515(D) requires the Hearings Officer to find that the proposed use "[w]ill not require public services other than those existing or programmed for the area." As the Hearings Officer's decision explains, the proposed uses include several elements:

> "An Application for 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) and Lot of Record Verifications"

Rec-10; 14-15 (staff description of the "proposed project"). In what can only be characterized as an unorthodox exercise in statutory construction, Friends argues that the approved filtration facility and pipelines and emergency access

road are *themselves* "public services" that are not programmed for the area.[14] Friends' argument is nonsensical and not supported by the text or context of MCC 39.7515(D). Indeed, in addressing the Friends' argument below, the Hearings Officer commented "I am not certain I understand the argument but it appears to be that the project cannot be approved because the project needs an access road and a water pipeline and those are not currently in the area. Mr. Mulkey's proposed standard would make any application impossible." Rec-54. Indeed, it would.

a) Text

In construing MCC 39.7515(D), LUBA's task is to discern the intent of the Board of County Commissioners by examining the text, context, and any relevant legislative history of the provision. *Gaines*, 346 Or at 171-72. MCC 39.7515(D) provides that proposed use "[w]ill not require public services other than those existing or programmed for the area." Neither the MCC nor the comprehensive plan define "public services[.]" However, the Multnomah County Comprehensive Plan ("MCCP") Public Facilities Goal includes provisions related to water supply and wastewater treatment systems, energy

[14] The emergency access road is located in Clackamas County and was not part of the present application. Rec-14. Although Friends identifies the emergency access road and filtration facility, Friends' argument is, or appears to be, limited to the approved pipelines, which are categorized as "utility facilities." Rec-10; 14-15.

facilities, solid waste management facilities, transportation, police, fire, and emergency response facilities. MCCP, pages 11-13 to 11-15.

The text of MCC 39.7515(D) is relatively straightforward. Applied to this application and Friends' argument, the proposed use is, in part, to construct the pipelines delivering raw water to, and filtered water from, the filtration facility. The pipelines cannot be both the "proposed use" and the "public facilities" referenced in MCC 39.7515(D). As applied to this case, Friends' construction would read: "the water pipelines [the proposed use] will not require the water pipelines [public services] other than the water pipelines [those] existing or programmed for the area." The argument is circular. As the Hearings Officer recognized, such a construction would make approval impossible. Rec-54. The plain text of MCC 39.7515(D) does not support Friends' construction.

Application of other code sections yield the same result. Under MCC 39.7520(A)(6), high power transmission lines and substations are allowed as conditional uses in the MUA-20 zone. Under Friends' construction of the standard, the local power company could not place new transmission lines or a substation in the MUA-20 zone because the substation would rely on the needed power lines to operate, and because the needed power lines are "public services" that do not yet exist, the proposed use must be denied.

b) Context

A statute's context includes, among other things, its immediate context—the phrase or sentence in which the term appears—and its broader context, which includes other statutes on the same subject. *PGE*, 317 Or at 610. The "programmed for the area" language is included in several other sections of the code and demonstrate that the "proposed use" cannot also be the "public services" referenced in the approval criterion. For example, MCC 39.7615(B)(9) establishes the criteria for regional landfills, a type of "public service." The "public facilities" standard provides:

> "The Approval Authority shall find that: …
>
> "(B)(9) Public Facilities and Services — where all such facilities necessary to serve the landfill are either available or programmed for the area;"

MCC 39.7615(B)(9). While the sentence structure is not the same, it is clear that this standard distinguishes between the "proposed use" (the landfill) and the "public facilities" necessary to serve the landfill, *e.g.* water and sewer. They are not, nor can they be, the same thing. Similarly, MCC 39.4707(A)(3) establishes the standards for dwellings in the Multiple Use Forest zone. This section provides:

> "The dwelling will not require public services beyond those existing or programmed for the area;"

Again, this section clearly distinguishes between the proposed use, e.g. the dwelling, and the public services necessary to serve the dwelling. They cannot be the same thing.

The MCCP also provides relevant context. Policy 11.12 provides:

> "11.12 A water supply system for new development shall be by either of the following methods: 1. Connection to a public water system having adequate capacity to serve the development and all other system customers. 2. A private water system that produces safe drinking water with sufficient volume and pressure to meet applicable Building Code and Fire Protection Code."

This policy highlights that, when referring to water supply, the comprehensive plan – and by extension MCC 39.7515(D) – refers to the provision of potable water that is required to serve the needs of development through a well or public water system.

State law provides additional textual guidance. Under ORS 197.712, the county is required to:

> "develop and adopt a public facility plan[.] The public facility plan shall include rough cost estimates for public projects needed to provide sewer, water and transportation *for* the land uses contemplated in the comprehensive plan and land use regulations."

