

July 5, 2024

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED

Land Use Board of Appeals  
DSL Building  
775 Summer Street NE, Suite 330  
Salem, OR 97301-1283

Re: *Cottrell Community Planning Organization, et al. v. Multnomah County, et al.*  
LUBA Case No. 2023-086

Dear Board Clerk:

Enclosed for filing are an original and one copy of Intervenor-Petitioners Oregon Association of Nurseries' and Multnomah County Farm Bureau's Joint Petition for Review for the above-referenced case.

Please call if you have any questions. Thank you.

Sincerely,

JORDAN RAMIS PC



James D. Howsley  
Admitted in Oregon and Washington

Enclosures

cc (via US mail): Carrie Richter  
Jeff Kleinman  
David N. Blankfeld  
Zoe Lynn Powers  
Renee France  
Andrew Mulkey  
Elliot Field  
Client

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

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,*

vs.

MULTNOMAH COUNTY,  
*Respondent,*

and

PORTLAND WATER BUREAU,  
*Intervenor-Respondent.*

LUBA No. 2023-086

---

**INTERVENOR-PETITIONERS OREGON ASSOCIATION OF  
NURSERIES' AND MULTNOMAH COUNTY FARM BUREAU'S  
JOINT PETITION FOR REVIEW**

---

July 2024

James D. Howsley, OSB #012969  
Ezra L. Hammer, OSB #203791  
Jordan Ramis PC  
1211 SW 5<sup>th</sup> Ave., 27<sup>th</sup> Fl.  
Portland, OR 97204  
Phone: (503) 598-7070  
[jamie.howsley@jordanramis.com](mailto:jamie.howsley@jordanramis.com)  
[ezra.hammer@jordanramis.com](mailto:ezra.hammer@jordanramis.com)  
*Attorneys for Intervenor-Petitioners  
Oregon Association of Nurseries and  
Multnomah County Farm Bureau*

Jeffrey L. Kleinman, OSB #743726  
1207 SW 6<sup>th</sup> Ave  
Portland, OR 97204  
Phone: (503) 248-0808  
[kleinmanjl@aol.com](mailto:kleinmanjl@aol.com)  
*Attorney for Intervenor-Petitioners  
Pleasant Home Community Association  
and Angela Parker, dba Hawk Haven  
Equine*

Zoe Lynn Powers, OSB #144510  
Renee France, OSB #004472  
Radler White Parks & Alexander LLP  
111 SW Columbia St., Suite 700  
Portland, OR 97201  
Phone: (971) 634-0215  
[zpowers@radlerwhite.com](mailto:zpowers@radlerwhite.com)  
[rfrance@radlerwhite.com](mailto:rfrance@radlerwhite.com)  
*Attorney for Intervenor-Respondent  
Portland Water Bureau*

Elliot Field, OSB #175993  
Garrett Hemann Robertson, P.C.  
4895 Skyline Rd. S.  
Salem, OR 97306  
Phone: (503) 581-1501  
[efield@ghrlawyers.com](mailto:efield@ghrlawyers.com)  
*Attorney for Intervenor-Respondent  
Gresham-Barlow School District  
No. 10J*

Carrie Richter, OSB #003703  
Bateman Seidel  
1000 SW Broadway, Suite 191  
Portland, OR 97205  
Phone: (503) 972-9920  
[crichter@batemanseidel.com](mailto:crichter@batemanseidel.com)  
*Attorney for Petitioners and  
Intervenor-Petitioner Multnomah  
County Rural Fire Protection  
District No. 10*

David N. Blankfeld, OSB #980373  
Multnomah County Attorney's Office  
501 SE Hawthorne, Suite 500  
Portland, OR 97214  
Phone: (503) 988-3138  
[david.n.blankfeld@multco.us](mailto:david.n.blankfeld@multco.us)  
*Attorney for Respondent Multnomah  
County*

Andrew Mulkey, OSB #171237  
1000 Friends of Oregon  
340 SE 6<sup>th</sup> Avenue  
Portland, OR 97214  
Phone: (971) 420-0916  
[andrew@friends.org](mailto:andrew@friends.org)  
*Attorney for Intervenor-Petitioner  
1000 Friends of Oregon*

## TABLE OF CONTENTS

I.	STANDING.....	1
II.	STATEMENT OF THE CASE.....	1
	A. Nature of the Decision and Relief Sought.....	1
	B. Summary of the Arguments .....	2
	C. Summary of Material Facts .....	3
III.	JURISDICTION .....	3
	1. Standard of Review .....	4
IV.	ARGUMENT.....	4
	A. First Assignment of Error – The Decision Misinterpreted and Misconstrued Applicable Law and Failed to Make Adequate Findings Supported by Substantial Evidence in Concluding that Reasonable Alternatives Were Considered Pursuant to ORS 215.275.....	4
	1. Preservation.....	4
	2. Standard of Review .....	5
	3. Argument.....	5
	B. Second Assignment of Error – The Decision Misinterpreted and Misconstrued the MUA-20 Farm Impact Test and Erred in Concluding That the Test is Less Strict than the Different EFU Farm Impact Test.....	16
	1. Preservation.....	16
	2. Standard of Review .....	17
	3. Argument.....	17
	C. Third Assignment of Error – The Decision Lacks Adequate Findings Relating to Individualized Farm-by-Farm Determinations of Accepted Farm Practices, the Significant Impacts to Those Practices, and Increased Costs Associated with Those Impacts. ....	25
	1. Preservation .....	25
	2. Standard of Review .....	25
	3. Argument.....	26
	D. Fourth Assignment of Error – The Decision Misconstrued Applicable Law and Failed to Make Adequate Findings Supported by Substantial Evidence in Concluding that the Project Evaluated the Scope of Surrounding Farm Lands as the County Farm Impact Test Requires.....	35
	1. Preservation.....	35
	2. Standard of Review .....	35
	3. Argument.....	36
V.	CONCLUSION .....	40

**TABLE OF AUTHORITIES**

**CASES CITED**

*1000 Friends of Oregon et al v. Lake County*,  
 \_\_\_ Or LUBA \_\_\_ (LUBA No 2022-105, Oct 16, 2023) .....26

*CKCCAT v. Klamath County*,  
 40 Or LUBA 129, 140 (2001).....6

*Corporation Presiding Bishop v. City of West Linn*,  
 45 Or LUBA 77, 96 (2003).....10

*Devin Oil Co., Inc., v. Morrow County*,  
 236 Or App 164, 167 (2010).....4, 5, 25, 36

*Fifth Avenue Corp. v. Washington Co.*,  
 282 Or 591, 599, 581 P2d 50 (1978) .....22

*Friends of Marion County v. Marion County*,  
 \_\_\_ Or LUBA \_\_\_ (LUBA No. 2021-043, Nov 22, 2021) .....33

*Friends of Marion County v. Marion County*, \_\_\_ Or LUBA \_\_\_, (LUBA No.  
 2021-089, April 21, 2022.....34

*Gage v. City of Portland*,  
 319 Or 308, 315, 877 P2d 1187 (1994) .....5, 17, 25, 36

*Great Northwest Towing v. City of Portland*,  
 17 Or LUBA 544, 577 (1989).....22

*Hood River Valley PRD v. Hood River County*,  
 67 Or LUBA 314, 330 (2013).....36, 37

*Horning v. Washington County*,  
 51 Or LUBA 303, 318-21 (2006) .....11

*Larvik v. City of La Grande*,  
 39 Or LUBA 467, 470-71 (1998) .....33

*Le Roux v. Malheur County*,  
 30 Or LUBA 268, 271 (1995).....passim

*Mental Health Division v. Lake County*,  
 17 Or LUBA 1165, 1176 (1989).....22

<i>Moore v. Clackamas County</i> , 29 Or LUBA 372, 380 (1995).....	33
<i>Portland Gen. Elec. Co. v. Bureau of Labor &amp; Indus.</i> , 317 Or 606, 859 P2d 1143 (1993) .....	2, 3, 17, 19, 21
<i>Schellenberg v. Polk County</i> , 21 Or LUBA 425, 442 (1991).....	34
<i>Schellenberg v. Polk County</i> , 22 Or LUBA 673, 682-83 (1992) .....	38
<i>State v. Gaines</i> , 346 Or 160, 206 P3d 1042 (2009) .....	2, 3, 17, 19, 21
<i>Stop the Dump Coalition v. Yamhill County</i> , 72 Or LUBA 341 (2015).....	26
<i>Stop the Dump Coalition v. Yamhill County</i> , 364 Or 432, 458, 435 P3d 698 (2019) .....	2, 3, 26, 31, 32, 40
<i>Sunnyside Neighborhood v. Clackamas Co. Comm.</i> , 280 Or 3, 21, 569 P2d 1063 (1977) .....	32
<i>Tonquin Holdings, LLC v. Clackamas County</i> , 64 Or LUBA 68, 74 (2001).....	5, 25, 36
<i>Underhill v. Wasco County</i> , 43 Or LUBA 277, 284-285 (2002) .....	10
<b>STATUTES</b>	
ORS 197.015(10)(a)(A)(iii) .....	3
ORS 197.825(1) .....	3
ORS 197.830(2) .....	1
ORS 197.835(9)(a)(C) .....	16
ORS 197.835(9)(a)(C) and (D).....	2, 7
ORS 197.835(9)(a)(D) .....	5, 17, 25, 36
ORS 197.835(11).....	31
ORS 215.175.....	4
ORS 215.175(2) .....	2
ORS 215.213 (1)(c)(A) .....	19
ORS 215.243 .....	5
ORS 215.275 .....	passim
ORS 215.275(2) .....	2, 7

