

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-PETITIONERS  
PLEASANT HOME COMMUNITY  
ASSOCIATION AND ANGELA  
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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 statement of standing by Intervenor-Petitioners Pleasant Home Community Association and Angela Parker, dba Hawk Haven Equine (collectively, “PHCA”).

## II. STATEMENT OF THE CASE

### A. NATURE OF THE DECISION

PWB rejects PHCA’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”)<sup>1</sup> criteria referenced in PHCA’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

---

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

1           ○ (2) the pipelines, where located in MUA-20.

2   No other part of the decision is implicated.

3           **B.   RELIEF SOUGHT**

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

5           **C.   SUMMARY OF ARGUMENTS**

6                   **1.   First Subassignment**

7           The Hearings Officer's irrelevant commentary is irrelevant. Construction  
8   is not the "use" being reviewed, as explained in the County Brief, Section IV.A.

9                   **2.   Second Subassignment**

10          The "area" under MCC 39.7515(A) is both mapped and well described in  
11   the findings and supported by the record. Those findings adequately respond to  
12   issues raised by opponents below and the Hearing Officer was not required to  
13   provide any additional interpretation.

14                  **3.   Third Subassignment**

15          The two sentences PHCA cites are not conflicting findings. The multi-  
16   factor approach taken by the Hearings Officer provided 28 pages of detailed  
17   findings on the character of the area.

18                  **4.   Fourth Subassignment**

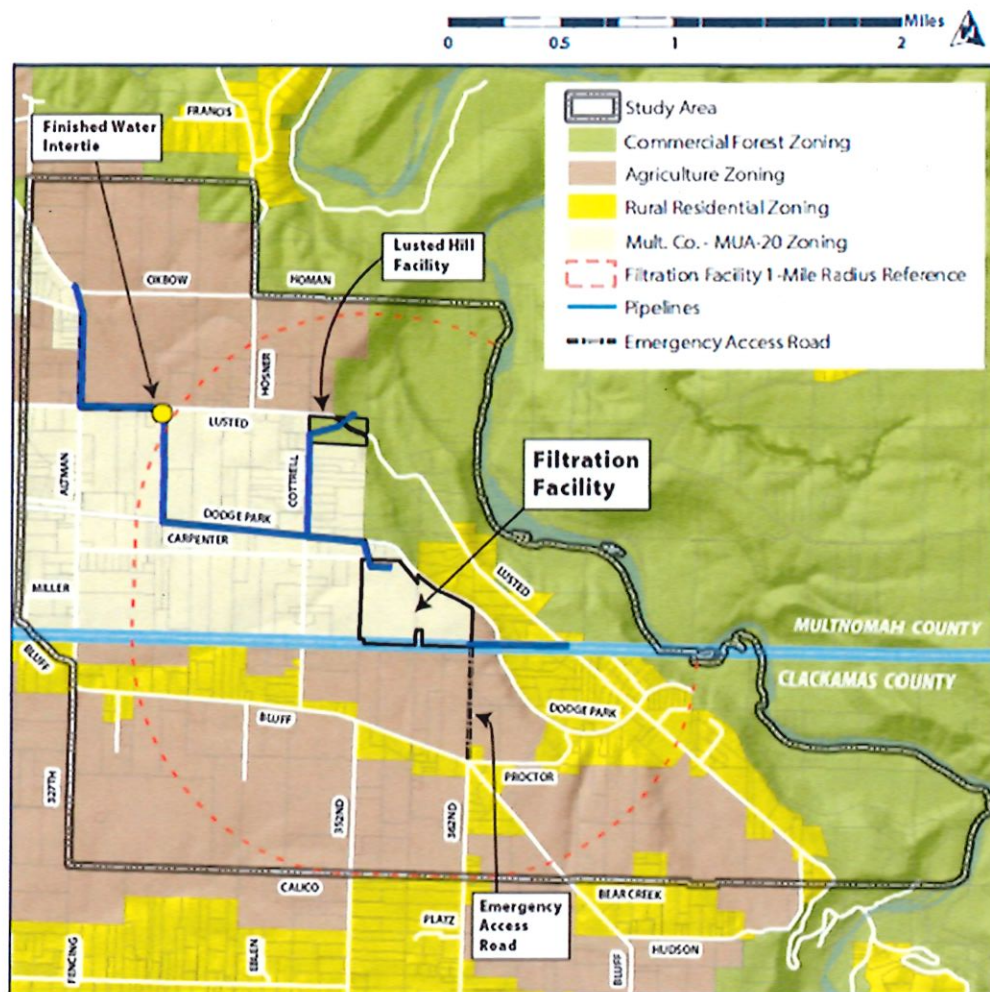
19          Incorporated findings are findings, and the findings provided here  
20   adequately describe the character of the area. PHCA does not present any  
21   coherent interpretational argument, and certainly not any that are more plausible

1 than the approach taken by the Hearings Officer. The findings adequately  
2 respond to issues raised below and are supported by substantial evidence.

3 **D. SUPPLEMENTARY STATEMENT OF FACTS**

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

6 The proposed filtration facility will be located on a 94-acre site located in  
7 the County's MUA-20 zone. To evaluate compliance with MCC 39.7515(A),  
8 PWB developed a project study area and described each study area boundary.  
9 Rec-196-197. The study area includes and surrounds all project elements (the  
10 filtration facility, communication tower, intertie, pipelines, and access roads).  
11 Rec-7892.



**Figure 9. Consolidated Land Use Study Area with Generalized Zoning**

Rec-7892.

Approximately 44% of the study area is zoned Exclusive Farm Use, approximately 36% is zoned with a rural residential zone, and approximately 20% is zoned commercial forest. *Id.* Mid- to large-scale agricultural operations (nurseries and agricultural processing) are the predominant agricultural type and land use in the project area. Rec-7893. Seven of the project area nurseries and agricultural processing operations had a 2020 average employee count of 86, with two of the businesses having employee counts at of exceeding 200. Rec-7894. In contrast, the project will have a maximum of 26 employees, with only

1 10 on the largest shift. Rec-7911. The closest nursery is located just west of the  
2 filtration facility site on Carpenter Lane and includes three loading docks with  
3 access onto Carpenter Lane. Rec-7897. The filtration facility will see an  
4 average of five trucks per working day. Rec-7911. Mid- and large-scale  
5 nurseries are shown on the map below in the darker blue.

6 There are also five public facilities within the study area (in the map's  
7 lighter blue), including PWB's Lusted Hill Treatment Facility located a half  
8 mile north of the filtration facility (number 11); the existing large water tanks  
9 for Pleasant Home Water District (number 9) surrounded on three sides by the  
10 filtration facility site; and a large photovoltaic solar power utility facility just to  
11 the south (number 13). Rec-7896.



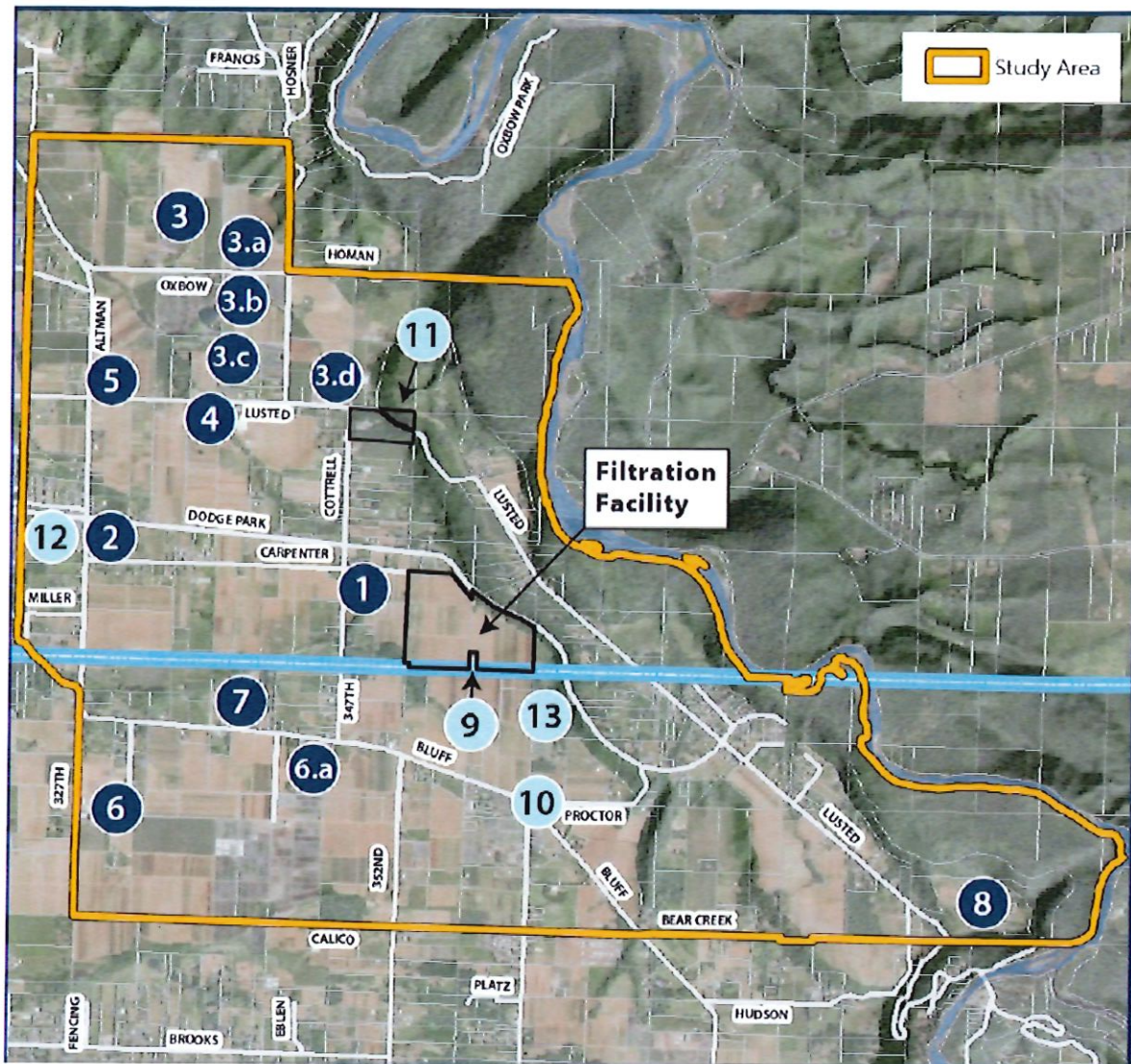


Figure 5. Mid- and Large-Scale Nursery and Agricultural Processing Centers and Public Facilities

Rec-7896.

