

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

3
4 COTTRELL COMMUNITY PLANNING ORGANIZATION,
5 PAT MEYER, MIKE COWAN, PAT HOLT,
6 RON ROBERTS, KRISTY MCKENZIE, MIKE KOST,
7 RYAN MARJAMA, MACY DAVIS, TANNER DAVIS,
8 LAUREN COURTER, and IAN COURTER,

9 *Petitioners,*

10
11 and

12
13 MULTNOMAH COUNTY RURAL FIRE
14 PROTECTION DISTRICT NO. 10,
15 PLEASANT HOME COMMUNITY ASSOCIATION,
16 ANGELA PARKER, DBA HAWK HAVEN EQUINE,
17 1000 FRIENDS OF OREGON,
18 OREGON ASSOCIATION OF NURSERIES,
19 MULTNOMAH COUNTY FARM BUREAU,
20 and GRESHAM-BARLOW SCHOOL DISTRICT 10J,

21 *Intervenors-Petitioners,*

22
23 vs.

24
25 MULTNOMAH COUNTY,

26 *Respondent,*

27
28 and

29
30 PORTLAND WATER BUREAU,

31 *Intervenor-Respondent.*

32
33 LUBA No. 2023-086

34
35 FINAL OPINION

36 AND ORDER

37
38 Appeal from Multnomah County.

1
2 Carrie A. Richter filed a joint petition for review and intervenor-
3 petitioner's brief and reply brief and argued on behalf of petitioners. Also on the
4 brief was Bateman Seidel Miner Blomgren Chellis & Gram, PC.
5

6 Carrie A. Richter filed a joint petition for review and intervenor-
7 petitioner's brief and reply brief and argued on behalf of intervenor-petitioner
8 Multnomah County Rural Fire Protection District No. 10. Also on the brief was
9 Bateman Seidel Miner Blomgren Chellis & Gram, PC.
10

11 Jeffrey L. Kleinman filed an intervenor-petitioner's brief and reply brief
12 and argued on behalf of intervenors-petitioners Pleasant Home Community
13 Association and Angela Parker, dba Hawk Haven Equine.
14

15 Elliot R. Field filed an intervenor-petitioner's brief and reply brief on
16 behalf of intervenor-petitioner Gresham-Barlow School District 10J. Also on the
17 brief was Garrett Hemann Robertson P. C.
18

19 James D. Howsley filed an intervenor-petitioner's brief on behalf of
20 intervenors-petitioners Oregon Association of Nurseries and Multnomah County
21 Farm Bureau. Also on the brief was Ezra L. Hammer and Jordan Ramis PC.
22

23 Andrew Mulkey filed an intervenor-petitioner's brief and reply briefs on
24 behalf of intervenor-petitioner 1000 Friends of Oregon.
25

26 David Blankfeld filed the respondent's brief and argued on behalf of
27 respondent.
28

29 Zoe Lynn Powers filed the intervenor-respondent's briefs. Also on the
30 briefs was Renee France and Radler White Parks & Alexander, LLP. Zoe Lynn
31 Powers and Renee France argued on behalf of intervenor-respondent.
32

33 RUDD, Board Member; ZAMUDIO, Board Chair, participated in the
34 decision.
35

36 RYAN, Board Member, did not participate in the decision.
37
38

REMANDED 01/22/2025

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You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a county hearings officer’s decision approving consolidated applications required to construct a drinking water filtration facility, communication tower, and associated pipelines.

BACKGROUND

Intervenor-respondent Portland Water Bureau (PWB) seeks to develop a 135 million gallon per day drinking water filtration facility and related communication tower and pipelines.

The water filtration facility and communication tower are proposed on a 94-acre site located approximately 0.33 miles east of SE Cottrell Road and served by Carpenter Lane.¹Record 14.²

The 94-acre site and much of the surrounding area are zoned Multiple Use Agriculture 20 (MUA-20). A portion of the 94-acre site is also subject to “Significant Environmental Concern for wildlife habitat (SEC-h) [and] water resources (SEC-h), [and] Geologic Hazards (GH)” zoning overlays. Record 10. This portion of the project is labeled “Filtration Facility and Communication Tower” on the map below.

¹ Cottrell is an unincorporated community located in northern Clackamas County and bisected by Bluff Road, from which an emergency access to the facility is proposed.

² All record citations are to the Second Amended Record.

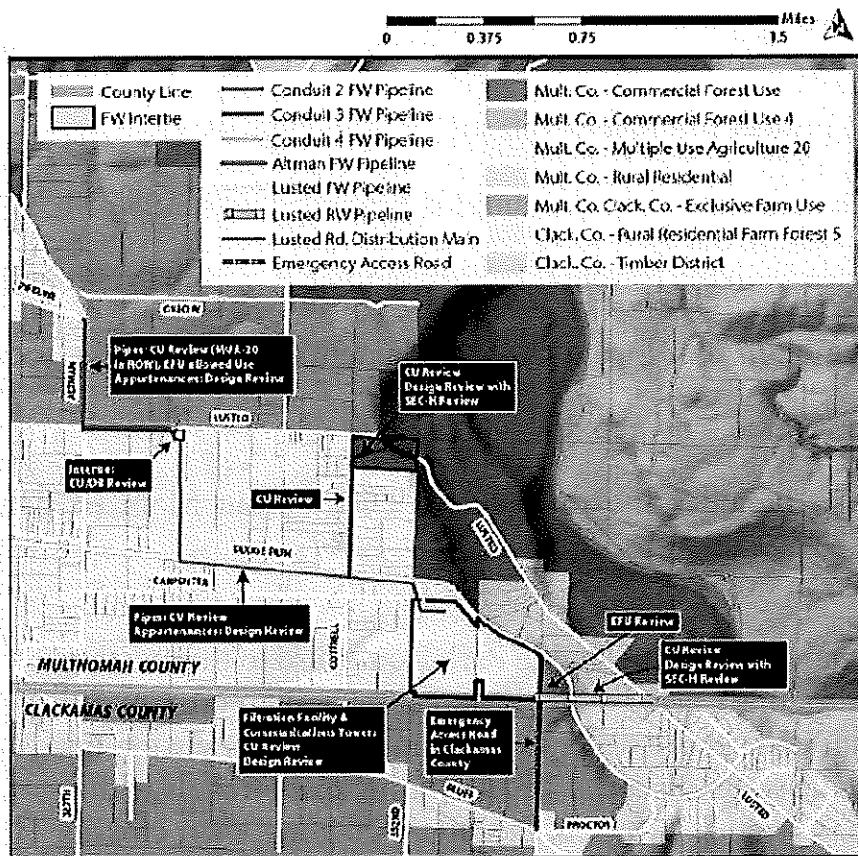


Figure 4. Project Location, Base Zoning, and Land Use Permits

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2 Record 11.

3 Raw water pipelines (RW Pipelines) are proposed to extend approximately
 4 0.4 miles through areas zoned Rural Residential (RR) and Exclusive Farm Use
 5 (EFU) from existing conduits running along Lusted Road across private property
 6 just north of the county line to the water filtration facility. Record 14. The
 7 location of this element of the project is labeled “Lusted RW pipeline” on the
 8 map above.

9 A Finished Water Intertie (FW Intertie) is proposed “on Lusted Road east
 10 of Altman Road in an area zoned MUA-20. The Intertie controls the flow of
 11 finished water to the water transmission system. The facility is located at the

1 northwest corner of 33304 SE Lusted R[oa]d property.” Record 15. The location
2 of this element of the project is labeled “Intertie” on the map above.

3 A finished water pipeline (FW Pipeline) is proposed within the MUA-20
4 zone to extend 1.5 miles from the filtration facility, primarily within existing right
5 of way, to the FW Intertie. *Id.* The location of this element of the project is labeled
6 “Lusted FW Pipeline” on the map above.

7 The project also includes the Lusted Hill Distribution Main (LRDM),
8 which is intended to

9 “connect[] the new pipeline in Dodge Park Boulevard to the existing
10 main adjacent to the Lusted Hill Treatment Facility on Cottrell
11 Road. This main will supply water to existing local water customers
12 and five wholesale water districts. The 0.6[]mile main travels within
13 the Cottrell Road [right-of-way] in the MUA-20 zone, then crosses
14 the [PWB] property at 6704 SE Cottrell R[oa]d in the Commercial
15 Forest Use (CFU) zone and connects to the existing main in an
16 adjacent easement on 34747 SE Lusted R[oa]d.” Record 15.

17 It is labeled “Lusted Rd Distribution Main” on the map above.

18 Lastly, three additional pipelines are proposed within existing county
19 right-of-way through MUA-20 and Exclusive Farm Use (EFU) zones to connect
20 the FW Intertie to existing conduits. Record 15.

1 Elements of the project are proposed on both resource and non-resource
2 land.³ Multnomah County Code (MCC) 39.4200 explains that the purposes of the
3 Resource District, EFU Base Zone

4 “are to preserve and maintain agricultural lands for farm use
5 consistent with existing and future needs for agricultural products,
6 forests and open spaces; to conserve and protect scenic and wildlife
7 resources, to maintain and improve the quality of the air, water and
8 land resources of the [c]ounty and to establish criteria and standards
9 for farm uses and related and compatible uses which are deemed
10 appropriate. Land within this base zone shall be used exclusively for
11 farm uses as provided in [ORS c]hapter 215 and the [OAR c]hapter
12 660, [d]ivision 33 as interpreted by this [EFU] Subpart.”

13 MCC 39.4300 explains that the purposes of the Non-Resource District, MUA
14 base zone

15 “are to conserve those agricultural lands not suited to full-time
16 commercial farming for diversified or part-time agriculture uses; to
17 encourage the use of non-agricultural lands for other purposes, such
18 as forestry, outdoor recreation, open space, low density residential
19 development and appropriate [c]onditional [u]ses, when these uses
20 are shown to be compatible with the agricultural uses, natural
21 resource base, the character of the area and the applicable [c]ounty
22 policies.”

23 MCC 39.4350 explains that the purposes of the Non-Resource Rural Residential
24 (RR) base zone

25 “are to provide areas for residential use for those persons who desire

³ In its section setting out the county’s zoning base codes, the Multnomah County Code (MCC) identifies Part 4.A “Resource Districts” and Part 4.B “Non-Resource Residential Base Zones (Exception Lands).” *See* MCC 4-1, 4-56.

1 rural living environments; to provide standards for rural land use and
2 development consistent with desired rural character, the capability
3 of the land and natural resources; to manage the extension of public
4 services; to provide for public review of nonresidential use
5 proposals and to balance the public's interest in the management of
6 community growth with the protection of individual property rights
7 through review procedures and flexible standards.”

8 “Utility facilities necessary for public service[]” are allowed in the EFU
9 zone under MCC 39.4225(A) and community service uses are conditionally
10 allowed in the MUA-20 zone under MCC 39.4320. In order to permit the project,
11 PWB applied for the following county approvals:

- 12 • Community Service Conditional Use Permit for Utility Facility
13 (Filtration Facility)
- 14 • Community Service Conditional Use Permit for Utility Facility
15 (Pipelines)
- 16 • Community Service Conditional Use Permit for Radio Transmission
17 Tower (Communication Tower)
- 18 • Review Use for Utility Facility (Pipeline- EFU)
- 19 • Design Review (Filtration Facility, Pipelines, Communication Tower,
20 Intertie Site)
- 21 • Significant Environmental Concern for Wildlife Habitat (LRDM, RW
22 Pipeline)
- 23 • Geologic Hazard (RW Pipeline)
- 24 • Lot of Record Verifications. Record 13.

25 On June 30, 2023, the hearings officer conducted a public hearing on
26 PWB's applications. The record was held open until August 7, 2023. The rebuttal
27 period was closed on September 6, 2023, with final arguments due September
28 28, 2023. On November 29, 2023, the hearings officer approved the applications
29 subject to conditions of approval.

1 This appeal followed. Petitioners Cottrell Community Planning
2 Organization, Pat Meyer, Mike Cowan, Pat Holt, Ron Roberts, Kristy Mckenzie,
3 Mike Kost, Ryan Marjama, Macy Davis, Tanner Davis, Lauren Courter, and Ian
4 Courter are referred to, collectively, as Cottrell or petitioners. Intervenor-
5 petitioner Multnomah County Rural Fire Protection District No. 10 is referred to
6 as "RFPD10." Intervenor-petitioners Pleasant Home Community Association
7 and Angela Parker, dba Hawk Haven Equine, are referred to, collectively, as
8 "PHCA." Intervenor-petitioner 1000 Friends of Oregon is referred to as "1000
9 Friends." Intervenor-petitioner Oregon Association of Nurseries and intervenor-
10 petitioner Multnomah County Farm Bureau are referred to, collectively, as
11 "OAN." Intervenor-Petitioner Gresham-Barlow School District 10J is referred to
12 as "GBSD."

13 **MOTION TO TAKE OFFICIAL NOTICE**

14 On July 5, 2024, PHCA filed a motion requesting that we take official
15 notice of "Multnomah County Ordinance 148, adopted September 6, 1977, and
16 in particular the cover page, pages 53-55, and page 70 bearing the date of
17 adoption and the signature of the [b]oard chair." Motion to Take Official Notice
18 2.

19 OAR 661-010-0046(2)(a) provides:

20 "A motion to take official notice shall contain a statement explaining
21 with particularity what the material sought to be noticed is intended
22 to establish, how it is relevant to an issue on appeal, and the authority
23 for notice under ORS 40.090. The motion to take official notice

1 evidence shall be filed in writing and as a separate document and
2 shall not be contained within a brief or other filing.”

3 PHCA argues:

4 “The purpose for requesting notice of [the referenced] material is to
5 establish the existence of a review standard for [c]ommunity
6 [s]ervice uses, requiring a showing that the proposal is ‘consistent
7 with the character of the area,’ dating from 1977 and continuing to
8 present. This is related directly to the decision maker’s discussion
9 and interpretation of that criteria.” Motion to Take Official Notice
10 2.

11 PHCA’s motion does not explain how the date the county originally
12 adopted a code provision requiring that a proposal be consistent with the
13 character of the area is relevant to a hearing officer’s 2023 interpretation of the
14 character of the area code standard. Stating that the 1977 adoption date is “related
15 to” the decision maker’s interpretation is inadequate to meet the requirement in
16 OAR 661-010-0046(2)(a) that the movant explain with particularity what the
17 requested material is intended to establish.

18 The motion to take official notice is denied.

19 **MOTION TO STRIKE PORTION OF ORAL ARGUMENT**

20 On October 7, 2024, PWB field a motion to strike portions of oral
21 argument from petitioners and intervenors-petitioners during their rebuttal, which
22 PWB argues included argument beyond the scope of the county’s and PWB’s
23 (together, respondents’) oral argument.

24 OAR 661-010-0040(5)(a) provides, in part: “Unless the Board otherwise
25 orders, petitioner(s) shall be allowed 15 minutes for oral argument. Petitioner(s)

1 may reserve up to 5 minutes for rebuttal following respondents' oral argument,
2 *to respond to arguments made during respondents' oral argument.*" (Emphasis
3 added.) PWB asserts that "[n]one of the 'rebuttal' argument after the statement
4 at minute 30:01 were in any way responsive 'to arguments made during
5 respondents' oral argument' as required by OAR 661-010-0040([5])(a)." Motion
6 to Strike 3. PWB quotes petitioners' counsel as stating during their rebuttal "I'd
7 like to talk quickly about a couple of things that, uh, that I didn't hear anything
8 about today." Motion to Strike 2. PWB argues that it did not address certain
9 matters during its presentation because they were not raised during the direct
10 argument and that raising these matters during rebuttal denied PWB the
11 opportunity to respond. However, PWB does not identify what those matters are
12 or how they relate to the assignments of error or the relevant approval criteria.
13 We will assume, without deciding, that the rebuttal oral argument did exceed the
14 scope of rebuttal argument permitted by OAR 661-010-0040(5)(a). However,
15 without a more focused argument from PWB, we cannot conclude that violation
16 prejudiced PWB's substantial rights to "a full and fair hearing." OAR 661-010-
17 0005; *see id.* ("Technical violations not affecting the substantial rights of parties
18 shall not interfere with the review of a land use decision or limited land use
19 decision."). The motion to strike is denied.

20 INTRODUCTION

21 The hearings officer conditionally approved the water filtration facility as
22 a type of community service use, specifically, as a "[u]tility facilit[y], including

1 power substation or other public utility buildings or uses, subject to approval
2 criteria in MCC 39.7515(A) through (H).” MCC 39.7520(A)(6). The MCC
3 39.7515 approval criteria require that the hearings officer determine that the use

- 4 “(A) Is consistent with the character of the area;
- 5 “(B) Will not adversely affect natural resources;
- 6 “(C) The use will not:
 - 7 “1. Force a significant change in accepted farm or forest
8 practices on surrounding lands devoted to farm or
9 forest use; nor
 - 10 “2. Significantly increase the cost of accepted farm or
11 forest practices on surrounding land devoted to farm or
12 forest use.
- 13 “(D) Will not require public services other than those existing or
14 programmed for the area;
- 15 “(E) Will be located outside a big game winter habitat area as
16 defined by the Oregon Department of Fish and Wildlife or
17 that agency has certified that the impacts will be acceptable;
- 18 “(F) Will not create hazardous conditions;
- 19 “(G) Will satisfy the applicable policies of the Comprehensive
20 Plan;
- 21 “(H) Will satisfy such other applicable criteria as are stated in this
22 Section.
- 23 “(I) In the West Sandy River Rural Planning Area, the use is
24 limited in type and scale to primarily serve the needs of the
25 rural area.”

1 The majority of petitioners' and intervenors-petitioners' assignments of
2 error concern compliance of the water filtration facility with MCC 39.7515(A)
3 through (F) and alleged unaddressed construction-related impacts. We begin by
4 addressing and denying five assignments of error that the hearings officer
5 generally erred by excluding construction impacts from the scope of the use when
6 evaluating the compliance of project components subject to MCC 39.7515.⁴ We
7 then address the remaining assignments of error.

⁴ 1000 Friends' second assignment of error is "The County Misinterpreted the Statutory Farm Impacts Test to Exclude Impacts Caused by Construction as a Matter of Law." 1000 Friends' Intervenor-Petitioner's Brief 12. 1000 Friends' second assignment of error combines arguments related to local code and state law and to portions of the project on MUA-20 and EFU land. For purposes of clarity, we resolve 1000 Friends' second assignment of error separately, later in this opinion.

1 **COTTRELL’S SECOND ASSIGNMENT OF ERROR**
2 **GBSD’S FIRST ASSIGNMENT OF ERROR**⁵
3 **PHCA’S ASSIGNMENT OF ERROR’S FIRST SUBASSIGNMENT**
4 **PORTION OF GBSD’S AND RFP10’S SECOND ASSIGNMENTS OF**
5 **ERROR**

6 Cottrell, GBSD and PHCA argue that the hearings officer misconstrued
7 the code because they failed to include construction impacts when evaluating
8 compliance with the community service criteria in MCC 39.7515.⁶

9 PHCA also argues that the hearings officer made inadequate findings
10 unsupported by substantial evidence that construction impacts are not part of the
11 approved community service use because the hearings officer improperly served
12 as a fact witness and prejudged the application. GBSD and RFPD10 also set forth
13 assignments of error that are contingent upon our concluding that construction
14 impacts must be considered when evaluating compliance with MCC 39.7515.

⁵ GBSD adopts and incorporates Cottrell’s second assignment of error by reference. GBSD’s Intervenor-Petitioner’s Brief 4.

⁶ Cottrell maintains: “Throughout the decision, the [h]earings [o]fficer consistently concluded that ‘temporary construction impacts’ should not be considered with evaluating the various conditional use permit criteria in MCC 39.7515(A)-(F). [Record] 35, passim. This interpretation is inconsistent with the express language and purpose for these standards.” Petition for Review 15.

1 **A. Construction of Law**

2 **1. Standard of Review**

3 ORS 197.835(9)(a)(D) provides that LUBA shall reverse or remand a land
4 use decision if we determine the local government improperly construed the
5 applicable law. OAR 661-010-0071(2)(d) provides that LUBA will remand a
6 local government decision that “improperly construes the applicable law, but is
7 not prohibited as a matter of law[.]”

8 Where the local regulation at issue in an appeal directly implements state
9 statute, no deferential standard of review applies. *Landwatch Lane County v.*
10 *Lane County*, LUBA No 2021-010 (May 10, 2021) (slip op at 5); *Kenagy v.*
11 *Benton County*, 115 Or App 131, 134-36, 838 P2d 1076, *rev den*, 315 Or 271
12 (1992) (LUBA does not defer to the governing body’s interpretation of a local
13 provision that implements and adopts state statutory language). MCC 39.7515(C)
14 requires that the community service use will not:

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

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

19 This language is nearly identical to that in ORS 215.296(1), which provides, in
20 part, that uses allowed on land zoned for exclusive farm use under ORS
21 215.283(2)

22 “may be approved only where the local governing body or its
23 designee finds that the use will not:

- 1 “(a) Force a significant change in accepted farm or forest practices
2 on surrounding lands devoted to farm or forest use; or
- 3 “(b) Significantly increase the cost of accepted farm or forest
4 practices on surrounding lands devoted to farm or forest use.”

5 ORS 215.296(1) does not, however, apply to the water treatment facility because
6 the use is on land zoned MUA-20, which is not an exclusive farm use zone, and
7 therefore not an allowed use under ORS 215.283(2).⁷ Accordingly, the hearings
8 officer was not required to interpret MCC 39.7515(C) consistent with
9 interpretations of the almost identical language in ORS 215.296(1) because MCC
10 39.7515(C) does not adopt or implement ORS 215.296(1).

11 PWB and the county argue that deference is owed to the hearings officer’s
12 interpretation. First, the county asserts that we should defer to the hearings
13 officer’s decision under ORS 197.829(1) which provides:

14 “[LUBA] shall affirm a local government’s interpretation of its
15 comprehensive plan and land use regulations, unless [LUBA]
16 determines that the local government’s interpretation:

- 17 “(a) Is inconsistent with the express language of the
18 comprehensive plan or land use regulation;
- 19 “(b) Is inconsistent with the purpose for the comprehensive plan
20 or land use regulation;
- 21 “(c) Is inconsistent with the underlying policy that provides the
22 basis for the comprehensive plan or land use regulation; or

⁷ ORS 215.283(2) lists nonfarm uses that “may be established, subject to the approval of the governing body or its designee in any area zoned for exclusive farm use subject to ORS 215.296[.]”

1 “(d) Is contrary to a state statute, land use goal or rule that the
2 comprehensive plan provision or land use regulation
3 implements.”

4 ORS 197.829 does not, however, require that we defer to a hearings officer’s
5 interpretation of the local code.

6 “ORS 197.829 provides a deferential standard of review most
7 appropriately applied to a governing body interpretation of local
8 land use legislation, not a hearings officer interpretation. *See Gould*
9 *v. Deschutes County*, 233 Or App 623, 629, 227 P3d 758 (2010)
10 (neither LUBA nor the courts owe deference to a hearings officer’s
11 interpretation of local land use legislation).”⁸ *Landwatch Lane*
12 *County*, LUBA No 2021-010 (emphasis omitted) (slip op at 5).

13 The county also asserts that where the hearings officer’s interpretation is
14 “at least as supportable as [opponents’] contrary view” we will affirm the
15 hearings officer’s interpretation, citing *Patel v. City of Portland*, 77 Or LUBA
16 349, 359 (2018), which summarizes a holding of *Gould v. Deschutes County*, 67
17 Or LUBA 1, 7, *aff’d*, 256 Or App 520, 301 P3d 978 (2013), as “where different
18 interpretations are equally plausible, and context supports a hearings officer
19 choice of interpretation, LUBA will defer to the hearings officer’s interpretation.”
20 Respondent’s Brief 10-11. Our use of the word “defer” in the above parenthetical
21 may have resulted in some confusion but in reviewing *Gould* it makes clear that

⁸ The county asserts that it takes this position for purposes of preserving the ability to raise the issue at the Court of Appeals. We observe that the Court of Appeals has held that deference is not owed to a hearings officer’s interpretation of local law and we do not address this argument further. *Gould v. Deschutes County*, 233 Or App 623, 629, 227 P3d 758 (2010).

