BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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

Petitioners,

and

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

Intervenor-Petitioners,

v.

MULTNOMAH COUNTY,

Respondent,

and

PORTLAND WATER BUREAU,

Intervenor-Respondent.

LUBA No. 2023-086

INTERVENOR-RESPONDENT'S RESPONSE BRIEF TO THE PETITION FOR REVIEW OF PETITIONER COTTRELL COMMUNITY PLANNING ORGANIZATION, PAT MEYER, MIKE COWAN, PAT HOLT, RON ROBERTS, KRISTY MCKENZIE, MIKE KOST, RYAN MARJAMA, MACY AND TANNER DAVIS, LAUREN COURTER, AND IAN COURTER

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Exhibit M.11

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I. STANDING

Intervenor-Respondent Portland Water Bureau ("PWB") has standing as the applicant and as a party that appeared below. ORS 197.830(7)(B).

Intervenor accepts the standing of Petitioners (collectively, "CPO").

II. STATEMENT OF THE CASE

A. NATURE OF THE DECISION

PWB rejects CPO's statement of the nature of the decision as lacking specificity about the portions of the decision challenged. As further explained in Section II.A of Multnomah County's ("County") Consolidated Response Brief ("County Brief"), the challenged decisions are a portion of the Hearings Officer's final decision in T3-2022-16220, issued by the County on November 29, 2023 (the "decision"). The decision approves multiple consolidated land use permit applications. Rec-13. The only permits subject to the Multnomah County Code ("MCC")[1] criteria referenced in CPO's arguments are:

- Two Community Service Conditional Use Permits for Utility Facilities in Multiple Use Agriculture–20 ("MUA-20") for:
  - (1) the filtration facility, and
  - (2) the pipelines, where located in MUA-20.

No other part of the decision is implicated.

B. RELIEF SOUGHT

PWB requests that LUBA affirm the County's decision.

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

C. SUMMARY OF ARGUMENTS

1. First Assignment of Error

CPO did not adequately preserve the arguments raised in the first assignment of error. Even if it had, none of the information cited constitutes impermissible new evidence in PWB's Final Written Argument ("final argument").

2. Second Assignment of Error

This assignment of error is addressed in County Brief, Section IV.A.

3. Third Assignment of Error

The Hearings Officer correctly interpreted the term "natural resources" in MCC 39.7515(B) and made appropriate findings of compliance based upon substantial evidence in the record.

D. SUPPLEMENTARY STATEMENT OF FACTS

In an effort to avoid repetition, the material facts raised in this brief supplement the statement of facts set forth in the County Brief.

The majority of the filtration facility site is cleared of vegetation and has most recently been used for commercial agricultural purposes. Rec-7991. There are two areas near the edges of the site in the Significant Environmental Concern (SEC) overlay. Rec-7952. An area along the northeast edge is designated SEC-habitat ("h") overlay. *Id.* The southwest corner includes a portion of a 200-foot buffer along Johnson Creek within the SEC-water

resource ("wr") overlay. *Id.* Johnson Creek itself is located on an adjacent property. *Id.* Stormwater will be treated and managed with a system of swales, planters, and vegetated stormwater basins, and flow rates will be equal to or lesser than existing flow rates. Rec-6230-6241.

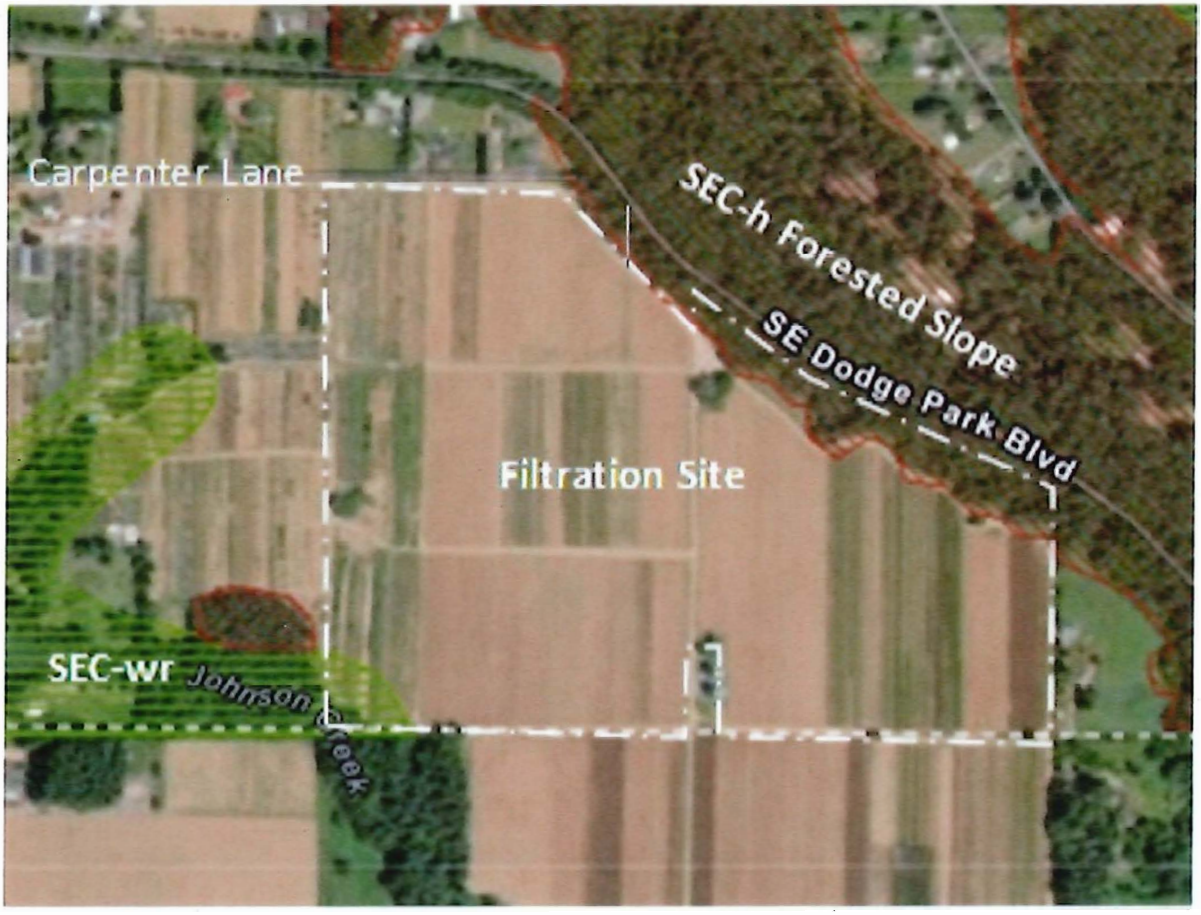

Figure 32. Filtration Facility Site Natural Landscape and SEC Overlays

Rec-7855.

Development on the filtration facility site avoids all SEC overlay areas. Rec-7952. Where pipelines must cross SEC overlay areas, any impacts to resources have been avoided. The raw water pipeline will be placed in a tunnel approximately 150-200 feet below the surface of the SEC-h overlay east of the filtration facility site. Rec-7748-7749. A distribution main will also avoid SEC-

wr and SEC-h zoned surface areas through the use of trenchless borings below the surface. Rec-7749.

III. LUBA'S JURISDICTION

PWB agrees LUBA has jurisdiction.

IV. ARGUMENT

A. RESPONSE TO FIRST ASSIGNMENT OF ERROR

1. Introduction

CPO argues that PWB submitted new evidence in the final argument and that remand is required to permit the CPO to respond to the alleged "new facts." CPO Brief, 7-13. Because this issue was not preserved below, CPO may not raise it for the first time on appeal. Putting aside the waiver issue, CPO incorrectly characterizes elements of the final argument as "new evidence" and does not tie any of the "new facts" to the relevant approval standards. Thus, CPO provides no basis for remand.

2. Preservation

CPO acknowledges it did not preserve the issues under this assignment of error, but argues that "the record was closed and no further testimony was allowed." CPO Brief, 7. A headnote-type summary and a case citation without pin cite or analysis is insufficient to support CPO's preservation argument and is not sufficiently developed for review. *Deschutes Development v. Deschutes County*, 5 Or LUBA 218, 220 (1982).

