

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
MULTNOMAH COUNTY RURAL
FIRE PROTECTION DISTRICT
NO. 10**

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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 Intervenor-Petitioner Multnomah County Rural Fire Protection District No. 10 (“RFPD10”).

II. STATEMENT OF THE CASE

A. NATURE OF THE DECISION

PWB rejects RFPD10’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 RFPD10’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.

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

1 **B. RELIEF SOUGHT**

2 PWB requests that LUBA affirm the County's decision.

3 **C. SUMMARY OF ARGUMENTS**

4 **1. First Assignment of Error**

5 The Hearings Officer interpretation of MCC 39.7515(D) is consistent
6 with the plain language and is far more plausible than alternative interpretations
7 suggested by RFPD10.

8 **2. Second Assignment of Error**

9 The Hearings Officer properly interpreted MCC 39.7515(D), (F), and
10 adopted adequate findings based upon substantial evidence in the record.

11 **D. SUPPLEMENTARY STATEMENT OF FACTS**

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

14 **1. Intergovernmental Agreement**

15 RFPD10 is a rural fire district organized and existing under
16 ORS Chapter 478. Rec-1896. The project is located within the RFPD10
17 boundary. Rec-1895. RFPD10 does not directly provide emergency services.
18 Rec-1896-1916. Rather, the City of Gresham ("Gresham") and RFPD10 have
19 entered into an Intergovernmental Agreement for Fire Services ("IGA"). *Id.*

1 The IGA states Gresham “shall provide fire service^[2] in accordance with the
2 specifications of this Agreement within the territory of the District[.]” Rec-
3 1897. Specifically, the IGA provides:

4 (A) City will provide fire suppression, advanced
5 life support, emergency medical rescue, and Level A
6 hazardous materials response to all alarms as
7 dispatched.

8
9 *Id.*

10 With respect to the applicable level of service, the IGA provides:

11 “[t]he City will provide a minimum level of service
12 within the area of the District that is consistent with
13 the service provided within comparable areas of the
14 City, but in no event less than the level of service
15 more specifically required by other provisions of this
16 Agreement, including, but not limited to, Article II,
17 Section 4.”

18
19 *Id.* The IGA also requires Gresham to staff Station 76, a fire station in
20 RFPD10’s service area located approximately 2.6 miles from the filtration
21 facility site. Rec-1898. Pursuant to the IGA, no less than one qualified career
22 officer and two qualified career firefighters staff Station 76, 24 hours per day.
23 Rec-1898. According to a 2022 Community Risk Assessment and Standards of
24 Coverage Report (“Risk Assessment Report”) prepared for Gresham Fire and
25 Emergency Services (“GFES”), Station 76 has the lowest call volume of

² “Fire service” is in the IGA as “fire prevention, fire suppression, fire investigation, fire inspection, fire code enforcement, fire education, hazardous material response service, emergency medical service and rescue service, emergency preparedness, and fire service planning.” Rec-1896 (emphasis added).

1 GFES's seven fire stations. Rec-1588. Station 76 also has the highest Station
2 Demand Zone Reliability at 90%, meaning that 90% of the time a unit from the
3 Station can respond to a call. Rec-1587. GFES's Regional Hazardous Materials
4 ("HazMat") Program is housed in Station 72, which is approximately 16
5 minutes from the filtration facility site. Rec-1535, 1835.

6 2. Existing PWB Facilities/Filtration Facility Design

7 PWB currently operates two water facilities near the filtration facility site
8 that have safety protocols and training in place to manage delivery, storage, and
9 use of treatment chemicals. Rec-2095. PWB has been operating the Lusted Hill
10 Treatment Facility ("Lusted Hill"), located half a mile north of filtration facility
11 site, and in the RFPD10 boundary, since 1992. *Id.* Lusted Hill currently accepts
12 chemical deliveries including soda ash and carbon dioxide. Rec-2096. Once the
13 filtration facility is operational, existing treatment occurring at Lusted Hill will
14 be integrated into the filtration facility, and chemicals currently going to Lusted
15 Hill will go to the filtration facility instead. *Id.* PWB also operates the
16 Headworks Facility, located east of the project site near the Bull Run
17 watershed, and has been safely using chlorine gas at that facility for over 95
18 years. *Id.* Once the filtration facility is operating, PWB will no longer need to
19 use chlorine gas for treatment. *Id.*

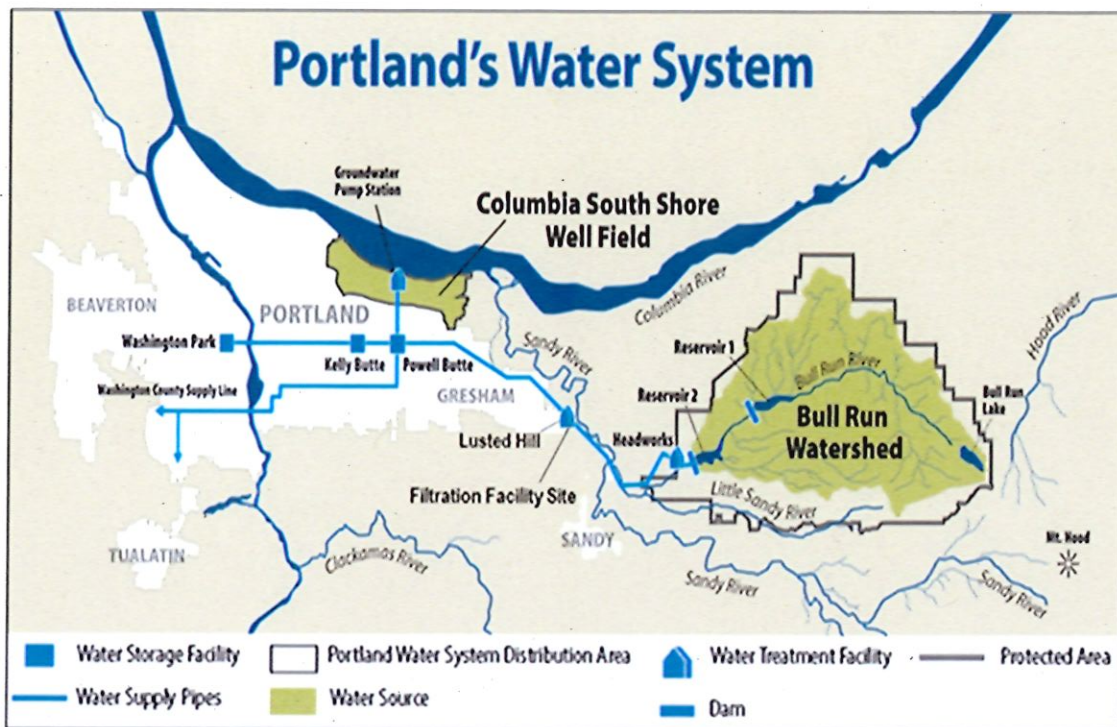


Figure 3. Portland's Water System Showing Proposed Filtration Facility Site

1

2

Rec-1823.

3

4 Instead of having chlorine delivered, the filtration facility will make a 0.8%

5 solution of hypochlorite on-site, a concentration far more dilute than household

6 bleach. Rec-2095-2096, 465. The filtration facility has been designed in

7 compliance with the International Building Code, National Fire Protection

8 Association ("NFPA") fire codes, and industry best practices that incorporate

9 redundant safety features. Rec-3550, 2097. The filtration facility will be

10 operated by highly trained operators whose training includes, but is not limited

11 to, hazardous materials emergency response, incident command systems, first

12 aid, and confined space entry. Rec-2098.

3. Filtration Facility Deliveries

The filtration facility will require a maximum of 16 chemical deliveries per week. Nearly half of those deliveries will be salt and soda ash, dry products. Rec-2096. Trucks transporting chemicals to the filtration facility will be subject to applicable federal and state safety and environmental statutes and regulations for safe transportation of chemical products. Rec-2096.

Several public roads in the vicinity of the project are currently identified as "failed roads" with a PCI of less than 50. Rec-343-344. Conditions 5 and 6 require both initial improvements to those road surfaces and a return of the surface to a condition as good or better than pre-construction. Rec-88-90. 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.³ Rec-737.

III. LUBA'S JURISDICTION

PWB agrees with petitioner's statement of LUBA jurisdiction.

IV. ARGUMENT

A. RESPONSE TO FIRST ASSIGNMENT OF ERROR

1. Preservation

PWB agrees this issue were preserved.