ORS 215.275(3) .....7  
 ORS 215.275(5) .....19  
 ORS 215.283(1) .....20  
 ORS 215.283 (1)(c)(A).....19

**OTHER**

**Multnomah County Code (MCC)**

MCC 39.4300.....18  
 MCC 39.7515.....2, 3, 16, 17, 40, 41  
 MCC 39.7515(C) ..... 17, 21, 22, 25, 36, 39  
 MCC 39.7515(C)(2).....18, 19

**INDEX OF JOINT APPENDIX UNDER SEPARATE COVER**

- a. Multnomah County Code Section 39.7500-Community Service Uses ..... 1
- b. Excerpts of Comprehensive Plan ..... 4
  - i. Community Facilities ..... 4
  - ii. MUA-20..... 5
- c. Multnomah County Code Section 39.4300 - MUA-20 Zoning ..... 7
- d. Map of proposed development details with zoning ..... 8
- e. Map of facility with surrounding farms and transportation limitations ..... 9
- f. Hearings Officer's Decision..... 10
- g. PWB Final Written Argument and Appendix ..... 98



## I. STANDING

Intervenor-Petitioners Multnomah County Farm Bureau and Oregon Association of Nurseries timely filed their individual motions to intervene and submitted written comments as part of the underlying proceedings.

Record 3292 (Multnomah County Farm Bureau) and Record 2930 (Oregon Association of Nurseries). Therefore, each has standing pursuant to ORS 197.830(2).

## II. STATEMENT OF THE CASE

### A. Nature of the Decision and Relief Sought.

Respondent's Hearing Officer approved Intervenor-Respondent, the City of Portland's, application for a large water filtration facility and associated utility pipelines and infrastructure (the "Utility Infrastructure" and collectively the "Project") (the "Decision") on rural land. Specifically, the Decision approved a Community Services Conditional Use Permit for a filtration facility, a Community Services Conditional Use Permit for pipelines, a Community Services Conditional Use Permit for a communications tower, Review Use for pipelines in EFU land, Design Review for a filtration facility, pipelines, communication tower and intertie site, Significant Environmental Concern for Wildlife Habitat Review for pipelines, Geologic Hazard Review for pipelines, and Lot of Record Verifications.

1           Intervenor-Petitioners seek remand or reversal because the Decision  
2           improperly construes applicable law and lacks adequate findings supported by  
3           substantial evidence in the record. It fails to properly analyze alternatives,  
4           properly interpret and apply the farm impact test, fails to fully analyze farm-by-  
5           farm impacts on the record, and fails to properly identify the surrounding  
6           agricultural area that is adversely impacted. ORS 197.835(9)(a)(C) and (D);  
7           ORS 215.275(2); MCC 39.7515; *Portland Gen. Elec. Co. v. Bureau of Labor &*  
8           *Indus.*, 317 Or 606, 859 P2d 1143 (1993); *State v. Gaines*, 346 Or 160, 206 P3d  
9           1042 (2009); and *Stop the Dump Coalition v. Yamhill County*, 364 Or 432, 458,  
10          435 P3d 698 (2019).

11           For the foregoing reasons, Intervenor-Petitioners respectfully request that  
12          LUBA reverse the Decision approving the Project, or in the alternative, remand  
13          the matter for further proceedings in order to rectify the fundamental and  
14          structural deficiencies addressed herein.

15          **B.    Summary of the Arguments.**

16           The Decision misconstrues ORS 215.175(2) regarding the required  
17          alternatives analysis, lacks adequate findings, and lacks substantial evidence to  
18          support the conclusion that the Utility Infrastructure must cross through EFU  
19          land. The Decision lacks adequate alternatives analysis pursuant to 215.275(2)  
20          because it relies on mere supposition and conclusory statements that are

1 unsupported by substantial evidence in the record. Additionally, the Decision  
2 misconstrued the Multiple Use Agriculture (MUA-20) farm impact test,  
3 codified in MCC 39.7515, because it failed to apply the test to the actual farm  
4 practices on individual farms. *Stop the Dump Coalition* (2019), *supra*. The  
5 Decision also misconstrued the farm impact test because in applying that test, it  
6 failed to apply the correct methodology for interpretation in *PGE, supra* and  
7 *Gaines, supra*. Finally, the Decision failed to correctly identify the surrounding  
8 area that is subject to adverse farm impacts.

9 **C. Summary of Material Facts.**

10 Portland applied to build a large water filtration plant and the associated  
11 utility infrastructure on rural land to serve the City of Portland. Respondent  
12 issued a Type 2 decision which was appealed to the Multnomah County  
13 Hearings Officer who held a hearing on June 30, 2023, and issued the county's  
14 final decision on November 29, 2023. This appeal followed.

15 **III. JURISDICTION**

16 The Decision applies discretionary land use regulations and therefore is a  
17 final "land use decision." ORS 197.015(10)(a)(A)(iii). LUBA has statutory  
18 jurisdiction. ORS 197.825(1).

1           **1. Standard of Review**

2           Adequate findings are those which: (1) identify the relevant approval  
3 standards; (2) set out the facts relied upon; and (3) explain how the facts lead to  
4 the conclusion that the request satisfies the approval standard. *Le Roux v.*  
5 *Malheur County*, 30 Or LUBA 268, 271 (1995).

6           In a substantial evidence challenge, the board’s standard of review is to  
7 consider all of the evidence in the record and determine whether the evidence  
8 would permit a reasonable person to find that an approval criterion is met.  
9 *Devin Oil Co., Inc. v. Morrow County*, 236 Or App 164, 167 (2010).

10   **IV. ARGUMENT**

11   **A. First Assignment of Error – The Decision Misinterpreted and**  
12   **Misconstrued Applicable Law and Failed to Make Adequate**  
13   **Findings Supported by Substantial Evidence in Concluding that**  
14   **Reasonable Alternatives Were Considered Pursuant to ORS 215.275.**

15           **1. Preservation.**

16           The inadequacy of the ORS 215.175 alternative sites analysis was argued  
17 below, at Record 3342.

18    “In this case, the [applicant’s] analysis of alternative  
19    pipeline routes is not sufficient and fails to comply with  
20    the alternatives analysis required by ORS 215.275.”

1           **2.     Standard of Review.**

2           Adequate findings (1) identify the relevant approval standards; (2) set out  
3 the facts relied upon; and (3) explain how the facts lead to the conclusion that  
4 the request satisfies the approval standard. *Le Roux, supra.*

5           In a substantial evidence challenge, LUBA’s standard of review is to  
6 consider all of the evidence in the record and determine whether the evidence  
7 would permit a reasonable person to find that an approval criterion is met.  
8 *Devin Oil, supra.*

9           LUBA reviews a hearings officer’s interpretation of local code to  
10 determine whether the interpretation is correct, without deference. ORS  
11 197.835(9)(a)(D); *Gage v. City of Portland*, 319 Or 308, 315, 877 P2d 1187  
12 (1994); *Tonquin Holdings, LLC v. Clackamas County*, 64 Or LUBA 68, 74  
13 (2001).

14           **3.     Argument.**

15           ORS 215.243 codifies the legislative policy for preservation of  
16 agricultural land.

17                   “(2) The preservation of a maximum amount of the  
18                   limited supply of agricultural land is necessary to the  
19                   conservation of the state’s economic resources and the  
20                   preservation of such land in large blocks is necessary in  
21                   maintaining the agricultural economy of the state and for  
22                   the assurance of adequate, healthful and nutritious food  
23                   for the people of this state and nation.

1 (3) Expansion of urban development into rural areas is a  
2 matter of public concern because of the unnecessary  
3 increases in costs of community services, conflicts  
4 between farm and urban activities and the loss of open  
5 space and natural beauty around urban centers occurring  
6 as the result of such expansion.”

7 Consistent with this policy, state law discourages the siting of utility  
8 infrastructure serving cities on land designated for exclusive farm use. ORS  
9 215.275 requires applicants “to demonstrate” that it is necessary to locate the  
10 utility infrastructure on farmland. In order to do so, an applicant must consider  
11 and analyze a number of geographic alternatives as part of the approval process  
12 to ensure that the preferred location is, in fact, the best place to site the public  
13 utility infrastructure and protected farmland is impacted only as a last resort.

14 As LUBA has explained, “at the core of the necessity test is the  
15 requirement that the local government determine that the utility facility cannot  
16 feasibly be located on non-EFU land, which in turn requires that the local  
17 government consider reasonable alternatives to siting the facility on EFU-zoned  
18 land.” *CKCCAT v. Klamath County*, 40 Or LUBA 129, 140 (2001).

