

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

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

LUBA No. 2023-086

12 Petitioners,

13 and

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

Intervenor-Petitioners,

v.

MULTNOMAH COUNTY,

Respondent,

and

PORTLAND WATER BUREAU,

Intervenor-Respondent.

PETITIONERS' PETITION FOR REVIEW

JULY 2024

Exhibit M.9

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1 **I. STATEMENT OF THE CASE**

2 **A. Statement of Petitioner’s Standing.**

3 Petitioners Cottrell Community Planning Organization, Pat Meyer, Mike
4 Cowan, Pat Holt, Ron Roberts, Kristy McKenzie, Mike Kost, Ryan Marjama,
5 Macy, Tanner Davis and Lauren and Ian Courter (hereinafter “petitioners”)
6 timely filed this appeal and have standing. Rec-3212, 2926, 3274, 2857, 3189,
7 3229, 3129, 2882, 2709.¹ ORS 197.830(2).

8 **B. Nature of the Decision and Relief Sought.**

9 The challenged decision is a Hearings Officer’s decision that approved
10 community service conditional use permits for a water filtration plant, pipelines
11 and communication tower on lands zoned Multiple Use Agriculture - 20 (MUA-
12 20) and Exclusive Farm Use (EFU) along with design review, environmental
13 overlay and natural hazard reviews. LUBA should reverse or remand the
14 challenged approvals.

15 **C. Summary of the Arguments.**

16 The applicant, Portland Water Bureau’s (PWB) final written argument
17 introduced new facts, new interpretations and new conditions that
18 fundamentally altered the proposal after the record was closed to new evidence
19 prejudicing Petitioners’ substantial rights.

20 The Hearings Officer misconstrued the MUA-20 conditional use criteria
21 to exclude the consideration of the construction impacts caused by use.

22
23

¹ All pages referenced “Rec” are to the County’s Second Amended Record
24 filed on May 23, 2024.

1 The Hearings Officer misconstrued Multnomah County Code (MCC)
2 39.7515(B), adopted inadequate findings which lack substantial evidence to
3 show that the proposed use will not “adversely affect natural resources.”

4 The Hearings Officer failed to make findings responding to identified
5 adverse impact to endangered birds from the communications tower.

6 **D. Summary of Material Facts.**

7 PWB filed a conditional use application to build a 135 million-per-day
8 drinking water treatment facility and communications tower on a 94-acre site
9 zoned for MUA-20 in Multnomah County. Maps at App-8-9, App-13-14.²
10 What PWB representatives characterized as a “mega project” and County
11 staffers called “a complex development,” this facility would serve “nearly one
12 million people,” the largest infrastructure project PWB has ever proposed.
13 App-35, Rec-1265, 3500. Vehicular access for all construction trucks, worker
14 vehicles, operations and maintenance access will be accomplished along SE
15 Carpenter Ln., a narrow country road east of SE Cottrell Rd. Maps at App-8-9.
16 A secondary emergency-only access will be provided by improving a private
17 farm access road connecting to Bluff Rd. to the south.³ Conveying 135 mil.
18 gals of water per day will require installing an expansive array of massive raw,
19 finished water pipelines and a finished water intertie within road right-of-ways
20 on private farm properties zoned MUA-20 as well as for Exclusive Farm Use

21 _____
22 ² The Appendix page number references to the final decision match the
Record page numbers.

23 ³ Located within Clackamas County, this road access was approved for
24 emergency road access only.

1 (EFU). App-8-9. Portions of the raw water pipeline and the Lusted Rd.
2 distribution main will be within areas designated for Significant Environmental
3 Concern for wildlife habitat (SEC-h). App-60.

4 The nature of farming activities in the surrounding area varies widely
5 from blueberry cultivation to equestrian boarding and training, but by and large
6 the most significant farming activity is the growing wholesale nursery stock, the
7 state's largest agricultural revenue generator. App-9. Nearly 75% of the
8 nursery stock grown in Oregon leaves the state and over half of that reaches
9 markets east of the Mississippi River. Rec-2930. Distribution of plants and
10 trees is accomplished by common carrier-contracted semi-trucks that often
11 share container space with other nurseries in the area before moving to
12 highways headed east. Rec-3707, 3772. Reliable, uniform and predictable
13 growth, ease of access and timely delivery are all vital to successful nursery
14 stock farming in this area. Rec-3707.

15 The surrounding area also consists of rural residential and active farm
16 uses. Rural residents characterized the area as "serene," "bucolic" and a place
17 where children can safely ride their bikes or walk to the bus stop and families
18 can walk within the vehicle travel lane sharing it with farm traffic. Rec-3202,
19 3239, and elsewhere. Popular residential activities include birdwatching, star
20 gazing and tracking wildlife given its proximity to the Sandy River, a National
21 Wild and Scenic River, and the headwaters of the Johnson Creek. Rec-3307.

22 Construction of the water filtration facility will require soil excavation to
23 accommodate 34 separate tanks and basins that will displace approximately
24

1 373,454 cubic yards of soil – equivalent to 113 Olympic sized swimming pools
2 and the delivery of concrete to create the tanks. Rec-5310. Additional
3 excavation will be required to reduce the overall elevation of the plant site, the
4 11 buildings and 261,981 cubic yards of material will have to be excavated for
5 the pipelines.

6 Dump trucks, cement trucks, construction material delivery, worker
7 commuter vehicles and all necessary supporting vehicles are estimated to add
8 an additional 550-900 additional am/pm peak hour vehicle trips per day to
9 substandard Carpenter Road and the surrounding rural road network. Rec-4208.
10 Using PWB counts, the residents and farmers along Carpenter Road currently
11 experience 14 am and 11 pm peak hour trips. Rec-4206. This will impose a
12 32-to-40 fold increase in the amount of traffic directed into this area creating
13 delays. Road upgrades coupled with installation of the pipeline and intertie will
14 cause road closures, detours and construction back-ups. Rec-5309, 5311, 5315.
15 Construction was projected to begin in the third quarter of 2023 and finish in
16 2028. App-37. Yet, throughout the proceeding, PWB indicated construction
17 could take up to seven years. Rec-8027.

18 In its land use application, PWB took the position that the construction
19 impacts could not be considered as part of the conditional use review. Shortly
20 before the public hearing on June 30, 2023, PWB reversed course, submitting a
21 traffic impact analysis identifying the construction related traffic impacts and as
22 part of the evidentiary open-record rebuttal period, PWB submitted a report
23
24

1 evaluating construction transportation impacts on farming. Rec-4201 and Rec-
2 1967.

3 After the record closed to all parties, the PWB submitted a 305-pg final
4 written argument setting forth entirely new interpretations of various criteria,
5 the first and only analysis of the evidence and conditions of approval that
6 purports to fundamentally change how construction will occur and the facility
7 will operate. App-98. In approving this application, the Hearings Officer relied
8 on several pages at a time to serve as his own findings as to each of the
9 applicable criteria as his own. This appeal followed.

10 **E. Statement of Board's Jurisdiction.**

11 The decision applies land use regulations and is a final "land use
12 decision." ORS 197.015(10)(a)(A)(iii). LUBA has jurisdiction. ORS
13 197.825(1).

14 **II. ASSIGNMENTS OF ERROR**

15 **A. Introduction to Assignments of Error.**

16 The purposes for the MUA-20 zone, as set forth within the
17 Comprehensive Plan, include the following:

18 "3.14 Restrict uses of agricultural land to those that are
19 compatible with exclusive farm use areas in recognition of the
20 necessity to protect adjacent exclusive farm use areas.

21 3.15 Protect farmland from adverse impacts of residential and
22 other non-farm uses.

23 3.16 New non-agricultural businesses should be limited in scale
24 and type to serve the needs of the local rural area." App-5-6.

1 The proposed water treatment facility is not a farm use, nor is it a use
2 permitted outright in the zone. Rather, as a “utility facility,” the water treatment
3 facility is classified as a community service use, permitted subject to the
4 conditional use criteria set forth in MCC 39.7515 A - H. MCC 39.4320(A);
5 39.7520(A)(6). App-1-2. These community service conditional use criteria
6 serve to implement the following Comprehensive Plan policy:

7 “2.45 Support the siting and development of community
8 facilities and services appropriate to the needs of rural areas
9 while avoiding adverse impacts on farm and forest practices,
10 wildlife, and natural and environmental resources including
11 views of important natural landscape features.” App-4.

