

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

Counsel listed on next page

Carrie A. Richter, OSB No. 003703
Bateman Seidel, P.C.
1000 SW Broadway, Suite 1910
Portland, OR 97205
(503) 972-9920
*Attorney for Petitioners and Attorney
for Intervenor-Petitioner Multnomah
County Rural Fire Protection District
No. 10*

Zoe Lynn Powers, OSB No. 144510
Renee France, OSB No. 004472
Radler White Parks & Alexander,
LLP
111 SW Columbia Street, Suite 700
Portland, OR 97201
(971) 634-0215
*Attorneys for Intervenor-Respondent
Portland Water Bureau*

James D. Howsley, OSB No. 012969
Ezra L. Hammer, OSB No. 203791
Jordan Ramis PC
1211 SW Fifth Avenue, 27th Floor
Portland, OR 97204
(360) 567-3913
*Attorneys for Petitioner-Intervenors
Oregon Association of Nurseries and
Multnomah County Farm Bureau*

Elliot Field, OSB No. 175993
Garrett Hemann Robertson PC
4895 Skyline Rd. S
Salem, OR 97306
(503) 581-1501
*Attorney for Petitioner-Intervenor
Gresham-Barlow School District No.
10J*

David N. Blankfeld, OSB No. 980373
Jenny Madkour, OSB No. 982980
Multnomah County Attorney's Office
501 SE Hawthorne Blvd Ste 500
Portland, OR 97214
(503) 988-3138
Attorney for Respondent

Jeffrey L. Kleinman, OSB No.
743726
1207 SW Sixth Avenue
Portland, OR 97204
(503) 248-0808
*Attorney for Intervenor-Petitioner
Pleasant Home Community
Association and Angela Parker, dba
Hawk Haven Equine*

Andrew Mulkey, OSB No. 171237
340 SE 6th Avenue
Portland, OR 97214
(971) 420-0916
*Attorney for Intervenor-Petitioner
Friends of Oregon*

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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).

PWB accepts the standing of Intervenor-Petitioners Oregon Association of Nurseries and Multnomah County Farm Bureau (collectively, “OAN”).

II. STATEMENT OF THE CASE

A. NATURE OF THE DECISION

PWB rejects OAN’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 (the “County”) Consolidated Response Brief (“County Brief”), the challenged decisions are only 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 OAN’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; and

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

- 1 • Review Use for Utility Facility in Exclusive Farm Use (“EFU”) zoned
2 land, for the raw water pipeline tunnel 150-200 feet beneath the south
3 edge of the EFU property. Rec-7693.

4 No other part of the decision is implicated.

5 **B. RELIEF SOUGHT**

6 PWB requests that LUBA affirm the decision in full.

7 **C. SUMMARY OF ARGUMENTS**

8 **1. Fourth Assignment of Error**

9 MCC 39.7515(C) is limited to evaluating “surrounding lands devoted to
10 farm ... use[.]” The County has discretion in determining the scope of the
11 surrounding lands. The findings provide a detailed explanation of how the
12 “surrounding lands” for analysis in this case was determined, namely: based on
13 the potential externalities or sensitivities of the project, as required by caselaw.
14 OAN does not attempt to respond to those findings.

15 **2. Second Assignment of Error**

16 This assignment of error was not preserved. Even if it were, the decision
17 explicitly applied *Portland General Electric Company v. Bureau of Labor &*
18 *Industry*, 317 Or 606, 859 P2d 1143 (1993), *State v. Gaines*, 346 Or 160, 206 P3d
19 1042 (2009), and their progeny (*PGE/Gaines*), and did not apply a “less
20 strenuous” test than in state law.

3. Third Assignment of Error

This assignment of error was not preserved. Even if it were, OAN ignores the Hearings Officer's incorporation of explicit and extensive farm-by-farm findings in Exhibit J.88. Rec-52.

4. First Assignment of Error

This assignment of error was not preserved. Even if it were, there was no obligation to study alternatives that crossed EFU land, leaving two alternatives for the raw water pipelines. Each of those two alternatives had fatal geotechnical flaws, as shown in an expert report. There is no error.

D. SUPPLEMENTARY STATEMENT OF FACTS

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

OAN's summary of facts is erroneous in stating that the County "issued a Type 2 decision which was appealed to the ... Hearings Officer[.]" OAN Brief, 3. The consolidated decision was processed as a Type III application, with the County's initial (and final) decision made by the Hearings Officer. Rec-8027; MCC 39.1105(B), (F) . There was no prior decision by staff, only a staff report that recommended approval. Rec-3905.

The findings about the Farm Impacts Test (defined below) are based on an extensive set of analyses performed by the applicant's farm expert, Mr. Prenguber of Globalwise. Mr. Prenguber's reports were not *post hoc* evaluations.

1 Instead, Mr. Prenguber has been advising the project team for years and directly
2 contributed to work to modify design and construction decisions to minimize or
3 eliminate potential impacts on farm practices. Rec-276; APP-061; Rec-530. The
4 six reports in the record from Mr. Prenguber are:

- 5 • The 163-page “**Operations Report**” was submitted as part of the
6 initial application. It defines the surrounding lands, maps the types
7 of farms in the area, farm-by-farm, and provides a detailed review
8 of accepted farm practices for each type of farm. It analyzes the
9 externalities and sensitivities of the proposed project and concludes
10 that there will be no significant impact on accepted farm practices
11 from that operating use. Rec-7128-7292.
- 12 • In response to new staff assertions that the County’s code required
13 consideration of construction activities in addition to the operating
14 use,² Mr. Prenguber’s “**Farm Traffic Report**” (Rec-526-562)
15 summarized research he had done “over the last two years ...
16 assessing how ... construction activity could potentially impact
17 farmers that use the road system,” particularly in light of the 11
18 constraints on construction in the right-of-way that PWB had self-
19 imposed. Rec-529; 530-531. The report includes a farm-by-farm
20 review of farmer routes. Rec-534-562.

² See County Brief, Section IV.A.4(b).

1 out by section, followed by the record pages referenced, with highlighting of the
2 pertinent sections. *See Frewing v. City of Tigard*, 59 Or LUBA 23, 26 (2009) (“it
3 is common practice, and very useful to the Board, for parties to highlight or
4 otherwise draw attention to the pertinent sections”). We hope this organization is
5 helpful to the Board.

6 County code at MCC 39.7515(C) contains language materially³ identical
7 to the state statute at ORS 215.296(1) (known as the “Farm Impacts Test”), which
8 provides standards of approval for “certain uses in [EFU] zones.” The filtration
9 facility and most of the pipelines are in the MUA-20 zone, explicitly a “non-
10 resource” and “exception lands” base zone to which Goal 3 does not apply. Rec-
11 257. Although the local MUA-20 approval criterion does not implement state
12 law, the language is the same:

13 “(C) The use will not:

14
15 “(1) Force a significant change in accepted farm
16 or forest practices on surrounding lands devoted
17 to farm or forest use; nor
18

³ The only difference is the use of the conjunction “nor” between the subsections in MCC 39.7515(C), rather than “or” in ORS 215.296(1). “Nor” means “or not” – and is more technically grammatically correct in this context. Merriam-Webster’s Unabridged Dictionary, s.v. “nor,” accessed July 21, 2024, <https://unabridged.merriam-webster.com/unabridged/nor>. No party has ascribed any interpretational significance to this grammatical correction by the County in their otherwise wholesale adoption of the state Farm Impacts Test, and there does not appear to be any reason to do so. *See, e.g., Friends Brief*, 22n6. For this reason, and for brevity, PWB refers to these tests as the same.

1 “(2) Significantly increase the cost of accepted
2 farm or forest practices on surrounding lands
3 devoted to farm or forest use.”
4

5 MCC 39.7515(C).

6 Because it does not implement nor directly apply state law, caselaw
7 interpreting ORS 215.296(1) was not required to be applied⁴ to this project under
8 MCC 39.7515(C). PWB argued that a lower, “less stringent” standard could
9 apply under the local code, particularly as the Multnomah County
10 Comprehensive Plan (MCCP) directs that the MUA-20 policies to “minimize
11 conflicts between farm and non-farm uses” are intended to be “less stringent than
12 policies in Exclusive Farm Use zones.” MCCP, page 3-11; Rec-258. LUBA could
13 find that the “less stringent” standard should be applied under the local code for
14 those same reasons, but, at this point, for this case, it is irrelevant: the Hearings
15 Officer found that the project meets the more stringent state law standard. Rec-
16 37, 52.

17 As discussed in the County’s Brief, Section IV.A, PWB argued, and the
18 Hearings Officer found, that construction is not the “use” to be evaluated under
19 the MCC: “The text and context of the [MCC] is plain and unambiguous and
20 simply does not provide any textual support for a claim that temporary

⁴ Where local code “does not implement” the Farm Impacts Test in state law, “it is not necessarily the case that the county must undertake the same analysis required under the statute” and “cases interpreting the statute do not control how the county interprets and applies the code[.]” *Comden v. Coos County*, 56 Or LUBA 214, 220, 224 (2008).

