

BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

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

*Petitioners,*

and

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

*Intervenor-Petitioners,*

v.

MULTNOMAH COUNTY,

*Respondent,*

and

PORTLAND WATER BUREAU,

*Intervenor-Respondent.*

LUBA No. 2023-086

**INTERVENOR-RESPONDENT'S  
RESPONSE BRIEF TO THE  
PETITION FOR REVIEW OF  
INTERVENOR-PETITIONER 1000  
FRIENDS OF OREGON**

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## TABLE OF CONTENTS

I.	STANDING .....	1
II.	STATEMENT OF THE CASE.....	1
	A. NATURE OF THE DECISION.....	1
	B. RELIEF SOUGHT.....	2
	C. SUMMARY OF ARGUMENTS.....	2
	1. First Assignment of Error .....	2
	2. Second Assignment of Error.....	2
	3. Third Assignment of Error.....	2
	D. SUPPLEMENTARY STATEMENT OF FACTS.....	2
III.	LUBA’S JURISDICTION.....	3
IV.	ARGUMENT.....	3
	A. RESPONSE TO FIRST ASSIGNMENT OF ERROR.....	3
	B. FARM IMPACTS TEST .....	3
	C. RESPONSE TO SECOND ASSIGNMENT OF ERROR.....	4
	1. Preservation.....	4
	2. Standard of Review.....	4
	3. Friends avoids any <i>PGE/Gaines</i> analysis and ignores the clear <i>PGE/Gaines</i> analysis in the findings. ....	5
	4. <i>Von Lubken</i> does not indirectly (and wildly) change the structure of Oregon land use. ....	7
	5. <i>Stop the Dump</i> does not provide legislative history that overcomes clear text and context. ....	9
	6. Arguments about the significance of temporary construction impacts are irrelevant to this assignment of error. ....	13
	D. RESPONSE TO THIRD ASSIGNMENT OF ERROR .....	15

- 1. Preservation..... 15
- 2. Standards of Review ..... 17
- 3. The findings on construction-related impacts to the transportation system comply with *Heiller’s* test. .... 18
  - a) *Heiller* Prong 1: The findings address the applicable legal standard. .... 19
  - b) *Heiller* Prong 2: The findings set out the facts relied upon..... 20
  - c) *Heiller* Prong 3: The findings explain how those facts lead to the conclusion that the standards are met. .... 21
- 4. *Protect Grand Island Farms* supports the findings but is ignored by Friends..... 25
- 5. The findings address and respond to specific issues raised..... 27
- 6. Substantial Evidence..... 29
  - a) The Hearings Officer found that Mr. Prenguber *and* local farmers were experts on farm practices – *and* that County Transportation was the best expert on the transportation system..... 30
  - b) The findings explicitly weigh the conflicting expert testimony.... 34
  - c) Nothing “so undermines” the expert testimony that a reasonable person would not rely on it. .... 35
    - (1) Irrelevant Commentary ..... 36
    - (2) The Hearings Officer adopted Exhibit J.88 with a farm-by-farm analysis..... 37
    - (3) Everyone agrees that farmers use the roads – Friends fails to address the actual question: significance..... 38
    - (4) Each piece of opponent expert evidence cited by Friends has an “adequate” rebuttal in the record. .... 40
    - (5) Friends’ attacks on Conditions of Approval are unavailing..... 43

7. The average delay was only one of many pieces of substantial  
evidence supporting the findings. .... 46

V. CONCLUSION..... 49

## TABLE OF AUTHORITIES

### Cases

<i>Angel v. City of Portland</i> , 22 Or LUBA 649, 659, <i>aff'd</i> 113 Or App 169 (1992).....	32
<i>Angius v. Washington County</i> , 52 Or LUBA 222, 240 (2006).....	36
<i>Barnes v. City of Hillsboro</i> , 239 Or App 73, 81, 243 P3d 139 (2010).....	9
<i>Boldt v. Clackamas County</i> , 107 Or App 619, 623, 813 P2d 1078 (1991) .....	16
<i>City of Eugene v. Comcast</i> , 263 Or App 116, 127 (2014), <i>affirmed</i> 359 Or 528 (2016).....	4
<i>Comden v. Coos County</i> , 56 Or LUBA 214, 216, 219, 224n5 (2008) .....	27
<i>Concerned Citizens v. Jackson County</i> , 33 Or LUBA 70, 101 (1997).....	30
<i>Dahlen v. City of Bend</i> , ___ Or LUBA ___, ___ (2021) (LUBA No 2021-013, June 14, 2021) (slip op at 5-6).....	4
<i>Devin Oil Co. v. Morrow Cty.</i> , 236 Or App 164, 167, 235 P3d 705 (2010) .....	15
<i>Faye Wright Neighborhood Planning Council v. Salem</i> , 1 Or LUBA 246, 252 (1980).....	28, 29
<i>Frewing v. City of Tigard</i> , 59 Or LUBA 23, 26 (2009) .....	3
<i>Gould v. Deschutes County</i> , 67 Or LUBA 1, 7 (2013).....	5
<i>Haugen v. City of Scappoose</i> , 330 Or App 723, 728, 545 P3d 760 (2024).....	12
<i>Heiller v. Josephine County</i> , 23 Or LUBA 551, 556 (1992).....	2, 17, 18, 19, 20, 24, 27
<i>Kine v. Deschutes County</i> , 75 Or LUBA 419, 427 (2017) .....	28, 29
<i>NDNA v. City of Portland</i> , 80 Or LUBA 269 (2019) (slip op at 27).....	31
<i>Niederer v. City of Albany</i> , 79 Or LUBA 305, 314 (2019) .....	18
<i>Norvell v. Portland Area LGBC</i> , 43 Or App 849, 853 (1979) .....	28
<i>Oregon Shores Conservation Coalition v. Coos County</i> , 81 Or LUBA 839, ___ (2020) (slip op at 65) .....	34, 38
<i>Patel v. City of Portland</i> , 77 Or LUBA 349, ___ (2018) (slip op at 12).....	4, 7

<i>Portland General Electric Company v. Bureau of Labor &amp; Industry</i> , 317 Or 606, 859 P2d 1143 (1993).....	2, 6
<i>Protect Grand Island Farms v. Yamhill County</i> , 66 Or LUBA 291 (2012).....	22, 23, 25, 27, 43
<i>Rhyne v. Multnomah County</i> , 23 Or LUBA 442, 447 (1992).....	45, 46
<i>Springfield Utility Bd. v. Emerald People’s Utility Dist.</i> , 339 Or 631, 642, 125 P3d 740 (2005).....	6
<i>State v. Elvig</i> , 230 Or App 57, 61, 213 P3d 851 (2009).....	12
<i>State v. Gaines</i> , 346 Or 160, 206 P3d 1042 (2009).....	2, 5, 10, 11, 12
<i>State v. Patton</i> , 237 Or App 46, 52-53, 238 P3d 439 (2010), <i>rev den</i> , 350 Or 131 (2011).....	11
<i>State v. Tyson</i> , 243 Or App 94, 99, 259 P3d 64 (2011).....	11
<i>State v. Zuniga</i> , 288 Or App 742, 743, 407 P3d 961 (2017).....	6
<i>Stoloff v. City of Portland</i> , 51 Or LUBA 560, 563 (2006).....	17, 18, 29, 38
<i>Stop the Dump Coalition v. Yamhill County</i> , 364 Or 432 (2019).....	9, 10, 11, 13, 19
<i>Thomahlen v. City of Ashland</i> , 20 Or LUBA 218, 229-30 (1990).....	18
<i>Thomas v. Wasco County</i> , 35 Or LUBA 173, 178 (1998).....	40
<i>Tonquin Holdings, LLC v. Clackamas County</i> , 64 Or LUBA 68, 83 (2011).....	32, 34, 35, 47
<i>Vanderburg v. City of Albany</i> , ___ Or LUBA ___, ___ (LUBA No 2022-082, Jan 5, 2023) (slip op at 12).....	24, 28
<i>Wal-Mart Stores, Inc. v. City of Bend</i> , 52 Or LUBA 261, 277 (2006).....	31, 40, 42, 43
<i>Waverly Landing Condo. Owners’ Assoc. v. City of Portland</i> , 61 Or LUBA 448, ___ (2010) (slip op at 7).....	4
<i>Westside Rock v. Clackamas County</i> , 51 Or LUBA 264, 294 (2006).....	36

*Willamette Oaks, LLC v. City of Eugene*, 295 Or App 757, 767, 437 P3d 314  
 (2019), *rev den*, 365 Or 192 (2019)..... 16, 32

**Statutes**

ORS 197.797(1) ..... 16  
 ORS 197.830(7)(B)..... 1  
 ORS 197.835(9)(a)(C) ..... 49  
 ORS 197.835(9)(a)(D) ..... 4  
 ORS 215.213(11) ..... 6  
 ORS 215.213(2) ..... 6  
 ORS 215.283(2) ..... 6  
 ORS 215.283(2)(q)..... 6  
 ORS 215.283(2)(r) ..... 6  
 ORS 215.283(4) ..... 6  
 ORS 215.296(1) ..... 5, 6, 7, 8

**Other Authorities**

MCC 39.7515(C) ..... 7, 27

**Rules**

OAR 661-010-0039 ..... 12



**JOINT APPENDIX UNDER SEPARATE COVER**

1.	Findings on Farm Impacts .....	001
2.	Petitioners and Intervenor-Petitioners Joint Opposition to Intervenor- Respondent’s Motion to Extend Response Brief Deadline and File Over- Length Response Briefs.....	169
3.	MCC 39.1105 .....	181
4.	MCC 39.1185 .....	187
5.	MCC 39.2000 .....	190
6.	MCC 39.4065 .....	206
7.	MCC 39.4115 .....	207
8.	MCC 39.4215 .....	211
9.	MCC 39.4230 .....	212
10.	MCC 39.4300 .....	218
11.	MCC 39.4305 .....	218
12.	MCC 39.4310 .....	218
13.	MCC 39.4320 .....	222
14.	MCC 39.4325 .....	223
15.	MCC 39.4345 .....	226
16.	MCC 39.4355 .....	226
17.	MCC 39.4405 .....	227
18.	MCC 39.4455 .....	228
19.	MCC 39.4505 .....	229
20.	MCC 39.4555 .....	230
21.	MCC 39.4605 .....	231
22.	MCC 39.4655 .....	232
23.	MCC 39.4702 .....	235