1 we did not defer to the hearings officer’s interpretation because it and the
2 opponent’s interpretations were equally plausible. Rather, we found contextual
3 support for the hearings officer’s interpretation and agreed with that
4 interpretation. In reviewing the hearings officer’s interpretation of the term “use”
5 in the MCC, here, we review the decision for legal correctness.

6 In interpreting whether the MCC requires the consideration of construction
7 impacts associated with a community service use in the MUA-20 zone, we apply
8 the same framework that we employ when interpreting a statute. We will consider
9 the text and context and, if helpful, legislative history to identify the governing
10 body’s intent. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009); *PGE*
11 *v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993);
12 *Waste Not of Yamhill County v. Yamhill County*, 305 Or App 436, 457, 471 P3d
13 769 (2020).

14 **2. Text**

15 Again, Cottrell and PHCA maintain that when determining the scope of
16 PWB’s community service *use*, the MCC requires inclusion of related
17 construction activities.

18 MCC 39.4305 provides:

19 “No building, structure or land shall be used and *no building or*
20 *structure shall be hereafter erected*, altered or enlarged in [the
21 MUA-20] zone *except for the uses listed in MCC 39.4310 through*
22 *39.4320* when found to comply with MCC 39.4325 through 39.4345
23 provided such uses occur on a Lot of Record.” (Emphases added.)

1 Petitioners contend:

2 “In describing activities or ‘uses’ within the MUA-20 zone, MCC
3 39.4305 provides that ‘no building or *structure shall* be hereafter
4 *erected*, altered or enlarged’ except for the uses listed as permitted,
5 review or conditional uses under MCC 39.4310 through 39.4320.
6 (Emphasis added.) [Record] 7. This provision plainly states that the
7 act of ‘erecting’ a structure qualifies as a use. It is axiomatic that a
8 use requiring some form of enclosed structure or building cannot
9 exist without first being constructed or ‘erected.’ In response to
10 PWB’s concern, adopted by the [h]earings [o]fficer by reference,
11 that the use category does not expressly reference ‘construction,’
12 everyone knows that a use cannot exist without first being
13 constructed.” Petition for Review 23 (emphasis in original,
14 underscoring omitted).

15 Cottrell maintains that although the MCC 39.2000 definitions do not define the
16 term “use,” MCC 39.2000 defines “development” as:

17 “Any act requiring a permit stipulated by Multnomah County
18 Ordinances as a prerequisite to the use or improvement of any land,
19 including, but not limited to, a building, land use, occupancy, sewer
20 connection or other similar permit, and any associated ground
21 disturbing activity. *As the context allows or requires, the term*
22 *‘development’ may be synonymous with the term ‘use’ and the terms*
23 *‘use or development’ and ‘use and development.’” (Emphasis*
24 *added.)*

25 The county responds, in part, that the hearings officer correctly concluded
26 that interpreting “community service use” to include construction and associated
27 impacts, would impermissibly insert what had been omitted into the MCC. ORS
28 174.010. We agree.

29 ORS 174.010 provides:

30 “In the construction of a statute, the office of the judge is simply to

1 ascertain and declare what is, in terms or in substance, contained
2 therein, not to insert what has been omitted, or to omit what has been
3 inserted; and where there are several provisions or particulars such
4 construction is, if possible, to be adopted as will give effect to all.”

5 The hearings officer explained:

6 “The express text of the code does not regulate or apply approval
7 criteria to temporary construction activities. MCC 39.4305 (‘Uses’)
8 commences with the following language: ‘No * * * land shall be
9 used and no building * * * shall be hereafter erected; in this base
10 zone except for the uses listed in MCC 39.4310 through 39.4320
11 when found to comply with MCC 39.4325 through 39.4345 * * *’
12 (Emphasis added.) This introduction to the MUA-20 zone expressly
13 defines that land altering activities that are subject to the MUA-20
14 approval criteria: namely, the uses listed in MCC 39.4310 through
15 39.4320. The next question is whether temporary construction
16 activities are a use listed in MCC 39.4310 through MCC 39.4320.
17 They are not. MCC 39.4320 identifies the conditional uses regulated
18 by approval criteria and states that the ‘following uses may be
19 permitted when found by the approval authority to satisfy the
20 applicable standards of this [c]hapter.’ The first use of the
21 enumerated list is ‘Community Service Uses listed in MCC
22 39.7520[.]’ The code section continues with a defined list of uses
23 that are subject to the approval criteria of the MUA-20 zone.
24 Temporary construction activities for a permanent use are not on the
25 list either as a separate use or as a use related to the permanent use.
26 Temporary construction activities for a permanent use are simply
27 not listed as a use that is subject to the approval criteria.

28 “The cross reference for Community Service Uses to MCC 39.7520
29 leads to the specific chapter that regulates Community Service Uses
30 in all zones. There, the code continues that the ‘Community Service
31 approval shall be for the specific use or uses approved.’ MCC
32 39.7510(A). MCC 39.7510 then states that the conditions and
33 restrictions which may be imposed by the approval authority apply
34 to the [c]ommunity [s]ervice use itself and MCC 39.7515 explicitly
35 states that the approval criteria apply to the [c]ommunity [s]ervice
36 use. Lastly, and most importantly, MCC 39.7520 specifically lists

1 the [c]ommunity [s]ervice uses. 'Utility facilities' is listed as a
2 conditional community service use under MCC 39.7520(A)(6)
3 subject to the applicable approval criteria. Again, as in the MUA-20
4 zone, there is no language in any of the listed community service
5 uses that includes construction activities to build the use as either an
6 element of the use or as a separate use category that also must meet
7 the approval criteria that otherwise apply to the permanent use."
8 Record 136-37 (underscoring in original, footnote omitted).⁹

9 While some county staff opined that an amendment of the definition of
10 "development" in the code supported the conclusion that construction impacts
11 should be considered part of the community service use, the hearings officer was
12 not bound by staff's opinion. "Development" is not a term used in the community
13 service use approval criteria. Additionally, the code definition of "development"
14 does not provide that "development" and "use" are always used interchangeably.
15 It provides only that "*As the context allows or requires*, the term 'development'
16 may be synonymous with the term 'use' and the terms 'use or development' and
17 'use and development.'" MCC 39.2000 (emphasis added). Thus, a code reference
18 to a community service "use" is not necessarily a reference to a community
19 service "use and development." *See State v. Couch*, 341 Or 610, 617-18, 147 P3d

⁹ MCC 39.4300 through 39.4395 contain regulations applicable to land within the MUA-20 zone. MCC 39.4320(A) provides that "Community Service *Uses* listed in 39.7520 pursuant to the provisions MCC 39.7500 through 39.7810" are conditionally allowed in the MUA-20 zone. (Emphasis added.) MCC 39.7520, titled "Uses," identifies community service uses that may be permitted in a base zone, including "utility facilities, including power substation or other public utility building or uses subject to the approval criteria in MCC 39.7515(A) through (H)." MCC 39.7520(A)(6).

1 322 (2006) (the court first looks for statutory definitions of words in dispute).
2 Lastly, the county identifies legislative history related to the amendment of the
3 “development” definition to add the last sentence and a contemporaneous
4 statement that it was not a substantive change to the code. Respondent’s Brief 26.

5 The express text of the MCC does not regulate or apply the community
6 service use approval criteria to temporary construction activities associated with
7 a community service use. We conclude that the hearings officer did not
8 misconstrue MCC 39.7515 based on the text.

9 3. Context

10 Cottrell makes numerous arguments that the context supports its
11 interpretation of the term “use” as including related construction activity.

12 a. MCC 39.7515 and Case Law

13 Cottrell and PHCA argue that the hearings officer’s analysis concluding
14 that construction impacts are not part of the allowed use and subject to the use
15 approval criteria, is unsupported by the context of MCC 39.7515. Cottrell and
16 PHCA rely, in part, upon case law applying the county’s approval criteria for its
17 contention that a community service use *must be maintained or always be*
18 *consistent* with the applicable approval criterion and further contend that *always*
19 *or maintained* necessarily includes during the period of construction. *See, for*
20 *example*, PHCA’s Intervenor-Petitioner’s Brief 15 and Petition for Review 17
21 (citing *West Hills & Island Neighbors v. Multnomah County*, LUBA No 83-018
22 (June 29, 1983), *aff’d*, 68 Or App 782, 683 P2d 1032, *rev den*, 298 Or 150 (1984))

1 (“the criteria * * * all are stated in strict terms and all have bearing on how
2 ‘consistent’ the use is with the character of the area.”.) (slip op at 16). PHCA
3 argues that the county intended to create a high bar for allowing these community
4 service uses and that the hearings officer incorrectly concluded that the list of
5 community service uses includes some that would necessarily include substantial
6 impacts.

7 Cottrell argues:

8 “In *Stephens v. Multnomah County*, LUBA referred to these
9 identical criteria relating to hazardous conditions and natural
10 resources as ‘unequivocal statements’ *that certain conditions must*
11 *be maintained* and remanded a decision where the findings appeared
12 to review the criteria as permissive rather than mandatory in their
13 requirements. 10 Or LUBA 147[, 152] (1984).” Petition for Review
14 17 (emphasis added).

15 PHCA similarly cites *West Hills & Island Neighbors* as support for its argument
16 that the use must always be consistent with the character of the area and that
17 always includes during construction. PHCA Intervenor-Petitioner’s Brief 15;
18 LUBA No 83-018 (slip op at 15-16, 16 n 6).

19 The county responds, and we agree, that the cited cases do not stand for
20 the stated propositions. In *Stephens*, the storage of portable toilets was a permitted
21 use in the base zone, but the storage and transfer of waste material was a
22 community service use and required a special permit. The county in *Stephens* did
23 not address whether noise associated with the activity was consistent with the
24 character of the area as required by MCC 39.7515(A), but rather imposed a

1 condition of approval limiting the hours of operation to avoid interrupting
2 nighttime sleep. LUBA concluded, in *Stephens*, that it was necessary for the
3 findings to state whether approval was consistent with the area's character and,
4 if such was the case, explain how the condition made the use consistent with the
5 character of the area. That case does not address construction impacts and is not
6 analogous. Unlike the county in *Stephens*, where no finding of consistency was
7 made, here, the hearings officer found that the use *is* consistent with the character
8 of the area, as conditioned.

9 *West Hills & Island Neighbors* concerned a permit for a landfill as a
10 community service use. We concluded that the county could not base a finding
11 that the landfill was consistent with the character of the area on its conclusion
12 that the property would be consistent with the character of the area *after the*
13 *landfill use ended* and the property was revegetated. LUBA No 83-018 (slip op
14 at 11-12). *West Hills & Island Neighbors* does not state or support an
15 interpretation that construction impacts must be considered.

16 We do not agree with Cottrell and PHCA that our case law supports the
17 conclusion that MCC 39.7515 requires consideration of construction impacts. We
18 agree with the hearings officer that, as a general proposition, the law may provide,
19 in a given case, that the focus is on the approved use as opposed to its
20 construction. For example, *Citizens Against LNG v. Coos County* concerned the
21 appeal of a county decision approving a permit to construct a 49.72-mile segment
22 of a natural gas pipeline. 63 Or LUBA 162 (2011). Coos County's zoning code

1 and OAR 660-006-0025(4)(q) allowed as “a conditional use in forest zones new
2 distribution lines, including gas pipelines, ‘with rights-of-way 50 feet or less in
3 width.’” *Id.* at 171. The petitioners argued “that the county erred in approving a
4 temporary 45-foot[-]wide construction easement for the pipeline, in addition to
5 the permanent 50-foot[-]wide right-of-way.” *Id.* (footnote omitted). The
6 intervenor-respondent responded, and we agreed

7 “that a temporary construction easement or area necessary to
8 construct a new distribution pipeline is not a ‘right-of-way’ for
9 purposes of OAR 660-006-0025(4)(q). ‘Right-of-way’ suggests a
10 linear transportation or distribution system of some kind, not a
11 temporary storage or construction staging area, and the focus of the
12 rule is clearly the permanent right-of-way. As to whether a
13 temporary construction area that is necessary to construct an
14 authorize use is itself an authorize use in a forest one under OAR
15 chapter 660, division 006, it is reasonable to presume that the Land
16 Conservation and Development Commission (LCDC) did not view
17 such a temporary construction area to be a ‘use’ in itself, but rather
18 an accessory function that is necessary to construct the authorized
19 use.” *Id.* at 172.

20 Accordingly, that case is instructive and supports the hearings officer’s
21 interpretation of MCC 39.7515 that construction impacts are not a part of the
22 community service use.

23 *McLaughlin v. Douglas County* is an appeal of a decision concluding that
24 a 7.5-mile subsurface natural gas transmission line and associated facilities
25 comprise a “utility facility necessary for public service” and approving a
26 conditional use permit for the same. LUBA No 2020-004 (Apr 13, 2021). The
27 petitioner argued that the pipeline exceeded a statutory 50-foot right-of-way

1 limitation in OAR 660-006-0025, as well as the county code, because an
2 additional 45-foot-wide area would be used during construction for clearing and
3 grading, temporary storage of spoil materials, and to provide a vehicle passing
4 lane. We agreed that the temporary use was not a permanent disturbance, was
5 associated with construction, and not legally limited to the 50-foot permanent
6 right of way.

7 The *absence* of language in a regulation should generally be considered
8 intentional. *Bert Brundige, LLC v. Dept of Rev.*, 368 Or 1, 3, 485 P3d 269 (2021).
9 The hearings officer concluded, and we agree, that the county regulation of
10 temporary construction uses in other contexts, such as the large fill provisions in
11 MCC 39.7220, evidence that the county knows how to regulate construction-
12 related impacts or activity where it intends to do so and, in those cases, has
13 specifically called out the construction activity in the allowed uses. Record 137-
14 38. Differently, the county has not expressly included construction-related
15 impacts in the approval criteria for community service uses. We conclude that
16 the hearings officer did not misconstrue MCC 39.7515 based on context and case
17 law.

18 **b. Comprehensive Plan Policies**

19 Cottrell argues that interpreting the term “use” to include construction is
20 reinforced by the purpose and policy of the community service uses set out in the
21 Multnomah County Comprehensive Plan (MCCP). Cottrell maintains its

1 interpretation requiring consideration of construction impacts is supported by the
2 following policy in MCCP policy 2.45:

3 “Support the siting and development of community facilities and
4 services appropriate to the needs of rural areas while avoiding
5 adverse impacts on farm and forest practices, wildlife, and natural
6 and environmental resources including views of important natural
7 landscape features.” MCCP 2-23.

8 Cottrell concludes nothing suggests the county intended to allow “uses that
9 would introduce construction impacts of a scale and intensity that will
10 revolutionize how existing residents can go about their daily lives.” Petition for
11 Review 16-17. Cottrell argues that considering construction impacts is necessary
12 to achieve the policies of the zone, maintaining that

13 “[w]here a use includes the erection of a building and the zone has
14 as one of its purposes protecting rural residential and farm uses, the
15 conditional use criteria cannot be interpreted to allow the destruction
16 of the rural community character, natural resources or the creation
17 of hazards associated with erecting that building, solely on a theory
18 that such impacts are assumed simply because the conditional use is
19 allowed.” Petition for Review 24.

20 MCCP policy 2.45 is not, however, properly read in isolation. MCCP policy 2.45
21 is found within MCCP chapter 2 “Land Use” whose sole goal is:

22 “To implement an efficient land use planning process and policy
23 framework as a basis for all decisions and actions related to use of
24 land that is consistent with state law and community goals and
25 priorities, addresses or mitigates potential conflicts between
26 different uses, and is implemented in a fair, equitable and reasonable
27 manner.” MCCP 2-9.

28 MCCP chapter 2 introduces its “Community Facilities” discussion as follows:

1 “Community facilities such as schools, parks, fire stations, and
2 cemeteries *are currently allowed in a number of areas within the*
3 *[c]ounty as ‘conditional uses’ if they meet specific criteria.* The
4 following policies provide direction and support for County Zoning
5 Code requirements which guide the decisions related to these
6 uses[.]” MCCP 2-23 (emphasis added).

7 The need to meet applicable criteria is recognized. That does not, however, lead
8 to the conclusion that construction impacts are properly considered part of the
9 *use.*

10 MCCP chapter 3 “Farm Land” discusses the Multiple Use Agriculture
11 areas within the county and explains: “County policies for these areas promote
12 agricultural activities and *minimize* conflicts between *farm and non-farm uses* but
13 are less stringent than policies in [EFU] zones[.]” again, referencing the uses.

14 MCCP 3-11 (emphases added). Multiple Use Agriculture policies include:

15 “3.14 *Restrict uses* of agricultural land to those that are *compatible*
16 with exclusive farm use areas in recognition of the necessity to
17 protect adjacent exclusive farm use areas.

18 “3.15 Protect farm land from adverse impacts of *non-farm uses*.

19 “Strategy 3.15-1: Ensure that new, replacement, or expanding uses
20 on MUA zoned lands minimize impacts to farm land and
21 forest land by requiring recordation of a covenant that
22 recognizes the rights of adjacent farm managers and foresters
23 to farm and practice forestry on their land.

24 “Strategy 3.15-2: Amend Multiple Use Agricultural Zone to include
25 deed restrictions protecting surrounding agricultural and
26 forestry practices as a requirement for approval of new and
27 replacement dwellings and additions to existing dwellings.”

1 MCCP 3-11, 12 (emphases added, boldface and emphases
2 omitted).¹⁰

3 The above MCCP policies, read together, are consistent with the hearings
4 officer's interpretation of "use" in MCC 39.7515 that it does not require the
5 avoidance of all related impacts on farm uses and is focused on the use itself and
6 minimizing impacts on farm uses. Thus, the MCCP does not provide a context
7 that compels us to agree with Cottrell's or PHCA's interpretation of "use."

8 PHCA's, Cottrell's, and GBSD's assignments of error asserting that the
9 hearings officer misconstrued the term "use" in the context of MCC 39.7515 are
10 denied.

11 **B. Adequacy of Findings and Substantial Evidence**

12 OAR 661-010-0071(2)(a) and (b) provide that we will remand a land use
13 decision for further proceedings where the findings are insufficient to support the
14 decision, except as provided in ORS 197.835(11)(b), or the decision is not
15 supported by substantial evidence in the whole record. Adequate findings identify
16 the relevant approval standard, the evidence relied upon, and explain how the
17 evidence leads to the conclusion that the standard is or is not met. *Heiller v.*
18 *Josephine County*, 23 Or LUBA 551, 556 (1992). Findings must address specific
19 issues related to the approval standards raised in the proceedings below. *Norvell*
20 *v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979). ORS

¹⁰ The MCCP does not define "compatible" for purpose of MCCP 3.14. The plain meaning of "compatible" is "capable of existing together without discord or disharmony." *Webster's Third New Int'l Dictionary* 463 (unabridged ed 2002).

1 197.835(9)(a)(C) provides that we will reverse or remand a local government
2 decision that is not supported by substantial evidence in the whole record.
3 Substantial evidence is evidence in the whole record that a reasonable person
4 would rely upon to reach a decision. *Dodd v. Hood River County*, 317 Or 172,
5 179, 855 P2d 608 (1993).

6 PHCA makes numerous arguments that the hearings officer’s findings that
7 the use does not include construction are in error. PHCA argues that the hearings
8 officer did not apply the *State v. Gaines* interpretation framework to the MCC
9 when they determined that construction impacts are not properly considered as
10 part of the use. 346 Or at 171-72. PHCA argues: “Nowhere do the approval
11 criteria include the supposed necessity of the facility, government requirements,
12 and supposed health hazards or system failures. In relying upon his belief as to
13 these matters, the [hearings officer] misinterpreted and misconstrued the
14 applicable law, and made inadequate findings unsupported by substantial
15 evidence.” PHCA’s Intervenor-Petitioner’s Brief 14. PHCA argues that the
16 hearings officer “engages in irrelevant speculation with respect to the county’s
17 use of the stringent ORS 215.296(1) farm impacts test in MCC 39.7515(C)[.]”
18 PHCA’s Intervenor-Petitioner’s Brief 17. PHCA argues that the hearings office
19 improperly relies on their experience working in land use and their inability to
20 “remember coming across an application where the construction impacts were
21 considered.” Record 35. PHCA cites *Hood River Valley PRD v. Hood River*
22 *County*, 67 Or LUBA 314, 330 (2013), for the proposition that “[t]he decision[

1 Jmaker's personal knowledge, even if 'common knowledge,' is evidence outside
2 the record and cannot support resulting findings." PHCA Intervenor-Petitioner's
3 Brief 16. Cottrell also argues that the hearings officer relied upon an incorrect
4 conclusion that construction is temporary in nature and that the anticipated years-
5 long duration of project construction, along with the impacts of construction, is
6 such that construction cannot be considered to generate temporary impacts.
7 Cottrell maintains that "[n]othing in the test for interpreting local regulations set
8 forth in *PGE/Gaines* recognizes a hearing officer's experience 'in his many years
9 of work in land use,' the 'olden days of residential development' as relevant to
10 discerning the meaning of a local regulation in the first instance." Petition for
11 Review 19.

12 We agree with Cottrell and PHCA that some of the hearings officer's
13 comments were irrelevant to interpreting the code or relied upon their experience
14 in error. PWB responds, however, and we agree that the hearings officer
15 "expressly was not 'relying upon' the importance of the project" and the
16 erroneous commentary is extraneous, and harmless error. PWB's Intervenor-
17 Respondent's Brief to PHCA 10-11; *see also* Respondent's Brief 45. We also
18 agree with respondents that the hearings officer's commentary in the findings
19 concerning extra record issues such as their land use experience is simply
20 additional support for the hearings officer's main conclusion that the MCCP and
21 MCC do not require the county to consider construction impacts as part of the
22 community service use. That conclusion is supported by the hearings officer's

1 interpretation, which we affirm. The findings are adequate without the disputed,
2 erroneous considerations. *See Angius v. Washington County*, 52 Or LUBA 222,
3 239-40 (2006) (concluding that the hearings officer’s comment concerning
4 personal knowledge or experience outside the record was not a basis for remand
5 when the comments was “merely an additional basis to reach the main
6 conclusion”); *see also Allen v. City of Portland*, 15 Or LUBA 464, 472, *rev’d on*
7 *other grounds*, 87 Or App 459, 742 P2d 701 (1987), *rev den*, 305 Or 103 (1988)
8 (holding that, when a local government makes an irrelevant finding, LUBA may
9 consider it “mere surplusage, and the fact that the finding may be erroneous or
10 not supported in the record is not grounds for reversal or remand.”).

11 We do not reach or resolve the remaining findings and evidence challenges
12 because those challenges rely on petitioners’ and intervenors-petitioners’
13 argument that the hearings officer misconstrued the code, which we reject above,
14 and they do not provide an independent basis for remand.

15 Cottrell’s second, GBSD’s first, and PHCA’s first subassignment of error
16 under their assignment of error are denied. For the reasons set out in our
17 resolution of Cottrell’s second assignment of error we do not address the
18 construction-related challenges in GBSD’s and RFPD10’s second assignments
19 of error.

20 **COTTRELL FIRST ASSIGNMENT OF ERROR**

21 ORS 197.797(6)(e) provides:

22 “Unless waived by the applicant, the local government shall allow

1 the applicant at least seven days after the record is closed to all other
2 parties to submit final written arguments in support of the
3 application. The applicant's final submittal shall be considered part
4 of the record, but shall not include any new evidence. This seven-
5 day period shall not be subject to the limitations of ORS 215.427 or
6 227.178 and ORS 215.429 or 227.179."

7 Cottrell maintains that PWB submitted:

8 "[A] 309-page final written argument providing the first and only
9 indication of how PWB believed that criteria were satisfied. In this
10 final argument, PWB introduced new interpretations, identified
11 which evidence satisfied the standards for the first and only time and
12 proposed 24 pages of new and revised conditions of approval,
13 claiming that through these conditions the project would satisfy the
14 standards." Petition for Review 8.

15 Cottrell argues that PWB's final submission

16 "deviated so significantly from the initial application that it is more
17 aptly classified as an amendment rather than a final written
18 argument. The result was to prejudice [p]etitioners' substantial
19 rights in depriving them of the opportunity to respond." Petition for
20 Review 8-9 (citation omitted).