Conditions recommended by County Transportation require PWB to widen and resurface Carpenter Lane east of Cottrell Road consistent with County design standards. Rec-87-88.

Potential visual impacts from the filtration facility itself are mitigated through a variety of design measures, including extensive building and parking setbacks, placement of building and structures in the lower area of the site, and

1 large landscape berms and plantings. Rec-194. The filtration facility structures  
2 were designed to be consistent with the architectural styles of existing homes  
3 and agricultural structures and most structures are well below the maximum  
4 building height in the MUA-20 zone of 35 feet. Rec-7942; 17.

5 The filtration facility will fully mitigate off-site noise through screening,  
6 topography, and structural buffering. Rec-7917. An Exterior Noise Analysis  
7 prepared by an acoustical engineer evaluated the highest noise levels generated  
8 by simultaneous operation of all equipment at the filtration facility, including  
9 those with intermittent operation, and concluded that, even under those rare  
10 circumstances, facility noise generation at property lines will be less 50 dBA  
11 and equivalent to, or lower than, measurements of background ambient noise.  
12 Rec-202, 453. The acoustical engineer also collected nighttime ambient noise  
13 measurements and concluded that noise levels at the property line generated by  
14 non-emergency facility equipment would be within or below the range of  
15 measured nighttime ambient noise at all location points. Rec-453-454.

16 The filtration facility will also mitigate any light impacts. Rec-206. The  
17 filtration facility is purposefully located in a lower elevation portion of the site  
18 and buffered by landscaping and berms. *Id.* Additionally, all lights will be  
19 shielded and comply with County dark sky lighting standards. Rec-207. The  
20 Lighting Report in the record, prepared by a professional lighting designer,  
21 concluded that, even if all lights at the facility were at full light output, all light

1 would be contained on the property with 0 footcandle light trespass along the  
2 property lines. Rec-6865-6866. Additionally, all fixtures have full cutoff beam  
3 distributions with zero uplight. *Id.*

4 Overall, “the filtration facility itself will be quiet, odorless, safe, and  
5 relatively unobtrusive with extensive visual screening[.]” Rec-190.

### 6 **III. LUBA’S JURISDICTION**

7 PWB agrees that LUBA has jurisdiction.

### 8 **IV. ARGUMENT**

#### 9 **A. PRESERVATION**

10 PWB agrees that the arguments presented in PHCA’s brief were  
11 preserved except where noted in the arguments below. For the reasons set forth  
12 below, PWB objects to the PHCA arguments related to (1) the size and  
13 boundary of the “area” for purposes of MCC 39.7515(D) or (F), and (2) a  
14 “totality” of the character of the area that needs to be addressed. Neither of  
15 these arguments were raised with sufficient specificity, if at all, during the local  
16 proceeding.

#### 17 **B. STANDARD OF REVIEW**

18 PHCA’s statement of the standard of review is incorrect, as the decision  
19 does not “implement[] state law” and is not subject to “ORS 197.829(1)(d).”  
20 PHCA Brief, 11.

1        Instead, “review of the hearings officer’s interpretation in this case is  
2        governed by ORS 197.835(9)(a)(D), which requires that LUBA determine  
3        whether the hearings officer “[i]mproperly construed the applicable law.”  
4        *Waverly Landing Condo. Owners’ Assoc. v. City of Portland*, 61 Or LUBA 448,  
5        \_\_\_\_ (2010) (slip op at 7). As explained in *Dahlen v. City of Bend*, \_\_\_\_ Or  
6        LUBA \_\_\_\_, \_\_\_\_ (2021) (LUBA No 2021-013, June 14, 2021) (slip op at 5-6), to  
7        determine under ORS 197.835(9)(a)(D) if the Hearings Officer “properly  
8        construed the law, [LUBA will] consider the text and context of the code and  
9        give words their ordinary meaning” under the standard rules for interpreting  
10       code provisions under *Portland General Electric Company v. Bureau of Labor*  
11       & *Industry*, 317 Or 606, 859 P2d 1143 (1993), *State v. Gaines*, 346 Or 160, 206  
12       P3d 1042 (2009), and their progeny (*PGE/Gaines*). The goal of code  
13       interpretation is “to discern the intent of the body that promulgated the law” –  
14       in this case, the County Board. *City of Eugene v. Comcast of Or. II, Inc.*, 263 Or  
15       App 116, 127 (2014), *affirmed* 359 Or 528 (2016).

16       Under ORS 197.835(9)(a)(D), LUBA will affirm a hearings officer, even  
17       if “debatable,” if “the hearings officer’s interpretation is more consistent with  
18       the text of [the code] than [opponents’] interpretation” or “at least as  
19       supportable as [opponents’] contrary view.” *Waverly*, 61 Or LUBA at \_\_\_\_ (slip  
20       op at 7); *Patel v. City of Portland*, 77 Or LUBA 349, \_\_\_\_ (2018) (slip op at 12)  
21       (summarizing a holding of *Gould v. Deschutes County*, 67 Or LUBA 1, 7

1 (2013), as “where different interpretations are equally plausible, and context  
2 supports a hearings officer choice of interpretation, LUBA will defer to the  
3 hearings officer’s interpretation”).

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

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

12 **C. RESPONSE TO FIRST SUBASSIGNMENT OF ERROR:**  
13

14 **Irrelevant commentary is irrelevant and construction is not the**  
15 **use.**  
16

17 **1. Irrelevant Commentary**

18 PHCA’s opening argument is that, in recognizing that he could see the  
19 “importance of the project,” the Hearings Officer somehow “made his decision  
20 in the opening paragraph.” PHCA Brief, 12-13. This is obviously untrue – in  
21 acknowledging that *some* decision maker *could* have a preference to approve a  
22 project of this importance, the Hearings Officer was directly declining to  
23 engage with that preference and, instead, “neutrally applied the criteria to the  
24 facts of this case to reach my conclusion.” Rec-14. That is, the Hearings Officer

1 expressly was not “relying upon” the importance of the project, contrary to  
2 PHCA Brief, 14.

3 PHCA does not provide any substance to their argument that this was a  
4 misinterpretation, inadequate findings, or not supported by evidence. PHCA  
5 Brief, 14. PHCA merely notes the approval criterion at issue (“consistent with  
6 the character of the area”) and that “[n]one of the county’s approval criteria  
7 relate” to the importance of the project or to another irrelevant consideration,  
8 site selection.<sup>2</sup> We agree it does not relate to the approval criteria. PHCA Brief,  
9 15. As further explained in County Brief, Section IV.A.6(b), particularly given  
10 that PHCA agrees that it does not “relate” to any of the approval criteria, the  
11 legal implication is that irrelevant commentary is irrelevant and this was “at  
12 most harmless error.” *Angius v. Washington County*, 52 Or LUBA 222, 240  
13 (2006).

14 This argument is inadequately developed for review and does not provide  
15 a basis for reversal or remand.

16 **2. Construction is Not the Use**

17 As explained in County Brief, Section IV.A, the Hearings Officer  
18 provided a *PGE/Gaines* analysis considering the relevant text, context, and  
19 legislative history and concluded that construction, including any externalities

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<sup>2</sup> As the Hearings Officer correctly noted, “It is not in my purview to judge whether this is the correct type of facility or whether the facility could be built elsewhere.” Rec-14.

1 of construction, are not the “use” to be evaluated under the use approval  
2 criteria. Opponents have not provided any substantive *PGE/Gaines* analysis to  
3 the contrary, in PHCA’s brief or in any other brief.

4 The County has responded in its Brief, Section IV.A, to PHCA’s  
5 assertions on this topic (PHCA Brief, 14-17). Accordingly, this brief generally  
6 addresses only arguments related to the actual use proposed – the filtration  
7 facility, pipelines, intertie, and related appurtenances (the “project”) – and not  
8 those related to construction of the project.

9 **D. RESPONSE TO SECOND SUBASSIGNMENT OF ERROR:**

10  
11 **The “area” and the rationale for its selection are well-defined**  
12 **in the findings and record.**

13  
14 In the title of this subassignment of error, PHCA smashes together an  
15 interpretation, findings, and substantial evidence challenge. We attempted to  
16 assist the Board by separating these legal challenges below.

17 **1. Findings identify the relevant area and provide detailed**  
18 **rationale for its selection.**

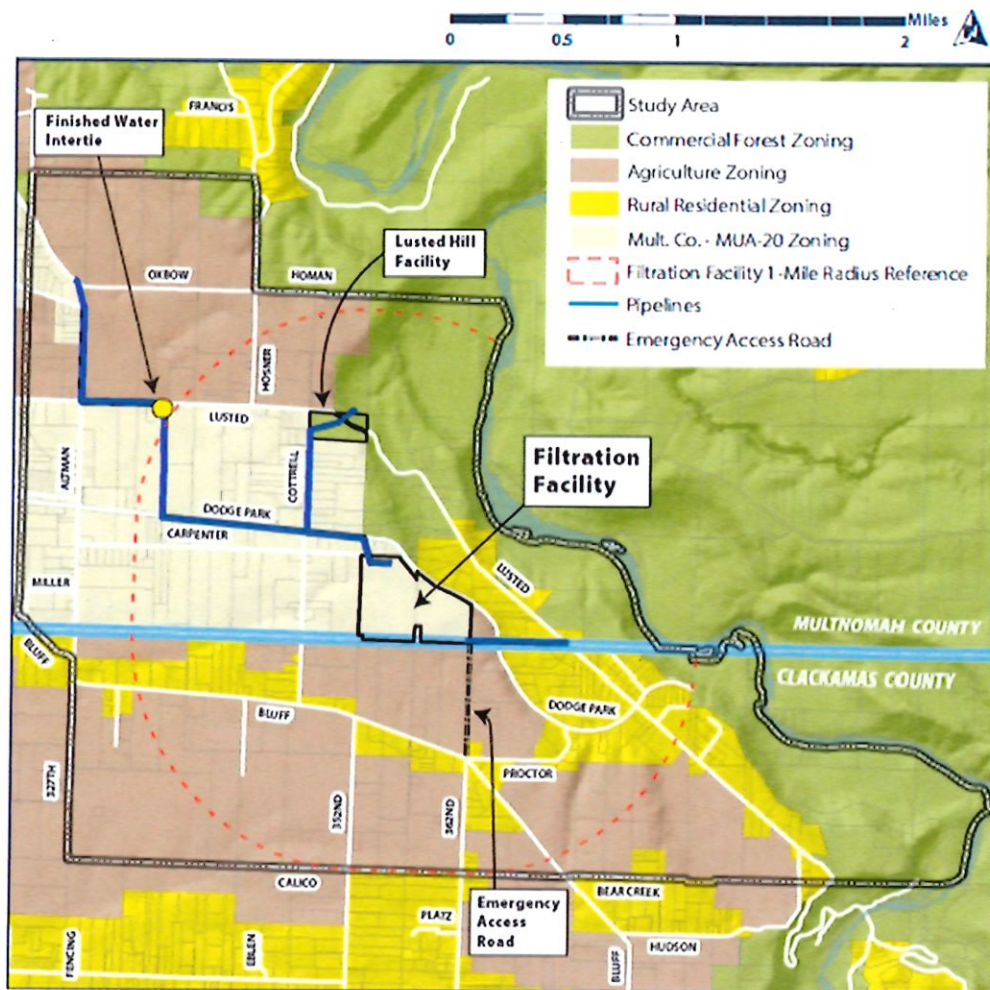
19  
20 PHCA seems to argue that the findings did not “identify the relevant  
21 area” as required in their quotation of *Knight v. City of Eugene*, 41 Or LUBA  
22 279 (2002). PHCA Brief, 19-20. It is unclear why they cite to *Knight* or why  
23 they would believe the findings do not identify the relevant “area.” There are 11  
24 pages of findings describing the boundaries of the “area” chosen for study and  
25 the rationale. Rec-189-199 (“The Area and the Rationale for its Selection are