1 construction activities required for a permanent use are also subject to the
2 approval criteria for the long-term use.” Rec-138; Rec-35-36 (incorporating).

3 However, because ORS 215.296(1) “arises in its own text, context, and
4 legislative history” the findings contain “a separate analysis” of the statute under
5 *PGE/Gaines*. Rec-260-261; APP-010-013 (“Looking at the question through the
6 required lens of *PGE/Gaines* makes clear that construction is not part of the use
7 to be evaluated.”). That conclusion – that “construction is not part of the use to
8 be evaluated” under state law – also would have allowed the Hearings Officer to
9 apply a less stringent standard and avoid the work of considering arguments
10 related to construction. However, as with the M CCP, the Hearings Officer
11 declined to apply a lower bar. Instead, the findings evaluate construction-related
12 arguments, and find that the Farm Impacts Test is met *both* for the operating
13 project and, in the alternative if construction were evaluated, for construction of
14 the project. Rec-52 (“I find that for both the operation and the construction under
15 the Application, [the project] does not violate the farm impact test.”).

16 The findings summarize the caselaw interpreting the statute that the
17 decision applied. A portion is quoted here:

18 “The key Oregon Supreme Court case interpreting
19 ORS 215.296(1) is *Stop the Dump Coal. v. Yamhill*
20 *Cty.*, 364 Or 432 (2019) [“*STD IV*”]. In *Stop the Dump*,
21 a landfill sought to expand on EFU land in Yamhill
22 County. Overall, the Court said that the Farm Impacts
23 Test requires:
24

1 “(1) the applicant to properly identify the
2 surrounding lands, the farms on those lands, the
3 accepted farm practices on each farm, and the
4 impacts of the proposed nonfarm use on each
5 farm practice;[]”
6

7 “(2) the local government to determine whether
8 the proposed nonfarm use will force a
9 ‘significant’ change to, or cost increase in, an
10 accepted farm practice, as that term is ordinarily
11 used; and’
12

13 “(3) if there is a significant change, the local
14 government to determine whether the applicant
15 has demonstrated that, with conditions of
16 approval ..., the nonfarm use meets the test.’
17

18 “*Id.* at 444-45 (formatting added).”
19

20 Rec-258-259; APP-004-006.

21 The findings also carefully make clear that the “Farm Impacts Test is not
22 a broad test asking whether there are any ‘significant impacts’ on anything related
23 to farming. Instead, the language of the statute and the MCC is narrowly tailored
24 to ask whether the use will ‘force a significant change in accepted farm ...
25 practices’ or ‘significantly increase the cost of accepted farm ... practices[.]’”
26 Rec-274; APP-057-059. For this reason, LUBA has reversed decisions where a
27 county improperly converted an analogue of the Farm Impacts Test “into a
28 simpler and broader ‘significant impacts’ standard that appears to be divorced
29 from ‘costs’ or ‘changes in’” accepted practices. *Oregon Pipeline Company v.*
30 *Clatsop County*, 71 Or LUBA 246, slip op at 16 (2015).

1 Moreover, this is not a case where evidence in the record is sparse. A good
2 amount of caselaw interpreting the statutory Farm Impacts Test remands a
3 decision because a county simply did not do the work to try to fully identify and
4 analyze the potential impacts on accepted farm practices in the surrounding lands.
5 *See, e.g., DLCD v. Klamath County*, 25 Or LUBA 355, 366 (1993) (only
6 describing forest practices as “logging” and “salvage logging” not adequate).

7 Here, as the findings explain,

8 “In contrast to that minimalist approach, the Water
9 Bureau chose to hire a farm expert early in their
10 planning process in order to inform the design of the
11 project and the manner of construction in order to
12 minimize any impacts on accepted farm practices
13 below the level of significance. The Globalwise reports
14 listed above and the analysis of potential farm impacts
15 therein are based on over two years of reviewing farm
16 conditions in the Surrounding Lands, 17 trips to the
17 Surrounding Lands for interviews with more than 60
18 farmers in the area, and interviews and discussions with
19 private businesses serving farms, government officials,
20 and farm-industry organizations both in Multnomah
21 and Clackamas counties as well as state-level
22 organizations. ... ***Together they provide nearly 400***
23 ***pages of analysis.***”

24
25 Rec-276; APP-060-061.

26 OAN’s Fourth Assignment of Error addresses the first step of the Farm
27 Impacts Test, so it is addressed first below. This is followed by OAN’s Second
28 and Third Assignments of Error, which also address the Farm Impacts Test. The
29 First Assignment of Error addresses an EFU standard, rather than the Farm
30 Impacts Test, so it is addressed last.

1 **B. RESPONSE TO FOURTH ASSIGNMENT OF ERROR**

2 **1. Preservation**

3 PWB agrees this assignment of error was preserved.

4 **2. Standard of Review**

5 “[R]eview of the hearings officer’s interpretation in this case is governed
6 by ORS 197.835(9)(a)(D), which requires that LUBA determine whether the
7 hearings officer “[i]mproperly construed the applicable law.” *Waverly Landing*
8 *Condo. Owners’ Assoc. v. City of Portland*, 61 Or LUBA 448, ___ (2010) (slip
9 op at 7). As explained in *Dahlen v. City of Bend*, ___ Or LUBA ___, ___ (2021)
10 (LUBA No 2021-013, June 14, 2021) (slip op at 5-6), to determine under
11 ORS 197.835(9)(a)(D) if the Hearings Officer “properly construed the law,
12 [LUBA will] consider the text and context of the code and give words their
13 ordinary meaning” under the standard rules for interpreting code provisions under
14 *PGE/Gaines*. The goal of code interpretation is “to discern the intent of the body
15 that promulgated the law” – in this case, the County Board of Commissioners.
16 *City of Eugene v. Comcast of Or. II, Inc.*, 263 Or App 116, 127 (2014), *affirmed*
17 359 Or 528 (2016).

18 Under ORS 197.835(9)(a)(D), LUBA will affirm a hearings officer, even
19 if “debatable,” if “the hearings officer’s interpretation is more consistent with the
20 text of [the code] than [opponents’] interpretation” or “at least as supportable as
21 [opponents’] contrary view.” *Waverly*. 61 Or LUBA at ___ (slip op at 7); *Patel*

1 *v. City of Portland*, 77 Or LUBA 349, ___ (2018) (slip op at 12) (summarizing a
2 holding of *Gould v. Deschutes County*, 67 Or LUBA 1, 7 (2013), as “where
3 different interpretations are equally plausible, and context supports a hearings
4 officer choice of interpretation, LUBA will defer to the hearings officer’s
5 interpretation”).

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

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

14 3. Background

15 Both subsections of MCC 39.7515(C) are limited to evaluating “accepted
16 farm ... practices **on surrounding lands** devoted to farm ... use[.]” (Emphasis
17 added.) The following abbreviates the key analysis of this issue in the findings:

18 “Neither County Code related to MCC 39.7515(C) nor
19 state statutes related to ORS 215.296(1) provide a
20 definition or precise method of determining what the
21 ‘surrounding lands’ are relevant to this analysis.
22 Caselaw related to the statute provide[s] guidance that:

23
24 “... [the] study area must be based on evidence
25 of the likely impacts of the *proposed conditional*

1 use on farm practices on surrounding [] lands
2 that are close enough to be subject to those
3 impacts. ... Stated differently, 'surrounding
4 lands' ... are those lands in such proximity to the
5 proposed ... conditional use that the
6 **externalities or sensitivities of the proposed**
7 **use** could potentially cause significant changes
8 in or significantly increase the cost of accepted
9 farm practices on nearby lands.

10
11 "*Hood River Valley PRD v. Hood River County*, 67 Or
12 LUBA 314, slip op. at 7 (2013) (italics in original;
13 bolding added).

14
15 "This is precisely the analysis used to define the
16 Surrounding Lands for the project. See Exhibit A.33
17 (Operations Report), Sections 4-6. Most relevantly,
18 Exhibit A.33 (Operations Report), [Rec-7147-48]
19 explains:

20
21 "The Surrounding Lands ... were defined to be
22 sufficiently large to encompass all potential
23 impacts that the proposed [project] might have
24 on accepted farm practices or on the costs of
25 accepted farm practices[.] The potential
26 externalities identified are noise, vibration, odor,
27 light/glare, dust, mud, litter, vector control, air
28 emissions, water quality/quantity, radio
29 transmission, security, traffic, and chemicals
30 used at the filtration facility. There is also the
31 potential for impacts to emanate from any
32 'sensitivities' of the proposed use, and how any
33 sensitivity interacts with farmers who follow
34 accepted farm practices in the Surrounding
35 Lands. The potential sensitivities of the
36 proposed use relate to agricultural chemicals and
37 farm traffic in the Surrounding Lands. ...