³ PWB objects to footnote 3 in the RFPD10 statement of facts. RFPD10 Brief, 3. The number of parking spaces projected to be located within the right-of-way is speculation and not a fact in the record.

1 **2. Standard of Review**

2 The Board will remand a decision that improperly construes applicable
3 law. ORS 197.835(9)(a)(D). As explained in *Dahlen v. City of Bend*, ___ Or
4 LUBA ___, ___ (LUBA No 2021-013, June 14, 2021) (slip op at 5-6), to
5 determine under ORS 197.835(9)(a)(D) if the Hearings Officer “properly
6 construed the law, [LUBA will] consider the text and context of the code and
7 give words their ordinary meaning” under the standard rules for interpreting
8 code provisions under *PGE v. Bureau of Labor & Industry*, 317 Or 606, 859
9 P2d 1143 (1993), *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009) and their
10 progeny (*PGE/Gaines*).

11 LUBA reviews findings to determine if they (1) address the applicable
12 standards, (2) set out the facts relied upon, and (3) explain how those facts lead
13 to the conclusion that the standards are met. *Heiller v. Josephine County*, 23 Or
14 LUBA 551, 556 (1992).

15 The Hearings Officer’s decision must be supported by substantial
16 evidence in the whole record. ORS 197.835(9)(a)(C).

1 3. RESPONSE TO FIRST AND SECOND
2 SUBASSIGNMENTS OF ERROR: The Hearings
3 Officer's interpretation of MCC 39.7515(D) is more
4 plausible than RFPD10's interpretation.

5
6 a) The Hearings Officer correctly interpreted
7 MCC 39.7515(D).

8
9 MCC 39.7515(D) requires a conclusion that the proposed use "will not
10 require public services other than those existing or programed for the area." The
11 Hearings Officer correctly interpreted the plain text in concluding that
12 MCC 39.7515(D) requires "that the services be available." Rec-54. The most
13 contextually appropriate definition for the term "available" is "that is accessible
14 or may be obtained."⁴ It is clear from the subsequent findings related to
15 emergency services – "I find that there is fire protection services for the
16 project" and "I agree with the Applicant that special response services exists in
17 the area" – that the Hearings Officer was interpreting MCC 39.7515(D)'s term
18 "existing" in his conclusion that the criterion requires that services be
19 "available."⁵ *Id.* The plain meaning of "existing" within the context of
20 MCC 39.7515(D) is "to continue to be" or "maintain being."⁶ Based upon the
21 respective definitions, "available" set a higher bar than "existing" because it
22 requires that services be accessible in addition to simply continuing to be.
23 Therefore, the Hearings Officer applied a more rigorous test in evaluating the

⁴ Merriam-Webster's Unabridged Dictionary, accessed July 7, 2024.

⁵ The scope of the interpretation is further clarified by the Hearings Officer's later and different interpretation of the term "programmed for the area." Rec-54.

⁶ Merriam-Webster's Unabridged Dictionary, accessed July 7, 2024.

1 evidence than that required by the plain meaning of the criterion, and any error
2 in doing so was harmless.

3 b) MCC 39.7515(D) does not impose a level of
4 service or require an adequacy
5 determination.
6

7 Under any plausible interpretation, MCC 39.7515(D) sets a relatively low
8 bar. In its first two subassignments of error, RFPD10 goes to extraordinary
9 interpretational lengths to try to raise that bar. The interpretations offered by
10 RFPD10 add requirements that are not supported by the plain text or applicable
11 context and are far less plausible than the Hearings Officer's interpretation.
12 RFPD10 then restates and imposes those fundamentally flawed interpretations
13 throughout the remaining subassignments of error.

14 RFPD10's first subassignment of error must be denied because
15 MCC 39.7515(D) does not impose an obligation to identify or conclude that a
16 specific level of service exists or that the service that exists is "adequate."⁷ To
17 eventually arrive at a test RFPD10 wants to apply, RFPD10 first distorts the
18 meaning and context of the term "require," a single word in MCC 39.7515(D).

⁷ Where the County has elected to impose an adequacy standard, it has done so expressly. *See, e.g.*, MCC 39.4115(E)(2) stormwater systems "shall be adequate to ensure[;]" MCC 39.4230(Q)(2) private access and intersections shall "provide adequate emergency access[;]" MCC 39.5345(B) requiring phased development "if public facilities are not otherwise adequate to service the entire development[;]" MCC 39.7315 requiring roads to be "adequate to safely accommodate additional traffic[;]" MCC 39.7802(A) allowing hearings officer to reduce density when it would "place undue burden" on fire protection service.

1 Out of several possible definitions, RFPD10 defined “required,” to mean “to
2 call for as suitable or appropriate in a particular case.” RFPD10 Brief, 8. There
3 are alternative definitions for “require” that are far more logical in the context
4 of the criterion. *See State v. Oliver*, 221 Or App 233, 237, 189 P3d 1240, *rev*
5 *den*, 345 Or 318 (2008) (relevant dictionary definition is the one that makes
6 sense in the context of the statute). Webster’s also defines “require” as “to
7 demand as necessary help or aid; need as an essential: stand in urgent need of.”⁸
8 Replacing “require” with the two definitions demonstrates that the definition
9 relating to help or aid is contextually more appropriate. Consider the following
10 comparison: 1) the proposed use will not *demand as necessary help or aid*
11 public services other than those existing or programed for the area; versus 2) the
12 proposed use will not *call for as suitable or appropriate in a particular case*
13 public services other than those existing or programed for the area. (Emphasis
14 added.) It is not whether it would be “suitable” for a use to have the public
15 service, which implies that the use could forgo the “suitable” public service and
16 still operate. It is only when the public service is “necessary” for the use and it
17 does not exist that a proposed use would fail this test.

18 As the term “require” is used in the criterion, the definition to demand as
19 necessary help or aid makes far more sense, as it refers to those public service
20 categories the proposed use will demand or need. Even if the Board were to

⁸ *Merriam-Webster's Unabridged Dictionary*, accessed July 7, 2024.

1 determine that RFPD10's preferred definition was more appropriate, that
2 definition still fails to support RFPD10's conclusion. There is no express or
3 implied "adequacy of service" standard.

4 RFPD10 next isolates "suitable or appropriate" from its suggested definition
5 without evaluating or considering the relevance in the context of the code.
6 RFPD10 Brief, 8. Relying on "suitable or appropriate," RFPD10 argues that
7 MCC 39.7515(D) requires a determination that the level of the service itself is
8 adequate, but RFPD10 fails to explain how "suitable or appropriate" are
9 synonymous with adequate in the context of the criterion. More importantly, as
10 the comparison above reveals, in the context of the relevant criterion, "suitable
11 or appropriate" in the definition relates to whether requesting the service is
12 suitable or appropriate, not whether the service to be provided is itself suitable
13 or appropriate. Nothing in RFPD10's analysis supports the conclusion that
14 MCC 39.7515(D) requires a determination by the Hearings Officer that the
15 quality and character of the emergency services required by the use is adequate,
16 much less the utterly false assertion that such a determination is "expressly
17 what the criterion mandates." RFPD10 Brief, 9.

18 Finally, RFPD10 manufactures a two-step evaluation it claims is necessary
19 to determine whether "adequate" public services exist, which as explained
20 above, is not a conclusion required by MCC 39.7515(D). The RFPD10
21 arguments related to the definition of "required" cannot, and do not, support a

1 conclusion that the Hearings Officer was required to, or moreover had the
2 authority to, apply RFPD10's fabricated two-step evaluation related to
3 adequacy. To be clear, describing a two-step evaluation is not in itself a fatal
4 flaw if it is grounded in the text of the criterion being applied. However, the
5 interpretational gymnastics needed to arrive at RFPD10's two-step evaluation is
6 flawed at each level, and thus, the reason for and substance of the evaluation is
7 neither consistent with, nor required by, MCC 39.7515(D).

8 Instead, the text of MCC 39.7515(D) requires no more than identification
9 of the services that a proposed use could require and a determination that those
10 services exist or are programed for the area. The Hearings Officer's
11 interpretation that the identified services be "available" is far more consistent
12 with the text of MCC 39.7515(D) and therefore more plausible than the flawed
13 multi-step interpretation set forth by RFPD10. *Patel v. City of Portland*, 77 Or
14 LUBA 349, ___ (2018) (slip op at 12) (summarizing a holding of *Gould v.*
15 *Deschutes County*, 67 Or LUBA 1, 7 (2013), as "where different interpretations
16 are equally plausible, and context supports a hearings officer choice of
17 interpretation, LUBA will defer to the hearings officer's interpretation").