1 Well-Defined”). Those findings are incorporated at Rec-41. Incorporated  
2 findings are findings.

3 For the analysis of MCC 39.7515(A)’s compatibility standard, Rec-41 is  
4 the relevant page where the Hearings Officer incorporated extensive findings  
5 from applicant’s final argument. Therefore, all pages of applicant’s final  
6 argument referenced in this brief as “findings” are incorporated by Rec-41,  
7 unless another page incorporating them is specified.

8 *Knight* itself suggests that the ideal findings would provide a “map or a  
9 geographically precise written description” of “the area” being considered. 41  
10 Or LUBA at 285. The findings here provide *both*. The map in the findings at  
11 Rec-196 is provided below, and the geographically precise written description  
12 is at Rec-195-197. These are the ideal findings under *Knight*. This argument has  
13 no substance and should be rejected.



**Figure 9. Consolidated Land Use Study Area with Generalized Zoning**

*Rec-196.*

**2. Findings provide a detailed rationale for the area's selection.**

As noted above, there are 11 pages of findings describing the boundaries of the "area" chosen for study and the rationale for that area. Rec-189-199. For example, the findings provide:

- "The study area boundary is large enough to consider all areas where the externalities or sensitivities of the proposed use could potentially have impacts[.]" Rec-190.

1 • “[T]he ... consolidated, unified study area ... ensures that the  
2 analysis is comprehensive and does not fail to consider cumulative  
3 impacts across the project, even where components of the project  
4 are subject to separate land use applications.” Rec-190.

5 • “[T]he main potential for off-site impacts relates to the  
6 transportation intersections and roadways analyzed in the TIA<sup>3</sup>  
7 ... The transportation engineer chose these intersections because  
8 they could be affected by project operations based on his  
9 professional judgment and in response to feedback received during  
10 the Water Bureau’s public engagement process. The Multnomah  
11 County Transportation Planning & Development Department  
12 reviewed and approved the thirteen intersections included in the  
13 TIA[.]” Rec-191.

14 • “[T]he study area also is large enough to include nursery crop land  
15 and associated wholesale nursery operational centers and  
16 agricultural processing operations.” Rec-192.

17 • “The study area shown on Figure 9 is designed to be large enough  
18 to include these potential viewshed impact areas.” Rec-194.

19 • “In addition to traffic, views, and agriculture, participants in  
20 outreach meetings have raised concerns related to potential

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<sup>3</sup> The “Project TIA” is at Rec-7294-7464 and the “Construction TIA” is at Rec-4201-4227.

1 lighting, noise, hazardous materials, olfactory, and water and air  
2 quality impacts from project operations. Each of these potential  
3 impact categories has been analyzed as part of the planning and  
4 design of the project, but none has a potential for an impact area  
5 larger than the study area created by considering traffic, views, and  
6 agriculture.” Rec-195.

- 7 • “The study area includes the filtration facility, communications  
8 tower, an emergency access road from Bluff Road, the intertie on  
9 Lusted Road, and related raw and finished water pipelines. The  
10 boundaries of the study area take into consideration roadways and  
11 topographical features which clearly divide areas of the counties.”  
12 Rec-195.

13 The findings: (1) address the applicable standards, including specifically  
14 identifying and mapping “the area” and explicitly noting that it must “include  
15 ... some justification or rationale for its selection of ‘the area’ to be  
16 considered[,]”<sup>4</sup> Rec-188-89; (2) set out the facts relied upon, such as explaining  
17 how the roads and intersections analyzed in the Project TIA and Construction  
18 TIA were chosen because they “could be affected” by the project, and the  
19 “main potential for off-site impacts relates to the transportation” system, Rec-

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<sup>4</sup> The “rationale” provided in the bullet points above is also aligned with caselaw that the “area” should include areas “directly affected by the proposed use” or areas “within sight and sound, or other effects of the proposed use.” *Multnomah County v. City of Fairview*, 18 Or LUBA 8, 15 (1989).

1 190-91; and (3) explain how those facts lead to the conclusion that the standards  
2 are met, including that “[t]he study area boundary is large enough to consider  
3 all areas where the externalities or sensitivities of the proposed use could  
4 potentially have impacts[.]” Rec-190. *Heiller*, 23 Or LUBA at 556. The 11  
5 pages of analysis are more than sufficient to provide adequate findings,  
6 particularly because “nothing in the MCC defines or prescribes the relevant  
7 study area for the purposes of the MCC 39.7515(A) Compatibility Standard.”  
8 *Tarr v. Multnomah County*, 81 Or LUBA 242 (2020) (slip op at 33). Indeed,  
9 there are ideal findings under *Knight*.

10 PHCA does not attack the findings themselves under any of the three  
11 *Heiller* tests. In fact, they do not object to any portion of the 11 pages of  
12 findings that set forth in detail the rationale for the chosen study area, just  
13 saying “[t]he required findings are absent here.” PHCA Brief, 21. Instead,  
14 PHCA would like a different area, such as the extremely large one proposed by  
15 Jim Johnson. PHCA Brief, 19.<sup>5</sup> However, simply disagreeing with the  
16 conclusion reached is not enough for a findings challenge. Where, as here, “a  
17 petitioner does not explain why challenged findings are inadequate but, rather,  
18 disagrees with the conclusion reached in those findings, petitioner’s challenge

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<sup>5</sup> See also Intervenor-Respondent’s Response Brief to The Joint Petition For Review Of Intervenor-Petitioners Oregon Association of Nurseries and Multnomah County Farm Bureau (the “PWB OAN Brief”), Section IV.B.5 (analyzing Mr. Johnson’s proposed “surrounding lands” for the Farm Impacts Test).

1 to the findings will not be sustained.” *Vanderburg v. City of Albany*, \_\_\_\_ Or  
2 LUBA \_\_\_\_, \_\_\_\_ (LUBA No 2022-082, Jan 5, 2023) (slip op at 12). PWB asks  
3 that this challenge be rejected.

4 **3. Findings adequately respond to issues raised below and**  
5 **are supported by substantial evidence.**  
6

7 PHCA argues that the findings do “not address” opposition testimony or  
8 “resolve the conflicting positions of the parties[.]” PHCA Brief, 18, 20. This  
9 argument is fundamentally flawed, as “the decision maker is not required to  
10 identify and respond to every piece of opposing evidence.” *Stoloff*, 51 Or  
11 LUBA at 567. As described further below in Section IV.F.4, the key is that the  
12 general *issue* raised was addressed. Here, the issue of the correct “area” for  
13 study was absolutely adequately addressed in eleven pages.

14 PHCA points to Mr. Johnson’s proposed study area. PHCA Brief, 19.  
15 However, that testimony was directly addressed in the findings, Rec-263-268,  
16 48, and relates to “surrounding lands” for MCC 39.7515(C)’s Farm Impacts  
17 Test – a differently worded standard addressed in PWB OAN Brief, Section  
18 IV.B.5.

19 The only testimony PHCA identifies as relevant to the “area” is that of  
20 Gresham-Barlow School District (“GBSD”). Confusingly, PHCA Brief, 19,  
21 states that GBSD’s concerns are about “impacts on public services and  
22 hazardous conditions” under different approval criteria – subsections (D) and  
23 (F) are cited, not subsection (A) character of the area. The subsection (F)

1 hazardous conditions criterion does not even use the word “area” and is  
2 irrelevant. The subsection (D) public services approval criterion does use the  
3 word “area,” but no party below,<sup>6</sup> or in their briefing to this court, has argued  
4 that a different definition of “area” should have been applied or would change  
5 the way that approval criterion is applied.<sup>7</sup>

6 Even if GBSD’s testimony did relate to subsection (A) compatibility, the  
7 cited pages of the record reflect “GBSD’s traffic concerns,” Rec-1405, and how  
8 PWB’s proposed conditions of approval respond to those concerns by requiring  
9 construction traffic to avoid schools. Rec-474. As noted above, construction is  
10 not the use and this is irrelevant. Moreover, the “traffic concerns” issue was  
11 addressed. LUBA has said that the “area” should include areas “directly  
12 affected by the proposed use”<sup>8</sup> or areas “within sight and sound, or other effects  
13 of the proposed use.” *Multnomah County v. City of Fairview*, 18 Or LUBA 8,  
14 15 (1989). County Transportation validated that the study area covered the area  
15 that would potentially experience externalities *even considering* construction  
16 traffic. Rec-733 (noting this argument from the schools but concluding that the

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<sup>6</sup> PHCA does not point to any preservation of this argument, and it is waived.

<sup>7</sup> The Hearings Officer specifically addressed GBSD’s only argument related to MCC 39.7515(D) in concluding, “I agree with the Applicant that it will not require services from the schools. No one is living at the [f]iltration [f]acility or in the pipelines.” Rec-54.