12 Pursuant to this policy and the plain language of the conditional use
13 criteria in MCC 39.7919, the County committed to protecting the economic and
14 business success of farmers, the livability for rural residential uses, as well as
15 wildlife and natural resources from nonfarm uses with the MUA-20 zoning
16 designation. This protection occurs by constraining community service uses to
17 a scale and intensity that is “appropriate to the needs of rural areas” which is far
18 exceeded by this facility’s service of “one-quarter of Oregonians.” App-14.

19 This plan policy and the implementing community service criteria do not
20 distinguish between or otherwise prioritize certain types of community service
21 uses over other community service uses because of their necessity or perceived
22 public benefit. The Hearings Officer erred in this case by allowing a PWB-
23 identified self-imposed demand for this facility along with the need for safe
24 drinking water generally to contravene interpreting the conditional use criteria

1 in a way that is consistent with their text and their implementing plan policies.
2 The result will be to forever change the neighborhood character, modify how
3 wildlife and birds rely on this area and substantially and permanently impact
4 how farm practices occur increasing their cost in order to accommodate a
5 nonfarm use that should never have been considered for this location.

6 As discussed in the assignments of error that follow, approving this
7 application required imposing elaborate, but unenforceable conditions, which
8 modified the substantive proposal, after the record was closed, prejudicing
9 opponents' ability to participate. Misconstruing the criteria, insufficient
10 findings that fail to respond to the detailed, expert testimony offered, and a lack
11 substantial evidence are all defects that were not successfully papered over and
12 explained away, no matter how hard PWB tried.

13 **B. FIRST ASSIGNMENT OF ERROR – The Hearings Officer**
14 **relied on New Evidence submitted after the close of the record**
15 **in violation of ORS 197.797(6)(e).**

16 **1. Statement of Preservation**

17 Petitioners are not precluded from raising a challenge to the county's
18 admission of new evidence within the applicant's final written argument as a
19 procedural error on appeal to LUBA merely because they failed to object during
20 the proceedings below where the record was closed and no further testimony
21 was allowed. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

22 **2. Standard of Review**

23 LUBA must reverse or remand a land use decision where it finds that the
24 county "failed to follow the procedures applicable to the matter before it in a

1 manner that prejudiced the substantial rights of the petitioner.” ORS
2 197.835(9)(a)(B).

3 Under *Fasano v. Washington Co. Comm.*, a party has a right to rebut
4 evidence submitted during local quasi-judicial land use proceedings. Depriving
5 a party of the right to respond to new evidence prejudices the petitioners' right
6 to rebut evidence. *Caine v. Tillamook County*, 25 Or LUBA 209, 213-14
7 (1993).

8 3. Argument

9 PWB’s initial 105-page application provided no explanation for various
10 interpretations, most notably disavowing and not offering any evaluation of
11 construction-related impacts. Notwithstanding submitting disparate pieces of
12 evidence while the record was open, PWB waited until after the record closed
13 to all parties to submit a 309-page final written argument providing the very
14 first and only indication of how PWB believed that the criteria were satisfied.
15 In this final argument, PWB introduced new interpretations, identified which
16 evidence satisfied the standards for the first and only time and proposed 24
17 pages of new and revised conditions of approval, claiming that through these
18 conditions the project would satisfy the standards. Nearly all of these
19 arguments, along with all the approval conditions, were adopted by reference by
20 the Hearings Officer to support the decision.

21 Although LUBA allows an applicant to submit “final written arguments
22 in support of the application” under ORS 197.797(6)(e), the 309-page magnum
23 opus submitted by the PWB deviated so significantly from the initial
24

1 application that it is more aptly classified as an amendment rather than a final
2 written argument. The result was to prejudice Petitioners' substantial rights in
3 depriving them of the opportunity to respond. *Brome v. City of Corvallis*, 36 Or
4 LUBA 225, 234-35, *aff'd*, 163 Or App 211, (1999).

5 ORS 197.797(6)(e) gives an "applicant at least seven days after the
6 record is closed to all other parties to submit final written arguments in support
7 of the application." ORS 197.797(9) defines "argument" and "evidence" as
8 follows:

9 "(a) 'Argument' means assertions and analysis regarding the
10 satisfaction or violation of legal standards or policy believed
11 relevant by the proponent to a decision. 'Argument' does not include
facts.

12 (b) 'Evidence' means facts, documents, data or other information
13 offered to demonstrate compliance or noncompliance with the
standards believed by the proponent to be relevant to the decision."

14 LUBA has held that ORS 197.797(9)(b) "defines 'evidence' broadly."
15 *Friends of the Hood River Waterfront v. City of Hood River*, 67 Or LUBA 179,
16 194-95 (2013). The new evidence set forth in the PWB final written argument
17 and relied on by the Hearings Officer include:

- 18 • The effect of delayed construction to require issuance of a "boil
19 water order" and the claim that such an order "will have massive
20 economic effects on the state" are facts offered for the first time to
21 encourage a particular outcome when opponents were deprived of
22 an opportunity to explain why these new statements are false.

23 App-98. See also Rec-408, ("Given the essential nature of this
24

1 project for protecting the safety of our water supply and our
2 regional economy.”) Presumably these facts supported the
3 Hearings Officer finding that “if this facility is not built, people
4 will die.” App-14.

- 5 • Identification of the statute and standard of review appropriate
6 when considering County transportation staff testimony is
7 presented by PWB as a fact mandating deference to staff decision-
8 making regarding road mitigation. App-119. “County
9 Transportation is the authority on whether the proposed mitigation
10 is sufficient to keep the County’s roads both safe and within
11 county standards...” App-129, 246. Hearings Officer reliance at
12 App-47.
- 13 • PWB reviewed “over 2,000 prior County decisions” and found “no
14 past interpretation by the County that would support an
15 interpretation to consider construction.” “Staff have never listed
16 the temporary construction activities as a use that is regulated by
17 the same approval criteria that apply to the permanent use...”
18 App-111, 112. The record includes only five approvals. Only what
19 these 5 approvals show (or do not show) may be considered.
- 20 • A discussion of the length of delay created by construction
21 including a new table, a new average calculation from construction
22 delay being 3 seconds and the statement “providing further
23 explanation of what the traffic engineer means by...minimal
24

1 delays” are all new facts. App-123/124. Hearings Officer relied on
2 this new fact at App-49. Petitioners had no opportunity to explain
3 why the new facts are misleading and incorrect.

- 4 • Regarding interpreting the farm impact test, PWB states:

5 “We reviewed the many hours of legislative history to
6 confirm that the legislature did not indicate any intention to
7 apply this test to construction rather than or in addition to the
8 ultimate use.” App-231.

9 What this legislative history shows or does not show is a factual
10 statement intended to influence how the criteria must be
11 interpreted. Hearings Officer adopted these new facts as his own
12 at App-46.

- 13 • Allegation that the videos are “clearly staged” including a
14 definition of the term “staged” offered as facts to undercut the
15 validity and discredit the opposition testimony. App-155/156.
- 16 • Explanation of the Tree Plan including “1/3 of the trees that must
17 be removed within the Dodge Park Boulevard right-of-way to
18 accommodate the pipeline are less than 6 inches DBH,” and trees
19 under 6 in. are not included in tree replacement calculations and
20 the methodology used by the PWB for counting trees are all new
21 facts presented for the first time after the record was closed to all
22 parties. App-223/224. These statements were adopted as findings
23 by the Hearings Officer at App-43.

- PWB speculation as to the effect of refusal by emergency response providers to communicate with construction crews are new facts offered to portray Multnomah County Rural Fire District #10 as unresponsive. App-320. Adoption by reference at App-57.