18 Even if MCC 39.7515(D) could be plausibly interpreted to require a finding
19 that some level of service or adequacy standard is required for compliance with
20 MCC 39.7515(D), as discussed below, the Hearings Officer made such a
21 finding.

1 conditional use application and nothing in MCC 39.7515(D) requires RFPD10
2 approval.⁹

3 While failing to connect the claim that a service provider must be willing
4 to provide service to the text of MCC 39.7515(D), RFPD10 contends that the
5 Hearings Officer applied an inappropriately low threshold of “requiring only
6 that emergency services exist within the area.” RFPD10 Brief, 10. That,
7 however, is exactly what the plain text of MCC 39.7515(D) requires. Therefore,
8 rather than an inappropriately low threshold, the Hearings Officer applied the
9 criterion. As described in the statement of facts, the IGA commits GFES to
10 provide emergency services to the area including the facility. There can be no
11 dispute that fire protection and specialty response services exist and will serve
12 the facility.

13 Finally, RFPD10 assigns relevance to the Hearings Officer’s reference to
14 the term “programmed for the area” as applied to fire and emergency services.
15 RFPD10 Brief, 11. However, the Hearings Officer clearly found that both
16 regular fire protection and specialty emergency response services that could be

⁹ Unlike service providers who comment in a land use proceeding, decision makers are subject to ethical rules that, among other obligations, require them to recuse themselves in cases where they are so biased that they are incapable of an impartial decision. *Halvorsen-Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 711 (2001). The RFPD10 Board is comprised of members elected by electors within the district that includes and surrounds the project. Rec-1895. Further, the RFPD10 Board member who testified on behalf of the Board at the hearing also testified on his own behalf and submitted 78 pages of written testimony in opposition to the project based in part upon claims related to character of the area and natural resources. Rec-3820-3886, 1418-1430.

1 required by the proposed use “exist.” Therefore, it was not necessary for the
2 Hearings Officer to make an alternative finding that fire and emergency
3 services are programmed for the area, and he did not do so. RFPD10’s
4 discussion applying the Hearings Officer’s water line analogy to fire and
5 emergency services is not relevant to the Board’s review of these assignments
6 of error. RFPD10 Brief, 10-12.¹⁰

7 d) PWB evaluated the types of services
8 required, the expected demand, and the
9 existence of those services.
10

11 For the reasons set forth above, MCC 39.7515(D) does not require the
12 applicant to establish, or the decision maker to find, that service is adequate or
13 that any specific level of service exists. Nonetheless, PWB provided expert
14 testimony on the nature and expected demand of service that could be required,
15 and addressed response time arguments under a standard that RFPD10 claimed
16 was required.

17 In compliance with the criterion, PWB identified the public services that
18 could be required by the project, including fire protection services. Rec-7968.
19 PWB further identified and addressed specialty emergency response as a
20 subcategory of fire protection services that could be required by the project.
21 Rec-1835-1836, 1841-1842.

¹⁰ The Hearings Officer’s reference to “programed for the area” is after the fire and specialty services and nothing indicates he intended for it to relate back to emergency services.

1 PWB also evaluated the historic emergency response required by its
2 existing facility in the area and similar facilities to establish the expected
3 demand for all categories of fire protection services at the project site.
4 Specifically, PWB confirmed that Lusted Hill has not required an emergency
5 response from the fire department since it began operating in 1992. Rec-2095.
6 PWB's fire protection services consultant, Performance Based Fire Protection
7 Engineering ("PBFPE") further reviewed and summarized emergency response
8 data for a wastewater treatment facility in Gresham in the GFES service area
9 over the 10-year period from 2013 to 2023,¹¹ and a wastewater treatment
10 facility in Portland over the same 10-year period. Rec-1842-1844. The evidence
11 reviewed indicates that those facilities resulted in just 4.5 service calls per year
12 on average. Rec-1842-1844, 1886-1888. Notably, there were no hazardous
13 materials or technical rescue calls at either facility over the 10-year period.¹² *Id.*
14 Rec-1843-1844. Based upon its comparative review, PBFPE concluded,

15 " [t]he frequency of calls for emergency services from
16 this proposed facility would not be expected to be a
17 large burden on the current emergency services
18 provided for the area."
19

20 Rec-1846.

¹¹ The Gresham wastewater facility has two 5,000 gallon containers of 12.5% sodium hypochlorite (corrosive) compared to the 0.8% concentration of sodium hypochlorite (non-corrosive) to be used at the filtration facility. Rec-1838.

¹² To help establish expected demand of services, PWB also submitted a fire protection strategy report that summarizes the facility-specific fire protection systems, chemical containment provisions and response plans, and PWB staff emergency response training. Rec-3549-3551.

1 Finally, PBFPE evaluated the location, expected response time, and call
2 volume for the closest fire response station, Station 76, and concluded, “Station
3 76 is able to appropriately handle its current call volume at the highest
4 percentage of all stations with GFES.” Rec-326, 1834. PBFPE also evaluated
5 the closest station with HazMat response capabilities, Station 72. Rec-1834-
6 1835, 1841-1842. PBFPE concluded, “Regional HazMat Response teams are
7 available including Response Team #3 which responds out of Gresham Station
8 72, approximately 16 minutes from the proposed project site.” Rec-327, 1835.
9 Both stations are operated by GFES. GFES is required by the existing IGA to
10 provide fire suppression, advanced life support, emergency medical rescue, and
11 hazardous materials response on all alarms in RFPD10’s boundaries. Rec-1896-
12 1916.

13 e) MCC 39.7515(D) findings satisfy the Heiller
14 test.
15

16 The Hearings Officer adopted as findings sections of the Applicant’s
17 Final Written Argument (“final argument”) related to fire protection services
18 and specialty emergency services.¹³ Rec-54. The collective findings address and
19 interpret MCC 39.7515(D) as applied to the two categories of emergency
20 services identified. The findings identify facts relied upon for concluding that

¹³ “I adopt [final argument] pages 190-192 as my findings that the fire services are provided[;]” “I adopt [final argument] pages 192-194 as findings[.]” Record citations to findings incorporated by the Hearing Officer in this brief include the final argument citation followed by the decision citation.

1 fire protection services exist including, (1) the anticipated call volume, (2) the
2 fire protection services at Station 76 approximately 2.6 miles and a 7- to 8-
3 minute drive from the filtration facility, and (3) Station 76 staffing and high
4 demand zone reliability. Rec-325-327, 54. The findings also directly respond to
5 issues raised by RFPD10 related to emergency service to the facility and
6 explain how the facts led to the conclusion “the record clearly establishes, and
7 RFPD10 effectively concedes in its response that fire protection services that
8 could be required by the filtration facility currently exist.” Rec-326-327.

9 The findings also identify facts relied upon for concluding that specialty
10 emergency services exist, including (1) the IGA; (2) the specialty emergency
11 response capabilities of Station 72, located a 16-minute drive from the filtration
12 facility; (3) the mutual aid and regional response for special operations; and (4)
13 funding plans for the Station 72 HazMat team. Rec-327-329, 54. The findings
14 also directly respond to issues raised by RFPD10 and explain why the fact that
15 specialty emergency response services are available at Station 72 satisfies the
16 criterion explaining, for example, “nothing in the public services criterion
17 suggests that every possible emergency service must be available at the closest
18 station, only that it exists in the area,” and concluding “[t]he Fire Protection
19 Report and the record clearly indicate that specialized response services exist in
20 the area.” Rec-328, 329, 54.