21 **A. Standard of Review**

22 Cottrell's first assignment of error is that the hearings officer committed
23 procedural error prejudicing their substantial rights when the hearing's officer
24 accepted new evidence that PWB included in their final written arguments
25 without providing Cottrell an opportunity to respond. We will reverse or remand
26 a local government decision wherein the local government "[f]ailed to follow the
27 procedures applicable to the matter before it in a manner that prejudiced the
28 substantial rights of the petitioner[.]" ORS 197.835(9)(a)(B).

1 **B. Waiver**

2 PWB argues that Cottrell waived this assignment of error because they did
3 not object to the hearings officer’s consideration of components of the final
4 argument letter. Cottrell maintains that preservation was not required because the
5 material was submitted after the record was closed to new evidence.

6 As we explained in *Eng v. Wallowa County*:

7 “As a general matter

8 “Any right that petitioner may have to rebut new evidence
9 under *Fasano [v. Washington County Comm., 264 Or 574,*
10 507 P2d 23 (1973)] or ORS 197.7[97](6)(b) requires that
11 petitioner contemporaneously assert that right of rebuttal at
12 the time new evidence is submitted, so that the local
13 government can rule on the merits of the request and allow an
14 appropriate opportunity for rebuttal where such opportunity
15 is warranted.’ *Frewing v. City of Tigard, 47 Or LUBA 331,*
16 338 (2004).

17 “We have held, however, that where evidence was submitted with
18 the final legal argument, neither the hearing nor the time before
19 adoption of the final decision provided petitioners with an
20 opportunity to make their objections known to the [local
21 government]. *Brome v. City of Corvallis, 36 Or LUBA 225, 234,*
22 *aff’d[,] Schwerdt v. City of Corvallis, 13 Or App 211, 987 P2d 1243*
23 *(1999), abrogated on other grounds by Church v. Grant County, 187*
24 *Or App 518, 69 P3d 759 (2003).* We held in *Brome* that the party
25 challenging evidence improperly included with legal argument is
26 not required to make a written request to respond to the evidence.
27 *Id.* at 234. Rather, on appeal to LUBA, the petitioners must
28 demonstrate ‘that they objected to the procedural error below, if
29 there was an opportunity to do so’ and the error prejudiced their
30 substantial rights. *Id.* The opportunity to provide comments must be
31 meaningful.” 79 Or LUBA 421, 433-34 (2019).

1 In *Eng*, the petitioner did not object below to the county's consideration of
2 new evidence included with the applicant's final written argument. We
3 nonetheless concluded that the county committed procedural error where it
4 considered that evidence and did not provide the petitioner with an opportunity
5 to respond. PWB argues that this case is distinguishable from *Eng*, because the
6 county in *Eng* deliberated and made a tentative decision three days after receiving
7 new evidence and the county's board chair said at the beginning of the meeting
8 that no new written or oral testimony would be accepted. Differently here, months
9 lapsed between the time the final written legal argument was submitted and the
10 hearings officer issued their decision. Further, PWB maintains that the hearings
11 officer's willingness to reopen the record for good cause is evidenced at Record
12 434, which includes the hearings officer's positive response to a September 7,
13 2023, email from someone, not a party to this appeal, asking that the hearings
14 officer accept rebuttal testimony that the county did not timely receive due to a
15 computer problem. PWB also makes general arguments that petitioners could
16 have litigated their case differently, for example arguing to the hearings officer
17 that the hearings officer had reopened the record by accepting a legal argument
18 with evidentiary components or filing a motion to take evidence outside the
19 record with LUBA.

20 Although there are other ways Cottrell could have litigated their case, both
21 before the hearings officer and before LUBA, it is unclear to us how Cottrell
22 would know of the hearings officer's purported willingness to reopen the record

1 for good cause and therefore how the hearings officer’s response to the
2 September 7, 2023, email is arguably relevant. Furthermore, in determining that
3 the procedural assignment of error was not waived in *Brome*, we did not rely on
4 the length of the time between the filing of the final written argument and the
5 issuance of the final decision. In *Brome*, the time between closure of the record
6 and issuance of the decision was not as short as the three days in *Eng* but instead,
7 exceeded three weeks. The petitioner in *Brome*

8 “did not object to intervenor’s submission of evidence on October
9 5, 1998, during the course of the hearing on that date, or in the
10 intervening weeks until the city issued its written opinion on
11 October 29, 1998. [We stated that] we disagree that the foregoing
12 circumstances afforded petitioners an opportunity to object to
13 intervenor’s violation of ORS 197.7[97](6)(e). The evidence was
14 submitted prior to the October 4, 1998 hearing as part of intervenor’s
15 final argument, and neither the hearing nor the period until the city
16 adopted the final written decision presented an opportunity for
17 petitioners or other parties to testify or otherwise make objections
18 known to the city council.” 36 Or LUBA at 234.

19 We conclude that Cottrell did not waive their objections to the inclusion of certain
20 material in PWB’s final written argument and proceed to our discussion of each
21 item challenged by Cottrell.

22 **C. Material in PWB’s Final Written Argument Submission**

23 **1. Introduction**

24 Cottrell characterizes numerous items from PWB’s final written argument
25 as evidence. ORS 197.797(9) provides that, for the purposes of the section:

1 “(a) ‘Argument’ means assertions and analysis regarding the
2 satisfaction or violation of legal standards or policy believed
3 relevant by the proponent to a decision. ‘Argument’ does not
4 include facts.

5 “(b) ‘Evidence’ means facts, documents, data or other information
6 offered to demonstrate compliance or noncompliance with the
7 standards believed by the proponent to be relevant to the
8 decision.”

9 **2. Statements Challenged by Cottrell**

10 **a. Potential for Boil Water Orders**

11 Cottrell argues that PWB’s legal argument contained new evidence when
12 PWB stated that “[i]f the schedule is delayed, [PWB] will no longer be able to
13 provide Bull Run Water without issuing a boil water order, which will have
14 massive economic effects on the state.” Record 127. PWB responds that
15 admission of new evidence is not a basis for reversal or remand where the new
16 information is not “offered to demonstrate compliance or noncompliance with
17 approval standards.” ORS 197.797(9)(b). We agree.

18 In *Eng*, the applicant’s final written argument included an email from a
19 contractor that had worked on one of three surrounding dwellings. Although the
20 email was provided as context for and to rebut the opponents’ evidence, where it
21 was evidence relied upon by the decision maker for purposes of determining
22 whether at least three dwellings existing on January 1, 1993, as required by
23 applicable criteria, we concluded that it could not be included in the final written
24 argument without allowing the opponents an opportunity to respond.

1 *Brome* concerned the city’s decision approving a university’s development
2 plan for a hotel/conference facility. 36 Or LUBA at 226. The petitioner argued
3 that material submitted with final legal argument included a list of universities
4 and discussion of one of the university’s involvement with campus hotels and
5 that the city relied on that evidence in making their decision. We concluded:

6 “The evidence presented and the argument based on that evidence
7 were directed at what seems to be *the* crucial issue of the challenged
8 decision: whether hotel/conference facilities are customarily
9 associated with universities. The city council considered
10 intervenor’s new evidence and associated argument, and ultimately
11 agreed with intervenor. We cannot say that the final decision makers
12 did not find intervenor’s new evidence persuasive.

13 “* * * * *

14 “Once the applicant improperly submitted evidence into the record
15 pursuant to ORS 197.7[97](6)(e), the city had two choices: it could
16 reject that evidence, or it could offer an opportunity for other
17 persons to respond to that evidence. Here, the city did neither.
18 Accordingly, we conclude that the city committed procedural error
19 that prejudiced petitioner’s substantial rights.” *Id.* at 233-35.

20 In both *Eng* and *Brome*, the new evidence was relevant to the decision maker’s
21 conclusion that the approval criteria were satisfied.

22 Here, PWB’s reference is to a boil water order in an introductory section
23 of PWB’s letter and is not linked to any approval criterion. Record 127. The
24 hearings officer referenced the boil water order but not in the context of an
25 approval criterion. The hearings officer made a general observation that “I also
26 believe this facility is necessary to continue to provide safe water for up to a

1 million Oregonians when a natural disaster affects the Bull Run Watershed * * *
2 and puts one quarter of Oregonians drinking water at risk.” Record 14. Cottrell
3 fails to connect the boil water order statement to an approval criterion or argue
4 that the hearings officer improperly relied on the boil water order statement in
5 deciding to approve the applications. In the absence of evidence or argument that
6 the hearings officer’s decision is improperly based on considerations other than
7 the approval criteria, we will not assume such error. Further, PWB correctly
8 observes that information regarding potential boil water orders and related impact
9 was already in the record at Record 3737 and therefore not new evidence. PWB’s
10 Intervenor-Respondent’s Brief to Petition for Review 10. We will not develop
11 Cottrell’s argument for them. *Deschutes Development v. Deschutes Cty.*, 5 Or
12 LUBA 218, 220 (1982). Cottrell does not set out a basis for remand.

13 **b. Weight Given to Transportation Staff Testimony**

14 Cottrell argues that PWB introduced new evidence when it stated that
15 “[c]ounty transportation is the authority on whether the proposed mitigation is
16 sufficient to keep the [c]ounty’s roads both safe and within county standards,
17 given the potential impacts in the Construction [Transportation Impact Analysis
18 (TIA)] and [the] Project TIA.” Record 158; *see also* Petition for Review 10.
19 Cottrell posits:

20 “Identification of the statute and standard of review appropriate
21 when considering [c]ounty transportation staff testimony is
22 presented by PWB as a fact mandating deference to staff decision[
23]making regarding road mitigation. [Record 148]. ‘County

1 Transportation is the authority on whether the proposed mitigation
2 is sufficient to keep the [c]ounty’s roads both safe and within county
3 standards[.]’ [Record 158, 275]. *Hearings Officer reliance at*
4 *[Record] 47.*” Petition for Review 10 (emphasis added).

5 Cottrell does not develop an argument explaining *how* the hearings officer relied
6 on the cited PWB material to conclude that an applicable criterion was met. The
7 hearings officer stated:

8 “I put particular weight on [the county’s Transportation Memo dated
9 September 6, 2023,] as I am very familiar with [the] County
10 Transportation Department[] from many years of providing them
11 legal advice. They are jealous of their roads [and] want to see them
12 maintained and function properly. The County Transportation
13 Department is the single best expert on their own roads. I weigh this
14 expert testimony over competing testimony. If the County
15 Transportation Department, with the many and sometimes onerous
16 yet feasible conditions placed on the PWB, believe these roads can
17 function and allow farmers to continue to successfully do business,
18 I defer to these experts.” Record 47.

19 This statement does not reveal any reliance on the final PWB written argument.

20 Moreover, Cottrell does not explain what specific PWB statement at
21 Record 148 is not legal argument, in this case, an assertion regarding the
22 satisfaction or violation of a legal standard. PWB argues Cottrell misrepresents
23 its argument and that it argued staff testimony *may* be given additional
24 significance. Without specific direction from Cottrell and reviewing the entire
25 page ourselves, we find PWB stated:

26 “Importantly, County Transportation has reviewed and verified the
27 conclusions of Global Transportation Engineering, the project’s
28 transportation engineer, that the project will not create gridlock or
29 safety hazards. County Transportation’s ‘staff have special expertise

1 in the safe and efficient use of the right-of-way and various demands
2 on streets, including traffic, parking, and loading.’ *NDNA v. City of*
3 *Portland*, 80 Or LUBA 269, [286] (2019). In addition to that expert
4 status, County Transportation’s testimony should be given
5 additional weight as a neutral reviewer of applicant and opposition
6 testimony. See *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA
7 261, 277 (2006) (a local decision maker may assign additional
8 significance to the testimony of city or state engineers based on their
9 neutrality regarding the development proposal).” Record 148.

10 We agree with PWB that its assertion that weight should be given to county
11 staff opinion on the issue of road safety and citations to LUBA cases is
12 permissible legal argument, that it is analysis regarding the satisfaction of legal
13 standards or policy believed relevant by the proponent to a decision not including
14 evidence. Cottrell’s argument does not state a basis for remand.

15 **c. PWB’s Characterization of Videos**

16 Cottrell argues that PWB submitted evidence when it alleged opponent
17 videos were staged and included a dictionary definition of the word “staged.”
18 “Dictionary definitions help to articulate the ordinary meanings” of words. *Stop*
19 *the Dump Coalition v. Yamhill County*, 364 Or 432, 447 (2019). PWB made legal
20 argument commenting on its perception of the quality of petitioners’ evidence.

21 Additionally, assuming for purposes of this opinion that the definition of
22 “staged” is evidence, we agree with PWB that Cottrell has made no attempt to
23 show that the hearings officer relied on the definition. As PWB points out, the
24 hearings officer characterized the videos as “excellent and informative” and thus
25 did not accept PWB’s characterizations. PWB’s Intervenor-Respondent’s Brief

1 to Petition for Review 15 (citing Record 50). Cottrell does not set out a basis for
2 remand.

3 **d. PWB Speculation Concerning Fire Department**
4 **Response**

5 Cottrell argues PWB provided evidence when it speculated as to the legal
6 effect of a refusal by an emergency response provider to communicate with
7 construction crews. PWB stated that

8 “emergency response coordination requires the cooperation from
9 the emergency responders, an[] element that has been lacking to
10 date. In the event that the emergency response entities refused to
11 coordinate with [PWB], who is also a critical public service
12 provider, on a final plan or refused to consider options for
13 communication with [PWB] construction crews, it would be those
14 entities creating a potentially hazardous situation rather than
15 [PWB].” Record 349.

16 This is a legal argument that the *use* will not create a hazardous condition
17 in contravention of MCC 39.7515. Cottrell does not set out a basis for remand.

18 **e. Review of Prior Decisions and Other Arguably**
19 **Legislative History**

20 Cottrell argues PWB stated in its legal argument that it had reviewed over
21 2,000 county applications and that the county had never considered construction
22 impacts and that, because the record only contains five of the over 2,000
23 purportedly reviewed county applications, only those five approvals may be
24 considered.

25 PWB’s final argument states:

26 “The [c]ounty has also never accepted the opponents’ proffered

1 interpretation on any like case in the past. [PWB] reviewed over
2 2,000 prior [c]ounty decisions and has provided for the record key
3 examples of this fact, at Exhibit I.70, I.71, I.72, and I.73. For
4 example, in Exhibit I.70, the County with an analysis performed by
5 the same [c]ounty planner as is involved with this project,
6 specifically looked at only 'Once construction is complete' (page 4).
7 * * * These cases unequivocally demonstrate that the [c]ounty has
8 never applied the permanent use approval criteria to the temporary
9 construction activities necessary to build the permanent use."
10 Record 140 (footnotes omitted).

11 PWB argues that "[a]s the fact that the county has never before applied their code
12 to construction was in the record and that was the point of the 'prior decisions'
13 statement, it cannot be prejudicial to [Cottrell]." PWB's Intervenor-Respondent's
14 Brief to Petition for Review 12.

15 Cottrell does not argue that (or identify where) the hearings officer relied
16 in any way on the alleged review of over 2,000 cases or that the assertion that the
17 county had never viewed construction in the manner put forth by opponents was
18 new evidence and we will not develop their argument for them. Petition for
19 Review 10. Cottrell does not set out a basis for remand.

20 **f. Length of Construction Delay**

21 Cottrell states:

22 "A discussion of the length of delay created by construction
23 including a new table, a new average calculation from construction
24 delay being 3 seconds and the statement 'providing further
25 explanation of what the traffic engineer means by [* * *] minimal
26 delays' are all new facts. [Record 152-53]. [The h]earings [o]fficer
27 relied on this new fact at [Record] 49. Petitioners had no opportunity
28 to explain why the new facts are misleading and incorrect." Petition
29 for Review 10-11.

1 PWB's final argument includes the following statement:

2 "So, how much delay are we talking about? At the very worst (peak
3 construction) at the most delayed intersection (Capenter/Cottrell),
4 the delay caused by the project is all of 15 and a half seconds. Table
5 1 below shows those calculations, done by subtracting the existing,
6 background conditions seconds of delay from the peak construction
7 (with road closures) seconds of delay. The information comes from
8 the Construction TIA and One-Access Analysis. Note that this also
9 includes growth in background traffic, so it is a conservative
10 estimate of the seconds of delay caused by the project.

11 "The average (mean) of these seconds of delay is all of 3.3 seconds
12 for the Dodge/Altman closures and 3 seconds for the Lusted/Cottrell
13 closures." Record 152.

14 Cottrell states that we held in *Knapp v. City of Jacksonville* that the city council
15 properly rejected calculations allegedly based on data in the record as new
16 evidence. 70 Or LUBA 259, 272 (2014). In *Knapp*,

17 "we agree[d] that the annotated site plans and petitioner's
18 calculations of lot coverage constituted 'new evidence,' which was
19 submitted to controvert testimony, on the construction plans and
20 orally at the hearing that the proposed development complies with
21 the lot coverage limitations. It is not apparent on the face of the site
22 plans that the impervious surfaces exceed 50 percent of the lot area.
23 Petitioner's argument to that effect relies on a series of
24 interpretations, assumptions, and trigonometric calculations that
25 was not previously available in the [Historic Architectural Review
26 Commission (HARC)] record. Because the city council's review
27 was confined to the HARC record, the city council correctly rejected
28 that new evidence." *Id.*

29 While discussing the analysis of farm impacts in the record, the hearings
30 officer stated that public roads:

1 influence how the criteria must be interpreted.” *Id.* Cottrell asserts “[The
2 h]earings [o]fficer adopted these new facts as [their] own at [Record] 46.” *Id.*
3 PWB responds that its statement that it reviewed many hours of legislative history
4 may be a new fact but Cottrell does not tie the statement to an approval standard.

5 The hearings officer stated that “[PWB’s] final rebuttal devotes 67 pages
6 to this subject and I will use that as an abbreviated framework to make my
7 decision using [PWB’s] numbering.” Record 46. This is not an adoption of the
8 legislative history statement but a statement that the hearings officer will use
9 PWB’s statement as a framework. We agree with PWB that Cottrell has not
10 developed an argument that the hearings officer relied on PWB’s asserted review
11 of the legislative history. Cottrell does not set out a basis for remand.

12 **h. Tree Plan**

13 The hearings officer adopted findings regarding tree protection and MCCP
14 chapter 5 (Natural Resources) policy 5.40. Cottrell argues that the hearings
15 officer accepted new evidence when it adopted as findings PWB’s explanation in
16 its final argument that

17 “[One third] of the trees that must be removed within the Dodge
18 Park Boulevard right-of-way to accommodate the pipeline are less
19 than 6 inches DBH,’ and trees under 6 in[ches] are not included in
20 the tree replacement calculations and the methodology used by * *
21 * PWB for counting trees are all new facts presented for the first
22 time after the record was closed to all parties. [Record 252-53].
23 These statements were adopted as findings by the [h]earings
24 [o]fficer at [Record] 43.” Petition for Review 11.

1 PWB maintains that the tree footnote in its final argument is consistent
2 with the statement from PWB's Wildlife Impact Memo in the record and the
3 regulations in the code. Footnote 64 at Record 253 states:

4 "As provided in the Tree Plan at Exhibit J.75, Attachment A, a large
5 percentage of the trees to be removed are less than 6 inches DBH.
6 For example, nearly [one third] of the trees that must be removed
7 within the Dodge Park Boulevard right-of-way to accommodate the
8 pipeline are less than 6 inches DBH. Typically, trees under 6 inches
9 DBH are not included in tree replacement calculations. To be
10 conservative, the [PWB] is including all trees in its tree removal
11 count and has provided a replacement ratio recommended by the
12 project's wildlife biologist of 1.5:1 and takes into consideration the
13 range of trees sizes. Exhibit I.96, pg 6 (Wildlife Habitat Memo)."

14 Cottrell does not address the citations to evidence in the record included in
15 the final written argument discussing the tree plan or the relevant MCC
16 regulations and thus does not develop this subassignment of error. Cottrell does
17 not set out a basis for remand.

18 3. Feasibility and Conditions of Approval

19 a. Feasibility

20 Cottrell argues that PWB's final argument submittal proposed construction
21 related conditions of approval related to signage and driver education and
22 amending the Traffic Control Plan (TCP) "relating to emergency coordination,
23 trip caps and providing access through construction zones." Petition for Review
24 12. Cottrell contends that, within its legal argument,

25 "PWB claims for the first time that these conditions imposing
26 amendments to the project are feasible because federal standards

1 impose similar requirements. [Record 179]. Whether compliance
2 with a condition is feasible or why feasibility should be assumed are
3 all new assertions purported to show that compliance will be
4 achieved and as such, they are new facts.” Petition for Review 12.

5 PWB stated in its final submittal:

6 “It is clearly feasible to develop a traffic control plan, as evidenced
7 by the fact that every project doing work in the right-of-way must
8 have one that comp[lies] with the ‘184 pages of specific standards’
9 provided by the Federal Highway Administration if ‘the normal
10 function of the roadway is suspended.’ Exhibit I.75 (Construction
11 Supplemental Information).” Record 179.

12 Cottrell does not argue that Exhibit I.75 was new evidence. PWB’s
13 argument that Exhibit I.75 was sufficient to establish feasibility was legal
14 argument concerning evidence that was already in the record. Moreover, as we
15 explained previously in this opinion, construction is not part of the MCC 39.7515
16 use evaluation and Cottrell has not shown how these conditions relate to an
17 applicable approval criterion. Cottrell has not established a basis for remand.

18 **b. Conditions of Approval**

19 Cottrell argues:

20 “PWB’s final submittal included numerous new conditions of
21 approval imposing detailed and highly specific limits on how
22 construction will occur including signage, driver education, and
23 mandating amendments to the [TCP] relating to emergency
24 coordination, trip caps, and providing for access through
25 construction zones. [Record 57, 168-69, 346], full list at [Record
26 409-32]. The effect of these conditions is to change how
27 construction occurs.” Petition for Review 12.

28 PWB responds that the assignment of error is insufficiently developed for review;

29 “Although the conditions, and proposed revisions to conditions, span 22 pages

1 and include dozens of conditions and sub-conditions, [Cottrell] does not bother
2 to identify a single offending condition.” PWB’s Intervenor-Respondent’s Brief
3 to Petition for Review 18 (emphasis omitted).

4 In *Marine Street LLC v. City of Astoria*, we concluded that there is no right
5 to respond to a proposed condition of approval submitted after the close of the
6 evidentiary record that was a restriction on an approved text amendment and, we
7 concluded, not evidence. 37 Or LUBA 587, 597 (2000). However, in *Haugen v.*
8 *City of Scappoose*, the Court of Appeals concluded that a petitioner had a right
9 to respond where the city council approved an application subject to a condition
10 of approval limiting the number of lots to a total less than that requested in the
11 underlying application. 330 Or App 723, 724-25, 545 P3d 760 (2024). During the
12 local proceedings in *Haugen*, the city council reopened the record to only allow
13 comments from intervenor’s counsel and the petitioner “identified specific
14 factual assertions made by intervenor’s counsel * * * that were offered to
15 convince the council – the decision[]maker – to approve the application, as
16 limited by the condition, notwithstanding the council’s apparent conclusion that
17 the original application was ‘inconsistent with the comprehensive plan and
18 applicable land use regulations.’” *Id.* at 730. The Court of Appeals found
19 sufficient for developing their argument

20 “petitioner’s recitation of specific statements made by the city
21 council members related to the requirements for the specific zone
22 for which they were considering a zone change and overlay request
23 – which, under the circumstances represented a conclusion that the

1 application did not comply with relevant standards – and
2 intervener’s statements in response[.]” *Id.* at 732.

3 The facts in *Haugen* differ from those here in important ways, including
4 the fact that, in *Haugen*, the petitioner specifically identified the challenged
5 condition and the Court of Appeals was able to pinpoint the city council’s
6 reliance on that condition to change the outcome from denial to approval.
7 Differently, here, Cottrell describes broad classes of conditions, that is “signage,
8 driver education, and mandating amendments to the [TCP] relating to emergency
9 coordination, trip caps, and providing for access through construction zones[.]”
10 but does not provide any analysis of any specific condition explaining why the
11 conditions (presumably limiting construction impacts) changes the application
12 itself in a manner requiring that Cottrell be able to respond or relates to the use
13 as opposed to its construction. Petition for Review 12.

