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

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

and

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

vs.

MULTNOMAH COUNTY,
Respondent,

and

PORTLAND WATER BUREAU,
Intervenor-Respondent.

LUBA No. 2023-086

FINAL OPINION
AND ORDER

Appeal from Multnomah County.

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

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

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

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

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

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

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

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

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

RYAN, Board Member, did not participate in the decision.

REMANDED 01/22/2025

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

Opinion by Rudd.

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.[1] Record 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.

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[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.

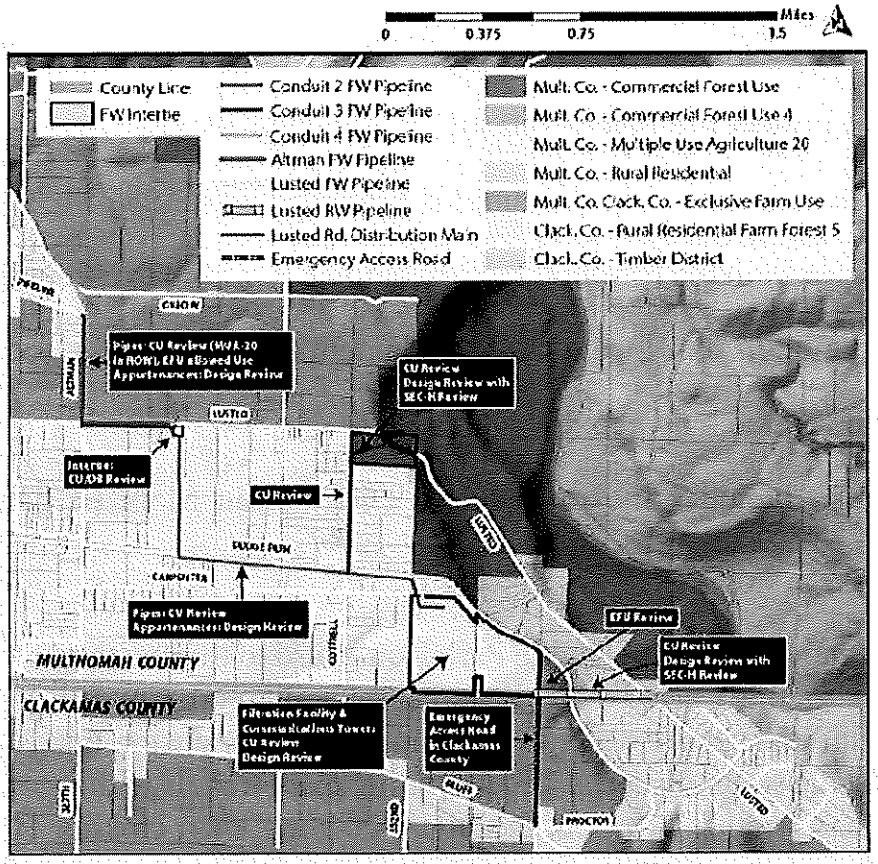

Figure 4. Project Location, Base Zoning, and Land Use Permits

Record 11.

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

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

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

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

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

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

It is labeled "Lusted Rd Distribution Main" on the map above.

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

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

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

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

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

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

> "are to provide areas for residential use for those persons who desire

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[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.

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

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

- Community Service Conditional Use Permit for Utility Facility (Filtration Facility)
- Community Service Conditional Use Permit for Utility Facility (Pipelines)
- Community Service Conditional Use Permit for Radio Transmission Tower (Communication Tower)
- Review Use for Utility Facility (Pipeline- EFU)
- Design Review (Filtration Facility, Pipelines, Communication Tower, Intertie Site)
- Significant Environmental Concern for Wildlife Habitat (LRDM, RW Pipeline)
- Geologic Hazard (RW Pipeline)
- Lot of Record Verifications. Record 13.

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

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

MOTION TO TAKE OFFICIAL NOTICE

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

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

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

> evidence shall be filed in writing and as a separate document and shall not be contained within a brief or other filing."

PHCA argues:

> "The purpose for requesting notice of [the referenced] material is to establish the existence of a review standard for [c]ommunity [s]ervice uses, requiring a showing that the proposal is 'consistent with the character of the area,' dating from 1977 and continuing to present. This is related directly to the decision maker's discussion and interpretation of that criteria." Motion to Take Official Notice 2.