24.	MCC 39.4707 .....	235
25.	MCC 39.4750 .....	238
26.	MCC 39.4820 .....	239
27.	MCC 39.4850 .....	240
28.	MCC 39.4854 .....	241
29.	MCC 39.4870 .....	244
30.	MCC 39.5090 .....	246
31.	MCC 39.5345 .....	250
32.	MCC 39.5860 .....	251
33.	MCC 39.6225 .....	258
34.	MCC 39.7200 .....	263
35.	MCC 39.7215 .....	265
36.	MCC 39.7220 .....	268
37.	MCC 39.7315 .....	270
38.	MCC 39.7505 .....	274
39.	MCC 39.7510 .....	274
40.	MCC 39.7515 .....	274
41.	MCC 39.7520 .....	275
42.	MCC 39.7550 through 39.7575.....	279
43.	MCC 39.7615 .....	289
44.	MCC 39.7750 .....	292
45.	MCC 39.7802 .....	293
46.	MCCP Chapter 2.....	294
47.	MCCP Chapter 5.....	318
48.	MCCP 11.2 .....	355
49.	MCCP Pages 11-13 to 11-15.....	357
50.	MCRR 6.100 A and B .....	360
51.	MCRR 8.000.....	362

52. MCRR Chapter 13 ..... 363

53. MCC TOC Chapter (Part) 4.B..... 368

## I. STANDING

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

PWB accepts the standing of Intervenor-Petitioner 1000 Friends of Oregon (“Friends”).

## II. STATEMENT OF THE CASE

### A. NATURE OF THE DECISION

PWB rejects Friends’ 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 Friends’ arguments are:

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

No other part of the decision is implicated.

---

<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           **B.     RELIEF SOUGHT**

2           PWB requests that LUBA affirm the decision in full.

3           **C.     SUMMARY OF ARGUMENTS**

4                 **1.     First Assignment of Error**

5           PWB concurs with County's Brief, Section IV.A.

6                 **2.     Second Assignment of Error**

7           In its interpretational challenge, Friends does not make any arguments  
8           applying *Portland General Electric Company v. Bureau of Labor & Industry*,  
9           317 Or 606, 859 P2d 1143 (1993), *State v. Gaines*, 346 Or 160, 206 P3d 1042  
10          (2009), and their progeny (*PGE/Gaines*). Instead, Friends makes policy  
11          arguments and cites caselaw that does not support its arguments.

12                 **3.     Third Assignment of Error**

13          There are clear and extensive findings that construction-related impacts  
14          to the transportation system are not "significant" under the Farm Impacts Test.  
15          Those findings comply with all three parts of the test of *Heiller v. Josephine*  
16          *County*, 23 Or LUBA 551, 556 (1992). Caselaw supporting the findings is  
17          simply ignored by Friends. Friends fails to identify any issues not addressed by  
18          findings or supported by substantial evidence.

19                 **D.     SUPPLEMENTARY STATEMENT OF FACTS**

20          To avoid repetition, nothing is needed to supplement the background  
21          facts in Section II.D of the County Brief and those on the Farm Impacts Test in

1 PWB's brief responding to Intervenor-Petitioners Oregon Association of  
2 Nurseries and Multnomah County Farm Bureau (collectively, "OAN").

### 3 **III. LUBA'S JURISDICTION**

4 PWB agrees LUBA has jurisdiction.

### 5 **IV. ARGUMENT**

#### 6 **A. RESPONSE TO FIRST ASSIGNMENT OF ERROR**

7 PWB concurs with the response to the First Assignment of Error in  
8 County Brief, Section IV.A.

#### 9 **B. FARM IMPACTS TEST**

10 To avoid repetition, this section supplements the background on the  
11 "Farm Impacts Test" in Section IV.A of the PWB OAN Brief. As noted there,  
12 the Hearings Officer's Farm Impacts Test findings are complex and span over  
13 150 pages. APP-1-168. The Hearings Officer used the headings of PWB's final  
14 argument to make clear what he was adopting as findings. Rec-46. To aid in  
15 review of these findings, in the Joint Supplemental Appendix ("APP-") that  
16 adoption is broken out by section, followed by the record pages referenced,  
17 with highlighting of the pertinent sections. *See Frewing v. City of Tigard*, 59 Or  
18 LUBA 23, 26 (2009) ("it is common practice, and very useful to the Board, for  
19 parties to highlight or otherwise draw attention to the pertinent sections"). We  
20 hope this organization is helpful to the Board.

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

2                   **1.     Preservation**

3           This issue 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 \_\_\_, \_\_\_  
10 (2021) (LUBA No 2021-013, June 14, 2021) (slip op at 5-6), to determine if the  
11 Hearings Officer “properly construed the law, [LUBA will] consider the text  
12 and context of the code and give words their ordinary meaning” under the  
13 standard rules for interpreting code provisions under *PGE/Gaines*. The goal of  
14 code interpretation is “to discern the intent of the body that promulgated the  
15 law” – in this case, the Board of County Commissioners. *City of Eugene v.*  
16 *Comcast*, 263 Or App 116, 127 (2014), *affirmed* 359 Or 528 (2016).

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

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

5 **3. Friends avoids any *PGE/Gaines* analysis and ignores the**  
6 **clear *PGE/Gaines* analysis in the findings.**  
7

8 The Hearings Officer found, after providing a full *PGE/Gaines* analysis  
9 of ORS 215.296(1), that it is “clear that construction is not part of the use to be  
10 evaluated” for the Farm Impacts Test. APP-010-013.

11 Friends focuses this assignment of error on broad, policy-level arguments  
12 that construction should be considered the use. Friends states the “question is  
13 whether statewide farm protection laws,” local code, “and the policies that they  
14 implement, require that the farmers must suffer” from their version of the facts,  
15 where the proposal will mean there is no road capacity left for farmers (contrary  
16 to three expert opinions, as explained below). Friends Brief, 24. However, this  
17 proceeding is not about making (or even directly applying existing) policy –  
18 Friends is welcome to approach the legislature or the Board of County  
19 Commissioners about policy changes. Instead, the “question” here is what the  
20 law currently says, using the familiar methodology of *PGE/Gaines*. *See Gaines*,  
21 346 Or at 171-72 (summarizing methodology).

22 Friends avoids applying the required *PGE/Gaines* methodology, instead  
23 quoting testimony from a neighbor of the filtration facility site (Holt) who



1 opposes the project. Friends Brief, 15-16. However, application to the facts of  
2 this case is not part of *PGE/Gaines* – interpretation of a statute is “always is a  
3 question of law.” *State v. Zuniga*, 288 Or App 742, 743, 407 P3d 961 (2017).

4 The findings, on the other hand, “[l]ook at the question through the  
5 required lens of *PGE/Gains*” and find it “clear that construction is not part of  
6 the use to be evaluated.” Rec-261; APP-010-013. For example,

7 “The text of ORS 215.296(1) provides that it is the  
8 ‘use allowed under [the EFU statutes]’ that is to be  
9 evaluated. ORS 215.296(1) refers to four locations of  
10 ‘uses’ subject to its test: ORS 215.213(2);  
11 ORS 215.213(11); ORS 215.283(2); and  
12 ORS 215.283(4). The vast majority of these uses  
13 describe[] the ultimate use, rather than construction.  
14 There are a few select categories that address  
15 construction directly, such as ORS 215.283(2)(q)  
16 (‘Construction of additional passing and travel  
17 lanes...’) and ORS 215.283(2)(r) (‘Reconstruction or  
18 modification of public roads and highways...’). This  
19 context further supports the analysis that for this  
20 project – which would be a ‘utility facility necessary  
21 for public service’ in EFU – construction is not the  
22 subject to be evaluated under the test. The legislature  
23 knew how to call out and regulate construction when  
24 that was the intended result. *See Springfield Utility*  
25 *Bd. v. Emerald People’s Utility Dist.*, 339 Or 631,  
26 642, 125 P3d 740 (2005) (‘[U]se of a term in one  
27 section and not in another section of the same statute  
28 indicates a purposeful omission[.]’ (quoting *PGE*, 317  
29 Or at 611)).”  
30

31 *Id.* After additional *PGE/Gaines* analysis, APP-013-014, the findings conclude  
32 that construction is not the use to be evaluated under the statutory Farm Impacts  
33 Test.

1 Friends does not engage whatsoever with those *PGE/Gaines* findings,  
2 does not provide any of their own analysis of the text or context of  
3 MCC 39.7515(C) or ORS 215.296(1), nor proffer any legislative history that  
4 addresses construction. LUBA's review relies on arguments from petitioner  
5 regarding a different interpretation than the one made by the local government  
6 in order to weigh it against the Hearings Officer's interpretation. In that  
7 weighing, "where different interpretations are equally plausible, and context  
8 supports a hearings officer choice of interpretation, LUBA will defer to the  
9 hearings officer's interpretation". *Patel*, 77 Or LUBA at \_\_\_ (slip op at 12).  
10 Where, as here, petitioners do not present any contrary *PGE/Gaines*  
11 interpretation, there is no basis on which to find that the non-existent  
12 interpretation is "equally plausible", let alone *more* plausible, than what the  
13 Hearings Officer provided. Therefore, under *Patel*, PWB asks that LUBA  
14 uphold the Hearings Officer.

15 **4. *Von Lubken* does not indirectly (and wildly) change the**  
16 **structure of Oregon land use.**  
17

18 Friends includes one sentence claiming that PWB presented an "overly  
19 narrow" reading of *Von Lubken* by "overlook[ing]" the case's statements about  
20 "cumulative impacts on farming as articulated by the Court of Appeals."  
21 Friends Brief, 14. Later, Friends argues that not considering construction as part  
22 of the non-farm use "would violate the Court of Appeals holding from *Von*  
23 *Lubken*[".]" Friends Brief, 17. However, Friends does not quote literally

1 anything from any Court of Appeals *Von Lubken* case regarding cumulative  
2 impacts, let alone something that holds construction is the use. Nor does  
3 Friends provide a pin citation to the Court of Appeals case they appear to be  
4 pointing to, cited in the previous paragraph – *Von Lubken v. Hood River*  
5 *County*, 118 Or App 246 (1993) (“*Von Lubken VI*”). That case has three  
6 sentences about cumulative impacts, providing in full:

7 “Finally, petitioners argue that LUBA erred by  
8 considering the six impacts of the golf course on their  
9 farm operations in isolation and that ORS 215.296(1)  
10 should be construed to require their cumulative  
11 effects to be considered. We agree with petitioners’  
12 reading of the statute. Because we remand, the county  
13 and/or LUBA will have the opportunity to reconsider  
14 the compatibility of the proposed use with  
15 ORS 215.296(1).”