ORS 197.712(2)(e) (emphasis added). The statute makes it clear that such plans must identify the "projects needed" to provide water *for* the land uses contemplated in the development code. Similarly, OAR 660-011-0065(1)(b) defines "extension of a water system" in part, to mean an extension of a

pipeline "to provide service to a use." ORS 215.275 similarly demonstrates that the pipelines and filtration facility are *providing* public services not *requiring* public services. The statute provides, in relevant part: "A utility facility . . . is necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service." ORS 215.275(1). There is simply no way to read MCC 39.7515(D) in the manner suggested by Friends.

c) Maxims of Statutory Construction

"If, after consideration of text, context, and legislative history, the intent of the legislature remains unclear, then the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *PGE*, 317 Or at 612. The decision's interpretation of MCC 39.7515(D) is consistent with general maxims of statutory construction. For instance, it does not "insert what has been omitted, or omit what has been inserted[.]" ORS 174.010. It also gives "effect to all" provisions in the standard. *Id.* Even if the Friends' construction could be applied as it contends it is written, because it would lead to an absurd result (i.e., precluding a public service use because the "proposed use" requires the "proposed use" to function) it cannot be so applied. "It is a fundamental tenet of statutory construction that an unambiguous statute should not be interpreted. If the language is plain, it must be applied as written, unless that application would produce an absurd and unreasonable result." *Hillsboro v. Housing Dev. Corp.*, 61 Or App 484, 488, 657 P2d 726 (1983).

d) Response to Petitioner's Specific Arguments

One of Friends' primary mistakes is asserting that the raw water delivered by a pipeline is "water service." Friends Brief, 9 ("the water service that the applicant would require both to and from the facility are truly massive."). The raw water pipelines are the "proposed use" and they are not "water service" as with a drinking water connection provided by a municipal or quasi-municipal water provider. The filtration facility is not like a microchip factory that depends on a public water system to furnish large quantities of water from a local government to produce microchips. Rather, the delivery of raw water, the filtration of that water, and the subsequent delivery of the filtered water *is* the proposal.

After explaining that he did not understand Friends' argument, the Hearings Officer concluded that "[a]s stated above the Application proposes the construction of those facilities and as such I find that these facilities are 'programed for the area' and the Application meets this requirement." Rec-55. The reference to "as stated above" refers to the prior paragraphs in the decision, which provide, in part, "I understand that meaning as, for instance, if an application needed a water line, it could still be approved even if the water line was not currently in the area, if it was going to be installed before the project operated." Rec-55.

The Hearing Officer's reason for adding an additional reference to programmed for the area is unclear. But, Regardless of the Hearings Officer's reason, the finding is superfluous because, as discussed above, the pipelines are not "public services" within the meaning of MCC 39.7515(D). Friends' argument is limited solely to the approved pipelines. Friends Brief 12 ("By concluding that the proposed large diameter pipelines existed or were otherwise programmed for the area, the hearings officer misconstrued applicable law."). Because the pipelines are not and cannot be public services required for the use within the context of MCC 39.7515(D), whether the pipelines exist or are programmed for the area is irrelevant to compliance with MCC 39.7515(D). The pipelines themselves simply do not require *any* public services. Where a local government makes an irrelevant finding, LUBA may consider it "mere surplusage, and the fact that the finding may be erroneous or not supported in the record is not grounds for reversal or remand." *Allen v. City of Portland*, 15 Or LUBA 464, 472 (1987). Moreover, to the extent that LUBA does not consider the Hearings Officer's statement "mere surplusage" LUBA "may make its own determination of whether the local government decision is correct" under ORS 197.829(2).

Fundamentally, the question under MCC 39.7515(D) is whether the proposed use "will require public services[.]" Friends only argues that the pipelines are the public services referenced in MCC 39.7515(D). Because

public services cannot be both the service provided by the project and needed by the project, LUBA can find that that "the local government decision is correct" under ORS 197.829(2). PWB requests that LUBA so find and reject the first assignment of error.

V. Alternative Standard of Review

As noted in Section IV.A.2, Petitioners reference ORS 197.829 as providing the applicable standard of review in this matter. Oregon courts have held that ORS 197.829 applies only to decisions of a governing body and not those of a hearings officer. *See, e.g.*, *Tonquin Holdings v. Clackamas County*, 247 Or App 719, 723, 270 P3d 397 (2012). The cases making that holding all rely on *Gage v. City of Portland*, 319 Or 308, 312, 877 P2d 1187 (1994). However, *Gage* was decided before the effective date of ORS 197.829 and therefore did not construe ORS 197.829. *Gage*, 319 Or 317 n 7.

To adequately preserve the issue for judicial review, we request that the Board construe ORS 197.829, consistent with the long-established statutory construction principles laid out in *PGE/Gains*, and hold that interpretations adopted by the Hearings Officer are subject to deference under ORS 197.829.