<sup>8</sup> LUBA’s choice of words in *Multnomah County* shows that construction is not the “proposed use” to be evaluated under MCC 39.7515(A).



1 conditions of approval for school avoidance would “ensure operations of local  
2 traffic are adequately addressed”).

3       Regardless, there is no evidence that the high school “three miles west of  
4 the site”<sup>9</sup> (PHCA Brief, 19) should be included in the study area when the  
5 Construction TIA “concludes that the collective construction traffic will have  
6 minimal impacts on intersection and roadway operations, including during  
7 needed roadway closures for pipeline construction” with the use of  
8 Transportation Demand Management (TDM) strategies. Rec-4201-4586. That  
9 is, even for the highest potential traffic impact – during peak construction – “all  
10 study [area] intersections perform at acceptable levels of service with minimal  
11 delay” with TDM, “and so there is no reason to believe that there would be  
12 [issues] outside the study area, as traffic continues to disperse.” Rec-264; Rec-  
13 48 (adopting findings).

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<sup>9</sup> The findings explain why a one-mile reference area was used in developing the study area, and shown on the Figure 9 map provided above: “The one-mile line is just that, a reference line. It is helpful to understand the scale of the comprehensive analysis that the applicant undertook. It is also the radius that includes most of pipelines as well as most of the intersections that needed to be studied (that is, where the potential for impacts at an intersection was determined by County Transportation). Where a larger area was needed to capture these potential impacts, the area extends beyond the one-mile reference line to some logical boundary like a major road. The reference line is intentionally conservative, intending to consider a larger potential area of impact than, for example, is required under OAR 660-023-0180(5)(a) for mining uses (1,500 feet), or than was required by Multnomah County in the Water Bureau’s Lusted Hill Facility review ([Exhibit A.162]) (1,320 feet).” Rec-197n28.

1 Opponents fear overwhelming impacts from construction traffic, but that  
2 is simply not what the objective evidence in the record shows. Level of Service  
3 requirements “serve as a gauge to allow the [County] to objectively measure the  
4 performance, or lack thereof, of its transportation system.” *Montlake Cmty.*  
5 *Club v. Hearings Bd.*, 110 Wash App 731, 739, 43 P3d 57 (2002). The system  
6 inside the study area will, objectively and even during construction, continue to  
7 function within County levels of service with minimal delays, as shown by the  
8 Project TIA and the Construction TIA. That conclusion was validated by  
9 County Transportation, who the Hearings Officer found to be the most credible  
10 expert on the functioning of their own roads. Rec-47. Nothing requires a larger  
11 study area than chosen by the County. *See also* PWB OAN Brief, Section  
12 IV.B.3.

13 **4. Nothing required an express code interpretation or an**  
14 **explanation of differently worded standards.**

15 PHCA’s only code interpretation argument we can discern in the second  
16 subassignment of error argues that “[t]he H.O. did not expressly interpret the  
17 code language regarding the scope of the “area” or “surrounding lands,” nor did  
18 he attempt explaining the distinction, if any, between the two.” PHCA Brief, 19.

19 First, the “surrounding lands” for MCC 39.7515(C)’s Farm Impacts Test  
20 is addressed at PWB OAN Brief, Section IV.B. It stands on its own caselaw,  
21 and its own findings regarding application to the facts of this case – it will not

1 be discussed further here.<sup>10</sup> Nothing required the Hearings Officer to compare  
2 and contrast different approval criteria, and PHCA does not make any  
3 substantive argument, or quote any caselaw, that he was so required. Indeed,  
4 caselaw supports the Hearings Officer's approach of addressing the standards  
5 separately, as character of the area "is a local standard that is distinct from the  
6 farm impacts standard." *Schrepel v. Yamhill County*, \_\_\_ Or LUBA \_\_\_ (LUBA  
7 No. 2020-066/067, December 30, 2020) (slip op at 56); *Conte et al v. City of*  
8 *Eugene*, 77 Or LUBA 69 (2018) (slip op at 26) (holding that "differently  
9 worded standard[s]" applied to the same application are validly addressed  
10 separately).<sup>11</sup>

11 Second, nothing requires an "express[] interpret[ation]" in order for  
12 findings to be adequate. PHCA does not identify the source of any legal  
13 requirement that an express interpretation is needed, and caselaw is to the  
14 contrary. See *All. for Responsible Land Use v. Deschutes Cty.*, 149 Or App 259,  
15 266, 942 P2d 836 (1997) (county was not required to "expressly interpret" an

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<sup>10</sup> To the extent this includes some argument about the "area" under MCC 39.7515(D), this argument is wholly undeveloped for review. Nor does PHCA cite to any place in the record where that kind of an argument raised below, and we know of none. This argument was not preserved.

<sup>11</sup> To be clear, the Hearings Officer did engage in an evaluation of the context in which MCC 39.7515(A) arises, which includes the Farm Impacts Test, and notes that the caselaw guidance on defining the "area" under (A) is "similar to the guidance for the Farm Impact Test[.]" Rec-198n32. For that reason, the two areas in this case are identical. However, there is nothing the Hearings Officer was required to do in this regard that he failed to do. There is no error presented in this argument.

1 approval criterion because the county's "interpretation ... can be inferred from  
2 the way in which it applied the provision in its decision"); *Rouse v. Tillamook*  
3 *County*, 34 Or LUBA 530, 533 (1998) (upholding findings that "do not  
4 expressly interpret" approval criterion where detailed evaluation showed how  
5 the County had "impliedly interpreted this criterion").

6 Third, the findings do interpret the scope of the "area" because the  
7 findings clearly lay out the caselaw that has already done that interpretation and  
8 explains how the "area" under MCC 39.7515(A) is to be found. That caselaw  
9 includes *Tarr v. Multnomah County*, 81 Or LUBA 242 (2020), in which LUBA  
10 specifically explained, *for this exact same criterion*, that "nothing in the MCC  
11 defines or prescribes the relevant study area for the purposes of the  
12 MCC 39.7515(A) Compatibility Standard." *Id.* slip op at 33; Rec-198. It is  
13 unclear how PHCA would have liked the Hearings Officer to "expressly  
14 interpret the code language" when caselaw already has determined that  
15 "nothing in the MCC" is available to be interpreted.

16 The findings note that "caselaw does give us some guidance":

17 "Specifically, LUBA has said that it should include  
18 areas 'directly affected by the proposed use' or areas  
19 'within sight and sound, or other effects of the  
20 proposed use.' *Multnomah County*, 18 Or LUBA at  
21 15. Accordingly, the study area is designed to be large  
22 enough to include the entire project as well as all  
23 areas where the externalities or sensitivities of the  
24 proposed use could potentially have impacts, with the  
25 potential transportation, visual, and agricultural  
26 impact categories driving the study area boundaries."

1  
2 Rec-198-99 (footnote omitted). For these reasons, PHCA's argument that there  
3 is no "express interpretation" is unavailing.<sup>12</sup>

4 **E. RESPONSE TO THIRD SUB-ASSIGNMENT OF ERROR:**

5  
6 **There are no conflicting findings.**

7  
8 PHCA argues that there are "conflicting findings" on the character of the  
9 area. PHCA Brief, 21. PHCA does not identify any applicable legal requirement  
10 or caselaw, and this sub-assignment of error is not adequately developed for  
11 review.

12 Moreover, the cited findings do not conflict. Each is taken completely out  
13 of its context and made to stand for some broad, neat, single-sentence statement  
14 of the character of the area. In context, however, it is clear that neither sentence  
15 purports to be a single-sentence definitive statement of the character. Moreover,  
16 the "area" is shown by the record, and the findings, to both have an "area of  
17 farm and farm fields" as well as residential use: "the study area is characterized  
18 by farming (primarily nursery crops and production), residential, forestry,  
19 public facility, solar facility, and utility land uses." Rec-207. As both exist in  
20 the area, and neither finding quoted by PHCA indicates that residential or farm  
21 uses are the *exclusive* use in the area, there simply is no conflict.

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<sup>12</sup> Moreover, PHCA has provided nothing to establish that the application was inconsistent with the text, context, or legislative policy to be considered in a *PGE/Gaines* interpretation. If LUBA determined it were essential, and missing, the Board could provide the interpretation. ORS 197.829(2).

1 PHCA ignores the 28 pages of incorporated findings taking the “multi-  
2 factor approach” affirmed in *Tarr*, setting forth the character of the area for  
3 each of those factors, and explaining how the project is consistent with that  
4 character. Rec-201-227; *Tarr*, 81 Or LUBA slip op at 37. The “character of the  
5 area” is inherently going to be complex, particularly in an area like this one  
6 where there are rural residences mixed in with large-scale nursery uses and  
7 existing utility uses, including PWB’s existing pipelines and Lusted Hill  
8 facility. If the Hearings Officer *had* tried to sum up the “character of the area”  
9 in one neat sentence, it would not have captured the nuance that the findings  
10 provide by following *Tarr*’s multi-factor approach.

11 This subassignment of error should be denied.

12 **F. RESPONSE TO FOURTH SUBASSIGNMENT OF ERROR**

13 **1. Incorporated findings are findings.**

14 This subassignment of error requires us to first review a fundamental  
15 principle: incorporated findings are findings. Under *Gonzalez v. Lane County*,  
16 24 Or LUBA 251, 259 (1992), the Hearings Officer indicated his intent to  
17 incorporate and identified the pages incorporated when he expressly states that  
18 he “adopt[s] as my finding[s] the Applicant’s Final Argument Page[s] 54-92.”  
19 Rec-41. In fact, PHCA later acknowledges “the incorporated materials” but,  
20 broadly, states that nothing in the nearly 40 pages of adopted findings changes  
21 their conclusions in their brief. *See* PHCA Brief, 29 (“too”); 23 (stopping block

1 quotation immediately before Hearings Officer expressly adopts final argument  
2 pages as findings).

3 So, when PHCA says things like there is only a “cursory discussion” of  
4 this approval criterion, Brief, 23, it must be the case that PHCA is ignoring the  
5 nearly 40 pages of incorporated findings. That approach must be rejected.  
6 Incorporated findings are findings.

