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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.

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INTERVENOR-PETITIONER MULTNOMAH COUNTY RURAL FIRE  
PROTECTION DISTRICT NO. 10'S REPLY BRIEF

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SEPTEMBER 2024

Exhibit M.21

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1 Construction impacts from concurrent development of a massive water  
2 treatment facility and pipelines will over-extend emergency service providers  
3 and create hazardous conditions in violation of the MCC 39.7515 criteria and  
4 therefore, RFPD10 replies to the County's Response Brief.

5 **A. Facts**

6 Any claim that PWB must build this filtration facility to satisfy federal  
7 and state safe drinking water requirements is patently untrue. Those standards  
8 require PWB to treat its water for cryptosporidium, but they do not mandate this  
9 particular facility. Selecting the most expensive treatment solution for its  
10 ratepayers and forcing all of the negative externalities on an otherwise bucolic  
11 farming community were entirely PWB choices. No state or federal law  
12 requires that this facility be located or developed in the way that PWB  
13 proposed.

14 Nothing in the record or the conditions of approval limits the number of  
15 chemical deliveries to 16 delivery trucks per week as the County claims.  
16 PWB's final written argument states: "it is not possible to identify every  
17 hazardous material that might be needed for final operation." App-309.

18 **B. Scope of Review**

19 The County's repeated assertion that the Hearings Officer's (H.O.'s)  
20 decision is entitled to any deference is wrong. "The hearings officer's  
21 interpretation is to be reviewed for whether it is correct as a matter of law."  
22 *Tonquin Holdings, LLC v. Clackamas County*, 247 Or App 719, 722-23 (2012).  
23 LUBA must directly assess whether the H.O.'s decision is correct given the  
24

1 text, context and legislative history, including comprehensive plan policies that  
2 can provide helpful context. See LUBA’s reasoning in *Tonquin Holdings v.*  
3 *Clackamas County*, 64 Or LUBA 68, 102 (2011).

4 **C. Preservation**

5 The first and only time that PWB (or the County) offered any explanation  
6 for why construction impacts need not be considered under *PGE/Gaines*,  
7 including MCC 39.4305 purpose statement, was in the PWB final argument and  
8 therefore, no preservation was required.

9 **D. Construction is an Inseparable Element of a Community Service Use**

10 This is a quasi-judicial application for a specific utility facility use;  
11 LUBA need not determine to what degree construction impacts must be  
12 considered for every use in every zone throughout Multnomah County or  
13 statewide. Rather, the question is much more narrow - whether the conditional  
14 use criteria in MCC 39.7515, when applied within an MUA-20 zone, must take  
15 into account construction impacts, either as a result of local code, or the  
16 significant impact test under ORS 215.296, which PWB agreed with and the  
17 H.O. applied in this case.

18 Under the County’s view, construction of a conditional use within the  
19 MUA-20 zone is not regulated because it is not an activity that is separately  
20 listed as a permitted or conditional use within the zone. (Imagine how lengthy  
21 the list of uses would need to be if construction must be separately identified.)  
22 If the failure to specifically identify “construction” of a use is indeed  
23 determinative, then the “construction of a utility facility” use could never occur  
24

1 because it would be a use specially identified as permitted within the MUA-20  
2 zone. MCC 39.4305. If it is manifestly obvious that MUA-20 use  
3 authorizations do not prohibit constructing the listed use, the reverse is just as  
4 apparent - the impacts from constructing an allowed use must be considered as  
5 an indistinguishable part of the use itself. Restated differently, if the County is  
6 correct that “a building cannot be erected detached from an allowed use,” as on  
7 page 20, then the impacts resulting from “erection” of that same building must  
8 similarly satisfy the conditional use criteria.

9       Regarding *PGE/Gaines*, the Petition contains the required analysis,  
10 insofar as the convoluted decision and lengthy incorporated findings would  
11 permit, and Respondents had no trouble responding to the argument. MCC  
12 39.4305 expressly identifies the “erection” of uses. By inserting the term  
13 “permanent” as a modifier of “use,” the H.O. has inserted what has been  
14 omitted in violation of ORS 174.010. Regarding the legislative history of the  
15 2018 code amendment – defining “development” to be the same as “use” – this  
16 change could be explained as memorializing a long-standing intent to treat  
17 “erection” of a building for a use as part of that same use. If the purpose  
18 statement for “review and approval of the location and development of special  
19 uses” in MCC 39.7500 remains ambiguous, Comprehensive Plan Policy 2.45  
20 directly refers to authorizing conditional uses only “while avoiding adverse  
21 impacts” without any limitation.

22       *Von Lubken v Hood River County* requires the consideration of  
23 “cumulative impacts” across all farm practices including construction impacts.  
24

1 118 Or App 246; 28 Or LUBA 362, 365-9 (1994). (Additional \$20,000  
2 incurred “due to the dust created for a two and one-half month period during  
3 construction” was a significant impact.)

4           Regarding temporal limitations, PWB reliance on Conditions 1 and 2  
5 requiring completion of the projects in four years are insufficient because: (1)  
6 this project will take 5 to 7 years; (2) nothing in the text or context supports  
7 finding that four years is the length of time to ameliorate otherwise  
8 “inconvenient” construction impacts; (3) the four year obligation requires  
9 “completion of the exterior surfaces of the structure,” which will not necessarily  
10 eliminate externalities such as heavy trucks, worker traffic or road closures (It is  
11 unclear how this obligation applies to pipeline installation where no “structure”  
12 is proposed); and (3) MCC 39.1195 expressly authorizes an unlimited number  
13 of extensions which these project will require.

14 **E. Conclusion**

15           Community Service uses are so labeled due in part to their “effect on the  
16 neighborhood.” MCC 39.7500. Most of the approval criteria are focused on  
17 evaluating the impacts a use will have on its surroundings – “the character of  
18 the area,” “natural resources,” “farm and forest practices,” “public service”  
19 demand, and “hazardous conditions.” Affirming the County’s decision would  
20 allow for abject decimation of the neighborhood character, elimination of farm  
21 practices, demand excessive and unplanned public facilities and the creation of  
22 unlimited hazardous conditions without any consideration of those impacts,  
23 even where the effects will be permanent. Nothing in the text or context of the  
24



1 County's regulations supports this result. These decisions must be reversed or  
2 remanded.

3 Dated this 6<sup>th</sup> day of September, 2024

4 BATEMAN SEIDEL MINER  
5 BLOMGREN CHELLIS & GRAM, PC

6 

7 By \_\_\_\_\_  
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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 996 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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DATED September 6, 2024.

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