PWB’s final submittal included numerous new conditions of approval imposing detailed and highly specific limits on how construction will occur including signage, driver education, and mandating amendments to the Traffic Control Plan (TCP) relating to emergency coordination, trip caps and providing for access through construction zones. App-57,139-140, 317, full list at App-380-403, Rec-424-432. The effect of these conditions is to change how construction occurs. PWB claims for the first time that these conditions imposing amendments to the project are feasible because federal standards impose similar requirements. App-150. Whether compliance with a condition is feasible or why feasibility should be assumed are all new assertions purported to show that compliance will be achieved and as such, they are new facts.

In *Marine Street LLC v. City of Astoria*, LUBA held that a condition is a restriction on a proposed development which does not give rise to a rebuttal right. 37 Or LUBA 587, 597 (2000). However, more recent cases suggest otherwise. For example, in *Van Dyke v. Yamhill County*, LUBA held that language within a condition of approval identifying circumstances that would nullify the obligation to build a fence qualify as “new evidence.” ___ Or LUBA ___ (LUBA No. 2019-047, October 11, 2019)(slip op 21). More recently, in *Haugen v. City of Scappoose*, the Court of Appeals remanded

1 LUBA’s decision for failing to consider whether a condition-imposed reduction
2 in a subdivision plan qualified as “new evidence” because it “significantly
3 changed the proposal.” 30 Or App 723, 730 (2024).

4 Like *Van Dyke* and *Haugen*, the conditions of approval offered and
5 accepted in this case purport to prescribe the parameters of the proposal in ways
6 that PWB believes will prove a feasible means to satisfy the criteria, but these
7 conditions also significantly modify the proposal. Proclaiming that these newly
8 submitted conditions are feasible, as a matter of fact, is equivalent to LUBA’s
9 holding in *Haugen* that a statement from the applicant that the condition
10 represented “the smallest number of lots that could make ‘pencil.’” *Id* at 732.
11 Both are statements that the conditions will work or be sufficient to satisfy the
12 applicable standards. As such, they are offered as statements of fact to show
13 that criteria are satisfied; they are “evidence” under ORS 197.797(9)(b).

14 By submitting these new facts and conditions that effectively modified
15 the proposal in substantive ways, after the record was closed to all parties,
16 Petitioners were deprived of the opportunity to rebut their accuracy and
17 adequacy. For this reason, this matter must be remanded with instructions to
18 reopen the record allowing all parties the opportunity to respond.

19 **C. SECOND ASSIGNMENT OF ERROR - The County**
20 **Misconstrued the Conditional Use Obligations of the MUA-20**
21 **Zone to Exclude Construction Impacts.**

22 **1. Statement of Preservation**

23 The impacts from construction resulting from this use was a key issue
24 addressed by the opponents, PWB, County staff and the Hearings Officer. Rec-

1 3385, 34, 3951, 35, 143, 145. Opponents argued that construction impacts must
2 be considered part of the use because the term “development,” as used in MCC
3 39.2000 includes “any act requiring a permit...including associated ground
4 disturbing activity” and the term “use” and “development” are “synonymous.”
5 Rec-3385, 3386. Opponents also argued that, to give meaningful evaluation of
6 conditional use criteria, particularly the significant impact test for farm impacts,
7 required consideration from the start of construction to and through operation of
8 the proposed project. *Id.* Opponents challenged PWB’s reliance on certain
9 LUBA cases that considered construction in the context of Goal 4. *Id.* These
10 issues were preserved.

11 PWB’s first comprehensive response to any of these arguments was
12 offered in its final written argument, after the record was closed to all parties to
13 rebut these newly proffered interpretations. PWB introduced contextual
14 arguments drawn from the various Community Service Use categories and an
15 evaluation of other County definitions relating to “development” for the first
16 time. Because Petitioners could not have known that PWB would assert these
17 new legal arguments and the record before the county was closed for any
18 further response, Petitioners cannot be foreclosed from doing so now.

19 *Washington Co. Farm Bureau v. Washington Co.*, 21 Or LUBA 51, 57 (1991).

20 **2. Standard of Review**

21 As this assignment of error involves a challenge to the interpretation of a
22 county ordinance by a hearings officer, LUBA reviews a hearings officer’s de-
23 cision to determine whether it correctly interprets and applies the applicable law
24

1 and owes no deference to that interpretation. *Gage v. City of Portland*, 319 Or
2 308, 316-17 (1994).

3 LUBA’s standard of review of a local government interpretation requires
4 reversal or remand where LUBA concludes that the interpretation:

5 “(a) Is inconsistent with the express language of the comprehensive
6 plan or land use regulation;

7 (b) Is inconsistent with the purpose for the comprehensive plan or
8 land use regulation;

9 (c) Is inconsistent with the underlying policy that provides the basis
10 for the comprehensive plan or land use regulation; or

11 (d) Is contrary to a state statute, land use goal or rule that the
12 comprehensive plan provision or land use regulation implements.”
13 ORS 197.829.

14 The methodology for interpreting a local regulation, described in *State v.*
15 *Gaines*, 346 Or 160, 165-73 (2009), and *Portland Gen. Elec. Co. v. Bureau of*
16 *Labor & Indus.*, 317 Or 606, 610-11 (1993), requires LUBA to focus initially
17 on the text and context of the relevant code provisions, with due consideration
18 of any relevant legislative history.

19 3. Argument

20 Throughout the decision, the Hearings Officer consistently concluded
21 that “temporary construction impacts” should not be considered when
22 evaluating the various conditional use criteria in MCC 39.7515(A)-(F). App-35,
23 passim. This interpretation is inconsistent with the express language and
24 purpose for these standards. ORS 197.829(1)(a) and (b).

1 By way of introduction, the MCC provides that Community Service uses
2 “shall be for the specific use or uses approved together” subject to a finding
3 “that the proposal meets the following approval criteria.” MCC 39.7505(A) and
4 39.7515. App-1-2. In subsections (A) through (H) that follow, the County has
5 adopted eight exacting criteria required to ensure that impacts from the
6 proposed use are compatible with and will not impose adverse impacts on the
7 surrounding area. Whether the “proposal” or “use” is “consistent with the
8 character of the area,” will “adversely affect natural resources,” “will force a
9 significant change in” or “significantly increase the cost of” farm practices,
10 require public services beyond those programmed for the area, or create
11 “hazardous conditions” required an exacting evaluation of the characteristics of
12 the proposed use, most particularly the intensity of the consequences resulting
13 from allowing the use.

14 In bemoaning the vagaries of the area character protection criterion, the
15 Hearings Officer found:

16 “I believe that the Board must have intended some flexibility in this
17 interpretation or else they would not have permitted these highly
18 intensive community services uses in these zones. To narrow it
19 down, what is evaluated under these criteria is the final uses and not
20 the construction of these uses.” App-41.

21 As discussed in greater detail below, nothing in the language anywhere in
22 the county’s regulatory scheme suggests that in implementing the Community
23 Service Use standards, the County intended to permit “highly intensive” uses or
24 that uses that would introduce construction impacts of a scale and intensity that

1 will revolutionize how existing residents can go about their daily lives was
2 intended. With respect to commercial farms where such authorization would put
3 them out of business, the County’s response is essentially: “Too bad for you,
4 because these consequences were the result of our five-to-seven-year
5 construction period and not our operation.” This is nonsensical.

6 In *Stephens v. Multnomah County*, LUBA referred to these identical
7 criteria relating to hazardous conditions and natural resources as “unequivocal
8 statements” that certain conditions must be maintained and remanded a decision
9 where the findings appeared to view the criteria as permissive rather than
10 mandatory in their requirements. 10 Or LUBA 147 (1984).

11 In *West Hills & Island Neighbors, Inc v. Multnomah County*, LUBA
12 rejected the county’s interpretation that consistency with the community service
13 standards for a landfill can be evaluated considering the bare land after the
14 landfill is covered over and landscaped. LUBA explained that “[t]he use must
15 always be ‘consistent with the character of the area.’” __ Or LUBA __ (LUBA
16 No. 83-018, June 29, 1983), slip op at 15-16 n 6, *aff’d* 68 Or App 782, *rev den*
17 298 Or 150 (1984) Taken together, these cases hold that these conditional use
18 criteria are holistic in requiring compliance from the inception of a use until its
19 conclusion. There is no other way to interpret LUBA’s use of the term
20 “always.”