7 **2. Findings adequately describe the character of the area.**

8 PHCA provides a long set of “Opponents’ Evidence of the Character of  
9 the Area” arguing that “the decision lacks adequate findings providing a  
10 consistent or even ascertainable determination of the character of the area.”  
11 PHCA Brief, 32. But the decision does provide extensive findings on the  
12 character of the area. Those findings include, without limitation:

- 13 • “[T]he study area is characterized by farming (primarily nursery  
14 crops and production), residential, forestry, public facility, solar  
15 facility, and utility land uses.” Rec-207.
- 16 • “The study area includes several nearby moderate to large-scale  
17 nursery operations and associated fields. Most nurseries own or  
18 lease land for growing nursery stock, and typically own land that  
19 accommodates more intensive office, storage, processing, and  
20 distribution facilities.” Rec-192-193. “[S]everal smaller nursery



1 operations and fields also are located in the study area.” Rec-192-  
2 193.

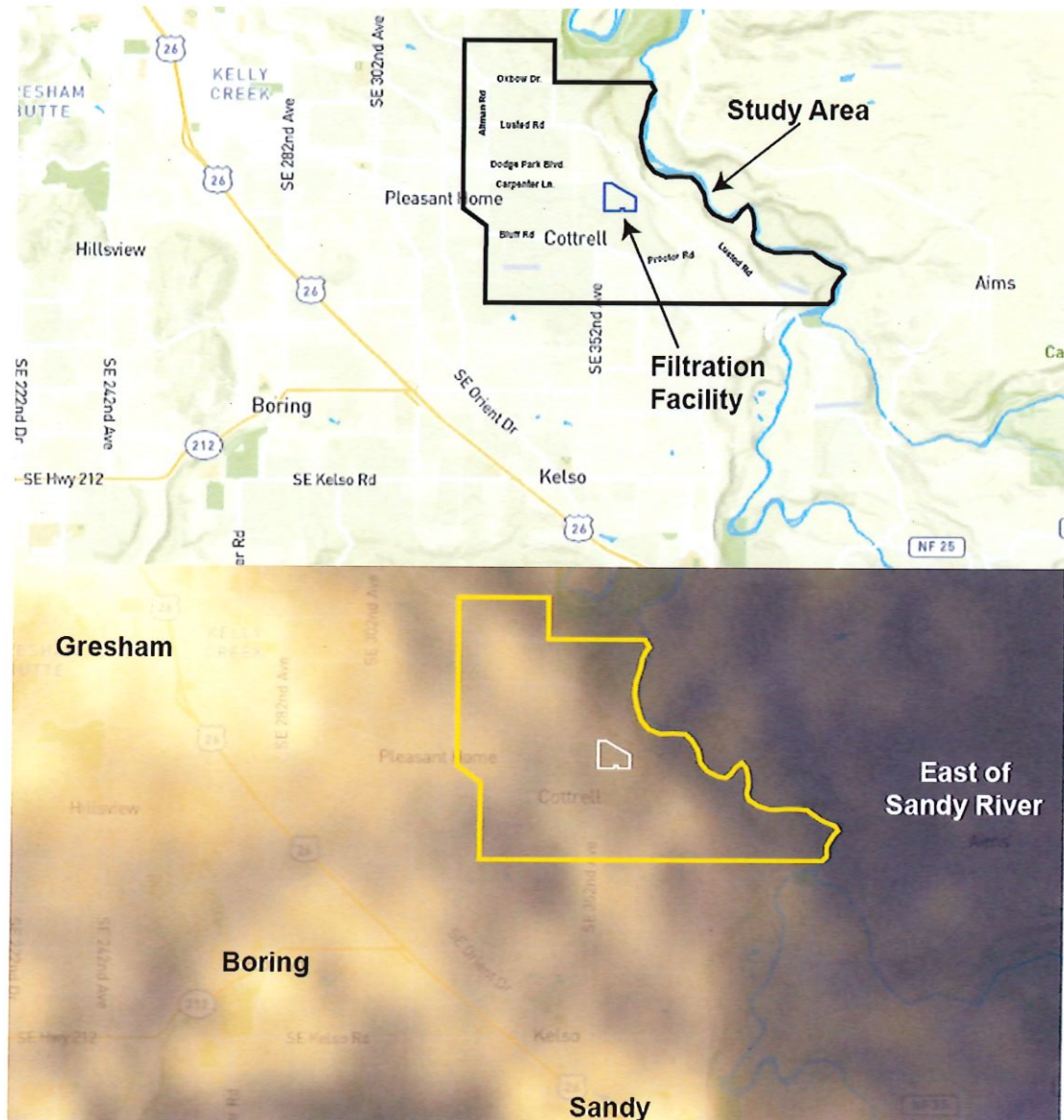
- 3 • “[T]he existing PHWD storage tanks are clearly visible from Bluff  
4 Road.” Rec-194.

- 5 • “[N]oise generated in the area ... includes farm equipment, large  
6 trucks, irrigation pumps, and ventilation equipment serving farms,  
7 businesses and residents.” Rec-205.

- 8 • A noise analysis measured the current “background ambient noise”  
9 at the property line, and found that “existing median hourly  
10 nighttime Leq sound levels range between 40 dBA and 50 dBA.”  
11 Rec-205.

- 12 • The existing uses “generate light” and “residential homesites  
13 frequently have outdoor security or safety lighting fixtures that are  
14 not shielded and, therefore, do not meet current Dark Sky  
15 Ordinance lighting standards.” Rec-207-208. The findings describe  
16 this lighting at some length. “Agricultural warehouses and  
17 processing centers typically have unshielded security floodlights  
18 above their entrances, pole lights over their vehicle maneuvering  
19 and outdoor storage areas, and arena lighting over some fields.  
20 Light is sometimes visible from greenhouses.” Rec-212.

- The findings provide Figure 12, showing the “relatively bright farming and residential land that characterizes most of the study area.” Rec-213-214.



**Figure 12. Night Sky Conditions in and around the Study Area**  
*Rec-214.*

- Neighbors have seen “assorted wildlife in their backyards, SEC areas, and the filtration facility site” and that “wildlife has become

generally habituated to the presence of humans in this area.” Rec-220.

- “The use of trucks for moving materials in and out of the area is part of the current character of the area, as shown in Exhibit I.85 (Existing Traffic) [Rec-1959-1966] as well as in various farmers’ descriptions of their shipping practices.” Rec-221.

- “Carpenter Lane is currently not improved to County local road standards.” Rec-221.

- There is “dust [produced by] existing and surrounding farming activities” including a “tremendous amount of seasonal dust from tractors.” Rec-222.

- “Johnson Creek is located near the southwest corner of the filtration facility site and Beaver Creek is located north of the finished water intertie site.” Rec-223.

- “The steep Sandy River bluff and inherent disruption of the street network by the river itself separates land east of the river from potential impacts west of the river.” Rec-224.

- Security fencing is common at “nurseries in the study area” as well as at the “Water Bureau’s Lusted Hill Facility, which is a half mile away and in the study area[.]” “The PHWD tanks, PGE electrical substation (SW of intersection of Altman Rd and Dodge Park

Boulevard), and the photovoltaic solar power generation facility (36461 Proctor Road) all have security fencing.” Rec-225.

- Visually, there are “unscreened, utilitarian buildings and outdoor storage and parking areas of large nurseries in the area.” Rec-225.

“[F]indings of compliance with relevant approval criteria need not be perfect, rather they need only be adequate to establish the factual and legal basis for the particular conclusions drawn in a challenged decision[.]” *Thomahlen v. City of Ashland*, 20 Or LUBA 218, 229-30 (1990); *Niederer v. City of Albany*, 79 Or LUBA 305, 314 (2019) (quoting this passage from *Thomahlen*). PHCA does not make any arguments about why the findings set forth above are inadequate nor attack the actual findings.

Further, PHCA cites only to *Multnomah County*, 17 Or LUBA at 314, to argue that “findings must adequately explain what the character is[.]” In *Multnomah County*, the issue was with a “finding simply restat[ing] the approval standard” and not making *any findings whatsoever* about the character of the area. *Id.* As the long list above shows, in this case the findings do much more than state that the use is consistent with the character of the area. PHCA cites to no legal authority that anything more than the provided findings were required in the context of MCC 39.7515(A), instead just baldly stating that the “H.O. has simply failed[.]” PHCA Brief, 30.

1       Indeed, much briefer findings than those provided by the Hearings  
2   Officer in this case have been upheld by LUBA. For example, in *Tarr*, 81 Or  
3   LUBA slip op at 30n11, the findings upheld by LUBA merely referenced the  
4   applicant's description of the area and explained that "[t]he rural area  
5   surrounding the subject property consists of rural residences and small farms."  
6   The findings in this case go much further to define the character of the area and  
7   are supported by extensive substantial evidence that is specifically referenced in  
8   the findings. For example, "Visual compatibility is also addressed in Design  
9   Review narratives, Exhibit A.5 (Filtration Facility) [Rec-7826-7875] and  
10   Exhibit A.9 (Pipelines / Intertie) [Rec-7700-7722]" and "Exhibit A.4, pages 53-  
11   65 [Rec-7937-7949], provide[s] additional analysis." Rec-227. The findings are  
12   clearly "adequate to establish the factual and legal basis for the particular  
13   conclusions drawn" and should be upheld. *Thomahlen*, 20 Or LUBA at 229-30.

14       Assuming only for the sake of argument that the description of the  
15   current character of the area in the findings were in some way inadequate,  
16   PHCA does not even explain how that can be anything more than harmless  
17   error. PHCA agrees with the "multi-factorial approach" taken in *Tarr* and in the  
18   decision. PHCA Brief, 30. The Hearings Officer found, on every one of those  
19   factors, that the project will not have externalities that impact the area,  
20   including that proposed use is "quiet, odorless, safe, and relatively unobtrusive  
21   with extensive visual screening[.]" Rec-190. While the decision could have

1 gone on and on summarizing more of the detailed evidence in the record about  
2 the character of the area, it did not need to in order to be adequate to establish  
3 the factual basis of the decision, as the conclusion that the use was compatible  
4 would not have changed.

5 Instead, where, as here, “a petitioner does not explain why challenged  
6 findings are inadequate but, rather, disagrees with the conclusion reached in  
7 those findings, petitioner’s challenge to the findings will not be sustained.”  
8 *Vanderburg*, slip op at 12. PHCA explains that “opponents” applied the *Tarr*  
9 multi-factor approach, “they” looked at uses other than residential uses, and  
10 “they” drew the conclusion that the character of the area would be  
11 “obliterated[.]” PHCA Brief, 30. Those arguments show that PHCA disagrees  
12 with the conclusions reached in these findings, but it does not explain anything  
13 about why the Hearings Officer’s findings are inadequate.<sup>13</sup> This argument  
14 should be rejected.