16  
17 *Von Lubken VI*, 118 Or App at 251. No one disputes that ORS 215.296(1)  
18 requires evaluation of cumulative effects<sup>2</sup> – but Friends’ argument (to the extent  
19 we can discern it, as it is not adequately developed for review) proposes to  
20 extend the meaning of those three *Von Lubken VI* sentences to hold that  
21 construction is part of the use. That argument stretches credulity and should be  
22 rejected.

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<sup>2</sup> In fact, extensive findings provide a farm-by-farm analysis of cumulative impacts, including those from construction, and conclude that cumulative impacts do not exceed the threshold of significance. Rec-52, APP-142-168 (“I adopt the analysis of cumulative impacts in Exhibit J.88.”).

1 To the extent Friends attempts to reference something other than the *Von*  
2 *Lubken VI* Court of Appeals decision, they have not explained that argument.  
3 “LUBA is not obligated to make or develop a party’s arguments when the party  
4 does not endeavor to do so itself.” *Barnes v. City of Hillsboro*, 239 Or App 73,  
5 81, 243 P3d 139 (2010).

6 **5. *Stop the Dump* does not provide legislative history that**  
7 **overcomes clear text and context.**  
8

9 Fundamentally, *Stop the Dump Coalition v. Yamhill County*, 364 Or 432  
10 (2019) (*STD IV*), does not reach the question presented in this assignment of  
11 error, namely, whether construction is part of the “use” to be considered under  
12 the statutory Farm Impacts Test approval criterion for the permanent use. To the  
13 extent it is addressed at all, *STD IV* continually refers to “the nonfarm use” and  
14 quotes the statutory context for those non-farm uses. *Id.* at 446 (“A use allowed  
15 under [the relevant statutes] may be approved only” if it complies with the Farm  
16 Impacts Test.). The findings are consistent with *STD IV* as they point to those  
17 same statutes as *PGE/Gaines* context. Rec-261; APP-013.

18 Again, Friends does not make any arguments challenging the Hearings  
19 Officer’s *PGE/Gaines* analysis. Further, Friends acknowledges that *STD IV*  
20 does not reach the question presented in this assignment of error, and instead  
21 that the “focus ... was to interpret the term ‘significant[.]’” Friends Brief, 15.  
22 Instead, Friends references the discussion in *STD IV* of legislative history,  
23 which they are “free to proffer ... to the court, and the court will consult it after

1 examining text and context[.]” *Gaines*, 346 Or at 172. However, Friends then  
2 quotes a part of *STD IV* that does not evaluate legislative history at all, instead  
3 summarizing the Court of Appeals in *Von Lubken VI*, noting that the current  
4 analysis “aligns” with that prior decision. Friends Brief, 15; *STD IV*, 364 Or at  
5 457. That is not legislative history “proffer[ed] ... to the court[.]” and Friends  
6 does not explain why it should be considered under *PGE/Gaines*.

7 After reviewing *STD IV* and the legislative history the case *does*  
8 summarize, the Hearings Officer found that “[t]here is no legislative history ...  
9 which indicates a legislative intent to require an evaluation of temporary  
10 construction impacts to farm practices.” Rec-260; APP-260. Friends’ arguments  
11 to the contrary rely, again, on broad policy considerations, rather than any  
12 specific legislative history, such as statements of legislators or public testimony,  
13 indicating legislative intent to meaningfully diverge from the established  
14 principle in Oregon land use that construction is not the use. *See County Brief*,  
15 Section IV.A.3(a).

16 To the extent the legislative history in *STD IV* is relevant here, it shows  
17 that the legislature, and those testifying, were operating under that established  
18 principle (that construction is not the use). For example, a farmer was  
19 concerned about the ultimate use of a rural residence for some person to live in,  
20 and “if that person has a big dog, or even a little dog, and then they run out  
21 through your field a number of times ... you know there was a cost in shattered

1 seed.” *STD IV*, 364 Or at 462. To have a big dog, or a little dog, the person is  
2 living in the house, post-construction. Construction is not the use.

3 Even following *Gaines*, statutory text is still primary. For example, in  
4 *State v. Tyson*, 243 Or App 94, 99, 259 P3d 64 (2011), defendant argued a  
5 statute should not apply to her conduct (observing sexual acts with a child)  
6 because the purpose behind that statute was explicitly to fight child  
7 pornography, not private observation. *Tyson* held that, “even if we agreed with  
8 defendant that the legislative history was inconsistent with the statute’s plain  
9 meaning, legislative history cannot substitute for, or contradict the text of, a  
10 statute.” *Id.* (quotation marks removed).

11 Similarly, in this case, even if the purpose in the legislative history *were*  
12 inconsistent with the text and context showing that construction is not the use  
13 (which we do not concede), that policy cannot overcome the words the  
14 legislature actually used. As the court explained in *Gaines*:

15 “Only the text of a statute receives the consideration  
16 and approval of a majority of the members of the  
17 legislature, as required to have the effect of law. ...  
18 The formal requirements of lawmaking produce the  
19 best source from which to discern the legislature’s  
20 intent, for it is not the intent of the individual  
21 legislators that governs, but the intent of the  
22 legislature as formally enacted into law[.]”  
23

24 346 Or at 171; see *State v. Patton*, 237 Or App 46, 52-53, 238 P3d 439 (2010),  
25 *rev den*, 350 Or 131 (2011) (“whatever the legislative history might show about  
26 the legislature’s intentions, those intentions must be reflected in actual statutory

1 wording that, when reasonably construed, is capable of carrying out such an  
2 intention.”).

3 For that reason, *Gaines* emphasized that “a party seeking to overcome  
4 seemingly plain and unambiguous text with legislative history has a difficult  
5 task before it.” 346 Or at 172. Again, Friends does not dispute the correctness  
6 of the Hearings Officer’s text and context analysis or make their own  
7 *PGE/Gaines* analysis.<sup>3</sup> Instead, Friends arguments are limited to “seeking to  
8 overcome” the conclusions of the text and context analysis “with legislative  
9 history” – or, perhaps worse, with broad policy arguments detached from  
10 legislative history. Friends does not accomplish their “difficult task” by simply  
11 arguing that there is a policy of preserving farmland in the EFU zones<sup>4</sup>  
12 (particularly when the portion of the project subject to the Farm Impacts Test is  
13 not even located in EFU<sup>5</sup>). *See State v. Elvig*, 230 Or App 57, 61, 213 P3d 851  
14 (2009) (rejecting legislative argument because it “has no basis in the statute’s  
15 text”).

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<sup>3</sup> Friends cannot now advance these new bases in a reply brief as they have made no mention of any text or context arguments their opening brief. OAR 661-010-0039; *Haugen v. City of Scappoose*, 330 Or App 723, 728, 545 P3d 760 (2024).

<sup>4</sup> Friends Brief, 15-17.

<sup>5</sup> The filtration facility and the majority of the pipelines are in the MUA-20 zone, explicitly a “non-resource” and “exception lands” base zone to which Goal 3 does not apply. Rec-257.

1           **6. Arguments about the significance of temporary**  
2           **construction impacts are irrelevant to this assignment of**  
3           **error.**  
4

5           Friends states that PWB (and the findings) “misrepresent[ed] what the  
6 Supreme Court said” in *STD IV* – without providing a record citation to that  
7 misrepresentation. Friends Brief, 17. The reference appears to be to the  
8 subsection of the findings titled: “Any Construction Impacts Are Temporary,  
9 Which Must Be Calculated into the Determination of Significance.” Rec-47;  
10 APP-015-016. That subsection does not relate to the *PGE/Gaines* analysis, and  
11 instead addresses the *weight* of significance that should be given to temporary  
12 construction impacts *if* a court ultimately found that construction impacts are  
13 relevant. *Id.* Therefore, Friends’ argument about a misrepresentation is  
14 irrelevant here, in its interpretational assignment of error.<sup>6</sup>

15           Friends argues that the effects of construction will “become permanent”  
16 and therefore construction is the use. Friends Brief, 15. But those are not the

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<sup>6</sup> Moreover, there was no misrepresentation, the Court really does explain that the focus is on reduction of land over time. In *STD IV*, the Oregon Supreme Court is rejecting a Court of Appeals approach that only counted “impending reductions” in the supply of agricultural land, in favor of an approach that also includes consideration of impacts that “could well lead to later reductions in the supply of operating, productive agricultural land over time[.]” The distinction is temporal: between whether only “impending” reductions in agricultural land count, rather than impacts that could create those reductions “later” or “over time.” In making that distinction, the Court repeatedly makes clear that the legislature’s focus was still on the supply of agricultural land. *STD IV*, 364 Or at 454 (“the legislature was concerned about the supply of agricultural land”); 455 (“goal of preserving land” and making “long-term resource decisions”); 462 (“legislature’s long-term policy of preserving agricultural land”).



1 facts of this case as found by the factfinder. Take, for example, the carefully  
2 selected testimony at Friends Brief, 15-16, from Mr. Holt of R&H Nursery, a  
3 neighbor of the filtration facility site. Rec-3274. That testimony shows only one  
4 side of the evidence presented to the Hearings Officer. As detailed below in the  
5 relevant assignment of error – substantial evidence, Section IV.D – the  
6 Hearings Officer also had in front of him extensive expert responses to the  
7 comments from Mr. Holt. Rec-293-294, 608-609, 648, 685-686, 2013-2016,  
8 2033-2044. The findings concluded that construction impacts will be  
9 temporary, not permanent. APP-016. Friends does not explain why LUBA  
10 should second guess the Hearings Officer’s choice between conflicting expert  
11 testimony, nor how that would make construction the use under a *PGE/Gaines*  
12 analysis.