CPO cites *Eng v. Wallowa County,* 79 Or LUBA 421 (2019), but does not explain why preservation was not required in that case, how the present case is similar to *Eng*, or otherwise explain why CPO should be excused from the preservation requirement. CPO could have easily preserved its objection below through a single email to the Hearings Officer during the two-month period between PWB's final argument and issuance of the decision. Rec-9, 127 (showing dates of decision and final argument). A single email during a two-month period is a low bar to cross.

Eng does not assist CPO. Moreover, CPO ignores other relevant caselaw and standards that it must address to avoid the preservation requirement. CPO must "demonstrate (1) that they objected to the procedural error below, if there was opportunity to do so; and (2) that the city's error prejudiced their substantial rights." *Brome v. City of Corvallis*, 36 Or LUBA 225, 234 (1999), *aff'd Schwerdt v. City of Corvallis,* 163 Or App 211, 987 P2d 1243 (1999), *abrogated on other grounds by Church v. Grant County,* 187 Or App 518, 69 P3d 759 (2003). A two-month period, during which CPO was represented by counsel, provided CPO "an opportunity" to object.[2] Although the record was closed pursuant to ORS 197.797(6)(e), CPO had an opportunity to object. In fact, the Hearings Officer had already shown he was willing to "allow … into

[2] Email correspondence to the county email server was used throughout the process. *See, e.g.,* Rec-3384 (CPO counsel email to Hearings Officer).

the record" materials submitted by email after the close of the record with good cause. Rec-434.

In *Eng*, the applicant submitted an email together with the applicant's final written argument. *Eng*, slip op at 17. Three days later, the board of commissioners deliberated and made a tentative decision to approve the application, relying, in part, on the email. The board chair "advised at the meeting's outset that no written or oral input would be accepted from the parties." *Eng*, slip op at 18. LUBA held that petitioner's subsequent opportunity to review findings prior to formal adoption "was not a meaningful opportunity to participate" because the county had already made a decision. *Eng,* slip op at 19. In this case, there were two months – rather than three days – of meaningful opportunity to send an email.

Similarly, in *Horizon Construction v. City of Newberg*, 114 Or App 249, 253-254, 834 P2d 523 (1992), the court held that where an objection to the city council would not have cured the *ex parte*-related error committed by the city, and where an objection would not have allowed the objecting party to adequately respond had the council reopened the record, the party was excused from raising an objection. Here, the Hearings Officer had indicated his willingness to reopen the record for good cause, Rec-434, and an objection could have cured what CPO perceives as procedural error by allowing a factual response.

In *Gran v. City of Yamhill*, __ Or LUBA __, __ (LUBA No. 2017-070, October 26, 2017) (slip op at 15), LUBA did not require a petitioner to lodge an objection when there was both limited time and limited opportunity:

> "[I]n this case the only opportunity the petitioner may have had to enter an objection to receipt of the evidence on June 21, 2017, was one day later, at the city council's June 22, 2017 regular city council meeting when the city council adopted its final decision. The city council meeting offered no formal opportunity for the parties to lodge procedural objections, and the record had closed on June 21, 2017, one day before the city council took final action."

The circumstances here are not remotely similar. CPO was represented by counsel throughout the local process. Rec-832. An email objection from counsel during a two-month window is by no means equal to forcing a layperson to stand in the middle of a city council hearing and raise an objection after being informed that there is no opportunity to speak.

The CPO requests remand to address the "new facts" (presumably after this case has wound its way through the judicial review process). The issues raised by CPO could have been easily and quickly addressed in the initial decision. Instead, CPO elected to raise its objections for the first time on appeal. It is disingenuous for CPO to argue, on the one hand, that the "time is of the essence" legislative policy set forth in ORS 197.805, referred to as a "guiding tenant of the land use appeal process," should prohibit PWB from seeking extra time to file its briefs and, on the other hand, ignore this "guiding tenant" by

raising an issue for the first time nearly 10 months after submittal of final argument. *See* APP-170 (Joint Opposition Motion) (CPO and other petitioners strenuously arguing that LUBA should deny request for extended briefing because the legislative policy in ORS 197.805 is "intended to promote the speediest practicable review of land use decisions[.]"). CPO had two months to raise their objection. They should not be rewarded with another bite at the apple at some distant remand hearing.

To remand, LUBA must find that the Hearings Officer "failed to follow the procedures applicable to the matter before it in manner that prejudiced the substantial rights of the petitioner." ORS 197.835(9)(a)(B). CPO does not identify "procedures applicable to the matter" or identify any specific error committed by the Hearings Officer. Presumably, CPO believes that the Hearings Officer should have rejected the alleged new evidence. Yet, with a record exceeding 8,000 pages, absent an objection, how was the Hearings Officer to know that anyone thought the final argument contained "new facts"?

Rather than sitting on its hands for two months, CPO had options. First, because the record includes all materials placed before the decision maker and not rejected by the decision maker (OAR 661-010-0025(1)(b)), CPO could have argued that, in accepting the "new facts," the Hearings Officer reopened the record under ORS 197.797(7). CPO could have filed a concurrent request to respond to the new evidence. Alternatively, CPO could have simply sent an email to the Hearings Officer. Lastly, assuming that the Hearings Officer ignored the request, and CPO evidence was not included in the record, CPO could have asked LUBA to accept additional evidence to demonstrate procedural irregularities under ORS 197.835(2)(b) with a request that the board "make findings of fact on those allegations." *Id.* CPO did none of these things.

3. Standard of Review

LUBA reviews procedural claims of error under ORS 197.835(9)(a)(B).

4. No New Evidence

PWB's final argument did not include "new evidence." Even assuming some portions of PWB's final argument included "new facts," for purposes of ORS 197.797(9)(b), such facts must be "offered to demonstrate compliance or noncompliance" with approval standards in order to violate the final written argument limitations in ORS 197.797(6)(e). *See, e.g., Howard v. City of Madras*, 41 Or LUBA 122, 125 (2001) (finding that city did not commit error by accepting evidence after record closed when the evidence "did not concern

criteria relevant to revocation of the site plan"). The CPO's argument is not sufficiently developed for review because it does not allege that the "new facts" were relevant to approval standards or identify the standards to which the facts might apply. It is not enough to allege that the Hearings Officer "relied" on the facts. CPO Brief, 9. Reliance on "new facts" must be tied to approval standards. With respect to the conditions argument, CPO does not identify which of the conditions or sub-conditions in the PWB 22-page "Proposed Conditions of Approval" appendix constitute new evidence. For this simple fact, their argument is not developed for review.

CPO's individual assertions are each discussed below.

a) <u>Boil Order</u>

CPO alleges PWB's statements regarding a "boil order" and economic impacts of such an order were "offered for the first time." CPO Brief, 9. CPO is wrong. The City of Sandy Public Works Director provided written testimony that:

> "If facilities for treatment of cryptosporidium are not constructed by September 30, 2027, the City of Portland will no longer be able to provide Bull Run water without stipulating the water is not safe for consumption without boiling or other home treatment. The impact of not having safe water for the community and economy of the region is enormous. It is critical for the public and economic welfare of the community to build this once-in-a-generation project as quickly as possible."

Rec-3737.

b) Transportation Standard

CPO alleges that at final argument, page 13, PWB identified "the statute and standard of review" and presented such "as a fact mandating deference to staff decision making." CPO Brief, 10. The PWB argument at page 13 does not reference a statute. Rec-148. The cited page identifies two LUBA decisions and highlights that local transportation staff "have special expertise" and that decision makers *may* assign additional significance to city or state engineers based on the neutral review status. *Id.* It is preposterous to suggest that citing cases and applying facts and law of those cases to an application is "new evidence." This is the essence of legal argument.