19 The Intervenor-Respondent seeks to place the Utility Infrastructure in  
20 EFU land and, therefore must demonstrate that it is absolutely necessary for  
21 public service. Pursuant to ORS 215.275, Intervenor-Respondent was obligated  
22 to show it considered reasonable alternatives to the selected location. Simply

1 put, it failed to do so. Further, the Decision misconstrues the alternatives  
2 analysis required by that statute, and is unsupported by substantial evidence.  
3 ORS 197.835(9)(a)(C) and (D). The Decision was required to apply the ORS  
4 215.275(2) factors as part of the reasonable alternatives analysis, and failed to  
5 show that the Utility Infrastructure must be sited on exclusive farm land due to  
6 one or more of the following:

- 7 (a) Technical and engineering feasibility;
- 8 (b) The proposed facility is locationally dependent. A  
9 utility facility is locationally dependent if it must cross  
10 land in one or more areas zoned for exclusive farm use in  
11 order to achieve a reasonably direct route or to meet  
12 unique geographical needs that cannot be satisfied on  
13 other lands;
- 14 (c) Lack of available urban and nonresource lands;
- 15 (d) Availability of existing rights of way;
- 16 (e) Public health and safety; and
- 17 (f) Other requirements of state or federal agencies.

18 Additionally, while the Decision may consider costs associated with any  
19 of the factors listed above, cost alone may not be the only consideration in  
20 determining that a utility facility is necessary for public service.

21 ORS 215.275(3).

22 Here, the Intervenor-Respondent submitted a three and a half page report  
23 from RhinoOne Geotechnical entitled “Geotechnical Technical Memorandum –  
24 Raw Water Pipeline Alternatives from Lusted Rod to Filtration Facility” (the  
25 “Alternatives Analysis”), which purports to review six alternate pipeline routes

1 to connect the project pipeline infrastructure with the filtration facility and  
2 existing pipe network in the immediate area. Record 6024.<sup>1</sup> Of the three and a  
3 half pages in the report, two and half were dedicated to images of the area,  
4 conclusory statements, and a review of the professionals who advised  
5 RhinoOne Geotechnical in its analysis (the “GTAC”). A mere single page of  
6 text reviews three of the six alternatives, with the selected route receiving a  
7 mere paragraph of analysis.

8 The Alternatives Analysis fails to correctly identify the ORS 215.275  
9 factors, and fails to identify the underlying evidence required to address those  
10 factors. The Alternatives Analysis fails to explain what evidence leads to the  
11 conclusion that the factors are fully satisfied. Moreover, the Decision fails to  
12 identify other evidence in the record addressing the factors. Thus the Decision  
13 lacks adequate findings because the Alternatives Analysis lacks sufficient  
14 evidence, and because the Decision does not explain how the Alternatives  
15 Analysis or any other record evidence demonstrates that ORS 215.275 is  
16 satisfied. *Le Roux, supra.*

---

<sup>1</sup> While the RhinoOne report references six pipeline routes, it provides (limited) analysis of only three routes, including Route 1 (the Respondent’s preferred route), Route 2, and Route 4. Routes 3, 5, and 6 are all iterations of the same route heading south from the project site and are not individually addressed in the report.



1           Despite the requirement to do so, the Alternatives Analysis completely  
2 fails to provide an appropriate justification for siting the pipeline on EFU land.  
3 As indicated above, state law requires that a site is only warranted if one of the  
4 enumerated justifications exists. Here, the Intervenor-Respondent justified the  
5 placement of the infrastructure, in order “to serve project objectives.”  
6 Record 6024.

7           The “project objectives” are found in the Intervenor-Respondent’s “EFU  
8 Review Application Narrative.” Record beginning at 7689. They are: “1)  
9 Provide reliable, safe drinking water to nearly one million people; 2) Provide a  
10 seismically resilient water transmission and filtration system; 3) Protect public  
11 health in compliance with federal and state drinking water regulations; and 4)  
12 Preserve gravity flow from the Bull Run Watershed to Water Bureau  
13 customers.” Record 7695.

14           While these are all certainly worthwhile endeavors, neither “serving  
15 project objectives” nor any of the four listed objectives are within the  
16 enumerated reasons for placing the Utility Infrastructure on EFU land.  
17 Multnomah County staff expressed concern regarding the usefulness of the  
18 objectives in satisfying ORS 215.275. As the Decision explained, “staff is  
19 uncertain that all of [applicant’s] objectives for the project qualify as technical  
20 and engineering feasibility factors for the application.” Record 27. When staff

1 concerns regarding adequate findings are completely ignored, the decision must  
2 be remanded. *Underhill v. Wasco County*, 43 Or LUBA 277, 284-285 (2002)  
3 (when staff recommended a 300-yard buffer to ensure compatibility with uses  
4 on surrounding properties, but the final decision lacks findings on why a buffer  
5 is not required, the findings were inadequate).

6 Multnomah County staff's concerns are well founded as the Decision  
7 fails – on its face – to make adequate findings regarding how the Alternatives  
8 Analysis leads to the conclusion that ORS 215.275 is satisfied. The Decision  
9 fails to properly connect the dots between project objectives and any of the  
10 enumerated justifications for siting the proposed Utility Infrastructure on EFU  
11 land. There are no findings that sufficiently connect the dots.

12 Despite the failure to identify an appropriate reason for justifying the  
13 placement of the infrastructure, Intervenor-Respondent may argue that technical  
14 and engineering feasibility, generally, serves as the appropriate justification.  
15 However, in attempting to do so, the Decision relies on conclusory statements  
16 unsupported by substantial evidence. Without that substantial evidence, the  
17 Decision fails.

18 As LUBA has stated, conclusory evidence is simply insufficient to make  
19 necessary legal findings such as those that ORS 215.275 requires. *See*,  
20 *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77, 96 (2003),

1 where LUBA found that conclusory testimony by an acoustic engineer that a  
2 proposed church would not violate “maximum allowable noise levels” was  
3 insufficient to demonstrate that proposed uses would not exceed specific  
4 decibel levels within a specified distance from adjoining residential uses. *See*  
5 also, *Horning v. Washington County*, 51 Or LUBA 303, 318-21 (2006), where  
6 LUBA held that a fire district letter opining that conducting large concert events  
7 of up to 5,500 people on a forest-zoned parcel would not significantly increase  
8 the risk of wildfires was not substantial evidence to support a finding to that  
9 effect, where the letter was expressly contingent on the county maintaining a  
10 prohibition on burning of any kind, and the evidence regarding the effectiveness  
11 of banning burning of any kind during large concert events was extremely  
12 limited and conclusory.

13 Here, the entirety of the evidence in the record supporting the  
14 Alternatives Analysis is conclusory. The Alternatives Analysis references the  
15 supposedly extensive analysis that the GTAC conducted, and relies on this  
16 analysis to justify its conclusion that none of the alternatives, other than the  
17 Intervenor-Respondent’s preferred route, are viable. However, beyond a mere  
18 reference to said analysis, the Alternatives Analysis fails to include any facts  
19 that justify its conclusions.

1           As demonstrated below, none of the supposed analysis that disqualifies  
2 the alternative routes is supported with any evidence beyond mere supposition  
3 and conclusory statements. It reviews several routes and declares a winner,  
4 without providing any material evidence to justify its decision.

### 5           **Route 2 (Non-Preferred Option)**

6           The Alternatives Analysis dismiss Route 2, which would avoid all  
7 impacts to EFU land. It states,

8                     “The GTAC recommended it not be considered further  
9                     due to geologic and seismic hazards and challenging  
10                    construction requirements.

11                   Slope stability analysis, guided by GTAC input, was  
12                   based on low blow count materials observed in  
13                   geotechnical borings, soil characterizations, water table  
14                   levels, and historic landslide records. The GTAC noted  
15                   the history of shallow slope failures between the upper  
16                   terrace (where the filtration facility will be located) and  
17                   the lower terrace (Where the new raw water pipeline will  
18                   connect to the existing supply lines in Lusted Road).  
19                   These shallow/surficial slope failures (5 to 10 feet deep)  
20                   are mapped and were also identified in geotechnical  
21                   explorations on Doge Park Boulevard, as the road begins  
22                   to gain elevation near the county line.

23                   In addition, major constructability issues were also  
24                   identified and were complicated by the compact work  
25                   zone within the narrow roadway to avoid the adjacent  
26                   steep slopes.

1           The GTAC concluded that these risks cannot be mitigated  
2           within reasonable certainty and should be avoided by  
3           selecting an alternative alignment.”

4   Record 6026.

5           Intervenor-Respondent presented no evidence to the Hearings Officer  
6   related to low blow count materials, soil characterization, water table levels,  
7   historic landslide levels, or explanation of what constructability issues are  
8   present, as they relate to Route 2. There are no meeting minutes from the  
9   GTAC meetings in the record. There are no third party reports or other  
10   information that would provide the basis for the Alternative Analysis’  
11   conclusions regarding Route 2. Indeed, other than the cursory statements  
12   above, Intervenor-Respondent shared nothing with the Hearings Officer to  
13   verify said statements. The record includes no underlying material or exhibits  
14   associated with the Alternatives Analysis that verifies the Decision’s  
15   conclusionary statements regarding Route 2.