21 The Hearings Officer erred in this case for the same reason that LUBA
22 found the County erred in *West Hills & Island Neighbors, Inc.* by considering
23 the impacts only of one component phase of a use – its operation rather than the
24

1 construction activities, merely because they are “temporary.” By divorcing the
2 construction-phase impacts from the use itself, without any guidance in the
3 language for doing so, the County’s interpretation would allow construction-
4 related consequences that would destroy the character of the area and natural
5 resources and put farmers out of business.

6 Rather than focus on the conditional use obligations to protect the rural
7 area from impacts within the applicable standards, the Hearings Officer: (1)
8 focused on construction impacts in land use generally, (2) adopted PWB’s
9 arguments inferring distinctions in the terms “development” and “use” in the
10 MCC, and (3) considered controlling LUBA’s consideration of these issues in
11 other jurisdictions that are subject to different regulatory schemes. Each of
12 these responses are defective.

13 In the most direct discussion of construction impacts, the Hearings
14 Officer’s findings explain:

15 “I[n] all my many years of work in land use, I cannot remember
16 coming across an application where the construction impacts were
17 considered. It is only the impacts of the actual permitted use that are
18 considered. In the olden days of residential development (before
19 clear and objective criteria), there were zoning codes requiring that
20 new subdivisions be harmonious or fit in with the character of the
21 area. One hundred acres of graded bare land, massive piles of dirt,
22 thousands of dump trucks and construction trips, dust, neighboring
23 roads torn up, rock hammers (in central Oregon), continual noise
24 from pounding nails and saws, graders, bull dozers and clouds of
dust, all create impacts. These subdivisions are often in phases that
go on for years. These subdivisions are generally immediately
adjacent to densely packed existing neighborhoods. Yet many
thousands of acres were permitted to be developed. All of the
neighbors of all of the subdivisions ever built across our state
suffered these temporary impacts. All of the farmers across the roads

1 from these residential subdivisions also suffered these temporary
2 impacts.

3 Similarly, every major transportation project creates impacts on all
4 adjoining and nearby properties. These are the same lengthy and
5 difficult impacts involved with this case. County Transportation
6 Staff disagree with the Planning Staff as to this code interpretation.
7 Exhibit J.44, Page 2, September 6, 2023. This Staff memorandum is
8 after the memorandum quoted above so perhaps the County position
9 has changed.

10 ‘There is testimony that argues that the construction
11 period is too long to be considered ‘temporary.’
12 [Exhibit I.35] The County disagrees. The proposed
13 development is a complex development, therefore, the
14 construction period will take longer than a residential
15 home, for example. In analyzing state regulatory rules,
16 LUBA soundly presumed that the Land Conservation
17 and Development Commission does not view a
18 “temporary construction area” to be a use under land
19 use regulations, but rather ‘an accessory function that
20 is necessary to construct the authorized use.’ *Citizens
21 Against LNG, Inc., et. al. v. Coos County*, 63 Or LUBA
22 176 (2011). Here, the five-year construction period is
23 necessary to build a complex water filtration facility,
24 that if the application is approved, will be an authorized
use.’

I am certain County Transportation Planners recognize that if any of
their transportation projects have to meet this standard, it would
create extra burdens for their projects.” App-35.

Nothing in the test for interpreting local regulations set forth in
PGE/Gaines recognizes a hearings officer’s experience “in his many years of
work in land use,” the “olden days of residential development” as relevant to
discerning the meaning of a local regulation in the first instance. Similarly, the
degree to which a particular interpretation would impact county road projects is

1 irrelevant. Construction impacts from a subdivision, presumably an urban use,
2 or a rural transportation project, presumably an outright permitted use, where
3 construction impacts might be tolerated, are not germane to whether
4 construction impacts must be considered when evaluating a proposed
5 conditional use in a zone where protecting farm use and natural resources are an
6 expressly stated and avowed purpose of the zone. For the MCC 39.7515
7 conditional use criteria requiring avoidance of impacts to have meaning, they
8 must include the impacts that will occur during construction.

9 Additionally, the *PGE/Gaines* interpretation framework does not give
10 any significance to uniformity in local government interpretation in the past. In
11 fact, the Hearings Officer expressly rejected PWB's arguments that past errors
12 in interpretation require perpetuation in the future. App-36.

13 The Hearings Officer and PWB's analysis of this issue is infused with the
14 belief that construction impacts will be temporary and that this temporary
15 nature makes them nothing more than an inconvenience. However, the Hearings
16 Officer made no effort to interpret how long construction impacts must extend
17 in order to be "temporary," either by interpreting the criteria or based on the
18 facts. Nor does he grapple with the specific and unrebutted testimony that the
19 extensive disruptions that will be caused by the construction project will cause
20 significant impacts to multiple farm operations in the area. Rec-2860-2875,
21 videos 12, 13, 14, 22, 27, and passim.

22 The only explanation offered on this point comes from PWB after
23 lamenting the need for line drawing, it points to MCC 39.1185(B)(2) requiring
24 completion of construction within four years. App-118. The Hearings Officer

1 does not discuss this argument or adopt it by reference but PWB has stated that
2 construction will begin in the third quarter of 2023 and finish in 2028. Rec-
3 4202. There is no evidence to suggest that PWB can complete facility and
4 pipeline construction within 4-years in any event, again suggesting that the
5 impacts will be anything but temporary.

6 In any event, Petitioners soundly reject the Hearings Officer or PWB's
7 characterization that the construction impacts in this case will be "temporary."
8 The record reflects that the construction impacts will extend for 5-7 years,
9 introducing construction truck, worker traffic and a level construction
10 disruption leading to delays and detours of an order of magnitude that far
11 exceeds anything that this area has ever experienced and that its existing
12 infrastructure and rural services are sized to accommodate.

13 Moving beyond personal experience and slippery slope speculation, those
14 portions of the Hearings Officer's findings that do reflect consideration of the
15 text and context of the various provisions as recognized in the *PGE/Gaines*
16 state:

17 "I agree with Applicants construction of the code and the same
18 analysis applies to the County Code as would apply to statutes. I
19 agree with Applicant's interpretation as to "uses" as applying to
20 ultimate uses as opposed to temporary uses that are called out in the
21 code. I agree with Applicant's interpretation of the *Citizens Against*
22 *LNG v. Coos County*, 63 Or LUBA 162 (2011), where the focus of
23 the land use regulations is on the permanent use, just like the
24 regulations here. I agree with Applicant's analysis of *McLaughlin v.*
Douglas County, Or LUBA (2021) (April 13, 2021, LUBA No.
2020-004). Before I read that case, I was of the belief that since the
legislature allowed pipelines and transmission lines in the EFU zone
it, 'reflects a legislative determination that those inevitable impacts
[from construction] are also allowed.' This case confirms that belief.
There also is a legislative preference to put these uses in ROW's.

1 This temporary impact must certainly have been weighed and it was
2 permitted in EFU.

3 I agree with Applicant and disagree with Planning Staff that the
4 change in the definition of 'development' changes the results here.
5 It does not appear to be a significant change and if it was intended
6 to include all temporary construction activity which would be a
7 major policy shift, it should be made explicit in the code and also
8 found in the legislative history. I agree with Applicant that the
9 legislative history does not support such an interpretation." App-36.

10 PWB's final written argument, adopted by reference by the Hearings
11 Officer, suggests that since nothing in the general or community service use
12 obligations lists "construction activities" as "either an element of the use or as a
13 separate use category that also must meet the approval criteria that otherwise
14 apply to the permanent use," construction impacts must not be considered.
15 App-108. PWB claims that because "Large Fills" are included as a community
16 service use suggests that where temporary construction uses are intended to be
17 regulated as a separate use, they are so regulated. PWB emphasizes that
18 construction-related impacts are regulated through building permit review and
19 are not relevant to land use. App-108/109.

20 In cases such as *Western Land & Cattle, Inc. v. Umatilla County*, LUBA
21 and the Court of Appeals have consistently rejected relying on a "negative
22 inference" as meaning a "legislative intent to prohibit" a use. 58 Or LUBA
23 295, *aff'd* 230 Or App 202 (2009). PWB's interpretation relies on drawing the
24 same negative inferences with respect to the construction of uses that must fail
for the same reasons. PWB cannot interpret silence to mean intent, particularly
when the County's interpretation allows urban-scaled construction of a claimed

1 community service use that will destroy the rural, farm and natural resource
2 protective elements that the community service standards are in place to protect.

