

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
INTERVENOR-PETITIONER
GRESHAM-BARLOW SCHOOL
DISTRICT 10J**

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I. STANDING

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

Intervenor accepts the standing of Intervenor-Petitioner Gresham-Barlow School District 10J (“GBSD”).

II. STATEMENT OF THE CASE

A. NATURE OF THE DECISION

PWB rejects GBSD’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 GBSD’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.

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

1 No other part of the decision is implicated.

2 **B. RELIEF SOUGHT**

3 PWB requests that LUBA affirm the County's decision in full.

4 **C. SUMMARY OF ARGUMENTS**

5 **1. First Assignment of Error**

6 GBSD's First Assignment of Error is addressed in County Brief, Section
7 IV.A.

8 **2. Second Assignment of Error**

9 GBSD's challenges to the relevant "area" for MCC 39.7515(A)'s
10 compatibility standard are unavailing, as the area is actually quite large, relative
11 to other study areas under Oregon law, such as for a mining use, and because
12 County Transportation validated that there was no indication of impacts inside
13 the study area that would require making the area larger. The findings also
14 provide many pages of description of the character of the area, including
15 findings on issues that GBSD asserts were omitted or that GBSD disagrees
16 with. There are findings related to the compatibility of construction traffic and
17 in-road construction with the area, although construction is not the use to be
18 evaluated under MCC 39.7515(A).

19 **3. Third Assignment of Error**

20 The Hearings Officer properly interpreted MCC 39.7515(F) under
21 applicable case law, and adopted adequate findings based upon substantial

1 evidence in the record that facility operational traffic will not create a hazardous
2 condition.

3 **D. SUPPLEMENTARY STATEMENT OF FACTS**

4 In an effort to avoid repetition, the facts raised in this brief supplement
5 the statement of facts in the County's Brief and the facts related to the character
6 of the area in PWB PHCA Brief.

7 **1. Project Traffic Generation**

8 PWB prepared and submitted a Bull Run Filtration Project Traffic Impact
9 Analysis ("Project TIA") that inventoried existing conditions and provided a
10 trip generation summary for project operations based upon conservative daily
11 trip estimates to and from the site. Rec-7294-7316. The study area and
12 intersections to be studied in the Project TIA (and for that matter, in the
13 Construction TIA, Rec-4201-4227) were reviewed and validated by County
14 Transportation at the time of the pre-app and on an ongoing basis during the
15 local proceedings in response to public comments. Rec-733.

16 Operation of the filtration facility will generate a maximum of 16
17 chemical delivery trucks and nine solids haul off-trucks entering and exiting the
18 site during a 5-day work week. Rec-7304. Combined, this amounts to 25 trucks
19 per week, or approximately five truck trips entering and existing the filtration
20 facility site per day. *Id.* The Project TIA conservatively estimated that all trucks
21 for operation will be "entering and exiting the site during each of the peak

1 hours[,]” (instead of more realistically delivered across the daytime hours). *Id.*
2 The Project TIA also estimated the number of PWB-staff-generated trips per
3 day based upon a conservative estimate that assumed that the full staff of 26
4 employees would be there simultaneously. Rec-7302. In fact, there will be a
5 maximum of 10 employees on the largest shift.² *Id.*

6 Under that conservative analysis,³ the anticipated project-generated trips
7 per weekday (including both trucks and staff vehicles) are 32 AM peak hour
8 trips, 32 PM peak hour trips, and 124 total daily trips. Rec-7304. For purposes
9 of comparison, average daily traffic counts on roads within the study area
10 include 1,340 trips on Dodge Park Boulevard, 2,700 trips on Bluff Road, 2,160
11 trips on Oxbow Drive, and 1,250 trips on Lusted Road. Rec-7296 (Table 1).
12 None of those roads have existing bike lanes or sidewalks. *Id.*