16           **Route 4 (Non-Preferred Option)**

17           The Alternatives Analysis provides even less information regarding  
18   Route 4, which would also avoid all impacts to EFU. It states that, Route 4,  
19           “is a non-EFU alignment connecting to the site from the  
20           northeast from Lusted Road. A fatal flaw screening  
21           analysis was conducted using recommendations provided  
22           by the GTAC. Based on field explorations and historic  
23           knowledge of the region, the GTAC concluded that

1 [Route 4] was fatally flawed because of ‘very high’  
2 seismic hazards where Lusted Road approaches the steep  
3 scarp above the Sandy River ... Catastrophic slope  
4 failures are anticipated during the Cascadia Subduction  
5 Event in this area. In addition, the estimated shaft depth  
6 required for a trenchless crossing at the filtration facility  
7 site was deemed to be too deep to be considered feasible.  
8 Lastly, there is not enough room within the existing  
9 right-of-way of Lusted Road to provide a reasonable  
10 setback to the top of the slope to minimize or avoid the  
11 hazard. This alignment is therefore considered fatally  
12 flawed and was eliminated.”

13 Record 6026.

14 There was no evidence in the record related to the purported fatal flaw  
15 screening analysis. There is no evidence as to the purported field explorations  
16 or an explanation of the so-called historic knowledge of the region. In fact, it is  
17 completely unclear how historic knowledge of the region could assist in the  
18 determination where a pipeline should exit the water treatment facility. There is  
19 no evidence as to why, during a future Cascadia subduction event, Route 4  
20 would fail, but other routes – including Intervenor-Respondent’s preferred  
21 route, would not. There is no evidence showing the estimated shaft depth or an  
22 explanation as to why that depth is not feasible. Finally, there is no evidence as  
23 to what would constitute “enough room” to “provide a reasonable setback.”  
24 Certainly, reasonable minds can disagree about what constitutes enough room  
25 and what a reasonable setback means in this context. Despite this, the Hearings

1 Officer decided these issues without any sort of actual evidence or  
2 documentation. The Decision relied only on the above paragraph to fully  
3 disqualify Route 4, which, if adopted, would fully avoid placing the pipeline  
4 and related utility infrastructure on EFU land as state law calls for.

5 **Route 1 (Preferred Option)**

6 After a cursory dismissal of Routes 2 and 4, the Alternatives Analysis  
7 turns to Route 1, and states that it,

8 “avoids the steep scarp along Lusted Road and hazards  
9 associated with the Doge Park Boulevard Alignment. It  
10 provides a direct route between the existing conduits in  
11 Lusted Road and the filtration facility. For purposes of  
12 seismic resiliency and technical feasibility, the GTAC  
13 determined that tunneling under the upper slope at the  
14 proposed depths (147 feet to 217 feet below ground  
15 surface) provides the greatest protection for the pipeline  
16 in the event of an earthquake or landslide. This  
17 alignment meets the seismic resiliency goals in  
18 accordance with the Oregon Resiliency Plan.”

19 Record 6027.

20 Again, beyond these mere four sentences, there is absolutely no evidence  
21 to underpin the Intervenor-Respondent’s conclusory statements. There is no  
22 evidence that Route 1 avoids any specific hazards. There is no evidence that  
23 the GTAC decided anything or that the proposed pipeline depths were relevant  
24 to a decision making process. Surprisingly, the Alternatives Analysis  
25 references specific depths (147 feet to 217 feet) in this section but fails to do so

1 regarding Route 4, which it merely states would require work at depths that is  
2 not feasible. What are those non-feasible depths? And, how was the Hearings  
3 Officer to know that the depths differed from those referenced in the analysis  
4 regarding Route 1? There is no substantial evidence in the record to support the  
5 Decision's conclusion that the pipeline must be routed through EFU land.  
6 Therefore, ORS 197.835(9)(a)(C) requires remand or reversal.

7 In summary, the Decision's conclusory review is not a true alternatives  
8 analysis. It functions like an executive summary that completely fails to  
9 identify evidence in the record or explain why that evidence leads to the  
10 conclusion that the selected route satisfies ORS 215.275. *Le Roux, supra.*  
11 Therefore, the Decision lacks adequate findings supported by substantial  
12 evidence and must be reversed or, in the alternative, remanded in order for the  
13 proper analysis to occur.

14 **B Second Assignment of Error – The Decision Misinterpreted and**  
15 **Misconstrued the MUA-20 Farm Impact Test and Erred in**  
16 **Concluding That the Test is Less Strict than the Different EFU Farm**  
17 **Impact Test.**

18 **1. Preservation**

19 As part of the underlying matter, community members argued that  
20 Intervenor-Respondent failed to properly apply the MUA-20 farm impact test as  
21 required in MCC 39.7515. They stated,



1 “The purpose of this letter is to set out the legal  
2 framework for the evidence that will be presented by fact  
3 witnesses at the hearing in this matter, especially as to the  
4 county’s protection of ongoing, accepted farm practices  
5 under MCC 39.7515(C). The impacts of the [Intervenor-  
6 Respondent’s] proposed facility and related pipelines,  
7 and especially those impacts arising during the projected  
8 five-year construction period, would result in continuous,  
9 ongoing violation of this provision. In any event, as we  
10 will explain, PWB has come nowhere near meeting its  
11 burden of proof herein and apparently perceives no need  
12 to do so.”

13 Record 3557.

14 This issue was preserved.

15 **2. Standard of Review.**

16 LUBA reviews a hearings officer’s interpretation of local code to  
17 determine whether the interpretation is correct, without deference.

18 ORS 197.835(9)(a)(D); *Gage, supra*.

19 **3. Argument.**

20 The Decision misconstrued the Multiple Use Agriculture (MUA-20) farm  
21 impact test, codified in MCC 39.7515, when failing to use the *PGE/Gaines* test,  
22 which the Oregon Supreme Court established in *PGE, supra*, and later refined  
23 in *Gaines, supra*. Additionally, the Decision further erred in determining that  
24 the MUA-20 farm impact test was both different and less stringent than the  
25 same test under ORS 215.275, which the county code implements.

1 Respondent utilizes the MUA-20 zone in order to “conserve those  
2 agricultural lands not suited to full-time commercial farming for diversified or  
3 part-time agriculture uses; to encourage the use of non-agricultural lands for  
4 other purposes, such as forestry, outdoor recreation, open space, low density  
5 residential development and appropriate Conditional Uses, *when these uses are*  
6 *shown to be compatible* with the natural resource base, the character of the area  
7 and the applicable County policies.” (Emphasis added.) MCC 39.4300.

8 In order to ensure compatibility, Multnomah County generally prohibits  
9 the placement of utility infrastructure on MUA-20 land. Such infrastructure is  
10 only conditionally approvable when it would not harm the nearby farming  
11 community. To determine whether this harm exists under MCC 39.7515(C)(2),  
12 the Decision asks whether the utility infrastructure would, “Significantly  
13 increase the cost of accepted farm or forest practices on surrounding lands  
14 devoted to farm or forest use.” Record 43.

15 Importantly, this criterion is similar, but not identical to the farm impact  
16 test codified in ORS 215.275, which prohibits the placement of utility  
17 infrastructure on farmland when doing so will cause “a significant change in  
18 accepted farm practices or a significant increase in the cost of farm practices on

1 the surrounding farmlands.”<sup>2</sup> Unlike ORS 215.275(5), MCC 39.7515(C)(2)  
2 does not include the ability to impose conditions as a means for mitigation.  
3 Additionally, the statute and code sections are worded differently.

4 As stated above, there are two separate tests applicable to the underlying  
5 project, the first is applicable to the Facility and most of the Utility  
6 Infrastructure located on land zoned MUA-20, and a separate one for the Utility  
7 Infrastructure located on EFU zoned land.

8 In determining how to read the two tests together, the Decision should  
9 have relied upon the *PGE/Gaines* method of statutory interpretation. The  
10 Oregon Supreme Court explicitly devised this test to help resolve questions  
11 around legislative interpretation. It requires the decision maker, when  
12 examining a statute, to rely upon the text, context, and the purpose of the  
13 underlying statute. Despite this obligation, the Decision made no such effort.  
14 Instead, the Decision merely acknowledged that the county’s farm income test  
15 may differ from the statutory test.

---

<sup>2</sup> ORS 215.275(5) provides in relevant part, “The governing body of the county or its designee shall impose clear and objective conditions on an application for utility facility siting under ORS 215.213 (1)(c)(A) or 215.283 (1)(c)(A) to mitigate and minimize the impacts of the proposed facility, if any, on surrounding lands devoted to farm use in order to prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on the surrounding farmlands.”

1            “It is also odd that the test for pipelines in the MUA is  
2            potentially more stringent than pipeline in the EFU. If this  
3            case is remanded for that reason, perhaps the Applicant  
4            can seek a County legislative proposal.”