3 As part of its final written argument, PWB for the first time responds to
4 the County planning staff report analysis that a 2018 amendment to the
5 definition of “development” to include “associated ground disturbing activity”
6 indicated an intent to consider construction impacts as part of a use. PWB
7 argues that because the term “development” is not used in the MUA-20 zone or
8 the conditional use criteria, the amendment to the definition is irrelevant. App-
9 114-115.

10 In describing activities or “uses” within the MUA-20 zone, MCC
11 39.4305 provides that “no building or *structure shall be hereafter erected,*
12 altered or enlarged” except for the uses listed as permitted, review or
13 conditional uses under MCC 39.4310 through 39.4320. (Emphasis added.)
14 App-7. This provision plainly states that the act of “erecting” a structure
15 qualifies as a use. It is axiomatic that a use requiring some form of enclosed
16 structure or building cannot exist without first being constructed or “erected.”
17 In response to PWB’s concern, adopted by the Hearings Officer by reference,
18 that the use category does not expressly reference “construction,” everyone
19 knows that a use cannot exist without first being constructed.

20 Further, the MCC 39.2000 definitions do not define the term “use” but in
21 closing, the definition of “development” provides in relevant part:

22 “As the context allows or requires, the term ‘development’ may be
23 synonymous with the term ‘use’ and the terms ‘use or development’
24 and ‘use and development.’”

1 There would be no reason for the county to state that the conditional use
2 criteria must be satisfied from the start of construction to the end of operations
3 because conditional use criteria will operate to mitigate impacts throughout the
4 whole life of the use – beginning with its “erection.” Where a use includes the
5 erection of a building and the zone has as one of its purposes protecting rural
6 residential and farm uses, the conditional use criteria cannot be interpreted to
7 allow the destruction of the rural community character, natural resources or the
8 creation of hazards associated with erecting that building, solely on a theory
9 that such impacts are assumed simply because the conditional use could be
10 allowed.

11 Interpreting the term “use” to include construction is reinforced by the
12 purpose and policy of the Community Service uses and the language of the
13 criteria themselves that the intent is to protect farm and rural uses and not to let
14 them be destroyed, even if the period for destruction is “temporary.” More
15 specifically, as quoted above Comprehensive Plan Policy 2.45 calls for
16 “support[ing] the siting and development of community facilities and
17 services...” App-4. This “siting and development” includes construction. The
18 purpose for the MUA-20 zone as set forth in MCC 39.4300 provides:

19 “The purposes of the Multiple Use Agriculture base zone are to
20 conserve those agricultural lands not suited to full-time commercial
21 farming for diversified or part-time agriculture uses; to encourage
22 the use of non-agricultural lands for other purposes, such as forestry,
23 outdoor recreation, open space, low density residential development
24 and *appropriate Conditional Uses, when these uses are shown to be
compatible with the agricultural uses, natural resource base, the
character of the area and the applicable County policies.*”
(Emphasis added). App-7.

1 These provisions are plain and unambiguous - a community service
2 “siting” and “development” and “use” is allowed only where adverse impacts
3 are avoided throughout the life of that use. An interpretation that allows adverse
4 impacts to occur during construction without considering the effect of such
5 impacts, either in the short or long term, violates the purpose for the provision.
6 ORS 197.829(1)(b) and (c).

7 In the opening portion of the decision, the Hearings Officer admits as
8 much where he states: “Weighing up against [the perceived necessity of this
9 facility], there is the impact to the neighbors and local farmers from the
10 construction of the facility.” App-5. There is an undeniable impact from
11 construction. The Hearings Officer admits as much and the PWB took over 300
12 pages to try to explain them away and when it could not, offered 24-pages of
13 elaborate and untenable conditions purporting to control them.

14 In support of its interpretation, PWB relies on two liquid natural gas
15 pipeline cases and neither of these cases support PWB. In *Citizens Against LNG*
16 *v. Coos County*, petitioner argued that the temporary construction easement
17 necessary to install a pipeline was not a “use” permitted on forest lands under
18 OAR 660-006. 63 Or LUBA 162 (2011). LUBA disagreed finding that a
19 temporary construction area was an “accessory function that is necessary to
20 construct the authorized use” and that the rule does not otherwise prohibit
21 temporary construction areas. *Id* at 172. In *McLaughlin v. Douglas County*,
22 where petitioners claimed that the timber removal necessary for construction
23 would have the effect of being permanent, LUBA held “a temporary
24 construction right-of-way is not prohibited in the forest zones.” Or LUBA

1 (2021)(April 13, 2021, LUBA No. 2020-004). These cases are inapplicable for
2 a number of reasons.

3 First, how the administrative rules authorizing pipelines on forestlands
4 under OAR 660-06 to allow temporary construction uses has no relevance to
5 this case where OAR 660-06 provisions do not apply. The pipelines proposed
6 here cross both Goal 3 protected lands as well as MUA-20 zoned lands where
7 forestland authorizations are irrelevant.

8 Second, these cases answer the wrong question. Petitioners' argument
9 here is not that construction of the proposed facility/pipeline is not part of
10 "utility facility" use. MCC 39.4320(A). The issue is the County's refusal to
11 consider construction impacts when they are an inseparable and
12 indistinguishable component of the proposed use. An evaluation of these
13 impacts is essential, particularly pursuant to a conditional use regulatory
14 structure that mandates that adverse consequences from the use cannot occur.
15 As such, these consequences must be considered in determining whether the
16 conditional use criteria are satisfied.

17 In fact, in *McLaughlin*, the county did consider the degree to which
18 "installation of the pipeline will not prevent or impede the current forest
19 activities" as part of the compatibility criterion required in order to approve the
20 pipeline as a conditional use. *Id.* at 20. This analysis clearly suggests that the
21 county did consider the degree to which installation of the pipeline would
22 comply with the compatibility criterion necessary to obtain a conditional use.
23 Petitioners demand the same in this case.

24 PWB suggests that construction-related impacts such as trenching,
blasting and power hammering would be inherent in all conditional uses and as

1 such, it must be assumed that these impacts were to be tolerated as part of the
2 use. Whether or not this is in fact true is a question that is not supported by any
3 evidence in the record. We would also note that not every community service
4 use includes the largest water treatment facility in the state in one of most
5 pristine and suitable areas for growing nursery stock.

6 Moreover, PWB argues that considering construction impacts would
7 have the effect of prohibiting all utility facilities as a conditional use relying on
8 *Davis v. Polk County*. 58 Or LUBA 1,7 (2008). In *Davis*, the county denied a
9 conditional use permit for a racetrack because dust generated from the use
10 would undermine a purpose statement calling for the zoned area to serve as a
11 buffer area between urban and farm uses. The petitioner argued that, since a
12 racetrack is allowed as a conditional use and that all racetracks generate dust,
13 the county's decision had the effect of prohibiting all racetracks. Although
14 LUBA agreed with petitioner that because a number of the listed conditional
15 uses would "inherently create dust or emissions," it was unlikely that the county
16 intended to prohibit any uses that emit dust. What LUBA also said is:

17 "However, the possibility that some AR-5 property might be
18 developed with dusty farm uses does not necessarily mean that the
19 county is precluded from considering whether *the off-site dust*
20 *impact of a proposed conditional use in the AR-5 zone is of such a*
21 *magnitude that it would prevent the AR-5 zoned property to serve its*
22 *desired purpose as a buffer*. We therefore leave open the possibility
23 that the county could require that conditional uses in the AR-5 zone
24 must generate less dust than farm uses, so as to preserve at least
some of the dust buffer function apparently envisioned by PCZO
128.510(B), notwithstanding that the AR-5 zone allows unrestricted
development of dusty farm use." Id at 8-9. (Emphasis added)

1 There is no evidence to suggest that, by considering the impacts of
2 construction as part of the conditional use evaluation, the criteria would have
3 the effect of prohibiting all utility facilities of any type on MUA-20 land. There
4 is similarly no indication that by allowing utility facilities as a conditional use
5 the county intended to allow utility facilities of an unlimited scale or magnitude
6 of construction impacts.⁴ The question is not the mere existence of construction
7 impacts – certainly construction impacts may be likely from any use - but rather
8 their magnitude – the number of large dump/cement trucks, trenchers and
9 pipelaying equipment, coupled with worker vehicles necessary to excavate
10 water retention tanks and basins that convey 135,000 mil. gals of water per day
11 supplying 1/4 of all Oregonians is what makes this particular utility use so
12 much more impactful than a rural-scaled water tower or a cellular transmission
13 tower.