1 While the first two subassignments primarily relate to interpretation,
2 RFPD10 drops in two undeveloped findings claims. First, citing *Norvell v.*
3 *Portland Area LGBC*, 43 Or App 849 (1979), without any discussion of the
4 relevance of the case, RFPD10 returns to their theme of “adequacy” and seems
5 to argue that the findings do not address certain concerns raised by RFPD10.
6 RFPD10 Brief, 9. If that is the argument, it is without merit and inadequately
7 developed for review. *Norvell* stands for the proposition that findings “must
8 address and respond to specific *issues* relevant to compliance with applicable
9 approval standards that were raised in the proceedings below” – not that every
10 single quote must be responded to. *Vanderburg v. City of Albany*, ___ Or
11 LUBA ___, ___ (LUBA No 2022-082, Jan 5, 2023) (slip op at 12). In a
12 footnote, RFPD10 selects isolated words from a list of “findings” adopted by
13 the RFPD10 Board presumably to identify them as the detailed concerns.
14 RFPD10 Brief, 9. RFPD10’s numbered concerns, however, fail to attribute a
15 specific approval criterion to any given “finding.” Instead, RFPD10 makes a
16 general assertion that the project does not meet three separate approval criteria
17 – MCC 39.7515(D), (F), or (G). Rec-5313-5317. This approach was insufficient
18 for either PWB or the Hearings Officer to discern a connection between a
19 specific concern and any one of the three criteria. Despite the lack of clarity, the
20 Hearings Officer’s findings directly address response times, distance, unit

1 availability,¹⁴ and the relevance of claimed budget constraints. Rec-326-327,
2 54. RFPD10's concern related to roadway conditions is more appropriately
3 connected to the hazardous condition criterion at MCC 39.7515(F) and it is
4 addressed in those findings. To the extent that RFPD10 intended connect the
5 roadway comments to MCC 39.7515(D), it did not do it well enough for the
6 Hearing Officer to understand that claim.

7 Second, RFPD10 contends, without any evaluation of the findings, that
8 the Hearings Officer made no "express findings" identifying the evidence that
9 led him to conclude the criterion was satisfied. RFPD10 Brief, 10. The
10 argument is inadequately developed for review. *See Neighbors for Livability v.*
11 *City of Beaverton*, 168 Or App 501, 507, 4 P3d 765 (2000) (LUBA does not
12 review land use decisions *per se*; it reviews "the arguments that the parties
13 make about land use decisions"). To the extent it is an argument that the
14 decision itself included inadequate findings, the Hearing Officer expressly
15 adopted final argument findings related to both fire protection services and
16 specialty emergency services. As explained above, the full findings identify the
17 criterion, set out facts relied upon, and explain how those facts led to the
18 conclusion that the criterion is satisfied.

¹⁴ The PBFPE response to the RFPD10 finding that contains the terms "unit availability" and "distance" refers back to the response to comment #3 related to response times, which is directly addressed in the findings. Rec-1836, 326-327, 54.

1 4. **RESPONSE TO THE THIRD SUBASSIGNMENT OF**
2 **ERROR: The decision is supported by substantial**
3 **evidence.**
4

5 In its third subassignment of error, RFPD10 makes a blended claim
6 attempting to discredit the substantial evidence in the record that the Hearings
7 Officer reasonably relied upon to conclude that the proposed use satisfies
8 MCC 39.7515(D), and again adds undeveloped claims related to adequacy of
9 findings. RFPD10 also relies upon its fundamentally flawed interpretations
10 from the first two subassignments of error. The evidentiary arguments that
11 extensively rely on those interpretations are equally defective.

12 RFPD10 specifically challenges three sources of evidence that support
13 the Hearings Officer's conclusion that services that could be required by the
14 project exist. Collectively these sources of evidence, along with the GFES 2022
15 Community Risk Assessment and Standards of Coverage Report ("GFES Risk
16 Report")¹⁵ constitute substantial evidence that a reasonable person would rely
17 on to determine the proposed use satisfies MCC 39.7515(D). RFPD10's
18 criticisms of this evidence lack both relevance and accuracy.

19 RFPD10 first attacks the relevance of the IGA. As detailed above, the
20 IGA clearly establishes that Gresham has contractually agreed to provide both
21 general fire protection services and specialty emergency services to all alarms
22 within RFPD10. Rec-1897. RFPD10 argues that GFES has not made a

¹⁵ Rec-1497-1595.

1 commitment to serve conditional uses or PWB's facility in particular. RFPD10
2 Brief, 17. While an affirmative commitment is not required, the IGA states:
3 "[t]he City will provide a minimum level of service within the area of the
4 District that is consistent with the service provided within comparable areas of
5 the City; but in no event less than the level of service more specifically required
6 by other provisions of this Agreement[.]" Rec-1897. Therefore, through the
7 IGA, GFES has committed to a minimum level of service identified in the IGA.
8 The IGA further identifies the types of services it will provide to include fire
9 suppression, advanced life support, emergency medical rescue, and hazardous
10 materials response. *Id.*

11 RFPD10 points to a clause that follows the level of service statement in
12 the IGA that provides that fiscal constraints could require a reduction in service.
13 RFPD10 Brief, 15. The language refers to a reduction in the level of service not
14 a termination in service. Moreover, language RFPD10 excluded provides, "[i]f
15 events occur that require a material service reduction, the City will notify and
16 confer with the District prior to any reduction." Rec-1898. RFPD10 claims that
17 nothing in the record reflects whether any fiscal constraints have driven a
18 reduction in service, suggesting PWB must prove a negative. Given the notice
19 requirement, the relevant consideration is instead that the record includes no
20 evidence that Gresham has provided notice to RFPD10 that fiscal constraints

1 will force Gresham to reduce the level of service below that codified in the
2 IGA.

3 RFPD10 further seeks to diminish the relevance of the IGA by noting it
4 was executed before the project application was submitted and will expire per
5 the terms of the agreement. RFPD10 Brief, 15. RFPD10 then mistakenly
6 contends that for a service to exist or be programmed there must be an
7 agreement in place to provide staffing at the maximum levels *in perpetuity*. The
8 claim is supported by neither the code nor logic. MCC 39.7515(D) by its plain
9 terms necessitates a finding that proposed use will not require services other
10 than those existing. "Existing" is present tense. Therefore, the notion that any
11 Community Service use applicant must provide evidence that an emergency
12 responder or other service provider has agreements in place *in perpetuity* is both
13 contrary to the plain language of the criterion and preposterous given Oregon's
14 budget process.¹⁶

15 RFPD10 next attacks the Fire Service Agency Review Form signed by
16 GFES and included in the original application submittal. Rec-5669-5682. The
17 Hearings Officer's findings do not assign relevance to these completed forms
18 beyond noting that they identified items needed to comply with fire code and
19 that those were incorporated into project design. Rec-325, 54.

¹⁶ Pursuant to ORS 294.321, municipal corporations, including special districts, have a budget period of one or two years.

1 RFPD10 argues that GFES is not the “designated service provider” and
2 provides “input and technical advice on emergency services.” RFPD10 Brief,
3 17. While the relevance of the claim is not clear, it is also not accurate. MCC
4 39.7515(D) does not include the term “designated service provider.” Moreover,
5 to the extent that RFPD10 is attempting to argue that GFES only provides input
6 and technical advice on emergency services, that is directly inconsistent with
7 the IGA, which obligates Gresham to “provide fire service” in accordance with
8 the specifications of the IGA. Rec-1897 (emphasis added). The IGA
9 unequivocally establishes that GFES is a provider of both general and specialty
10 fire services in RFPD10’s boundaries.

11 Finally, RFPD10 attacks the expertise, evaluation, and conclusions of the
12 report prepared by PWB’s third-party expert, PBFPE (“PBFPE Report”),¹⁷ but
13 provides virtually no assessment of the evidence in the PBFPE Report. RFPD10
14 Brief, 18. The credentials of the report’s author support the Hearings Officer’s
15 conclusion that PWB provided expert fire protection service testimony. Rec-54,
16 1892-1894. RFPD10 claims, without support, that the PBFPE Report is non-
17 responsive to a determination of whether emergency services will be adequate.
18 While a specific determination of “adequacy” is not required by
19 MCC 39.7515(D), contrary to RFPD10’s claims, PBFPE responded to the

¹⁷ Rec-1828-1894.

1 RFPD10 “findings” by evaluating expected demand for services as well as the
2 level and type of fire protection service available to serve the project.

3 Perhaps recognizing that PBFPE in fact identified the low anticipated
4 demand for both general fire protection and specialty service through the review
5 of historic demand for services at two nearby wastewater treatment facilities,
6 RFPD10 seeks to diminish the relevance of that quantification of expected
7 demand. Critically, while RFPD10 is dismissive of the comparison in its brief,
8 it offered no rebuttal evidence challenging PBFPE’s conclusion on the expected
9 frequency of call volumes.¹⁸ Rec-808. RFPD10 further complains that there is
10 no analysis of the effect that adding “an additional 4.5 service calls per year will
11 have on RFPD10’s ability to maintain existing levels of service.” RFPD10
12 Brief, 19. Setting aside the fact that RFPD10 does not directly provide any fire
13 protection service, the suggestion that an analysis of the impact of 4.5
14 additional calls per year is necessary is absurd. While not needed to conclude
15 that MCC 39.7515(D) is met, a simple mathematic calculation based upon
16 evidence in the record reveals that adding 4.5 service calls per year to Station

¹⁸ Even the dismissal in the RFPD10 Brief misses the mark. The footnote attacking the wastewater treatment plant comparison speculates that the Gresham facility “presumably maintains an urban level of fire protection that is more proximate, specialized and is not available in the rural area.” RFPD10 Brief, 19. The historical data was evaluated to identify the expected demand for services, not the nature or proximity of the service.

