

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, AND LAUREN)
AND IAN COURTER,)

LUBA No. 2023-086

Petitioners,)

and)

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

Intervenor-Petitioners,)

v.)

MULTNOMAH COUNTY,)

Respondent,)

and)

PORTLAND WATER BUREAU,)

Intervenor-Respondent.)

**REPLY BRIEF OF PLEASANT HOME COMMUNITY ASSOCIATION
AND ANGELA PARKER, dba HAWK HAVEN EQUINE**

(Continued on reverse side)

SEPTEMBER 2024

Exhibit M.19

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1 **A. Reply re First Subassignment of Error**

2 Intervenors' first subassignment explains in a nutshell the entire one-
3 sided decision that follows its opening paragraph. Viewing the decision only
4 in selected snippets ignores the clarity provided by the decisionmaker at the
5 outset: *They need it. I approve it. Over and out.*

6 **B. Reply re Fourth Subassignment of Error**

7 In establishing area character area under MCC 39.7515(A), the locally
8 informed issues and supporting details count. Intervenors do not argue that the
9 H.O. was required to address every bit of their evidence, whether directly or
10 through interminable incorporated findings. The essence of this subassignment
11 is that, whether character is viewed in component elements or as a whole, the
12 residents established it and showed how this proposal is inconsistent with it.
13 The findings do not serve to refute this proof. Intervenors' evidence provides
14 the flesh and bones necessary to legitimately address consistency with the
15 character of the area, as to the multi-year construction period *and* the even
16 longer term.¹

17 In order to be adequate, findings must address and respond to specific
18 issues relevant to compliance with applicable approval standards raised in the

¹The relevance of construction impacts is addressed in RFPD 10's reply brief.

1 proceedings below. *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604
2 P2d 896 (1979). By describing specific testimony and video and photographic
3 evidence in their petition, intervenors explained the *issues* they had raised
4 under MCC 39.7515(A) to which the appealed decision fails to respond. This
5 is not just a recitation of evidence as PWB suggests.

6 While *Tarr v. Multnomah County*, 81 Or LUBA 242, 245 (2020) states
7 that no particular approach to determining consistency is required by MCC
8 39.7515(A), it provides no license for arbitrary decisionmaking based upon
9 whatever “factors [the H.O.] decided to consider.” (PWB Br 45) It does not
10 justify inadequate findings unsupported by substantial evidence. The evidence
11 summarized in intervenors’ petition is relevant and, here, determinative of the
12 character of the area. It was error for the H.O. to pay it lip service, then ignore
13 and fail to weigh it, whether in his own or the incorporated findings.

14 Intervenors reviewed the incorporated findings carefully when drafting
15 their petition, expecting to prepare extensive rebuttal. This was unnecessary
16 though, as PWB addressed only a few isolated issues. Length alone does not
17 render findings adequate. Lawyers can generate 1000 pages of findings while
18 sidestepping core issues.

1 The decision’s failure to adequately establish the character of the area is
2 not merely harmless error as PWB contends. (PWB Br 31) It reaches the heart
3 of the matter, especially the inadequacy of the findings.

4 The H.O’s interpretation of MCC 39.7515(A) as mandating “flexibility”
5 is not enhanced by his subsequent sentence regarding construction impacts.
6 (PWB Br 33) How much flexibility did he bestow upon himself? Just enough
7 to thoroughly trash the established character of the area? (Yes.)

8 PWB’s argument does not benefit from the provision of MCC
9 39.1185(B)(1) included in the conditions of approval, requiring completion of
10 the project within four years after construction commences. (PWB Br 34) The
11 evidence is that construction will optimally require 5-7 years (barring funding
12 problems, labor and supply chain issues, etc.). Indeed, the conditions state:

13 [PWB] may request to extend the timeframe within which these permits
14 are valid, as provided under MCC 39.1195, as applicable. The request
15 for a permit extension must be submitted prior to the expiration of the
16 approval period.

17 (R.82)

18 While itself failing to demonstrate consistency with the character of the
19 area, the four-year limitation is a chimera, serving only to dramatize the
20 inadequacy of the county’s conditions. MCC 39.1195(A) and (C)² together

²Supp App 1-2.

1 allow an unlimited number of one-year extensions beyond the four-year “limit.”