14 The Hearings Officer fears that considering construction impacts would
15 impute a sea-change in how the County has considered uses and as such,
16 construction impacts cannot be considered. App-35. The degree to which an
17 interpretation would alter how development review is conducted in the future is
18 not a recognized way to interpret the meaning of legislation. If the County is
19 concerned about the significance of requiring the consideration of all
20 consequences resulting from a proposed conditional use on MUA-20 zoned
21 land, the answer is to amend the code and not to simply interpret the obligation
22

23 ⁴ Rather, the plan policies directed at constraining community service uses to
24 those necessary to serve the area expressly suggest otherwise.

1 to not exist. *Goose Hollow Foothills League v. City of Portland*, 117 Or App
2 211, 218, 843 P2d 992 (1992). The Court of Appeals in *Goose Hill Foothills*
3 *League* explained:

4 “The Supreme Court and we have often emphasized that, to amend
5 legislation de facto or to subvert its meaning in the guise of
6 interpreting it, is not a permissible exercise. *See 1000 Friends of*
7 *Oregon v. Wasco County Court*, 299 Or 344, 703 P2d 207 (1985);
8 *West Hills & Island Neighbors v. Multnomah Co.*, 68 Or App 782,
9 683 P2d 1032, *rev den*, 298 Or 150, 690 P2d 506 (1984).”

10 Within the MUA-20 regulatory scheme, conditional uses, including
11 utility facilities, can only be allowed upon a finding that the adverse impacts
12 resulting from erecting a building to serve that use will not create impacts
13 pursuant to the MCC 39.7919 criteria. The Hearings Officer’s interpretation
14 that construction impacts resulting from a conditional use could not be
15 considered as a matter of law is inconsistent with the language of the standards,
16 their underlying purpose and therefore, requires remand under ORS 197.829.

17 **D. THIRD ASSIGNMENT OF ERROR – The Hearings Officer**
18 **erred by misconstruing MCC 39.7515(B), Adopting**
19 **Inadequate Findings which Lack Substantial Evidence to Show**
20 **that the Proposed Use “Will Not Adversely Affect Natural**
21 **Resources.”**

22 **1. Statement of Preservation**

23 During the proceedings below, Petitioners argued that the application of
24 MCC 39.7515(B) was not limited to considering only those areas designated
with the SEC overlay as evidenced by the plain language of the standards and
plan policies implemented by the standard. Rec-3389. Petitioners continually
maintained the obligation to inventory the nature and extent of the natural

1 resources. Rec-1290. Petitioners also raised the adverse impacts to wildlife
2 caused by directional drilling massive tunnels underneath SEC-h designated
3 areas. Rec-3830.

4 For the first time in its final written argument, PWB claimed that the
5 structure of Goal 5 supported its narrow interpretation of MCC 39.7515(B) at
6 Rec-229-232, and that compliance with various comprehensive plan policies
7 could serve as a surrogate for finding compliance. Petitioners had no reason to
8 know that these new interpretations and therefore, cannot be foreclosed from
9 challenging them on appeal.

10 **2. Standard of Review**

11 In evaluating a hearings officer's interpretation of MCC 39.7515(B),
12 LUBA must determine whether the interpretation is correct, affording no
13 deference to the hearings officer's interpretation. ORS 197.835(9)(a)(D); *Gage*
14 *supra*.

15 Adequate findings must (1) identify the relevant approval standards, (2)
16 set out the facts which are believed and relied upon, and (3) explain how those
17 facts lead to the decision on compliance with the approval standards. *Sunnyside*
18 *Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21 (1977). Additionally,
19 findings must address and respond to specific issues relevant to compliance
20 with applicable approval standards that were raised in the proceedings below.
21 *Norvell v. Portland Area LGBC*, 43 Or App 849, 853 (1979).

22 Regarding a substantial evidence challenge, substantial evidence is
23 “evidence a reasonable person would rely on in making a decision.” *Dodd v.*
24

1 *Hood River County*, 317 Or 172, 179 (1993), and “[s]ubstantial evidence exists
2 to support a finding of fact when the record, viewed as a whole, would permit a
3 reasonable person to make that finding.” *Id*

4 **3. Argument**

5 This assignment of error involves the Hearings Officer’s conclusion that
6 the proposal met MCC 39.7515(B), which requires a finding that the proposed
7 use “will not adversely affect natural resources.” To reach that conclusion, the
8 Hearings Officer made a hodge-podge of various findings, none of which
9 actually addressed the criterion at issue.

10 Relying on the analysis provided by County staff and PWB, the Hearings
11 Officer concluded that: (1) where development will not avoid SEC overlay
12 areas, SEC permits were obtained protecting Goal 5 resources, (2) PWB’s list
13 of expert evidence demonstrating compliance was more persuasive, (3) the
14 Finding of No Significant Impact (FONSI) by the EPA was persuasive, (4)
15 PWB relies on clean water to exist so it is motivated to protect it, (5) the
16 “natural resources” subject to protection only includes those natural resources
17 that are inventoried and adopted as Goal 5 resources, and (6) that the
18 “application would comply with listed comprehensive Plan Natural Resource
19 Topics and Policies,” adopting by reference PWB argument discussing each of
20 these policies. App-42-43.

21 None of these findings are responsive to the obligation imposed by MCC
22 39.7515(B) to interpret and apply a criterion requiring no adverse effect to
23
24

1 natural resources. In *McCoy v. Linn County*, where a criterion requires a finding
2 of no adverse effect, LUBA explained:

3 “In sum, to show that a proposed conditional use “will not adversely
4 affect the livability of abutting properties and the surrounding
5 neighborhood,” the county must (1) identify the qualities or
6 characteristics constituting the “livability” of abutting properties
7 and the surrounding neighborhood; and (2) establish that the
8 proposed use will have no adverse effects on those qualities or
9 characteristics. If the county relies on conditions to accomplish (2),
10 it must impose conditions it finds are sufficient to insure the
11 standard will be met.” Id at 301-302.

12 As summarized above, the Hearings Officer did not make any effort to
13 identify or describe the natural resources at issue. Instead, the Hearings Officer
14 resorted to the SEC overlay and the comprehensive plan to determine which
15 resources were eligible for protection. The nature or quality of the resources,
16 even those incumbered by SEC, are not evaluated in the findings and there is no
17 interpretation or findings indicating that any adverse impact standard was
18 applied at all in the first instance.

19 ***First Subassignment of Error – The County Erred in Concluding that
20 Only Goal 5 Significant Natural Resources are Eligible for Consideration
21 under MCC 39.7515(B).***

22 As adopted by reference, PWB goes to great lengths to argue that only
23 those resources that have been inventoried and designated as “significant”
24 under Goal 5 qualify for consideration under MCC 39.7515(B). App-200-203.
However, that is not what the criterion says and the defect is the Hearings
Officer’s assumption that MCC 39.7515(B) necessarily has anything to do with

1 the Goal 5 protection scheme.⁵ The test for interpreting an ordinance under
2 *PGE/Gaines* is to focus on the text of the provision itself and not to pigeon-hole
3 the criterion into whatever closely related Statewide Land Use goal-related
4 scheme may serve the purpose, particularly when there is no evidence of that
5 intent on the face of the standard itself.