1 76 would increase that station's annual call load by less than 1%.¹⁹ As noted
2 above, the findings state that Station 76 has a station demand zone reliability of
3 90%.²⁰ Rec-326. Given the call reliability in combination with the
4 comparatively low additional call volume anticipated, there is substantial
5 evidence in the record that fire service exists and is available.

6 RFPD10 claimed below that National Fire Protection Association
7 (NFPA) response time standards could not be met, and seems to argue now that
8 meeting an NFPA standard is necessary for compliance with MCC 39.7515(D).
9 Rec-5313; RFPD10 Brief, 20. Nothing in the text of MCC 39.7515(D) supports
10 a conclusion that the County requires compliance with NFPA standards or any
11 other specific response standard in the determination that emergency response
12 services that could be required by the use exist. RFPD10 merely asserts that the
13 NFPA standards apply without providing any interpretational connection to
14 MCC 39.7515(D) compliance.

15 However, even if MCC 39.7515(D) could somehow be interpreted to
16 require compliance with a time standard, PBFPE provided a thorough response

¹⁹ The GFES Risk Report provides that Station 76 had an average annual call volume between 2018 and 2021 of 553.75 calls. Rec-1589. ($4.5 \div 553.75 = .8\%$)

²⁰ Notably, RFPD10 concurred with PBFPE's conclusion adopted by the Hearings Officer that Station 76 is "able [to] accommodate [] additional call load," and that "the 90th percentile is considered best practice and the most reliable measure to perform." Rec-806. RFPD10's further response related to expected future population and employment growth. *Id.* Speculative future growth has no impact on "existing" services.

1 to RFPD10's claim that it is unable to meet NFPA 1710 response times. Rec-
2 326-329, 54. PBFPE explained that the filtration facility "will sit right at the
3 threshold of the 8-minute response, with an expected arrival time between 7 to
4 8 minutes for Station 76[.]"²¹ Rec-326, 54. RFPD10 provided the following
5 reply, "RFPD10 does not dispute consultant's assertion and has never raised the
6 issue specific to the filtration plant." Rec-808. RFPD10 goes on to state that it
7 raised the response time issue in relation to construction delays. *Id.* The sole
8 question under MCC 39.7515(D) is whether the proposed use will require
9 services others than those existing. While PWB will provide emergency vehicle
10 access through construction zones at all times in compliance with Condition 7
11 (Rec-95), the timing of emergency response to other properties during
12 construction is completely irrelevant to determining if this use satisfies
13 MCC 39.7515(D).

14 RFPD10 cites *Langford v. City of Eugene*, 26 Or LUBA 60 (1993), to
15 seemingly question the sufficiency of PBFPE's conclusion on expected
16 response times. However, rather than supporting RFPD10's position, the case

²¹ To the extent that there is any question about the relevance of 8 minutes as an appropriate response time metric, PWB's consultants identified 8 minutes as the applicable NFPA 1710 response time. Rec-3549. This statement was reviewed by the Gresham Fire Chief, and he did not claim that the NFPA 1710 response time was erroneous. Rec-3016-3017. Additionally, the Gresham Risk Report repeatedly identifies an "8-minute travel time" or "8-minute drive time" as the relevant duration for evaluating performance. Rec-1584-1585. Therefore, GFES's own assessment of performance is based upon the target 8-minute drive time.

1 highlights the fact that, unlike the standard at issue in *Langford*,
2 MCC 39.7515(D) does not establish a specific level of service or adequacy
3 requirement. The standard at issue in *Langford* required housing applications to
4 demonstrate “[p]ublic and private facilities are adequate to meet anticipated
5 demand.” *Langford* at 62 (emphasis added). In addition to an approval standard
6 expressly requiring an adequacy determination, the Eugene Comprehensive
7 Plan included an area plan, the Wilakenzie Area Plan, that specifically
8 identified a four-minute response time. *Id.* at 61, 63. LUBA expressly
9 considered the specific time metric identified in the area plan adopted by the
10 city in concluding that additional evaluation of adequacy was needed. Unlike
11 the standards at issue in *Langford*, MCC 39.7515(D) does not require, expressly
12 or otherwise, a finding that public services are “adequate.” Even if it did, the
13 County has not adopted, nor does it reference, a specific response standard that
14 must be satisfied for required services to “exist.”

15 Finally, RFPD10 questions the Hearings Officer’s reliance on PBFPE’s
16 expert testimony over RFPD10’s assertion that it is not capable, or willing to,
17 provide an acceptable level of service. RFPD10 Brief, 13, 21. RFPD10 posits
18 that RFPD10’s Board and PBFPE have submitted conflicting evidence.
19 However, there is not a direct factual dispute between experts on facts in the
20 record relevant to the decision. PBFPE evaluated expected demand by looking
21 at the response history of similar facilities. RFPD10 offered no rebuttal

1 evidence to that comparison. PBFPE also evaluated Gresham's own Risk
2 Report and pointed to evidence in that document to establish that fire response
3 services are available within an 8-minute drive from an existing station with a
4 high response rating, and specialty response services are available at a station
5 within a 16-minute drive. Rec-1835. RFPD10 did not dispute the facts in the
6 GFES Risk Report. Instead, RFPD10 questions why the Hearings Officer did
7 not "rely on the RFPD10 findings that it is not capable of providing an
8 acceptable level of service." RFPD10 Brief, 21. As clearly established in the
9 Hearings Officer's decision and as described above, that question is not relevant
10 for purposes of compliance with MCC 39.7515(D).²²

11 The Hearings Officer properly relied on substantial evidence in the
12 record in concluding that special response services that could be required exist
13 to serve the project.

14 **5. RESPONSE TO THE FOURTH SUBASSIGNMENT OF**
15 **ERROR: MCC 39.7515(D) does not apply a specific time**
16 **metric.**
17

18 RFPD10 once again misapplies the word "required" in its fourth
19 subassignment of error. The plain language of the criterion relates to services
20 that could be required by the proposed use. It does not, as RFPD10's argument

²² Even if RFPD10's expert testimony conflicted with the expert testimony of PBFPE on any relevant evidence, the Hearings Officer has the right to rely on one expert over another. *See Borton v. Coos County*, 52 Or LUBA 46, 56 (2006). It was entirely reasonable to rely on PBFPE, despite being headquartered in a different state, given that the subject matter of the testimony, the evidence evaluated, and the record as a whole.

1 suggests, identify or mandate that a specific response time or service level is
2 required. Therefore, the argument that MCC 39.7515(D) requires PWB to
3 identify a specific NFPA response time or other specific response time for
4 specialty response is entirely without merit.²³ Moreover, the expert testimony
5 provided by PBFPE related to specialty service response times responded to the
6 comment from RFPD10 that Station 76 is not equipped or trained to respond to
7 hazardous materials and confined space rescue, and that those services “must be
8 dispatched from various Gresham fire stations which increases the response
9 times.” Rec-3814. Understanding that the RFPD10 and GFES comments in the
10 record focused on NFPA response times, PBFPE and the findings explain
11 NFPA does not require that a specialty response team be on-scene within any
12 response time metric.²⁴ Rec-327, 54. PBFPE and the findings further confirm
13 that regional HazMat response teams are available, including Response Team
14 #3 that responds out of GFES Station 72, approximately 16 minutes from the
15 filtration facility site.²⁵ *Id.*

²³ RFPD10 repeatedly seeks to dismiss PBFPE’s credibility because they are based in a different state. However, the entire argument RFPD10 makes in this subassignment of error relates to a national standard. A site visit is not needed to explain what is and is not required by the NFPA.

²⁴ Contrary to RFPD10’s assertion related to findings in the third subassignment of error, these findings are also responsive to the quoted statement from the GFES on response times for a major event. RFPD10 Brief, 17.

²⁵ In response to RFPD10’s claims about GFES budget constraints, the adopted findings note the PBFPE report provides evidence that there is currently no plan to disband HazMat teams and evidence of an alternative source of HazMat response. *Id.*

1 The Hearings Officer properly found the identified specialty emergency
2 services that could be required by the project exist in the area. Rec-54. That
3 conclusion is supported by substantial evidence in the record as reflected in the
4 Hearings Officer's findings. Rec-327-329, 54.