13 Similarly, Friends attempts to attack the decision’s *PGE/Gaines*  
14 interpretation on the basis that the findings “prohibited consideration of  
15 construction impacts ... because they are by definition temporary” and that the  
16 holding was made “[s]imply because” “construction impacts are ‘inherently  
17 temporary[.]’” Friends Brief, 20-21. Neither is true. The findings make clear  
18 that, *if* construction is to be considered, the temporary (or permanent, for that  
19 matter) nature of the impacts must go to *weighing* their significance, not to  
20 whether construction is the use. Rec-262; APP-015-016.

1 Overall, Friends has advanced no *PGE/Gaines* analysis or substantive  
2 challenge to the findings that construction is not the use. We ask that those  
3 findings be upheld.<sup>7</sup>

#### 4 **D. RESPONSE TO THIRD ASSIGNMENT OF ERROR**

##### 5 **1. Preservation**

6 Not all the Friends raises were preserved, although the general issue of  
7 construction-related transportation impacts under the Farm Impacts Test was.

8 Most notably, Friends argues that the Farm-Impacts-Test-related  
9 “Operations Report” (Rec-7128-7292) did not “identify accepted farm practices  
10 on a farm-by-farm basis[.]” There is no criticism in the record of the Operations  
11 Report’s identification of farm practices, nor of the farm-by-farm mapping of  
12 the farms on which those practices are used. Had a concern with the approach  
13 taken in the Operations Report (to explain farm practices and then map where  
14 those farm practices occur) been raised, Mr. Prenguber would have had the  
15 opportunity to clarify any concerns with the Operations Report, as he did, in  
16 detail, for every other comment in the record about farm impacts. Rec-3535-  
17 3547; Rec-2006-2080; Rec-617-674.

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<sup>7</sup> Even if LUBA disagrees, the Hearings Officer’s interpretation is at most harmless error, because alternative findings were made that the project does not violate the Farm Impacts Test even if construction is considered. Rec-52; APP-142; *Devin Oil Co. v. Morrow Cty.*, 236 Or App 164, 167, 235 P3d 705 (2010) (affirming LUBA’s reliance on alternative finding that the record demonstrated that the project met the approval criterion).

1 To preserve an argument, it must include “sufficient detail to allow a  
2 thorough examination of the issue by the decision-maker, so as to potentially  
3 obviate the need for further review or at least make that review more efficient  
4 and timely.” *Willamette Oaks, LLC v. City of Eugene*, 295 Or App 757, 767,  
5 437 P3d 314 (2019), *rev den*, 365 Or 192 (2019). None of the record pages  
6 cited in the preservation section of Friends Brief, 21 (or anywhere else),  
7 criticizes the Operations Report’s identification of farm practices, nor is there  
8 any criticism of the farm-by-farm mapping of the farms on which those  
9 practices are used. We know of no document in the record where such a  
10 criticism was raised at all, let alone with the “sufficient detail to allow a  
11 thorough examination” that is required for preservation.

12 Friends cannot for the first time in this appeal challenge the Operations  
13 Report descriptions of accepted farm practices and mapping of the farm-by-  
14 farm locations where those practices occur. “The purpose of [the preservation  
15 requirement] is to prevent unfair surprise. [Petitioner] may not fail to raise  
16 issues locally and then surprise the local government by raising those issues for  
17 the first time at LUBA.” *Boldt v. Clackamas County*, 107 Or App 619, 623, 813  
18 P2d 1078 (1991). ORS 197.797(1) requires that “issues [] be raised and  
19 accompanied by statements or evidence sufficient to afford the ... hearings  
20 officer, and the parties an adequate opportunity to respond to each issue.” It  
21 would be unfair surprise at this point, more than a year after public notice of the

1 application including the Operations Report, Rec-4948-4953, for Friends to be  
2 allowed to criticize an aspect of that report that no one challenged in front of the  
3 Hearings Officer and that Mr. Prenguber did not have the opportunity to  
4 respond to. This argument was waived.

5 As to the argument that it was “procedural error” to do math in  
6 applicant’s final argument, Friends has not provided a standard of review  
7 relating to procedural error nor developed an argument that it somehow  
8 prejudiced their substantial rights. That argument has been waived. *See Stoloff*  
9 *v. City of Portland*, 51 Or LUBA 560, 563 (2006) (“in order to prevail on a  
10 claim of procedural error a petitioner must identify the procedure allegedly  
11 violated”); PWB CPO Brief, Section IV.A.

## 12 2. Standards of Review

13 The standard of review for interpretation is set forth under the Response  
14 to Second Assignment of Error.

15 LUBA reviews findings to determine if they (1) address the applicable  
16 standards, (2) set out the facts relied upon, and (3) explain how those facts lead  
17 to the conclusion that the standards are met. *Heiller*, 23 Or LUBA at 556.  
18 However, “findings of compliance with relevant approval criteria need not be  
19 perfect, rather they need only be adequate to establish the factual and legal basis  
20 for the particular conclusions drawn in a challenged decision[.]” *Thomahlen v.*

1 *City of Ashland*, 20 Or LUBA 218, 229-30 (1990); *Niederer v. City of Albany*,  
2 79 Or LUBA 305, 314 (2019) (quoting this passage from *Thomahlen*).

3 “In order to prevail on a substantial evidence challenge, a petitioner must  
4 identify the challenged findings and explain why a reasonable person could not  
5 reach the same conclusion based on all the evidence in the record.” *Stoloff*, 51  
6 Or LUBA at 568.

7 **3. Findings on construction-related impacts to the**  
8 **transportation system comply with *Heiller*'s test.**  
9

10 The Hearings Officer made clear and extensive findings that  
11 construction-related impacts to the transportation system are not “significant” as  
12 that term has been interpreted in Farm Impacts Test caselaw. Rec-47, 49; APP-  
13 015-111. Those findings comply with all three parts of the *Heiller* test, as  
14 demonstrated below.

15 Friends does not develop any coherent argument to the contrary. After  
16 setting forth *Heiller* as the correct standard of review, the brief provides a  
17 jumble of arguments detached from *Heiller* and mixed in with general policy  
18 and substantial evidence arguments. All of Friends' arguments are limited to  
19 temporary construction-related impacts to the public transportation system.  
20 Accordingly, this analysis of *Heiller* will focus on that topic as well.

a) **Heiller Prong 1: The findings address the applicable legal standard.**

First, the findings address the applicable standard, the Farm Impacts Test.

As has been explained in PWB OAN Brief, Section IV.C.5, the Hearings Officer applied the most stringent test available to him – which normally would be reserved for EFU land, rather than MUA-20 exception lands.<sup>8</sup>

Friends makes two arguments that may address this first prong of *Heiller*.

First, Friends argues that the findings, broadly, “reflect the failure to apply the farm impact test consistent with” *STD IV* (without saying what the failure may be) and then summarize, but do not apply, *STD IV*. Friends Brief, 23-25 (“the first step...” and quoting statutory definition of accepted farming practice).

Second, Friends complains that the “hearings officer failed to acknowledge and apply the significance thresholds[.]” Friends Brief, 42-43. Confusingly, Friends then quotes to where those same significance thresholds are “acknowledge[d] and appl[ied]” in the findings. *Compare* Friends Brief, 43, with Rec-46; APP-004-006.

None of Friends’ arguments quote the findings setting forth the legal standard, APP-004-009, or explain why those findings do not address the applicable standard. To the extent that Friends is even attempting to challenge

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<sup>8</sup> Even if the more stringent state law standard were inapplicable, the alternative would have been a *less* stringent test for the MUA-20, non-resource zone in the County. Therefore, any error would be harmless because the Hearings Officer found that the project meets the higher bar, more stringent test.

1 the findings under the first prong of *Heiller*, their arguments are inadequately  
2 developed for review.

3 b) **Heiller Prong 2: The findings set out the**  
4 **facts relied upon.**  
5

6 Second, the findings provide, in ~100 pages, the facts relied upon in  
7 determining that construction-related transportation impacts will not rise to the  
8 level of “significant” under the Farm Impacts Test. APP-060-168. Some key  
9 facts found by the Hearings Officer include:

- 10 • “Even for the highest potential traffic impact – during peak  
11 construction” – area roads “will continue to operate within the  
12 County’s standards for levels of service” and “all study area  
13 intersections meet or exceed County requirements[.]” Rec-278,  
14 264; APP-065, 041.
- 15 • “Delay on the roads is also fundamentally part of the use of the  
16 public road network” by farmers. Rec-278; APP-065.
- 17 • “Even if a farmer traveled long distances through many  
18 intersections, the delay during the temporary construction period  
19 would be in the order of less than half a minute.” *Id.*
- 20 • “[T]he vast majority of construction will be a rolling single-lane  
21 closure for a short stretch of the road[.]” Rec-298; APP-093.
- 22 • “When roads have one-lane closed, farmers will be able to pass  
23 through that work zone with other traffic.” Rec-304; APP-103.

- 1 • “[T]he objective evidence shows that there will not be extreme  
2 delays for shipping[.]” Rec-307; APP-111.
- 3 • This is “inherently the use of a shared public resource, and  
4 accommodation of other[s] using that shared resource is part of the  
5 accepted farm practice.” Rec-49; APP-063.
- 6 • “[D]etours are a normal part of farming practice as there are  
7 always issues involved in the use of shared roads.” Rec-50; APP-  
8 096.
- 9 • “[A]rea farmers have more than one way to enter their properties.”

10 *Id.*

11 Friends does not contend that the Hearings Officer did not set out the  
12 facts relied upon (or if they do, we could not discern that argument, and it is  
13 inadequately developed for review). Instead, Friends seems to disagree with the  
14 facts that the Hearings Officer found and chose to rely upon. That is a  
15 substantial evidence challenge (addressed below), not a challenge to the  
16 findings.

17 c) **Heiller Prong 3: The findings explain how**  
18 **those facts lead to the conclusion that the**  
19 **standards are met.**  
20

21 The findings explained how the facts listed above, among others, led to  
22 conclusions that the temporary construction-related impacts to the public



1 transportation system would not be significant. Among others, those  
2 explanations include:

3 • “[T]he Project TIA [Rec-7294-7464] and Construction TIA [Rec-  
4 4201-4227] show that there are no ‘externalities ... of the proposed  
5 use [which] could potentially cause’ significant farm impacts[.]”  
6 Rec-264; APP-041.