14 Again, we will not develop Cottrell’s argument for it. Cottrell does not set
15 out a basis for remand.

16 Cottrell’s first assignment of error is denied.

17 **OAN’S FIRST ASSIGNMENT OF ERROR**

18 OAN argues that the hearings officer misinterpreted and misconstrued
19 applicable law and failed to make adequate findings supported by substantial
20 evidence in concluding that reasonable alternatives to a selected pipeline route
21 were considered, as required by ORS 215.275(2).

1 **A. Introduction**

2 Counties are required to allow on EFU land those uses set out in ORS
3 215.283(1). ORS 215.283(1) provides that uses allowed on EFU land include:

4 “(c) Utility facilities necessary for public service, including
5 wetland waste treatment systems but not including
6 commercial facilities for the purpose of generating electrical
7 power for public use by sale or transmission towers over 200
8 feet in height. *A utility facility necessary for public service*
9 *may be established as provided in:*

10 “(A) ORS 215.275; or

11 “(B) If the utility facility is an associated transmission line,
12 as defined in ORS 215.274 and 469.300.” (Emphasis
13 added.)

14 ORS 215.275(5) provides:

15 “The governing body of the county or its designee shall impose clear
16 and objective conditions on an application for utility facility siting
17 under ORS 215.213(1)(c)(A) or 215.283(1)(c)(A) to mitigate and
18 minimize the impacts of the proposed facility, if any, on surrounding
19 lands devoted to farm use in order to prevent a significant change in
20 accepted farm practices or a significant increase in the cost of farm
21 practices on the surrounding farmlands.”

22 A county may conditionally allow on EFU land, those uses authorized
23 under ORS 215.283(2). ORS 215.296(1) provides:

24 “*A use allowed under ORS 215.213(2) or (11) or 215.283(2) or (4)*
25 *may be approved only where the local governing body or its*
26 *designee finds that the use will not:*

27 “(a) Force a significant change in accepted farm or forest
28 practices on surrounding lands devoted to farm or
29 forest use; or

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

4 ORS 215.275(5) and ORS 215.296(1) are similar. ORS 215.275 differs from
5 ORS 215.296 in multiple respects, however, and provides, in part:

6 “(1) A utility facility established under ORS 215.213(1)(c)(A) or
7 215.283(1)(c)(A) is necessary for public service if the facility
8 must be sited in an exclusive farm use zone in order to provide
9 the service.

10 “(2) To demonstrate that a utility facility is necessary, an applicant
11 for approval under ORS 215.213(1)(c)(A) or
12 215.283(1)(c)(A) must show that reasonable alternatives have
13 been considered and that the facility must be sited in an
14 exclusive farm use zone due to one or more of the following
15 factors:

16 “(a) Technical and engineering feasibility;

17 “(b) The proposed facility is locationally dependent. A
18 utility facility is locationally dependent if it must cross
19 land in one or more areas zoned for exclusive farm use
20 in order to achieve a reasonably direct route or to meet
21 unique geographical needs that cannot be satisfied on
22 other lands;

23 “(c) Lack of available urban and nonresource lands;

24 “(d) Availability of existing rights of way;

25 “(e) Public health and safety; and

26 “(f) Other requirements of state or federal agencies.”

27 We have explained that

28 “[a]t the core of the necessity test is the requirement that the local
29 government determine that the utility facility cannot feasibly be

1 located on non-EFU land, which in turn requires that the local
2 government consider reasonable alternatives to siting the facility on
3 EFU-zoned land.” *Central Klamath County CAT v. Klamath*
4 *County*, 40 Or LUBA 129, 140 (2001).

5 ORS 215.283(1)(c)(A) is implemented in the county’s EFU zone in MCC
6 39.4225(A) which governs “review uses” in the EFU zone.¹¹ The hearings officer
7 found:

¹¹ MCC 39.4225 states:

“REVIEW USES.

“(A) *Utility facilities necessary for public service*, including wetland waste treatment systems but not including commercial facilities for the purpose of generating power for public use by sale or transmission towers over 200 feet in height provided:

“(1) Radio and television towers 200 feet and under when found to satisfy the requirements of ORS 215.275 ‘Utility facilities necessary for public service; criteria; mitigating impact of facility’ and MCC 39.7550 through 39.7575.

“(2) Wireless communications facilities 200 feet and under when found to satisfy the requirements of MCC 39.7700 through 39.7765.

“(3) *All other utility facilities and/or transmission towers 200 feet and under in height subject to the following:*

“(a) *The facility satisfies the requirements of ORS 215.275, ‘Utility facilities necessary for public service; criteria; mitigating impact of facility’; and*

1 “There are two segments of the pipeline that cross EFU lands.
2 Segment 1, along Lusted Road will be outside the road right of way
3 but will be tunneled under the ground. Segment 3 will be in the road
4 right of way (ROW) along Lusted and Altman Roads.

5 “Segment 1, outside of the ROW, has to comply with the additional
6 standard in the MCC above and mirror ORS 215.283[(1)](c) and
7 ORS 215.275 regarding utilities in the EFU that are not in the ROW.
8 This is a much more complicated process. [PWB] addresses these
9 standard[s] in Exhibit A.10 titled 2.C Pipeline EFU Review
10 Application Narrative. I adopt that as finding[s] to demonstrate it
11 meets this standard. Exhibit A.10 page 4 explains that the EFU
12 alignment was necessary to connect the facility to the pipeline [for]
13 ‘technical and engineering’ feasibility reasons. I also adopt [PWB’s]
14 legal reasoning found in its Final Rebuttal Argument, Exhibit L.1.
15 Section E.

16 “[PWB] correctly argues that there is no alternatives analysis
17 requirement for the Filtration Facility itself (which I agreed to in the
18 introduction to this decision)[.] The alternatives analysis is only
19 required for this small portion of the pipeline that is in the EFU and
20 outside of the ROW.” Record 27-28.

21 As its alternatives analysis, PWB submitted a three-and-a-half-page report
22 from RhinoOne Geotechnical dated August 9, 2022, and entitled “Geotechnical
23 Technical Memorandum Raw Water Pipeline Alternatives from Lusted Road to
24 Filtration Facility[.]” (RhinoOne Alternatives Analysis) which describes six
25 potential pipeline routes that would connect the project pipeline infrastructure
26 with the filtration facility and existing pipe network in the immediate area.

“(b) The facility satisfies the requirements of MCC 39.6500
through 39.6600; 39.7525(A); 39.8000 through 39.8050; and
39.6745.” (Emphases added.)

1 Record 6024-25. The RhinoOne Alternatives Analysis explains “[t]he rationale
2 for eliminating from further consideration the raw water pipeline routes that
3 avoid EFU land * * *.” Record 6026.

4 The hearings officer accepted PWB’s argument that it “selected a non-
5 resource zone property for the filtration facility, routed the overwhelming
6 majority of pipelines through non-resource lands and, as a result, only a single
7 EFU property outside of the [ROW] is needed – with the tunnel being located
8 between 147 and 217 feet *below the surface* of the property.” Record 28
9 (emphasis in original).

10 **B. Preservation**

11 ORS 197.835(3) provides that LUBA “may only review issues raised by
12 any participant before the local hearings body as provided by ORS 197.195,
13 197.622 or 197.797, whichever is applicable.” OAN argues “The inadequacy of
14 the ORS 215.175 alternatives sites analysis was argued below, at Record 3342.
15 ‘In this case, [PWB’s] analysis of alternative pipeline routes is not sufficient and
16 fails to comply with the alternative analysis required by ORS 215.275.’” OAN’s
17 Intervenor-Petitioner’s Brief 4 (quoting Record 3342).

18 PWB responds that the issue raised at Record 3342 is not the same issue
19 raised in this assignment of error and argues that OAN has not preserved this
20 assignment of error. 1000 Friends submitted the following testimony at Record
21 3342-43:

22 **“ORS 215.275**

1 “The facility fails to meet the criteria in ORS 215.283(1)(c)(A) and
2 ORS 215.275. For the purpose of complying with ORS 215.275,
3 [PWB] cannot separate the treatment facility from the pipelines
4 required to connect the facility to the existing water system. The
5 treatment facility and its pipes are a single facility because the
6 pipelines are required to connect the treatment part of the facility to
7 the larger water system. For that reason, the proposed facility is
8 located on both EFU and MUA-20 land. [PWB] must consider
9 alternatives in which the entire facility can be located outside of
10 EFU designated lands.

11 “In this case, [PWB’s] analysis of alternative pipeline routes is not
12 sufficient and fails to comply with the alternatives analysis required
13 by ORS 215.275. There are other alternatives in which the facility
14 would not be located on EFU land at all and would not require any
15 pipes to cross EFU land in order to connect to the existing water
16 system. For that reason, [PWB] has not shown that the facility ‘must
17 be sited in an exclusive farm use zone’ due to the factors outlined in
18 ORS 215.275(2). *See also* 215.275(3). [PWB’s] initial analysis of
19 alternative sites showed that locations with the UGB exist, are
20 available, are technically feasible, meet the project’s locational
21 requirements, and comply with public health and safety concerns.
22 [PWB’s] proposal violates ORS 215.275.”

23 The issue that 1000 Friends raised is that the entire facility, including the
24 raw water pipelines, can be located on non-resource land and, thus, it is not
25 necessary to locate any part of the water infrastructure on resource land.
26 Differently, OAN raises the following three issues: (1) In approving the portion
27 of the pipeline in the EFU zone to connect the facility to the existing pipe
28 infrastructure, the county failed to adequately consider alternative pipeline
29 routes; (2) The RhinoOne Alternatives Analysis fails to address all of the factors
30 in ORS 215.275 and is not substantial evidence to support a conclusion that the
31 pipeline must be sited on EFU land; and (3) The hearings officer’s findings on

1 alternatives are inadequate to support the conclusion that the pipelines “must be
2 sited in an exclusive farm use zone.” ORS 215.275(1).

3 The purpose of the preservation requirement is to “prevent unfair surprise.”
4 *Boldt v. Clackamas County*, 107 Or App 619, 622, 813 P2d 1078 (1991). A
5 petitioner may not fail to raise an issue locally and then unfairly surprise the local
6 government and other parties by raising the issue for the first time at LUBA. *Id.*
7 A particular issue must be identified in a manner detailed enough to give the local
8 government and the parties fair notice and an adequate opportunity to respond.
9 *Id.* at 623. We agree with PWB that the issue that 1000 Friends raised below
10 under ORS 215.275 is distinct from and not inclusive of the water pipeline
11 alignment alternatives analysis issue that OAN raises on appeal. OAN does not
12 point to any other instance in the record where it raised the issue of alternative
13 routes to be considered and the issue is waived.

14 OAN also argues that the hearings officer’s decision is not supported by
15 substantial evidence because the evidence relied upon is conclusory and does not
16 include raw data relied upon by the experts. We explained in *Lucier v. City of*
17 *Medford* that

18 “[i]n order to preserve the right to challenge at LUBA the adequacy
19 of the adopted findings to address a relevant criterion or the
20 evidentiary support for such findings, a petitioner must challenge
21 the proposal’s compliance with that criterion during the local
22 proceedings. Once that is done, the petitioner may challenge the
23 adequacy of the findings and the supporting evidence to demonstrate
24 the proposal complies with the criterion. The particular findings
25 ultimately adopted or evidence ultimately relied on by the decision

1 maker need not be anticipated and specifically challenged during the
2 local proceedings.” 26 Or LUBA 213, 216 (1993) (emphases
3 added).

4 We set out the proper reading of *Lucier* in *Bruce Packing Company v. City of*
5 *Silverton*, 45 Or LUBA 334, *aff'd*, 191 Or App 305, 82 P3d 653 (2003). In *Bruce*
6 *Packing Company*, the applicable quasi-judicial zone change criteria required a
7 finding that “[t]he uses which would be permitted in the proposed zone could be
8 accommodated on the proposed site without exceeding its physical limitations.”
9 *Id.* at 349 (brackets in original). The petitioner argued that the city failed to
10 “evaluate whether the subject property can accommodate all of the uses allowed
11 in the [relevant] zone, not just the proposed use.” *Id.* The petitioner also argued
12 that there was no evidence supporting statements in the findings “that the
13 property will discharge stormwater into the municipal system, that there are no
14 steep slopes, wetlands or other onsite natural features that require protection, and
15 no cultural or historic resources in the area that affect development.” *Id.* at 350.
16 The petitioner maintained that it raised below “the general issue of whether the
17 proposal complied with ‘each and every’ criterion under [the code provision],
18 with specific reference to [a specific code subsection]” and that “waiver under
19 ORS 197.7[97](1) simply does not apply to arguments that [the] adopted findings
20 are inadequate or not supported by substantial evidence.” *Id.* at 351 As we
21 explained:

22 “The critical considerations under *Lucier* and ORS 197.7[97](1) are
23 whether issues were raised below regarding compliance with an
24 approval criterion and, if so, whether those issues were ‘raised and

1 accompanied by statements or evidence sufficient to afford the
2 governing body, planning commission, hearings body or hearings
3 officer, and the parties an adequate opportunity to respond[.]” *Id.*
4 at 352-353 (quoting ORS 197.797(1)).

5 We concluded that “[a]t no point below did petitioner or another party argue that
6 [the code subsection] requires evaluation of all uses allowed in the [relevant]
7 zone. Indeed, * * * petitioner’s attorney discussed [the code subsection] in terms
8 that suggested the city need consider only the proposed use.” *Id.* at 353.

9 “Because no issues were raised below regarding these matters, the
10 city was not required to adopt a responsive finding addressing such
11 issues. In other words, if the city had adopted no findings
12 whatsoever regarding the presence or absence of stormwater
13 drainage, wetlands, steep slopes, etc., the city would not have
14 committed reversible error. In that sense, the challenged finding that
15 there are no storm drainage limitations, wetlands, steep slopes,
16 natural resources, or historic and cultural resources on the property
17 is simply surplusage. The lack of evidence supporting unnecessary
18 or nonessential findings is not a basis for reversal or remand.” *Id.* at
19 354.

20 Consistent with our decision in *Bruce Packing Company*, we have
21 concluded that where a draft transportation study was available during the local
22 proceedings and did not include a technical appendix, “an objection to the
23 missing technical appendix could have been raised at any time. Therefore, any
24 issue concerning the missing technical information is waived and cannot be
25 raised for the first time at LUBA.” *Lowrey v. City of Portland*, 68 Or LUBA 339,
26 353 (2013). As mentioned above, the evidence submitted by PWB included
27 RhinoOne Geotechnical’s August 9, 2022, RhinoOne Alternatives Analysis
28 report describing six potential pipeline routes that would connect the project

1 pipeline infrastructure with the filtration facility and existing pipe network in the
2 immediate area. Record 6024. The RhinoOne Alternatives Analysis explains
3 “[t]he rationale for eliminating from further consideration the raw water pipeline
4 routes that avoid EFU land * * *.” Record 6026. We agree with PWB that OAN
5 does not identify where it raised below the issue that expert reports or summaries
6 of those reports are not substantial evidence absent the raw data or that the raw
7 data must otherwise be in the record and the substantial evidence challenge is
8 waived. PWB’s Intervenor-Respondent’s Brief to OAN 41-42.

9 **C. Findings**

10 OAN also argues that the hearings officer’s findings are inadequate
11 because they fail to explain how the RhinoOne Alternatives Analysis, or any
12 other evidence in the record, demonstrates that ORS 215.275 is satisfied. OAN
13 argues that the three-and-one-half-page Rhino Alternatives Analysis is
14 conclusory and does not address the ORS 215.275 factors. OAN’s Intervenor-
15 Petitioner’s Brief 8. OAN also argues that the project objectives do not justify the
16 selected alternatives as required by ORS 215.275. *Id.* at 9. OAN did not waive
17 the findings challenge because the alleged inadequacy of the hearings officer’s
18 findings did not arise until the hearings officer issued their decision and, because
19 there was not an opportunity for a local appeal of the hearings officer’s decision,
20 OAN had no opportunity to raise the findings challenge until this LUBA appeal.
21 *Riverview Abbey Mausoleum Company v. City of Portland*, 79 Or LUBA 38, 42,
22 *aff’d*, 297 Or App 192, 440 P3d 684 (2019) (a petitioner is not required to

1 anticipate erroneous findings or interpretations in a final decision in order to
2 challenge them at LUBA). OAN's findings challenge regarding ORS 215.275 is
3 not waived.

4 OAN does not, however, acknowledge or challenge the hearings officer's
5 findings addressing compliance with ORS 215.275. The hearings officer adopted
6 as findings PWB's application narrative at Exhibit A.10 which addresses ORS
7 215.275 and "identifies alternatives and evaluates the factors to demonstrate the
8 raw water pipeline is a utility facility necessary for public service."¹² Record 181.
9 We agree with PWB that the hearings officer also incorporated by reference the
10 detailed findings at Record 7695-98. These findings include that

11 "Rhino One Geotechnical assembled and led a Geotechnical
12 Technical Advisory Committee (GTAC) to provide geotechnical
13 and seismic guidance for the Bull Run Filtration Project. The GTAC
14 consisted of regional subject matter experts that included geologist
15 and geotechnical engineers. The TAC members included [five listed
16 experts].

17 "The GTAC met on several occasions to review results of
18 geotechnical investigations and provide guidance on how to avoid
19 and/or mitigate project hazards and risks, including for pipeline
20 alternatives. Pipeline alignment and construction alternatives were
21 evaluated and refined over the course of a year. Six raw water
22 pipeline alternatives were studied including alignments within and
23 outside of EFU lands." Record 7696-97 (parenthetical omitted).

¹² The hearing officer adopted PWB's Exhibit 2.C Pipeline EFU Review Application Narrative and PWB's reasoning in its Final Rebuttal Argument, Exhibit L1., Section E, as their findings that ORS 215.275 is met. Record 27-28.

1 The incorporated findings then discuss features of various alternatives
2 before concluding

3 “The proposed, selected alternative (RW Alternative 1* * *) avoids
4 the steep scarp along Lusted Road and hazards associated with the
5 Dodge Park alignment. It provides a direct route between the
6 existing conduits in Lusted Road and the filtration facility. For
7 purposes of seismic resiliency and technical feasibility, the GTAC
8 determined that tunneling under the upper slope at the proposed
9 depths (147 feet to 217 feet below ground surface) provides the
10 greatest protection of the pipeline in the event of an earthquake or
11 landslide.” Record 7697.

12 PWB identified and the hearings officer’s findings incorporated multiple
13 project objectives including the adequacy of the selected alternative to provide
14 seismic resiliency. Record 7696. The findings identified the relevant approval
15 criterion, ORS 215.275, and explained that the expert’s analysis established that
16 the selected alignment provided the greatest protection in case of earthquake or
17 landslide. The findings are adequate.

18 OAN’s first assignment of error is denied.

19 **COTTRELL’S FOURTH ASSIGNMENT OR ERROR**

20 Cottrell’s fourth assignment of error is that the findings are inadequate to
21 address their argument that the communications tower will negatively impact
22 endangered migratory birds in violation of MCC 39.7515(B). Petition for Review
23 42. PWB responds that the communication tower is not subject to MCC
24 39.7515(B). We agree.

1 Uses allowed as a community service use in the MUA-20 zone include
2 radio and television transmission towers including: “VHF and UHF television
3 towers, FM radio towers, two-way radio, common carrier, and cellular telephone
4 towers, and fixed microwave towers[.]” MCC 35.7520(8)(a). PWB applied for
5 and was granted a Community Service Conditional Use Permit for a Radio
6 Transmission Tower (Communication Tower located at Filtration Facility). MCC
7 39.7515 provides that transmission towers approved as a community service use
8 “shall meet the approval criteria of MCC 39.7550 through 39.7575[.]” We agree
9 with PWB that MCC 39.7515(B) is not an applicable approval criterion for the
10 communications tower and the hearings officer was not required to adopt findings
11 addressing the relationship between the communications tower and MCC
12 39.7515(B).

13 Cottrell’s fourth assignment of error is denied.

14 **PORTION OF GBSD’S SECOND ASSIGNMENT OF ERROR**

15 **PHCA’S FIRST ASSIGNMENT OF ERROR, SECOND THROUGH**
16 **FOURTH SUBASSIGNMENTS**

17 **A. Introduction**

18 MCC 39.7515(A) requires that the community service use be “consistent
19 with the character of the area[.]” GBSD argues in its second assignment of error
20 and PHCA argues in the second through fourth subassignments of its sole
21 assignment of error, that the hearings officer misconstrued the law and made

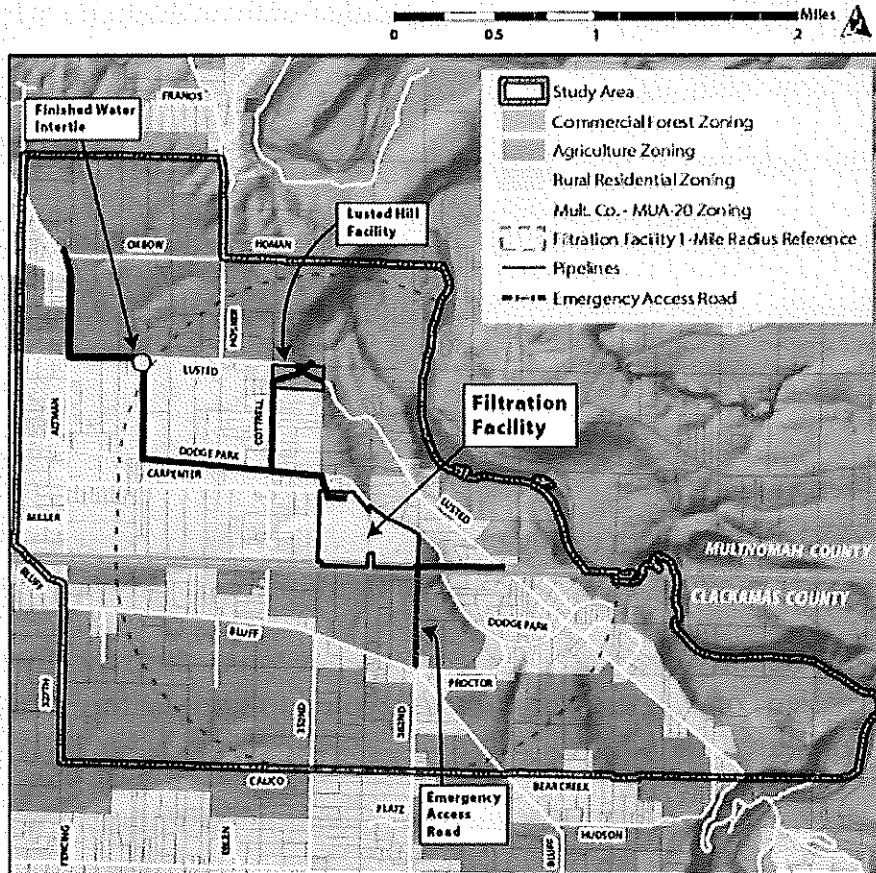
1 inadequate findings unsupported by substantial evidence that the proposed use is
2 consistent with the character of the area.

3 *Multnomah County v. City of Fairview* concerned an appeal of a decision
4 approving a conditional use permit for an aggregate barge uploading, stockpiling
5 and truck transshipping facility. 18 Or LUBA 8 (1989) (*City of Fairview*).
6 Applicable county conditional use criteria included a requirement that “the
7 approval authority shall find that the proposal * * * is consistent with the
8 character of the area.”¹³ *Id.* at 10 n 2. We concluded that the decision maker’s
9 conclusion that the proposed use is consistent with the character of the area
10 requires that the decision maker identify the area considered and provide (1) a
11 rationale or justification for the selection of the area considered, (2) a description
12 of the character of the area, and (3) an explanation of why the criteria is or is not
13 met. *Id.* at 14-16. Citing *Knight v. City of Eugene*, PHCA argues that approval
14 standards that require an analysis of impacts of a use on nearby areas or uses in
15 the area must identify the relevant area. PHCA’s Intervenor-Petitioner’s Brief 19-
16 20 (citing 41 Or LUBA 279 (2002)). Below, we discuss GBSD’s and PHCA’s
17 assignments of error using the framework set out in *City of Fairview*.