5 The first assignment of error should be rejected.

6 **B. RESPONSE TO SECOND ASSIGNMENT OF ERROR**

7 **1. Preservation**

8 PWB agrees that this issue was preserved.

9 **2. Standard of Review**

10 RFPD10 makes claims related to interpretation, findings, and substantial
11 evidence in this assignment of error, and the standards of review identified
12 under the first assignment apply to this assignment as well.

13 **3. RESPONSE TO FIRST SUBASSIGNMENT OF**
14 **ERROR: The Hearings Officer's interpretation of**
15 **MCC 39.7515(F) is consistent with the text and context**
16 **of the code and avoids an absurd result.**

17
18 MCC 39.7515(F) requires a conclusion that the proposed use "will not
19 create hazardous conditions." The Hearings Officer's adopted findings provide
20 a *PGE/Gaines* analysis of MCC 39.7515(F) that evaluates the plain language of
21 the criterion and gives proper contextual relevance to the entire term "hazardous
22 conditions" and "create" to support the interpretation that "the most reasonable
23 interpretation of the term 'hazardous condition' is something that is continually
24 in the state of being hazardous, not the risk that a hazardous situation could

1 arise at any point in the future, as broadly suggested by RFPD10 and other
2 project opponents.” Rec-331-332, 56.

3 The Hearings Officer determined “hazardous condition” means
4 “something that is continuously being in a hazardous state not something that
5 could remotely potentially happen.” Rec-56. Consistent with the interpretation
6 that mitigation must be commensurate with the risks, he also determined “it has
7 to be a hazard that cannot be mitigated to a point where it is no longer a serious
8 hazard.” *Id.* The Hearings Officer makes the following additional findings in
9 agreement with and based upon the final argument discussion of past County
10 interpretations and the absurd result of RFPD10’s proposed interpretation:

11 “I agree with Applicant that past interpretations of this
12 criteria have required applicants to evaluate potential
13 hazards and identify mitigation and safety measures,
14 so it does not create a hazardous condition. It does not
15 require that there be no possibility of a hazardous
16 condition and such an interpretation would be
17 unreasonable.”

18
19 Rec-56, 333-335. As addressed below, the Hearings Officer appropriately
20 applied this interpretation in the findings under each category of claimed hazard
21 and made an unequivocal finding for each facility operation category that the
22 proposed use will not create a hazardous condition. Rec-341 (use of chemicals),
23 342 (transport of chemicals), 343, 346 (facility operation traffic), and 349
24 (geotechnical).

1 a) The Hearings Officer's interpretation is
2 more plausible than RFPD10's
3 interpretation.
4

5 (1) Text

6 RFPD10 offers an alternative interpretation of MCC 39.7515(F) that rests
7 on a dictionary definition of a term not included in the criterion, "hazard."
8 RFPD10 Brief, 26. However, defining "hazard" or even "hazardous" alone and
9 out of context fails to shed any light on legislative intent. RPD10 then
10 challenges the interpretation of "condition" the Hearings Officer adopted. *Id.*
11 RFPD10 opines that the definition for "condition" cited, "a mode or state of
12 being" is more appropriate to describing social rank, work, or physical status.
13 These musings lack definitional support, however as "rank" and "position" are
14 listed in a different alternative meaning.²⁶ RFPD10's suggestion that
15 "something that exists as an occasion of something else" is better is not
16 persuasive, especially when considering the offered definition is further
17 described in the same definitional option as a "prerequisite." RFPD10's
18 argument that neither definition supports any sort of continuity is equally
19 unpersuasive. *Id.* A mode or state of being certainly has a temporal component
20 as a state of being can change that supports the Hearings Officer's interpretation
21 of "hazardous condition" as something continuously in a hazardous state.

²⁶ "Condition" *Merriam-Webster's Unabridged Dictionary*, accessed July 17, 2024.

1 RFPD10 also argues that PWB attempts to narrow the definition of
2 “hazardous condition” by identifying the existence of the word “create.”
3 RFPD10 Brief, 28. Rather than narrowing the definition of hazardous
4 conditions, the Hearings Officer appropriately discussed “create” in order to
5 acknowledge the inclusion of that word in the text of the criterion and give it
6 appropriate contextual relevance. ORS 174.010.

7 **(2) Context**

8 The Hearings Officer found that in two past community service use
9 approvals the County applied an interpretation of MCC 39.7515(F) that is
10 consistent with the Hearing Officer’s plain language interpretation. Rec-56,
11 332-333. In those cases, the County evaluated mitigation and safety measures to
12 determine that MCC 39.7515(F) was met despite the risk that a hazard could
13 arise. *Id.* The Hearings Officer found that a local government is not bound by
14 past interpretations. Rec-36. However, RFPD10 is wrong in its assertion that
15 how a regulation has been applied in the past is irrelevant. In *Patel*, LUBA
16 found that, when faced with interpreting an ambiguous term, past
17 interpretations of the same term provided “some support for the hearings officer
18 to interpret the term in the same way[.]” *Patel* at ____ (slip op at 13).

19 While not identifying it as such, RFPD10 seemingly points to MCCP
20 2.50 as contextual support for its alternative interpretation. RFPD10 Brief, 26-
21 27. However, to the extent it provides interpretational context, Policy 2.50 lends

1 more support to the Hearings Officer's adopted interpretation. In relevant part,
2 the direction to the County in the policy is to "impose conditions of approval
3 that mitigate off-site effects of the approved use" when necessary to "protect
4 the public from the potentially deleterious effects of the proposed use."
5 RFPD10 isolates the term "potentially" in the policy to try to support its
6 interpretation that a community service use must be denied if there is any
7 "chance" of an adverse outcome. *Id.* However, the focus of the policy is on the
8 land use "approval process" and relates to the imposition of approval criteria
9 that "mitigate off-site effects." *Id.* The policy does not require the complete
10 avoidance or elimination of off-site effects.²⁷ Moreover, the policy seeks to
11 protect the public from "potentially deleterious effects," terms not used in
12 MCC 39.7515(F).

13 RFPD10 also seems to make a context argument in its reference to
14 MCCP 2.45 and the purpose for the MUA-20 zone set forth at MCC 39.4300.
15 RFPD10 Brief, 31. However, RFPD10 has no evaluation of the language other
16 than to use the reference to those provisions to try to draw a distinction between
17 the proposed community service use and other community service uses allowed
18 conditionally in the MUA-20 zone. To the extent RFPD10 is trying to further
19 the argument made elsewhere that MCC 39.7515(F) should apply differently to

²⁷ The MCC does not define mitigate, but its plain meaning is "to make (something) less severe, violent cruel, intense, or painful." *Merriam-Webster's Unabridged Dictionary*, accessed July 17, 2024.

1 the proposed utility facility use, that distinction is inconsistent with the code
2 that applies MCC 39.7515(F) equally to all community service uses.²⁸

3 **(3) Maxims of Construction**

4 RFPD10 never articulates a proposed alternative interpretation of
5 “hazardous condition” in its brief. However, based upon RFPD10’s evaluation
6 of the definition of “hazard,” the only interpretation offered effectively claims
7 that a community service use cannot meet MCC 39.7515(F) if the proposed use
8 would create any “chance” or “possibility” of any “degree” of danger, peril, or
9 loss. Such an extreme interpretation cannot be what the County Board intended
10 when it adopted MCC 39.7515(F). As the hypotheticals included in the final
11 argument reveal,²⁹ that interpretation would require denial of virtually every
12 community service use subject to MCC 39.7515(F). Rec-333-334. That absurd
13 result effectively negates identifying Community Service uses as permissible
14 conditional uses in the first place. The Hearings Officer found:

15 “[a]most all the uses listed under the Community
16 Services could create hazards just by the nature of

²⁸ In fact, Policy 2.45 has even less relevance to utility facilities than other community service uses because MCC 39.7515(I) requiring that uses in the plan area be limited in type and scale to primarily serve the needs of the rural area does not apply to utility facilities, which are only subject to MCC 39.7515(A) through (H) pursuant to MCC 39.7520(A)(6).

²⁹ Without explanation or specificity sufficient for review, RFPD10 claims that hypothetical examples constitute new evidence. None of the information in that section of the final argument was offered to demonstrate compliance or noncompliance with MCC 39.7515(F). ORS 197.797(9). Instead, it was offered to provide analysis of a code interpretation and is therefore properly characterized as argument.