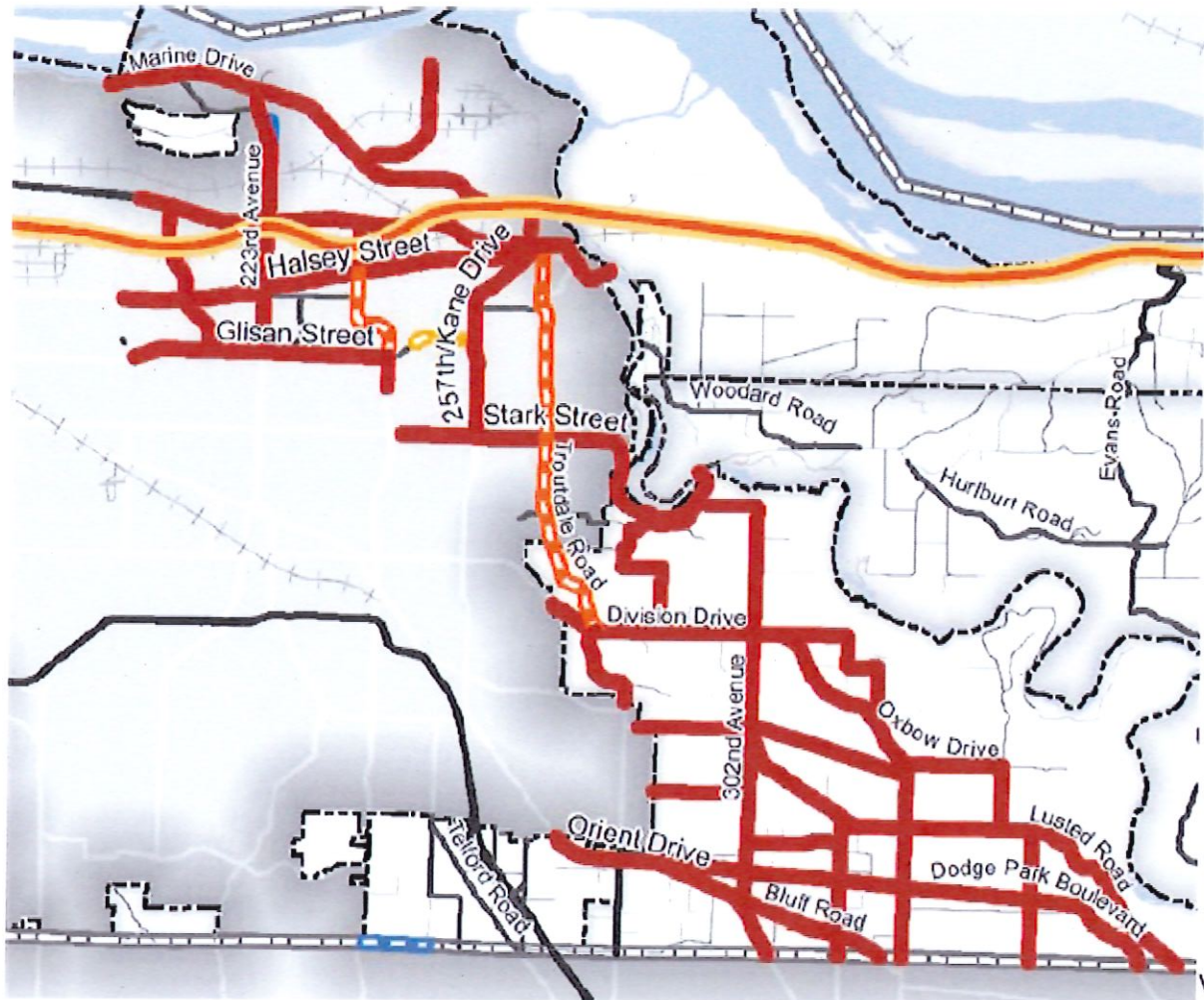
13 2. Schools in the Project Area

14 The three GBSD schools closest to the filtration facility site are located
15 along or near roads that the County has designated as freight routes with no
16 restrictions⁴ in its Transportation System Plan (“TSP”). Rec-1969.

² Condition of Approval 12.a further limits the number of employees to a maximum of 10 per shift Rec-86 (“at no time may the number of employees or visitors exceed” “26 full-time employees, with a maximum of 10 on the largest shift”).

³ Extremely conservative assumptions were also made for the Construction TIA. Rec-150-151.

⁴ Pursuant to the Multnomah County Transportation System Plan, restrictions on other roadways include: “roadways limited to 40-foot-long vehicles, to 50-foot-long vehicles, and to local deliveries only.” Rec-1969.



1
2 *Red indicates TSP-designated freight routes (with no restrictions).*
3 *Rec-1969.*

4 Sam Barlow High School is located 3 miles northwest of the filtration
5 facility site, at the southwest corner of the intersection of 302nd Avenue and
6 Lusted Road. Rec-473-474. Both 302nd Avenue and Lusted Road are TSP
7 designated freight routes. Rec-1969. East Orient Elementary School and West
8 Orient Middle School are located approximately 2.5 to 3 miles west of the
9 filtration facility site between Dodge Park Boulevard and Orient Drive near
10 where it merges with Bluff Road. Rec-475-477. East Orient Elementary School

1 also fronts 302nd Avenue. *Id.* Dodge Park Boulevard, Orient Drive, Bluff Road,
2 and 302nd Avenue are TSP designated freight routes. Rec-1969.

3 PWB met with GBSD staff, including the Chief Financial Officer,
4 Director of Facilities, and the Security Coordinator, to discuss traffic
5 considerations related to the project. Rec-466-478. PWB also met with GBSD's
6 transportation provider, First Student, and Multnomah County Safe Routes to
7 School. *Id.* PWB requested school bus routes from GBSD and was sent to First
8 Student. Rec-582. In a 2022 email, First Student (through a representative who
9 subsequently submitted testimony in opposition to the project) told the PWB
10 that it would create a security conflict to share bus routes with PWB and that all
11 roads would be problematic. *Id.* Nevertheless, PWB has obligated its contractor
12 to evaluate routes when they are made available and make accommodations for
13 any bus route in the study area that would be impacted. *Id.* In response to school
14 concerns, PWB also proposed to expand the time periods in which it would
15 avoid area schools beyond the 20 minutes before and after start and end times
16 that had been identified by the traffic engineering expert in the Construction
17 TIA. The resulting Condition (Rec-93) incorporates a school-by-school analysis
18 of information that had been provided to PWB, including, for example, late start
19 information. Rec-578-579.

3. Fix-it-First

Condition of Approval 6 requires (1) initial improvements to those road surfaces that are currently considered to be “failed roads” with a pavement condition index (“PCI”) of less than 50, and (2) a return of the surface to a condition as good or better than the pre-construction condition. Rec-89. This approach was identified in the local proceeding as the “fix-it-first approach.” Rec-160. County Transportation determined that, with the required off-site improvements, the project will comply with County road rules and will not create a safety hazard for the traveling public. Rec-737.

III. LUBA’S JURISDICTION

PWB agrees that LUBA has jurisdiction.

IV. ARGUMENT

A. RESPONSE TO FIRST ASSIGNMENT OF ERROR

In its first assignment of error, GBSD incorporates by reference Petitioner’s second assignment of error. Petitioner’s second assignment of error is addressed in County’s Brief, Section IV.A. As explained in the County’s Brief, the Hearings Officer provided a *PGE/Gaines* analysis considering the relevant text, context, and legislative history and concluded that construction, including any externalities of construction, are not the “use” to be evaluated under the “use” approval criteria. Opponents, including GBSD, have not provided any substantive *PGE/Gaines* analysis to the contrary.

1 Accordingly, we will address arguments in GBSD's second and third
2 assignments of error related to the actual "use" proposed and not those related
3 to construction of the project.

4 B. RESPONSE TO SECOND ASSIGNMENT OF ERROR

5 1. Preservation

6 This Assignment of Error is limited to arguing that the project is
7 inconsistent with the character of the area "insofar as it creates ... significant
8 traffic risks and obstacles[.]" GBSD Brief, 5. That is, the only externalities
9 GBSD raises as concerns in its brief are traffic and in-road work. That is
10 understandable, given the distance of any GBSD school from the project.

11 PWB agrees that this issue was preserved as to *construction* of the
12 proposed use. However, construction is not the proposed use subject to
13 MCC 39.7515(A), and we are cited to nowhere in the record, and cannot find
14 anywhere, that GBSD argued that the small amount of *operational* traffic would
15 be inconsistent with the character of the area. Nor do we know of any place
16 where GBSD argued that there would be operational in-road work to be
17 considered, as the installation of the pipelines will inherently be complete when
18 they are operational.

19 "A petitioner must quote or point to a specific page, passage, or portion
20 of an audio recording to demonstrate where an issue was raised in the local
21 proceedings." *Central Oregon LandWatch v. Deschutes County*, ___ Or LUBA

1 ____, ____ (LUBA No 2023-006/009, July 28, 2023) (slip op at 55). LUBA will
2 not search the record for the petitioner. *Id.* Petitioner “has an affirmative
3 obligation to establish preservation of error.” *Rosewood Neighborhood*
4 *Association v. City of Lake Oswego*, ____ Or LUBA ____, ____ (LUBA No 2023-
5 035, Nov 1, 2023) (slip op at 7). GBSD has not met that obligation with respect
6 to operational traffic or in-road work and MCC 39.7515(A).