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<sup>13</sup> PHCA offhandedly argues that opponents (“they”) addressed the “*totality* of the area’s character” and that the findings “never address[] the requisite totality[.]” First, the concept that there is some “totality” that even logically could be described and that needs to be addressed is not an argument that was raised below, and PHCA does not point to any preservation of that issue. Second, PHCA points to literally no caselaw and provides no analysis of the code that would even imply a totality requirement. This argument is unpreserved and without merit.

1                   **3.     There is no interpretational issue presented.**

2           PHCA intertwines various arguments that appear to be about  
3   interpretation into this subassignment of error. We will attempt to discern them  
4   and address each group of these in turn.

5           First, PHCA argues that the Hearings Officer “presents no basis” for the  
6   comment about “flexibility” inherent in interpreting a “vague and completely  
7   open to interpretation” approval criterion. PHCA Brief, 23. This is false. The  
8   rest of that same sentence explains that the Hearings Officer was looking at the  
9   context of the code – a valid consideration under *PGE/Gaines* – to conclude  
10   that the Board “would not have permitted these highly intensive community  
11   service uses in these zones” if the character of the area approval criterion would  
12   inherently prohibit them from being approved. That is a valid interpretational  
13   approach to the context of an approval criterion, as discussed further below.

14          Nor does the quoted section of findings create the slippery slope logical  
15   fallacy on flexibility that PHCA fears (“how much is too much? Is there a  
16   usable scale?”). PHCA Brief, 23. Instead, the Hearings Officer is clear in the  
17   next sentence about what interpretation he is making: “To narrow it down, what  
18   is evaluated under these criteria is the final uses and not the construction of  
19   these uses.” Rec-41. The line is drawn between consideration of the final uses  
20   and the construction of the uses. There is no slippery slope in that clear line.

1           Instead, it becomes clear that PHCA just does not like the line as drawn,  
2 as they later advocate for a “case-by-case” approach that would consider  
3 construction if it were not a “typical or normal timeframe,” or there are too  
4 many truck trips, or roads are too unimproved to bring them up to county  
5 standards. PHCA Brief, 27-28. None of those lines, however, is tied to the code  
6 or any interpretation of the code. For example, PHCA argues that “compliance  
7 with” this approval criterion is only possible “if such uses can be constructed  
8 within a typical or normal timeframe.” PHCA Brief, 27. That assertion is  
9 completely untethered from the code, which says nothing about the timeframe  
10 for construction in asking if the “Community Service use ... is consistent with  
11 the character of the area.” MCC 39.7515. Moreover, even if “takes too long”  
12 were the test for when construction becomes subject to permanent use approval  
13 criteria, the project would be below the “too long” threshold, given the  
14 necessary consideration of what the code allows for the length of construction.  
15 MCC 39.1185(B)(1) states that construction must commence within two years  
16 of the date of the final decision and (B)(2) states that construction must be  
17 completed within four years of the date construction commences. That time  
18 period is not unusual; instead, it is expressly permitted by the code. These  
19 timelines have specifically been included as conditions of approval in this case  
20 (staff’s proposed conditions 1 and 2). Rec-81. The project does not extend  
21 beyond the code’s standards for length of construction.



1       Second, we cannot discern PHCA's context and legislative history  
2   argument about other uses subject to this approval criterion. PHCA Brief, 23-  
3   24; 26-27. The fact that MCC 39.7515(A) also applies to Community Service  
4   uses in other zones does not change that construction is not the use. Nor is it in  
5   conflict with the Hearings Officer's finding that "the Board ... would not have  
6   permitted ...uses in these zones," *plural*, that inherently could not meet the  
7   approval criterion. PHCA Brief, 23 (quoting that finding before making this  
8   argument). Considering whether a possible interpretation of an approval  
9   criterion "would make it very difficult for any community service use to gain  
10   approval" is a valid interpretational approach to the context of an approval  
11   criterion. *Tarr*, 81 Or LUBA slip op at 37; *see also Davis v. Polk County*, 58 Or  
12   LUBA 1, 7 (2008) (county findings denying a CUP for a racetrack due to a lack  
13   of harmony with other uses because the racetrack would be unable to prevent  
14   any dust from leaving the property were deemed inadequate where numerous  
15   listed conditional uses would necessarily generate dust).

16       PHCA also asserts that because some of the uses may fail the test in some  
17   areas "the board ... set an unusually high bar for approval." PHCA Brief, 27.  
18   PHCA reads too much into a list of uses – there is no indication in the code's  
19   text, context, or legislative history that the Board intended to set a "high bar"  
20   under this approval criterion. Nor is the proposed project a "high-impact use[]"  
21   of the kind that would in PHCA's estimation not meet that high bar. PHCA

1 Brief, 27. Instead, “the filtration facility itself will be quiet, odorless, safe, and  
2 relatively unobtrusive with extensive visual screening[.]” Rec-190.

3       Regardless, even if any of PHCA’s disjointed interpretational arguments  
4 were plausible, the Hearings Officer’s approach is more plausible, particularly  
5 in light of *Davis*, 58 Or LUBA at 7, and *Tarr*, 81 Or LUBA slip op at 37. Even  
6 if “debatable,” LUBA will affirm a Hearings Officer’s interpretation if it is “at  
7 least as supportable as [opponents’] contrary view.” *Waverly*, 61 Or LUBA at  
8 \_\_\_\_ (slip op at 7); *Patel*, slip op at 12 (summarizing a holding of *Gould*, 67 Or  
9 LUBA at 7, as “where different interpretations are equally plausible, and  
10 context supports a hearings officer choice of interpretation, LUBA will defer to  
11 the hearings officer’s interpretation”).

12       Third, we also cannot understand why the Hearings Officer’s  
13 acknowledgement that the “consistent with the character” standard is inherently  
14 vague and open to interpretation “implies that the participating public lacks  
15 comprehension” as PHCA asserts. Brief, 25. This is a discretionary standard,  
16 not an objective one. Both consistency and character are mushy, vague terms  
17 that do not create bright lines like a height allowance of a specific number of  
18 feet would. Quoting their dictionary definitions without applying those  
19 definitions to any facts of this case does not change that the standard is  
20 interpretable rather than objective. *See* PHCA Brief, 28. Opponents presented a  
21 “great deal of testimony” consistent with *their* interpretation of those mushy

1 terms – that does not mean that the Hearings Officer committed an  
2 interpretational error in rejecting their interpretation and certainly not that he  
3 was insulting the public. Instead, the Hearings Officer’s note that the standard is  
4 open to interpretation is merely another way of expressing what LUBA has  
5 previously held: the MCC “does not compel any particular approach” to the  
6 consistency analysis. *Tarr*, 81 Or LUBA slip op at 37.

7 Finally, PHCA again quotes half of a sentence (“further narrow this  
8 criterion”) and fails to challenge the substance that follows (test is comparing  
9 consistency of the proposed use “with the surrounding uses” and not bare land  
10 or farmland). PHCA Brief, 26. PHCA does not explain why the character of the  
11 area analysis should be something other than comparison to the surrounding  
12 uses. Nor is this passage a “red herring.” PHCA Brief, 26. The question of what  
13 counts as contributing to the character was raised by opponents,<sup>14</sup> by staff,<sup>15</sup> and  
14 in caselaw reviewed in the findings.<sup>16</sup> The Hearings Officer resolved this  
15 question and PHCA does not substantively challenge the interpretation that this

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<sup>14</sup> At Rec-201, the findings summarize Ms. Richter’s argument that characteristics of “permitted uses within the zone” cannot be considered, including “plant nurseries” on surrounding farmland specifically.

<sup>15</sup> At Rec-3952, staff seem to assert the contrary to Ms. Richter, that only the character of “primary uses” create the character of the area.

<sup>16</sup> At Rec-200, the findings discuss *Tarr*’s rejection of an approach comparing only to the character of the allowed single-family use in the zone.

1 approval criterion requires “an analysis of the character of the user and the  
2 character of other users in the area” including farmers.<sup>17</sup> Rec-189, 201.

3 **4. Findings adequately respond to issues raised below and**  
4 **are supported by substantial evidence.**  
5

6 PHCA punctuates their brief with complaints that the Hearings Officer  
7 did not make adequate findings addressing opposition testimony – though not in  
8 any of these punctuations citing to where in the record where such opposition  
9 testimony exists. PHCA Brief, 23 (“not weighed or evaluated ... largely  
10 ignored”); 24-25 (“scarcely addressed ... no express findings”); 25 (“barely  
11 addressed”); 29 (“failed to directly address or weigh”); 48 (“fail to rebut”).

12 The Hearings Officer was not required to “directly address” or make  
13 “express findings” responding to every individual piece of testimony and sub-  
14 argument of opposition testimony in the 8,000-page record. LUBA has long  
15 held that: “The Board does not accept the proposition that *every* issue or  
16 concern raised at a hearing on a land use matter must be addressed by a local  
17 jurisdiction in its findings. Formal issues and major relevant concerns raised  
18 must be addressed in some fashion, but not every assertion by a participant in a  
19 land use decision warrants a specific finding.” *Faye Wright Neighborhood*  
20 *Planning Council v. Salem*, 1 Or LUBA 246, 252 (1980); *Rosenzweig v. City of*  
21 *McMinnville*, 64 Or LUBA 402, 410 (2011) (citing *Faye*). For example, where

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<sup>17</sup> The nearby argument about substantial evidence that large scale nurseries create more impact than the project is addressed below.

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

8 The findings go to great lengths to respond to every issue raised by  
9 opponents. That includes findings interpreting the code and determining that  
10 construction is not the “Community Service use” to be evaluated under the  
11 approval criteria. Even as to arguments about the actual use, many of the  
12 specific arguments about any given issue were overlapping and could be  
13 addressed together in the findings. For example, opposition testimony related to  
14 noise from the filtration facility is summarized in the findings at Rec-202-202  
15 and addressed in the findings at Rec-202-206. The same approach is taken in  
16 the following pages of findings for each issue. Rec-206-227. PHCA does not  
17 identify any issue relevant to the proposed use that was adequately raised below  
18 and is not addressed in the findings.