1 their operation...If any hazard was the test, then none
2 of these would be allowed. I do not believe that is
3 what the legislation intended.”
4

5 Rec-56. Considering whether a possible interpretation of an approval criterion
6 would effectively preclude all uses permitted conditionally in a zone is a valid
7 interpretational approach to the context of the criterion. *Davis v. Polk County*,
8 58 Or LUBA 1, 7 (2008) (county findings denying a CUP for a racetrack due to
9 a lack of harmony with other uses because the racetrack would be unable to
10 prevent any dust from leaving the property were deemed inadequate where
11 numerous listed conditional uses would necessarily generate dust).

12 The Hearings Officer appropriately considered the interpretational
13 options considering both text and context and applied a plausible interpretation
14 that avoids the absurd result. *State v. Davidson*, 369 Or 480, 501, 507 P.3d 246
15 (2022) (“when one construction would lead to an absurd result and the other
16 would not, we generally favor the latter, under the assumption that the
17 legislature would not intend an absurd or impossible result”).

18 Instead of actually addressing the untenable result created by its
19 suggested interpretation, RFPD10 pivots to an argument that squarely conflicts
20 with the strict interpretation argument it made earlier, claiming “[t]he scale of
21 chemical and fuel demands for a water treatment facility far exceeds what
22 would be required for any rural-scaled use.” Setting aside the inaccuracy of the
23 claim, in order for this to be relevant, MCC 39.7515(F) would need to be

1 applied differently to different categories of community services. As noted
2 above, that is inconsistent with the code. It is also an approach that LUBA
3 expressly rejected in *West Hills & Island Neighbors v Multnomah County*,
4 stating “we believe [MCC 39.7515]³⁰ should be applied consistently no matter
5 what use is proposed.” LUBA No. 83-018 at 7, *affd*, 68 Or App 782 (1983), *rev*
6 *den*, 298 Or 150 (1983). Taking the two conflicting elements of RFPD10’s
7 alternative interpretation together reveals that it is less plausible than the
8 Hearing Officer’s interpretation.

9 **(4) Terms used in the decision**

10 RFPD10 contends that the Hearings Officer improperly includes words
11 that do not appear on the face of the text. RFPD10 Brief, 25. RFPD10 is correct
12 that “exceptional,” “unreasonable,” “continuous,” and “unmitigated” do not
13 appear in the plain text of MCC 39.7515(F). However, the Hearing Officer does
14 not apply those terms to his primary interpretation identified above. Instead, he
15 relates those terms to hypotheticals on the type of hazards that could result in
16 denial of a conditional use. Rec-56.

17 If the Board believes that reference to the terms is more than illustrative
18 dicta, each word RFPD10 objects to is connected to the Hearing Officer’s
19 interpretation of the text. As provided above, the interpretation (1) gives
20 relevance to the terms “condition” and “create” in the criterion by considering

³⁰ MCC 39.7515 was previously subsection 7015.

1 their ordinary meaning; (2) evaluates past County decisions as context, and
2 (3) concludes that any ambiguity resolved in favor of RFPD10's proposed
3 interpretation during the local proceeding would lead to an absurd and
4 unreasonable result. Rec-331-335, 56. Therefore, the adopted interpretation
5 supports a statement that denial would require a risk that is "continuous,"
6 "unreasonable," and "exceptional."³¹ The Hearing Officer also agreed that
7 mitigation and safety measures can be applied to meet the criterion so long as
8 they are "commensurate with the risk." Rec-334, 56. That interpretation
9 supports a statement that the risk must also be "unmitigated" in order to result
10 in denial.

11 **b) The Hearings Officer's interpretation is**
12 **consistent with LUBA decisions.**
13

14 RFPD10 seeks support for its position in *Stephens v. Multnomah County*,
15 10 Or LUBA 147 (1984). However, in referencing *Stephens*, RFPD10
16 erroneously conflates a findings requirement with an interpretational issue.
17 Requiring "an unequivocal finding of no hazardous conditions," does not
18 preclude a decision maker's interpretation of what constitutes a "hazardous
19 condition." Consistent with *Stephens*, the Hearings Officer in this case adopted

³¹ The plain meaning of "exceptional" is "being out of the ordinary." *Merriam-Webster's Unabridged Dictionary*, July 17, 2024. Therefore, the use of the term is consistent with the interpretation because finding an ordinary risk (*i.e.*, the risk that a vehicle traveling to or from a use could result in an auto accident) constitutes a hazardous condition under MCC 39.7515(F) is an absurd result that cannot be consistent with legislative intent.

1 unequivocal findings the proposed use “will not create a hazardous condition”
2 for each risk category and appropriately interpreted “hazardous condition.”
3 Notably, in addition to identifying a findings requirement, *Stephens*, as well as
4 *West Hills*, reject RFPD10’s claim that MCC 39.7515(F) cannot be met if there
5 is a chance of an adverse outcome. RFPD10 Brief, 29.

6 In *Stephens*, the County determined that a business subject to the
7 County’s “will not create hazardous conditions standard,” created a potential for
8 contamination if waste storage transfer was not handled appropriately. *Stephens*
9 at 151. The County referred to DEQ permit compliance in concluding the
10 criterion was met. *Id.* While LUBA remanded for other reasons, LUBA
11 expressly rejected the position taken repeatedly by RFPD10 during the local
12 proceeding that a hazard cannot be mitigated in order to avoid creating a
13 hazardous condition. *See, e.g.,* Rec-797. Like RFPD10, the petitioner in
14 *Stephens* argued “unconditional findings of no hazard” were required. *Stephens*
15 at 151. LUBA responded, “[w]e reject petitioner’s argument that conditions
16 may not be used to ensure compliance with ordinance criteria.” *Id.* at 152.

17 LUBA’s holding on the hazardous conditions criterion in *West Hills* also
18 directly refutes RFPD10’s suggested interpretation of MCC 39.7515(F). In *West*
19 *Hills*, the County addressed potential fire hazards created by a community
20 service use, and the County found “no hazard to exist because there will be fire
21 fighting procedures in force on-site and available fire-fighting forces off-site.”

1 *West Hills* at 24. Petitioners claimed that there was a potential for fire, among
2 other hazards, that made it impossible for the County to satisfy the criterion. *Id.*
3 at 25. In response, LUBA concluded, “we also find the county to have sufficient
4 evidence from which to conclude that fire danger is low and that fires that do
5 occur can be extinguished without hazard.” *Id.* In other words, LUBA expressly
6 rejected the notion that the possibility of a hazard at any point in time was the
7 equivalent of a hazardous condition under the criterion if there are protections
8 in place to mitigate the risk.

9 Collectively, the holdings in these cases are consistent with the Hearings
10 Officer’s interpretation. Rec-331-332, 56.

11 c) **The Hearings Officer provided adequate**
12 **findings.**
13

14 The Hearings Officer made findings under each risk category raised by
15 opponents. Rec-200-215, 56-58. The findings for each category identify facts
16 relied upon and explain how those facts led to an unequivocal finding that the
17 risk described in each category will not create a hazardous condition.

18 RFPD10 makes a general claim in its first subassignment of error that the
19 findings are inadequate, but fails to provide analysis of the findings adopted for
20 each risk category. RFPD10 also does not challenge the risk categories
21 themselves as being inadequate. Instead, RFPD10 argues that the findings are
22 too focused on facility design, operation, and mitigation. RFPD10 Brief, 31-32.
23 In making this argument, RFPD10 conflates the hazardous conditions criterion

1 at MCC 39.7515(F) with the character of the area criterion at MCC 39.7515(A)
2 by arguing that PWB or the Hearings Officer erred by not considering the
3 character of the area in evaluating the risk categories. *Id.* PWB disagrees with
4 RFPD10's one sided and inaccurate description. However, even if accurate,
5 there is nothing in the text of MCC 39.7515(F) that requires evaluation of
6 hazardous conditions differently depending on the "surrounding area context"
7 and RFPD10 has advanced no interpretation argument that would support that
8 conclusion. *Id.* This is evident in the final sentence of the subassignment where,
9 rather than referencing the actual text of the criterion, RFPD10 simply makes
10 up a brand new "adversely affect" standard that is wholly absent from any
11 plausible interpretation of MCC 39.7515(F).