Although the CPO Brief identifies CPO App-246 as including new evidence, CPO makes no effort to highlight the information or explain its relevance. Lastly, the brief reference to "Hearings Officer reliance at App-47" is similarly lacking. CPO makes no effort to connect the dots. Again, it is CPO's obligation to identify the "new evidence" and demonstrate that it relates to the approval standards. CPO has not done so.

c) County Decisions

CPO neglected to include the remainder of the sentence they quote: "The applicant reviewed over 2,000 prior County decisions and has provided for the record key examples of this fact, at Exhibits I.70, I.71, I.72, and I.73." Rec-140. Here too, CPO has not identified any approval standard to which the "2000

prior county decisions" statement would be relevant. PWB agrees with CPO that "only what these 5 approvals show (or do not show) may be considered." CPO Brief, 10. That is why PWB specifically included the five prior decisions in earlier submittals and specifically referenced them in its final argument. *Id.*

Moreover, the prior decisions comment only supports the title of that section: the county has never before applied their code to construction, rather than a proposed use. Rec-140. That fact is in the record in two places. First, PWB explained that is the "applicant team's experience with Multnomah County" specifically. Rec-3437. Staff responded, and agreed that they may have "failed to realize a significant change" had occurred that would allow applying the code to construction. Rec-2790. That is, staff did not rebut the applicant's assertion, and did not point to any prior decision doing so, instead asserting that they could do so now. As the fact that the county has never before applied their code to construction was in the record, and that was the point of the "prior decisions" statement, it cannot be prejudicial to CPO.

d) Length of Delay

The results of math based on evidentiary numbers already in the record do not constitute "new evidence." For example, one-half of 100 is 50. Citing 50 rather than "one-half of 100" is not a new fact, nor is it capable of rebuttal. Procedural rights are not prejudiced by being denied the opportunity to challenge whether two plus two equals four. The math resulting in the three

seconds of delay statement came solely from evidence in the record.[3] While PWB's math involved doing "two plus two"-level math for each intersection and scenario PWB studied in the Construction TIA, that does not convert the resulting table or average into new facts. Each of the two numbers for each intersection (background seconds of delay and peak construction seconds of delay) are contained in the record and CPO had every opportunity to do the math themselves.[4]

Lastly, as with its other objections, CPO does not tie its objections to any approval standard or explain why the "new fact" is relevant to an approval standard. Moreover, the Hearings Officer's reference to the three second delay is contained in the section of the decision that concluded that construction-related impacts (including traffic) are not the land use to which the approval standards apply. Rec-47. Thus, even if it were a new fact, and even if the

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[3] The subtraction that resulted in Table 1 in the Final Written Argument was "done by subtracting the existing, background conditions seconds of delay" found at Table 5 of the Construction TIA, at Rec-4212, "from the peak construction (with road closures) seconds of delay" from Table 8 of the Construction TIA, Rec-4219, as modified for the two intersections covered by the "One-Access Analysis" at Rec-1940. Rec-152 (location of quotations in final written argument). For example, for Intersection #15 in the PM (the last line of Table 1 at Rec-153), "the peak construction (with road closures) seconds of delay" shows as 13.1 at Rec-4212 and "the peak construction (with road closures) seconds of delay" show as 24.1 and 14.8 for the two paired closures. 13.1-24.1=11.0 and 13.1-14.8=1.7.

[4] *See Compania De Las Fabricas De Papel v. Bagley & Sewall Co.*, 10 FRD 140, 141 (NDNY 1950) (defendant could not claim that computation of damages was not set forth with sufficient particularity when they were "easily ascertainable by simple subtraction" by defendant).

Hearings Officer "relied" on the fact, because it is irrelevant to approval standards, CPO's substantial rights were not prejudiced.

e) Legislative History

CPO next argues that statements regarding "many hours" of legislative history is new evidence and that the Hearings Officer adopted these new facts as his own. CPO Brief, 11. While PWB's statement that it reviewed "many hours" may be considered a "new fact," CPO does not tie the statement to any approval standards. While the Hearings Officer adopted the pages of PWB's final argument that contained the "many hours" statement, CPO provides no evidence that the Hearings Officer specifically considered PWB's statement or relied on the statement to reach his conclusion. Moreover, if CPO believes there *is* relevant legislative history, there can be no prejudice to CPO, as they are free to proffer it to LUBA now. *Gaines*, 346 Or at 172.

f) Clearly Staged

PWB's final argument characterized opponent videos as "clearly staged."[5] Beliefs are not facts. Belief is the "conviction of the truth of some statement or the reality of some being or phenomenon especially when based on an examination of the grounds for accepting it as true or real."[6] PWB expressed

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[5] "Although clearly staged, the opposition videos generally show that the roads currently can accommodate truck traffic and farm traffic successfully. For example, take the videos in Exhibit J.54 and Exhibit J.28 -- two clearly staged videos of the exact same sequence being followed by a drone." Rec-289.

[6] "Belief." *Merriam-Webster's Unabridged Dictionary*, accessed July 15, 2024.

its belief that the opposition videos were staged. CPO does not tie this statement to any relevant approval standard or suggest that the Hearings Officer adopted this belief as part of his decision. In fact, the Hearings Officer characterized the videos as "excellent and informative." Rec-50. Even if the statement could be considered a "new fact," because CPO has not tied the statement to any relevant approval standard, CPO has not sufficiently developed its argument.

g) Tree Plan

CPO next alleges that PWB's reliance on a tree plan and a mitigation memorandum included in the record somehow qualifies as "new facts." CPO Brief, 11. That is incorrect. Moreover, CPO does not tie the "new fact" to an approval standard.

A footnote in PWB's final argument provides, in part:

> "a large percentage of the trees to be removed are less than 6 inches DBH. For example, nearly 1/3[7] of the trees that must be removed within the Dodge Park Boulevard right-of-way to accommodate the pipeline are less than 6 inches DBH. Typically, trees under 6 inches DBH are not included in tree replacement calculations. To be conservative, the Water Bureau is including all trees in its tree removal count and has provided a replacement ratio recommended by the project's wildlife biologist of 1.5:1[.]"

Rec-253. Evidence in the record supports this statement. PWB's Wildlife Impacts memorandum (Rec-1803) states that "Approximately a quarter of the trees proposed for removal [along Dodge Park Blvd.] are small in size (less than

[7] PWB's statement includes a typographical error. "1/3" should be "1/4."

6 inches in diameter.)" Similarly, the "Tree Plan Overall Sheet" identifies 324 trees in the Dodge Park Blvd. right-of-way, and states that "89 are up to 6" D.B.H.." Rec-487.

With respect to tree calculations "typically" exempting trees six inches or less in diameter, the County code specifically adopts this standard for regulated tree removal. *See, e.g.,* MCC 39.4854(F)(5) ("The applicant shall file a plan showing existing trees of six-inch diameter measured five feet from the base of the tree[.]"); MCC 39.5860(C)(5)(d)(1) (tree replacement table identifying trees 6 to 12 inches in diameter as the smallest size range requiring mitigation when removed from an SEC overlay). PWB's statement is not a "new fact," and it does not describe PWB's "methodology" related to trees generally as CUP asserts. CUP Brief, 11. Instead, it simply reflects the regulatory language of the code. The footnote clarifies that, "to be conservative," the tree removal count and the replacement calculations apply to *all* trees, even those under 6 inches DBH. Rec-253. Because PWB did not apply the diameter limit typically applied by the County, even if a new fact, it was not relevant to the decision or the applicable approval criteria.

h) <u>Emergency Response</u>

PWB's final argument includes the following:

> "However, emergency response coordination requires the cooperation from the emergency responders, an[] element that has been lacking to date. In the event that the emergency response entities refused to coordinate

> with the Water Bureau, who is also a critical public service provider, on a final plan or refused to consider options for communication with Water Bureau construction crews, it would be those entities creating a potentially hazardous situation rather than the Water Bureau."