5    Record 45.

6            Following this, the Decision proceeds down a purely speculative path  
7            regarding why the two farm impact tests are inherently different. It points to  
8            items that are wholly irrelevant to proper statutory interpretation (such as the  
9            unsupported assumption that utility facilities are permitted under  
10            ORS 215.283(1) in order to keep people connected to specific utility  
11            infrastructure and the fact that utilities get free access to county right-of-way).  
12            Taking these non-applicable facts into account, the Decision then defers to the  
13            Intervenor-Respondent and concludes that the MUA-20 farm impact test is  
14            somehow less rigorous than its state law counterpart. It states,

15            “I agree that the State law test does not directly apply for  
16            the reasons in Applicant’s Final Argument at pages 123<sup>3</sup>,  
17            and that the County could interpret this differently. I will  
18            leave that to the Board of Commissioners or at least a  
19            Planning Director’s Interpretation. However, as the Code  
20            wording matches the State law wording, I will use cases  
21            that interpret the statutory wording in this decision.”

22    Record 46.

---

<sup>3</sup> In adopting the Intervenor-Respondent arguments, the Decision finds that, “where the pipelines do cross EFU areas, a different, less-stringent standard applies” Record 257.

1           This is an important point. Rather than interpreting the MUA-20 farm  
2 impact test in MCC 39.7515(C) as written using the required *PGE/Gaines*  
3 framework, the Decision erroneously concluded that the “Code wording  
4 matches the State law wording,” and thus no such analysis was required.

5           But the wording of the two provisions does not match and even if they  
6 did match, the Decision would need to identify some language in the regulation,  
7 its context or the history of implementation that would support a finding that the  
8 County’s intent was to apply the EFU requirements to utility facilities in MUA-  
9 20. Absent this, the analytical approach in the Decision is completely at odds  
10 with Supreme Court guidance.

11           While the Decision certainly could have relied upon LUBA and court  
12 precedent to determine the parameters of the state law EFU farm impact test, it  
13 erred by merely transposing this analysis onto the county MUA-20 farm impact  
14 test without first going through the necessary framework analysis to determine  
15 that the two were the same. As previously stated, a mere word matching  
16 exercise is insufficient, because the words do not match.

17           Without the proper *PGE/Gaines* framework analysis, the Decision erred  
18 in merely seeking to apply EFU farm impact test case law to the MUA-20 farm  
19 impact test in this case. Indeed, the Decision was obligated – and failed – to  
20 interpret the farm impact test for MUA-20 zoned lands and apply it to the facts

1 of this case in the first instance. *Fifth Avenue Corp. v. Washington Co.*, 282 Or  
2 591, 599, 581 P2d 50 (1978) (county board should interpret its own regulations  
3 in the first instance). Because the Decision did not interpret and apply the  
4 correct version of MCC 39.7515(C) to the underlying conditional use  
5 application, the decision is inherently flawed. *Mental Health Division v. Lake*  
6 *County*, 17 Or LUBA 1165, 1176 (1989) (county must evaluate the application  
7 for the use as proposed); *Great Northwest Towing v. City of Portland*, 17 Or  
8 LUBA 544, 557 (1989) (city must apply the limitations in its own code).

9 In addition to failing to apply the proper interpretive methodology to the  
10 MUA-20 farm impact test, the Decision erred in concluding that it provides less  
11 protection than the EFU farm income test. Indeed, Respondent's  
12 comprehensive plan documents indicated otherwise.

13 Intervenor-Respondent raised, and the Decision wholly adopted, the  
14 notion that respondent's comprehensive plan provides for less protections in the  
15 MUA-20 zone than the state law does for EFU zone. The Intervenor-  
16 Respondent relies solely on an introductory statement within the chapter  
17 heading for "Multiple Use Agricultural Land" of the comprehensive plan,  
18 which states: "County policies for these areas promote agricultural activities  
19 and minimize conflicts between farm and non-farm uses but are less stringent  
20 than policies in Exclusive Farm Use zones." Record 74.

1           According to the Intervenor-Respondent, this is a mandate to allow  
2 nonfarm conflicts on MUA-20 zoned land to a greater degree than on EFU land  
3 which, as a plan policy, is controlling. This argument stretches the bounds of  
4 reason. First, the notion of reduced stringency applies to the land use policies  
5 that follow this introductory statement, not to the farm impact test in the  
6 development code. Importantly, these policies relate to items such as the  
7 designation and maintenance of MUA-20 designated land and limitations on the  
8 scale of non-farm uses to that are necessary to serve the local neighborhoods.  
9 None of these policies inform the zoning code provisions for the MUA-20 farm  
10 impacts test.

11           Further, the Intervenor-Respondents inference of a less stringent farm  
12 impact test fails to acknowledge the more particular language in the plan  
13 prioritizing farm land protections in the specific area where the pipeline is  
14 proposed. The area is identified as West of the Sandy River in the  
15 comprehensive plan, which mandates “that the agricultural economy of the area  
16 must remain strong,” Multnomah County Comprehensive Plan page 1-26.

17           Remaining strong is contingent upon avoiding conflicts between farm  
18 and non-farm that uses increase the cost of customary farm practices to such a  
19 degree as to put farmers out of business. This is further emphasized in the  
20 Respondent’s comprehensive plan policy to “avoid or minimize adverse effects

1 on farm and forest practices” when considering non-farm community uses.  
2 Multnomah County Comprehensive Plan page 2-11. Despite the fact that the  
3 Decision fails to make any findings related to these policies, the policies  
4 provide applicable contextual support that, in the area West of the Sandy River  
5 where the Facility and Utility Infrastructure are proposed, Multnomah County  
6 has made the legislative choice to strictly regulate Community Service  
7 conditional uses within the MUA-20 zone to avoid harming farming practices.

8 In conclusion, the Hearings Officer erred in failing to use the required  
9 interpretation methodology when determining the parameters of the MUA-20  
10 farm impact test. Additionally, pursuant to the Multnomah County  
11 Comprehensive Plan, it is clear that the Decision further erred in determining  
12 those parameters to be less strict than the EFU farm impact test. Rather, it is clear  
13 that the MUA-20 farm impact test for conditional uses only permits non-farm  
14 uses when existing farming activities are fully protected and able to continue.  
15 Because of these failings, the Decision misrepresents and misconstrues  
16 applicable law, and we respectfully request that LUBA reverse the Decision or,  
17 remand it so that Respondent can properly interpret the MCC farm impact test  
18 and provide the necessary findings.



1 **C. Third Assignment of Error – The Decision Lacks Adequate Findings**  
2 **Relating to Individualized Farm-by-Farm Determinations of**  
3 **Accepted Farm Practices, the Significant Impacts to Those Practices,**  
4 **and Increased Costs Associated with Those Impacts.**

5 **1. Preservation.**

6 In the underlying matter, community members argued that respondent  
7 had failed to properly analyze and mitigate farm impacts. They argued, “there  
8 is no evidence that [the applicant’s mitigation plan] would feasibly eliminate  
9 significant impacts on farm practices and the costs of those practices, as  
10 required by MCC 39.7515(C).” Record 3564.

11 This issue was preserved.

12 **2. Standard of Review.**

13 Adequate findings 1) identify the relevant approval standards; 2) set out  
14 the facts relied upon; and 3) explain how the facts lead to the conclusion that  
15 the request satisfies the approval standard. *Le Roux, supra*.

16 In a substantial evidence challenge, LUBA’s standard of review is to  
17 consider all of the evidence in the record and determine whether the evidence  
18 would permit a reasonable person to find that an approval criterion is met.  
19 *Devin Oil Co., Inc., supra*.

20 LUBA reviews a hearings officer’s interpretation of local code to  
21 determine whether the interpretation is correct, without deference.  
22 ORS 197.835(9)(a)(D); *Gage, supra; Tonquin Holdings, LLC, supra*.

1           **3. Argument.**

2           When reviewing impacts associated with non-farm practices on farmland,  
3 the Decision was obligated to apply the farm impact test to individual farms. It  
4 completely failed to do so. Beyond a mere perfunctory dismissal, the Decision  
5 includes no farm-by-farm analysis or response to the extensive farmer  
6 testimony regarding adverse farm impacts in the record. Additionally, as  
7 LUBA has explained, the burden of proof related to compliance with the farm  
8 impact test rests with the project applicant, not the impacted farmers. *Stop the*  
9 *Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

10           The Supreme Court has explained that a farm impacts test must be  
11 applied to specific farm practices on individual farms. *Stop the Dump Coalition*  
12 (2019), *supra*. LUBA further confirmed this requirement and remanded a  
13 county approval where the findings of farm impacts failed to identify the  
14 existing farm activities and the impacts from the approved use. *1000 Friends of*  
15 *Oregon et al v. Lake County*, \_\_\_ Or LUBA \_\_\_ (LUBA No 2022-105, Oct 16,  
16 2023) (*slip op.* at 13). The findings in the Decision suffer from the same  
17 deficiency.

18           Although the Decision discusses broad-based impact categories including  
19 traffic impacts, dust, noise, pesticide use, wells, reputational harm, security and  
20 cumulative impacts, they offer no evaluation on a farm-by-farm basis.

1 Record 48. Instead of marking particularized findings, the Decision argued  
2 away this analysis and stated both the farmers and the Intervenor-Respondent's  
3 contractor were equally expert when it came to analyzing farm practices.  
4 Record 48.