7 • “In addition to meeting [county level of service standards], it is the  
8 actual quantity of seconds of delay and the quality of movement on  
9 the public roads that the level of service and other county standards  
10 reflect [that provides] clear, objective evidence that the volume of  
11 construction traffic – even taking into consideration road closures  
12 – will not materially degrade farmers’ perception of the quality of  
13 flow or driver satisfaction.” Rec-278; APP-065 (internal quotation  
14 marks omitted, emphasis in original).

15 • The Hearings Officer relied, in part, on the conditions of approval,  
16 stating that: “I find that with the extensive but feasible conditions  
17 regarding construction, [these impacts] will not create a significant  
18 impact under the farm impact test.” Rec-49; APP-063.

19 ○ That approach (relying in part on conditions) is consistent  
20 with the approach LUBA upheld in *Protect Grand Island*  
21 *Farms v. Yamhill County*, 66 Or LUBA 291 (2012),

1 discussed below (but ignored by Friends). The findings  
2 conclude that: “Considering the extraordinary lengths the  
3 Water Bureau proposed to accommodate farm users of the  
4 public road network, which vastly exceed the road widening  
5 and signage conditions that were sufficient in *Protect Grand*  
6 *Island Farms* ... the temporary construction traffic will not  
7 force a significant change in accepted farm practices, nor  
8 significantly increase the cost of those practices.” Rec-286;  
9 APP-073.

- 10 • As to construction in the public right of way, the Hearings Officer  
11 found that PWB’s 11 proposed conditions of approval would  
12 “ensure that no impact on accepted farm practices ... would rise to  
13 the level of significance.” Rec-295; APP-090.

14 In these and many other findings over approximately 150 pages (APP-  
15 001-168), the Hearings Officer explained how the facts lead to the conclusion  
16 that construction-related transportation impacts would not be significant under  
17 the Farm Impacts Test.

18 For some reason, Friends thinks that “[t]he only finding responsive to”  
19 the significance threshold is quoted in their brief at 43. We cannot discern their

1 argument about this “only finding” and it is inadequately developed for review.<sup>9</sup>  
2 Regardless, there are many findings applying the significance threshold,  
3 including those listed above, so any issue with a single finding is harmless  
4 error.

5 Friends does not argue that the findings fail to explain how the facts  
6 “lead to the conclusion that the approval standards are met” under the third  
7 prong of *Heiller*, instead disagreeing with the conclusions reached and  
8 providing many pages summarizing evidence Friends sees as contrary to the  
9 findings. *See* Friends Brief, 45-53.<sup>10</sup> This is once again substantial evidence  
10 (and not a findings) argument, addressed below. Where, as here, “a petitioner  
11 does not explain why challenged findings are inadequate but, rather, disagrees  
12 with the conclusion reached in those findings, petitioner’s challenge to the

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<sup>9</sup> The analysis of this at Friends Brief, 44, also misrepresents the facts: nothing supports that fields will be “inaccessible.” Rec-532, Rec-2019. Nor will the construction period be 7 years, as there are conditions of approval that require it to be a maximum of 4 years. Rec-81-82. Nor will “peak construction” (for which the conservative Construction TIA was performed) last for the entire construction period. Perhaps most importantly, because the pipelines work “is limited and moves approximately 30 to 50 feet per day, even roads that are closed to through traffic will still provide access to field entry points that are outside of the work zone” and so the impact for any given field may, indeed, be “a few times” during the 4-year construction period. APP-093-094, Rec-532.

<sup>10</sup> Notably, none of this is “unrefuted evidence” as Friends asserts. Brief, 45. The table in Section IV.D.6(c)(4) below identifies where other experts in the record responded to farmer expert testimony cited by Friends. The Hearings Officer was entitled to make a choice between experts.

1 findings will not be sustained.” *Vanderburg v. City of Albany*, \_\_\_ Or LUBA  
2 \_\_\_, \_\_\_ (LUBA No 2022-082, Jan 5, 2023) (slip op at 12).

3 **4. *Protect Grand Island Farms* supports the findings but is**  
4 **ignored by Friends.**

5  
6 In *Protect Grand Island Farms v. Yamhill County*, 66 Or LUBA 291  
7 (2012), LUBA addressed the threshold of “significance” under the Farm  
8 Impacts Test in the specific context of impacts to the transportation system. The  
9 findings explain:

10 “There, the proposed use was **30 years of gravel**  
11 **mining** on an island that had only ‘a few public roads  
12 that generally circle the island, and ... is connected to  
13 the rest of the county by a single bridge.’ *Id.* at 293.  
14 Just as they have about the Water Bureau project,  
15 opponents:

16  
17 “... argued that truck traffic generated by the  
18 mining operation would significantly increase  
19 the cost of agricultural practices due to conflicts  
20 between the gravel transport trucks and other  
21 traffic using the public road in conjunction with  
22 customary agricultural practices, including  
23 travel by oversized and/or slow moving farm  
24 equipment and passenger and bus traffic  
25 visiting farms and farm stands.”

26  
27 *Id.* at 299.

28  
29 “Yet, despite the extremely constrained local road  
30 network with a single bridge to the island, and despite  
31 the three decades of increased traffic from large  
32 gravel transport trucks, LUBA affirmed the County’s  
33 approval of the project based on two simple  
34 conditions – road widening and an onsite sign  
35 notifying truck drivers to yield to farm traffic[.]”  
36

1 Rec-279; APP-066.

2 The findings conclude that: “The Water Bureau proposes to do much  
3 more than road widening and an onsite sign to accommodate farm traffic  
4 – as detailed in the [] proposed conditions of approval.” *Id.* Those  
5 conditions of approval include:

- 6 • fixing miles of roads in the surrounding lands before sending truck  
7 traffic there (“fix-it-first”, Condition D.6, Rec-89-90);
- 8 • avoiding certain roads entirely, including Carpenter Lane west of  
9 Cottrell (Condition D.8, Rec-90, Condition E.2, Rec-93);
- 10 • posting radar speed signs, marking haul routes, posting on-site  
11 signs like those in *Protect Grand Island Farms*, conducting  
12 extensive driver education and implementing an accountability  
13 plan, removing obscuring vegetation along haul routes, and  
14 providing a liaison and communications (Condition E.1, Rec-91-  
15 93); and
- 16 • eleven self-imposed constraints on pipeline construction based on  
17 the work of PWB’s agricultural expert (Farm Traffic Report, Rec-  
18 531), including specific times of year when specific road segments  
19 cannot be closed and requiring a single lane of traffic flow at all  
20 times on Dodge Park (Rec-95-96).

21 The Hearings Officer found that,

1 “Considering the extraordinary lengths the Water  
2 Bureau proposed to accommodate farm users of the  
3 public road network, which vastly exceed the road  
4 widening and signage conditions that were sufficient  
5 in *Protect Grand Island Farms*, even if construction  
6 traffic is evaluated under the MCC 39.7515(C)  
7 standard, the temporary construction traffic will not  
8 force a significant change in accepted farm practices,  
9 nor significantly increase the cost of those practices.  
10 *See also Comden v. Coos County*, 56 Or LUBA 214,  
11 216, 219, 224n5 (2008) (upholding approval of a  
12 mining operation directly adjacent to an organic farm  
13 that would generate 67,000 truck trips per year for  
14 twenty years, despite arguments that the truck traffic  
15 on public roads would have impacts on farming uses,  
16 including horse breeding).”

17  
18 Rec-286; APP-073.

19 Friends does not even mention *Protect Grand Island Farms* or *Comden*  
20 or attempt to distinguish those cases, which set a high bar for “significance” of  
21 impacts for use of the shared public roads (even when the increased large truck  
22 traffic will continue for 30 years and occurs in a constrained road network).  
23 Friends’ arguments regarding both substantial evidence and findings are  
24 significantly weakened by simply ignoring this on-point case.

25 **5. The findings address and respond to specific issues**  
26 **raised.**  
27

28 Friends objects at multiple points that the findings “fail to respond to the  
29 detailed concerns raised by farmers[.]” Friends Brief, 23, 34, 54. However,  
30 LUBA has explicitly held that “*Heil[l]er* does not require the decision-maker to  
31 adopt findings explaining why it chose not to rely upon evidence that conflicts

1 with the evidence it did choose to rely upon.” *Kine v. Deschutes County*, 75 Or  
2 LUBA 419, 427 (2017).

3 Friends cites to *Norvell v. Portland Area LGBC*, 43 Or App 849, 853  
4 (1979), to support this argument. Friends Brief, 34. But *Norvell* stands for the  
5 proposition that findings “must address and respond to specific *issues* relevant  
6 to compliance with applicable approval standards” – not that every sub-  
7 comment must have a response. *Vanderburg*, slip op at 12; see PWB OAN  
8 Brief, Section IV.D.3 (collecting caselaw).

9 The findings did not need to respond to each concern in the 8,000-page  
10 record for the findings to be upheld under *Norvell*. “Formal issues and major  
11 relevant concerns raised must be addressed in some fashion, but not every  
12 assertion by a participant in a land use decision warrants a specific finding.”  
13 *Faye Wright Neighborhood Planning Council v. Salem*, 1 Or LUBA 246, 252  
14 (1980).

15 In *Norvell*, there were “no finding[s]” whatsoever on relevant issues. 43  
16 Or App at 853. This case is quite distinct, with over 40 pages of findings on  
17 transportation-related construction impacts to farming, including the sub-issues  
18 of construction in the ROW, detours, alternate routes, wide equipment with  
19 one-lane road closures, and product shipping concerns. APP-063-111. As  
20 transportation-related construction impacts are the only issue raised by Friends,  
21 and the findings exhaustively address that issue, the brief fails to identify any

1 “[f]ormal issues [or] major relevant concerns”<sup>11</sup> – rather than “piece of  
2 opposing evidence”<sup>12</sup> – that the findings do not address.