Rec-349. PWB's statement merely reflects PWB's consultant's expert testimony that "an emergency coordination plan requires input and cooperation from the emergency responders" and PWB's legal conclusion that if such coordination is lacking from emergency responders, PWB would not be at fault for creating a hazardous situation. Rec-509. With response to the "lacking to date" statement, it too is a reflection of testimony in the record demonstrating that cooperation from emergency providers had been less than ideal. *See, e.g.,* Rec-3793 (testimony from Fire Chief Lewis); Rec-3843-3848 (testimony from RFPD10 Board); Rec-796-812 (RFPD10 opposition testimony). Notwithstanding that the PWB argument does not include any "new facts," as with other arguments, CPO fails to connect PWB's statements to the approval criteria or any suggestion that the Hearings Officer relied on the statement to demonstrate compliance with approval criteria.

i) <u>Conditions</u>

As part of its final argument, PWB submitted "Appendix A," a 24-page collection of conditions that include conditions from the original staff report (Rec-409), the staff post-hearing memorandum (Rec-416), staff cultural resource memorandum (Rec-417), county transportation staff conditions (Rec-

418), and PWB-proposed conditions (Rec-424). CPO states that the conditions will "change how construction occurs" and that "compliance with a condition is feasible or why feasibility should be assumed are all new assertions purported to show that compliance will be achieved and, as such, they are new facts." CPO Brief, 12. CPO concludes that because the conditions were included in final argument, CPO "was deprived of the opportunity to rebut their accuracy and adequacy." CPO Brief, 13.[8]

Here too, CPO's argument is not sufficiently developed for review. Although the conditions, and proposed revisions to conditions, span 22 pages and include dozens of conditions and sub-conditions, CPO does not bother to identify a *single* offending condition. At best, CPO argues that conditions related to the traffic control plan are new because there is a reference to "federal standards" in the final argument. CPO Brief, 12. As explained in PWB's final argument, the question was whether it is feasible to create a traffic control plan—not whether the plan itself would satisfy approval standards. PWB pointed to the fact that the Manual on Uniform Traffic Control Devices includes standards that apply to temporary road closures. This is not new evidence or a new claim. *See, e.g.,* Rec-802 (RFPD10 referring to "184 pages in 'MUTCD Part 6 on Temporary Traffic Control[.]); Rec-2093 (PWB memorandum

[8] This statement is patently false. If the CPO believes that conditions are insufficient to demonstrate that the application complies with approval standards, such an argument can be raised on appeal.

identifying MUTCD Part 6 and "184 pages of specific standards for the needs and control of all road users[.]").

Although CPO does not identify any specific condition of approval or language within the conditions that would constitute "new evidence," their broad-brush approach relies on *Van Dyke v. Yamhill County*, __ Or LUBA __ (LUBA No. 2019-047, October 11, 2019) (slip op at 21). CPO asserts that "LUBA held that language within a condition of approval identifying circumstances that would nullify the obligation to build a fence qualify as 'new evidence.'" CPO Brief, 12. The assertion is misleading, at best. In fact, LUBA said the opposite:

> "It is not clear to us whether the contingency included in Condition 1(e) constitutes 'new evidence' within the meaning of ORS 197.763(6)(e) and (9). Whether a solar farm is sited at the intersection of the Trail and Fryer Road, and the characteristics of a fence surrounding that non-farm use, have no obvious bearing on compliance or noncompliance with any approval standards that apply to the Trail."

Van Dyke, slip op at 20-21. Because LUBA remanded the decision for other reasons, LUBA suggested to the county that it should provide an opportunity for petitioners to address the proposed solar farm and the proposed fence. *Id.*

CPO's reliance on *Haugen v. City of Scappoose*, 330 Or App 723, 545 P3d 760 (2024), is similarly misplaced. In *Haugen*, the applicant sought subdivision approval. After several council members expressed concerns about lot size and density, the council reopened the record to allow the applicant to

propose conditions to address council concerns. *Id.* at 726. The council, however, did not just reopen the record to allow for the submission of a new condition. The council allowed the applicant to speak and explain the basis for the condition. Petitioner in that case:

> "recounted the content of statements made by intervenor's counsel [during the reopened hearing] regarding density, lot size, and the floodplain, including explanations of engineering issues related to and the financial feasibility of smaller lot sizes, how the lot sizes would impact the ability to protect Scappoose Creek and other natural resources on the property, and whether project amenities would 'pencil' if intervenor were to abandon the current application for a planned development overlay and instead file a 46-lot subdivision application that did not require the same project amenities."

Id. at 733. There is simply nothing in *Haugen* that supports the argument that a newly proposed condition equates to evidence. The court in *Haugen* was concerned that petitioner was not given an opportunity to rebut the extensive factual testimony provided by intervenor's counsel and remanded to allow LUBA to address the argument. *Id.* ("LUBA had to address the merits of petitioner's argument that the new information … was evidence[.]"). On remand, LUBA did not find that the proposed conditions equated to new evidence. Rather, LUBA held applicant "submitted evidence *in addition to* amendments and conditions of approval" and remanded to allow petitioner to address those issues. *Haugen*, slip op at 5 (emphasis added).

Again, CPO does not identify any specific condition of approval but instead broadly argues that "new facts and conditions [] effectively modified the proposal in substantive ways[.]" CPO Brief, 13. The suggestion that PWB's belief that the conditions are feasible is by no means "equivalent to LUBA's holding in *Haugen* that a statement for the applicant that the condition represented 'the smallest number of lots that could make 'pencil.'" *Id.* Again, in *Haugen*, both LUBA and the Court of Appeals were concerned with the new evidence presented to the council to which the petitioner was prevented from responding. *Haugen* at 732-33. Moreover, without a more focused argument on which of the conditions allegedly constitute "new facts," neither PWB nor LUBA should be tasked with examining 22 pages of conditions and hazarding a guess as to which condition or conditions are at issue. CPO had a simple task: identify the specific condition and make a focused argument. They did not do so and so have not sufficiently developed their argument.

B. RESPONSE TO SECOND ASSIGNMENT OF ERROR

CPO's Second Assignment of Error is addressed in the County Brief, Section IV.A.

C. RESPONSE TO THIRD ASSIGNMENT OF ERROR

1. Preservation

PWB agrees that the issues raised in the third assignment of error were preserved.

2. Standard of Review

The review of the Hearings Officer's interpretation of MCC 39.7515(B) is governed by ORS 197.835(9)(a)(D). As explained in *Dahlen v. City of Bend*, ___ Or LUBA ___, ___ (2021) (LUBA No 2021-013, June 14, 2021) (slip op at 5-6), to determine under ORS 197.835(9)(a)(D) if the Hearings Officer "properly construed the law, [LUBA will] consider the text and context of the code and give words their ordinary meaning" under *PGE v. Bureau of Labor & Industry*, 317 Or 606, 859 P2d 1143 (1993), *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009), and their progeny (*PGE/Gaines*). LUBA will affirm a hearings officer's interpretation, even if "debatable," if "the hearings officer's interpretation is more consistent with the text of [the code] than [opponents'] interpretation" or "at least as supportable as [opponents'] contrary view." *Waverly Landing Condo. Owners' Assoc. v. City of Portland,* 61 Or LUBA 448, __ (2010) (slip op at 7).

LUBA will affirm the County's decision if it is supported by adequate findings. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). LUBA reviews findings to determine if they (1) address the applicable standards, (2) set out the facts relied upon, and (3) explain how those facts lead to the conclusion that the standards are met. *Heiller*, 23 Or LUBA at 551.

For substantial evidence claims, LUBA considers all the evidence in the record in evaluating whether a finding is supported by substantial evidence and

determines whether the evidence would permit a reasonable person to make that finding. *Citizens for Responsibility v. Lane County*, 218 Or App 339, 345, 180 P3d 35 (2008). "In order to prevail on a substantial evidence challenge, a petitioner must [1] identify the challenged findings and [2] explain why a reasonable person could not reach the same conclusion based on all the evidence in the record." *Stoloff v. City of Portland*, 51 Or LUBA 560, 568 (2006).

3. Response to First and Second Subassignments of Error: The Hearings Officer's interpretation is consistent with the text and context of the code.

a) Goal 5 Interpretation

MCC 39.7515(B) requires a conclusion that the proposed use "will not adversely affect natural resources." The Hearings Officer applied the *PGE/Gaines* methodology to construe the meaning of the term "natural resources."[9] Rec-229-232, 43. Because the term "natural resources" is not defined by the MCC, the Hearings Officer correctly turned to the relevant context of the term "natural resources" in the MCCP to construe the definition consistent with the *PGE/Gaines*. *See also Neuenschwander v. City of Ashland*, 20 Or LUBA 144 (1990) (In so far as possible, LUBA construes relevant local

[9] The Hearing Officer adopted the findings on pages 94-97 (Rec-229-232) of the PWB's final argument. Rec-43. *See Gonzalez v. Lane County*, 24 Or LUBA 251, 260 (1992) (confirming "I adopt as my findings" would allow a reasonable person to know that the decision maker incorporated the findings). Record citations herein to findings incorporated by the Hearings Officer include the final argument citation followed by the decision citation.

government comprehensive plan and code provisions together, to give meaning to both.).