38
39 "A local government has significant discretion in
40 determining the scope of surrounding lands. [] *Hood*
41 *River Valley PRD*, 67 Or LUBA at slip. op. page 6. ...
42

1 “Again, LUBA’s direction is to include in the study
2 area those ‘lands in such proximity to the proposed ...
3 conditional use that the externalities or sensitivities of
4 the proposed use could potentially cause significant
5 changes in or significantly increase the cost of accepted
6 farm practices on nearby lands[.]’ Traffic externalities
7 have the largest potential area of impact (compared to
8 impacts such as noise, for example) – as traffic
9 inherently moves outward and then disperses on the
10 public road network. Even for the highest potential
11 traffic impact – during peak construction – ‘all study
12 intersections perform at acceptable levels of service
13 with minimal delay [with exceptions addressed by the]
14 Transportation Demand Management (TDM) [plan.]
15 That is, the Project TIA and Construction TIA show
16 that there are no ‘externalities ... of the proposed use
17 [which] could potentially cause’ significant farm
18 impacts *inside* of the study area, and so there is no
19 reason to believe that there would be [farm impacts]
20 *outside* the study area, as traffic continues to disperse.
21 ...

22
23 “Moreover, County Transportation has reviewed and
24 approved the study area – providing a neutral, third
25 party opinion that, indeed, it represents lands in such
26 proximity that the externalities of the proposed
27 construction could potentially have impacts. *See Wal-*
28 *Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261,
29 277 (2006) (a local decision maker may assign
30 additional significance to the testimony of city or state
31 engineers based on their neutrality regarding the
32 development proposal)[.] Exhibit J.87 (Global
33 Transportation 2ndORP Response), [Rec-567],
34 explains:

35
36 “PWB has worked with County Transportation
37 to define the limits of where significant impacts
38 to the transportation system could be possible.
39 These limits were validated by the Construction
40 TIA, showing that there are no intersections of
41 concern in the study area with Transportation
42 Demand Management measures in place. ... The

1 County followed the process commonly used by
2 local municipalities to develop study areas. The
3 methodology accounts for the fact that the
4 further from the project vehicles travel, the more
5 dispersed project related traffic becomes,
6 lessening the impacts on the traffic network
7 outside of the study area. Through coordination
8 and discussion with the County and considering
9 study intersections defined by the project,
10 intersections of relevance in the County TSP,
11 and locations further requested to be added to the
12 study by the County, the current study area was
13 defined and approved.”
14

15 APP-039-042; Rec-263-265.

16 **4. The County has discretion to define the surrounding**
17 **lands, based on their case-specific analysis.**
18

19 OAN first argues that it is absolutely “not correct” to say that *Hood River*
20 *Valley* supports the proposition that the County has “great leeway to define the
21 surrounding area.” OAN Brief, 36. OAN is simply wrong. *Hood River Valley*
22 specifically states that: “Generally, a local government has significant discretion
23 in determining the scope of surrounding lands.” 67 Or LUBA slip op at 6. No one
24 argues that the discretion is unlimited. As explained in the findings quoted above,
25 and in *Hood River Valley*, the scope must include the area that could experience
26 the “externalities or sensitivities” of the proposed conditional use in each specific
27 case. But in applying the legal test to the facts of the case, the county does have
28 discretion, and it is unclear on what basis OAN argues otherwise.

1 **5. Johnson's arguments are incorrect for the same reasons**
2 **the Hearings Officer rejected them.**
3

4 Next, OAN reasserts arguments made by Jim Johnson of the Oregon
5 Department of Agriculture below that the area studied should have been larger.
6 OAN Brief, 37-39. The Hearings Officer rejected these arguments in his findings,
7 stating in part:

8 "Opponents try to attack the definition of the Surrounding
9 Lands by pointing out that some nurseries are very large
10 companies with fields both inside and outside of the
11 Surrounding Lands or cooperate with nurseries outside of the
12 Surrounding Lands. This is irrelevant. ... Overall, the
13 agricultural expert concluded that:

14
15 "The Surrounding Lands as presented in the Operations
16 Report was selected after extensive study of agriculture
17 around the filtration facility and the pipelines route. ...
18 The Surrounding Lands were mapped after six months
19 of study. The criteria were selected after discussions
20 with farmers to understand what types of nurseries and
21 other farms are in the area. ...

22
23 "The potential area of impact to transportation of farm
24 crops was a factor in the selection of the Surrounding
25 Lands and was evaluated based on operational and,
26 later, construction traffic evaluations from Global
27 Transportation Engineering. ...

28
29 "The fact that some nursery loads are filled by two or
30 more nurseries, some of which might be long distances
31 from the Water Bureau projects, does not require a
32 study area larger than is defined in the Water Bureau
33 reports. Both for operations and construction traffic,
34 Global Transportation Engineering evaluated key
35 intersections in the Surrounding Lands and concluded
36 that, with TDM strategies, impacts to intersection and
37 roadway operations due to construction or operations
38 traffic from the Project will be minimal even under

1 conservative analysis assumptions that take into
2 consideration roadway closures due to pipeline
3 construction. In preparing this response, the
4 transportation engineer at Global Transportation
5 Engineering, Dana Beckwith, confirmed via email that
6 there are no significant impacts shown by his analysis
7 in the Surrounding Lands study area and that traffic
8 will tend to disburse and have less impact as it moves
9 further away from the filtration facility and pipelines.
10 Given that response, the Surrounding Lands as selected
11 and analyzed is fully adequate.
12

13 “Exhibit I.80 (Globalwise 1stORP Response), pages 52-
14 53[Rec-2057-2056]; *see also* Exhibit I.84 (Global
15 Transportation 1stORP Response), page 24[Rec-1990].”
16

17 APP-039, 042-043; Rec-265-266.

18 OAN does not attempt to respond to the findings quoted above relying on
19 the farm expert, nor make any new arguments.

20 OAN does try to illustrate that the study area was “limited” by stating that
21 it “extended a mere one-mile to the north and south of the project site,
22 approximately one and one-half miles to the west and approximately two-miles
23 to the east.” OAN Brief, 37-38. But OAN does not say why this geographic area
24 was error – indeed in *Schellenberg v. Polk County*, 22 Or LUBA 673, 683 (1992),
25 LUBA upheld a “study area extending from ½ to 1 ½ miles” from the proposed
26 use, where (as in this case) the findings included a detailed description of the area
27 and explained why those boundaries were chosen.

28 OAN argues for the larger area proposed by Mr. Johnson, stating that the
29 “Decision fails to address this expert testimony[.]” OAN Brief, 38-39. This is

1 confusing because there *are* specific, responsive findings addressing Mr.
2 Johnson's proposed area. APP-039, 042-043; Rec-265-266 (evaluating the
3 "criteria Mr. Johnson suggests for defining Surrounding Lands," and explaining
4 that "Mr. Johnson's suggestions would lead to a study area that includes over 36
5 square miles of land," similar to, and problematic for the same reasons as, the
6 "45 square mile surrounding lands" rejected in *Hood River Valley PRD*). OAN
7 makes no attempt to respond to these specific, responsive findings. Regardless, a
8 decision maker is not required to "adopt findings addressing evidence that
9 conflicts with the evidence it chooses to rely upon." *Kine v. Deschutes County*,
10 75 Or LUBA 419, 427 (2017).

11 OAN may be operating under a misunderstanding of the law regarding
12 incorporated findings. OAN argues that the "Decision" lacks adequate findings
13 because it "**merely incorporated** Intervenor-Respondent's analysis as the basis
14 for complying with" the Farm Impacts Test, and "[**t**]his **means** that the Decision
15 lacked substantial evidence[.]" OAN Brief, 39 (emphasis added). If this, or
16 something like it, is OAN's argument, it is inadequately developed for review
17 and, also, patently wrong.

18 Incorporated findings are findings. Under *Gonzalez v. Lane County*, 24 Or
19 LUBA 251, 259 (1992), all that is required is that the Hearings Officer indicated
20 his intent to incorporate and that he identified the document incorporated such
21 that "a reasonable person reading the decision would realize that another

1 document is incorporated into the findings” and be able to request to review the
2 document. *See Gonzales*, 24 Or LUBA at 260 (holding that the phrase “based
3 upon ... does express an intent to adopt”); APP-039 (“Based on ... Pages 128-
4 133...”); *Wilson Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 106, 115
5 (1994) (incorporation happens through words that indicate what the city believes
6 to be relevant). OAN’s brief itself concedes that the decision “incorporated
7 Intervenor-Respondent’s analysis” in its final written argument and “adopts [the]
8 analysis” specifically about the surrounding area. OAN Brief, 39, 40. Those
9 concessions in OAN’s own brief support a conclusion under *Gonzalez* that
10 reasonable people would “realize that another document is incorporated into the
11 findings.” OAN makes no arguments to the contrary and instead agrees that they
12 were “incorporated”.