A. TEXT

In relevant part, ORS 197.829 provides that LUBA "shall affirm a local government's interpretation of its comprehensive plan and land use regulations[.]" Relying on *Gage*, courts have stated that "local government"

means the elected governing body. *Siporen v. City of Medford*, 349 Or 247, 257-58, 243 P3d 776 (2010) (Oregon Supreme Court recognizing that ORS 197.829 is "in large part, a codification" of the court's holding in *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992)). In *Siporen,* the court referenced *Gage* and highlighted that "at least one of the fundamental ideas behind applying [the deferential standard of review under ORS 197.829] is that, when a governing body is responsible for enacting an ordinance, it may be assumed to have a better understanding than LUBA or the courts of its intended meaning." *Siporen*, 313 Or 258. *Siporen* did not rely on *Gage* or otherwise expressly affirm *Gage*. The question of deference to a hearings officer was not present in *Siporen.*

The fundamental error in cases applying *Gage* to ORS 197.829 is that the statute does not use the term "governing body." Rather, ORS 197.829 applies to a "local government's interpretation[.]" ORS 197.015 defines "local government" as "any city, county or Metro or an association of local governments performing land use planning functions under ORS 195.025." The definition, alone, does not resolve whether ORS 197.829 applies to *any* decision of a local government or only those of the "governing body." The context in which "local government" is used throughout ORS chapter 197 and, in particular, LUBA's review standards in ORS 197.805 to 197.845, support the conclusion that ORS 197.829 applies equally to a hearings officer decision.

Fundamental to statutory construction is that the "use of the same term throughout a statute indicates that the term has the same meaning throughout the statute." *PGE*, 317 Or 611 (*citing Racing Comm. v. Multnomah Kennel Club*, 242 Or 572, 586, 411 P2d 65 (1966)). ORS 174.010 instructs reviewing courts "not to insert what has been omitted, or to omit what has been inserted." A construction of ORS 197.829 that replaces "local government" with "governing body of the local government" violates both of those rules of statutory construction.

B. CONTEXT

The terms "local government," "governing body," and "governing body of [the] local government" are used extensively throughout ORS chapter 197. This fact alone suggests that the choice to use "local government" in ORS 197.829 and not "governing body" or "governing body of the local government" was deliberate. "In the absence of evidence to the contrary, we ordinarily assume that the legislature uses terms in related statutes consistently." *State v. Cloutier*, 351 Or 68, 99, 261 P3d 1234 (2011). Here there is no evidence to the contrary.

LUBA has exclusive jurisdiction to review any "land use decision or limited land use decision of a local government." ORS 197.825(1). Given that an interpretation must be included in a "land use decision" subject to LUBA's review, there has to be some indication in ORS 197.829 that LUBA's obligation

to affirm an interpretation is limited to those "land use decisions" of a "governing body." There is no such expression of intent in the statutes. ORS chapter 197, in fact, demonstrates just the opposite.

"Governing body" and "local government" are two separate concepts under ORS chapter 197. For example, a "comprehensive plan" is the "policy statement of the governing body of a local government[.]" ORS 197.015(5). If the legislature intended "local government" and "governing body" to be synonymous, it would not have used the two terms in a single sentence. Reading them to be synonymous requires reading one of them out of the statue, in violation of ORS 174.010's instruction to "not ... omit what has been inserted."

Similarly, under ORS 197.370, the legislature provided that the "governing body of the local government" may extend the time period for issuance of expedited land use decisions. Under ORS 197.375(5) the "governing body of the local government" may find whether exigent circumstances allow for the delay in issuance of expedited land division appeals. When the legislature intended the "governing body" to have certain obligations, it made those express. *See, e.g.,* ORS 197.160(1)(b); ORS 197.412; ORS 197.416(3)(a)(B); ORS 197.433(3); ORS 197.445(7)(f); ORS 197.797; ORS 197.797(1).

There are multiple references to "local government" decisions in ORS 197.805 to ORS 197.845. In each instance, a local government decision refers broadly to any final land use decision, whether issued by the governing body, a hearings officer, a planning commission, or any other local governmental body. Given that an interpretation under ORS 197.829 must be within a "land use decision" of a "local government" there is simply no basis to conclude that a "local government" interpretation subject to deference under ORS 197.829 is limited to those made solely by the "governing body." There is no such limitation in the statute. Otherwise, the only land use decisions subject to LUBA's jurisdiction would be those made by a governing body. While *Gage* may have identified a number of valid *policy* reasons to limit *Clark* to decisions made by a governing body, such policy reasons are not reflected in the plain text of ORS 197.829. *Gage* inserted the words "governing body of the" in front of "local government" in the statue. This is not permissible under PGE/Gaines. See *State v. Patton*, 237 Or App 46, 50-51, 238 P3d 439 (2010), *rev den*, 350 Or 131 (2011) ("We are prohibited, by statutory command and by constitutional principle, from adding words to a statute that the legislature has omitted.").