### 3           **6. Substantial Evidence**

4           “In order to prevail on a substantial evidence challenge, a petitioner must  
5 [1] identify the challenged findings and [2] explain why a reasonable person  
6 could not reach the same conclusion based on all the evidence in the record.”  
7 *Stoloff*, 51 Or LUBA at 568. Friends accomplishes neither.

8           Friends fails to identify specific challenged findings, instead pointing  
9 broadly to their own evidence and own conclusions that transportation-related  
10 impacts of construction will have a significant impact on farmers. Friends  
11 would like the Hearings Officer to have rejected PWB’s evidence and instead  
12 relied on opponents’ evidence.<sup>13</sup> However, the “county is entitled to choose the  
13 evidence it relies upon as long as that evidence, considering the evidence in the  
14 entire record, is substantial evidence, *i.e.*, evidence a reasonable person would  
15 rely upon.” *Kine*, 75 Or LUBA at 427.

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<sup>11</sup> *Faye*, 1 Or LUBA at 252.

<sup>12</sup> *Stoloff*, 51 Or LUBA at 567.

<sup>13</sup> This is most clear at Friends Brief, 42, where they assert “no reasonable person would rely on PWB and the County’s transportation experts” without challenging those experts’ credentials or logic, or otherwise saying why, and then follow that statement with objecting that farmers are the experts (ignoring the other experts) and bemoaning the “hearings officer’s about face” to disagree with the farmers. Ignoring that other experts exist is insufficient to explain why evidence in the record should make LUBA overturn the Hearings Officer’s choice between experts.



1 a) The Hearings Officer found that Mr.  
2 Prenguber and local farmers were experts on  
3 farm practices – and that County  
4 Transportation was the best expert on the  
5 transportation system.  
6

7 The findings explain that the Hearings Officer was faced with experts on  
8 both sides: “The question is whether Applicant’s or the opponent’s expert  
9 testimony is more accurate. I find that the farmers are experts in the area. **I also**  
10 **find that [Mr. Prenguber] is an expert in farm practices and impacts.”** Rec-  
11 48; APP-60 (emphasis added).

12 Friends ignores that Mr. Prenguber was qualified as an expert, selectively  
13 quoting other findings to state only that “farmers were the experts[.]” Friends  
14 Brief, 42. However, Friends does not dispute that Mr. Prenguber is “qualified  
15 by education [and] experience” to render an expert opinion. *See Concerned*  
16 *Citizens v. Jackson County*, 33 Or LUBA 70, 101 (1997). Mr. Prenguber’s  
17 experience notably includes a past analysis of transportation of nursery products  
18 for Oregon Association of Nurseries, one of the intervenor-petitioners. Rec-  
19 5532 (resume).

20 Friends also ignores that Mr. Prenguber is not the only expert relevant to  
21 their argument about the transportation system during construction. The  
22 findings on that issue inherently rely on more general facts about what the  
23 actual construction impacts to congestion and function on county roads will be.  
24 *See, e.g.*, APP-041 (“Even for the highest potential traffic impact – during peak

1 construction” “all study area intersections meet or exceed County  
2 requirements”).

3 The Hearings Officer found that County Transportation is the “the single  
4 best expert on their own roads” and that he would “weigh this expert testimony  
5 over competing testimony” particularly as to their expert opinion that “with the  
6 many and sometime[s] onerous yet feasible conditions placed on the PWB ...  
7 these roads can function and allow farmers to continue to successfully do  
8 business.” Rec-47; APP-019. It was appropriate for the Hearings Officer to rely  
9 on County Transportation’s evaluation of the other experts’ conflicting  
10 testimony,<sup>14</sup> as County Transportation “staff have special expertise in the safe  
11 and efficient use of the right-of-way and various demands on streets, including  
12 traffic” and because of “their neutrality regarding the merits” in weighing  
13 opposing traffic testimony. *See NDNA v. City of Portland*, 80 Or LUBA 269  
14 (2019) (slip op at 27); *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261,  
15 277 (2006). No one challenges County Transportation’s credentials to render a  
16 “neutral expert” opinion that “construction of the project will not significantly  
17 affect transportation in the area.” Rec-52.

18 This is the so-called Battle of the Experts, where: “LUBA will generally  
19 not second guess a land use decision maker’s choice between conflicting expert  
20 testimony, so long as it appears to LUBA that a reasonable person could decide

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<sup>14</sup> Mr. Ard for opponents, and Mr. Beckwith for the applicant. Rec-730; APP-019-038.

1 as the decision maker did based on all of the evidence in the record.” *Willamette*  
2 *Oaks, LLC v. City of Eugene*, 67 Or LUBA 351 (2013) (slip op at 18). “[T]he  
3 question LUBA must answer is whether [the oppositions’] experts’ testimony  
4 ‘so undermines’ [the relied-upon expert’s] testimony that a reasonable person  
5 would not rely on [that expert’s] testimony to conclude” that the standard is  
6 met. *Tonquin Holdings, LLC v. Clackamas County*, 64 Or LUBA 68, 83 (2011)  
7 (quoting *Angel v. City of Portland*, 22 Or LUBA 649, 659, *aff’d* 113 Or App  
8 169 (1992)).

9 Where faced with experts that “reached conflicting conclusions” but  
10 where the relied upon expert’s “professional credentials as a[n] expert are  
11 unchallenged,” LUBA will generally defer to the local decision makers’ choice  
12 of which testimony to rely upon. *Angel*, 22 Or LUBA at 659. As noted above,  
13 no party has challenged Mr. Prenguber’s professional credentials to issue an  
14 expert opinion on impacts to farm practices, nor those of Mr. Beckwith on  
15 which Mr. Prenguber relies,<sup>15</sup> or of County Transportation. Therefore, Mr.  
16 Prenguber’s expert opinion, standing alone, and certainly with the two other  
17 expert opinions on the transportation system, is substantial evidence on which a  
18 reasonable person could rely.

19 As to the two expert opinions on the transportation system, Friends  
20 notably does not cite to *any* evidence whatsoever from the opposition’s traffic

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<sup>15</sup> See, e.g., Rec-643-644, 2058.

1 expert, Mr. Ard – let alone evidence that would “so undermine” the expert  
2 opinions of *both* County Transportation and Mr. Beckwith that LUBA should  
3 overturn the Hearings’ Officer’s choice of experts on the functioning of the  
4 transportation system during construction.

5         Instead, Friends argues that “no reasonable person could look at the  
6 evidence presented by the farmers” and not agree with them. Friends Brief, 35.  
7 However, the question is not what a reasonable person could find looking *just*  
8 “at the evidence presented by the farmers,” but whether that evidence “so  
9 undermines” Mr. Prenguber’s, Country Transportation’s, and Mr. Beckwith’s  
10 expert opinions that it was not reasonable for the Hearings Officer to rely on  
11 those three experts.

12         Friends does not even apply the Battle of the Experts caselaw or attempt  
13 to explain how their arguments meet that higher standard for this substantial  
14 evidence challenge. All of Friends’ challenges to these experts are broadly  
15 framed, not attacking any specific expert opinion or finding, but instead  
16 attacking the overall conclusion that the temporary construction impacts to the  
17 transportation system are not significant.

18         “[P]etitioners must do more than identify conflicting expert testimony in  
19 the record and point out that the findings do not address one side of that  
20 conflict,” including that they must identify “the specific issue” and “the  
21 conflicting expert testimony that the decision-maker allegedly failed to

1 recognize[.]” *Oregon Shores Conservation Coalition v. Coos County*, 81 Or  
2 LUBA 839, \_\_\_ (2020) (slip op at 65).

3 Friends’ arguments fall dramatically short of the three showings required  
4 in *Oregon Shores*. On that basis alone, Friends’ substantial evidence challenge  
5 should be rejected. No additional analysis is needed. There was substantial  
6 evidence in the record, in the form of three unchallenged experts’ testimony, on  
7 which the Hearings Officer was entitled to rely to find that the transportation-  
8 related construction impacts will not have a significant impact on accepted farm  
9 practices.

10 b) **The findings explicitly weigh the conflicting**  
11 **expert testimony.**  
12

13 “[T]his is not a case where the hearings officer failed to appreciate that he  
14 was presented with conflicting expert testimony[.]” *Tonquin*, 64 Or LUBA at  
15 83-84. As noted above, the Hearings Officer found that both farmers and Mr.  
16 Prenguber were experts on accepted farm practices. The findings explain that  
17 the Hearings Officer reviewed and weighed all of the evidence in the record on  
18 impacts to farm practices in order to determine “whether Applicant’s or the  
19 opponent’s expert testimony is more accurate.” Rec-48, 52; APP-060, 142.  
20 Furthermore, the Hearings Officer found that County Transportation was the  
21 best (and only neutral) expert on what the impacts to county road functioning  
22 will be from construction. APP-019, 139. The adopted findings from County  
23 Transportation “reviewed the engineering critiques and applicant’s rebuttals”

1 point by point – from opponents’ Mr. Ard and applicant’s Mr. Beckwith – and  
2 found Mr. Beckwith more compelling. APP-023-026. Similarly, the analysis of  
3 cumulative impacts adopted as findings provides farm-by-farm references to  
4 farmer expert testimony and Mr. Prenguber’s expert rebuttal, before drawing  
5 conclusions. APP-142-168.

6 The Hearings Officer made an informed choice and determined that the  
7 three experts supporting the applicant’s case were more believable. “[T]he  
8 choice between that believable expert testimony [was] for the hearings officer,  
9 and LUBA [should] not second guess that choice.” *Tonquin*, 64 Or LUBA at  
10 83.

11 c) Nothing “so undermines” the expert  
12 testimony that a reasonable person would  
13 not rely on it.  
14

15 Based on the foundation above that (1) the Hearings Officer knew there  
16 were conflicting experts, (2) no one has challenged those experts’ credentials,  
17 and (3) the findings explicitly reference the conflicting experts’ opinions before  
18 drawing conclusions, Friends has a challenging standard to meet in convincing  
19 LUBA to now “second guess” his “choice between conflicting expert  
20 testimony” – more specifically, Friends must show that “a reasonable person  
21 could [not] decide as [the Hearings Officer] did” because the opposition’s  
22 “experts’ testimony ‘so undermines’ [the relied upon expert] testimony that a

1 reasonable person would not rely on [that expert's] testimony to conclude" that  
2 the standard is met. *Tonquin*, 64 Or LUBA at 83.