13 **6. This argument also fails based on a battle of the experts.**

14 Finally, OAN argues that Mr. Johnson is an “expert”⁵ and that “[o]nly with
15 [his] understanding of the surrounding area can the county make the necessary
16 findings related to its farm impact test.” OAN Brief, 38. OAN ignores that the
17 Hearings Officer’s findings rely on the testimony of the applicant’s agricultural
18 expert, Mr. Prenguber, as shown in the quotations from the findings above.
19 “[T]he question LUBA must answer is whether [the oppositions’] experts’

⁵ OAN does not cite to anywhere in the record that the Hearings Officer made that determination, and we know of none.

1 testimony ‘so undermines’ [the relied upon expert] testimony that a reasonable
2 person would not rely on [that expert’s] testimony to conclude” that the standard
3 is met.” *Tonquin Holdings, LLC v. Clackamas County*, 64 Or LUBA 68, 83
4 (2011). As explained further in PWB Friends Brief, Section IV.D.6(a), no one
5 has challenged Mr. Prenguber’s professional credentials, nor have they
6 challenged the professional credentials of the applicant’s traffic expert or County
7 Transportation’s experts, on which Mr. Prenguber relies to determine the extent
8 of potential externalities to define the surrounding lands. Even if Mr. Johnson is
9 an expert, which we do not concede, OAN makes no effort to meet the
10 challenging standard to convince LUBA to overturn the Hearings Officer’s
11 choice to rely on those three experts. “[T]he choice between that believable
12 expert testimony [was] for the hearings officer, and LUBA [should] not second
13 guess that choice.” *Tonquin Holdings*, 64 Or LUBA at 83.

14 C. RESPONSE TO SECOND ASSIGNMENT OF ERROR

15 1. Preservation

16 OAN’s preservation section for the Second Assignment of Error cites to a
17 single page of the record, Rec-3557, quoting Mr. Kleinman’s opening paragraph
18 with broad statements about how the project will violate MCC 39.7515(C). The
19 assignment of error – to the extent we can discern the claims therein – is about a
20 failure of the decision to use *PGE/Gaines* and assigning error to the decision in
21 applying a “less stringent” test than under state law. Neither of those topics are

1 reflected in the single page of the record cited. “Each assignment of error must
2 demonstrate that the issue raised in the assignment of error was preserved during
3 the proceedings below. Where an assignment raises an issue that is not identified
4 as preserved during the proceedings below, the petition shall state why
5 preservation is not required.” OAR 661-010-0030(4)(d). OAN’s statement of
6 preservation provides neither of the options under OAR 661-010-0030(4)(d). As
7 further explained in Sections IV.D.1 and IV.E.2 below, this impermissibly and
8 prejudicially shifts the burden to respondent. OAN has not met their burden to
9 demonstrate that the second assignment of error was preserved. The issue
10 presented in this assignment of error is waived.

11 2. **Standard of Review**

12 As further explained above in Section IV.B.2, under
13 ORS 197.835(9)(a)(D), LUBA will affirm a hearings officer, even if “debatable,”
14 if “the hearings officer’s interpretation is more consistent with the text of [the
15 code] than [opponents’] interpretation” or “at least as supportable as [opponents’]
16 contrary view.” *Waverly*. 61 Or LUBA at ___ (slip op at 7).

17 3. **The Hearings Officer did, explicitly, apply *PGE/Gaines*.**

18 OAN first argues that the “Decision misconstrued ... MCC 39.7515, when
19 failing to use the *PGE/Gaines* test[.]” It is unclear why OAN thinks the findings
20 did not “use” *PGE/Gaines*, and this argument is inadequately developed for
21 review. The Hearings Officer explicitly recognized that part of his job was to

1 “interpret the County code”. Rec-45. In doing so, he adopted extensive findings
2 applying *PGE/Gaines*. For example, at Rec-46, 258-59; APP-004-006, the
3 findings discuss *STD IV*, which provides the analysis of the identical language in
4 state statute under *PGE/Gaines*. *STD IV*, 364 Or at 446 *et seq.* The Hearings
5 Officer did not need to reinvent the wheel when the Oregon Supreme Court has
6 already spoken authoritatively on the *PGE/Gaines* analysis of this text. Many
7 other cases cited in the findings also apply *PGE/Gaines*. Moreover, the
8 *PGE/Gaines* analysis as to why construction is not the use under the state
9 statutory language is also explicit in the decision. APP-010-014; Rec-260-262.

10 Perhaps OAN thinks the “Decision” did not “use” *PGE/Gaines* for the
11 same reason they think there were no responsive findings to Mr. Johnson’s
12 proposed study area expansion. If so, that is error for the same reason explained
13 in Section IV.B.5 above, namely that incorporated findings are findings.

14 **4. Conditions are allowed; the EFU standard was**
15 **considered.**
16

17 OAN makes some more specific arguments that seem related to
18 *PGE/Gaines*, but none are sufficiently developed for review.

19 First, OAN argues that the Farm Impacts Test in code “does not include
20 the ability to impose conditions[.]” OAN Brief, 19. This was addressed by the
21 Hearings Officer, and OAN makes no effort to argue against those findings. Rec-
22 46, 258; APP-002-003. This argument is inadequately developed for review.

1 Next, OAN argues that the findings did not use *PGE/Gaines* to “read the
2 two tests together”, referring back to the Farm Impacts Test in the MUA-20 zone
3 (MCC 39.7515(C)) and then, strangely, to the separate, non-identical test that
4 applies to utility facilities in EFU (ORS 215.275(5)) referenced in OAN’s prior
5 paragraph. OAN Brief, 19. However, it would be error to “read the two tests
6 together” – because, as OAN outright says, those two standards are “separate
7 tests” for separate zones. OAN does not make any arguments as to *why* the two
8 different tests should be read “together”, instead just complaining there should
9 have been *PGE/Gaines* analysis.⁶

10 In fact, the Hearings Officer did consider, in multiple places, that
11 ORS 215.275(5) (EFU test that applies to utility facilities) is not identical to the
12 MUA-20 Farm Impacts Test, which, as noted above, was adopted essentially
13 verbatim from ORS 215.296(1) (EFU test that applies to non-utility-facility
14 uses). Rec-28 (adopting Rec-180-182), Rec-46 (adopting Rec-257-258). Further,
15 the Hearings Officer explicitly considered arguments about applying the EFU’s
16 ORS 215.275(5) to the filtration facility in MUA-20, rejecting that concept, as
17 each, of course, only applies in its own zone. *See* Rec-28,⁷ 180-182 (“Each

⁶ OAN also misstates the test under *PGE/Gaines*, which looks at text, context, and legislative history, not “text, context, and the purpose of the underlying statute.” OAN Brief, 19.

⁷ The decision here refers to “Applicant’s ... Final Rebuttal ... Section E.” There are multiple Sections E in the final rebuttal document, but only one that is related to the topic being discussed.

1 element of a use [is] subject to the standards of the zone where they are located.”).

2 OAN again makes no effort to argue against the relevant findings and this
3 argument is inadequately developed for review.

4 **5. The Hearings Officer did not adopt a “less strenuous” test**
5 **than that in state law.**

6
7 PWB asked the Hearings Officer to consider the fact that the MCCP is in
8 conflict with the code, in violation of ORS 215.050(2). Rec-257-258. However,
9 the Hearings Officer did not take up that invitation, instead explicitly applying
10 the higher bar under the state law test and caselaw:

11 “1. The State Law Test Does Not Apply Directly
12 and the Comprehensive Plan Indicates Test Should Be
13 Less Onerous in MUA-20 Exception Area’

14
15 **“Hearing Officer:** I agree that the State law test does
16 not directly apply for the reasons in Applicant’s Final
17 Argument at pages 123, and that the County *could*
18 interpret this differently. I will leave that to the Board
19 of Commissioners or at least a Planning Director’s
20 Interpretation. *However, as the Code wording*
21 *matches the State law wording, I will use cases that*
22 *interpret the statutory wording in this decision.”*

23
24 Rec-46 (emphasis added). The Hearings Officer examined the text of the code,
25 in its context, and concluded that, in this decision, he would apply the more
26 onerous state law standard, as the plain text of MCC 39.7515(C) is materially
27 identical to ORS 215.296(1), indicating an intention by the County to adopt the
28 state law standard. *Id.*

1 That is, rather than “defer[ing]” to PWB as OAN asserts (Brief, 20), the
2 Hearings Officer disagreed with PWB on this point. In perhaps the most baffling
3 part of OAN’s argument, OAN states that the decision “concludes that the MUA-
4 20 farm impact test is somehow less rigorous than its state law counterpart” while
5 immediately thereafter quoting the part of the decision where the Hearings
6 Officer states he *will not* apply a less rigorous test, and instead will “use cases
7 that interpret the statutory wording in this decision.” OAN Brief, 20. Friends
8 explains in its brief that the “hearings officer applied the farm impact test as set
9 forth in ORS 215.296[.]” Friends Brief, 22n6. It is not clear why OAN thinks
10 otherwise.