7 Regardless and in the alternative, PWB addresses the unpreserved
8 arguments below.

9 2. **Standard of Review**

10 LUBA reviews findings to determine if they (1) address the applicable
11 standards, (2) set out the facts relied upon, and (3) explain how those facts lead
12 to the conclusion that the standards are met. *Heiller v. Josephine County*, 23 Or
13 LUBA 551, 556 (1992). However, “findings of compliance with relevant
14 approval criteria need not be perfect, rather they need only be adequate to
15 establish the factual and legal basis for the particular conclusions drawn in a
16 challenged decision[.]” *Thomahlen v. City of Ashland*, 20 Or LUBA 218, 229-
17 30 (1990); *Niederer v. City of Albany*, 79 Or LUBA 305, 314 (2019) (quoting
18 this passage from *Thomahlen*). A decision-maker is not required to “adopt
19 findings addressing evidence that conflicts with the evidence it chooses to rely
20 upon.” *Kine v. Deschutes County*, 75 Or LUBA 419, 427 (2017).

1 “In order to prevail on a substantial evidence challenge, a petitioner must
2 identify the challenged findings and explain why a reasonable person could not
3 reach the same conclusion based on all the evidence in the record.” *Stoloff v.*
4 *City of Portland*, 51 Or LUBA 560, 568 (2006).

5 **1. The findings identify the relevant “area” and provide**
6 **detailed rationale for selection of the area.**
7

8 MCC 39.7515(A) requires a finding that the proposed use “is consistent
9 with the character of the area.” As is explained in extensive detail in PWB
10 PHCA Brief, Section IV.D, there are *11 pages* of findings describing the
11 boundaries of the “area” chosen for study and the rationale for that area. *See*
12 *also* Rec-189-199, 41 (section of findings titled “The Area and the Rationale for
13 its Selection are Well-Defined”).⁵

14 GBSD first argues that the study area is “small,” providing no
15 comparison that defines that relative term. When considered in the context of
16 other study areas under Oregon land use law, the study area is actually quite
17 large. The study area is depicted in Figure 9 (Rec-196) with a “1-Mile Radius
18 Reference”:

⁵ For the analysis of MCC 39.7515(A)’s compatibility standard, Rec-41 is the relevant page where the Hearings Officer incorporated extensive findings from applicant’s final argument. Record citations to findings incorporated by the Hearings Officer herein include the final argument citation followed by the decision citation.

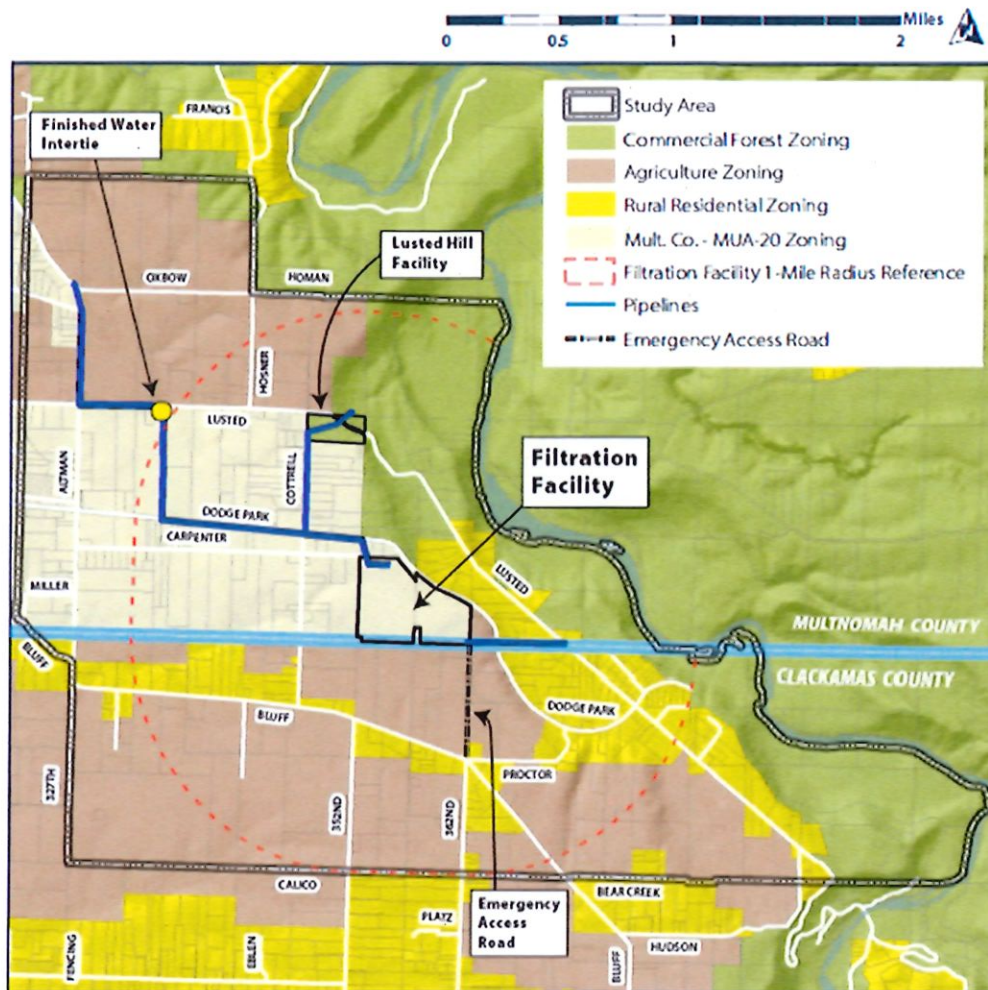


Figure 9. Consolidated Land Use Study Area with Generalized Zoning

1

2

Why was the one-mile reference area used in developing the study area,

3

and shown on the Figure 9 map provided above? The findings⁶ explain:

4

“The one-mile line is just that, a reference line. It is helpful to understand the scale of the comprehensive analysis that the applicant undertook. It is also the radius that includes most of pipelines as well as most of the intersections that needed to be studied (that is, where the potential for impacts at an intersection was

5

6

7

8

9

⁶ The Hearings Officer states, “I find that the area selected for the study and rationale for the selected area reasonable and adopt the finding in Applicant’s Final Argument at pages 56-64. [Rec-191-199.] I also find that Applicant’s analysis of uses in the area consistent with case law. Applicant’s Final Argument pages 64-66. [Rec-199-201.]” Rec-41.