2 The issues-and-findings matrix presented at PWB Br 41-42 expressly
3 addresses only post-completion-of-construction impacts. Even then, the
4 contention that deer and elk would use “the protected habitat areas at the edges
5 of the filtration site as a movement corridor” after construction ends and the
6 animals ostensibly return is belied by the application itself. (R.220) PWB’s
7 site plans show how constrained those future “corridors” would be and how
8 much grazing/feeding/movement area would be permanently lost to this
9 industrial facility. (*See e.g.* R.7565.) PWB admits future restriction of wildlife
10 access in its description of permanent security fencing and “patrols along a
11 fence line gravel road.” (R.7843, 7853)

12 The Carpenter Lane “improvements” (R.221) will irrefutably speed
13 traffic in a manner inconsistent with current, safe use by pedestrians/bicyclists/
14 equestrians, as will the addition of normal post-completion workday employee
15 and truck traffic. The cited findings and underlying evidence in no way
16 contradict this. There will be no sidewalks or trails.

17 Ms. Parker’s testimony, discussed at PWB Br 43, establishes the
18 character of the area as the basis for the success of her agricultural business,
19 explaining that loss of that character will cause the farm impacts she describes,

1 during and after construction. Other unrefuted permanent changes inconsistent
2 with the character of the area include the removal of the roadside treescape, per
3 Video 1 (Int Pet 34:1), and “10-20 employees driving up and down [Carpenter]
4 3 times a day at shift change” and “a minimum of 5 heavy duty tanker trucks
5 coming and going every day” during the busiest shipping season...at the
6 neighboring nursery we don’t even see 5 trucks as week.” (R.716) “Our road
7 will never again be a quiet, dead-end country lane. It will be a 24/7/365
8 jobsite.” (*Id.*) Permanent changes to the character of the Carpenter Lane
9 community are described at length by Tami Wensenk. (R.2797; Int Pet 34-35)

10 County road standards are irrelevant to proof of the character of the area.
11 (PWB Br 47-51) If the BOCC had wished to create an exception to the
12 requirements of MCC 39.7515 for any needed road improvements, it could
13 have done so at any point over the 47 years following their adoption.

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C. Conclusion

As explained here and in intervenors’ petition, intervenors’ assignment of error should be sustained.

Dated: September 5, 2024.

Respectfully submitted,



Jeffrey L. Kleinman, OSB #743726
Attorney for Intervenor-Petitioners Pleasant Home Community Association and Angela Parker, dba Hawk Haven Equine

(h) ORS 215.755 (3) a caretaker residence for a public park or public fish hatchery in the CFU zones as provided for in MCC 39.4070(G).

(D) Expiration under (A), (B), or (C) above is automatic. Failure to give notice of expiration shall not affect the expiration of a Type II or III approval.

(E) Notwithstanding Subsections (A), (B), or (C) of this section, on exception lands the decision maker may set forth in the written decision specific instances or time periods when a permit expires.

(F) Deferral of the expiration period due to appeals. If a permit decision is appealed beyond the jurisdiction of the County, the expiration period shall not begin until review before the Land Use Board of Appeals and the appellate courts have been completed, including any remand proceedings.

(G) Notwithstanding Subsections (A), (B), (C), (D), (E), or (F) of this section, for uses in Chapter 39 with different specified timelines contained in their approval criteria, those codes shall govern over these provisions.

(Ord. 1318, Amended, 11/30/2023; Ord. 1309, Amended, 08/18/2022)

§ 39.1187 EXPIRATION OF PRIOR TYPE I PERMITS.

All Type I permits issued prior to September 29, 2018 (Ord. 1262) shall expire on September 29, 2024, unless a different timeframe was specifically included in the permit or the use or development has been established according to all specifications and conditions of approval in the permit by September 29, 2024. Expiration of a Type I permit means that a new application is required for uses that are not established within the approval period.

§ 39.1190 EXPIRATION OF PRIOR LAND USE DECISIONS.

All land use decisions authorized prior to January 1, 2001 (Ord. 953 & Ord. 997) shall expire on January 1, 2003, unless:

(A) A different timeframe was specifically included in the decision, or

(B) The decision was for “residential development,” as specified in MCC 39.1185(C), which have the expiration timeframes of MCC 39.1185 (C)(1).

§ 39.1195 EXTENSION OF A TYPE II OR TYPE III DECISION.

(A) The Planning Director shall grant one extension period of 24 months for approvals of dwellings listed in MCC 39.1185 (C) and shall grant one extension period of up to 12 months for all other approvals provided:

(1) An applicant makes a written request for an extension of the development approval period;

(2) The request is submitted to the county prior to the expiration of the approval period;

(3) The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and

(4) The county determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.