The Hearings Officer's interpretation turned to MCCP Chapter 5, entitled "Natural Resources" because that chapter is titled with the very same term used in MCC 39.7515(B). Rec-230, 43. The Hearings Officer explained that Chapter 5 uses the term "natural resources" to explicitly establish and define the categories of "natural resources" that would be protected under the code and describe how those resources would be protected. *Id.* Because MCCP Chapter 5 was adopted by the Board of County Commissioners, it embodies the intent of the County in defining the meaning of the term "natural resources." *City of Eugene v. Comcast of Or. II, Inc.*, 263 Or App 116, 127 (2014), *affirmed* 359 Or 528 (2016).

The Hearings Officer found that Chapter 5 specifically lists eight categories of "natural resources" that would be regulated through the MCCP and the MCC:

> "This chapter provides an overview of conditions and planning issues associated with natural resources and environmental quality, along with Comprehensive Plan policies and strategies to address them, including the following topics: • Water quality and erosion control • Rivers, streams, and wetlands • Wildlife habitat • Air quality, and noise and lighting impacts • Scenic views and sites • Tree protection • Wilderness areas • Mineral and energy resources."

Rec-230, 43 (emphasis added). As that quotation shows, in defining these categories, the County uses the same term, "natural resources," that is used in MCC 39.7515(B) and does not use the term "significant natural resources" as CPO asserts. *Id.*; MCCP 5-2.

The Hearings Officer then methodically reviewed the MCCP language that establishes the County's method for protecting those categories of natural resources through the MCC and specifically addressed those relevant provisions:

> "Goals 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) and 6 (Air, Water, and Land Resources Quality) of Oregon's statewide planning goals require cities and counties to plan for the management and protection of *natural resources*, including maintaining air, land, and water quality and protecting riparian corridors, wetlands, and wildlife habitat.
>
> ....
>
> "Multnomah County protects water quality, ecological function, and wildlife habitat associated with streams and rivers through the County's Significant Environmental Concern (SEC) overlay zones for streams and water resources (SEC-s and SEC-wr), scenic waterways (SEC-sw), significant wetlands (SECw), wildlife habitat (SEC-h), and Willamette River Greenway (WRG). Although the SEC-h overlay does not directly apply to riparian areas, it protects upland wildlife habitat areas which in turn can have a beneficial effect on adjacent riparian corridors[.]"

Rec-230, 43 (emphasis added). The Hearings Officer construed the plain language of these provisions to conclude that (1) the MCCP is appropriate

context for construing undefined terms in the MCC; (2) MCCP Chapter 5 uses the same term "natural resources" to define categories of "natural resources" that the County intends to regulate; (3) that these "natural resource" categories are explicit in the MCCP and offer a definitive list of resources intended for regulation; and (4) that the categories of "natural resources" that the County intended to protect are those that they selected for protection through application of the SEC Overlay. Rec-230-231, 43. The Hearings Officer determined that there is no other category of "natural resources" that operate as leftovers from the "natural resources" that are protected in the SEC Overlay. *Id.*

The Hearings Officer then reviewed prior decisions of the County to assess how the County has interpreted this same reference to "natural resources" under MCC 39.7515(B). *Patel* slip op at 13. (when applying ambiguous terms, prior decisions provide some support for the hearings officer to interpret the term in the same way). In each case, the Hearings Officer determined that the County consistently applied and interpretated the term "natural resources" in MCC 39.7515(B) to mean "natural resources" located within the SEC Overlay and to no other "natural resource" outside of the SEC Overlay. Rec-232-233, 43.

The Hearings Officer's interpretation uses both the text and context, provided by the MCCP, to give the term "natural resources" its ordinary meaning using the standard rules for interpreting the code under *PGE/Gaines*.

In so doing, the Hearings Officer properly construed the law in determining the County's definition of "natural resources" and LUBA should therefore affirm the interpretation.

CPO chooses a different MCCP policy for context, citing MCCP Policy 2.45 which calls for the protection of "natural and environmental resources" with the development of community service uses. CPO Brief, 34. CPO concludes that because "natural" and "resource" are included in Policy 2.45, the Hearings Officer's interpretation is wrong "plain and simple." CPO Brief, 34. CPO does not further develop this argument under *PGE/Gaines*. LUBA should not now develop this argument for them. *See Beall Transport Equipment Co. v. Southern Pacific,* 186 Or App 696, 700-01 n 2, 64 P3d 1193, *adh'd to as clarified on recons,* 187 Or App 472 (2003) ("it is not this court's function to speculate as to what a party's argument might be" or "to make or develop a party's argument when that party has not endeavored to do so itself").

To the extent LUBA considers this argument, Policy 2.45 is part of MCCP Chapter 2, Land Use, and is not specific to "natural resources" like Chapter 5. Most critically here, neither Chapter 2, nor Policy 2.45 establish or define any "natural resources" or categories of "natural resources." Policy 2.45, therefore, does not provide any more probative context for how the County actually defines "natural resources." Instead, it is far more plausible to conclude, under *PGE/Gaines* and *Patel*, that the "natural" "resource" reference

in Policy 2.45 is also subject to the definition of "natural resources" that is contained in Chapter 5, thus providing a consistent definition of natural resources across all provisions. Policy 2.45 does not provide any reason to conclude that CPO's undeveloped interpretation is more plausible considering the text and context of MCC 39.7515(B).

CPO also seems to argue that the County Board did not intend "natural resources" to be defined as those specifically listed in the MCCP (the County Board adopted) and protected under the SEC Overlay (the County Board adopted) but instead all or any natural resource identified by project opponents. CPO Brief, 34. This is not an interpretation at all. Instead, it is merely a claim that "natural resources" are something else, an undefined leftover category of other things, not described in the code or the MCCP and presumably left to an ad hoc determination based on whether a party in opposition determines that there is some resource that should be considered and protected. That is not a text/context argument under *PGE/Gaines*.

CPO also asserts a general argument that the Hearings Officer should not have used Statewide Planning Goal 5 as context for his interpretation of the term "natural resources." CPO Brief, 33-34. The Hearings Officer reasoned that Goal 5 establishes an inventory process for "natural resources" and that, consistent with these Goal 5 rules, the County's Goal 5 process is articulated in MCCP Chapter 5 Natural Resources. Rec-229-230, 43. In turn, Chapter 5

defines "natural resources" as those that are regulated by the Goal 5 process and are subsequently protected in the MCC through the application of the Significant Environmental Concern ("SEC") Overlay. *Id.*

Thus, the Hearings Officer continued, under *PGE/Gaines*, the County cannot accept the opposition's argument that the "no adverse effect" standard applies to a new category of natural resources not identified or defined in the MCC and not protected under Goal 5. "The text and context of the MCC and Comprehensive Plan support no other interpretation." Rec-232, 43.

As these Hearings Officer findings demonstrate, the Hearings Officer considered and rejected the counter interpretation because it would disregard MCCP language, disregard the context for the term "natural resource" in MCC 39.7515(B), and was not as consistent with the text and context of the code as the County's prior interpretation and application of the same code section.

b) <u>"Adversely affect" applied in findings.</u>

CPO claims that the Hearings Officer's interpretation misconstrues the law because it would render MCC 39.7515(B) a nullity. CPO Brief, 33. While the argument is not developed in the brief, CPO seems to argue that if the adverse effect standard applies only to natural resources in an SEC Overlay, and those resources are already subject to SEC Overlay standards, MCC 39.7515(B) may be meaningless. CPO's argument should be rejected.