1 determined by County Transportation). Where a larger
2 area was needed to capture these potential impacts,
3 the area extends beyond the one-mile reference line to
4 some logical boundary like a major road. The
5 reference line is intentionally conservative, intending
6 to consider a larger potential area of impact than, for
7 example, is required under OAR 660-023-0180(5)(a)
8 for mining uses (1,500 feet), or than was required by
9 Multnomah County in the Water Bureau's Lusted Hill
10 Facility review ([Exhibit A.162]) (1,320 feet)."
11

12 Rec-197n28, 41. Therefore, there is no reason to say that the study area is
13 "small."

14 GBSD next agrees with the approach and that "a study area cabined by
15 the traffic impacts of the Project would be a defensible one," but says that this
16 study area fails to achieve a study area that adequately analyzes traffic impacts
17 because PWB listened to school district concerns and proposed a condition of
18 approval as an accommodation to the school district. *See Van Dyke v. Yamhill*
19 *County*, 80 Or LUBA 348, ___ (2019) (slip op at 47) (explaining that a
20 condition was "an accommodation" to neighboring users, given that the activity
21 was not relevant to the approval criterion). The condition PWB offered relating
22 to avoiding schools with construction traffic was not necessary to support the
23 finding of compliance with MCC 39.7515(A), as construction is not the "use"
24 evaluated under MCC 39.7515(A). Instead, as is common in land use cases,
25 PWB "voluntarily subjected itself to this condition as part of a good faith effort
26 to address the concerns of" opponents – but that does not mean it affects the
27 County's findings or makes construction into the use to be reviewed under

1 MCC 39.7515(A). *See Gould v. Deschutes County*, 54 Or LUBA 205, 263
2 (2007).

3 Regardless, there is no evidence that schools “outside the study area”
4 should be included in the study area when the Construction TIA “concludes that
5 the collective construction traffic will have minimal impacts on intersection and
6 roadway operations, including during needed roadway closures for pipeline
7 construction” with the use of Transportation Demand Management (TDM)
8 strategies. Rec-4201. That is, the Hearings Officer relied on the expert opinion
9 of Mr. Beckwith, which was validated by the expert opinion of County
10 Transportation, that, even for the highest potential traffic impact – during peak
11 construction – “all study [area] intersections perform at acceptable levels of
12 service with minimal delay” with TDM, “and so there is no reason to believe
13 that there would be [issues] outside the study area, as traffic continues to
14 disperse.” APP-039-042; Rec-263-265, 47 (“County Transportation is the single
15 best expert on their own roads”).

16 Opponents fear dramatic impacts from construction traffic, but that is
17 simply not what the objective evidence in the record shows. Level of Service
18 requirements “serve as a gauge to allow the [County] to objectively measure the
19 performance, or lack thereof, of its transportation system.” *Montlake Cmty.*
20 *Club v. Hearings Bd.*, 110 Wash App 731, 739, 43 P3d 57 (2002). The system
21 inside the study area will, objectively and even during construction, continue to

1 function within County levels of service with minimal delays. That expert
2 conclusion was validated by County Transportation, who the Hearings Officer
3 found to be the most credible expert on the functioning of their own roads. Rec-
4 47. Given that the objective measure of performance inside the study area
5 showed no issues inside the study area, and given that traffic will continue to
6 disperse and lessen impacts outside of the study area, there is no basis on which
7 to argue that a larger study area than chosen by the County needed to be
8 evaluated. The findings were correct:

9 “Given no significant impact on the transportation
10 system within the study area, and given that traffic
11 impacts will disperse as they travel further from the
12 project, extending the study area to include thousands
13 of acres of additional land would be an unreasonable
14 burden that has no reasonable expectation of changing
15 the analysis or outcome of the traffic study or analysis
16 of character of the area.”

17
18 Rec-200, 41. This argument should be rejected.

19 GBSD makes the same arguments for why the findings did not provide
20 “adequate rationale for the area.” GBSD Brief, 8. The condition “proposed by
21 PWB” in an effort of good faith and accommodation is not “an admission and
22 acknowledgement of the traffic impacts beyond the study area.” GBSD Brief, 8.
23 Instead, PWB consistently maintained throughout the proceedings below that
24 the study area was adequate, and the Hearings Officer agreed. Rec-189-199, 41.
25 This is in no way the “admission” that GBSD asserts occurred.

1 **2. The findings provide an adequate description of the**
2 **character of the area.**
3

4 GBSD argues that a “brief and nondescript” description in PWB’s initial
5 application was used as “defining the character of the area” by the Hearings
6 Officer and is insufficient. GBSD Brief, 8-9. That argument has layers of error.

7 The brief cherry picks words from the Introduction to the consolidated
8 land use applications (Exhibit A.2) to represent that there was only a “brief”
9 description in the initial application. In fact, the Introduction has eight pages
10 (Rec-8035-8042) describing the character of the area. Second, Section 1.A
11 (Exhibit A.4) of the initial application narratives incorporates and expands upon
12 those eight pages, starting at Rec-7892 (“Project Study Area Characteristics and
13 Consistency”). That description continues for 59 pages, concluding at Rec-
14 7951. It is a misrepresentation of the record to say that the initial application’s
15 analysis of the character of the area was “brief and nondescript.” GBSD Brief,
16 9. We agree with GBSD that the Hearings Officer accepted these as findings,
17 along with the additional findings described in detail in PWB PHCA Brief,
18 IV.F.2. Those findings are plainly much more extensive than the “generally
19 residential” statement LUBA found insufficient in the case cited by GBSD,
20 *Kine v. City of Bend*, 72 Or LUBA 423 (2015) (slip op at 19).

21 GBSD also objects that the Hearings Officer’s findings “fail[] to capture
22 the breadth of the character of the area” as proposed by various quotations from
23 the record. However, LUBA has explicitly held that “*Heil[]er* does not require

1 the decision-maker to adopt findings explaining why it chose not to rely upon
2 evidence that conflicts with the evidence it did choose to rely upon.” *Kine v.*
3 *Deschutes County*, 75 Or LUBA 419, 427 (2017). Nor does “every assertion by
4 a participant in a land use decision warrant[] a specific finding.” *Faye Wright*
5 *Neighborhood Planning Council v. Salem*, 1 Or LUBA 246, 252 (1980).

6 More specifically, GBSD argues that (1) the findings “cut ... out” the
7 “characteristic of the area” that “people walk directly on the street due to the
8 lack [of] sidewalks and walkable shoulders,” (2) the findings “fail[] to note the
9 lack of traffic as part of the character of the area[,]” and (3) the findings “do[]
10 not capture the serenity or quiet of the area[.]” Fundamentally, these arguments
11 relate to how construction traffic would be inconsistent with this character, and
12 that argument is irrelevant, given that construction is not the use. Regardless,
13 we will address each of those claims in turn.