19 It is with the lens of *Faye* that we approach the 14 pages of factual  
20 assertions (with no accompanying legal argument) in PHCA Brief, 32-46. The  
21 section opens with a claim that the decision does not provide “a consistent or

1 even ascertainable determination of the character of the area” and, presumably,  
2 the 14 pages are intended to show that character. The section closes with claims  
3 that this “evidence is utterly ignored in the findings” and is “overlooked by the  
4 findings” – claims similar to those that punctuate the balance of the brief, as  
5 noted at the beginning of this section. PHCA Brief, 46.

6 But most of the 14 pages relate to opponents’ fears about construction.  
7 As we have explained above, construction is not the use to be evaluated under  
8 this approval criterion.

9 There are a few factual assertions that relate to the actual proposed use,  
10 but PHCA fails to identify any “[f]ormal issues [or] major relevant concerns” –  
11 rather than “piece of opposing evidence” – that the findings do not address. *See*  
12 *Faye*, 1 Or LUBA at 252. Note that many of the lengthy block quotes are not  
13 “issues” or “concerns” at all – for example describing Carpenter Lane as  
14 “quaint[.]” PHCA Brief, 34. The following table explains where each issue or  
15 major concern relevant to the proposed use (rather than construction) and raised  
16 in this section of PHCA’s brief (to the extent we can discern the point of this  
17 section) are addressed in the findings:

18

Issue and Where Addressed in Findings <sup>18</sup>	PHCA-Cited Testimony on Issue	PHCA Brief Page – Record Citation
<u>Light/Dark Skies:</u> Rec-206-219 (project lighting will not extend beyond site boundaries or impact dark skies, identifying light studies and light design and shielding features).	Night sky/light photos	33 – Rec-2903-2908; 2914-2916
	24/7 lights	33 – video 32
<u>Habitat/Wildlife:</u> Rec-220-221 (addressing SEC avoidance, mitigation plan, and area wildlife).	Habitat/wildlife photos	33 – Rec-2917-2920; 3249-3254
	Wildlife in area	33 – video 32; video 46
	Tree habitat	33 – video 1
	“elk...bears”	39
	“wildlife habitat” “elk”	40
	“wildlife” “elk, deer, [etc.]” “moving through fields and backyards”	43-44
<u>Noise:</u> Rec-201-206 (summarizing and referencing daytime and nighttime background noise studies, facility operation noise generation reports, facility will not create a constant background hum and conditions); 205 (“will not create a constant background hum”).	Noise examples – traffic, tractor, garbage truck, helicopter, wildlife, dog barks	33 – video 24; video 34; video-41
	Facility noise assumptions	33 – video 32
	“quiet nights” “noise...24/7/365”	36
	“silence” and “sounds”	39
	“noise”	40
	“noise 24/7” “different from the natural sounds”	43
	“quiet”	44
	“dog barks” “horse clops”	45

<sup>18</sup> Incorporated by Rec-41 unless otherwise noted. *See Wilson Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 106, 115 (1994) (there are no magic words, incorporation happens through words that indicate what the city believes to be relevant) and Rec-221 (“as shown in” “extensively discussed”).

Issue and Where Addressed in Findings <sup>18</sup>	PHCA-Cited Testimony on Issue	PHCA Brief Page – Record Citation
<u>Dust:</u> Rec-39; 222-223 (referencing operation dust mitigation plan required through condition at Rec-94).	“dust”	40
<u>Traffic:</u> Rec-221, incorporating Rec-149-150, 158 (identifying operation traffic volume and level of service; County Transportation determination on transportation network and safety); Rec-727-745 (County Transportation’s Exhibit J. 44), incorporated as findings by Rec-14; Rec-4107 (County Transportation’s B.16 stating “none of the intersections LOS is below ‘B’.” and indicating County standard of “LOS C”), incorporated as findings by Rec-14.	Traffic and truck volume	33 – video 7; video 32
	“traffic”	40
	“post-construction...traffic trips”	41
	“no traffic” “little traffic”	45
<u>Nonvehicular Use of Roads:</u> Rec-221, incorporating Rec-149-150 (operational traffic volumes) and Rec-163-164 (pedestrian and non-vehicular travel along roadways); Rec-38 (County	Pedestrian use of Carpenter Lane	33 – video 19, video 21; video 24
	“feel safe” “neighbors on foot” “dangers for	37-38



Issue and Where Addressed in Findings <sup>18</sup>	PHCA-Cited Testimony on Issue	PHCA Brief Page – Record Citation
Transportation conditions ensure “safe condition” including, <i>e.g.</i> “fix it first” condition 6 at Rec-89 and condition at Rec-90 prohibiting through truck trips on Carpenter Lane); Rec-732, incorporated as findings by Rec-14 (County Transportation’s expert opinion affirming that applicant’s response that accommodations for bike/ped traffic are adequate).	[horseback] riders” on roads <sup>19</sup>	
	“safe ... on area roads”	39
	“danger on our roads”	41
	“safe” and “feel safe”	42-43
	Roads “safe space”	44
<u>Carpenter Lane Improvements:</u> Rec-221 (Carpenter Lane improved to comply with County road standards). <i>See also</i> Rec-344 (addressing safety benefits to pedestrians of widening Carpenter Lane), adopted as findings at Rec-57.	Widening of Carpenter Lane	33 – video 32; video 42
	“road improvements” will “destroy the character”; “road has never been painted or striped”; “extending the road to the edges of the right of way”	34
	“widening carpenter”	38
	“lack sidewalks or curbs”	39
	“no shoulder or paint”	45
<u>Visual Compatibility:</u> Rec-225 (facility and site designed to blend with surrounding area).	Viewshed and feel and look of neighborhood	33 – video 32

<sup>19</sup> PHCA provides excerpts from a letter submitted by Angela Parker. PHCA Brief, 37-39. The letter provides no code citations but addresses the Farm Impact Test language, MCC 39.7515(C). Rec-1474-1475. The opening paragraph indicates that the letter was intended as a response to PWB’s farm expert to explain the “reality of [her] farm operation.” The letter closes with the following: “the proposal [] will force a significant change in my accepted farm practices and will significantly increase the cost of these practices, eliminating much of the farm income [.]” The only reference to character of the area is in a single sentence following a comment on expected increased traffic. Thus, while PHCA quotes extensive sections of the letter, the only portion of the letter arguably related to MCC 39.7515(A) is the second bullet point at PHCA Brief at 38. Nonetheless, other issues are also included in the table. Findings related to the Farm Impacts Test comments are at APP-001-168

Issue and Where Addressed in Findings <sup>18</sup>	PHCA-Cited Testimony on Issue	PHCA Brief Page – Record Citation
<u>Study Area:</u> Rec-198n31 (responding to boundary objection and explaining boundary reasoning).	“gerrymandered” area boundaries	36

Note that the findings themselves point to the extensive substantial evidence in the record on which they rely. For example,

“The Water Bureau has prepared many exhibits directly addressing sound generation, ambient noise levels, and the results of extensive designed mitigation including topography and building materials. These exhibits are identified below, with relevant sections excerpted.

- “Exhibit A.4 Filtration Facility Conditional Use Application Narrative Section A.3.1 pp 32-34
- “Exhibit A.45 Oregon Water Treatment Plant Operations p. 19
- “Exhibit A.49 Bull Run Facility Exterior Noise Analysis
- “Exhibit A.51 Potential Local Impacts of Facility Operation: Air Quality, Dust, Noise, and Vibration
- “Exhibit A.65 Acoustical Analysis Finish Water Intertie
- “Exhibit A.172 Acoustic Baseline Measurement
- “Exhibit A.175 Pre-construction Ambient Sound Level Measurement

- “Exhibit I.74 Operations Supplemental Information, page 5
- “Exhibit J.69 Facility Operational Noise Response
- “Exhibit J.82 Acoustics and Nighttime Generator Sound Levels”

Rec-202.

Again, the 14 pages of asserted facts in PHCA’s brief are not accompanied by any legal argument as to how they could show error in the decision. “LUBA is not obligated to make or develop a party’s arguments when the party does not endeavor to do so itself.” *Barnes v. City of Hillsboro*, 239 Or App 73, 81, 243 P3d 139 (2010). There are a few statements that could be parts of legal arguments, which we address in the following paragraphs.

PHCA argues that the body of evidence “adds to and goes far beyond” PWB’s evidence. It is not clear why that is relevant. The Hearings Officer had to decide what factors to consider in the character of the area, because the MCC “does not compel any particular approach” to the consistency analysis. *Tarr*, 81 Or LUBA slip op at 37. The Hearings Officer chose an approach, considered the factors he decided to consider, and decided that the proposed use is consistent with the character of the area. That was not error and PHCA does not explain how it would be.

PHCA quotes to a series of comprehensive plan policies and a "Vision Statement" for West of the Sandy River. PHCA Brief, 31-32. PHCA does not make any legal argument that the findings are inconsistent with these statements of policy and vision. Moreover, nothing required the Hearings Officer to establish the character of the area by reference to the "Vision Statement" or comprehensive plan goals. To the contrary, the Hearings Officer was required to look at the "present 'character of the area'" and "not what the area may become" under the planning and zoning applicable to the site. *Fedde v. City of Portland*, 8 Or LUBA 220, 227 (1983). The Hearings Officer appropriately evaluated the present character of the area under *Fedde*, rather than the future-facing policy or vision.

PHCA objects that the finding of fact that large scale nurseries create more impact than the project is unsupported by the record. PHCA Brief, 26. PHCA really only attacks this finding under the premise that construction is the use to be evaluated under the permanent approval criterion. As is discussed in County Brief section IV.A, construction is not the use. As to the proposed project use, there is substantial evidence in the record that this is correct: "impacts from nursery operations on sensitive residential and school uses (e.g., transportation, noise, lighting, chemical drift, dust, groundwater pollution, and appearance) are greater than any potential impacts from the proposed filtration facility with mitigation features included." Rec-7893. The employees at the

1 mid- to large-scale agricultural operations in the study area range “from six to  
2 245 employees. The filtration facility will have 26 employees[.]” Rec-7894.  
3 “[T]he mid- to large-scale nursery operational centers and agricultural  
4 processing centers typically have unscreened buildings, often with unpaved and  
5 screened outdoor storage and parking areas. Because most nursery operational  
6 centers use noisy outdoor equipment and diesel trucks, and have unshielded  
7 light fixtures, they typically have off-site noise, lighting, and air quality  
8 impacts, which help define the character of the area.” Rec-7899. “[T]he  
9 filtration facility has been designed to screen buildings, pave or landscape all  
10 portions of the site to reduce the risk of dust, and to mitigate noise, light, and air  
11 quality impacts that could result from a hypothetical unmitigated project.” Rec-  
12 7899. Therefore, the record supports that these agricultural uses have  
13 “significantly higher external impacts, such as those from unscreened buildings,  
14 noise, light, and air quality.” Rec-7899; *see also* Rec-8037-8041 (Introduction).