6 Contrary to PWB’s assertions, yet accepted by the Hearings Officer,
7 MCC 39.7515(B) does not reference the terms “significant natural resource,”
8 “Goal 5,” or otherwise imply that such an approach was intended. PWB has
9 inserted this language as a way to place limitations on that phrase. By
10 narrowing the application of this policy to apply only to “significant” natural
11 resources protected by Goal 5, the hearing officer’s interpretation allows for
12 natural resources that may not have been identified in the decades old initial
13 Goal 5 determination to be adversely affected. Such an interpretation effectively
14 rewrites the explicit text of the policy in violation of ORS 174.010. *Crowley v.*
15 *City of Hood River*, 294 Or App 240, 244 (2018) and *Friends of Hood River*
16 *Waterfront*, 263 Or App 80, 90 (2014).

17 Where the county has chosen to reference and regulate resources that it
18 has deemed “significant” through the Goal 5 process it has stated as much. In

19
20 ⁵ The PWB argument seems to acknowledge this potential where it states:

21 “This is not to say that the County could not adopt another program
22 to protect non-significant resources, unrelated to Goal 5.” App-202.

23 The problem for PWB is that this claimed “express determination” is not
24 actually expressed anywhere; it does not appear on the face of any
express text, context, or purpose to be furthered by the standard.

1 identifying the criteria for SEC permit approval, MCC 39.5540 states that “the
2 SEC designation shall apply to those significant natural resources...” The
3 County has elected not to make the same reference with respect to uses that are
4 subject to community service use review. This intent is supported by
5 Comprehensive Plan Policy 2.45, which is not related to Goal 5, calls for the
6 protection of “natural resources,” not “significant natural resources.” Quoted
7 above. “Natural resources” and “wildlife” are identified for protection from
8 community service uses within the plan policy 2.45 plain and simple. App-4.

9 PWB argues that including other non-SEC designated areas would result
10 in providing greater protection to natural resources than to those resources
11 deemed “significant” and protected by virtue of Goal 5 and the SEC overlay.
12 App-202. That is incorrect; it is not an either/or proposition. All natural
13 resources are protected under MCC 39.7515(B) and “significant” natural
14 resources have additional regulations. The findings created by PWB and
15 adopted by the Hearings Officer does not acknowledge that all natural
16 resources, including those subject to the Goal 5 created SEC overlay, are
17 subject to the “no adverse effect” standard of MCC 39.7515(B) for conditional
18 uses. The PWB interpretation that finds that MCC 39.7515(B) can be satisfied
19 entirely and completely through compliance with SEC review would make
20 MCC 39.7515(B) a nullity and isn’t the correct approach. ORS 174.010.

21 In order to avoid having to inventory natural resources in the first
22 instance, PWB invented the fiction that the Goal 5 program is the entire natural
23 resource protection program when it comes to community service uses. Having
24

1 taken the leap of faith that Goal 5 establishes the limit of the obligation, PWB
2 argues, and the Hearings Officer found, that the County is prohibited from
3 protecting natural areas that have not been deemed “significant.” OAR 660-
4 023-0030(6) provides that a local government may “determine that a particular
5 resource site is not significant” and upon doing so, these sites cannot be
6 regulated “under Goal 5.” There is no indication that the County has formally
7 determined that the natural resources impacted by a conditional use are not
8 significant and therefore, ineligible for any protective regulations.

9 In short, the conditional use criterion protecting natural resources from
10 community service uses is not a Goal 5 regulation. LUBA’s decision in *West*
11 *Hills & Island Neighbors, Inc.* was issued in 1983 and the community service
12 use criteria have remained unchanged since that time. The County adopted its
13 SEC overlay program for wildlife and streams in the area west of the Sandy
14 River after 2002. Comprehensive Plan Chapter 5, p-12. This timing suggests
15 that the County made a choice to not intermingle its SEC overlay program with
16 protecting areas from non-farm conditional uses. There is no evidence of any
17 intent to do otherwise and, as such, the term “natural resources” in the
18 conditional use criteria must not be constrained to considering only those
19 impacts to SEC protected areas.

20 ***Second Subassignment of Error: Compliance with the County’s***
21 ***Natural Resource-Focused Comprehensive Plan Policies Cannot Substitute***
22 ***for a Finding No Adverse Effect to Natural Resources.***

23 Moving beyond the question of whether MCC 39.7515(B) is limited only
24 to “significant” resources, the Hearings Officer found that the proposal

1 complies with Chapter 5 of the Comprehensive Plan and adopts PWB
2 arguments in response to each of those plan policies.⁶ App-43. However,
3 consideration of these plan policies answers a question that is asked by a
4 different criterion - MCC 39.7515(G). Under the Hearings Officer's approach
5 here, like the approach taken with respect to SEC protections, the plan policy
6 obligations would entirely supplant any independent natural resource protection
7 obligation set forth MCC 39.7515(B), again rendering this provision a nullity.

8 There is no indication that compliance with otherwise applicable plan
9 policies in MCC 39.7515(G) can serve as a surrogate for identifying resources
10 and determining whether there is an adverse effect under MCC 39.7515(B).
11 Again, this would make the "adverse effect" standard in subsection B entirely
12 redundant resulting in it having no independent effect. ORS 174.010.

13 ***Third Subassignment of Error –The County Failed to Interpret and***
14 ***Apply the "Adverse Impact" Standard and to make Adequate Findings Based***
on Substantial Evidence.

15 By interpreting MCC 39.7515(B) to have no independent regulatory
16 effect beyond the SEC and the Comprehensive Plan Chapter 5 policies, the
17 Hearings Officer similarly failed to interpret, and then to apply, the "adverse
18 impact" provision to protect natural resources as the standard expressly
19 requires. This approach is inconsistent with text and context of the provision,
20 the first step in interpreting a regulation. *PGE/Gaines*. There is no indication

22 ⁶ Although PWB argued that Chapter 5 of the Comprehensive Plan
23 established the finite list of which "natural resources" must be considered to
24 satisfy MCC 39.7515(B), this argument was not adopted by the Hearings
Officer by reference.

1 that the County, nor PWB, interpreted the term “adversely affect” in the first
2 instance, given the purpose and policy for protecting farmland, rural residential
3 and natural resource uses, discussed above.

4 In *McCoy v. Linn County*, LUBA noted that:

5 “The use of the language ‘will not adversely affect’ in a mandatory
6 approval standard imposes a very stringent standard. *West Hill &
7 Island Neighbors, Inc. v. Multnomah County*, ___ Or LUBA ___
8 (LUBA No. 83-018; June 29, 1983), *aff’d* 68 Or App 782, 683 P2d
9 1032, *rev den* 298 Or 150 (1984). Under such a standard the county
10 must find that proposed development will cause no adverse effects
11 on the protected subject (in this case, the “livability of abutting
12 properties and the surrounding neighborhood”).” 16 Or LUBA 295,
13 300 (1987), *aff’d* 90 Or App 271 (1988).

14 In *Coffey v. City of North Bend*, LUBA rejected a challenge to the adequacy of
15 conditions to mitigate against impacts because the criteria did not impose a
16 mandatory obligation to eliminate any adverse impact. In footnote 14, LUBA
17 offered MCC 39.7515(B) as an example of standards that would impose an
18 absolute prohibition on impacts. 17 Or LUBA 527, 542 (1989). This “very
19 stringent” standard cannot be satisfied by, for example, claiming to mitigate for
20 the loss of bird habitat without any analysis or evidence to support a finding
21 that the solution was “possible, likely and reasonably certain to succeed.” *Gould
22 v. Deschutes County*, 216 Or App 150, 161, 171 P3d 1017 (2007).

23 Whether the Hearings Officer believed the applicant’s experts, found that
24 the EPA-approved FONSI or PWB would constitute good stewardship of water
quality, there is no evidence that these experts engaged in any inventory to
evaluate the character of natural resources in the first instance, much less

1 whether the development would have any adverse effect on those resources.
2 Adequate findings must identify what specific facts the Hearings Officer relied
3 on to find the standard was satisfied. *Sunnyside Neighborhood v. Clackamas*
4 *Co. Comm. supra*. A bullet point list identifying 17 different documents and
5 concluding that it is “considerable evidence” at App-199, adopted by reference
6 at App 43, is insufficient to show that the County analyzed the evidence
7 measuring the extent of the any adverse effect. Without establishing the extent
8 of the impact through a review of substantial evidence, it is impossible to
9 determine whether the proposed mitigations achieve compatibility.