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

The motion to take official notice is denied.

MOTION TO STRIKE PORTION OF ORAL ARGUMENT

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

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

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

INTRODUCTION

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

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

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

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

COTTRELL'S SECOND ASSIGNMENT OF ERROR

GBSD'S FIRST ASSIGNMENT OF ERROR[5]

PHCA'S ASSIGNMENT OF ERROR'S FIRST SUBASSIGNMENT

PORTION OF GBSD'S AND RFP10'S SECOND ASSIGNMENTS OF ERROR

Cottrell, GBSD and PHCA argue that the hearings officer misconstrued the code because they failed to include construction impacts when evaluating compliance with the community service criteria in MCC 39.7515.[6]

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

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[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.

A. Construction of Law

1. Standard of Review

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

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

> "(1) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; nor
>
> "(2) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use."

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

> "may be approved only where the local governing body or its designee finds that the use will not:

> "(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
>
> "(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use."

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

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

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless [LUBA] determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

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[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[.]"

> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

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

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

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

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[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).

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

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

2. Text

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

MCC 39.4305 provides:

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

Petitioners contend:

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

Cottrell maintains that although the MCC 39.2000 definitions do not define the term "use," MCC 39.2000 defines "development" as:

> "Any act requiring a permit stipulated by Multnomah County Ordinances as a prerequisite to the use or improvement of any land, including, but not limited to, a building, land use, occupancy, sewer connection or other similar permit, and any associated ground disturbing activity. *As the context allows or requires, the term 'development' may be synonymous with the term 'use' and the terms 'use or development' and 'use and development.'*" (Emphasis added.)

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

ORS 174.010 provides:

> "In the construction of a statute, the office of the judge is simply to

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

The hearings officer explained:

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

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

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

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

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[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).

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

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

3. Context

Cottrell makes numerous arguments that the context supports its interpretation of the term "use" as including related construction activity.

a. MCC 39.7515 and Case Law

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

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

Cottrell argues:

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

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

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

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

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

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

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

> "that a temporary construction easement or area necessary to construct a new distribution pipeline is not a 'right-of-way' for purposes of OAR 660-006-0025(4)(q). 'Right-of-way' suggests a linear transportation or distribution system of some kind, not a temporary storage or construction staging area, and the focus of the rule is clearly the permanent right-of-way. As to whether a temporary construction area that is necessary to construct an authorize use is itself an authorize use in a forest one under OAR chapter 660, division 006, it is reasonable to presume that the Land Conservation and Development Commission (LCDC) did not view such a temporary construction area to be a 'use' in itself, but rather an accessory function that is necessary to construct the authorized use." *Id.* at 172.

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

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

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

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

b. Comprehensive Plan Policies

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

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

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

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

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

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

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

MCCP chapter 2 introduces its "Community Facilities" discussion as follows:

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

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

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

> "3.14 *Restrict uses* of agricultural land to those that are *compatible* with exclusive farm use areas in recognition of the necessity to protect adjacent exclusive farm use areas.
>
> "3.15 Protect farm land from adverse impacts of *non-farm uses*.
>
> "Strategy 3.15-1: Ensure that new, replacement, or expanding uses on MUA zoned lands minimize impacts to farm land and forest land by requiring recordation of a covenant that recognizes the rights of adjacent farm managers and foresters to farm and practice forestry on their land.
>
> "Strategy 3.15-2: Amend Multiple Use Agricultural Zone to include deed restrictions protecting surrounding agricultural and forestry practices as a requirement for approval of new and replacement dwellings and additions to existing dwellings."

MCCP 3-11, 12 (emphases added, boldface and emphases omitted).[10]

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

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

B. Adequacy of Findings and Substantial Evidence

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

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[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).

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

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

]maker's personal knowledge, even if 'common knowledge,' is evidence outside the record and cannot support resulting findings." PHCA Intervenor-Petitioner's Brief 16. Cottrell also argues that the hearings officer relied upon an incorrect conclusion that construction is temporary in nature and that the anticipated years-long duration of project construction, along with the impacts of construction, is such that construction cannot be considered to generate temporary impacts. Cottrell maintains that "[n]othing in the test for interpreting local regulations set forth in *PGE/Gaines* recognizes a hearing 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." Petition for Review 19.