14 First, that the area has a “lack of sidewalks and walkable shoulders” is
15 actually included in the findings, stating that “current conditions have limited
16 accommodations for bike/ped,” Rec-732, 14 (incorporating J.44 as findings).

17 The findings additionally explain that the:

18 “roadways currently have limited accommodations for
19 this kind of traffic and yet they share roadways
20 successfully with large farm vehicles and trucks. This
21 is consistent with rural road standards, which do not
22 include bike lanes or sidewalks[.] ... Additionally, the
23 use of marked haul routes will also allow pedestrians,
24 bicyclists, equestrians, and other non-vehicular traffic
25 to choose to recreate or travel on other roadways.”

1
2 Rec-163, 221, 41.⁷

3 Second, the “lack of traffic” presented by opponents is subjective
4 evidence that they perceive “minimal traffic[.]” GBSD Brief, 9-10. As noted
5 above, under *Kine* and *Faye*, the Hearings Officer did not have to explain why
6 he chose not to rely upon that subjective evidence, as he had objective data
7 about the level of current traffic in the area in the Project TIA. The findings
8 explain the Hearings Officer’s conclusion on the issue: “Operational project
9 traffic is consistent with the County road system and intersection capacity, as
10 shown in Exhibit A.31 (Project TIA) and related evidence listed below.” Rec-
11 221, 41.

12 Third, the “serenity or quiet” of the area is described – again objectively,
13 rather than subjectively – in the findings:

14 “Facility noise generation at property lines during the
15 day will be equivalent to or lower than measurements
16 of background ambient noise and similar in the
17 intermittent character. Nighttime (10 p.m. to 7 a.m.)
18 ambient noise was reported at six locations along the
19 Facility property line in the Acoustic Baseline
20 Measurement. The existing median hourly nighttime
21 Leq sound levels range between 40 dBA and 50 dBA.
22 The noise levels at the property line generated by the
23 equipment at the Facility (excluding equipment
24 operated only during emergencies), as reported by

⁷ See *Wilson Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 106, 115 (1994) (there are no magic words, incorporation happens through words that indicate what the city believes to be relevant) and Rec-221, 41 (“as shown in” “extensively discussed”).

1 Facility Exterior Noise Analysis, are predicted to
2 range between 29 and 46 dBA.”
3

4 Rec-205, 41. Additionally, it is not always “serene” in the area. As the
5 findings explain: “noise generated in the area ... includes farm equipment, large
6 trucks, irrigation pumps, and ventilation equipment serving farms, businesses
7 and residents[.]” *Id.* The findings note that it was opposition testimony that
8 “identif[ied] that farm related noise, ‘motorcycle rallies, cruise-ins[,] and rod
9 runs’ are characteristic of the area.” Rec-202, 41.

10 Overall, GBSD simply disagrees with the findings, and the evidence that
11 the Hearings Officer chose to rely on for these issues. Where, as here, “a
12 petitioner does not explain why challenged findings are inadequate but, rather,
13 disagrees with the conclusion reached in those findings, petitioner’s challenge
14 to the findings will not be sustained.” *Vanderburg v. City of Albany*, ___ Or
15 LUBA ___, ___ (LUBA No 2022-082, Jan 5, 2023) (slip op at 12).

16 **3. The findings describe compatibility with the character of**
17 **the area.**
18

19 GBSD argues that “multi-year construction and traffic will change the
20 character of the area.” As addressed above, construction is not the use and
21 therefore the argument in this final section about compatibility is not relevant to
22 the approval criterion. Regardless, we provide some correction and response
23 below.

1 GBSD states that PWB spent “less than a page in its final argument”
2 responding to opposition comments related to increased traffic during
3 construction. That is not correct. That page (Rec-221) clearly refers the reader
4 to where “[a]ll aspects of traffic and road improvement have been extensively
5 discussed in Section I.B above” in the final written argument. Section I.B, at
6 Rec-148-174, provides a thorough analysis of all testimony and evidence for
7 both operational and construction traffic.

8 And then there is the Hearings Officer’s note that part of his analysis of
9 transportation issues is “addressed later in this decision.” Rec-41. That includes
10 findings that “County Transportation ... is the single best expert on their own
11 roads. [And, therefore, the Hearings Officer] weigh[ed] this expert testimony
12 over competing testimony.” Rec-47. The Hearings Officer adopted as findings
13 the expert reports of County Transportation. Rec-14. These include extensive
14 findings about both operational and construction traffic. For example, in
15 response to comments that the “rural character... will be negatively impacted”
16 and that “schools in the vicinity will be affected by the construction/operation
17 traffic increasing students’ safety risk,” the findings incorporated from County
18 Transportation, after reviewing the Construction TIA and Project TIA, find that
19 the conditions of approval “will mitigate the impacts of the construction traffic
20 and ongoing facility operations.” Rec-4123-24, 14. The findings are also clear
21 that the “area of study” was “deemed ... appropriate” by County

1 Transportation. Rec-4107, 14. Moreover, as to the school concerns in particular,
2 the findings respond that the conditions of approval⁸ “will ... ensure operations
3 of local traffic are adequately addressed.” Rec-733, 14. Overall, there is much
4 more than a page of analysis of the traffic issue and that analysis is consistent
5 with the Hearings Officer’s finding that the project is consistent with the
6 character of the area.

7 GBSD next complains that the extensive expert studies in the record,
8 which were reviewed and validated by County Transportation, also an expert,
9 “do not explain how the increased traffic is consistent with the area” and that
10 “ends the ... inquiry[.]” GBSD Brief, 11. Even if those experts were not
11 enough, the block quotation GBSD provides immediately thereafter explains
12 exactly how “the increased traffic” they are complaining about – increased
13 compared to the bare land at the filtration facility site today – is consistent with
14 the character of the area: namely that it must be compared to other “surrounding
15 uses” and the traffic they generate rather than to bare land. In particular, “large
16 scale nurseries ... create more impact on the surrounding area than will the
17 proposed” project, and the “use of trucks [by farmers] for moving materials in
18 and out of the area is part of the current character of the area.” Rec-221, 41.

⁸ Note that the conditions of approval in this memorandum from County Transportation do not include (nor rely upon for this conclusion) the “school avoidance” condition at Rec-404 addressed above.

1 There is no argument that operational traffic is not consistent with the character
2 of this existing use of the roads in the area by these large organizations.

3 Contrary to GBSD's assertion, "impacts upon schoolchildren" were not
4 "unaddressed and unmitigated[.]" GBSD Brief, 12. As noted above, for the
5 schools' concerns in particular, the findings respond that the conditions of
6 approval "will ... ensure operations of local traffic are adequately addressed."
7 Rec-733, 14.