The SEC Overlay standards do not themselves contain a "no adverse effect" standard. Thus, by applying the no adverse effect conditional use standard, as the Hearings Officer did here, to the full list of natural resources defined in MCCP, the Hearings Officer gave specific relevance to the no adverse effect conditional use standard and applied it as an additional test to those resources also protected under the SEC Overlay. Rec-7748-7749, 7952, 42. The Hearings Officer did not simply conclude, as suggested by CPO, that because the SEC criteria were satisfied, so too were the MCC 39.7515(B) criteria. CPO Brief, 34. Instead, the Hearings Officer independently applied the no adverse effect standard in addition to the SEC standards to determine if the conditional use had any adverse effect on the natural resource categories described in the MCCP. *See, e.g.*, Rec-42-43 (filtration facility footprint avoiding SEC overlay area; thus, the Hearings Officer found no adverse effect; pipelines crossing an SEC overlay through use of subsurface boring has no adverse effect on natural resources).

Perhaps the confusion here is that the project has been carefully and deliberately sited in areas that are almost entirely outside the SEC overlay and therefore the facilities have very little potential to create any adverse effect on "natural resources." But that does not mean the adverse effect standard was not applied. Instead, it means the standard operated as it should, to discourage siting decisions that could have an adverse effect on natural resources.

CPO's alternative argument in the second subassignment of error rests on the undeveloped claim that MCC 39.7515(G), which requires a finding that the proposed use "satisfy the applicable policies of the Comprehensive Plan," is somehow acting as a surrogate for the adverse effect standard of MCC 39.7515(B). CPO Brief, 36. That position ignores the substance of the Hearings Officer's findings. The Hearings Officer specifically applied the "adverse effect" standard to each category of "natural resource" identified in MCCP Chapter 5, considered all the evidence in the record under each natural resource category, and concluded that there was no adverse effect. *See* Rec-43 ("adopt[ing] staff findings above" that the project "will not adversely affect natural resources"; citing the final argument "demonstrating compliance with the [no adverse effect] criterion"; citing "considerable evidence demonstrating compliance with this [no adverse effect] criterion"; referencing the no adverse effect criterion, the findings "in comparing expert opinions under this criterion [MCC 39.7515(B)], I adopt the Applicant's expert opinion as the more persuasive").

Critically, the Hearings Officer then specifically "adopt[s] as my findings" the final argument at pages 99-122 (Rec-234-257), which commence with the finding that "[a]s detailed below, the record demonstrates that the project, with the imposition of the recommended conditions of approval, <u>will not adversely affect</u> the natural resources identified through the policies under

each topic in MCCP Chapter 5." Rec-234, 43 (emphasis added). The Hearing Officer's findings that follow reference the "adversely affect" standard and specifically cite MCC 39.7515(B), not MCC 39.7515(G).[10] Rec-234-257, 43.

Conversely, the findings under MCC 39.7515(G) do not address the "adversely affect" standard at all and do not refer back to the no adverse effect findings under Subsection (B). Rec-354, 58, 75. The no adverse effect findings under Subsection (B) are independent findings with no "surrogacy" to Subsection (G). CPO seems to be confusing two issues: the scope of the regulated natural resources and whether the adverse effect standard was applied. The standard was applied to all natural resource categories as identified in MCCP Chapter 5; CPO would just prefer it apply to a broader range of resources of their selection.

The Hearings Officer's interpretation is more consistent with, and more supported by the text and context of, the code than the expansive interpretation offered by CPO. In addition to being untethered to the code or MCCP, the CPO's interpretation is inconsistent with the County's prior interpretations of the same language, and would, in effect, require the County to regulate "natural resources" the County Board chose not to regulate through Goal 5, MCCP Chapter 5, or the SEC Overlay. LUBA should therefore affirm the Hearings

[10] The terms "adversely affect" and "adverse effect" are repeated at least 29 times in the Hearing Officer's findings at Rec-234-257. For example, "the project will also avoid adversely affecting fish habitat in the surrounding water bodies[.]" Rec-249, 43.

Officer's interpretation and reject CPO's first and second subassignments of error.

4. Response to Third and Fourth Subassignments of Error: The Hearings Officer's findings that the proposed use satisfies MCC 39.7515(B) is supported by substantial evidence in the record.

CPO's third and fourth subassignments of error blend an argument on findings with an argument related to substantial evidence and each make the same claims. Thus, we address these subassignments together.

CPO's blended findings and substantial evidence argument falls into five categories: (1) the Hearings Officer should have been required to review the original Goal 5 inventory under the MCCP or conduct a new study or inventory to determine what natural resources are protected; (2) the Hearings Officer should not have "discounted" the value of a "hedgerow along Dodge Park Road" or accepted a tree replacement at a ratio of 1.5:1; (3) the Hearings Officer ignored the opponent's expert on fish impacts; (4) the construction impacts of the tunnel should have been evaluated; and (5) the communication tower will harm migratory birds. CPO Brief, 36-40.

a) Goal 5 and Site-Specific Inventory

CPO's general inventory argument seems to be that all the findings are defective or there is no substantial evidence because the Hearings Officer did not review the prior Goal 5 Inventory or require a new inventory on the site. CPO Brief, 37-38, 40. This is not a particular claim as to specific evidence but

instead a general claim that seems to underlie the balance of CPO's argument. It is wrong and misrepresents the extensive record. Two inventories were conducted on the project site: the County's Goal 5 Inventory that resulted in the location of the SEC overlays on a portion of the property for the protected natural resources and the extensive natural resource evaluations conducted by the PWB's resource experts.

The County conducted a Goal 5 inventory of all natural resources on the project site. The result of that inventory was placing SEC-h and SEC-wr overlays on portions of the project site to protect those regulated natural resources. Rec-42. CPO raises no challenge to that already adopted Goal 5 inventory and do not challenge the location of the SEC overlays on the project site as a result of that inventory. LUBA must therefore reject this argument.

In terms of a site-specific inventory, CPO identifies no provision of the MCC that requires or defines such an inventory requirement. The reason is because MCC 39.7515(B), contains no such requirement. If CPO's claim is instead that there was no resource evaluation to determine whether there was an adverse effect on natural resources on the property, that is also wrong. PWB's experts evaluated the "natural resources" defined by MCCP Chapter 5, across the project, identified the location or presence of those resources, characterized those resources and then evaluated the impacts from the project on those resources. Rec-228, 234-251, 43.

The Hearings Officer's site-specific analysis starts with a list of exhibits. Rec-228, 43. CPO glibly dismisses this extensive evidence of site-specific studies by referring to the exhibits as a "bullet point list" with "no evidence that these experts engaged in any inventory to evaluate the character of natural resources in the first instance[.]" CPO Brief, 37-38. CPO is well aware these studies exist as an evidentiary foundation for the extensive Hearings Officer findings that evaluate all categories of natural resources. Rec-43. Thus, the decision examines the evidence CPO claims does not exist: a site-specific study of the presence of natural resources on the site as properly defined under MCCP Chapter 5 natural resource categories. CPO's general evidentiary and findings challenge based on the absence of these studies must therefore be rejected for lack of merit.[11]

[11] CPO also seems to rely on *McCoy v. Linn County*, 16 Or LUBA 295, *aff'd* 90 Or App 271 (1988), to further support its inventory argument. *McCoy* addressed whether a use "will not adversely affect the livability of abutting properties and the surrounding neighborhood." *Id.* at 301-302. The *McCoy* standard is readily distinguishable because it did not address the no adverse effect standard in MCC 39.7515(B) and therefore did not address the text or context of Subsection (B). Second, the subject matter of "natural resources" and "livability" have very different origins in the MCC. Presumably, a "livability inventory" or livability categories do not already exist in the MCCP and were not defined by category in the MCCP like the natural resource inventory that already exists under Goal 5 and Chapter 5. To stretch *McCoy* into a requirement that the County re-inventory natural resources outside of a Goal 5 update, or outside of an SEC Overlay, is untethered from the code and *McCoy* facts.

b) Trees in the Hedgerow

We turn now to CPO's specific claim regarding tree replacement and the hedgerow along Dodge Park Boulevard. As a threshold issue, "trees" are not a category of natural resource protected outside of the SEC Overlay zones pursuant to MCCP Chapter 5. The Hearings Officer found: "the only tree protection policy included in MCCP Chapter 5" refers to "tree replacement for trees removed within an SEC overlay zone. The County has not adopted tree protection or replacement standards for trees removed outside an SEC zone." Rec-252, 34. Further, the Hearings Officer found "all regulated trees within the SEC zones are protected" under this application and "with the exception of a scattering small former nursey stock, existing trees on the filtration facility will be preserved and protected." Rec-253, 43. Finally, in reference to the tree replacement described in the findings and below, the Hearings Officer finds, "[w]hile not required to do so by code or to satisfy the natural resource criterion, [PWB] proposes extensive additional plantings at the filtration facility site." Rec-254, 43. CPO does not contest these findings.