5 The Decision merely adopts in sum the findings from the Intervenor-  
6 Respondent's final submittal and proffers no independent or particularized  
7 analysis. This is particularly erroneous because Respondent received dozens of  
8 highly specific comments from nearby farm operators evidencing adverse farm  
9 impacts in the record. Yet the Decision failed to analyze this expert evidence of  
10 farm impacts on a farm-by-farm basis.

11 As an example, Shawn Nerison of Surface Nursery submitted testimony  
12 that highlighted a series of serious impacts that the Project would have with  
13 respect to his farming practices. In referencing the Project and its associated  
14 impacts, Mr. Nerison discusses the need to purchase,

15 "industrial-quality hearing and respiratory protection for  
16 my employees, beyond the scope of what is usual and  
17 expected with accepted nursery farming practices ...  
18 Noise-cancelling headphones must have Bluetooth  
19 capability so employees can still be reached by phone or  
20 radio if needed. Headphones must also be weather, water  
21 and dustproof, lightweight and comfortable to ensure  
22 employees will wear them, and highly durable for use in  
23 an outdoor ag setting. Headphones will be replaced at a  
24 minimum annually due to the nature of the work  
25 environment. Headphones of this style cost

1 approximately \$165 per set. To allow for headphones that  
2 may be damaged during the year, and new employees, I  
3 would have to purchase 55 sets to be dispersed between  
4 50 employees, with 5 sets in reserve. Total cost for  
5 hearing protection: \$9,075 per year x 4 years = \$36,300.  
6 This is a significant cost to our farming operations.”

7 Record 3709.

8 In addition to the need to purchase expensive headphones, Mr. Nerison  
9 explained the cost associated with acquiring appropriate respiratory gear, which  
10 was necessary to address Project impacts. Specifically, he spoke to the need to  
11 acquire,

12 “95-type dust masks commonly used for nursery work  
13 are sufficient for normal operations and accepted farm  
14 practices, however, they will not be sufficient to protect  
15 the health of my employees ... It is reasonable to assume,  
16 therefore, that we will want to provide an upgraded,  
17 filter-based, fully dust, fume & waterproof respirator  
18 mask that is comfortable for each employee to wear for  
19 hours at a time. This ... will require that each employee  
20 has a dedicated, personal respiration mask they can use  
21 when near these areas of construction and construction  
22 traffic. They will also need to be full-face to offer eye  
23 protection from the same contaminants in the air. To  
24 allow for respirator masks that may need to be replaced  
25 during the year, and for new employees, I would have to  
26 purchase 55 sets at \$70 each, with extra filters (\$495), to  
27 be dispersed between 50 employees, with 5 sets in  
28 reserve. Total cost for respiratory protection: \$4,345 per  
29 year = 17,380 for 4 years.”

30 Record 3710.

1 Patrick Holt of R&H Nursery, Inc provided similarly detailed comments  
2 related to project impacts to farming practices.

3 “Dust and noise from the [Project] will have a significant  
4 impact on nursery operations and accepted farm  
5 practices. My employees will be exposed to noise and  
6 dust levels much higher than normal and expected in  
7 nursery work. It is in a nursery’s best interest to generate  
8 as little dust as possible, for employee’s health as well as  
9 the health of the trees and plants... Normal farm  
10 operations and accepted farm practices include regular  
11 work in the field on foot performing hand pruning and  
12 trimming, working on or moving irrigation, planting,  
13 digging, and more. During these activities, the fields are  
14 quiet and free from equipment stirring up dust. [Due to  
15 the Project, my employees] will be subject to levels of  
16 dust and particulate in the air stirred up by the constant  
17 traffic and dump trucks coming on and off the  
18 construction site and driving directly next to these work  
19 areas.

20 Noise generated from [the Project] far exceeds noise  
21 levels found in normal farm operations and accepted  
22 farm practices at R&H Nursery. In order to protect the  
23 hearing health of our employees, I may need to purchase  
24 industrial-quality hearing protection for my employees,  
25 beyond the scope of what is expected with accepted  
26 farming practices.

27 This impact on respiratory health is very serious. My  
28 employees may be subject to unusually high levels of  
29 dust and particulates from the [Project].”

30 Record 3280.

1           In addition to health impacts that employees may face, Mr. Holt further  
2 explains plant-related impacts that the Project will cause.

3                   “the dust, diesel, fumes and airborne particulate may  
4 affect my trees. The massive amount of dirt & top soil to  
5 be excavated and hauled off-site will generate quantities  
6 of dust that far exceed what is part of normal farming  
7 practices. The majority of the [Project is cited next to my  
8 farm]; diesel fumes and dust drift is inevitable and cannot  
9 be adequately mitigated with water. Excessive amounts  
10 of dust and diesel fumes ... will fall onto and coat my  
11 trees and plants. Plants that are coated in dust have a  
12 reduction photosynthesis that results in growth problems.  
13 Dust covering plants also affects respiration and  
14 transpiration which increases leaf temperature which  
15 allows the penetration of phytotoxic gaseous pollutants.  
16 This leads to the tree or plan have visible damage and  
17 generally there is a decreased productivity. The only  
18 mitigation for this impact is cost prohibitive.”

19 Record 3280-3281.

20           Despite these, and other expert testimony of farm impacts on the record,  
21 the Decision only reviewed the individualized comments for a fraction of the  
22 farmers that submitted farm-specific testimony, and offered a mere  
23 conclusionary statement that all identified impacts will be mitigated.

24           Except for the discussion of access concerns at and pesticide “no entry”  
25 periods and fumigation concerns, the Respondent, and the Decision via its  
26 wholesale adoption of Respondent’s testimony, makes no mention of any other  
27 individual farm property or farm operation. Indeed, the Decision is

1 unambiguous in its position and via adoption of Intervenor-Respondent's final  
2 written argument, fully acknowledges this lack of analysis related to farm-  
3 specific comments on the record: "We will not attempt to summarize here the  
4 farm by farm [impacts and instead rely upon then the] farm practice by farm  
5 practice analysis performed by Mr. Bruce Prenguber at Globalwise."

6 Record 276. In other words, the Decision indicates it is permitted to treat  
7 farmers as a homogenous, generalized group, and that individualized analysis of  
8 identified impacts are unnecessary. There are certainly no findings in the  
9 Decision that specifically address the noise and dust related significant farming  
10 impacts that Messrs Nerison and Holt discuss in detail.

11 In adopting the Intervenor-Respondent's arguments without  
12 modification, the Decision also failed to perform the farm-by-farm analysis  
13 required by *Stop the Dump Coalition* (2019), *supra*. Although LUBA may  
14 overlook conclusory findings under ORS 197.835(11) where "the parties  
15 identify relevant evidence in the record which clearly supports the decision or a  
16 part of the decision," this is not the case here because there is no evidence in the  
17 record that the Intervenor-Respondent evaluated individual farm operations, or  
18 addressed the specific comments explaining individual farm impacts.

19 The Intervenor-Respondent will likely point to a series of reports  
20 compiled by Globalwise Inc. addressing farm operations. However, none of

1 these reports include substantial evidence that addresses, let alone resolves, the  
2 farm-specific adverse impacts that farmers documented in the record.

3 The first of these reports, included in the land use application, addressed  
4 farm practices by farming category such as nursery plants or livestock-related  
5 farming. Record 7155. This report did not address any farm-specific impacts  
6 that individual farmers had raised during the community engagement process,  
7 but rather reviews generalized farm impacts. Record 7225.

8 In a subsequent report that the Intervenor-Respondent submitted to the  
9 public hearing, Globalwise Inc. analyzed transportation-related construction  
10 conflicts. Record 526. The report highlights steps to minimize farm impacts  
11 such as flagging farmers through otherwise closed work zones or  
12 communicating with farmers through mechanisms included a good neighbor  
13 agreement (which was never signed). Record 530-532. As with the first report,  
14 this one does not include evidence that addresses adverse impacts and  
15 associated mitigation on a farm-by-farm basis, nor does it ascribe impacts to  
16 any particular farm operations as the Supreme Court required in *Stop the Dump*  
17 *Coalition* (2019), *supra*.

18 Findings are adequate when they show that the applicable criteria and  
19 evidence have been considered in the decision. *Sunnyside Neighborhood v.*  
20 *Clackamas Co. Comm.*, 280 Or 3, 21, 569 P2d 1063 (1977). With the



1 conclusionary nature of the findings that lack any reference to evidence on  
2 farm-specific practices and impacts, the findings are inadequate to satisfy the  
3 required farm impact test.

4       Additionally, the Decision relies on statements from County staff  
5 regarding determinations that farm-related transportation issues are fully  
6 addressed. Record 47. However, in doing so, the Decision goes too far. The  
7 county staff in their capacity opining on farm impacts are not a farming experts  
8 and therefore lack the needed capacity in identifying accepted farm practices  
9 and the impacts to these practices. *Friends of Marion County v. Marion*  
10 *County*, \_\_\_ Or LUBA \_\_\_\_ (LUBA No. 2021-043, Nov 22, 2021) (slip op at  
11 11) (remanding where evidence of farm use conflicts relied on was provided by  
12 intervenor’s counsel who lacks expertise of actual farm impacts).