11 Confusingly, OAN again asserts that the Hearings Officer concluded that
12 the MUA-20 Farm Impacts Test “provides less protection than the EFU farm
13 income test” because the “Decision wholly adopted” PWB’s argument about the
14 MCCP providing for “less strenuous” review in MUA-20. OAN Brief, 22-23. As
15 noted above, this is false. The Hearings Officer did not adopt, but instead
16 rejected, this argument from PWB. Rec-46. This assignment of error (if even
17 preserved) is, at best, inadequately developed for review, and at worst, harmless
18 error to apply a more onerous standard than required.

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

2 **1. Preservation**

3 For preservation, OAN cites to a single page of the record, Rec-3564,
4 quoting a sentence arguing specifically that the condition of approval requiring a
5 Transportation Demand Management (“TDM”) Plan would not feasibly
6 eliminate farm impacts. However, the assignment of error argues about providing
7 a farm-by-farm analysis, and has nothing to do with the TDM plan, the condition
8 requiring that TDM plan, nor anything else on the cited page of the record.

9 “Each assignment of error must demonstrate that the issue raised in the
10 assignment of error was preserved during the proceedings below.” OAR 661-
11 010-0030(4)(d). “A petitioner must quote or point to a specific page, passage, or
12 portion of an audio recording to demonstrate where an issue was raised in the
13 local proceedings.” *Central Oregon LandWatch v. Deschutes County*, ___ Or
14 LUBA ___, ___ (LUBA No 2023-006/009, July 28, 2023) (slip op at 55). LUBA
15 will not search the record for the petitioner. *Id.*

16 Petitioner “has an affirmative obligation to establish preservation of error.”
17 *Rosewood Neighborhood Association v. City of Lake Oswego*, ___ Or LUBA
18 ___, ___ (LUBA No 2023-035, Nov 1, 2023) (slip op at 7). For example, in *H2D2*
19 *Properties, LLC v. Deschutes County*, 80 Or LUBA 528, 532-33 (2019), the
20 preservation failure was not a technical violation where it improperly shifted the
21 burden to respondents to review over 100 pages to determine whether the issues

1 raised in six assignments of error were preserved. The record in this case is much
2 more than the 100 pages in *H2D2*, it is over 8,000 pages, with additional videos
3 and hearing recordings. Citing to one page – that does not even present the issue
4 in the assignment of error – improperly shifts the burden and prejudices the
5 substantial rights of the responding parties.

6 OAN has not met their burden to demonstrate that the third assignment of
7 error was preserved. The issue presented in this assignment of error was not
8 preserved and is waived.⁸

9 2. Standard of Review

10 OAN's statement of the Third Assignment of Error is that "The Decision
11 Lacks Adequate Findings." OAN Brief, 25. The argument section is consistent
12 with the statement of the Third Assignment of Error as being related to
13 inadequate findings. *See, e.g.*, OAN Brief, 32-33 ("Findings are adequate
14 when...").

15 LUBA reviews findings under the familiar three-part test of *Heiller*, set
16 forth in Section IV.B.2 above.

17 The standard of review section also sets forth proposed standards for a
18 substantial evidence challenge and an interpretational challenge. However,
19 neither type of challenge is included in the title nor in the body of the Third

⁸ Preservation cannot be demonstrated in the reply brief. *Rosewood Neighborhood Association*, slip op at 10.

1 Assignment of Error. These challenges, to the extent they can be found, are
2 inadequately developed for review.

3 **3. There are explicit and extensive farm-by-farm**
4 **evaluations in the findings.**

5
6 OAN complains that the findings “completely failed” “to apply the farm
7 impact test to individual farms” and had “no farm-by-farm analysis or response
8 to the extensive farmer testimony[.]” OAN Brief, 26. As discussed below, this is
9 decidedly false.

10 The findings say:

11 **“I adopt the analysis of cumulative impacts in**
12 **Exhibit J.88.** I find that the cumulative impacts from
13 the Applications does not violate the farm impact test.
14 I agree with the Applicant that Mr. Prenguber qualifies
15 as a farm expert. Whereas, certainly individual farmers
16 are also experts, for this analysis of cumulative
17 impacts, I put more weight on Mr. Prenguber’s expert
18 opinion.”

19
20 Rec-52, APP-142 (emphasis added).

21 The adopted Exhibit J.88 (starting at Rec-675, APP-144) explicitly
22 provides an extensive “Farm by Farm Application of Principles” that takes the
23 time to “identify each farm and any categories where there is an asserted or
24 studied potential change or increase in cost of accepted farm practices, and
25 evaluates whether, cumulatively, there is a significant impact on accepted farm
26 practices for that farm.” Rec-683, APP-152. The decision clearly satisfies the
27 requirements for findings under *Heiller* and OAN does not raise any arguments

1 to the contrary – other than simply saying that the farm-by-farm findings do not
2 exist. *See Neighbors for Livability v. City of Beaverton*, 168 Or App 501, 507, 4
3 P3d 765 (2000) (LUBA does not review land use decisions per se; it reviews “the
4 arguments that the parties make about land use decisions.”).

5 Citing to no caselaw, OAN asserts that the decision “merely adopts”
6 findings proposed by PWB with “no independent” analysis. OAN Brief, 27. This
7 is legally irrelevant. As explained above in Section IV.B.5, adopted findings are
8 findings. OAN makes no argument to the contrary, and certainly not one that is
9 sufficiently developed for review.

10 OAN then turns to a series of long block quotations from farmer testimony,
11 arguing again that the decision “makes no mention of any other individual farm
12 property or farm operation.” OAN Brief, 30. It appears that OAN misses, or
13 would prefer to ignore, the Hearings Officer’s incorporation into findings of
14 Exhibit J.88. APP-142. It appears that way in particular because, when
15 acknowledging that there are “a series of reports compiled by Globalwise Inc.
16 addressing farm operations[,]” OAN only mentions the first two reports in the
17 record, and misses (or ignores) the remaining four, including Exhibit J.88. OAN
18 Brief, 31-32; *see* Section II.D (above, listing the six Globalwise reports).

19 OAN concludes that none of these farmer comments were reviewed in the
20 decision. Again, that mistake appears to be based on missing or ignoring the
21 incorporation of Exhibit J.88. Surface Nursery is specifically addressed in the

1 findings at Rec-686-87; APP-155-156. R&H Nursery is specifically addressed in
2 the findings at Rec-685-686; APP-154-155. OAN does not identify any farmers
3 that were not evaluated on a farm-by-farm basis in the findings.

4 Nor did the decision even need to address in detail every individual piece
5 of testimony and sub-argument in that testimony in the 8,000-page record.
6 “LUBA has consistently held that when a relevant *issue* is adequately raised by
7 testimony or other evidence in the record, that *issue* must be addressed in the
8 decision maker’s findings.” *Rosenzweig v. City of McMinnville*, 64 Or LUBA
9 402, 410 (2011) (emphasis added, internal quotation marks omitted). The
10 findings go to great lengths to respond to every farm issue raised by opponents.
11 APP-019-038; APP-060-168. Many of the specific arguments about any given
12 issue were overlapping and could be addressed together in the findings.

13 Nothing requires that each comment about an issue be separately
14 enumerated and responded to in the findings. *Kine v. Deschutes County*, 75 Or
15 LUBA 419, 427 (2017). LUBA has long held that: “The Board does not accept
16 the proposition that *every* issue or concern raised at a hearing on a land use matter
17 must be addressed by a local jurisdiction in its findings. Formal issues and major
18 relevant concerns raised must be addressed in some fashion, but not every
19 assertion by a participant in a land use decision warrants a specific finding.” *Faye*
20 *Wright Neighborhood Planning Council v. Salem*, 1 Or LUBA 246, 252 (1980).

1 For example, where a hearings officer did not even mention, let alone
2 respond to, a letter from an opponent organization in the findings, but the findings
3 did contain findings and conditions of approval addressing the *issue* raised in that
4 letter – stormwater – LUBA upheld the decision, noting that while a “decision
5 maker must address issues raised by opponents regarding approval criteria[,] the
6 decision maker is not required to identify and respond to every piece of opposing
7 evidence.” *Stoloff v. City of Portland*, 51 Or LUBA 560, 567 (2006).