8 Overall, GBSD is focused exclusively on construction traffic and
9 construction in the right-of-way. Construction is not the use to be evaluated
10 under MCC 39.7515(A) and therefore these arguments are irrelevant.
11 Regardless, there is evidence in the record, and findings based on that evidence,
12 that refutes GBSD's arguments about construction and use in the Second
13 Assignment of Error. To the extent there are passing references to operations of
14 the project after construction in GBSD's Brief, and to the extent LUBA finds
15 that was preserved, there are no arguments on that topic actually developed for
16 LUBA's review. Even if the argument had been developed, as detailed in the
17 statement of facts, facility operation will create minimal truck and vehicles trips
18 when compared to existing daily trip conditions on surrounding roads.
19 Therefore, the record establishes that operational traffic is entirely consistent
20 with the character of the area. PWB asks that this assignment of error be
21 rejected.

1 **C. RESPONSE TO THIRD ASSIGNMENT OF ERROR**

2 **1. Preservation**

3 PWB agrees this issue was preserved.

4 **2. Standard of Review**

5 The standards of review for the substantial evidence and findings
6 challenges presented in this assignment of error are provided above, in Section
7 IV.B.2 related to the Second Assignment of Error.

8 It is not clear if GBSD is making an interpretational challenge in this
9 assignment of error. If LUBA finds that they are, review of an interpretation by
10 the Hearings Officer is governed by ORS 197.835(9)(a)(D) which requires that
11 LUBA determine whether the hearings officer “[i]mproperly construed the
12 applicable law.” *Waverly Landing Condo. Owners’ Assoc. v. City of Portland*,
13 61 Or LUBA 448, ___ (2010) (slip op at 7). As explained in *Dahlen v. City of*
14 *Bend*, ___ Or LUBA ___, ___ (2021) (LUBA No 2021-013, June 14, 2021)
15 (slip op at 5-6), to determine under ORS 197.835(9)(a)(D) if the Hearings
16 Officer “properly construed the law, [LUBA will] consider the text and context
17 of the code and give words their ordinary meaning” under the standard rules for
18 interpreting code provisions under *Portland General Electric Company v.*
19 *Bureau of Labor & Industry*, 317 Or 606, 859 P2d 1143 (1993), *State v. Gaines*,
20 346 Or 160, 206 P3d 1042 (2009), and their progeny (*PGE/Gaines*). The goal
21 of code interpretation is “to discern the intent of the body that promulgated the

1 law” – in this case, the County Board. *City of Eugene v. Comcast of Or. II, Inc.*,
2 263 Or App 116, 127 (2014) *affirmed* 359 Or 528 (2016).

3 Under ORS 197.835(9)(a)(D), LUBA will affirm a hearings officer, even
4 if “debatable,” if “the hearings officer’s interpretation is more consistent with
5 the text of [the code] than [opponents’] interpretation” or “at least as
6 supportable as [opponents’] contrary view.” *Waverly*. 61 Or LUBA at ___ (slip
7 op at 7); *Patel v. City of Portland*, 77 Or LUBA 349, ___ (2018) (slip op at 12)
8 (summarizing a holding of *Gould v. Deschutes County*, 67 Or LUBA 1, 7
9 (2013) as “where different interpretations are equally plausible, and context
10 supports a hearings officer choice of interpretation, LUBA will defer to the
11 hearings officer's interpretation”).

12 3. Argument

13 a) **GBSD avoids any PGE/Gaines analysis and**
14 **misunderstands the clear PGE/Gaines**
15 **analysis in the findings.**
16

17 MCC 39.7515(F) requires a finding that the proposed use “will not create
18 hazardous conditions.” GBSD asserts that the Hearings Officer “improperly
19 adds the qualifying adjectives ‘significant’ or ‘continuous’ to evaluate the
20 ‘hazardous conditions’ prong” of MCC 39.7515(F). The primary problem with
21 this claim is that it attributes those terms to the Hearings Officer in the abstract,
22 without an evaluation of how those terms evolved in the Hearings Officer’s

1 interpretational analysis. The Hearings Officer adopted the following findings
2 from PWB's final argument:

3 "Project opponents primarily focus on the 'hazardous'
4 element of the approval criterion to propose an
5 interpretation that would require an applicant to
6 demonstrate that there is no possibility whatsoever
7 that a hazardous situation could arise. However, that
8 focus ignores the remainder of the criterion in
9 violation of *PGE/Gains* rules for code interpretation.

10
11 "First, the term 'condition' cannot be ignored or read
12 out of the criterion. ORS 174.010 (code interpretation
13 cannot 'insert what has been omitted or omit what has
14 been inserted.') The relevant definition of 'condition'
15 is 'a mode or state of being.' Therefore, the most
16 reasonable interpretation of the term 'hazardous
17 condition' is something that is continually in the state
18 of being hazardous, not the risk that a hazardous
19 situation could arise at any point in the future, as
20 broadly suggested by RFPD10 and other project
21 opponents."

22
23 Rec-331-332, 56 (footnote omitted). Based upon the interpretation of the plain
24 meaning of "condition" provided above, the Hearings Officer found "hazardous
25 condition" to mean "something that is continuously being in a hazardous state
26 not something that could remotely potentially happen." Rec-56. In doing so, he
27 did not insert the word "continuous" into MCC 39.7515(F) as GBSD alleges.
28 Instead, the Hearings Officer considered the ordinary meaning of "condition"
29 and applied the contextually appropriate definition of "condition" and
30 articulated an interpretation of "hazardous condition" consistent with the plain
31 language of the criterion as required by *PGE/Gaines*.

1 The Hearings Officer's interpretation that there must be a "significant"
2 hazardous condition is equally consistent with and explained by the full scope
3 of findings related to the interpretation. First, the Hearings Officer expressly
4 rejected claims that MCC 39.7515(F) requires a conclusion that there is no
5 possibility that a hazard could occur:

6 "Almost all the uses listed under the Community
7 Services could create hazards just by the nature of
8 their operation: playgrounds, parks, reservoirs, dumps,
9 landfills etc. If any hazard was the test, then none of
10 these would be allowed. I do not believe that is what
11 the legislation intended."
12

13 Rec-56. The findings also explain why the interpretation promoted by project
14 opponents (which would preclude consideration of mitigation to meet the
15 criterion) is untenable and creates an absurd result. Rec-333-335, 56. Of course,
16 the use of mitigation to satisfy conditional use approval standards is entirely
17 consistent with the text and structure of the code. MCC 39.7510 addresses
18 conditions and restrictions for Community Service conditional uses such as the
19 project, and provides, "[t]he approval authority may attach conditions and
20 restrictions to any community service use approved" including any "reasonable
21 conditions [] that would [] mitigate any adverse effect upon the adjoining
22 properties which may result by reason of the conditional use allowed."