Instead, CPO pivots to the trees in the hedgerow outside of the SEC overlay and seem to make a claim that the removal of these trees, located in the right-of-way, will have an adverse effect on some wildlife. CPO Brief, 39. CPO provided no expert testimony below regarding the habitat value of the trees or

whether these trees, once removed and ultimately replaced, would have any adverse effect on a regulated "natural resource".

Conversely, as explained in the Hearing Officer's findings, PWB's wildlife biologist evaluated the habitat value of the hedgerow and concluded:

> "Although the trees and saplings provide some shelter and foraging opportunities for common birds and small- to medium-sized mammals habituated to living in urban environments, wildlife habitat functions are limited due to the proximity of the roadway, which generates noise and dust and reduces the quality of habitat, as well as the narrow width and overall sparseness of the hedgerow which limits areas for cover and other wildlife functions."

Rec-1804, 254, 43. The wildlife biologist therefore evaluated the character of the habitat and the quality of the roadside hedgerow, and determined that the habitat functions are limited by a number of factors. The biologist then proposed mitigation plantings that would mitigate for the loss of the low value hedgerow and other trees outside of the SEC overlays with higher value habitat. Rec-1804. The Hearings Officer found:

> "As noted, most of the unavoidable tree removal is within public road right-of-way. The trees within the right-of-way are in areas that are already dedicated to public use for both vehicle travel and utility infrastructure. It is not possible to replace the trees removed from the right-of-way in the same location, as tree roots are incompatible with subsurface pipelines. Following tree removal, the roadside areas will be reseeded with a roadside seeding mix identified at Exhibit 101, ESC-004 (Erosion Control General Notes). Mitigation plantings of native trees

> and shrubs will be provided at the filtration site, with tree replacement being provided at a ratio of 1.5:1."

Rec-253, 43. As explained in the Hearings Officer's findings, the project's wildlife expert explained the habitat benefits of providing the mitigation plantings on the filtration facility site instead of within the right-of-way:

> "Proposed plantings of native trees and shrubs at the filtration site will compensate for the removal of woody vegetation within the Dodge Park ROW and the unfiltered water pipeline alignment off of Lusted Road and no adverse impact to wildlife are anticipated to result. Mitigation would occur at the planned filtration site in relatively close proximity to the proposed impact locations but in an area not subject to frequent disturbances found in road rights-of-way (noise, dust, pesticide/herbicide, pruning, etc.). Replacing woody vegetation adjacent to SEC zones and expanding existing, larger patches of habitat would be a greater benefit to wildlife than replacing trees in or near road rights-of-way. Exhibit I.96, p. 6 (Wildlife Habitat Memo)."

Rec-1804, 253, 43. The Hearings Officer's findings conclude that the tree replacement exceeds 1.5:1 as the project Mitigation Plan requires PWB to plant 552 trees along with shrub plantings at a density of 399 shrubs per 10,000 square feet. Rec-253-254, 43. Consistent with *Heiller*, these findings (1) address the applicable standards, (2) set out the facts relied upon, and (3) explain how those facts lead to the conclusion that the standards are met. Even if LUBA does not believe these findings are perfect, they are "adequate to establish the factual and legal basis for the particular conclusions drawn in a challenged decision[.]" *Thomahlen v. City of Ashland*, 20 Or LUBA 218, 229-

30 (1990); *Niederer v. City of Albany*, 79 Or LUBA 305, 314 (2019) (quoting this passage from *Thomahlen*).

Considering all the evidence in the record, a reasonable person can certainly make the same finding that necessary removal of a low value hedgerow that (1) is located in the public right-of-way; (2) is impacted by dust and noise, with thin boundaries and small trees and shrubs; (3) is located outside of the SEC overlay; (4) can be removed in the absence of any specific tree regulation; and (5) is replaced with a high value, native tree canopy at a ratio of 1.5:1 in an area not impacted by the right-of-way uses will not adversely affect wildlife habitat. *Citizens for Responsibility v. Lane County,* 218 Or App at 345.

CPO claims that the expert's conclusions are "speculative", or that the timing of tree replacement will have an adverse effect on unidentified species, or there is a lack of proof that animals would prefer "a more pristine, native, over 12-inch diameter tree[s] that are free from noise and dust." CPO Brief, 39. CPO offers no opposing testimony on any of these allegations, as they must to meet their burden under *Stoloff*, 51 Or LUBA at 568. CPO cites to no testimony that small birds that may or may not occupy the roadside hedgerow will not move to the large and existing stands of trees in the area before the replacement trees are installed and point to no expert testimony in the record related to tree removal. LUBA will not second-guess a decision-maker's choice between

conflicting evidence so long as a reasonable person could decide as the decision-maker did. *Fairmount Neighborhood Assoc. v. City of Eugene*, 80 Or LUBA 551, ___ (2019) (slip op at 9-10). The Hearings Officer chose the specific evaluation and expertise of the wildlife biologist over the unscientific speculation of project opponents, as he is permitted to do, and LUBA should not second-guess that choice.

To ensure that this mitigation would be sufficient to result in no adverse impact, the Hearings Officer imposed several conditions mandating implementation of the Mitigation Plan in Exhibit I.96 (Rec-1810-1811), requiring a survey confirming the size, location, and species of all trees removed to ensure the 1.5:1 replacement ratio in the Mitigation Plan (Rec-94-95), and that all trees and shrubs not authorized to be removed are protected during construction. Rec-84. CPO does not contest these conditions. *See McCoy*, 16 Or LUBA at 301-302 (county may impose conditions sufficient to demonstrate no adverse effect); MCC 39.7510 ("the approval authority may attach conditions and restrictions to any community service use approved...to mitigate any adverse effect[.]").

Thus, the Hearings Officer's decision regarding tree removal and replacement satisfies *Heiller* and *Stoloff* and CPO's challenge to the findings and the evidence should be rejected.

c) Fish Habitat

CPO claims that the Hearings Officer "fail[ed] to acknowledge [fish impact] concerns" raised by Ms. Courter. CPO Brief, 38. Not only is the claim wildly inaccurate, LUBA is not obligated to make or develop a party's arguments when the party does not endeavor to do so itself. *See Beall Transport Equipment Co. v. Southern Pacific,* 186 Or App 696, 700-01 n 2, 64 P3d 1193, *adh'd to as clarified on recons,* 187 Or App 472 (2003).

Accordingly, we will consider this a *Norvell* challenge as to whether the Hearings Officer addressed the concerns on fish habitat at all, rather than a substantial evidence challenge as that was not raised or developed in the brief. *See Norvell v. Portland Area LGBC*, 43 Or App 849, 853 (1979).

The Hearings Officer extensively addressed testimony from both Ms. and Mr. Courter in the findings. The Hearings Officer's findings include approximately 12 pages specifically addressing the related MCCP Chapter 5 topics of water quality/erosion control and fish habitat and claims made by the Courters related to both categories. Rec-234-242 (water quality findings), 249-251 (fish habitat findings), 43.

As an introduction, the Hearings Officer specifically acknowledged:

> "Project opponents generally, and the Courters, specifically, explain that there are several species of migratory and resident salmonids within Johnson Creek generally, with several species located in reaches close to the filtration facility. Exhibit E.17, pgs. 3-4 (L. Courter); Exhibit J.19, pg. 17. The Water

> Bureau's fish biologist largely concurs but notes that upper reaches of both Johnson Creek and Beaver Creek near the project are impacted by development in the area including agriculture, roads, and expansion of the urban/rural interface. Exhibit I.95, pg. 1. The fact that there is habitat for sensitive and protected fish species in Johnson Creek and Beaver Creek is not in dispute. However, the fact that there is sensitive and protected fish habitat in the creeks in relatively close proximity to the filtration facility and intertie does not itself support a conclusion that the project will adversely affect the habitat as project opponents claim."

