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 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.	LUBA No. 2023-086

PETITIONERS' REPLY BRIEF

SEPTEMBER 2024

Exhibit M.20

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I. First Assignment

A. Preservation

A party's obligation to object during the proceedings below is constrained by whether there was a "meaningful" opportunity to do so. *Eng v. Wallow County,* 79 Or LUBA 421, 430 (2019). In *Brome v. City of Corvallis*, LUBA held that the submittal of additional evidence as part of final written argument did not require making a written request to respond to the improperly submitted evidence during the period after the hearing when the record is closed. 36 Or LUBA 225, 234 (1999). This is not a temporal issue. The question is whether there was a formal opportunity object.

The Hearings Officer's acceptance of written testimony after a deadline due to a County website malfunction offered no indication to participants that objecting to new facts within the final argument would prove "meaningful." Moreover, rather than weighing various equities in the abstract – whether the party has legal counsel, how many days passed, how long is a reasonable time for review - LUBA should uphold precedent requiring a hearing or other formally offered time to testify during the local proceeding as the bright line rule in measuring the "opportunity to object."

B. Length of Delay

For the first time, after the record closed to other parties, PWB responded to the question: "How much delay are we talking about" by offering new calculations of intersection delay. App-123. In discussing significant impacts from construction, PWB relied heavily on Table 1: "An average of three

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seconds of accommodation during the temporary construction period cannot possibly rise to the level of significance." App-257, by reference at App-49, and boldfaced text at App-249. Petitioners were deprived of the opportunity to explain why that three second average that was so heavily relied on is not only misleading, but wrong.

In *Knapp v. City of Jacksonville,* LUBA affirmed the city's rejection of mathematical calculations taken to address lot coverage requirements that were determinable based on review of a site plan as new evidence. 70 Or LUBA 259, 272 (2014). Whether the PWB equations were simple or not, these differences and averages represent "data" offered to show that this delay will not force a significant change in accepted farm practices as required by MCC 39.7515(C). As such, this information was "new evidence" under ORS 197.797(9)(b).

C. Conditions

The Petition explains PWB's proposed revisions to the conditions, most notably the additions to Transportation Condition 7 (c-through-f) modifying how construction will occur to accommodate emergency vehicles. App-318 (referenced in the CPO brief) and as "recommended additions" App-400-403. These new conditions require construction scheduling and emergency notification within the Traffic Control Plan. PWB claims these conditions will alleviate emergency service delays. Revising these conditions not only significantly changed the project, but deprived everyone, particularly RFPD10, from any opportunity to respond. Further, the only feasibility finding relating

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to the whole of Condition 7 addresses federal standards for one-lane operation and is not responsive. App-57/App-150.

II. Third Assignment

A. First SubAssignment

Multnomah County Comprehensive Plan (MCCP) Chapter 5 does not mandate how "natural resources" must be protected under MCC 36.7515(B). Nothing in the PWB-quoted introductory portions of Chapter 5 indicates that they are the sole authority for implementing natural resources protection policy within the MCC or that they bear any connected relationship to Community Service use review.

Rather, what is express is that the Community Service criteria of MCC 36.7515 implement MCCP Chapter 2: "The following policies provide direction and support for County Zoning Code requirements which guide the decisions related to these uses." MCCP Policy 2.45 mandates avoiding impacts on "wildlife, and natural and environmental resources." As a result, it is not as PWB claims that the CPO's arguments are "untethered" from the MCCP, it is that PWB's errs by "tethering" the interpretation of MCC 36.7515(B) to the wrong MCCP policies.

The County's Community Use standards have been part of the MCC since at least 1984. The County's Goal 5 program was first adopted in 1995 and its West of the Sandy River SEC program in 2002. *See Evans v. Multnomah County,* 33 Or LUBA 555, 565. Later-enacted statutes are not context for what the legislature intended an earlier-adopted statute to mean; this

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same principle should guide consideration of local provisions. *Stull v. Hoke*, 326 Or 72, 79-80 (1997).

B. Second/Third/Fourth SubAssignment

The Hearings Officer never "independently applied the no adverse effect standard" to pipeline crossings within the SEC overlays as PWB suggests. The findings for the Distribution Main and the Raw Water Pipeline to be bored below two SEC-h overlays state only that "the wildlife habitat permit has been applied for and approved." App-42. The Hearings Officer found that the "application will comply with listed....Plan....Policies," App-43, and did not adopt PWB's arguments (App-205) that MCCP Chapter 5 establishes the obligations for "adverse affect" compliance. Only the water quality responses of the PWB argument were adopted by reference. To the extent that the Hearings Officer relied on MCCP Chapter 5 to interpret the "adverse effect" requirements, such reliance was misplaced for the reasons stated above.

Regarding evaluation of impacts resulting from clear-cutting for road expansion and discharging stormwater into sensitive and protected salmonid-containing streams, PWB's approach was entirely reactive. After opponents identified the existence of natural resources and impacts, PWB hired an "expert" to devalue the habitat for that resource and to identify conditions, after the record was closed. The failure to identify the existence of wildlife/fish species and model the extent of habitat impact in the first instance, trying instead to bat down opponents' efforts to do so, does not satisfy PWB's burden of proving compliance with the approval standards. *Billington v. Polk County*,

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13 Or LUBA 125, 131 (1985). By agreeing to extensive conditions for mitigation, including replanting trees (at some point when construction is complete, like 5-7 years,) or in the form of the stormwater control plan to ameliorate inevitable erosion into Johnson Creek is an implicit admission that adverse impacts will occur.

III. Conclusion

These decisions must be reversed or remanded.

Dated this 6th day of September, 2024

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CERTIFICATE OF COMPLIANCE

I certify that (1) this brief complies with OAR 661-010-0030(2) and (2) the word-count of this brief (as described in OAR 661-010-0030(2)(b)) is 995 words. 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 the footnotes are required by OAR 661-010-0030(2)(d).

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CERTIFICATE OF FILING AND SERVICE

I certify that on September 6, 2024, I caused to be delivered by first class mail an original and one copy of the enclosed **PETITIONERS' REPLY BRIEF** with the:

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