1 Therefore, not only is it permissible to impose conditions, but those conditions
2 may be applied for the specific purpose of mitigating adverse effects.⁹

3 The findings correctly confirm that mitigation and risk minimization can
4 be considered and conclude that “mitigation and safety measures implemented
5 must be commensurate with the risk.” Rec-334, 56. Consistent with that
6 explanation and to provide an interpretation that avoids the absurd result, the
7 Hearings Officer correctly determined, that a “hazardous condition” within the
8 context of MCC 39.7515(F) “has to be a hazard that cannot be mitigated to a
9 point where it is no longer a serious hazard.” Rec-56 (emphasis added). As
10 clarified by this conclusion, the Hearings Officer did not simply insert the word
11 “significant” as alleged by GBSD. Instead, the interpretation correctly connects
12 the level of mitigation to the level of hazard, and concludes that a hazard,
13 serious or otherwise, can be mitigated so that the level of hazard is less than
14 significant and thus avoids a hazardous condition. Thus, it is incorrect to claim
15 that the Hearings Officer inserted the terms “significant” and “continuous” into
16 the code language. Instead, the Hearings Officer used the express language of
17 the code to define hazardous condition and render it consistent with the code
18 context, which specifically calls for mitigation.

⁹ LUBA reached this same conclusion in *Stephens v. Multnomah County*, 10 Or LUBA 147 (1984), responding to an argument that “unconditional findings of no hazard” are required under MCC 39.7515(F) by stating “[w]e reject petitioner’s argument that conditions may not be used to ensure compliance with ordinance criteria.” *Id.* at 152.

1 In addition to misapplying the Hearings Officer's interpretational
2 analysis, GBSD does not provide an alternative interpretation. GBSD fails to
3 provide any meaningful analysis of the text or context of MCC 39.7515(F)
4 consistent with *PGE/Gaines*. GBSD does not criticize or even address the
5 ordinary meaning interpretation adopted by the Hearings Officer. Instead,
6 GBSD simply states that the terms "significant" and "continuous" appear
7 elsewhere in the MCC. To the extent this is intended as contextual analysis, it
8 fails in that regard. Merely noting the number of times a word appears
9 somewhere else in the MCC is insufficient. Absent any evaluation of how those
10 words are applied in other unrelated sections of the MCC, the mere fact that
11 those words appear elsewhere does nothing to assist in discerning legislative
12 intent in the words chosen for MCC 39.7515(F).

13 Under *Patel*, the Board weighs opponent's interpretation against the
14 Hearings Officer's interpretation. In that weighing, "where different
15 interpretations are equally plausible, and context supports a hearings officer
16 choice of interpretation, LUBA will defer to the hearings officer's
17 interpretation". *Patel v. City of Portland*, 77 Or LUBA 349, ___ (2018) (slip op.
18 at 12) (summarizing a holding of *Gould v. Deschutes County*, 67 Or LUBA 1, 7
19 (2013)). Where petitioners do not present a contrary interpretation, there is no
20 basis on which to find that the non-existent interpretation is "equally plausible",

1 let alone more plausible, than the Hearings Officer’s interpretation. LUBA
2 should therefore affirm the Hearings Officer’s interpretation.

3 b) Hearings Officer’s findings adequately
4 address operational safety issues identified in
5 GBSD testimony.
6

7 GBSD’s brief does not clearly articulate a findings challenge. Instead, it
8 claims, “[t]he County’s response to MCC 39.7515(F) is inadequate because it
9 fails to respond to the concerns [] raised by the District that construction and
10 use of the water treatment facility: (1) do not include specific plans to ensure
11 student and community safety; (2) do not articulate specific plans to mitigate
12 traffic concerns; and (3) do not include specific plans for running school buses
13 while roads are torn open to lay pipe.” GBSD Brief, 16-17. While the
14 introduction to the list refers to “construction and use” of the filtration facility,
15 GBSD develops no argument that the findings related to facility operation are
16 lacking. Instead, the entire focus of the brief is on claimed hazards during
17 construction before the use is established. However, for the reasons set forth in
18 the County’s Brief, construction is not the use and, thus, the Hearings Officer
19 was not required to make findings under the MCC 39.7515(F) criterion related
20 to claimed impacts from construction. Consequently, the contention that the

1 findings do not adequately respond to concerns related to construction does not
2 constitute a basis for remand.¹⁰

3 In terms of GBSD's requests for plans, GBSD never connected its
4 requests for plans to MCC 39.7515(F) in the local proceeding. Even now,
5 GBSD offers no explanation in its brief as to why the requested plans would be
6 necessary for the proposed use to comply with the criterion. The Hearings
7 Officer made adequate findings that the proposed use met MCC 39.7515(F). It
8 was therefore not necessary for the Hearings Officer to specifically address
9 GBSD's requests for plans not required by the criterion or required for finding
10 compliance with the criterion. *Kine* at 427.

11 Again, while not making a direct findings argument based upon *Heiller*,
12 GBSD criticizes the length of the Hearings Officer's findings on facility
13 operation traffic. GBSD Brief, 17. Of course it is the content and not the length
14 of findings that is relevant to LUBA's review. Moreover, the word count

¹⁰ Despite finding that construction impacts are not the use considered in this application and decision, the Hearings Officer recognized that the "Applicant's Final Rebuttal goes to great lengths to discuss its efforts to mitigate the impacts from construction of the project." Rec-80. He then makes an alternative finding in the event construction activities were to be considered, stating, "I adopt pages 255-273 of the Applicant's Final Rebuttal demonstrating that as conditioned, these impacts can be mitigated to a level where they comply with the code and plan." *Id.* A section of the incorporated pages of findings specifically addresses construction concerns raised by GBSD and others. Rec-403-408. As addressed at length under the second assignment of error above, the Hearings Officer also imposed a PWB proposed condition to accommodate community concerns about construction truck safety issues during school drop-off and pick-up hours, and incorporated findings related to the safety of the transportation network during construction.

1 provided by GBSD fails to account for the findings that the Hearings Officer
2 adopts by reference in the final argument. Rec-57 (“I adopt as findings the
3 Applicant’s [final] argument pages 208-209 that as conditioned, the traffic from
4 the operation of the facility will not create a hazardous condition.”; “I adopt
5 Applicant’s [f]inal argument as to it[’s] conclusions on safety page 211.”).