¹³ In *City of Fairview*, the subject property had been annexed by the city but was still subject to county land use criteria.

1 **B. Area Selected**

2 The geographic boundaries of the area considered by the hearings officer
3 are described at Record 195 through 197 and are depicted below.



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

5 Record 196. PHCA argues that the hearings officer did not explain the distinction
6 between “area” in MCC 39.7515(A) or (D) and “surrounding lands” in MCC
7 39.7515(C). PHCA’s Intervenor-Petitioner’s Brief 19. According to PHCA:
8 “Such interpretation is essential to addressing the county’s approval standards
9 relating to the character of the area, the area within which only existing or

1 programmed public services will be required and the lands to which the farm
2 impacts test is applied.” *Id.*

3 MCC 39.7515(A) requires that the hearings officer evaluate whether the
4 use “[i]s consistent with the character of the *area*[.]” and MCC 39.7515(D)
5 requires that the hearings officer evaluate whether the use “[w]ill not require
6 public services other than those existing or programmed for the *area*.” (Emphases
7 added.) Differently, MCC 39.7515(C) requires that the hearings officer
8 determine that the

9 “Use will not:

- 10 “1. Force a significant change in accepted farm or forest practices
11 on *surrounding lands* devoted to farm or forest use; nor
12 “2. Significantly increase the cost of accepted farm or forest
13 practices on *surrounding lands* devoted to farm or forest use”
14 (Emphases added.)

15 PHCA does not explain why an interpretation distinguishing between
16 “area” and “surrounding lands” is necessary to determining if the hearings officer
17 identified the area they were considering for purposes of MCC 39.7515(A) or
18 (D). Moreover, the farm impacts area is concerned only with surrounding lands
19 that are devoted to farm or forest use. We agree with PWB that there is no support
20 for PHCA’s argument that the hearings officer must compare and contrast
21 different criteria with different operative language and different regulatory
22 purposes. *See Schrepel v. Yamhill County*, 81 Or LUBA 895, 930 (2020) (a
23 character of the area standard is distinct from a farm impacts standard in a code).

1 MCC 39.7515(A), as well as (D), refers to an area to be studied. MCC 39.7515(C)
2 refers to surrounding lands and the impact on farm and forest uses thereon.
3 “Area” and “surrounding lands” are different terms and the hearings officer was
4 not required to adopt findings distinguishing the two.

5 PHCA’s second subassignment of error is denied.

6 **C. Area Character**

7 GBSD argues that the hearings officer failed to adopt adequate findings
8 supported by substantial evidence. GBSD argues the hearings officer adopted
9 PWB’s Final Written Argument in its entirety as it relates to the character of the
10 area and that, in doing so, the hearings officer did not adequately describe the
11 character of the area.

12 **1. Description of Residential Character**

13 GBSD asserts that we concluded in *Kine v. City of Bend*, that describing
14 an area as “generally residential” is insufficient. 72 Or LUBA 423, 435-36
15 (2015). GBSD contends that the hearings officer adopted as part of their findings
16 PWB’s description of the area in part as farm or forest land with rural residences
17 that vary greatly in age, size, style, and appearance and that this does not
18 adequately capture the area’s character.

19 PWB responds that a detailed description of the character of the area is
20 provided. The description of residential uses in the study area includes the
21 following:

22 “Residential development is the predominant rural development

1 land use in the study area. Rural residential development is found on
2 the bench below and east of the filtration facility site (served
3 primarily by Lusted Road and Dodge Park Boulevard). Clusters of
4 residential development are found in the rolling hills west of that
5 area, primarily along roadways, and often adjacent to mid- to large-
6 scale nursery operations. Rural residences are located across
7 Carpenter Lane from the filtration facility, and along both sides of
8 Cottrell Road.

9 “Unlike farm, forest, and public uses, residential development can
10 be sensitive to potential impacts from public facilities or from
11 agricultural operations (in the reasonable worst case development
12 scenario). This potential is addressed in detail in subsection A.3 [of
13 this narrative] to ensure that no impacts will occur from the filtration
14 facility.

15 “As shown on Figures 15-20, rural residences in the study area come
16 in a wide variety of sizes, ages, and designs. In the aggregate,
17 residential uses generate substantial traffic and have external
18 impacts related to noise, outdoor lighting, and appearance.
19 Residences also generate transportation impacts, can have adverse
20 visual impacts, and contribute to ambient noise and light levels, as
21 discussed under [the] noise and lighting impacts [section].”¹⁴ Record

¹⁴ The record explains that two thirds of the study area is designated resource and the remaining third is designated as rural residential exception areas and includes as part of PWB’s characterization of the area, the explanation that

“Rural residences help to define the character of the study area. Rural residences are found in all study area zones, but predominantly in rural residential exception areas. Based on GIS analysis, there are approximately 370 homes in the study area (this includes both rural exception area homes and farm and forest-related dwellings). As documented in Appendix 0.1 and Section 1.A, the age, size, style, and appearance of homes and accessory structures and outdoor storage areas in the study area vary greatly.” Record 8036 (boldface omitted).

1 7904-05 (footnote omitted).

2 The description of residential uses in the area are more expansive than that
3 recognized by GBSD and is more than a statement that the area is “generally
4 residential.”

5 GBSD’s subassignment of error is denied.

6 **2. Description of Roads**

7 GBSD also maintains that the hearings officer’s description of the area
8 fails to capture the breadth of the character of the area, which it describes as a
9 place with a lack of sidewalks and walkable shoulders but where minimal traffic
10 enables walkers, runners and bikers to safely use the right of way and for students
11 to use roads for track practice. GBSD’s Intervenor-Petitioner’s Brief 9-10.

12 PWB argues that GBSD did not preserve this issue as it relates to the use,
13 as opposed to its construction. PWB’s Intervenor-Respondent’s Brief to GBSD
14 8. In the preservation section of its intervenor-petitioner’s brief for this
15 assignment of error, GBSD identifies ten pages without specifying where it
16 argues that the walk and bike use in the area was part of the area character for
17 purposes of evaluating operational impacts. *Id.* at 5 (citing Record 1404, 2947-
18 51, 3721, 3731-32, 5034). In its reply brief, GBSD does not specify where in the
19 ten pages identified in its intervenor-petitioner’s brief this issue was preserved
20 but instead cites an additional page and provides additional argument related to
21 construction. GBSD’s Reply Brief 2. In the originally cited 10 pages, GBSD
22 raised issues with respect to safety of students in the area as a result of traffic but

1 does not, as required by our rules, indicate where it preserved an argument that
2 current road usage must be include in the description of area character (instead it
3 appears to us potentially relevant to GBSD’s assignment of error related to
4 hazardous conditions).

5 We are not required to comb the record to determine whether an issue has
6 been preserved. In the course of our review of the record, however, we have
7 observed very broad GBSD statements in the record that the construction and use
8 will impact the character of the area. *See, for example*, Record 3731 (“our
9 concerns about safety of our students both during construction and during
10 operation of the facility.”). GBSD does not, however, develop an argument to us
11 that pedestrian and bicycle use of the right-of-way is a relevant characteristic of
12 the area for purposes other than construction impacts. For the reasons set out in
13 our resolution of Cottrell’s second assignment of error, construction impacts on
14 the character of the area are not relevant. The hearings officer did not err in not
15 including elements of the area’s character potentially relevant to construction in
16 their description of the area character.

17 GBSD’s subassignment of error is denied.

18 **D. Rationale for the Area Selected**

19 GBSD contends that the county failed to provide an adequate rationale for
20 the area selected. GBSD describes the study area as encompassing “a small area
21 of land surrounding the filtration site that is expanded to encompass areas of
22 traffic impacts.” GBSD’s Intervenor-Petitioner’s Brief 7. GBSD argues that the

1 hearings officer's rationale for the area studied is based on traffic and impacted
2 intersection considerations because they concluded that "the filtration facility
3 itself will be quiet, odorless, safe, and relatively unobtrusive[.]" *Id.* (citing Record
4 190). GBSD opines that the "[t]his standard – of a study area cabined by the
5 traffic impacts of the [p]roject would be a defensible one – if it addressed all of
6 the impacts of the traffic identified by PWB." *Id.* GBSD argues:

7 "As part of the conditions outlined by the [h]earings [o]fficer's
8 decision, trucks heading towards and leaving from the water
9 filtration site are slated to avoid roads that have direct access to four
10 [GBSD] schools. [Record] 93. These schools are Sam Barlow High
11 School, East Orient Elementary School, West Orient Middle School,
12 and Kelly Creek Elementary School. *Id.* Yet all of these schools are
13 outside the study area. PWB presented a study area for the character
14 of the area based on traffic impacts, yet excludes certain schools that
15 it admits and recognizes are going to be impacted by the increased
16 traffic. The area surveyed was too small and failed to consider the
17 entirety of traffic impacts that the record describes as certain to
18 materialize."¹⁵ GBSD's Intervenor-Petitioner's Brief 7.

19 GBSD argues that the impact on area schools is clearly a use externality
20 not included in the study area and in fact evidenced by the hearings officer's

¹⁵ "The three GBSD schools closest to the filtration facility site are located along or near roads that the [c]ounty has design designated as freight routes with no restrictions in its Transportation System Plan ('TSP'). Rec[ord] 1969." PWB's Intervenor-Respondent's Brief to GBSD 4 (footnote omitted). Sam Barlow High School is three miles northwest of the filtration site. *Id.* at 5 (citing Record 473-74). East Orient Elementary School and West Orient Middle School are located approximately 2.5 to 3 miles west of the filtration site. *Id.* (citing Record 475-77).

1 imposition of a condition of approval related to those schools. Similarly, PHCA
2 argues, within its second subassignment of error, that the selected area does not
3 include “an area extending to the high school and its environs” and because it
4 does not address impacts, identified in their fourth subassignment of error, it is
5 not supported by adequate findings and substantial evidence. PHCA’s
6 Intervenor-Petitioner’s Brief 20.

7 PWB argues that in *Tarr v. Multnomah County* we concluded that nothing
8 in the MCC defines or prescribes the study area for purposes of MCC
9 39.7515(A). 81 Or LUBA 242, *aff’d*, 306 Or App 26, 473 P3d 603 (2020), *rev*
10 *den*, 367 Or 496 (2021). PWB contends that PHCA argues the findings do not
11 address opposition testimony or resolve conflicting positions but that the decision
12 maker is required to address key issues and is not required to identify and respond
13 to every piece of opposing evidence. PWB’s Intervenor-Respondent’s Brief to
14 PHCA 18 (citing *Stoloff v. City of Portland*, 51 Or LUBA 560, 567 (2006)). PWB
15 argues PHCA does not object to any portion of the findings explaining the basis
16 for the study area.¹⁶ PWB argues that PHCA is simply disagreeing with the
17 conclusion without explaining why the findings are inadequate and that PHCA’s
18 argument is insufficient. *Vanderburg v. City of Albany*, LUBA No 2022-082 (Jan
19 5, 2023) (slip op at 12-13). Furthermore, roads serving schools are included in

¹⁶ PWB maintains PHCA points to testimony submitted in response to compliance with the surrounding lands standard in MCC 39.7515(C)’s farm impacts test and was addressing the findings at Record 263-268, 48.

1 the study area and PWB argues that it accepted a construction related condition
2 of approval as an accommodation to neighbors and that it is not required to obtain
3 compliance with MCC 39.7515(A). We agree.

4 PWB identifies 11 pages of findings describing area boundaries, the study
5 area, and the rationale for its selection. Record 189-99. The hearings officer
6 adopted these findings and thereby established that they agreed with these
7 statements regarding the extent of the area. The findings describe the study area
8 as “large enough to include nursery crop land and associated wholesale nursery
9 operational centers and agricultural processing operations[,]” “potential
10 viewshed impact areas[,]” “cumulative impacts across the project,” and “off-site
11 impacts” on intersections that the transportation engineer chose based on their
12 professional judgment and in response to feedback received during PWB’s public
13 engagement process. Record 190-195. In *City of Fairview*, we implied that
14 identification of an area that excluded territory within sight and sound or other
15 effects of the use is an unreasonable interpretation of “area.” 18 Or LUBA at 15
16 n 6; PWB’s Intervenor-Respondent’s Brief to PHCA 23-24 (quoting Record 198-
17 99). Here, in findings adopted by the hearings officer, PWB explains:

18 “[T]his study area is designed to be large enough to include the
19 entire project as well as all areas where externalities or sensitivities
20 of the proposed use could potentially have impacts, with the
21 potential transportation and agricultural impact categories driving
22 the study area boundaries. The study area includes the filtration
23 facilities, communications tower, an emergency access road from
24 Bluff Road, the intertie on Lusted Road, and related raw and finished
25 water pipelines. The boundaries of the study area take into

1 consideration roadways and topographical features which clearly
2 divide areas of the counties.” Record 195.

3 We agree with PWB that GBSD and PHCA do not address the hearings
4 officer’s findings selecting the area to be considered or explain why they are
5 inadequate to respond to opponents’ advocacy for a larger area. Roads impacted
6 by the water facility use are included in the analysis even if the destination of
7 some users of those roads, including schools, is outside the study area. GBSD
8 and PHCA do not establish a basis for remand.

9 These subassignments of error are denied

10 **E. Hearings Officer’s Conclusion that the Use is Consistent with**
11 **the Character of the Area**

12 **1. Findings and Evidence Related to Consistency of Use with**
13 **Character of the Area**

14 **a. Inadequate Findings Subassignment of Error**

15 PHCA argues there is no support for the hearings officer’s statements, that
16 MCC 39.7515(A) is vague and open to interpretation and that the county intended
17 some flexibility in its interpretation, and the hearings officer therefore made an
18 incorrect interpretation inadequate for our review. PHCA’s Intervenor-
19 Petitioner’s Brief 23.

20 The hearings officer found, in part:

21 “[MCC 39.7515(A)] is a crucial criterion for this application and
22 one for which there is a great deal of testimony. I firmly believe that
23 is because this standard is so vague and completely open to
24 interpretation. I believe the [b]oard must have intended some
25 flexibility in this interpretation or else they would not have
26 permitted the highly intensive community service uses in these

1 zones. To narrow it down, what is evaluated under these criteria is
2 the final uses and not the construction of these uses. I find that, as
3 conditioned, the final uses, the filtration plant, the pipelines
4 underground, and the intertie site meet these criteria and are
5 consistent with the character of the area. I adopt the staff findings
6 above as my findings. * * *

7 "I agree with [PWB] that the code allows impacts from these
8 conditional uses to be mitigated by conditions." Record 41.

9 PWB responds that the hearings officer conducted a *PGE/Gaines* code
10 interpretation because they relied on the context of the code to determine the
11 scope of the use. PWB's Intervenor-Respondent's Brief to PHCA 33. We agree
12 with PHCA that the hearings officer's interpretation is not tied to the text of the
13 code and is at least partially inadequate for review. However, we agree with the
14 hearings officer's statements that the code allows the imposition of conditions
15 and that such allowance is relevant to the interpretation of the criterion. ORS
16 197.829(2) provides that we may provide an interpretation where the local
17 government has provided an inadequate interpretation.¹⁷ We do so here and
18 conclude based on the purpose statement and the provision allowing conditions
19 of approval that, although the criteria must be met, some flexibility is in fact
20 incorporated into the code, as the hearings officer concluded. MCC 39.7500, the

¹⁷ ORS 197.829(2) provides:

"If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."

1 purpose statement for the Community Service Uses chapter, notes that
2 development of these uses may be appropriate based on “their public
3 convenience, necessity, unusual character or effect on the neighborhood[.]”¹⁸
4 MCC 39.7510 expressly states that the approval authority may attach conditions
5 to a community service use approval *in order to uphold the purpose* and intent of
6 the chapter and *to ‘mitigate any adverse effect* upon the adjoining properties
7 which may result by reason of the conditional use allowed.”¹⁹ (Emphases added.)

8 This assignment of error does not establish a basis for remand.

¹⁸ MCC 39.7500 states:

“This subpart of MCC [c]hapter 39 provides for the review and approval of the location and development of special uses which, by reason of their public convenience, necessity, unusual character or effect on the neighborhood, may be appropriate as specified in each base zone.”

¹⁹ MCC 39.7510 contains “Conditions and Restrictions” and states:

“The approval authority may attach conditions and restrictions to any community service use approved. Conditions and restrictions may include a definite time limit, a specific limitation of use, landscaping requirements, parking, loading, circulation, access, performance standards, performance bonds, and any other reasonable conditions, restrictions or safeguards that would uphold the purpose and intent of this [c]hapter and mitigate any adverse effect upon the adjoining properties which may result by reason of the conditional use allowed.”

1 **b. Conflicting Findings Assignment**

2 PHCA argues that the findings concerning the character of the area
3 conflict. PHCA directs our attention to the hearings officer’s acknowledgement
4 that there were many videos in the record showing a very nice area of farms and
5 farm fields and what PHCA asserts is a conflicting statement that the predominate
6 rural use in the study area is residential and residential is the most sensitive use.
7 PHCA’s Intervenor-Petitioner’s Brief 21-22. PHCA argues that the hearings
8 officer’s findings fail to adequately address the character of the area because “the
9 predominant uses are both agricultural and rural residential, and the farm uses are
10 ultra-sensitive to impacts from construction and related traffic, in addition to
11 other harms.” *Id.* at 22. We agree with PWB that this assignment of error is, at its
12 core, that PHCA disagrees with the hearings officer’s assessment of the impacts.
13 PWB’s Intervenor-Respondent’s Brief to PHCA 25. The hearings officer adopted
14 extensive findings describing the various elements of the area. Record 201-27.

15 PHCA’s third subassignment of error is denied.

16 **c. Incorrect Conclusion Assignment**

17 **i. GBSD**

18 GBSD argues that there are inadequate findings resulting in an inaccurate
19 conclusion that the water facility is consistent with the character of the area.
20 GBSD argues the findings fail to comply with the standard set out in *Heiller* and
21 are not supported by substantial evidence.

22 GBSD quotes the following hearings officer finding:

1 “To further narrow this criterion, the test of comparing ‘consistency’
2 with the character of the area is not with how it would compare if
3 the property is left as bare land but comparing it to the proposed use
4 with the surrounding uses. The area already has pipelines and water
5 facilities. The area also has large scale nurseries that create more
6 impact on the surrounding area than will the proposed facility or the
7 underground pipelines. I recognize these are outright allowed farm
8 uses and they get separate treatments in other parts of the code but
9 here, this criterion is merely comparing uses. Many of the videos in
10 the record show a very nice area of farms and farm fields. If such
11 proposed community service uses were just compared to farm land,
12 they would never be permitted which would be contrary to the code
13 which allows them.” GBSD’s Intervenor-Petitioner’s Brief 11-12
14 (quoting Record 41).

15 GBSD argues references to other utility projects in the area, specifically the
16 Lusted Hill Treatment Facility, are unhelpful because the existing facility is not
17 comparable in size and does not have the impacts that PWB’s use will have.
18 GBSD argues that mitigation to achieve consistency is allowed under MCC
19 39.7510 but there is no nexus here between the imposed mitigations and the
20 standard. GBSD argues that the mitigation of limiting trucks near school sites
21 during specific time frames “was attacked as unenforceable during its
22 development and more concrete enforcement strategies did not come to fruition,
23 explaining their absence from the record.” GBSD’s Intervenor-Petitioner’s Brief
24 13. GBSD contends that there is no clarity on mitigation other than a plan for
25 trucks to avoid driving by schools around pick-up and drop-off times and that
26 this does not address kids who walk to or from school or walk to or from a bus
27 stop in the study area.

1 In addition to its argument that GBSD did not preserve arguments
2 unrelated to construction, PWB responds that opponents' subjective evidence of
3 "minimal traffic" and "quiet serenity" did not require a response where there was
4 objective evidence of traffic levels. PWB's Intervenor-Respondent's Brief to
5 GBSD 17. PWB also contends that GBSD simply disagrees with the findings and
6 evidence the hearings officer chose to rely upon. We agree with PWB that
7 GBSD's disagreement with the hearings officer's conclusions does not establish
8 that large scale nurseries are not a valid impact comparator and that the hearings
9 officer's conclusion is not remandable error. We agree with PWB that where the
10 petitioner does not explain why challenged findings are inadequate as they relate
11 to consistency with the character of the area, the petitioner's challenge to findings
12 will not be sustained. *Vanderburg*, LUBA No 2022-082 (slip op at 12).

13 GBSD's assignment of error is denied.

14 **ii. PHCA**

15 For the reasons set out in our resolution of Cottrell's second assignment of
16 error, as well as PHCA's first subassignment of error, we do not consider the
17 construction related impacts asserted by PHCA in this assignment of error.

18 PHCA sets out *Webster's* definition of "character" as "main or essential
19 nature esp[ecially] as strongly marked and serving to distinguish: individual
20 composite of salient traits, consequential characteristics, features giving
21 distinctive tone (each town came to have a [character] of its own – Sherwood
22 Anderson)[.]" PHCA's Intervenor-Petitioner's Brief 28 (quoting *Webster's Third*

1 *New Int'l Dictionary* 376 (unabridged ed 2002)). PHCA also references
2 *Webster's* definition of "consistent" as "marked by harmony, regularity or steady
3 continuity throughout: showing no significant change, unevenness, or
4 contradiction[.]" *Id.* (quoting *Webster's* at 484). PHCA argues that the character
5 of the area is established by the MCCP's Vision Statement for the west of the
6 Sandy River Area:

7 "We value all of the features that make this a rural place, including
8 quiet open spaces, vistas or productive farm and forest lands and of
9 Mt. Hood, country road[s], healthy air, soils and streams and a night
10 sky where we can clearly see the [stars].

11 "We envision that the Orient and Pleasant Home rural centers will
12 continue to prosper within defined areas in order to provide for the
13 needs of residents and visitors. We want our roads to continue to
14 [serve as the] transportation network for the area, while remaining
15 usable for people enjoying the country and accessing the Sandy
16 River, with opportunities for exercise by walking, running,
17 bicycling and horseback riding." PHCA's Intervenor-Petitioner's
18 Brief 31 (quoting MCCP 1-26, brackets added).

19 PHCA also flags an MCCP goal to conserve agricultural land in mixed use
20 agricultural zones and maximize its retention for productive and sustainable farm
21 use and argues applicable policies include: "Ensure that transportation policies
22 and policies related to the regulation of activities and events in agricultural zones
23 minimize the difficulties conflicting uses impose on farming practices."²⁰

²⁰ PHCA does not explain the purpose of MCC 39.7515(C), which relates to impacts on farm uses specifically, if the character of the area criterion in MCC 39.7515(A) requires this evaluation.

1 PHCA's Intervenor-Petitioner's Brief 32 (quoting MCCP policy 3.4). PHCA
2 argues that the hearings officer's conclusion that transportation impacts are
3 consistent with the character of the area is incorrect and that they have no basis
4 in text or context to rely on road standard level of service compliance. PHCA
5 argues that the character of the area will be changed by the widening and
6 improvement of Carpenter Road, which the county has required as a condition of
7 approval.²¹ PWB is required to install a delineated paved pedestrian route on
8 Carpenter Road. PHCA argues that the Carpenter Road widening and pedestrian
9 route condition does not address other impacted roads or routes for bicyclists or
10 equestrians that cannot share a walkway with pedestrians. PHCA also argues that
11 the pedestrian route will be removed after the facility receives its first temporary
12 certificate of occupancy so it will be lost. Opponents argued below that the
13 presence of wildlife was related to the character of the area. Record 220. PHCA
14 also argues findings of no significant effect on wildlife are inadequate because

²¹ PWB is required to install a delineated paved pedestrian route per condition E(1)(c) which states:

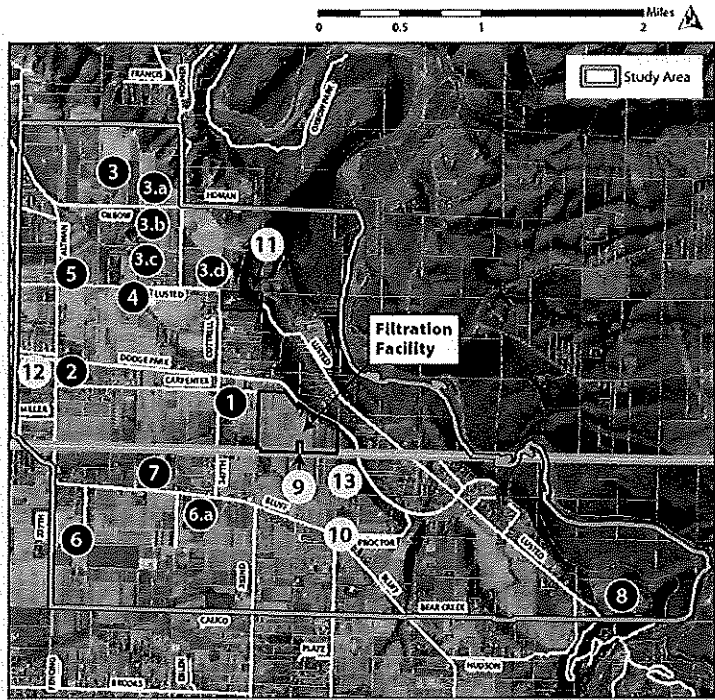
“Provide an ADA-compliant paved pedestrian route on Carpenter Lane east of Cottrell Road to the site access. The route will be delineated with pedestrian channelization devices when adjacent to the driving lanes with openings for property access. The paved pedestrian route will be installed prior to beginning off-hauling of excavated materials from the filtration facility site. After the temporary certificate of occupancy for the filtration facility is issued, the paved area will be removed and returned to County standards.” Record 92; *see also* Record 159.