8 OAN fails to identify any “[f]ormal issues [or] major relevant concerns”⁹
9 – rather than “piece of opposing evidence”¹⁰ – that the findings do not address or
10 where the findings are not supported by substantial evidence in the form of expert
11 testimony in the record. For example, the block quotations from Surface Nursery
12 in OAN Brief, 27-28, come from Exhibit E.36, starting at Rec-3705, and the re-
13 submitted, formatted version of that document at Exhibit I.31, starting at Rec-
14 2860. Mr. Prenguber (applicant’s farm expert) detailed his response to Exhibit
15 E.36/I.31 in Exhibit I.80, starting at Rec-2018, with these noise and dust claims
16 covered starting on Rec-2023.¹¹ Noise and dust were both issues addressed
17 directly and extensively in the findings. APP-112-130.

⁹ *Faye*, 1 Or LUBA at 252.

¹⁰ *Stoloff*, 51 Or LUBA at 567.

¹¹ Moreover, these arguments are moot. Surface Nursery’s field is located in Clackamas County directly south of the filtration facility site. “[G]iven the Clackamas County decision, the Water Bureau will not be accessing the filtration facility during construction using the road referenced in this comment” from Surface Nursery quoted in OAN’s brief. Rec-2023; Rec-180.

1 The specific claim that Surface would need “Noise-canceling headphones
2 [with] Bluetooth” is additionally addressed at length in the findings. In part, those
3 findings provide:

4 “Farmers assert that they will have to buy expensive
5 Bluetooth, noise canceling headsets because of
6 construction noise. This is not credible. Farmers
7 already must provide hearing protection for workers
8 because of the noise generated by farm equipment. This
9 can come in the form of earplugs or earmuffs, for
10 example, that are worn when in proximity to those farm
11 noise sources. It is possible that more of the time
12 workers will need to use earplugs or earmuffs. This
13 would be limited to the time when those workers are in
14 very close proximity to the boundary of an active
15 construction area. However, there is not a significant
16 change in practices to use existing hearing protection
17 slightly more often for the small amount of time when
18 working in fields that are directly adjacent to
19 construction noise during the temporary construction
20 period.”

21
22 Rec-314; APP-126.

23 The block quotations from R&H Nursery are the same. These come from
24 Exhibit H.22.a, starting at Rec-3274. Mr. Prenguber detailed his response to
25 Exhibit H.22.a in Exhibit I.80, starting at Rec-2033, with these noise and dust
26 claims covered starting on Rec-2038. Noise and dust were both issues addressed
27 directly and extensively in the findings. APP-112-130. And, of course, the
28 Hearings Officer found that construction is not the use to be evaluated under the
29 Farm Impacts Test, so this testimony is irrelevant to the approval criterion in the
30 first place. Rec-46.

1 There are explicit and extensive farm-by-farm evaluations in the findings
2 and hundreds of pages of evidence supporting those evaluations. OAN cannot
3 simply ignore those evaluations and prevail in this argument.

4 **4. The Hearings Officer was correct to rely on statements**
5 **from County Transportation.**

6
7 OAN argues that it was error for the Hearings Officer to credit statements
8 from County staff regarding “farm-related transportation issues” because they are
9 “not a [sic] farming experts[.]” OAN Brief, 33. But the Hearings Officer does not
10 rely on County Transportation staff as farm experts, but as transportation experts
11 related to the potential for construction to create delays and impact safety on the
12 County’s roads – which applies to farm traffic and all other traffic. The
13 applicant’s agricultural expert, Mr. Prenguber, also provided his expert opinion,
14 relying as to transportation impacts on the work of Mr. Beckwith, the applicant’s
15 transportation expert. *See, e.g.,* APP-042; Rec-265. The Hearings Officer’s
16 findings make clear that he also relied on Globalwise’s expertise. For example,
17 the findings state:

18 “Exhibit J.84 (Farm Traffic Report) explains
19 Globalwise’s review of the project and accepted farm
20 practices related to use of the shared public right of way
21 in the Surrounding Lands, including ‘a comprehensive
22 description of the farm travel network for each road
23 segment in the Surrounding Lands. Appendix A
24 contains the detailed assessment of the farm-by-farm
25 traffic analysis.’ Exhibit J.84 (Farm Traffic Report),
26 page 5.”

27
28 Rec-295; APP-090.

1 In supporting this argument, OAN states that “the only time that the
2 Decision” found Mr. Prenguber to be an expert was at Rec-45. This is false. A
3 more general finding of his expertise is found at the bottom of Rec-48 (finding
4 Mr. Prenguber to be an “expert in farm practices and impacts”). Moreover, no
5 one challenges his credentials to render that expert opinion. Those credentials
6 notably include a past analysis of transportation of nursery products for OAN
7 itself. Rec-5532 (resume).

8 As further discussed in PWB Friends Brief, Section IV.D.6(a), the
9 Hearings Officer was entitled to rely on the three experts providing evidence that
10 the transportation network will not be consumed by gridlock during construction
11 (all intersections will operate within standard levels of service), and that there
12 will be no resulting significant impacts to accepted farm practices.

13 Overall, far beyond “a mere conclusionary statement,” OAN Brief, 30, the
14 decision provides over 150 pages of analysis and findings, including the
15 incorporation of the farm-by-farm analysis in Exhibit J.88. APP-001-168.

16 **E. RESPONSE TO FIRST ASSIGNMENT OF ERROR**

17 **1. Introduction to Response**

18 In challenging compliance with ORS 215.275 (utility facilities necessary
19 for public service in EFU zone), OAN argues that the Hearings Officer decision
20 was not supported by adequate findings, is unsupported by substantial evidence,

1 and incorrectly applies the alternatives analysis under ORS 215.275. OAN's
2 argument is not preserved and, even if it were, it provides no basis for remand.

3 2. Preservation

4 "The board may only review issues raised by any participant before the
5 local hearings body as provided by ORS 197.195, 197.622 or 197.797, whichever
6 is applicable." ORS 197.835(3). To sufficiently preserve an argument, the
7 argument must include "sufficient detail to allow a thorough examination of the
8 issue by the decision-maker, so as to potentially obviate the need for further
9 review or at least make that review more efficient and timely." *Willamette Oaks,*
10 *LLC v. City of Eugene*, 295 Or App 757, 767, 437 P3d 314 (2019), *rev den*, 365
11 Or 192 (2019).

12 OAN's statement of preservation provides, in its entirety:

13 "The inadequacy of the ORS 215.175 [sic] alternative
14 sites analysis was argued below, at Record 3342."

15
16 "In this case, the [applicant's] analysis of
17 alternative pipeline routes is not sufficient and
18 fails to comply with the alternatives analysis
19 required by ORS 215.275."

20
21 OAN Brief, 4.

22 The document at Rec-3342 is a portion of a letter from 1000 Friends that
23 raises entirely different issues than those presented by OAN in this assignment
24 of error. Rec-3342-43. The 1000 Friends' letter argued that the filtration facility
25 and pipelines were a single facility, that they could not be separated, and therefore

1 the filtration facility was also subject to the “utility facilities necessary for public
2 service” standard despite being located on exception land. *Id.* There is no
3 discussion in the 1000 Friends’ letter of the various alternatives for the raw water
4 pipeline route, no discussion regarding the adequacy of the RhinoOne
5 Geotechnical memorandum which substantiated the location of the underground
6 raw water pipelines, and no argument related to the sufficiency of the evidence
7 from RhinoOne or otherwise. The 1000 Friends’ letter and the OAN argument
8 both reference ORS 215.275 – but that is where the similarity ends. OAN cannot
9 in this appeal challenge for the first time the alternatives analysis for the location
10 of the raw water pipelines under ORS 215.275. OAN has not demonstrated that
11 the argument was preserved below.

12 Although petitioners before LUBA are not required to present arguments
13 identical to those raised below, “[t]he purpose of ORS 197.763(1) [*renumbered*
14 *as* ORS 197.797(1)] is to prevent unfair surprise. [Petitioners] may not fail to
15 raise issues locally and then surprise the local government by raising those issues
16 for the first time at LUBA.” *Boldt v. Clackamas County*, 107 Or App 619, 623,
17 813 P2d 1078 (1991). ORS 197.797(1) requires that “[s]uch issues [] be raised
18 and accompanied by statements or evidence sufficient to afford the governing
19 body, planning commission, hearings body or hearings officer, and the parties an
20 adequate opportunity to respond to each issue.” In a recent LUBA case affirmed
21 by the Court of Appeals, LUBA articulated the specificity requirement:

1 “To meet the burden of proof to demonstrate that the
2 subject property is not ‘agricultural land’ pursuant to
3 OAR 660-033-0020(1)(a)(B), an applicant is generally
4 required to provide an analysis of each of those factors,
5 and decision makers are required to adopt findings
6 addressing the specific factors. It follows that other
7 interested parties are required to raise and articulate
8 with specificity issues under the seven factors in order
9 to provide ‘fair notice’ to the decision maker and the
10 applicant that they are raising an issue under one or
11 more factors. General statements that the subject
12 property is suitable for farm use do not raise an issue
13 regarding any single factor with the specificity that is
14 required by ORS 197.797(1).”
15

16 *Central Oregon Landwatch v. Deschutes County*, __ Or LUBA __ (LUBA No.
17 2023-049, February 15, 2024) (slip op at 9), *aff’d* 333 Or App 263 (2024) (non-
18 precedential). 1000 Friend’s mere reference to ORS 215.275 is not sufficient,
19 especially when the argument related to the statute at Rec-3342 and that raised
20 on appeal have no overlap.