13       LUBA has explained that, although it is true that in the case of dueling  
14 experts, a local government may choose which evidence to accept, adequate  
15 findings must state the facts it relies on and explain why those facts lead to the  
16 conclusion that the applicable standard is satisfied. *Moore v. Clackamas*  
17 *County*, 29 Or LUBA 372, 380 (1995); *Le Roux, supra*; *Larvik v. City of La*  
18 *Grande*, 39 Or LUBA 467, 470-71 (1998). Indeed, the Decision acknowledged  
19 that the local farmers commenting on the record were indeed the most reliable  
20 experts with respect to identifying farm impacts:

1            “I believe the farmers who I find to be experts in this area  
2            are correct in determining that there will be farm impacts.”

3    Record 45.

4            Conversely, the only time that the Decision expresses an affirmative  
5    finding in favor of the Globalwise Inc. analysis as an expert is with respect to  
6    the evaluation of generalized and cumulative farming impacts. Record 45.

7            In *Schellenberg v. Polk County*, 21 Or LUBA 425, 442 (1991) and more  
8    recently in *Friends of Marion County v. Marion County*, \_\_ Or LUBA \_\_\_\_,  
9    (LUBA No. 2021-089, April 21, 2022), LUBA remanded a decision that lacked  
10    adequate identification of the accepted farm practices on surrounding land which  
11    made it impossible to evaluate whether the proposed use would cause a  
12    significant change or increase the cost of farming. The Decision suffers the same  
13    defects because it adopted large portions of argument by reference without  
14    explaining how the evidence was evaluated on a farm-by-farm basis and how  
15    conflicts between individual farm experts and the Intervenor-Respondent’s  
16    consultant were resolved.

17            In conclusion, the Decision fails to fully and appropriately consider the  
18    farm impacts on the surrounding farms. This means that the Decision cannot  
19    determine whether the proposed non-farm use would cause significant changes  
20    to, or increase the cost of, those practices. This failure to engage in complete

1 farm-by-fam analysis violates LUBA and Supreme Court precedents and means  
2 that the Decision lacks adequate findings supported by substantial evidence and  
3 must be reversed or, in the alternative remanded in order for Respondent to  
4 engage in the necessary farm impact analysis.

5 **D. Fourth Assignment of Error – The Decision Misconstrued Applicable**  
6 **Law and Failed to Make Adequate Findings Supported by**  
7 **Substantial Evidence in Concluding that the Project Evaluated the**  
8 **Scope of Surrounding Farm Lands as the County Farm Impact Test**  
9 **Requires.**

10 **1. Preservation**

11 In the underlying matter, the Oregon Department of Agriculture argued  
12 that Respondent had failed to properly analyze and the scope of the farming  
13 area surrounding the area of the proposed non-farm uses. It argued, “We would  
14 suggest that the ‘cooperating nature’ of the industry and the critical mass  
15 needed to support agricultural infrastructure needs requires analysis of a larger  
16 area.” Record 3734.

17 This issue was preserved.

18 **2. Standard of Review.**

19 Adequate findings 1) identify the relevant approval standards; 2) set out  
20 the facts relied upon; and 3) explain how the facts lead to the conclusion that  
21 the request satisfies the approval standard. *Le Roux, supra*.

22 In a substantial evidence challenge, LUBA’s standard of review is to  
23 consider all of the evidence in the record and determine whether the evidence

1 would permit a reasonable person to find that an approval criterion is met.

2 *Devin Oil Co., Inc., supra.*

3 LUBA reviews a hearings officer's interpretation of local code to  
4 determine whether the interpretation is correct, without deference.

5 ORS 197.835(9)(a)(D); *Gage, supra; Tonquin Holdings, LLC, supra.*

6 **3. Argument.**

7 In order to satisfy the approval criteria for the county farm impact test  
8 contained in MCC 39.7515(C), the Decision must find that the non-farm uses  
9 will not cause material impacts to the surrounding farm land. As a basis for that  
10 finding, the Decision was required to determine the appropriate geographic area  
11 of surrounding lands where the potential impacts could occur.

12 Here, the Intervenor-Respondent proposed a narrow area of surrounding  
13 lands that failed to fully address the integrated nature of the adjacent and nearby  
14 farms and their interrelated reliance upon the general area. The Decision fully  
15 adopted the Intervenor-Respondent's arguments regarding the narrow area. In  
16 doing so, the Decision could not properly analyze the non-farm uses under the  
17 county farm impact test.

18 Intervenor-Respondent cites to *Hood River Valley PRD v. Hood River*  
19 *County*, 67 Or LUBA 314, 330 (2013) for the proposition that they have great  
20 leeway to define the surrounding area. This is not correct. *Hood River Valley*,

1 *Id.*, stands for the proposition that there is no obligation to study *all* agricultural  
2 land in the Multnomah County. With that, Intervenor-Petitioners fully concur.

3 But as LUBA explained in *Hood River Valley, Id.*, the purpose of the  
4 surrounding lands analysis is to focus on the impacts of the proposed non-farm  
5 use on agricultural practices in the proximate surrounding area, not attenuated  
6 impacts to the larger economy caused by conversion of the subject property  
7 from agricultural to a non-farm use. As the Oregon Department of Agriculture  
8 explained below, the surrounding farms are,

9 “highly dependent on the movement (shipping and  
10 receiving) of their products by tractor-trailer trucks. Most  
11 area nursery and greenhouse products are moved to and  
12 from area farms towards Interstate Highway 84 and U.S.  
13 Highway 26. It is common practice for farmers to share  
14 loads with other operators. Two (or more) farms may have  
15 product that needs to be shipped to the east coast, but each  
16 separately would fill only half a load. Together, the two  
17 farms can fill a truck. Without the ability to move product  
18 efficiently between farms and ultimately to the major area  
19 highways, area farms would face significant increase in  
20 costs and decrease the availability of acquiring timely  
21 transport.”

22 Record 3734.

23 For that reason, the Oregon Department of Agriculture recommended a  
24 larger definition of the surrounding area. Here, Intervenor-Respondent  
25 determination of surrounding area extended a mere one-mile to the north and  
26 south of the project site, approximately one and one-half miles to the west and

1 approximately two-miles to the east. This limited study area failed to fully  
2 recognize the character of the existing farming economy and the  
3 interdependence of individual farm operations.

4 The Oregon Department of Agriculture argued that the Respondent  
5 should require the analysis of a larger study area that recognized the complex  
6 transportation requirements of the existing farming industry. Specifically, it  
7 explained that,

8 “an area that includes lands north to I-84, west to the  
9 Metro urban growth boundary and south to line the  
10 generally runs from Damascus to Sandy would better  
11 reflect the transportation needs of area nursery and  
12 greenhouse operations.”

13 Record 3734.

14 Such a more refined definition of the surrounding area would respond to  
15 the transportation patterns associated with the surrounding farm uses and allow  
16 for a full understanding of the adverse impacts caused by the non-farm uses.  
17 Only with this refined understanding of the surrounding area can the county  
18 make the necessary findings related to its farm impact test. This specific expert  
19 testimony, which the county received as part of the underlying proceeding,  
20 satisfies the two part requirement that LUBA delineated in *Schellenberg v. Polk*  
21 *County*, 22 Or LUBA 673, 682-83 (1992) (identify a specific surrounding area  
22 and explain how the area was chosen). Here, the Oregon Department of

1 Agriculture identified an appropriate area for study and explained why the area  
2 was chosen; in this instance, for efficient transportation of farm products. The  
3 Decision lacks adequate findings because it fails to address this expert  
4 testimony, including the department's reasoning about why a larger study area  
5 is appropriate.

6 In conclusion, because the Decision failed to adequately recognize the  
7 existing farming economy surrounding its proposed non-farm uses, the analysis  
8 of the too-small surrounding areas failed to comply with the requirements of  
9 MCC 39.7515(C). The Decision merely incorporated Intervenor-Respondent's  
10 analysis as the basis for complying with the county's regulations. This means  
11 that the Decision lacked substantial evidence to answer the ultimate legal  
12 question of whether MCC 39.7515(C) was properly satisfied. For the  
13 foregoing, we respectfully request that LUBA reverse the Decision or remand it  
14 for further proceedings and direct the county to more fully analyze the  
15 individual surrounding farm uses.

## V. CONCLUSION

1  
2       The Decision's conclusory analysis is not a true alternatives analysis and  
3 fails to demonstrate that ORS 215.275 is met. The Decision is an executive  
4 summary that completely fails to include any of the underlying information that  
5 led the Intervenor-Respondent to choose the pipeline route. Without this  
6 information, Respondent, the Hearings Officer, the public at large, and LUBA  
7 lack substantial evidence to test the assumptions that led to the selection of this  
8 route and verify that those assumptions are, in fact, correct. Absent this evidence,  
9 the supposed Alternatives Analysis serves as little more than an executive  
10 summary that would traditionally accompany an expansive evidentiary document  
11 replete with charts, studies, and detailed analysis.