3 Friends does not meet that challenging standard to show that the findings  
4 are "unreasonable". *Westside Rock v. Clackamas County*, 51 Or LUBA 264,  
5 294 (2006) (even when opposing expert made "a reasonable argument", LUBA  
6 declined to "say the county's [contrary] view is unreasonable"). The following  
7 sections evaluate Friends' arguments.

### 8 **(1) Irrelevant Commentary**

9 The Hearings Officer included side commentary in the decision, such as  
10 about his personal experience with construction traffic.

11 For all the reasons in County Brief, Section IV.A.6(b), we agree with  
12 Friends that this commentary is not "relevant", Friends Brief, 23, and instead  
13 that "the challenged comment is merely an additional basis to reach the main  
14 conclusion[.]" *Angius v. Washington County*, 52 Or LUBA 222, 240 (2006). In  
15 this case, as in *Angius*, because "that main conclusion is supported by the  
16 record[, a]ny error in citing an additional basis outside the record to support that  
17 conclusion is, at most harmless error." *Id.* at 240. The main conclusion Friends  
18 challenges is supported by the record, including, without limitation, the three  
19 expert opinions that the transportation network will continue to meet all county  
20 level of service standards during construction and that there will not be  
21 significant farm impacts as a result.

**(2) The Hearings Officer adopted Exhibit J.88 with a farm-by-farm analysis.**

1  
2  
3  
4 Friends asserts that PWB “failed to engage in” a farm-by-farm analysis.

5 Friends Brief, 25.

6 As explained in OAN Brief, Section IV.D.3, this is false. Friends  
7 supports this argument by ignoring hundreds of pages of analysis in the record,  
8 citing only to the initial application’s “Operations Report” at Rec-7128-7292.

9 Friends Brief, 25. Most importantly, that argument ignores that Exhibit J.88,  
10 and the farm-by-farm analysis performed there, was incorporated as findings.

11 APP-142-168.

12 Friends complains that the Operations Report did not “identify accepted  
13 farm practices on a farm-by-farm basis[.]” Friends Brief, 25. However, the  
14 Operations Report provided 58 pages of descriptions of accepted farm practices  
15 for each type of farm use. Rec-7160-7218. The Operations Report links those  
16 accepted farm practices to specific properties, farm-by-farm, in various maps  
17 and tables. Rec-7151 (Figure 5), 7253-7291 (Tables 21-53).<sup>16</sup> Moreover,  
18 Exhibit J.88, incorporated into the findings, makes explicit the farm-by-farm  
19 application of the analysis.

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<sup>16</sup> As explained above in Section IV.D.1, any argument that this mapping and extensive description of the accepted farm practices did not meet the requirements of the Farm Impacts Test has been waived, as it was not raised below in any manner, and certainly not with sufficient specificity to allow PWB to respond to that criticism.





1           The same is true of Friends' argument that the findings fail to "explain  
2 why" farmer testimony "fails to establish that nursery farmer reliance on roads  
3 is an accepted farm practice." Friends Brief, 34. Friends also objects to  
4 "conclusions to the contrary" of Friends' assertion "that predictable and  
5 efficient travel between fields and to market is [] essential to farming for  
6 profit." Friends Brief, 35. Friends again fails to identify the finding they are  
7 challenging. The Hearings Officer did not decide "the contrary" – namely that  
8 predictable and efficient travel is *not* important to farmers – instead, he found  
9 that *the impacts* to that accepted farm practice of using the public road network  
10 *do not rise to the level of "significant"* under the Farm Impacts Test during  
11 construction.

12           No one disagrees that farmers use the roads. Mr. Prenguber found, and  
13 the findings included, that using the public road network (and sharing that  
14 network) is an accepted farm practice. Rec-529-530; APP-063. The question is  
15 whether the impacts are "significant." They are not. *Id.*

16           Similarly, the question is not whether farmers travel between fields and  
17 to market, Friends Brief, 35, but whether the additional traffic from  
18 construction will "significantly" impact those farm practices. It will not. We  
19 note that the quotation at Friends Brief, 34n9, was, in fact, "adopted by the  
20 Hearings Officer". APP-150. The next sentence of those findings, not quoted by  
21 Friends, provides: "The Project TIA and the Construction TIA show that the

1 increase in time spent on the roads and the associated cost of that increase in  
2 time will be minimal, as intersections in the Surrounding Lands will not exceed  
3 the County's standards for levels of service, and because the construction  
4 period is temporary." APP-150. The Farm Impacts Test does not prohibit  
5 "minimal" impacts on farming, as the word "significantly" "implies that some  
6 [impact] is permissible." *Thomas v. Wasco County*, 35 Or LUBA 173, 178  
7 (1998).

8 Friends does not address significance or identify any finding that is not  
9 supported by substantial evidence. The findings are clear that, based on three  
10 unchallenged expert analyses, and "with the extensive but feasible conditions  
11 regarding construction, [transportation-related aspects of construction] will not  
12 create a significant impact under the farm impact test." Rec-49; APP-063.

13 **(4) Each piece of opponent expert evidence**  
14 **cited by Friends has an "adequate" rebuttal**  
15 **in the record.**  
16

17 As LUBA explained in *Wal-Mart Stores, Inc.*, 52 Or LUBA 261, 276  
18 (2006), "[t]he critical issue *for the local decision maker* will generally be  
19 whether any expert or lay testimony offered by ... opponents raises questions or  
20 issues that undermine or call into question the conclusions and supporting  
21 documentation that are presented by the applicant's experts and, if so, whether  
22 any such questions or issues *are adequately rebutted* by the applicant's  
23 experts." (Emphasis added.)

1 Here, far from being “unrefuted,”<sup>17</sup> each piece of evidence cited by  
 2 Friends has corresponding evidence in the record in which one of three experts  
 3 rebutted that testimony, as shown in the table below.

4

Friends Brief Pages / Topic	Friends Record Citation	Applicable Rebuttal in Record
26	FN7: “Rec-1474-1476”	Rec-159; 163-164; 650-654; 691-692; 2068-2069.
27-30	“Rec-2863”, “Rec-2874”, “Rec-2862-2863”, “Rec-757-758”	APP-096-099; Rec-686-687; 2013-2016; 2018-2022; 3543-3547.
29	“Rec-759”	Not a fact in dispute that farm traffic can be slow. Rec-3545.
31	“Rec-774”	Rec-299, 299n.88.
32	“Rec-2732”	Rec-629.
33	“Rec-774”	This record page does not stand for the proposition it is cited for, namely “multiple farm vehicles needing to reach the same field.” Instead, it relates to concerns about detours and shipping delays, addressed at Rec-300-302; 306-307; 2013-2016; 2064-2065.
33	“Rec-753, 774”	Rec-300-302; 306-307; 2013-2016; 2064-2065.
34	“Rec-3707, 2831”	Farm profit is not the test. Rec-321-322; 2013-2016; 2064-2065.
35	“Rec-774”	The deteriorated condition of the roads before PWB restores them (“fix-it-first”) is not a fact in dispute. Rec-160.
45	“Rec-2831”	Rec-590-591; 655; 690-691; 2013-2016.
46-47	“Video 23, Rec-753”	Rec-289-293.
47-48	“Rec-3276-3278”,	Rec-2034; 2013-2016; 2035-2038.

<sup>17</sup> Friends Brief, 45.

Friends Brief Pages / Topic	Friends Record Citation	Applicable Rebuttal in Record
	“Rec-3280”	
48-49	“Rec-774”	Rec-301; 301n89; 300-302; 306-307; 2013-2016.
49-50	No record citations. Related to R&H access during construction.	Rec-293-294; 2013-2016; 2034-2038.
51-52	“Rec-757”, “Rec-752”	Rec-170-171; 294-307; 529-532; 2018-2020; 1983-1984.
52	“Rec-780-782”	Rec-170-174; 577; 2013-2016; 4214.
53	“Rec-753”	Rec-301-302; 533; 632-633; 1983-1984.
53	“Rec-1160-1163”	Farm is west of Cottrell on Carpenter, problems are “if” Carpenter west of Cottrell is used, which it will not be. Rec-92; 159; 298-299, 306-307, 2013-2016.
53-54	“Rec-768”	Rec-293-294; 567-568; 608-609; 643-647; 2042-2044.
54	“Rec-780-782”	Rec-298-299 (if no detour available, can use access); 530-532; 2013-2016; 2049 (detour is available).
55	“Rec-752”	This record citation does not stand for the proposition it is cited for, related to flagging farm equipment through work zones when no detour is available. Local access will be maintained. Rec-298-302, 531-532; Rec-4121, 14 (incorporating findings).

1

2 The issue for the Hearings Officer (the “local decision maker” under  
3 *Wal-Mart*) was to decide if that rebuttal was “adequate[.]” LUBA should not  
4 now overturn that adequacy determination and choice between experts made by  
5 the Hearings Officer. “LUBA’s role on review is not to determine which side’s

1 evidence it finds to be the weightier. ... Our role is far more limited. We are  
2 limited to determining whether the hearings officer's decision to rely on the  
3 [applicant's] experts' testimony in the way that [h]e did is reasonable, in view  
4 of all of the evidence." *Wal-Mart*, 52 Or LUBA at 277.

5 Overall, as shown in the table, and given that no one has challenged the  
6 three experts' credentials, "the hearings officer's decision to rely on the  
7 [applicant's] experts' testimony in the way that [h]e did is reasonable, in view  
8 of all of the evidence." *Wal-Mart*, 52 Or LUBA at 277.

9 **(5) Friends' attacks on Conditions of**  
10 **Approval are unavailing.**  
11

12 Friends argues that, with regards to "intersection closure and the lack of a  
13 detour," Mr. Prenguber's expert opinions "focus entirely on conditions of  
14 approval[.]" Friends Brief, 53-54. In *Protect Grand Island Farms*, discussed  
15 above in Section IV.D.4, LUBA held that reliance on conditions of approval is  
16 appropriate in this specific context (transportation impacts to farming). 66 Or  
17 LUBA at 299. Moreover, as the table shows, there is much more in the ~400  
18 pages of Mr. Prenguber's expert opinions than mere reliance on conditions of  
19 approval.