21 PWB proposes to convey raw water from the Bull Run Watershed to the
22 filtration facility via underground pipelines. Rec-7692-7699. The pipelines will
23 cross one parcel of land zoned EFU, but will not result in any surface disturbance
24 of the EFU land because the pipeline will be bored below the entire property,
25 entering at a depth of 147 feet on the east side and leaving at a depth of 217 feet
26 on the west before connecting to the tunnel shaft on the filtration facility site.

1 Rec-7696.¹² To demonstrate compliance with ORS 215.275, PWB commissioned
2 a “Geotechnical Technical Advisory Committee (GTAC) to provide further
3 geotechnical and seismic guidance for the Bull Run Filtration Project. The GTAC
4 consisted of regional subject matter experts that include geologists and
5 geotechnical engineers.” Rec-6025. The committee’s work resulted in a
6 “Geotechnical Technical Memorandum (GTM) in support of the selected
7 alternative for the raw water pipeline alignment” and evaluated several options
8 for the pipeline alignment. Rec-6024. The GTM was submitted as part of PWB’s
9 initial land use application. Rec-8017 (identifying GTM as technical appendix to
10 the primary application).

11 Other than the reference to the 1000 Friend’s unrelated comments, OAN
12 does not identify where it or any other party raised the issues set forth in the First
13 Assignment of Error. Raising a challenge to the evidence and conclusions of the
14 GTM for the first time before LUBA is the essence of “unfair surprise.” Had
15 OAN, 1000 Friends – or any other party – challenged the GTM, identified alleged
16 shortcomings, or made *any* challenge to the GTM, PWB could have responded.
17 Raising it now prejudices PWB’s substantial rights. The failure of any party to

¹² Given the below ground nature of the pipeline and the use of boring to construct the line, OAN’s suggestion that the pipeline violates the state’s agricultural land policy is farcical. Siting evaluation must ensure that “protected farmland is impacted only as a last resort.” OAN Brief, 6. Here, there is no impact to the farmland at the surface.

1 raise this challenge below precludes OAN from raising this argument for the first
2 time on appeal.¹³

3 3. Response to Legal Argument

4 Even if OAN or another party had raised the issues presented in this
5 assignment of error below, OAN's arguments still fail to provide any basis for
6 remand or reversal.

7 "Substantial evidence exists to support a finding of fact when the record,
8 viewed as a whole, would permit a reasonable person to make that finding." *Dodd*
9 *v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). Raw water must be
10 delivered to the filtration facility via the new pipelines from a connection to the
11 existing pipelines located in Lusted Road. Rec-7695. PWB studied six pipeline
12 alignment alternatives, only two of which could avoid EFU land. Rec-7697. For
13 the other alternatives that crossed EFU land, there was no obligation to study
14 those sites and select the "best" alternative among EFU-zoned property. *See*
15 *Sprint PCS v. Washington County*, 186 Or App 470, 479, 63 P3d 1261 (2003)

¹³ We note that OAN is precluded from addressing preservation in its reply brief. "[W]here preservation is disputed, LUBA will not search the record or large page ranges cited in the petition for review to determine whether an issue was raised below." *H2D2*, 80 Or LUBA at 532-33. "To the extent we have sometimes previously ... allow[ed] a petitioner to satisfy the requirement in OAR 661-010-0030(4)(d) in a reply brief by providing citations to and explanation of where issues were raised, we now conclude that OAR 661-010-0030(4) and OAR 661-010-0039 do not allow it." *Rosewood Neighborhood Ass'n*, slip op at 9.

1 (correct analysis “is limited to considering reasonable alternative sites to EFU
2 land”); *City of Albany v. Linn County*, 40 Or LUBA 38, 46 (2001).

3 PWB identified and analyzed two alternative routes that would avoid EFU
4 land. Rec-7697. OAN has not identified any argument or evidence in the record
5 suggesting that there were additional routes to consider – likely because no party
6 raised this issue below. PWB’s consultant team assembled and led a Geotechnic
7 Technical Advisory Committee (GTAC) which was tasked with reviewing “the
8 results of geotechnical investigations and provid[ing] guidance on how to avoid
9 and/or mitigate project hazards and risks, including for pipeline alternatives.”
10 Rec-6026. The results of GTAC’s review were summarized in the GTM prepared
11 by a professional engineer who was himself part of the GTAC. Rec-6027.
12 Moreover, all of these engineers are qualified as experts. Rec-5573 (resume of
13 author); Rec-6025-26 (other qualifications).

14 The GTM eliminated non-EFU Alternative 2 due to “geologic and seismic
15 hazards” noting “geotechnical borings, soil characteristics, water table levels, and
16 historic landslide records.” Rec-6026. The report also noted that Alternative 2
17 would present additional dangers due to “soil liquefaction and lateral spreading
18 on this steep slope during a Cascadia Subduction Zone earthquake[.]” The report
19 concluded that the “risks cannot be mitigated with reasonable certainty and
20 should be avoided by selecting an alternative alignment.” Rec-6026.

1 With respect to the second non-EFU alternative (Alternative 4), the report
2 concluded that it:

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

15

16 Rec-6026-27.

17 There is no contrary evidence in the record regarding the non-EFU
18 alternatives. Based on the GTM, PWB’s application addressed the ORS 215.275
19 factors, Rec-7692-99. PWB concluded that technical and engineering feasibility
20 factors described in the GTM demonstrated that it was necessary to site the
21 pipelines under EFU-zoned land to provide the service and avoid two routes with
22 significant seismic and geologic risks. Rec-7698. The Hearings Officer agreed
23 with PWB, finding that the two alternatives were not feasible for the same reasons
24 set forth in the GTM report. Rec-27.

25 OAN faults the GTM report for relying on “conclusory” “evidence”
26 because the report “fails to include any facts that justify its conclusion.” OAN
27 Brief, 11. It is impossible to square this assertion with the evidence. OAN appears
28 to believe that the report is not sufficient because it does not itself include specific

1 evidence related to water tables, soil characterization, or the number of historic
2 landslides present in the area. OAN Brief, 13. That is not the question. The GTM
3 is *itself* substantial evidence – evidence that a reasonable person would rely upon
4 in making a decision. Where a registered geotechnical engineer opines in a
5 stamped geotechnical report that a site is subject to “likely soil liquefaction and
6 lateral spreading” or “[c]atastrophic slope failures” during an earthquake,
7 underlying engineering calculations are not necessary for a reasonable person to
8 rely on the analysis to support the conclusion.

9 This circles back to the preservation issue. Had OAN or any other party
10 raised the issue below with the specificity required by long-standing precedent –
11 or raised it at all – PWB would have placed in the record meeting minutes,
12 calculations, and everything else OAN faults the report for not including. But
13 OAN elected instead to sandbag rather than preserve. *See Sherwood v. Oregon*
14 *Department of Transportation*, 170 Or App 66, 71, 11 P3d 664 (2000)
15 (referencing “anti-sandbagging” rationales for the preservation requirement of
16 ORAP 5.45(7)).

17 OAN’s reliance on *Corporation of the Presiding Bishop of the Church of*
18 *Latter-Day Saints v. City of West Linn*, 45 Or LUBA 77, 92 (2003), is misplaced,
19 if not misleading. In that case, city standards required compliance with specific
20 sound levels, including the L01 and “impulse sounds” standards. The applicant’s
21 sound engineer admitted at the public hearing that he did not study the L01 and

1 “impulse sounds” standards but offered his unsubstantiated opinion that short
2 duration noise would be consistent with these standards. The city council
3 ultimately denied the application based, in part, on the applicant’s failure to
4 provide a noise study that addressed the two standards. 45 Or LUBA 96. LUBA
5 did not hold, as argued by OAN, that “conclusory evidence” cannot be substantial
6 evidence. OAN Brief, 10. Moreover, before LUBA, the petitioner was seeking to
7 overturn a denial, which required the petitioner to demonstrate that applicable
8 standards were met as a matter of law. LUBA held that the conclusory statements
9 offered did not meet that test. LUBA did not suggest or hold that the expert
10 testimony failed to qualify as “substantial evidence.” *Corporation of the*
11 *Presiding Bishop*, 45 Or LUBA at 96.