6 The collective findings describe facts in the record that include: (1) the
7 conservative projections on the volume and nature of operational traffic, (2) the
8 impacts of that traffic on level of service at surrounding intersections, (3) details
9 of the planned roadway improvements and conditions to leave primary detour
10 and truck routes in as good or better condition as they were prior to construction
11 under the “fix-it-first” approach, (4) specific improvements on Carpenter Lane,
12 and (5) County Transportation’s response to testimony from project opponents.
13 Rec-343-344, 346, 57. The findings also explain that the required roadway
14 improvements and testimony from the PWB transportation expert (Mr.
15 Beckwith) and County Transportation (also experts) related to roadway safety
16 and compliance with County standards, lead to the following unequivocal
17 finding of compliance:

18 “Even absent the roadway improvement described
19 above, the relatively minimal traffic generated by
20 facility operation would not create a hazardous
21 condition. However, when taking into consideration
22 the roadway improvements to the surrounding
23 roadway system that will be in place following
24 construction, it is abundantly clear that the traffic

1 generated by operation of the filtration facility will
2 not result in a hazardous condition.”

3
4 Rec-346, 57. Taken together, the Hearings Officer findings, (1) address
5 MCC 39.7515(F), (2) set out the facts relied upon, and (3) explain how those
6 facts lead to the conclusion that operational traffic will not create a hazardous
7 condition. *Heiller* at 556.

8 c) The Hearings Officer’s decision that the
9 proposed use will not create a hazardous
10 condition is supported by substantial
11 evidence in the record as a whole.
12

13 As revealed in the findings cited above, the Hearings Officer relied on
14 the testimony and conclusions of County Transportation, as well as the PWB
15 transportation expert’s Project TIA and rebuttal testimony, specifically noting
16 that “County Transportation staff rebutted the expert testimony of the
17 opponent’s experts.” Rec-57.

18 In its brief, GBSD makes a general comment that substantial evidence in
19 the record does not support a decision that the “use, including construction
20 activities” does not create a hazardous condition. GBSD Brief, 17. Critically,
21 however, GBSD does not advance a single evidentiary argument related to
22 project operation.

23 Instead, GBSD identifies limited facts in the record related to road
24 closures during construction and points to concerns in the record about potential
25 impacts on student pick-up and drop-off as a result of construction activities.

1 Because construction is not the use subject to the approval criterion, it was not
2 necessary for the Hearings Officer to address or make findings or conclusions
3 related to construction activities in the decision.

4 d) **GBSD misinterprets the relevance and status**
5 **of a potential County Transportation**
6 **proposed condition.**
7

8 In a final argument, GBSD points out a condition of approval
9 recommended by County Transportation in a memo to the Hearings Officer
10 dated June 14, 2023 (“Exhibit B.16”). Rec-4091. However, GBSD misinterprets
11 the required timing and status of the recommendation in stating “the record
12 shows that this directive was not fulfilled.” GBSD Brief, 20.

13 The recommended condition of approval from Exhibit B.16 was the
14 following proposed condition 7.c:

15 “TCP(s) must demonstrate consultation/engagement
16 with Agricultural businesses abutting the pipeline and
17 detour routes and Gresham-Barlow School Districts,
18 as recommended in the Construction TIA (Exhibit
19 A.230) to ensure impacts on the local transportation
20 network are known in advance.”
21

22 Rec-4094. Pursuant to proposed condition 7.a, the referenced TCP was required
23 to be submitted during the Construction Permitting process. *Id.* The conditions
24 proposed in Exhibit B.16, including condition 7, were recommended by County
25 Transportation to be included in the final land use decision and applied at

1 identified time periods after land use approval.¹¹ As evident from the wording
2 of the condition and Exhibit B.16, County Transportation was not imposing a
3 requirement for consultation/engagement effective prior to a land use decision,
4 as suggested by GBSD. Nor would such an approach be consistent with land
5 use procedures.

6 In a later memo to the Hearings Officer dated September 6, 2023
7 (“Exhibit J.44”), County Transportation addressed and explained
8 amendments/revisions to conditions proposed in Exhibit B.16 in June, and
9 specifically noted that “[r]ecommended changes also reflect the testimony on
10 the record.” Rec-736. In a section addressing condition 7, County
11 Transportation states:

12 “Former condition 7c was also deleted, as
13 MCRR 13.250 provides a comprehensive list of
14 methods of notification and communication about
15 intents to close roads in full. 7c was therefore
16 considered unnecessary. Partial and full road closures
17 will follow typical Traffic Control procedures and
18 compliance methods (see MCRR 13.500.D).”
19

20 Rec-738. As a result of this recommendation from County Transportation¹², the
21 Hearings Officer’s decision does not include a condition consistent with the
22 originally recommended condition 7.c from Exhibit B.16. PWB did not submit
23 an objection to the condition into the record, but we note for clarity that since it

¹¹ The introduction to the list of proposed conditions states, “[i]f the Hearings Officer finds the applications can be approved, Transportation Planning recommends the following conditions be included”. Rec-4093.

¹² Exhibit J.44 is also part of the findings, incorporated at Rec-14.

1 was exclusively related to consultation for construction activities, condition 7c
2 was not a condition required for compliance with MCC 39.7515(F), or any
3 other MCC 39.7515 criterion.

4 **V. CONCLUSION**

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

7 DATED this 16th day of August, 2024.

8


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

3 **Brief Length**

4

5 I certify that (1) this brief complies with the word-count limitation in OAR 661-
6 010-0030(2) and (2) the word count of this brief as described in OAR 661-010-
7 0030(2) is 7,411 words.

8

9 **Type Size**

10

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

13 Dated this 16th day of August, 2024.

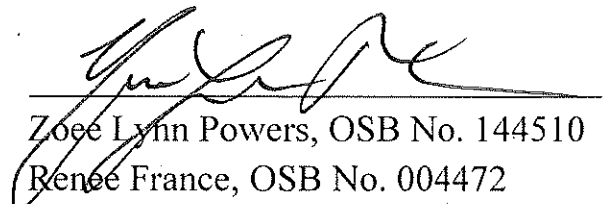
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CERTIFICATE OF FILING

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 INTERVENOR-PETITIONER GRESHAM-BARLOW SCHOOL DISTRICT 10J** 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 INTERVENOR-PETITIONER GRESHAM-BARLOW SCHOOL DISTRICT 10J** 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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3 Dated this 16th day of August, 2024.

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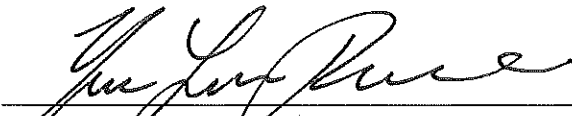
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