20 As to situations where there is "no detour", Friends Brief, 55, this has  
21 been extensively addressed. Flagging emergency vehicles through construction  
22 zones is a standard practice in the county, and there is no evidence that PWB  
23 cannot extend that practice to farmers as needed. Instead, as the findings

1 explain: “it is common practice to allow large emergency vehicles through work  
2 zones – extending this to include large farm vehicles will be inconvenient for  
3 the Water Bureau, but *easily feasible*.” Rec-305, APP-107 (emphasis added).  
4 The Hearings Officer was correct to rely on the expert opinion of Mr. Beckwith  
5 that this is common practice, that the contractors are familiar with these  
6 standard requirements, and that the “contractors will take measures to ensure  
7 they can accommodate [farm] vehicles through a work zone regardless of the  
8 stage of construction.” *Id.* LUBA should not overturn the Hearings Officer’s  
9 choice of expert.

10 Friends next attacks the Transportation Demand Management (TDM).  
11 Friends Brief, 56. It is unclear why Friends Brief, 59, states “the Hearings  
12 Officer made no reference to the need for TDM measures” as there are multiple  
13 TDM references in findings. *See, e.g.,* APP-025, 029, 041-042. It is also unclear  
14 why Friends Brief, 59, states no feasibility finding was adopted. There are  
15 actually two. First, County Transportation experts responding to an opponent’s  
16 argument that “there is insufficient evidence ... that feasible solutions exist,”  
17 provide findings that the “applicant[] [has] provided substantial evidence ... to  
18 determine that the conditions can and will be met[.]” APP-021-022.<sup>18</sup> Second,  
19 the Hearings Officer specifically found “that the conditions for [TDM] are  
20 feasible and not an improper deferral.” Rec-81.

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<sup>18</sup> This finding of feasibility also applies to the “conditions outlining the timing for in-road work[.]” Friends Brief, 56.

1           That finding of feasibility is supported by evidence in the record. Rec-  
2 174-178. That evidence includes percentage reductions achieved on other  
3 projects from the same kinds of TDM measures as well as the *opponents'* traffic  
4 expert concluding that bussing every single commuter for the project would  
5 take only nine bus trips. *Id.* Furthermore, the TDM condition was not “proposed  
6 by PWB” as Friends asserts, Brief 58, but instead was proposed by County  
7 Transportation after evaluating opponents’ criticism of the condition as  
8 previously drafted. APP-029.

9           Fundamentally, the TDM condition does not defer “discretionary  
10 determinations concerning compliance with approval criteria[.]” *Rhyme v.*  
11 *Multnomah County*, 23 Or LUBA 442, 447 (1992). The findings are based on  
12 the TIAs submitted by the applicant’s expert and reviewed by County  
13 Transportation as a neutral expert. The TDM condition merely implements the  
14 conclusions of those experts, particularly as to the number of Carpenter Lane  
15 trips without exceeding County level of service (LOS) standards. Rec-1938-  
16 1941.

17           There is no discretionary decision yet to be made – the TDM condition  
18 provides a clear, non-discretionary threshold of the capacity of Carpenter Lane  
19 – “296 vehicles (which maintains LOS ‘C’).” Rec-87. Staff need only check to  
20 see if one number is greater than another. That simple math is an objective, not  
21 discretionary, test. There does not need to be notice and a hearing every two



1 weeks to review the applicant's traffic counts and determine if  $X > Y$ . This is  
2 exactly the kind of nondiscretionary review that it is "entirely appropriate to ...  
3 defer [to] engineering staff[.]" *Rhyme*, 23 Or LUBA at 447.

4           **7. The average delay was only one of many pieces of**  
5           **substantial evidence supporting the findings.**  
6

7 Friends goes to great lengths to attack the final argument's use of math to  
8 argue that there will be only an average of three seconds of delay at area  
9 intersections. Friends Brief, 35-41. First, as explained in Section IV.D.1 above,  
10 Friends provides no argument that this was procedural error or new evidence.  
11 Friends Brief, 37n10.

12           Second, Friends misquotes the sentence they are attacking. It should read:  
13 "The fact that there will *be only an average of* three seconds of delay at area  
14 intersections supports this conclusion" – referring to the conclusion that, "with  
15 the extensive but feasible conditions regarding construction, [project  
16 construction] will not create a significant impact under the farm impact test."  
17 Rec-49 (italics indicate misquote). Examining that corrected quotation, it is  
18 clear that the Hearings Officer realized that this was only "an average" – not  
19 that it would be the total delay to any one farmer on any given trip, as Friends  
20 argues. Friends Brief, 37-38. Instead, the findings acknowledge that each  
21 intersection a farmer travels through would need to be added together, and there  
22 is evidence in the record, including maps, of specific farmers' routes. Rec-534-  
23 562. Looking at all of that, the findings conclude that, "[e]ven if a farmer

1 traveled long distances through many intersections, the delay during the  
2 temporary construction period will be in the order of less than half a minute.”  
3 APP-065.<sup>19</sup> Friends disagrees with that math, as discussed below, and *their*  
4 figure for total delay at peak construction (a shorter period in the middle of  
5 construction) is 76 seconds. Friends Brief, 40. Even if that occurs “twice daily”  
6 as Friends asserts, Friends Brief, 38, Friends does not explain why even a 2½  
7 minute delay during the limited timeframe of peak construction is such  
8 overwhelming evidence of “significance” – that “so undermines” Mr.  
9 Prenguber’s conclusions – that LUBA should overturn the Hearings Officer’s  
10 choice between conflicting expert testimony. *Tonquin*, 64 Or LUBA at 83.

11 Friends’ attacks on the math are similarly unavailing. First, Friends fails  
12 to recognize that the elimination of the southern access – resulting in the One-  
13 Access Analysis (Rec-1938) – required modification only of the scenarios in  
14 which the southern access was to be used. The southern access would have  
15 directly connected to Bluff Road, to the south in Clackamas County. All of the  
16 pipelines closures will be to the north, in Multnomah County. For this reason,  
17 the One-Access Analysis explicitly was based on “Scenario 4” as the “more  
18 conservative approach” “which routes all Truck trips to/from the south[.]” Rec-  
19 1938. The only intersections “where traffic volumes and travel patterns will

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<sup>19</sup> The citation to Rec-774 on Friends Brief, 38, does not stand for the proposition it is cited for, regarding “compounded, cumulative[.]” impacts. It is not clear where Friends thinks this is in the record.

1 change with the removal” of the southern access are at Cottrell/Carpenter and  
2 Cottrell/Bluff. *Id.* Neither of these intersections is to the north, where pipeline  
3 road closures will occur. Therefore, the One-Access Analysis did not need to  
4 address northern pipeline closures, and neither did the average delay math.  
5 Second, the math does not fail to consider multiple road closures – instead, Mr.  
6 Beckwith, the applicant’s transportation expert, found that it was sufficient to  
7 study the paired full closures, “as these roadway closures have the greatest  
8 potential for impacts” allowing that data to draw the conclusion that “single and  
9 partial closures will similarly perform at acceptable levels of service.” Rec-  
10 4214.<sup>20</sup>

11 The “contra-flow trips” argument (Friends Brief, 41) was addressed by  
12 the applicant’s expert at Rec-1975, validated by County Transportation at Rec-  
13 731, and County Transportation’s expert testimony was adopted by the  
14 Hearings Officer as findings at APP-019. It is unclear why Friends thinks there  
15 are no findings on this issue.

16 Moreover, even if this single piece of 3-seconds argument *were*  
17 unsupported by the record, which we do not concede, it was not the only thing  
18 the Hearings Officer relied upon. Instead, the Hearings Officer explicitly gave  
19 the most weight to County Transportation’s analysis in Exhibit J.44. APP-019.

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<sup>20</sup> To the extent Friends is criticizing the Construction TIA itself, it does not cite to where that argument was raised nor develop the argument. That argument has not been preserved.

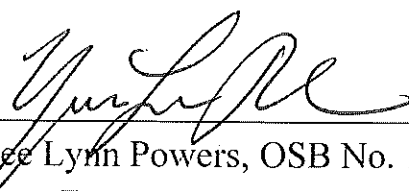
1 County Transportation wrote Exhibit J.44 before the applicant's final written  
2 argument was submitted, so it cannot have relied upon the 3 second argument.  
3 The same is true of the applicant's experts in farm practices (Mr. Prenguber)  
4 and in transportation (Mr. Beckwith), on which the Hearings Officer chose to  
5 rely. Therefore, even if LUBA finds that 3-seconds argument must be  
6 disregarded for some reason, it is at most harmless error, as there is substantial  
7 evidence "in the whole record" on which the Hearings Officer relied.  
8 ORS 197.835(9)(a)(C).

9 Overall, there is substantial evidence in the record on which the Hearings  
10 Officer relied to find that construction-related impacts to the public  
11 transportation system were not "significant" under the Farm Impacts Test.

## 12 V. CONCLUSION

13 Based on the foregoing, PWB respectfully requests that the Board deny  
14 each of intervenor-petitioners' assignments of error and affirm the County's  
15 decision.

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

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19 \_\_\_\_\_  
20 Zoee Lynn Powers, OSB No. 144510  
21 Renee France, OSB No. 004472  
22 Radler White Parks & Alexander, LLP  
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**CERTIFICATE OF FILING**

I hereby certify that on August 16, 2024, I filed the original of this  
**INTERVENOR-RESPONDENT’S RESPONSE BRIEF TO THE  
PETITION FOR REVIEW OF INTERVENOR-PETITIONER 1000  
FRIENDS OF OREGON** for LUBA No. 2023-086 together with one (1) copy,  
with the Land Use Board of Appeals, 775 Summer Street NE, Suite 330, Salem,  
Oregon 97301-1283, by FedEx.

**CERTIFICATE OF SERVICE**

I also certify that on August 16, 2024, I served the foregoing  
**INTERVENOR-RESPONDENT’S RESPONSE BRIEF TO THE  
PETITION FOR REVIEW OF INTERVENOR-PETITIONER 1000  
FRIENDS OF OREGON** for LUBA No. 2023-086, by United States Postal  
Service first class mail, postage prepaid, to the parties or their attorney as  
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