12 OAN’s reliance on another challenge to a denial is equally misplaced. The
13 petitioner in *Horning v. Washington County*, 51 Or LUBA 303, 318-21 (2006),
14 argued that a fire district letter concluding that large camping events would not
15 significantly increase fire risk was substantial evidence upon which the county
16 could rely. LUBA did not hold that the fire district letter was not substantial
17 evidence. Rather, LUBA held that because the letter contained a contingency that
18 predicated the fire district’s conclusion on maintaining a prohibition on open
19 burning, and there was no evidence to support the ability to maintain an open
20 burning ban, there was substantial evidence to support the county’s *denial* of the
21 application. LUBA did not hold that the fire district letter did not constitute

1 substantial evidence. *Horning*, 51 Or LUBA at 320. Rather, the question in
2 *Horning* was whether the *denial* was supported by substantial evidence. *Id.*

3 Relying on these cases that do not support its position, OAN argues that
4 “the entirety of the evidence ... is conclusory” and is not supported with “any
5 evidence beyond mere supposition and conclusory statements.” OAN Brief, 11-
6 12. How direct testimony from an engineer, in a stamped technical memorandum,
7 identifying seismic hazards, catastrophic slope failures, lack of available
8 mitigation, soil characteristics, water table levels, and historic landslide records
9 is “mere supposition” is lost on PWB. “Supposition” is defined as “the act or
10 process of supposing and especially of assuming something tentatively,
11 hypothetically, or for the sake of argument.”¹⁴ The GTM goes far beyond
12 supposition. Under OAN’s approach, a transportation engineer’s technical
13 memorandum identifying the crash history of an intersection would be “mere
14 supposition” if the memorandum was not accompanied by police reports or other
15 evidence of crash history. Similarly, a transportation engineer’s conclusions
16 regarding ITE trip generation would be “mere supposition” if the statements were
17 not accompanied by copies of the current version of the ITE Trip Generation
18 Manual and all the calculations and data underlying the Manual. This is nonsense.

¹⁴ “Supposition.” *Merriam-Webster’s Unabridged Dictionary*,
<https://unabridged.merriam-webster.com/unabridged/supposition>. Accessed July
30, 2024.

1 OAN also faults the GTM report for failing “to correctly identify the
2 ORS 215.275 factors.” OAN Brief, 8. The reason the GTM did not reference
3 ORS 215.275 is because it is a technical report prepared by an engineer intended
4 to evaluate the technical feasibility of several pipeline alignment alternatives.
5 Rec-6025. PWB then used the report to select an alignment and as evidence to
6 support its position that the pipelines qualify as a utility facility under
7 ORS 215.275. Rec-7696-7698. There is no need for the engineer’s report to cite
8 the factors set forth in ORS 215.275.

9 OAN asserts that when “staff concerns regarding adequate findings are
10 completely ignored, the decision must be remanded” and cite *Underhill v. Wasco*
11 *County*, 43 Or LUBA 277, 284-285 (2002). That case says no such thing. In
12 *Underhill*, the staff report suggested a 300-foot buffer for a hunting preserve to
13 mitigate potential impacts to nearby farm uses. The county court declined to
14 impose the buffer, did not explain why, and yet adopted the staff report (with the
15 buffer suggestion) as its findings. LUBA remanded, in part, because the “county
16 court’s decision is therefore inconsistent with the findings it adopted in support
17 of the decision.” *Id.* 12-13. There is simply *nothing* in *Underhill* to suggest that
18 a lack of a response to a staff concern mandates remand.

19 Here, the Hearings Officer simply noted that “Staff is uncertain that all of
20 PWB’s objectives for the project qualify as technical and engineering feasibility
21 factors for the application.” Rec-18. The Hearings Officer did not adopt any

1 position or suggestion of staff, nor are there inconsistent findings. The Hearings
2 Officer specifically adopted PWB's ORS 215.275 analysis. Rec-27. PWB
3 identified four specific project objectives, including the provision of reliable, safe
4 drinking water, a seismically resilient system, protection of public health, and
5 preservation of gravity flow from the Bull Run Watershed. Rec-7695. These
6 factors define reasonable project needs and are not the "technical and
7 engineering" standards relied upon. *See Sprint*, 186 Or App at 480-481 ("a
8 utility's decision about its service needs should be respected ... a site that does
9 not meet those needs is not a reasonable alternative"). The eight pages of findings
10 adopted by the Hearings Officer address the ORS 215.275 factors and rely upon
11 the GTM to demonstrate that the two non-EFU routes were not reasonable
12 alternatives due, primarily, to seismic risks. Rec-7692-99; Rec-18 (adopting
13 findings). Again, had OAN raised concerns below regarding the adequacy of
14 PWB's feasibility analysis, PWB would have supplied responsive testimony. But
15 OAN elected to raise concerns for the first time on appeal – the essence of "unfair
16 surprise."

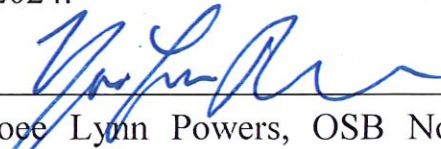
17 The only evidence in the record – a signed and stamped engineer's report
18 – supports the County's conclusion. There is no contrary evidence in the record.
19 Perhaps not surprisingly, OAN makes no effort to explain why a reasonable
20 person would not rely on the GTM. The report, prepared by a registered engineer
21 who participated in the GTAC and which summarized the findings and

1 recommendations of the GTAC, clearly qualifies as substantial evidence. *See,*
2 *e.g., Ghena v. Josephine County*, 51 Or LUBA 681, 686 (2006) (concluding that
3 testimony of county engineer, who was not trained in transportation engineering
4 and who did not review the underlying TIA, still constituted substantial
5 evidence). Rather, OAN in their brief throws darts at the analysis, when those
6 darts should have been thrown during the local proceeding. LUBA should reject
7 the First Assignment of Error.

8 V. CONCLUSION

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

11 DATED this 16th day of August, 2024.

12 
13 _____
14 Zoe Lynn Powers, OSB No. 144510
15 Renee France, OSB No. 004472
16 Radler White Parks & Alexander, LLP
Attorneys for Intervenor-Respondent

1 **CERTIFICATE OF FILING**

2 I hereby certify that on August 16, 2024, I filed the original of this
3 **INTERVENOR-RESPONDENT'S RESPONSE BRIEF TO THE JOINT**
4 **PETITION FOR REVIEW OF INTERVENOR-PETITIONERS OREGON**
5 **ASSOCIATION OF NURSERIES AND MULTNOMAH COUNTY FARM**
6 **BUREAU** for LUBA No. 2023-086, together with one (1) copy, with the Land
7 Use Board of Appeals, 775 Summer Street NE, Suite 330, Salem, Oregon 97301-
8 1283, by FedEx.

9 **CERTIFICATE OF SERVICE**

10 I also certify that on August 16, 2024, I served the foregoing
11 **INTERVENOR-RESPONDENT'S RESPONSE BRIEF TO THE JOINT**
12 **PETITION FOR REVIEW OF INTERVENOR-PETITIONERS OREGON**
13 **ASSOCIATION OF NURSERIES AND MULTNOMAH COUNTY FARM**
14 **BUREAU** for LUBA No. 2023-086, by United States Postal Service first class
15 mail, postage prepaid, to the parties or their attorney as follows:

Carrie A. Richter
Bateman Seidel, P.C.
1000 SW Broadway, Suite 1910
Portland, OR 97205
Attorney for Petitioners and
Attorney for Intervenor-Petitioner
Multnomah County Rural Fire
Protection District No. 10

David N. Blankfeld
Jenny Madkour
Multnomah County Attorney's Office
501 SE Hawthorne Blvd Ste 500
Portland, OR 97214
Attorney for Respondent

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17 *[Continued on next page]*

1

Jeffrey L. Kleinman
1207 SW 6th Avenue
Portland, OR 97204
*Attorney for Intervenor-Petitioner
Pleasant Home Community
Association and Angela Parker,
dba Hawk Haven Equine*

James D. Howsley
Ezra L. Hammer
Jordan Ramis PC
1211 SW Fifth Avenue, 27th Floor
Portland, OR 97204
*Attorneys for Petitioner-Intervenors
Oregon Association of Nurseries and
Multnomah County Farm Bureau*

Andrew Mulkey
340 SE 6th Avenue
Portland, OR 97214
*Attorney for Intervenor-Petitioner
1000 Friends of Oregon*

Elliot Field
Garrett Hemann Robertson PC
4895 Skyline Rd. S
Salem, OR 97306
*Attorney for Intervenor-Petitioner
Gresham-Barlow School District
No. 10J*

2

3 Dated this 16th day of August, 2024.

4

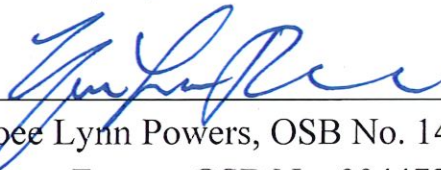
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Zoe Lynn Powers, OSB No. 144510
Renee France, OSB No. 004472
Radler White Parks & Alexander, LLP
Attorneys for Intervenor-Respondent