10 It was the opponents who identified the existence of various wildlife
11 species and offered description of the quality and character of their habitat.
12 Rec-3835, 1280, 1281, 1291, 3761, 3838. Lauren Courter, an environmental
13 toxicologist offered detailed testimony about the Coho Salmon, Winter
14 Steelhead and Coastal Cutthroat habitat in the headwaters of the Johnson Creek
15 bordering the subject property. Rec-3758. Other public testimony focused on
16 the loss of hedgerow trees along Dodge Park Rd. ROW that serves as shelter
17 and foraging opportunities for birds and small mammals. Rec-3827. Others
18 expressed concerns about how the communications tower would have a
19 negative impact on night-migrating birds. Rec-1001, 3758. Where specific
20 issues are raised concerning compliance with applicable criteria, the findings
21 must address those issues. *Norvell supra*. Here, the findings fail to even
22 acknowledge these concerns.
23
24

1 Regarding the evidence itself, rather than conduct a wildlife and habitat
2 evaluation necessary to quantify the existing natural resource condition, the
3 PWB expert reports discount the quality of various resources. For example, the
4 hedgerow along Dodge Park Road is discounted because of its small size,
5 presence of non-native species, proximity to dust and noise from the road
6 coupled with avoidance and mitigation measures including planting trees in
7 other areas. Rec-1804. These statements are entirely speculative because they
8 do not explain the characteristics of birds, insects, amphibians, reptiles and
9 mammals whose shelter and food the PWB expert simply assumes demand a
10 more pristine, native, over 12' diameter trees that are free from noise and dust.

11 For the first time in its final written argument, PWB acknowledges that it
12 will remove 363 trees as part of this approval but argues that mitigation for this
13 loss will occur by replanting trees at a ratio of 1.5:1. App-225-226. This effort
14 to minimize adverse impacts through mitigation is particularly problematic
15 where there is no evidence in the record to show that the removal of these trees,
16 presumably during the first year of construction, and then replacement some
17 five years later in an entirely different location that was already planned for tree
18 and shrub planting following construction will be sufficient to restore the
19 ecological services and wildlife whose habitat is adversely affected for a
20 construction period of 5 to 7 years. Even more troubling, there is no indication
21 how these replacement trees will serve natural resource functions, as compared
22 to the existing trees located within raw and finished pipeline routes.

1 Regarding night-migrating birds, PWB’s wildlife expert conceded that
2 communication towers and guy wires “can pose risks to night-migrating birds”
3 but rejected any need to inventory or study the effects of those risks because the
4 tower design will follow US Fish and Wildlife recommendations to “minimize”
5 the risk to birds. Rec-1805. PWB and its experts refused to do what the criterion
6 required and, for this reason alone, the findings not only lack substantial
7 evidence, they fail to provide any evidence that the criterion is satisfied. These
8 findings are insufficient and non-responsive to the no “adverse effect”
9 obligation.

10 The County failed to require any systematic evaluation of the natural
11 resource qualities of the properties and made no effort to determine what
12 adverse effects to those identified qualities will result from this development.

13 ***Fourth Subassignment of Error – The County’s consideration of the***
14 ***impacts to the SEC zoned areas lack adequate findings and is not supported***
15 ***by substantial evidence.***

16 If, as the Hearings Officer and PWB believed, the adopted Goal 5
17 program or Chapter 5 of the Comprehensive Plan establishes the bounds of
18 what the County could consider under this conditional use criterion, then it was
19 incumbent on them to review the Goal 5 or other plan inventories to determine
20 what species and habitat are protected. OAR 660-023-0030(1). Without having
21 these adopted inventories in the record or completing independent inventories
22 of the natural resources in the first instance, the Hearings Officer’s conclusion
23 that only the SEC overlay designated areas qualify as “natural resources” lacks
24 substantial evidence.

1 Step two identified by LUBA in *McCoy* is an evaluation of whether the
2 proposed use will have no adverse effect on the qualities or characteristics
3 identified in the inventory. Although PWB identifies all of the design choices
4 made to avoid natural resources, the raw water pipelines and the Lusted Road
5 distribution main do run through two SEC-h overlay areas. PWB claims that by
6 using “trenchless (tunnel) crossing,” it will “protect the habitat” by “avoiding
7 surface impact.” App-216.

8 At footnote 55 of the PWB findings (adopted by the Hearings Officer),
9 PWB goes even further explaining that the noise, ground vibration/blasting and
10 harmful diesel emissions resulting from boring the pipeline underneath SEC
11 designated areas cannot be considered because it is only a temporary
12 construction impact and that the obligation does not apply to activities
13 occurring below the surface. App-217. No regulatory text supports either of
14 these findings.

15 Without conducting an inventory to understand the nature, quality and
16 character of the natural resources designated by the SEC-h overlay, any claims
17 about what this unidentified habitat requires or does not require is nothing more
18 than speculation. There is no reason to assume that the habitat characteristics
19 are those that exist on the surface and are permanent. As explained above, there
20 is no exception in the adverse effect criterion for construction impacts, even in
21 cases where they may be temporary. Further, there is no language in the
22 criterion, or the plan policies (which are not cited in the findings and do not
23 appear to have been considered), to indicate that only those adverse effects that
24

1 occur on the surface of the land may be considered. This approach makes no
2 sense and simply cannot be what this criterion, requiring “no adverse effect”
3 allows.

4 For all of these reasons, this decision must be reversed or remanded.

5 **E. FOURTH ASSIGNMENT OF ERROR – The Hearings Officer**
6 **Failed to Make Findings Responding to Identified Adverse**
7 **Impacts to Endangered Birds from the Communications**
8 **Tower.**

9 **1. Statement of Preservation**

10 Petitioners argued that construction of a communications tower would
11 negatively impact endangered migratory birds in violation of MCC 39.7515(B).
12 Rec-3758. This issue was preserved.

13 **2. Standard of Review**

14 Generally, findings must (1) address the applicable standards, (2) set out
15 the facts relied upon, and (3) explain how those facts lead to the conclusion that
16 the standards are met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556
17 (1992). Findings must address and respond to specific issues relevant to
18 compliance with applicable approval standards that were raised in the
19 proceedings below. *Norvell supra*.

20 **3. Argument**

21 The County’s findings in response to MCC 39.7515(B) are inadequate
22 because they fail to respond to the concerns raised in the Courter-scientific
23 study that the communications tower will adversely affect endangered
24 migratory birds including the Willow flycatcher and the Sharp-shinned hawk.

1 Rec-1288, 3758. The PWB responded to these concerns in its final written
2 argument. App-199-200. The Hearings Officer made no findings on these
3 concerns or the communications tower with respect to the conditional use
4 criteria, nor is there any adoption of PWB's findings by reference in response.
5 *Norvell* requires that findings, to be adequate, must address issues raised below
6 regarding compliance with approval criteria. Although findings may adopt
7 other decisions by reference, there must be some indication that the decision-
8 maker intended to make that finding their own. *Highlands Condominium*
9 *Association v. City of Eugene*, 35 Or LUBA 772, 774-775 (1998). Therefore,
10 this matter must be remanded.

11 **III. CONCLUSION**

12 For these reasons, this matter must be remanded.

13 Dated this 5th day of July, 2024

14 BATEMAN SEIDEL MINER
15 BLOMGREN CHELLIS & GRAM, PC

16 

17 By

18

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1 **CERTIFICATE OF COMPLIANCE**

2 I certify that (1) this brief complies with OAR 661-010-0030(2) and (2)
3 the word-count of this brief (as described in OAR 661-010-0030(2)(b)) is
4 10,995 words. I certify that the size of the type in this brief is not smaller than
5 14 point for both the text of the brief and the footnotes are required by OAR
6 661-010-0030(2)(d).
7

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CERTIFICATE OF FILING AND SERVICE

I certify that on July 5, 2024, I caused to be delivered by first class mail an original and one copy of the enclosed **PETITIONER'S PETITION FOR REVIEW** with the:

Land Use Board of Appeals
775 Summer Street, Suite 330
Salem, OR 97301-1283

and, on the same date, I caused to be delivered by first class U.S. mail, a true and correct copy of the foregoing document on

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