1 PHCA argues that the incorporated findings do not rebut testimony relating to
2 post construction noise and the findings are therefore inadequate and not
3 supported by substantial evidence.

4 PWB supplements PHCA's statement of facts with the following:

5 "Mid- to large-scale agricultural operations (nurseries and
6 agricultural processing) are the predominant agricultural type and
7 land use in the project area. Rec[ord] 7893. Seven of the project area
8 nurseries and agricultural processing operations had a 2020 average
9 employee count of 86, with two of the businesses having employee
10 counts at or exceeding 200. Rec[ord] 7895. In contrast, the project
11 will have a maximum of 26 employees, with only 10 on the largest
12 shift. Rec[ord] 79011. The closest nursery is located just west of the
13 filtration facility site on Carpenter Lane and includes three loading
14 docks with access onto Carpenter Lane. Rec[ord] 7897. The
15 filtration facility will see an average of five trucks per working day.
16 Rec[ord] 7911. Mid- and large-scale nurseries are shown on the map
17 below in the darker blue.

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



1

>>22

2 PWB's Intervenor-Respondent's Brief to PHCA 4-6.

3 The hearing officer found that the area already has pipelines, water
 4 facilities, and large-scale nurseries and that the large-scale nurseries create more
 5 impact on the surrounding area than the proposed facility or proposed
 6 underground pipelines. PWB identifies various places in the findings where
 7 elements of the consistency with character of the area, including issues such as
 8 dust, noise, lighting, and wildlife impacts and the relative impact of large-scale
 9 nurseries, are discussed and we agree with PWB that PHCA does not explain why
 10 these findings are not adequate. PWB's Intervenor-Respondent's Brief to PHCA
 11 26-30. PWB notes that PHCA argues that the finding of fact that large-scale

²² PWB describes its mitigation of its project impacts at PWB's Intervenor-Respondent's Brief to PHCA 7.

1 nurseries are more impactful than the facility is unsupported but supportive facts
2 are in the record at 7894, 7899, and 8037 through 8041. PWB Intervenor-
3 Respondent's Brief to PHCA 46-47. We agree with PWB that PHCA has not
4 identified a basis for remand.

5 We also agree with PWB that we explained in *Tarr* that this criterion
6 requires a multi-factor analysis and the hearings officer conducted such an
7 analysis here. *Tarr*, 81 Or LUBA at 262-63; PWB's Intervenor-Respondent's
8 Brief to PHCA 32. Findings include that project truck traffic is consistent with
9 the character of the area. It is not clear to us, and PHCA does not explain, why
10 improving roads and using roads consistent with the standards adopted by the
11 county is not consistent with the character of the area. Transportation facilities
12 and improvements are an allowed use under MCC 39.4310(J), independent of
13 PWB's project. PWB's Intervenor-Respondent's Brief to PHCA 51.

14 PWB argues *Heiller* does not require a decision maker to adopt findings
15 explaining why it chose not to rely on evidence that conflicts with what was relied
16 upon. PWB's Intervenor-Respondent's Brief to GBSD 15-16 (citing *Kine*, 75 Or
17 LUBA at 427). We agree with PWB that the hearings officer adopted adequate
18 findings supported by substantial evidence identifying the evidence on which
19 they relied to conclude that the water facility is consistent with the character of
20 the area. PHCA's disagreement with those findings is not a basis for remand.

21 PHCA's fourth subassignment of error is denied.

1 GBSD's second assignment of error and PHCA's second, third, and fourth
2 subassignments of error are denied.

3 **PORTION OF RFPD10'S SECOND ASSIGNMENT OF ERROR**

4 **GBSD'S THIRD ASSIGNMENT OF ERROR**

5 MCC 39.7515(F) requires that the hearings officer determine that the
6 community service use "[w]ill not create hazardous conditions[.]" The phrase
7 "hazardous conditions" is not defined in the MCC. The individual terms
8 "hazardous" and "conditions" are also not defined in the MCC. "Generally, when
9 an enacting body like a city council has not defined a term used in its law, we
10 assume that the body used the words consistent with their ordinary meanings."

11 *City of Eugene v. Comcast of Oregon II, Inc.*, 263 Or App 116, 128, 333 P3d
12 1051 (2014), *aff'd*, 359 Or 528, 375 P3d 446 (2016). The hearings officer found,
13 in part:

14 "As an initial matter, I interpret [MCC 39.7515(F)] to mean the
15 application will not create a significant or continuous hazardous
16 condition. Almost any application in the area could create a
17 hazardous condition. The introduction of one new vehicle on the
18 road incrementally increases the chance for a hazardous condition.
19 Almost all uses listed under the Community Services could create
20 hazards just by the nature of their operations: playgrounds, parks,
21 reservoirs, dumps, landfills[,] etc. If any hazard was the test, then
22 none of these would be allowed. I do not believe that is what the
23 legislation intended.

24 "I agree with [PWB's] interpretation of the context of this
25 legislation. [PWB's] Final Rebuttal page 196-197. I agree that the
26 interpretation of 'hazardous condition' means something that is
27 continuously being in a hazardous state not something that could

1 remotely potentially happen. It also has to be a hazard that cannot
2 be mitigated to a point where it is no longer a serious hazard. This
3 comports with my analysis above, a playground could potentially be
4 hazardous. To be denied, [a hazardous condition] would have to be
5 something about the proposal such as an entrance with no sight
6 clearance, a swing set that swung across a road or a sand box that
7 was quicksand, *that created an exceptional, unreasonable,*
8 *continuous and unmitigated hazard.* Just because the playground
9 added trips to the road and incrementally made them more
10 hazardous does not mean it would violate this criterion.” Record 56
11 (emphasis added).

12 Defining the “condition” portion of “hazardous condition” the findings state:

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

21 “Another key element of the criterion that cannot be disregarded in
22 a plain reading of the code language is that the proposed conditional
23 use will not ‘create’ a hazardous condition. As discussed
24 [elsewhere], several of the risks identified by project opponents
25 already exist on the site or in the surrounding area. In those cases,
26 even if those risks could be considered a hazardous condition, the
27 project will not ‘create’ those conditions.” Record 331-32 (footnote
28 omitted).

1 **A. Misconstruction of Law**

2 **1. RFPD10's and GBSD's first subassignments of error²³**

3 GBSD argues that the hearings officer's interpretation is incorrect because
4 it inserts into the criterion the terms "significant," "exceptional," "continuous,"
5 and cannot be "mitigated to a point that is no longer seriously hazardous" in
6 violation of ORS 174.010. Record 56. RFPD10 also argues that the hearings
7 officer has inserted into MCC 39.7515(F) what has been omitted in violation of
8 ORS 174.010.

9 PWB argues that GBSD does not provide an alternative interpretation and
10 does not provide any meaningful *PGE/Gaines* interpretation or address the
11 hearings officer's interpretation. GBSD's interpretation argument is essentially
12 contextual: "Here, the [h]earings [o]fficer improperly adds the qualifying
13 adjectives 'significant' or 'continuous' to evaluate the 'hazardous conditions'
14 prong of the community service use approval criteria. Neither of these terms
15 appear in the community service use approval criteria." GBSD's Intervenor-
16 Petitioner's Brief 15. GBSD asserts that "[t]he term 'significant' is used
17 elsewhere in the MCC nearly 100 times. The term 'continuous' is used 19 times.
18 Had the drafters of MCC 39.7515 wanted to add 'significant' or 'continuous' to

²³ RFPD10 intermingles various arguments that the facts of this case do not support finding this criterion is met and we address these in our resolution of RFPD10's third subassignment of error. Similarly, RFPD10 intermingles interpretational arguments in its third subassignment and we resolve that interpretation subassignment here.

1 MCC 39.7515(F), they would have done so.” GBSD’s Intervenor-Petitioner’s
2 Brief 16. Starting with the text, however, RFPD10 points to *Webster’s* definition
3 of “hazard” as

4 “an adverse chance (as of being lost, injured, or defeated): danger,
5 peril[;] * * * a thing or condition that might operate against success
6 or safety a possible source of peril, danger, duress, or difficulty[;] *
7 * * a condition that tends to create or increase the possibility of
8 loss.”²⁴ RFPD10’s Intervenor-Petitioner’s Brief 26 (quoting
9 *Webster’s* at 1041).

10 RFPD10 observes that this definition does not state that the degree of danger or
11 loss must be significant, serious, or unreasonable and maintains that a hazard
12 exists when there is a chance or increased likelihood of an adverse outcome.
13 RFPD10 then opines that the more appropriate definition of “condition” than
14 PWB’s proposed “mode or state of being” is “something that exists as an
15 occasion of something else[.]” RFPD10’s Intervenor-Petitioner’s Brief 26
16 (quoting Record 331; *Webster’s* at 473). RFPD10 posits, for example, that PWB
17 creates a hazardous condition by locating its facility in a location with existing
18 substandard road conditions.

19 RFPD10 further argues that MCCP policy 2.45 limits community service
20 uses and the policy of MCC 39.4300 calls for the protection of existing uses.

²⁴ To be in “peril” is defined in part as “*the situation or state of being in imminent or fearful danger: exposure (as of one’s person, property, health, or morals) to the risk of being injured, destroyed or lost: a position of jeopardy (in constant [peril] of death).*” *Webster’s* at 1680 (emphasis added.)

1 RFPD10 maintains these provisions do not allow what RFPD10 describes as
2 “urban-scaled” utilities that endanger surrounding uses. See RFPD10’s
3 Intervenor-Petitioner’s Brief 2, 11, 15. RFPD10 cites *Stephens* for the proposition
4 that the criterion requires an unequivocal finding of no hazardous condition. 10
5 Or LUBA at 151-52.

6 MCCP policy 2.45 is under the title “Community Facilities” and provides:
7 “Support the siting and development of community facilities and services
8 *appropriate to the needs of rural areas while avoiding adverse impacts* on farm
9 and forest practices, wildlife, and natural and environmental resources including
10 views of important natural landscape features.” (Emphasis added.) MCC
11 39.4300, the purpose statement for the MUA-20 zone, provides:

12 “The purposes of the Multiple Use Agriculture base zone are to
13 conserve those agricultural lands not suited to full-time commercial
14 farming for diversified or part-time agriculture uses; *to encourage*
15 *the use of non-agricultural lands for other purposes*, such as
16 forestry, outdoor recreation, open space, low density residential
17 development and *appropriate [c]onditional [u]ses, when these uses*
18 *are shown to be compatible with the agricultural uses, natural*
19 *resource base, the character of the area and the applicable [c]ounty*
20 *policies.*” (Emphases added.)

21 Neither of these provisions discusses “urban-scaled” utilities and we understand
22 that the water facility will serve, in part, rural areas.²⁵ The hearings officer’s

²⁵ We observe that MCC 39.7515(G) requires that the community service use be consistent with applicable MCCP policies and that no party argues that the hearings officer’s findings of compliance with MCC 39.7515(G) are in error.

1 interpretation is consistent with MCC 39.7510 which authorizes “reasonable
2 conditions, restrictions or safeguards that would uphold the purpose and intent of
3 this [c]hapter and mitigate any adverse effect.” It is also consistent with our
4 decision in *Stephens* where we concluded that the decision maker was required
5 to make an unequivocal finding as to whether the criterion was met and we
6 rejected the petitioner’s argument that conditions may not be imposed to ensure
7 compliance with the no hazardous conditions criterion. 10 Or LUBA at 151-52.

8 The hearings officer concluded that where a hazard is reduced to an
9 insignificant level, the use has not created a hazardous condition. PWB argues,
10 and the hearings officer agreed, that the hazard has to be continuous because it is
11 part of a condition, where condition is “a mode or state of being.” Record 330-
12 31. The hearings officer also concluded that a contrary interpretation would
13 create an absurd result where essentially nothing is approvable.

14 The hearings officer’s interpretation is supported by MCCP policy 2.50’s
15 policy direction to mitigate impacts, providing:

16 “As part of land use permit approval, impose conditions of approval
17 that mitigate off-site effects of the approved use when necessary to:

18 “1. Protect the public from the potentially deleterious effects of
19 the proposed use; or

20 “2. Fulfill the need for public service demands created by the
21 proposed use.”

22 This interpretation is also supported by the plain meaning of words in the
23 criterion as discussed above. We agree with PWB that the hearings officer did

1 not insert what has been omitted and instead analyzed the terms “hazard,”
2 “create,” and “condition” to determine that the criterion requires that the use
3 create the condition and that the condition be an ongoing state of being.

4 These subassignments of error are denied.

5 **B. Application of Law**

6 **1. Operational Impacts**

7 RFPD10 argues that PWB “creates” a hazardous condition by placing this
8 scale of facility where it will be served by rural roads, maintaining: “16 chemical
9 delivery trucks entering and exiting the site every week for the life of the project
10 on roads that do not currently experience these chemical deliveries, is most
11 certainly a continuous condition that RFPD10 identified as hazardous.”
12 RFPD10’s Intervenor-Petitioner’s Brief 28. RFPD10 asserts that the water
13 facility is creating the hazard by coming into an area with substandard roads and
14 argues the findings include no discussion of substandard roads, impacts on
15 vehicles, pedestrians, bikes, and farm traffic. RFPD10 argues transporting
16 different chemicals on different roads creates a new hazard. RFPD10 argues that
17 if it is appropriate to evaluate reasonableness of the amount of the hazard created,
18 then the hearings officer improperly failed to consider the rural and residential
19 uses in the area. RFPD10 argues it is not reasonable to rely on a statement that it
20 is not possible to know every hazardous material that may be needed and that the
21 condition improperly allows changes based on PWB’s operational demands with
22 no review or input from the public. Compliance with PWB’s Hazardous Materials

1 Mitigation Plan (HMMP) is a condition of approval. The condition of approval
2 requires that PWB review and update the HMMP annually or more frequently as
3 needed to document on-site material or procedural changes and provide the
4 updates to the county and Gresham Fire and Emergency Service. Record 93.
5 RFPD10 argues that the findings and condition are inadequate because they do
6 not give the public notice and an opportunity to comment on amendments to the
7 HMMP.

8 PWB responds that the “character of the area” is evaluated in the hearings
9 officer’s response to MCC 39.7515(A), and the hearings officer was not required
10 to address it in its response to MCC 39.7515(F)’s hazardous condition criterion.
11 We agree.

12 PWB also responds that RFPD10 does not address the hearings officer’s
13 findings which include:

14 “I agree with [PWB] that deliveries of chemicals to the facility is
15 anticipated to be 16 trucks per 5-day work week, or little over 3 per
16 weekday. I find that there are no chemicals that are identified as
17 being highly hazardous delivered to the facility. I find that the
18 chemical truck drivers are trained and will receive site specific
19 driver safety training requirements. Exhibit I.74, page 2. I find that
20 [PWB] is experienced with truck deliveries of chemicals year
21 around. All trucks coming to the facility only equate to
22 approximately 0.4 [percent] and 0.8 [percent] of the background
23 traffic on Dodge Park and Cottrell. Exhibit I.84[,] page 5. Certainly,
24 any use of the shared roads can create hazards. The roads currently
25 have trucks with hazardous chemicals on them now. Because of my
26 findings above and based on [PWB’s] Final Rebuttal pages 207-209,
27 I find that the transport of chemicals to the facility will not create a
28 hazardous condition.” Record 57.

1 RFPD10 does not address the hearings officer's findings that PWB's
2 improvement of roads prior to development of the facility will resolve road
3 deficiencies. RFPD10 does not address the hearings officer's findings that the
4 different nature of the chemicals will not increase hazardous conditions in the
5 area. RFPD10 does not address the hearings officer's conclusion that several of
6 the types of risks opponents identified are already present in the area and
7 therefore not created by the facility. Accordingly, RFPD10 has not established a
8 basis for remand.

9 We agree with PWB that RFPD10 fails to address the hearings officer's
10 findings addressing this criterion as it relates to traffic and fails to explain why it
11 is insufficient. The hearings officer found that levels of service would be
12 maintained consistent with county standards and that PWB agreed to improve
13 road surfaces with a certain rating prior to construction. Record 343-44. The
14 hearings officer found that the relatively minimal traffic generated by the
15 facility's operation would not create a hazardous condition. Record 346. The
16 facility fronts on Carpenter Lane and PWB will improve this local road to meet
17 the county's local road standards and the hearings officer concluded:

18 "[D]uring facility operation bicyclists and pedestrians on Carpenter
19 Lane will continue to share the road with the cars and trucks
20 traveling on the road as they do now. The difference will be that the
21 wider road width and shoulders will provide more room to safely
22 accommodate vehicle and pedestrian travel, and both will benefit
23 from the improved road surface." Record 344.

1 The hearings officer also found that PWB will also improve the Dodge
2 Park/Cotrell and Carpenter/Cottrell intersections that meet and exceed county
3 standards. Record 345. RFPD10 does not explain why these findings are not
4 supported by substantial evidence and are inadequate to support the conclusion
5 that the criterion is met.

6 As PWB observes, the HMMP does not perform the function of the
7 mitigation plan as the one required in *Gould v. Deschutes County* where the
8 applicable criterion required a showing of no net loss or degradation of a resource
9 and the applicable local code required submission of a protection plan. 216 Or
10 App 150, 163, 171 P3d 1017 (2007). PWB argues, and we agree, that the findings
11 state that the HMMP is support for the conclusion that the criterion is met. The
12 findings do not state that the HMMP alone ensures that the criterion is met and
13 RFPD10 does not address these additional findings or explain why they are
14 inadequate. For example, the plan identifies elements of the built facility such as
15 hazardous material storage areas and containment and piping features to prevent
16 chemical release, as well as the HMMP's compliance of any international fire
17 and building code requirements. In *West Hills & Island Neighbors*, we concluded
18 that the community service criterion requiring no hazardous conditions could be
19 met through conditions such as on-site fire fighting procedures, available fire
20 fighting forces off site, and avoid landslide hazards through construction
21 techniques. LUBA No 83-018 (slip op at 24-25).

22 These assignments of error are denied.

1 **2. Conditions of Approval Generally**

2 RFPD10 maintains “[a]ny mitigation conditions that do not serve to
3 eliminate the hazard are insufficient to satisfy the standard.” RFPD10’s
4 Intervenor-Petitioner’s Brief 33. RFPD10 argues that the hearings officer’s
5 finding of no hazardous conditions is not supported by substantial evidence
6 because the hearings officer improperly considered mitigation measures reducing
7 hazards below an exceptional and continuous standard sufficient. In *Davis v. Polk*
8 *County*, we explained that the findings that because some dust would occur, a
9 dust-generating race track was necessarily not harmonious with other dust
10 generating uses, were inadequate. 58 Or LUBA 1, 7 (2008). For the reasons
11 previously stated, mitigation to zero impact is not required in order to avoid
12 creating a hazardous condition and the finding is not insufficient for failing to
13 find any and all risk eliminated.

14 For the reasons discussed above, the hearings officer did not misinterpret
15 the code when they imposed conditions of approval.

16 This subassignment of error is denied.

17 RFPD10’s second and GBSD’s third assignments of error are denied.

18 **RFPD10’S FIRST ASSIGNMENT OF ERROR**

19 **1000 FRIENDS’ FIRST ASSIGNMENT OF ERROR**

20 RFPD10 and 1000 Friends argue that the hearings officer’s conclusion that
21 the facility will not require public services other than those existing or
22 programmed for the area as required by MCC 39.7515(D) reflects a

1 misconstruction of law and is not supported by adequate findings and
2 unsupported by substantial evidence.

3 **A. 1000 Friends’ First Assignment of Error**

4 Statewide Planning Goal 11 (Public Facilities and Services) is “[t]o plan
5 and develop a timely, orderly and efficient arrangement of public facilities and
6 services to serve as a framework for urban and rural development.” 1000 Friends
7 notes that PWB’s treatment facility requires the construction and installation of
8 multiple miles of steel water pipes. 1000 Friends argues that the MCC does not
9 define “public services” but Goal 11 applies to public facilities and services and,
10 within the context of Goal 11, the project area is not “programmed” for what
11 1000 Friends describes as PWB’s urban service level facility. 1000 Friends
12 argues that the proposed filtration facility and pipeline and emergency access
13 road are “public services” not “programmed for the area[.]” MCC 39.7515(D).

14 The hearings officer concluded that the facility itself did not have to be
15 programmed for the area. The hearings officer interpreted “programmed for the
16 area” to mean if a use needed a water line it could be approved if the water line
17 would be installed before the project began operations. The county responds that
18 the hearings officer properly construed the MCC. The county notes that the
19 “programmed for the area” language is included in several other sections of the
20 code and argues that this demonstrates that the proposed use cannot also be the
21 “public services” referenced in the approval criterion.

22 “For example, MCC 39.7615(B)(9) establishes the criteria for

1 regional landfills, a type of ‘public service.’ The ‘public facilities’
2 standard provides:

3 “The Approval Authority shall find that: * * *

4 ““(B)(9) Public Facilities and Services – where all such facilities
5 necessary to serve the landfill are either available or programmed
6 for the area[.]’ MCC 39.7615(B)(9).” Respondent’s Brief 52.

7 The county argues that because this distinguishes between the use and the public
8 facilities necessary to serve the use, the use and the programmed facilities cannot
9 be the same thing. *Id.*

10 The county also points to the MCC 39.4707(A)(3) criterion applicable to
11 dwellings in the Multiple Use Forest zone providing “The dwelling will not
12 require public services beyond those existing or programmed for the area” which
13 clearly distinguishes between the use—the dwelling—and public services
14 necessary to serve the dwelling. The county also contends state law provides
15 additional textual guidance at ORS 197.712(2)(e) which provides in part:

16 “A city or county shall develop and adopt a public facility plan for
17 areas within an urban growth boundary containing a population
18 greater than 2,500 persons. The public facility plan shall include
19 rough cost estimates for public projects needed to provide sewer,
20 water and transportation for the land use contemplated in the
21 comprehensive plan and land use regulation.”

22 ORS 197.712(2)(e) distinguishes the public service facilities from the use being
23 served by those facilities. We agree with the county that the PWB facility and the
24 pipelines are not public services which must be programmed for the area. The
25 county also found that “[a]s stated [previously] the [a]pplication proposes the

1 construction of those facilities and as such [the hearings officer] find[s] that these
2 facilities are ‘programmed for the area’ and the [a]pplication meets the
3 requirement.” Respondent’s Brief 55 (quoting Record 55). We also agree with
4 the hearings officer that the access road is being developed for the water facility
5 and is therefore planned for the area.

6 1000 Friends’ first assignment of error is denied.