(B) Pursuant to OAR 660-033-0140, approval of an extension in EFU and CFU districts is an administrative decision, is not a land use decision as described in ORS 197.015, and is not subject to appeal as a land use decision. All other extension requests authorized by this section are land use decisions and shall be reviewed under the Type II procedures set forth in MCC 39.1125.

(C) Except for approvals of dwellings listed in MCC 39.1185(C), additional one-year extensions shall be authorized where applicable criteria for the decision have not changed. For each additional extension, the Planning Director shall confirm compliance with the standards in MCC 39.1195 (A) (1-4).
(Ord. 1270, Amended, 03/14/2019)

§ 39.1200 REVOCATION OF DECISIONS.

In the event an applicant, or the applicant's successor in interest, fails to fully comply with all conditions of approval or otherwise does not comply fully with the County's approval, the County may institute a revocation or modification proceeding under this section.

(A) All Type I, Type II, Type III and Type IV decisions may be revoked or modified if the Planning Director determines a substantial likelihood that any of the following situations exists:

- (1) One or more conditions of the approval have not been implemented or have been violated; or
- (2) The activities of the use, or the use itself, are substantially different from what was approved or represented by the applicant.

(B) Revocation or modification shall be processed as a Type III decision. The Land Use Planning Division or any private complaining party shall have the burden of proving, based on substantial evidence in the whole record, that the applicant or the applicant's successor has in some way violated the County's approval.

(C) Possible actions at the revocation hearing. Depending on the situation, the Hearings Officer may take any of the actions described below. The Hearings Officer may not approve the new use or a use that is more intense than originally approved unless the possibility of this change has been stated in the public notice. Uses or development which are alleged to have not fulfilled conditions, violate conditions or the

use is not consistent with the County's approval may be subject to the following actions:

(1) The Hearings Officer may find that the use or development is complying with the conditions of the approval or is as approved by the county. In this case, the use or development shall be allowed to continue;

(2) The Hearings Officer may modify the approval if the Officer finds that the use or development does not fully comply with the conditions of approval, that the violations are not substantial enough to warrant revocation, and that the use can comply with the original approval criteria if certain conditions are met. In this case, the Hearings Officer may modify the existing conditions, add new conditions to ensure compliance with the approval criteria, or refer the case to the code compliance officer for enforcement of the existing conditions;

(3) The Hearings Officer may revoke the approval if the Officer finds there are substantial violations of conditions or failure to implement land use decisions as represented by the applicant in the decision approved, such that the original approval criteria for the use or development are not being met.

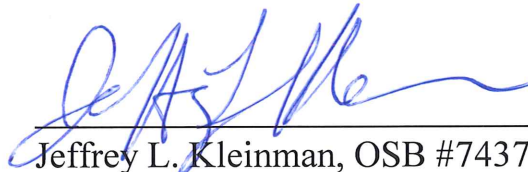
(D) Effect of revocation. In the event that the permit approval is revoked, the use or development becomes illegal. The use or development shall be terminated within thirty days of the date the revocation final order is approved by the Hearings Officer, unless the decision provides otherwise. In the event the decision maker's decision on a revocation request is appealed, the requirement to terminate the use shall be stayed pending a final, unappealed decision.

**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH
AND TYPE SIZE REQUIREMENTS**

I certify that (1) this brief complies with the word-count limitation in OAR 661-010-0039, and (2) the word count of this brief as described in OAR 661-010-0030(2)(k) is 1000 words.

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

Dated: September 5, 2024



Jeffrey L. Kleinman, OSB #743726
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on September 5, 2024, I filed the original of this PETITION FOR REVIEW OF PLEASANT HOME COMMUNITY ASSOCIATION AND ANGELA PARKER, dba HAWK HAVEN EQUINE together with one copy, with the Land Use Board of Appeals, 775 Summer Street NE, Suite 330, Salem, OR 97301-1283, by first class mail.

I hereby certify that on September 5, 2024, I served the foregoing PETITION FOR REVIEW OF PLEASANT HOME COMMUNITY ASSOCIATION AND ANGELA PARKER, dba HAWK HAVEN EQUINE by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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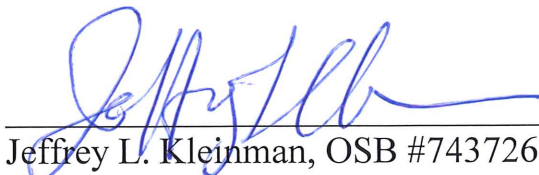
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