12 4. **RESPONSE TO SECOND SUBASSIGNMENT OF**
13 **ERROR: The findings are supported by substantial**
14 **evidence in the record.**
15

16 In the second subassignment of error, RFPD10 again seeks to alter the
17 MCC 39.7515(F) in stating that the unequivocal nature of the standard requires
18 "mitigation to a degree that no hazardous condition exists." The word "exists"
19 is not present in the text of MCC 39.7515(F), nor is it discussed as a relevant
20 finding in *Stephens* (the case RFPD10 cites for this erroneous proposition).

1 a) The HMMP is easily distinguished from the
2 habitat plan in Gould.
3

4 RFPD10 then identifies just two evidentiary arguments. The first relates
5 to the Hazardous Materials Management Plan (HMMP), Rec-2626-2655, for the
6 filtration facility discussed in the findings. While it is unclear how it relates to a
7 substantial evidence challenge, RFPD10 first claims that the finding that the use
8 of chemicals at the facility will not create an unduly hazardous condition is
9 insufficient. However, that is not the only finding related to the use of
10 chemicals included in the decision. The Hearings Officer adopts final argument
11 pages 201-204, 204-205, 205-206, and 207-209 as findings under the heading
12 “use of chemicals.” Rec-56-57. Those findings specific to HMMP state that
13 “the existence [and] substance of the HMMP supports the appropriate
14 conclusion that the project will not create a hazardous condition.” Rec-338, 56
15 (emphasis added). Use of the word “support” in the findings indicates that the
16 Hearings Officer did not conclude that the HMMP alone satisfies the criterion.
17 The Hearings Officer’s findings related to chemicals further clarify that the
18 HMMP protections, filtration facility design, and staff training, as summarized
19 in a set of factors in the findings, “work collectively to reduce the risk of a
20 hazardous situation to the point where the project will not create a hazardous
21 condition.” Rec-341, 57. The Hearings Officer did not rely on the HMMP in
22 isolation to conclude that the criterion was satisfied. Therefore, even if the
23 Hearings Officer made an equivocal finding when discussing the HMMP in

1 isolation, that finding is superseded by the unequivocal finding that, based upon
2 the collective factors reducing risks, the use of chemicals at the facility will not
3 create a hazardous condition.

4 RFPD10 next argues the condition of approval related to the HMMP
5 imposed by the Hearings Officer is flawed. RFPD10 relies exclusively on the
6 decision in *Gould v. Deschutes County* to make its case. *Gould v. Deschutes*
7 *County*, 216 Or App 150, 171 P3d 1017 (2007). However, the factual and legal
8 circumstances that the Court of Appeals relied upon to determine that the
9 county's decision in *Gould* was flawed are simply not present here.

10 In *Gould*, the applicable county standard required a determination that
11 any negative impact on fish and wildlife resources would be mitigated so that
12 there is "no net loss or net degradation of the resource." *Gould* at 163. *Gould*
13 also considered the fact that the development code expressly (1) required that
14 the application include the "proposed resource protection plan" and (2)
15 mandated that the approval standards be evaluated from substantial evidence in
16 the record. *Id.* In *Gould*, the mitigation plan was not yet composed, and the
17 Court of Appeals specifically concluded that, thus, "the particular nature of the
18 wildlife impact mitigation plan was not known" at the time of the local land use
19 hearing. *Gould* at 162. Finally, the yet to be developed wildlife impact
20 mitigation plan was the only evidence relied upon for a finding of no net loss.

1 The HMMP in this case is easily distinguished from the plan at issue in
2 *Gould*. First, unlike the “no net loss” standard at issue in *Gould*, for the reasons
3 set forth above, MCC 39.7515(F) does not require a determination that there is
4 no possibility of risk. Second, unlike the Deschutes County code, the MCC does
5 not require submittal of an HMMP to satisfy MCC 39.7515(F). In this case,
6 unlike in *Gould*, PWB prepared and submitted a plan for review during the
7 local land use proceeding and the HMMP condition of approval requires
8 submittal of a final plan that is in substantial compliance with the format and
9 contents of the HMMP in the record and in compliance with the International
10 Building Code and the International Fire Code.³² Rec-93. As discussed above,
11 the HMMP is not the only evidence relied upon to reach a finding of
12 compliance with MCC 39.7515(F). Instead, the existence of the HMMP is one
13 of several factors that, the Hearings Officer considered in concluding that based
14 upon the cumulative factors, the use of chemicals at the facility will not create a
15 hazardous condition.

16 Finally, the very nature of the HMMP is fundamentally different from the
17 wildlife impact mitigation plan at issue in *Gould*. As the name suggests and as
18 required by the standard, the purpose of the wildlife plan is to mitigate the
19 impacts of the development on wildlife resources. In other words, it is

³² Not only did RFPD10 provide substantive comments on the plan, but PWB modified the plan in response to some comments and fully addressed other comments. Rec-2626-2655, 1828-1894, 507-510.

1 responsive to fixed resources external to the use. In stark contrast, the HMMP is
2 an operational plan for the use itself that must be updated throughout the life of
3 the facility to account for changes in materials or emerging and improved safety
4 protocols.³³ Rec-338, 56. As required by the HMMP condition itself, any
5 changes must be consistent with international safety codes and updated
6 HMMPs must be provided to emergency responders. Keeping in mind the
7 purpose of the HMMP is to support the conclusion that the proposed use will
8 not create hazardous conditions, it is notable that a condition that fixed an
9 HMMP in place would be at odds with the end goal of the criterion itself. For
10 example, if there are future changes over the life of the facility to the
11 International Fire Code or OSHA standards that require some change in facility
12 operation, the HMMP must be updated to implement and reflect the new
13 standards.

³³ RFPD10 claims that a reference in Table 6 of the HMMP included in the record and referenced in the condition allows for the addition of future materials is effectively an acknowledgement that hazardous conditions will change in the future. RFPD10 Brief, 34. However, RFPD10 specifically omits from its quotation of the footnote that “[t]he examples included in the note are equipment specific lubricants and paints and coatings for equipment maintenance.” Rec-338, 2656-2657 (Supplemental Memo explanation of Table 6). With the explanation of the nature of the materials excluded reinserted, a reasonable person viewing that information and the record as a whole, including the evidence related to PWB’s safety record, staff training, and facility design, could absolutely make the finding that MCC 39.7515(F) was met.

1 b) MCC 39.7515(F) does not apply to
2 construction activities.
3

4 The remaining RFPD10 arguments are primarily intended to support the
5 claim that the Hearings Officer's conclusion related to construction activities on
6 the right-of-way was not supported by substantial evidence.³⁴ However, for the
7 reasons set forth in the County Brief, construction is not the land use under
8 review. Therefore, it was unnecessary for the Hearings Officer to find that
9 construction activities in the right-of-way or on the filtration facility site
10 satisfied MCC 39.7515(F).³⁵ While PWB strongly disagrees with RFPD10's
11 characterization of the evidence and findings related to construction activities
12 and safety,³⁶ the Hearing Officer's findings based on substantial evidence in the
13 record were not required for compliance with MCC 39.7515(F).

³⁴ RFPD10 further objects that the Hearings Officer did not specifically address a claim that a truck went off the road. RFPD10 Brief, 36-37. A decision-maker is not required to identify and respond to every piece of opposing evidence. *Stoloff v. City of Portland*, 51 Or LUBA 560, 567 (2006). Regardless, the findings address the issue of truck driver qualifications and address opponent concerns about inclement weather, specifically citing the Cottrell CPO testimony at Rec-1165-1168 that referenced the truck sliding off the road. Rec-56, 57, 342.

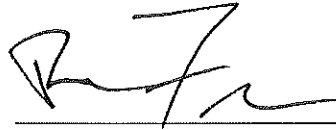
³⁵ While not required for compliance, the Hearings Officer adopted findings on emergency access during construction that identified and addressed feasibility of conditions of approval. Rec-57, 346-348. The Hearings Officer also adopted as findings County Transportation's response to RFPD10 testimony on emergency access. Rec-734-735, 14.

³⁶ Also note the accommodation condition related to emergency coordination that RFPD10 repeatedly claims is missing from the decision, is included in the conditions section of the decision in its entirety. Rec-95.

V. CONCLUSION

1
2 Based on the foregoing, PWB respectfully requests that the Board deny
3 each of petitioners' assignments and subassignments of error and affirm the
4 County's decision.

5 DATED this 16th day of August, 2024.

6
7 

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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
MULTNOMAH COUNTY RURAL FIRE PROTECTION DISTRICT
NO. 10** 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 MULTNOMAH COUNTY
RURAL FIRE PROTECTION DISTRICT NO. 10** for LUBA No. 2023-086,
by United States Postal Service first class mail, postage prepaid, to the parties
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