7 **B. RFPD10’s First Assignment of Error**

8 **1. RFPD10’s First and Second Subassignments**

9 MCC 39.7515(D) requires that the hearings officer determine that PWB’s
10 use “[w]ill not require public services other than those existing or programmed
11 for the area[.]” RFPD10’s first assignment of error is that the hearings officer
12 “misconstrued [MCC 39.7515(D)] to conclude that the ‘required’ level of
13 services requires nothing more than ‘availability’ or the existence of an
14 undetermined level of emergency services.” RFPD10’s Intervenor-Petitioner’s
15 Brief 8. RFPD10’s second subassignment of error is that the hearings officer
16 misinterpreted the criterion because the correct interpretation of MCC
17 39.7515(D) requires that the hearings officer identify the level of fire and
18 emergency services required to serve the proposed use. RFPD10 also contends
19 that the hearings officer failed to identify the level of fire and emergency services

1 required to serve PWB's use and failed to provide findings responding to issues
2 raised as required by *Norvell*.²⁶ 43 Or App at 853.

3 "Require" is not defined for purposes of MCC 39.7515(D). Accordingly,
4 we look to its plain meaning. RFPD10 cites *Webster's* definition of "require" as
5 "to call for as suitable or appropriate in a particular case[.]" and argues this
6 requires an affirmative expression quantifying and characterizing the demand.
7 RFPD10's Intervenor-Petitioner's Brief 8 (quoting *Webster's* at 1929). RFPD10
8 cites *Webster's* definition of "available" as "such as may be availed of: capable
9 of use for the accomplishment of a purpose[.]" RFPD10's Intervenor-Petitioner's
10 Brief 10 (quoting *Webster's* at 150). RFPD10 argues

11 "[T]he mere existence of [a] functioning rural fire district is
12 woefully inadequate to respond to a criterion that demands a
13 qualitative inquiry into whether a rural service provider has the
14 availability to serve and the required level of service without
15 compromising service to existing rural uses. Without this qualifying
16 evaluation, there is no ability to determine if the 'required' services
17 exist." RFPD10's Intervenor-Petitioner's Brief 10.

18 PWB argues there is no textual or valid contextual support for RFPD10's
19 interpretation. MCC 39.7515(D) requires that the hearings officer determine that
20 PWB's use "[w]ill not require public services *other than those existing or*
21 *programmed for the area.*" (Emphasis added.) "Exist" means "to have actual or

²⁶ RFPD10 maintains: "The hearings officer makes no effort to identify the number or types of trucks, levels or qualification of staffing, required response times or specialty services that might be 'required' in order to support this use." RFPD10's Intervenor-Petitioner's Brief 8.

1 real being whether material or spiritual[.]” *Webster’s* at 796. “Program” means
2 “a plan of procedure: a schedule or system under which action may be taken
3 toward a desired goal: a proposed project or scheme[.]” *Webster’s* at 1812.
4 Definitions of “require” also include “to demand as necessary or essential[.]”
5 *Webster’s* at 1929. PWB argues, and we agree, that MCC 39.7515(D) does not
6 require a specific level of service or that service be classified as adequate but
7 rather that the types of service, such as fire protection, is present or programmed,
8 that is planned to be present, in the area.

9 RFPD10’s first and second subassignments of error are denied.

10 **2. RFPD10’s Third Subassignment**

11 RFPD10’s third subassignment of error is that the evidence is not sufficient
12 to conclude that there are adequate services. Because we denied the first and
13 second subassignments of error, we conclude that MCC 39.7515(D) did not
14 require an evaluation of service capacity and deny this subassignment of error.

15 RFPD10’s third subassignment of error is denied.

16 **3. RFPD10’s Fourth Subassignment of Error**

17 RFPD10’s fourth subassignment of error is that the hearings officer’s
18 alternative findings that there are adequate services available are insufficient and
19 lack support of substantial evidence. Because we deny the first subassignment of
20 error, it is unnecessary for us to reach this subassignment of error.

21 RFPD10’s fourth subassignment of error is denied.

22 RFPD10’s and 1000 Friends’ first assignments of error are denied.

1 **OAN'S SECOND ASSIGNMENT OF ERROR**

2 OAN's second assignment of error is that the hearings officer
3 misconstrued the MUA-20 farm impacts test codified in MCC 39.7515 and erred
4 in concluding that the MUA-20 farm impacts test is less strict than the EFU farm
5 impacts test at ORS 215.275. ORS 215.275(5) provides:

6 "The governing body of the county or its designee shall impose clear
7 and objective conditions on an application for utility facility siting
8 under ORS 215.213(1)(c)(A) or 215.283(1)(c)(A) to mitigate and
9 minimize the impacts of the proposed facility, if any, on surrounding
10 lands devoted to farm use in order to prevent a significant change in
11 accepted farm practices or a significant increase in the cost of farm
12 practices on the surrounding farmlands."

13 OAN states that it preserved this error in the record at Record 3557. PWB
14 argues that OAN has not met its burden to establish the error was preserved.

15 At Record 3557, OAN stated:

16 "The purpose of this letter is to set out the legal framework for the
17 evidence that will be presented by fact witnesses at the hearing in
18 this matter, especially as to the county's protection of ongoing,
19 accepted farm practices under MCC 39.7515(C). The impacts of
20 [PWB's] proposed facility and related pipelines, and especially
21 those impacts arising during the projected five-year construction
22 period, would result in continuous, ongoing violation of this
23 provision. In any event, as we will explain, PWB has come nowhere
24 near meeting its burden of proof herein and apparently perceives no
25 need to do so.

26 "The Farm Impacts Test

27 "The fundamental approval criteria for the proposed Community
28 Service use are contained in MCC 39. Section 39.7515(C) requires
29 a showing that:

1 “(C) The use will not:

2 “(1) Force a significant change in accepted farm or forest
3 practices on surrounding lands devoted to farm or
4 forest use[.]” Record 3557.

5 Record 3557 does not set out an interpretation of the MUA-20 farm impacts test.

6 However, at Record 3558, OAN continues the introduction provided at Record
7 3557:

8 “(2) Significantly increase the cost of accepted farm or forest
9 practices on surrounding lands devoted to farm or forest use.

10 “This is often referred to as the ‘farm impacts’ test, and tracks
11 precisely with the language of ORS 215.296(1) regarding
12 conditional uses on lands designated for agricultural use, except that
13 the county uses the connector ‘nor’ rather than ‘or’ to make its
14 meaning even more clear. We would also note that the statute
15 contains an added provision allowing for mitigation of farm impacts
16 by means of conditions of approval. However, the county chose not
17 to include that provision. This reflects a desire on the part of the
18 county to provide even more protection for farming in the face of
19 proposed conflicting uses.” (Footnote omitted.)

20 Thus, OAN argued that the MUA-20 code is more restrictive than the statutory
21 farm impacts test in 215.296 because it does not provide for conditions.²⁷ Again,
22 ORS 215.296 provides, in part:

23 “(1) A use allowed under ORS 215.213(2) or (11) or 215.283(2)
24 or (4) may be approved only where the local governing body
25 or its designee finds that the use will not:

²⁷ We note that as we have previously discussed, MCC 35.7510 provides for conditions.

1 “(a) Force a significant change in accepted farm or forest
2 practices on surrounding lands devoted to farm or
3 forest use; or

4 “(b) Significantly increase the cost of accepted farm or
5 forest practices on surrounding lands devoted to farm
6 or forest use.

7 “(2) An applicant for a use allowed under ORS 215.213(2) or (11)
8 or 215.283(2) or (4) may demonstrate that the standards for
9 approval set forth in subsection (1) of this section will be
10 satisfied through the imposition of conditions. Any conditions
11 so imposed shall be clear and objective.”

12 In its assignment of error, OAN argues that the hearings officer erred in
13 finding the MUA-20 farm impacts test was different and less stringent than the
14 same test *under ORS 215.275* which the county code implements. First, we note
15 that OAN does not identify where in the decision the hearings office determined
16 that the MUA-20 test was in fact less stringent. Failure to provide a citation
17 increases the difficulty of reviewing OAN’s argument, particularly where PWB
18 argues and we agree, that the hearings officer determined that while the county
19 could interpret its code less stringently, they would not do so. Record 46; PWB’s
20 Intervenor-Respondent’s Brief to OAN 24. In any event, for purposes of
21 preservation, OAN has not identified where in the record it argued an
22 interpretation of ORS 215.275 was relevant to the hearings officer’s decision and
23 the alleged interpretive analysis required. PWB’s Intervenor-Respondent’s Brief
24 to OAN 21. OAN argues that the decision was required to use *PGE/Gaines* to
25 evaluate how ORS 215.275 and MCC 39.7515 interact where the provisions

1 apply to different parts of the project but does not identify where this issue was
2 preserved below.

3 OAN’s second assignment of error is denied.²⁸

4 **OAN FOURTH ASSIGNMENT OF ERROR**

5 **A. Misconstruction of Law**

6 MCC 39.7515(C)(1) requires that the hearings officer evaluate the effect
7 of the community service use on forest practices on “surrounding lands.” OAN
8 argues that the hearings officer misconstrued the law in concluding that they have
9 discretion in defining the “surrounding lands.” OAN’s Intervenor-Petitioner’s
10 Brief 36. As PWB acknowledges, we discussed identifying the relevant
11 “surrounding lands” in *Hood River Valley PRD*, explaining that in looking at that
12 term as it is used in ORS 215.296(1):

13 “Determination of the scope of ‘surrounding lands’ is the first step
14 in applying ORS 215.296(1), and a critical step, since that
15 determination circumscribe the universe of potential farm practices
16 to which the significant change/increase standard will be applied.
17 The statute does not define the term ‘surrounding lands.’ Generally,
18 a local government has significant discretion in determining the
19 scope of surrounding lands. However, limiting the scope of analysis
20 to the notice area or another arbitrary distance may be insufficient,
21 if that results in failure to consider substantial evidence of
22 significant impacts to accepted farm practices on lands beyond that

²⁸ As relevant, we address ORS 215.296(1) earlier in this decision and determine that it is not applicable to PWB’s water treatment facility and the MUA-20 zone. See *Cottrell Community Planning Organization v. Multnomah County*, LUBA No 2023-086 (Jan 22, 2025) (slip op at 16).

1 arbitrary distance.” 67 Or LUBA at 319-20 (internal citations
2 omitted).

3 We stated that the government does generally have significant discretion and that
4 the hearings officer did not misconstrue ORS 215.296 in so finding. We did not
5 state that the local government has unlimited discretion and also concluded:

6 “Stated differently, ‘surrounding lands’ for purposes of ORS
7 215.296(1) are those lands in such proximity to the proposed ORS
8 215.213(2) and ORS 215.283(2) conditional use that the
9 externalities or sensitivities of the proposed use could potentially
10 cause significant changes in or significantly increase the cost of
11 accepted farm practices on nearby lands.” *Id.* at 321.

12 The hearings officer did not misconstrue the “surrounding lands” reference
13 in the MUA-20 standard applicable to land that is not zoned EFU to also provide
14 significant discretion.

15 **B. Adequacy of Findings**

16 OAN also argues that the hearings officer’s findings are inadequate. OAN
17 argues that the decision lacks adequate findings because it does not respond to
18 the Oregon Department of Agriculture’s (ODA) reasoning for defining
19 “surrounding lands.” OAN’s Intervenor-Petitioner’s Brief 37 (quoting Record
20 3734). PWB responds that the hearings officer expressly rejected ODA’s position
21 in his findings. The hearings officer stated that the ODA testimony gave them
22 “pause” regarding the need for a larger surrounding lands analysis but agreed
23 with PWB that a larger area was not required by law. Record 48. The hearings
24 officer adopted adequate findings.

1 **C. Substantial Evidence**

2 OAN also argues that the hearings officer made a decision not supported
3 by substantial evidence in concluding that the decision correctly evaluated the
4 surrounding lands for purposes of the farm impacts test where the recommended
5 consideration was for a larger area. OAN’s Intervenor-Petitioner’s Brief 35. OAN
6 explains that ODA recommended a large definition of study area because the
7 surrounding farms are:

8 “[H]ighly dependent on the movement (shipping and receiving) of
9 their products by tractor-trailer trucks. Most area nursery and
10 greenhouse products are moved to and from area farms towards
11 Interstate Highway 84 and U.S. Highway 26. It is common practice
12 for farmers to share loads with other operators. Two (or more) farms
13 may have product that needs to be shipped to the east coast, but each
14 separately would fill only half a load. Together, the two farms can
15 fill a truck. Without the ability to move product efficiently between
16 farms and ultimately to the major area highways, area farms would
17 face significant increase in costs and decrease the availability of
18 acquiring timely transport.” OAN’s Intervenor-Petitioner’s Brief 37
19 (quoting ODA testimony at Record 3734).

20 OAN also argues that the hearings officer analyzed a too small area of land. The
21 hearings officer accepted the opinion of PWB’s expert concluding:

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

26 “The fact that some nursery loads are filled by two or more
27 nurseries, some of which might be long distances from the [PWB]
28 projects, does not require a study area larger than is defined in the
29 [PWB] reports. Both for operations and construction traffic, Global
30 Transportation Engineering evaluated key intersections in the

1 Surrounding Lands and concluded that, with [Transportation
2 Demand Management] strategies, impacts to intersection and
3 roadway operations due to construction and operations traffic from
4 the [p]roject will be minimal even under conservative analysis
5 assumptions that take into consideration roadway closures due to
6 pipeline construction. In preparing this response, the transportation
7 engineer at Global Transportation Engineering, Dana Beckwith,
8 confirmed via email that there are no significant impacts shown by
9 his analysis in the Surrounding Land study area and that the traffic
10 will tend to disburse and have less impact as item moves further
11 away from the filtration facility and pipelines. Given that response,
12 the Surrounding Lands as selected and analyzed is fully adequate.”
13 Record 48, Record 265.

14 In relying on PWB’s expert, the hearings officer’s findings are supported by
15 substantial evidence.

16 OAN’s fourth assignment of error is denied.

17 **OAN THIRD ASSIGNMENT OF ERROR**

18 OAN’s third assignment of error is that the decision lacks adequate
19 findings related to farm-by-farm determinations of accepted farm practices, the
20 significant impacts to those practices, and associated costs. OAN identifies this
21 issue as preserved at Record 3564. PWB argues that this is an insufficient
22 statement of preservation as the record is over 8000 pages long and Record 3564
23 does not direct us to specific farm practices raised below which OAN argues the
24 hearings officer failed to address.

25 OAN does not direct us to any specific language at Record 3564. Record
26 3564 is part of a discussion about whether conditions may be imposed to address

1 farm impacts. Without quoted language from OAN, we assume the language at
2 Record 3564 we are to consider is:

3 “[T]here is no evidence that [a transportation demand management
4 plan] would feasibly eliminate significant impacts on farm practices
5 and the costs of those practices as required by MCC 39.7515(C).

6 “In this regard, we do not intend criticism of county [t]ransportation
7 staff. They worked with only the limited information provided by
8 PWB and without the volume of evidence of farm practices to be
9 adduced at your hearing. As a result, they necessarily failed to
10 propose workable condition to the extent that that conditioning is
11 permissible and can or will be effective here.” Record 3564-65.

12 First, OAN argues that the hearings officer “completely failed” to “apply
13 the farm impact[s] test to individual farms.” OAN’s Intervenor-Petitioner’s Brief
14 26. OAN argues that the decision adopts PWB’s findings with no independent or
15 particularized analysis. *Id.* at 27. OAN argues

16 “The [d]ecision merely adopts in sum the findings from [PWB’s]
17 final submittal and proffers no independent or particularized
18 analysis. This is particularly erroneous because [the county]
19 received dozens of highly specific comments from nearby farm
20 operators evidencing adverse farm impacts in the record. Yet the
21 [d]ecision failed to analyze this expert evidence of farm impacts on
22 a farm-by-farm basis.” *Id.*

23 OAN does not identify where this assignment of error was preserved or
24 establish that preservation was not required. The hearings officer accepted the
25 analysis in the reports prepared by PWB’s expert. Although we agree with OAN
26 that a farm-by-farm analysis is required, we agree with PWB that OAN has not

1 identified where it preserved an argument that the studies ultimately relied upon
2 by the hearings officer did not contain an adequate farm-by-farm analysis.

3 In the body of its argument, OAN points to testimony from a farmer
4 regarding the need to purchase expensive headphones and respiratory gear. OAN
5 Intervenor-Petitioner's Brief 28. Testimony from Nerison of Surface Nursery and
6 Holt of R&H Nursery, Inc. also is cited. *Id.* at 27-29. OAN also argues that
7 relying on county staff conclusions that farm related transportation issues
8 identified are fully addressed are inadequate because staff are not farming
9 experts. As PWB points out, the hearings officer adopted reports including farm-
10 by-farm responses, including at Record 675-699. OAN does not explain why
11 these responses are inadequate and thus fails to develop this assignment of error.

12 OAN's third assignment of error is denied.

13 **1000 FRIENDS' SECOND ASSIGNMENT OF ERROR²⁹**

14 1000 Friends' second assignment of error is that the hearings officer
15 misconstrued the law when they determined that construction impacts are
16 temporary and that "temporary construction impacts do not have to be

²⁹ Relatedly, in a subassignment of its assignment of error that the hearings officer erred in their application of MCC 39.7515(A), PHCA argued that "PWB's consultant provided mapping and some justification for a constricted scope of 'surrounding lands.' R[ecord] 7148-52, 7764-66. Opponents submitted evidence proving the relevance of a far larger extent of the area and surrounding lands suffering farm impacts under MCC 39.7515(C)." PHCA's Intervenor-Petitioner's Brief 19. PHCA did not develop an assignment of error related to compliance with MCC 39.7515(C).

1 considered[]’ when determining whether the use could force a significant change
2 in or increase in the cost of accepted farm practices under MCC 39.7515(C) or
3 ORS 215.296.” 1000 Friends’ Intervenor-Petitioner’s Brief 20 (quoting Record
4 47). 1000 Friends explains:

5 “[T]he only bright line rule that [1000 Friends] seeks is one that does
6 not prohibit the consideration of construction -related impacts under
7 the MUA-20 conditional use scheme and on lands zoned EFU.
8 Under this fact-based analysis, utility uses will only be disallowed
9 on MUA-20 or EFU land where, as part of a cumulative impact
10 review, construction has a significant impact on accepted farm
11 practice or significantly increase the cost of farming.” 1000 Friends’
12 Intervenor-Petitioner’s Brief 19-20.

13 The assignment of error therefore has two parts: (1) MCC 39.7515(C) on MUA-
14 20 land, and (2) the application of the state statute’s farm impacts test.

15 For the reasons set forth in our resolution of Cottrell’s Second Assignment
16 of Error, the hearings officer’s decision does not misconstrue the application of
17 MCC 39.7515(C) on MUA-20 land and this first part of the assignment of error
18 is denied.

19 We proceed to the application of the state statute farm impacts test. We
20 understand the pipelines on EFU lands to be authorized as utility facilities
21 necessary for public service, a use authorized by ORS 215.283(1) and ORS
22 215.275, not ORS 215.283(2) and ORS 215.296.³⁰ ORS 215.275(5) is, however,

³⁰ ORS 215.283 states, in relevant part:

1 similar to ORS 215.296 and the parties do not assign error to the hearings
2 officer's references to ORS 215.296 rather than ORS 215.275. We proceed
3 accordingly.

4 1000 Friends argues that the hearings officer misconstrued the law in
5 concluding that they were not required to consider construction impacts. 1000
6 Friends argues *Von Lubken v. Hood River County*, supports the conclusion that

“(1) The following uses may be established in any area zoned for
exclusive farm use:

“* * * * *

“(c) Utility facilities necessary for public service, including
wetland waste treatment systems but not including
commercial facilities for the purpose of generating electrical
power for public use by sale or transmission towers over 200
feet in height. A utility facility necessary for public service
may be established as provided in:

“(A) ORS 215.275; or

“(B) If the utility facility is an associated transmission line,
as defined in ORS 215.274 and 469.300.”

ORS 215.275(5) provides:

“The governing body of the county or its designee shall impose clear
and objective conditions on an application for utility facility siting
under ORS 215.213(1)(c)(A) or 215.283(1)(c)(A) to mitigate and
minimize the impacts of the proposed facility, if any, on surrounding
lands devoted to farm use in order to prevent a significant change in
accepted farm practices or a significant increase in the cost of farm
practices on the surrounding farmlands.”

1 cumulative impacts on farms must be considered, and necessarily include
2 construction. 118 Or App 246, 251, 846 P2d 1178, *rev den*, 316 Or 529 (1993);
3 *see also Von Lubken v. Hood River County*, 28 Or LUBA 362, 365-69 (1994),
4 *aff'd*, 133 Or App 286, 891 P2d 5 (1995). 1000 Friends also points to *Stop the*
5 *Dump*, which concerned an application to expand a landfill on EFU land. 364 Or
6 432. 1000 Friends argues that *Stop the Dump* goes through the legislative history
7 of the farm impacts test and establishes that the focus of the farm impacts test is
8 on preserving land in productive agriculture and that agriculture uses not be
9 displaced by, or subject to interference from, nonfarm uses. 1000 Friends argues
10 that policies supporting the preservation of agricultural land support interpreting
11 the farm impacts test to require consideration of construction impacts, as do cases
12 requiring consideration of cumulative impacts of farm uses.

13 We do not agree with 1000 Friends that consideration of cumulative
14 impacts of the *use* as required by state law requires consideration of the impacts
15 of construction activity. The hearings officer found, and we agree:

16 “The text of ORS 215.296(1) provides that it is the ‘use allowed
17 under [the EFU statutes]’ that is to be evaluated. ORS 215.296(1)
18 refers to four locations of uses subject to its test: ORS 215.213(2);
19 ORS 215.213(11); ORS 215.283(2); ORS 215.283(4). The vast
20 majority of the uses describe[] the ultimate use, rather than
21 construction. There are a few select categories that address
22 construction directly, such as ORS 215.283(2)(q) (‘Construction of
23 additional passing and travel lanes * * *’) and ORS 215.283(2)(r)
24 (‘Reconstruction or modification of public roads and highways * *
25 *’). This context further supports the analysis that for this project –
26 which would be a ‘utility facility necessary for public service’ in

1 EFU – construction is not the subject to be evaluated under the test.
2 The legislature knew how to call out and regulate construction when
3 that was the intended result. *See Springfield Utility B[oard] v.*
4 *Emerald [PUD]*, 339 Or 631, 642, 125 P3d 740 (2005) (“[U]se of a
5 term in one section and not another section of the same statute
6 indicates a purposeful omission[.]” (quoting *PGE*, 317 Or at 611)).”
7 Record 261.

8 We also agree with PWB that legislative policy directed at the preservation of
9 land in agriculture use does not displace the text of the legislation itself. We
10 also observe that the presence of nonfarm uses in the list of uses allowed or
11 conditionally allowed on EFU land in ORS 215.283 evidence legislative intent
12 to allow some nonfarm uses, appropriately conditioned, to occur directly on
13 EFU land.

14 1000 Friends’ second assignment of error is denied.

15 **1000 FRIENDS’ THIRD ASSIGNMENT OF ERROR**

16 1000 Friends’ third assignment of error is that the hearings officer adopted
17 inadequate findings not supported by substantial evidence and erred in not
18 considering construction related transportation impacts on accepted farm
19 practices. This assignment of error is reliant on our sustaining 1000 Friends’
20 second assignment of error and concluding that the hearings officer was required
21 to consider construction related impacts. Because we conclude that the applicable
22 laws do not require consideration of construction impacts, this assignment of
23 error is denied.

24 1000 Friends’ third assignment of error is denied.

1 **COTTRELL THIRD ASSIGNMENT OF ERROR**

2 **A. Introduction**

3 The hearings officer found that the community service use “[w]ill not
4 adversely affect natural resources[,]” as required by MCC 39.7515(B) (the
5 natural resources criterion). Portions of the pipeline run through property that is
6 within overlays for Significant Environmental Concern for wildlife habitat (SEC-
7 h) and water resources (SEC-wr). The hearings officer found that the natural
8 resources criterion was met for the water filtration facility because it is outside
9 the SEC-h and SEC-wr overlays. With respect to the Lusted Hill Distribution
10 Main pipeline the hearings officer found that the natural resources criterion was
11 met because, while the pipeline would go through the SEC-wr overlay, it would
12 be installed via boring at a depth of 390 feet underground.