12       Additionally, the Decision misconstrued applicable law by failing to  
13 properly interpret and apply the farm impact test contained in MCC 39.7515.  
14 The Decision also failed to provide the rigorous farm-by-farm analysis of  
15 cumulative impacts required by *Stop the Dump Coalition* (2019), *supra*, and  
16 failed to address the detailed evidence submitted by farmers, whom the hearings  
17 officer deemed to be most credible about existing farm conditions. Finally, the  
18 Decision adopts analysis of a surrounding area that fails to address the nearby



1 farming practices. For these reasons, we respectfully ask that LUBA reverse or  
2 remand and direct the respondent to comply with ORS 215.275, MCC 39.7515,  
3 and controlling case law.

4 Respectfully submitted this 5th day of July, 2024.

JORDAN RAMIS PC  
Attorneys for Intervenor-Petitioners  
Oregon Association of Nurseries and  
Multnomah County Farm Bureau

5  
6  
7  
8  
9  
10  
11 By:   
12 James D. Howsley, OSB #012969  
13 jamie.howsley@jordanramis.com  
14 Ezra L. Hammer, OSB #203791  
15 ezra.hammer@jordanramis.com

## CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Brief Length and Type Size Requirements

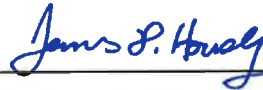
### **Brief Length**

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 8,559 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: July 5, 2024.



---

James D. Howsley, OSB #012969  
Ezra L. Hammer, OSB #203791  
Attorneys for Intervenor-Petitioners  
Oregon Association of Nurseries and  
Multnomah County Farm Bureau

CERTIFICATE OF COMPLIANCE

JORDAN RAMIS PC  
Attorneys at Law  
1211 SW Fifth Avenue, 27<sup>th</sup> Floor  
Portland, OR 97204  
Telephone (503) 598-7070

## **SUPPLEMENTAL APPENDIX**

MCC § 39.4300- PURPOSE. The purposes of the Multiple Use Agriculture base zone are to conserve those agricultural lands not suited to full-time commercial farming for diversified or part-time agriculture uses; to encourage the use of non-agricultural lands for other purposes, such as forestry, outdoor recreation, open space, low density residential development and appropriate Conditional Uses, when these uses are shown to be compatible with the agricultural uses, natural resource base, the character of the area and the applicable County policies.

MCC § 39.7515 APPROVAL CRITERIA. In approving a Community Service use, the approval authority shall find that the proposal meets the following approval criteria, except for transmission towers, which shall meet the approval criteria of MCC 39.7550 through 39.7575, wireless communications facilities, subject to the provisions of MCC 39.7705, and except for regional sanitary landfills, which shall comply with MCC 39.7600 through 39.7625.

- (A) Is consistent with the character of the area;
- (B) Will not adversely affect natural resources;
- (C) The use will not:
  - (1) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; nor
  - (2) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.
- (D) Will not require public services other than those existing or programmed for the area;
- (E) Will be located outside a big game winter habitat area as defined by the Oregon Department of Fish and Wildlife or that agency has certified that the impacts will be acceptable;
- (F) Will not create hazardous conditions;
- (G) Will satisfy the applicable policies of the Comprehensive Plan;
- (H) Will satisfy such other applicable approval criteria as are stated in this Section.
- (I) In the West of Sandy River Rural Planning Area, the use is limited in type and scale to primarily serve the needs of the rural area.

## INTRODUCTION AND CITIZEN INVOLVEMENT



*For our future, we envision:*

- *The residential density east of the Sandy River stabilized at levels allowed by current zoning.*
- *The Urban Growth Boundary maintained west of the Sandy River.*

### *West of Sandy River*

The West of Sandy River subarea is bounded on the east and north by the Sandy River, on the south by Clackamas County, and on the west by the city limits of Gresham and Troutdale. The area is open to urban influence to a greater degree than other planning subareas due to its proximity to urban development and a lack of physical barriers common to the other subareas, such as the steeper topography of West Hills, and the more limited access to Sauvie Island and the East of Sandy River area.

As part of the previous rural area planning effort for the West of Sandy area, the community developed and adopted the following vision statement and reaffirms its validity as part of this County Comprehensive Plan.

### **West of Sandy River Vision**

*As residents and landowners in the area between the cities of Gresham and Troutdale and the Sandy River, our vision is that we will continue to enjoy our rural lifestyle. We value all of the features that make this a rural place, including the quiet open spaces, vistas of productive farm and forest lands and of Mt. Hood, country roads, healthy air, soils and streams, and a night sky where we can clearly see the stars.*

*We envision that the Orient and Pleasant Home rural centers will continue to prosper within defined areas in order to provide for the needs of residents and visitors. We want our roads to continue to serve as the transportation network for the area, while remaining usable for people enjoying the country and accessing the Sandy River, with opportunities for exercise by walking, running, bicycling and horseback riding.*

*In order to maintain this vision, we recognize that the planned density of residential development must not increase, that the agricultural economy of the area must remain strong, and that development of new non-agricultural businesses should serve the needs of the area. The plan is intended to help us in our stewardship of the environment, our lifestyle, and our community over the next 20 years.*



3. Consider the suitability of any lands not designated as urban or rural reserve for such designation during the reserves plan review that is intended to occur within 20 years of the initial reserves designations.

**Strategy 2.4-2:** *A key element of the reserves program is that identification of land suitable for urban reserve provides the certainty needed for local governments and service providers to plan for future service needs in UGB expansion areas. The County will participate with Metro and an appropriate city in concept planning of urban reserve areas under consideration for inclusion within the UGB subject to the principles:*

1. Concept planning for specific, enumerated urban reserves on the urban and rural reserves map may occur separately and at different times.
2. A concept plan for any urban reserve area must be approved by the county, the city or cities who will govern the area, and by Metro.
3. Concept plans shall provide that any area added to the UGB shall be governed by an existing city, or by a new city, and shall include provision for the orderly efficient transition from urbanizable to urban land. The preferred approach is for existing county zoning and rural level of services to remain in effect until new urban areas are annexed into the designated city.
4. Concept planning for urban reserve areas that are suitable for industrial and other employment uses will recognize the opportunity to provide jobs in this part of the region.
5. Concept planning for urban reserve areas that are suitable for a mix of urban uses will recognize the opportunity to provide employment and mixed-use centers with housing at higher densities and employment at higher floor-to-area ratios, and will include designs for a walkable, transit-supportive development pattern.
6. Concept planning shall recognize environmental and topographic constraints and habitat areas and will reduce housing and employment capacity expectations accordingly.
7. Concept plans shall be designed to avoid or minimize adverse effects on farm and forest practices, and on important natural landscape features on nearby rural land.

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the date shown below, I filed the original and one (1) copy of the foregoing Intervenor-Petitioners Oregon Association of Nurseries' and Multnomah County Farm Bureau's Joint Petition for Review by certified mail return receipt requested, postage prepaid, on:

Oregon Land Use Board of Appeals  
DSL Building  
775 Summer Street NE, Suite 330  
Salem, OR 97301

I further hereby certify that on the date shown below, I served a true and correct copy of the foregoing Intervenor-Petitioners Oregon Association of Nurseries' and Multnomah County Farm Bureau's Joint Petition for Review by first class mail, postage prepaid, on:

Carrie Richter, OSB #003703  
Bateman Seidel  
1000 SW Broadway, Suite 191  
Portland, OR 97205  
Attorney for Petitioners and  
Intervenor-Petitioner Multnomah  
County Rural Fire Protection District  
No. 10

Jeff Kleinman, OSB #743726  
1207 SW 6<sup>th</sup> Ave  
Portland, OR 97204  
Attorney for Intervenor-Petitioners  
Pleasant Home Community  
Association and Angela Parker, dba  
Hawk Haven Equine

David N. Blankfeld, OSB #980373  
Multnomah County Attorney's Office  
501 SE Hawthorne, Suite 500  
Portland, OR 97214  
Attorney for Respondent Multnomah  
County

Zoe Lynn Powers, OSB #144510  
Renee France, OSB #004472  
Radler White Parks & Alexander LLP  
111 SW Columbia St., Suite 700  
Portland, OR 97201  
Attorney for Intervenor-Respondent  
Portland Water Bureau

CERTIFICATE OF FILING AND SERVICE

JORDAN RAMIS PC  
Attorneys at Law  
1211 SW Fifth Avenue, 27<sup>th</sup> Floor  
Portland, OR 97204  
Telephone (503) 598-7070

**CERTIFICATE OF FILING AND SERVICE CONTINUED**

Andrew Mulkey, OSB #171237  
1000 Friends of Oregon  
340 SE 6<sup>th</sup> Avenue  
Portland, OR 97214  
Attorney for Intervenor-Petitioner  
1000 Friends of Oregon

Elliot Field, OSB #175993  
Garrett Hemann Robertson, P.C.  
4895 Skyline Rd. S.  
Salem, OR 97306  
Attorney for Intervenor-Petitioner  
Gresham-Barlow School District No.  
10J

DATED: July 5, 2024



---

James D. Howsley, OSB #012969  
Ezra L. Hammer, OSB #203791  
Attorneys for Intervenor-Petitioners  
Oregon Association of Nurseries and  
Multnomah County Farm Bureau

**CERTIFICATE OF FILING AND SERVICE**

JORDAN RAMIS PC  
Attorneys at Law  
1211 SW Fifth Avenue, 27<sup>th</sup> Floor  
Portland, OR 97204  
Telephone (503) 598-7070