C. CONCLUSION

Given the plain text of "local government" ORS 197.829, the Hearings Officer's decision should be reviewed under ORS 197.829 (as proposed by Petitioners) rather than another, less deferential standard of review.

VI. CONCLUSION

Based on the foregoing, and for the reasons set forth in Intervenor-Petitioner PWB's Response Briefs, the County respectfully requests that the Board deny each of Petitioners' assignments of error and affirm the County's decision in full.

In the alternative, if LUBA should require a remand of the decision to the County, we expressly request that LUBA give definitive direction in any such remand in compliance with ORS 197.835(11)(a) and (b), which provide:

> "Whenever the findings, order and record are sufficient to allow review … the board shall decide all issues presented to it when reversing or remanding a land use decision described in subsections (2) to (9) of this section or limited land use decision described in ORS 197.828 and 197.195."

ORS 197.835(11)(a) (emphasis added). The findings, order, and record in this case are extensive, and no party has argued that they are insufficient to allow review.

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

ORS 197.835(11)(b) (emphasis added).

Taken together, these provisions require[15] that: (a) LUBA "decide all issues" before the Board; (b) decide those issues in a manner that affirms all parts of the decision that can be affirmed under the relevant standard of review; and (c) if remand is required, remand only those issues that cannot be resolved with specific "direction indicating appropriate remedial action." ORS 197.835(11)(a)-(b).

This request is consistent with caselaw detailing LUBA's obligation to decide all issues presented to it unless irrelevant or rendered immaterial or moot by the disposition of other issues. *Perkins v. City of Rajneeshpuram*, 68 Or App 726, 733, 686 P2d 369 (1984), *modified on other grounds*, 300 Or 1 (1985); *Mason v. Mountain River Estates*, 73 Or App 334, 341, 698 P2d 529 (1985). This request is also consistent with the policy direction to LUBA under ORS 197.805, which provides:

> "It is the policy of the Legislative Assembly that time is of the essence in reaching final decisions in matters involving land use and that those decisions be made consistently with sound principles governing judicial review. It is the intent of the Legislative Assembly in enacting ORS 197.805 to 197.855 to accomplish these objectives."

[15] Each subsection uses the word "shall" to describe a mandatory obligation. *See Dika v. Dept. of Ins. & Finance*, 312 Or 106, 109, 817 P2d 287 (1991) ("To construe the word 'shall' as anything other than mandatory would thwart the intention of the legislature[.]"); *Ajir v. Buell*, 270 Or App 575, 581, 348 P3d 320, 323 (2015) (quoting *Dika* and providing additional authorities).

(Emphasis added.) Specifically setting forth the scope of the remand, and the scope of affirmance, will further the policy of timely "reaching final decisions" on those matters – both on remand to the County and in any subsequent appeal to this Board.

Accordingly, if LUBA determines that remand is required for some of the permits approved by the decision, the County requests a limited remand with specific direction to the County on: (a) the assignments of error and permits[16] that have been affirmed and are not on remand, and (b) with specific direction on "remedial action" to cure any defect found in those assignments of error or permits that LUBA determines must be remanded, including whether or not the record must be reopened.

DATED this 16th day of August, 2024.

MULTNOMAH COUNTY
David Blankfeld, OSB No. 980373
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[16] As noted above in the Nature of the Land Use Decision, Section II.A, the three permits enumerated there are the only permits in the decision that have been challenged in this proceeding. The County requests that other permits be expressly upheld.

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief Length

I certify that (1) this brief complies with the word-count limitation in OAR 661-010-0030(2) and (2) the word count of this brief as described in OAR 661-010-0030(2) is 14,998 words.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by OAR 661-010-0030(2).

Dated this 16th day of August, 2024.

MULTNOMAH COUNTY
David Blankfeld, OSB No. 980373
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CERTIFICATE OF FILING

I hereby certify that on August 16, 2024, I filed the original of this **RESPONDENT'S CONSOLIDATED RESPONSE BRIEF PURSUANT TO OAR 661-010-0035(2)** for LUBA No. 2023-086 together with one (1) copy, with the Land Use Board of Appeals, 775 Summer Street NE, Suite 330, Salem, Oregon 97301-1283, by FedEx.

CERTIFICATE OF SERVICE

I also certify that on August 16, 2024, I served the foregoing **RESPONDENT'S CONSOLIDATED RESPONSE BRIEF PURSUANT TO OAR 661-010-0035(2)** for LUBA No. 2023-086, by United States Postal Service first class mail, postage prepaid, to the parties or their attorney as follows:

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