13 The hearings officer concluded that a pipeline connection occurring in the
14 SEC-wr overlay was exempt from an SEC permit requirement under MCC
15 39.5515(A)(24).³¹ The hearings officer determined the raw water pipeline will be
16 bored except at its connection for which PWB has applied for an SEC-h permit.

³¹ MCC 39.5515(A) states, in part:

“Except as provided in subsection (B) of this [s]ection, an SEC permit shall not be required for the following:

“* * * * *

“The placement of utility infrastructure such as pipes, conduits and wires within an existing right-of-way.”

1 The hearings officer found that the rest of the pipelines and intertie site were
2 designed to avoid disturbing any natural resources that the county has inventoried
3 as significant Statewide Planning Goal 5 (Natural Resources, Scenic and Historic
4 Areas, and Open Spaces) resources. Record 42. The hearings officer also relied
5 on a PWB exhibit list at Record 228 and stated that they found PWB's expert
6 more persuasive and also found an environmental impact statement finding of no
7 significant impact persuasive. The hearings officer accepted PWB's argument at
8 Record 229 through 231, and Record 353 through 354, and accepted PWB's
9 arguments in its final written argument at Record 234 through 257. The hearings
10 officer also found that the Comprehensive Plan Natural Resources Topics and
11 Policies were met.

12 In their third assignment of error, Cottrell argues that the hearings officer
13 misconstrued the law and made inadequate findings unsupported by substantial
14 evidence.

15 **B. First Subassignment of Error**

16 Goal 5 is "[t]o protect natural resources and conserve scenic and historic
17 areas and open spaces." Goal 5 requires counties to identify, inventory, and make
18 decisions concerning multiple resources, including, as pertinent here, wildlife
19 habitat and other natural resources. *See* OAR 660-023-0030 (inventory process).
20 For each identified resource site, counties are required to adopt comprehensive
21 plan provisions and land use regulations. OAR 660-023-0050 (programs to
22 achieve Goal 5). These provisions are generally referred to as programs to

1 achieve Goal 5 or Goal 5 programs. The county’s Goal 5 program includes the
2 SEC overlays at issue in this appeal.

3 The hearings officer concluded that only natural resources inventoried by
4 the county as Goal 5 significant natural resources are eligible for consideration
5 under MCC 39.7515(B). Cottrell argues that the hearings officer misconstrued
6 the law because the plain language of MCC 39.7515(B) does not the modify
7 “natural resources” with “significant,” that the MCC specifies “significant”
8 resources where it intends to apply that limitation and that the hearings officer’s
9 interpretation violates ORS 174.010 and inserts what has been omitted.

10 Cottrell argues that the MCCP does not establish through any express
11 statement that an SEC overlay is the only way natural resources are identified or
12 protected. Cottrell contends that the county adopted the community use natural
13 resources criterion before 1983, which was well before the county adopted the
14 applicable SEC overlays after 2002. Petition for Review 35. Thus, Cottrell
15 argues, the Goal 5 program reflected by the SEC overlays is not relevant context
16 for construing the community use natural resources criterion. Cottrell maintains
17 that the “interpretation that finds that MCC 39.7515(B) can be satisfied entirely
18 and completely through compliance with SEC review would make MCC
19 39.7515(B) a nullity and is not the correct approach. ORS 174.010.” Petition for
20 Review 34. Cottrell argues that the purpose of the SEC overlay is to protect
21 *significant* natural resources and that it does not replace or limit the requirement
22 in MCC 39.7515(B) to avoid adversely affecting natural resources. Cottrell

1 references MCCP policy 2.45, which is listed under Community Service, again
2 and notes its reference to avoiding adverse impacts on protection of “natural
3 resources”:

4 “Support the siting and development of community facilities and
5 services appropriate to the needs of rural areas while avoiding
6 adverse impacts on farm and forest practices, wildlife, and natural
7 and environmental resources including views of important natural
8 landscape features.”

9 The hearings officer agreed with and incorporated by reference PWB’s
10 interpretation that the only “natural resources” protected from adverse affects by
11 MCC 39.7515(B) are those within SEC overlays. Record 43. The hearings officer
12 identified two previous cases in which hearings officers interpreted the natural
13 resources criterion in this manner. Record 232-33. The hearings officer stated
14 that the county’s Goal 5 process is set out in MCCP chapter 5 “Natural
15 Resources.” MCCP chapter 5’s introduction discusses the local importance of
16 natural resources and

17 “Goals 5 (Natural Resources, Scenic and Historic Areas, and Open
18 Spaces) and [Statewide Planning Goal] 6 (Air, Water, and Land
19 Resources Quality) of Oregon’s statewide planning goals require
20 cities and counties to plan for the management and protection of
21 *natural resources*, including maintaining air, land, and water quality
22 and protecting riparian corridors, wetlands, and wildlife habitat.
23 [Statewide Planning] Goal 15 (Willamette River Greenway) also
24 protects the Willamette River and includes requirements for land
25 uses and other activities adjacent to it. These goals and their
26 associated administrative rules call for cities and counties to
27 inventory *significant natural resources* and create and implement
28 programs to protect them from impacts associated with land use and
29 development.” MCCP 5-2 (emphases added).

1 The MCCP chapter 5’s introduction includes the statement:

2 “This chapter provides an overview of conditions and planning
3 issues associated with *natural resources* and environmental quality,
4 along with Comprehensive Plan policies and strategies to address
5 them, including the following topics:

6 “• Water quality and erosion control

7 “• Rivers, streams, and wetlands

8 “• Wildlife habitat

9 “• Air quality, and noise and lighting impacts

10 “• Scenic views and sites

11 “• Tree protection

12 “• Wilderness areas

13 “• Mineral and energy resource” MCCP 5-2 (emphasis added).

14 MCCP chapter 5 states in part:

15 “Figures [in MCCP chapter 5] illustrate riparian areas (creeks,
16 streams, rivers and other bodies of water) that have been inventoried
17 and identified as *significant riparian resources* in the rural areas of
18 the [c]ounty. Riparian areas labeled as SEC Water Resource (SEC-
19 WR) and SEC Steams (SEC-S) are those streams subject to the
20 [c]ounty’s Significant Environmental Concern overlays for water
21 resources and streams respectively.

22 “* * * * *

23 “Multnomah County protects water quality, ecological function, and
24 wildlife habitat associated with streams and rivers through the
25 [c]ounty’s Significant Environmental Concern (SEC) overlay zones
26 for streams and water resources (SEC-s and SEC-wr), scenic

1 waterways (SEC-sw), significant wetlands (SEC-w) wildlife habitat
2 (SEC-h), and Willamette River Greenway (WRG).” M CCP 5-3
3 (emphasis added).

4 The hearings officer found that Goal 5 requires that the county collect
5 adequate information about Goal 5 resource sites, determine the significance of
6 the resource sites, and adopt a list of such sites and

7 “Once these resources are identified, Goal 5 requires an Economic,
8 Social, Environmental, and Energy analysis to determine which
9 Goal 5 natural resources will be protected. Importantly there, OAR
10 660-023-0030(6) states:

11 ““Local governments may determine that a particular resource
12 site is not significant, provided that they maintain a record of
13 that determination. Local governments shall not proceed with
14 the Goal 5 process for such sites and shall not regulate land
15 uses in order to protect such sites under Goal 5.””

16 “Thus, Goal 5 clearly distinguishes between natural resources that
17 can be regulated in a local code under Goal 5 and Goal 5 resources
18 that cannot, as a matter of law, be regulated under a local code.”
19 Record 229-30.

20 PWB’s statement that “Goal 5 clearly distinguishes between natural
21 resources that can be regulated in a local code under Goal 5 and Goal 5 resources
22 that cannot, as a matter of law, be regulated under a local code[]” is adopted by
23 the hearings officer as a finding. Record 230. The findings later acknowledge,
24 however:

25 “This is not to say that the [c]ounty could not adopt another program
26 to protect non-significant resources, unrelated to Goal 5. But the
27 [c]ounty has not done that here. The [c]ounty has expressly
28 determined ‘natural resources’ are defined as those resources that
29 have been inventoried and evaluated as significant and thus are

1 subject to regulations that minimize impact on the resource.” Record
2 231.

3 The purpose of the SEC regulations is set out in MCC 39.5500 which
4 provides:

5 “The purposes of the Significant Environmental Concern Overlays,
6 MCC 39.5500 through MCC 39.5860 (collectively, the ‘SEC’) are
7 to protect, conserve, enhance, restore, and maintain *significant*
8 *natural* and human-made *features which are of public value*,
9 including among other things, river corridors, streams, lakes and
10 islands, domestic water supply watersheds, flood water storage
11 areas, natural shorelines and unique vegetation, wetlands, wildlife
12 and fish habitats, significant geological features, tourist attractions,
13 archaeological features and sites, and scenic views and vistas, and
14 *to establish criteria, standards, and procedures for the development,*
15 *change of use, or alteration of such features or of the lands adjacent*
16 *thereto.”* (Emphases added.)

17 MCC 39.5540, “Criteria for Approval of SEC Permit” provides, in part:

18 “The SEC designation shall apply to those *significant natural*
19 *resources*, natural areas, wilderness areas, cultural areas, and wild
20 and scenic waterways *that are designated SEC on [the] Multnomah*
21 *County Zoning Map.”*

22 Although the hearings officer reviewed other cases and concluded the
23 county consistently interpreted natural resources to mean those located within an
24 SEC overlay, the parties do not argue prior hearings officer decisions are binding.
25 PWB argues, however, that Cottrell is incorrect to state that the hearings officer’s
26 interpretation makes MCC 39.7515 provision a nullity because the “not adversely
27 affect” standard still applies, it just only applies to resources in an SEC overlay.
28 PWB argues that accepting Cottrell’s argument that no adverse impacts on non-
29 inventoried natural resources is allowed under MCC 39.7515 would give non-

1 inventoried resources more protection than those within SEC overlays because,
2 unlike the SEC criteria, the community service criterion requires no adverse
3 affect.

4 PWB argues M CCP chapter 5 is titled "Natural Resources" and because
5 the county adopted M CCP chapter 5, "it embodies the intent of the [c]ounty in
6 defining the meaning of the term 'natural resource.'" PWB's Intervenor-
7 Respondent's Brief to Petition for Review 24. PWB argues the hearings officer

8 "construed the plain language of these provisions to conclude that
9 (1) the M CCP is appropriate context for construing undefined terms
10 in the MCC; (2) M CCP [c]hapter 5 uses the same term 'natural
11 resources' to define categories of 'natural resources' that the
12 [c]ounty intends to regulate; (3) that these 'natural resource'
13 categories are explicit in the M CCP and offer a definition list of
14 resource intended for regulation; and (4) that the categories of
15 'natural resources' that the county intended to protect are those that
16 they selected for protection through application of the SEC
17 Overlay." PWB's Intervenor-Respondent's Brief to Petition for
18 Review 25-26 (citing Record 230-32, 43).

19 We agree with Cottrell that the hearings officer misconstrued the code
20 when they concluded that "natural resources" in MCC 39.7515(B) includes only
21 those significant resources included in SEC overlays. We do not find support for
22 the argument that the title of M CCP chapter 5 serves as a definition of "natural
23 resources" for purposes of MCC 39.7515(B). The M CCP glossary explains that
24 within the context of the M CCP, "natural resource" is defined as: "Generally, a
25 functioning natural system, such as a wetland or a stream, wildlife habitat or
26 material in the environment used or capable of being used for some purpose, also

1 including minerals and fuels, agricultural resources and forests[.]”³² MCCC App
2 B, at 7. Although the glossary is intended as a “convenience” it contradicts the
3 hearings officer’s conclusion that “natural resource” as used in MCC 39.7515(B)
4 and MCCC chapter 5 means only significant natural resources.³³

5 We explained in *Home Builders Assoc. v. City of Eugene*, that we had been
6 directed to no authority requiring “that the city in all cases apply Goal 5 and the
7 Goal 5 rule before it amends its acknowledged land use regulations to protect
8 resources that are indisputably not part of the city’s acknowledged inventory of
9 Goal 5 resources.” 41 Or LUBA 370, 426-27 (2002). As Cottrell noted, MCCC

³² A glossary is not a dictionary but rather “a collection of textual glosses
* * * or of terms limited to a special area of knowledge [.]” *Webster’s* at 967.

³³ The MCCC glossary states that it

“includes common definitions of terms used in the [MCCC] and is intended as a convenience to help readers better understand some of the terms used in the [MCCC]. Definitions for terms used in this [c]omprehensive [p]lan that are defined in the Multnomah County Zoning Ordinance or in state statutes or administrative rules are found in those documents and those definitions control in the case of any conflict between those documents and those definitions control in the case of any conflict between those definitions and any statement in this Comprehensive Plan. Lastly, because the definitions in this [g]lossary are intended solely for the convenience of the reader in conveying a general idea of the meaning of terms used in this [p]lan, nothing in this [c]omprehensive [p]lan prohibits the [c]ounty from previously or subsequently defining any term, whether in the [z]oning [o]rdinance or otherwise, in a manner that may or does conflict with the meaning of any term used in this [p]lan.” MCCC App B, at 2.

1 policy 2.45 references “natural resources” and the community service criteria in
2 MCC 39.7515 predates the Goal 5 SEC program described in MCCP chapter 5.
3 We agree with Cottrell that the MCCP and MCC use “significant natural
4 resources” in some instances and “natural resources” in others and we conclude
5 that different terms are intended to have different meaning. A county may elect
6 to regulate natural resources not included in the county’s Goal 5 inventory and
7 we agree with Cottrell that the county did so in MCC 39.7515(B). Accordingly,
8 we agree that the hearings officer misconstrued MCC 39.7515(B). On remand,
9 the hearings officer should determine whether any natural resources will be
10 affected by the community service use and must find that the proposed use will
11 not adversely affect those natural resources.

12 Cottrell’s misconstruction of law assignment of error is sustained.

13 **C. Second Subassignment of Error**

14 The hearings officer’s findings addressing the “will not adversely affect
15 natural resources” criterion included that “[o]utside of identified Goal 5
16 resources, [PWB’s] Final [A]rgument demonstrates that, as conditioned, the
17 application would comply with listed Comprehensive Plan Natural Resource
18 Topics and Policies.” Record 43. Cottrell’s second subassignment of error is that
19 the hearings officer could not rely on findings that natural-resources-focused
20 MCCP policies substitute for a finding of no adverse effect to natural resources
21 because consistency with MCCP chapter 5 policies is in fact required by MCC

1 39.7515(G). Cottrell argues that there is no evidence that compliance with the
2 MCCC policies satisfies the MCC 39.7515(B) natural resources criterion.

3 PWB points out that these findings begin with the statement that “the
4 record demonstrates that the project, with the imposition of the recommended
5 conditions of approval, will not adversely affect the natural resources identified
6 through the policies under each topic in MCCC [c]hapter 5.” Record 234, 43
7 (footnote omitted). PWB states “The standard was applied to all natural resource
8 categories as identified in MCCC [c]hapter 5; [Cottrell] would just prefer it apply
9 to a broader range of resources of their selection.” PWB’s Intervenor-
10 Respondent’s Brief to Petition for Review 32. PWB argues that Cottrell’s
11 interpretation “is inconsistent with the [c]ounty’s prior interpretations of the same
12 language, and would, in effect, require the [c]ounty to regulate ‘natural resources’
13 [that] the [c]ounty * * * chose not to regulate through Goal 5, MCCC [c]hapter
14 5, or the SEC Overlay.” *Id.*

15 PWB does not respond to Cottrell’s assertion that the hearings officer did
16 not accept PWB’s argument that MCCC chapter 5 established the scope of natural
17 resources required to be considered. Petition for Review 36 n 6; Cottrell Reply 4.
18 We agree with PWB that the hearings officer adopted the PWB findings with
19 respect to MCCC policies 5.5, 5.6, 5.7, 5.11, 5.14, 5.18, 5.25, 5.26, 5.27, 5.40,
20 5.41, and 5.43. Record 43. We agree with Cottrell, however, that consistency with
21 applicable MCCC policies is required by a different approval criterion. For the
22 reasons set forth in our resolution of the third assignment of error’s first

1 subassignment of error, the hearings officer improperly limited their
2 consideration to mapped SEC resources. The hearings officer's findings of
3 conformance with MCCP policies do not respond to the question of whether all
4 required natural resources have been evaluated when making the "will not
5 adversely affect" determination. MCC 39.7515(B). The hearings officer made
6 inadequate findings and we sustain this subassignment of error.

7 **D. Third Subassignment of Error**

8 Cottrell's third subassignment of error is that the hearings officer failed to
9 apply the "will not adversely affect" standard and make adequate findings of
10 compliance because the hearings officer limited their consideration to SEC
11 mapped areas and MCCP chapter 5 policies. Cottrell explains that opponents
12 identified the existence of various wildlife species and offered descriptions of the
13 quality and character of their habitat. Petition for Review 38 (citing Record 3835,
14 1280-81, 1291, 3761, 3838). Opponents identified fish habitat in the headwaters
15 of Johnson Creek bordering the subject property. Record 3757-58. Other public
16 testimony focused on the loss of a hedgerow trees along the Dodge Park Road
17 right-of-way that opponents argued serves as shelter and foraging opportunities
18 for birds and small mammals. Record 3827-28.

19 With respect to the hedgerow of trees, PWB argues that they are not
20 protected outside the SEC overlay zone and that the record is adequate to
21 establish the factual and legal basis for the conclusion that the standard is met.
22 PWB argues that its "experts evaluated the 'natural resources' defined by MCCP

1 [c]hapter 5, across the project, identified the location or presence of those
2 resources, characterized those resources, and then evaluated the impacts from the
3 project on those resources. Rec[ord] 228, 234-251, 43.” PWB’s Intervenor-
4 Respondent’s Brief to Petition for Review 34. PWB explains:

5 “The majority of the filtration facility site is cleared of vegetation
6 and has most recently been used for commercial agricultural
7 purposes. Rec[ord] 7991. There are two areas near the edges of the
8 site in the [SEC] overlay. Rec[ord] 7952. An area along the northeast
9 edge is designated SEC-habitat (‘h’) overlay. *Id.* The southwest
10 corner includes a portion of a 200-foot buffer along Johnson Creek
11 within the SE-water resource (‘wr’) overlay. *Id.* Johnson Creek itself
12 is located on an adjacent property. *Id.* Stormwater will be treated
13 and managed with a system of swales, planters, and vegetated
14 stormwater basins, and flow rates will be equal to or lesser than
15 existing flow rates. Rec[ord] 6230-[41].” *Id.* at 2-3.

16 The hearings officer concluded:

17 “In sum, as documented in [PWB’s] Final Argument, the [c]ounty
18 does not have a tree protection ordinance and none of the trees
19 identified by opponents outside of the SEC zone are subject to
20 [c]ounty land use regulation. While not required to do so by code or
21 to satisfy the natural resource criterion, [PWB] proposes extensive
22 additional plantings at the filtration facility in an area within and
23 adjacent to the existing SEC-h where it will provide significant
24 habitat value. Staff’s Condition 12.g will apply to all new plantings
25 at the filtration facility site.” Record 254.

26 The hearings officer did not find that the natural resources identified in
27 MCCP chapter 5 established the scope of protected resources. Specific issues
28 concerning various natural resources outside SEC areas were identified by
29 opponents and not addressed, based on the hearings officer’s misconstruction of

1 the MCC 39.7515(B) natural resources criterion. Under a proper construction of
2 MCC 39.7515(B) on remand, the hearings officer should determine whether any
3 of the identified natural resources will be affected by the community service use
4 and must find that the proposed use will not adversely affect those natural
5 resources or explain why the identified natural resources are not subject to the
6 criterion.

7 This subassignment of error is sustained.

8 **E. Fourth Subassignment of Error**

9 Cottrell's fourth subassignment of error is that if we deny the first
10 subassignment of error, and conclude that the hearings officer correctly construed
11 the phrase "natural resources" in MCCP 39.7515(B) as coterminous with
12 inventoried natural resources within SEC-overlays, then the hearings officer's
13 decision is not supported by substantial evidence. Cottrell argues that "[w]ithout
14 having these adopted inventories in the record or completing independent
15 inventories of the natural resources in the first instance, the [h]earings [o]fficer's
16 conclusion that only the SEC overlay designated areas qualify as 'natural
17 resources' lacks substantial evidence." Petition for Review 40.

18 PWB explains that

19 "development of the filtration site avoids all SEC overlay areas.
20 Rec[ord] 7952. Where pipelines must cross SEC overlay areas, any
21 impacts on resources have been avoided. The new water pipeline
22 will be placed in a tunnel approximately 150 – 200 feet below the
23 surface of the SEC-h overlay east of the filtration facility site.
24 Rec[ord] 7748-[49]. A distribution main will also avoid SEC-wr and

1 SEC-h zoned surface areas through the use of trenchless boring
2 below the surface. Rec[ord] 7149.” PWB’s Intervenor-
3 Respondent’s Brief 3-4.

4 Cottrell argues that there was no inventory to evaluate the character of
5 natural resource much less whether there would be any adverse impact on those
6 resources. Opponents raised specific natural resource concerns that were not
7 addressed as Cottrell argues *Norvell* requires. Petition for Review 38; *Norvell*, 43
8 Or App at 853.

9 Cottrell argues PWB expert reports discount the quality of various
10 resources. Petition for Review 39. Cottrell argues statements “are entirely
11 speculative because they do not explain the characteristics of birds, insects,
12 amphibians, reptiles and mammals whose shelter and food the PWB expert
13 simply assumes demand a more pristine, native, over 12[-foot] diameter trees that
14 are free from noise and dust.” Petition for Review 39. Cottrell argues:

15 “Regarding night-migrating birds, PWB’s wildlife expert conceded
16 that communication towers and guy wires ‘can pose risks to night-
17 migrating birds’ but rejected any need to inventory or study the
18 effects of those risks because the tower design will follow US Fish
19 and Wildlife recommendations to ‘minimize’ the risk to birds.
20 Rec[ord]1805. PWB and its experts refused to do what the criterion
21 required and, for this reason alone, the findings not only lack
22 substantial evidence, they fail to provide any evidence that the
23 criterion is satisfied. These findings are insufficient and non-
24 responsive to the no ‘adverse effect’ obligation.

25 “The county failed to require any systematic evaluation of the
26 natural resource qualities of the properties and made no effort to
27 determine what adverse effects to those identified qualities will
28 result from this development.” Petition for Review 40.

1 Cottrell argues that the pipeline runs through two SEC-h overlay areas and
2 that PWB claims that a trenchless tunnel crossing will protect the habitat by
3 avoiding surface impacts. Cottrell cites the hearings officer's adoption of
4 footnote 55 of the PWB findings stating that noise, ground vibration/blasting and
5 harmful diesel emissions resulting from boring under the SEC areas cannot be
6 considered because it is only a construction impact and the obligation does not
7 extend to subsurface activities.³⁴ Petition for Review 41.

8 Because we sustained the first, second, and third subassignments of error
9 and new findings are required, we do not reach or resolve this subassignment of
10 error.

³⁴ Footnote 55 reads:

“Project opponents argue that the raw water pipeline tunneling activities will cause vibrations and noise that could adversely affect habitat within an SEC zone on the surface. First, for the reasons set forth [in this Final Argument], the temporary construction activities are not the use subject to the [c]ommunity [s]ervice use approval criteria, and therefore the natural resource approval criterion does not apply to the temporary tunneling. However, even if that were not the case, the focus of the Goal 5 habitat designation is protecting the surface habitat and tree canopy. This project accomplishes that by boring far beneath that surface habitat. Vibrations or noise that may temporarily impact individual animals within the habitat do not adversely affect the habitat itself. In other words, the trees and ground cover that SEC-h as the permeant habitat areas protected by the SEC-h zone remain in place and unaffected.” Record 246 n 55.

1 **SUMMARY**

2 The hearings officer did not misconstrue the applicable law in concluding
3 that the county was not required to consider construction impacts under the
4 community use criteria or the state statutory farm impacts test. The hearings
5 officer considered alternative alignments as required by ORS 215.275(2) and
6 made adequate findings supported by substantial evidence that the selected
7 alignment met project objectives, including providing the greatest seismic
8 resiliency. The hearings officer misconstrued the community use natural
9 resources criterion and, based on that misconception, failed to adopt adequate
10 findings supported by substantial evidence.

11 The county’s decision is remanded.