##### 15                   **5. Improvement of Carpenter to County standards.**

16           In various places, PHCA argues that the character of the area will be  
17 altered when “Carpenter [has] been widened and otherwise ‘improved[.]’”  
18 PHCA Brief, 26, 27-28, 30. For most of the brief, PHCA makes no effort to  
19 address the Hearings Officer’s findings responding to this argument:

20                   “Some opponent testimony indicates that  
21                   improvement of Carpenter Lane to County local road  
22                   standards would not be consistent with the character  
23                   of the area because Carpenter Lane is currently not

1 improved to County local road standards. 'Consistent  
2 with' does not mean 'exactly the same as current  
3 conditions'. Otherwise, no development could ever  
4 occur. It is consistent with the character of the area  
5 that, when roads in the area are improved, they are  
6 improved consistent with adopted County  
7 requirements and plans for the County road system."

8  
9 Rec-221.

10 Finally at Brief 47-48, PHCA argues that the "H.O.'s interpretation has  
11 no basis in the text or context of MCC 39.7515(A)" and that the "interpretation  
12 is incorrect."

13 PHCA first argues these findings are "incorrect" because  
14 MCC 39.7515(A) has "no connection whatsoever to county road standards" and  
15 that "LOS compliance is irrelevant". PHCA Brief, 47. It is unclear why LOS is  
16 mentioned, as that has nothing to do with these findings. As to county road  
17 standards, PHCA does not explain why looking to the county road standards,  
18 and the past practice of improving roads to that standard, was error.  
19 Referencing road standards when reviewing approval criteria that do not  
20 explicitly reference those standards has been upheld by LUBA. *See, e.g., Lee v.*  
21 *City of Albany*, 51 Or LUBA 56, 60-61 (2006).

22 Moreover, the findings did not make up the connection to County road  
23 standards out of wholecloth – it came from County Transportation's  
24 requirement that Carpenter be improved to those standards. Rec-87-88 (County  
25 Transportation's recommended condition 3 requiring dedication of Carpenter

1 Lane, citing Multnomah County Road Rules (“MCRR”) 6.100A, and condition  
2 5 requiring frontage and road improvements on Carpenter Lane, citing  
3 MCRR 6.100B). A requirement to upgrade local roads to serve a new  
4 development is standard (and expected) in land use cases.

5 As a *PGE/Gaines* interpretational matter, the Board could not have  
6 intended the “consistent with” standard to mean that roads accessing a  
7 development with “potholes [that] haven’t been fixed in years”<sup>20</sup> could not be  
8 required by County Transportation to be upgraded to County standards, because  
9 then almost no conditional uses subject to MCC 39.7515(A) could be approved.  
10 As the findings explain, “no development could ever occur” if roads could not  
11 be upgraded to county standards – that is a valid interpretational approach, as  
12 explained above. *See, e.g., Tarr*, 81 Or LUBA slip op at 37 (rejecting  
13 interpretation of approval criterion that “would make it very difficult for any  
14 community service use to gain approval” under MCC 39.7515(A) specifically);  
15 *see also Davis*, 58 Or LUBA at 7. An interpretation that prevents upgrade of  
16 roads to the County’s own adopted standards would be an absurd result. *State v.*  
17 *Davidson*, 369 Or 480, 501, 507 P3d 246 (2022) (“when one construction  
18 would lead to an absurd result and the other would not, we generally favor the

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<sup>20</sup> PHCA Brief, 34.

1   latter, under the assumption that the legislature would not intend an absurd or  
2   impossible result”).<sup>21</sup>

3           PHCA next argues that the Hearing Officer’s interpretation “has no basis  
4   in the text or context” and also that they did not like that the finding says  
5   “‘Consistent with’ does not mean ‘exactly the same as current conditions’.”  
6   PHCA’s two arguments are in tension – “consistent with” of course *is* the text  
7   of MCC 39.7515(A), so PHCA itself admits that the findings have a “basis in  
8   the text or context” of that provision by noting that the “phrase does not mean  
9   ‘exactly the same as current conditions.’” PHCA also objects that no one said it  
10   meant “exactly the same” and then, in the next sentence, they agree that the  
11   “phrase does not mean ‘exactly the same as current conditions’” by providing a  
12   different definition for the phrase. PHCA does not provide anything other than a  
13   bare definition or explain how that definition would change the result that “[i]t  
14   is consistent with the character of the area that, when roads in the area are  
15   improved, they are improved consistent with adopted County requirements and  
16   plans for the County road system.” The text and context argument has no merit.

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<sup>21</sup> Also absurd would be imputing to the Board an intention that MCC 39.7515(A) be read in a manner that prevents County Transportation from enforcing the Multnomah County Road Rules (“MCRR”), including MCRR 6.100(B) (Frontage Improvements) and MCRR 8.000 (off-site improvements). *See* Rec-5450-5451 (explaining that both MCRR sections apply to the project).



1 It is worth noting that the improvement of Carpenter Lane *itself* is not the  
2 project under review, but an off-site improvement triggered by the project  
3 proposal. In the MUA-20 zone where Carpenter Lane is located,  
4 “[t]ransportation facilities and improvements that ... are part of the adopted  
5 Multnomah County Functional Classification of Trafficways Plan” are an  
6 allowed use requiring no land use permitting under MCC 39.4310(J). *See* Rec-  
7 7296 (Table 1: “Functional Classification” of Carpenter is “Local”); Rec-568  
8 (explaining that Carpenter “road improvement will be consistent with  
9 Multnomah County standards for the roadway classification”). Therefore, the  
10 improvement of Carpenter Lane to its functional classification standard is not  
11 even part of the project subject to MCC 39.7515(A).

12 Finally, the Hearings’ Officer’s interpretation is plausible. PHCA does  
13 not even articulate an interpretation, so their lack of interpretation cannot be  
14 considered plausible. But, even if it were, “where different interpretations are  
15 equally plausible, and context supports a hearings officer choice of  
16 interpretation, LUBA will defer to the hearings officer’s interpretation.” *Patel*,  
17 77 Or LUBA slip op at 12.

18 PHCA next sets out a heading for “Conditions of Approval” but then  
19 only addresses one, namely PWB’s commitment to provide an “ADA-  
20 compliant paved pedestrian route on Carpenter Lane east of Cottrell” starting  
21 “when significant truck traffic for the construction will begin.” Rec-164, 92,

1 568. Fundamentally, construction is not the use, so this is irrelevant. Moreover,  
2 PHCA objects that this will not be provided on every roadway in the area.  
3 However,

4 "the roads the construction Trucks will be traveling on  
5 (the haul routes) were [] intended by design or policy  
6 to be used for heavy truck traffic. The County's  
7 Transportation System Plan specifically classifies  
8 those roadways identified for haul routes in the  
9 Construction TIA as freight routes, able to  
10 accommodate heavy vehicles. The exception is  
11 Carpenter Lane – which PWB is required to use as an  
12 access by the County's Road Rules, which require  
13 access be taken from the lowest classification street."  
14

15 Rec-570. The pedestrian route was proposed as an accommodation for  
16 Carpenter Lane because it is not classified in the County's Transportation  
17 System Plan as a freight route (unlike the balance of the roads that trucks will  
18 use), but must be used to access the site. For this reason, PWB proposed  
19 additional accommodation for pedestrians along Carpenter Lane while trucks  
20 for construction need to access the site.

21 PHCA does not articulate any argument about this condition, just  
22 returning to their complaint that Carpenter will be improved to county  
23 standards. As discussed above, the Hearings Officer's findings that "[i]t is  
24 consistent with the character of the area that, when roads in the area are  
25 improved, they are improved consistent with adopted County requirements and  
26 plans for the County road system" is plausible, certainly more plausible than the

1 lack of interpretation advanced by PHCA, and the interpretation should be  
2 upheld.

3 Finally, we pause to correct a fact. PHCA states that the Hearings Officer  
4 “did not find that the standard would be met during ... construction[.]” PHCA  
5 Brief, 48. This is false. The Hearings Officer did, after reviewing the extensive  
6 mitigation proposed by PWB in response to public concerns, find, in the  
7 alternative, that “as conditioned, these impacts [of construction] can be  
8 mitigated to a level where they comply with the code and plan.” Rec-80.

9 **V. CONCLUSION**

10 Based on the foregoing, PWB respectfully requests that the Board deny  
11 each of intervenor-petitioners’ assignments of error and affirm the County’s  
12 decision.

13 DATED this 16<sup>th</sup> day of August, 2024.

14


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\_\_\_\_\_  
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## CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS


## Brief Length

I certify that (1) this brief complies with the word-count limitation in OAR 661-010-0030(2) and (2) the word count of this brief as described in OAR 661-010-0030(2) is 10,995 words.

**Type Size**

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

Dated this 16<sup>th</sup> day of August, 2024.

  
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*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**  
4 **PETITION FOR REVIEW OF INTERVENOR-PETITIONERS**  
5 **PLEASANT HOME COMMUNITY ASSOCIATION AND ANGELA**  
6 **PARKER, dba HAWK HAVEN EQUINE** for LUBA No. 2023-086 together  
7 with one (1) copy, with the Land Use Board of Appeals, 775 Summer Street  
8 NE, Suite 330, Salem, Oregon 97301-1283, 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**  
12 **PETITION FOR REVIEW OF INTERVENOR-PETITIONERS**  
13 **PLEASANT HOME COMMUNITY ASSOCIATION AND ANGELA**  
14 **PARKER, dba HAWK HAVEN EQUINE** for LUBA No. 2023-086, by  
15 United States Postal Service first class mail, postage prepaid, to the parties or  
16 their attorney as follows:

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17 *[Continued on next page]*

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3

4 Dated this 16<sup>th</sup> day of August, 2024.

5

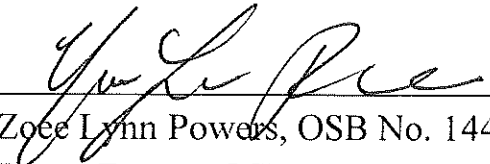
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