Rec-249, 43. The Hearings Officer then addresses specific fish habitat arguments, noting:

> "Claims of adverse effects to fish habitat largely overlap with claims related to water quality addressed above. However, the Courter's specifically allege that facility operation will have four specific fisheries impacts: 1) fine sediment inputs, 2) toxic runoff, 3) temperature increases, and 4) flashy flows."

Rec-250, 43. The findings then continue addressing in great detail each of the claims of adverse effects made by the Courters and providing details of the stormwater control facilities as a response to the Courter's claims. Rec-250-251, 43.

On the issue of expert testimony, the Hearings Officer found:

> "The fish biologist consulting on the project [] evaluated the filtration facility site and the intertie site, the existing drainage patterns, the range of fish species in the proximate reaches of both Johnson Creek and Beaver Creek, the facility designs and layouts, the stormwater systems, and best management practices to be implemented at the facilities. Following his review, he concluded that

> based upon his experience and expertise that he is 'confident that the proposed development and operation of the Bull Run Water Filtration Facility, and associated pipeline improvements, will not impact Johnson Creek or Beaver Creek.'"

Rec-236, 43. And in contrast, the Hearings Officer concluded:

> "[T]he Courter's testimony fails to evaluate or even reference the multifaceted stormwater treatment and detention systems at the filtration facility and interties, or the spill prevention and containment measures provided at the filtration facility. While the Courter's credentials certainly indicate that they are experts in their respective fields of toxicology and fisheries science, neither are certified engineers or stormwater management experts. While they provide detailed descriptions of what would occur to water quality if specific toxins or sediment loads were to enter the water, there is no expert testimony from project opponents in the record that directly challenges the effectiveness of the project's stormwater management facilities or other protective measures."

Rec-241, 43. The Hearings Officer's findings consider the Courter's testimony and the expert testimony of PWB's fish biologist, identify the adverse effect standard and the facts relied on to meet that standard, and explain why the facts led to the Hearings Officer's conclusion that MCC 39.7515(B) is satisfied.

Given the extent of these findings, there can be no credible assertion that the Hearings Officer "failed to even acknowledge these concerns." CPO Brief, 38. For these reasons, CPO's *Norvell* challenge must be denied.

d) Tunnel Construction

CPO claims that the construction impacts of boring a tunnel for required pipelines, well below the surface of the land, must be evaluated under MCC 39.7515(B) to demonstrate whether subgrade pipe construction has an adverse effect on natural resources. For the reasons set forth in County Brief, Section IV.A, construction is not the use, and thus, MCC 39.7515 does not apply to construction activities.

e) Communication Tower

CPO claims that the communications tower "findings are insufficient and non-responsive to the no-adverse effect obligation." CPO Brief, 40. For the reasons in the Fourth Assignment of Error, the Hearings Officer found MCC 39.7515(B) does not apply to the tower, therefore a finding of no "adverse effect" was not required.

D. RESPONSE TO FOURTH ASSIGNMENT OF ERROR

1. Preservation

PWB agrees that CPO preserved the issue.

2. Standard of Review

LUBA reviews findings to determine if they (1) address the applicable standards, (2) set out the facts relied upon, and (3) explain how those facts lead to the conclusion that the standards are met. *Heiller,* 23 Or LUBA at 551. Inadequate findings of compliance with inapplicable criteria are harmless error,

and not a basis to reverse or remand the challenged decision. *Jorgenson v. Union County*, 37 Or LUBA 738, 751-52 (2000).

3. MCC 39.7515(B) is not applicable to the communications tower.

The MCC 39.7515 standards, including subsection (B), do not apply to the communications tower. Acknowledging the concerns about bird strikes, PWB explained in the final argument, that the communication tower is a transmission tower, a specific type of Community Service use, and further clarified:

> "...the communication tower is not subject to the MCC 39.7515 standards, including subsection (B). The introduction to the Community Service use approval criteria at MCC 39.7515 states, "[i]n 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..." The applicable approval criteria at MCC 39.7750 through 39.7575 include standards related to height, setbacks and design. They do not include a standard related to adverse effects on natural resources, or other similar natural resources or habitat standard. The original application narrative demonstrates the tower complies with all applicable standards and staff agreed that all applicable approval criteria were met, or would be met through a condition of approval. There were no public comments challenging compliance of the tower with the applicable standards."

Rec-228-229 (emphasis added).

CPO does not challenge this interpretation of the plain language of MCC 39.7515 or suggest any alternative interpretation. Instead, CPO claims that the findings are inadequate because the Hearings Officer made no findings related to the concerns that the communications tower could adversely affect migratory birds. They further argue that "*Norvell* requires that findings, to be adequate, must address issues raised below regarding compliance with approval criteria." CPO Brief, 43. That description of the *Norvell* holding, however, is missing a critical word – "applicable."

The Hearings Officer was not required to address claimed impacts of the tower in the MCC 39.7515(B) specific findings because both the standard language itself and findings elsewhere in the decision clearly and unambiguously confirm that MCC 39.7515 approval criteria are not applicable

to the transmission tower.[12] The Hearings Officer was not required to make separate findings under subsection (B) again confirming the inapplicability of MCC 39.7515 to the tower.

Finally, if the Board were to determine that the Hearings Officer's decision does not sufficiently establish that MCC 39.7515(B) is not applicable to the communications tower, PWB requests that the Board exercise its authority under ORS 197.829(2) to conclude that MCC 39.7515(B) is not applicable to the communications tower as a matter of law.

[12] The text of MCC 39.7515 is in the decision. It expressly states that Community Service uses must meet the following approval criteria "except for transmission towers." Rec-36. Under the first MCC 39.7515 subsection, the Hearing Officer finds, "[t]he Communication Tower portion of the Application does not have to comply with this standard." Rec-41. It was not necessary to make the same finding for each subsection. The decision summary identifies "Community Service Conditional Use Permit for Radio Transmission Tower (Communication Tower)" separately from "Community Service Conditional Use Permit for the Utility Facility (Filtration Facility)." Rec-13. Finally, findings identify and address the radio transmission tower conditional use approval criteria that are applicable to the tower, adopting as findings both the relevant pages of the staff report and final argument. Rec-59. The staff report concludes that the communications tower is a radio tower subject to MCC 39.7560 through 39.7575, addresses the applicable criteria, and concludes the applicable criteria are satisfied with conditions. Rec-3963-3978. No party challenged the staff report conclusions under MCC 39.7560 to 39.7575 for transmission towers.

V. CONCLUSION

Based on the foregoing, PWB respectfully requests that the Board deny each of CPO's assignments of error and affirm the County's decision.

DATED this 16th day of August, 2024.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

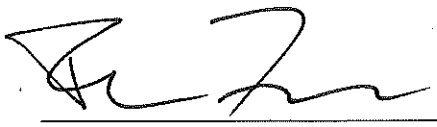
Brief Length

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 10,996 words.

Type Size

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

Dated this 16th day of August, 2024.



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CERTIFICATE OF FILING

I hereby certify that on August 16, 2024, I filed the original of this **INTERVENOR-RESPONDENT'S RESPONSE BRIEF TO THE PETITION FOR REVIEW OF PETITIONER COTTRELL COMMUNITY PLANNING ORGANIZATION, PAT MEYER, MIKE COWAN, PAT HOLT, RON ROBERTS, KRISTY MCKENZIE, MIKE KOST, RYAN MARJAMA, MACY AND TANNER DAVIS, LAUREN COURTER, AND IAN COURTER** for LUBA No. 2023-086, together with one (1) copy, with the Land Use Board of Appeals, 775 Summer Street NE, Suite 330, Salem, Oregon 97301-1283, by FedEx.

CERTIFICATE OF SERVICE

I also certify that on August 16, 2024, I served the foregoing **INTERVENOR-RESPONDENT'S RESPONSE BRIEF TO THE PETITION FOR REVIEW OF PETITIONER COTTRELL COMMUNITY PLANNING ORGANIZATION, PAT MEYER, MIKE COWAN, PAT HOLT, RON ROBERTS, KRISTY MCKENZIE, MIKE KOST, RYAN MARJAMA, MACY AND TANNER DAVIS, LAUREN COURTER, AND IAN COURTER** for LUBA No. 2023-086, by United States Postal Service first class mail, postage prepaid, to the parties or their attorney as follows:

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