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

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

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

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

COTTRELL FIRST ASSIGNMENT OF ERROR

ORS 197.797(6)(e) provides:

"Unless waived by the applicant, the local government shall allow

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

Cottrell maintains that PWB submitted:

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

Cottrell argues that PWB's final submission

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

A. Standard of Review

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

B. Waiver

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

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

"As a general matter

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

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

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

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

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

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

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

C. Material in PWB's Final Written Argument Submission

1. Introduction

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

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

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

2. Statements Challenged by Cottrell

a. Potential for Boil Water Orders

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

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

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

> "The evidence presented and the argument based on that evidence were directed at what seems to be *the* crucial issue of the challenged decision: whether hotel/conference facilities are customarily associated with universities. The city council considered intervenor's new evidence and associated argument, and ultimately agreed with intervenor. We cannot say that the final decision makers did not find intervenor's new evidence persuasive.
>
> "* * * * *
>
> "Once the applicant improperly submitted evidence into the record pursuant to ORS 197.7[97](6)(e), the city had two choices: it could reject that evidence, or it could offer an opportunity for other persons to respond to that evidence. Here, the city did neither. Accordingly, we conclude that the city committed procedural error that prejudiced petitioner's substantial rights." *Id.* at 233-35.

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

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

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

b. Weight Given to Transportation Staff Testimony

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

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

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

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

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

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

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

> "Importantly, County Transportation has reviewed and verified the conclusions of Global Transportation Engineering, the project's transportation engineer, that the project will not create gridlock or safety hazards. County Transportation's 'staff have special expertise

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

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

c. PWB's Characterization of Videos

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

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

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

d. PWB Speculation Concerning Fire Department Response

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

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

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

e. Review of Prior Decisions and Other Arguably Legislative History

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

PWB's final argument states:

"The [c]ounty has also never accepted the opponents' proffered

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

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

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

f. Length of Construction Delay

Cottrell states:

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

PWB's final argument includes the following statement:

> "So, how much delay are we talking about? At the very worst (peak construction) at the most delayed intersection (Capenter/Cottrell), the delay caused by the project is all of 15 and a half seconds. Table 1 below shows those calculations, done by subtracting the existing, background conditions seconds of delay from the peak construction (with road closures) seconds of delay. The information comes from the Construction TIA and One-Access Analysis. Note that this also includes growth in background traffic, so it is a conservative estimate of the seconds of delay caused by the project.
>
> "The average (mean) of these seconds of delay is all of 3.3 seconds for the Dodge/Altman closures and 3 seconds for the Lusted/Cottrell closures." Record 152.

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

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

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

> "[A]re shared public roads that we all use. We use them not just for transportation but to have access to water, sewer, gas, power etc. as [right-of-way]s are common (and free to use) conduits for these lifesaving utilities. When we share these roads, there often will be construction projects to fix the roads, fix or install utilities, widen the roads for new development and we need to slow down and take detours. There is irritation, delay and inconvenience but as this is part and parcel of sharing this public resource. I find that with the extensive but feasible conditions regarding construction, it will not create a significant impact under the farm impact[s] test.
>
> "The fact that there will be only an average of three seconds of delay at area intersections supports this conclusion." Record 49.

The hearings officer concluded that there is not a significant impact under the farm impacts test before stating that the finding *was also supported* by the length of delay. Although the three second delay calculation could be considered new evidence, Cottrell has not developed an argument that the hearings officer relied on the three second delay calculation where the hearings officer found that the standard was met independent of the three second delay conclusion. Cottrell does not set out a basis for remand.

g. Review of Legislative History of Farm Impacts Test

Cottrell argues that the hearings officer accepted as their own the facts in PWB's statement: "We have reviewed the many hours of legislative history to confirm that the legislature did not indicate any intention to apply [the farm impacts test in ORS 215.296] to construction rather than or in addition to the ultimate use.' [Record 260]." Petition for Review 11. Cottrell contends "What this legislative history shows or does not show is a factual statement intended to

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

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

h. Tree Plan

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

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

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

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

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

3. Feasibility and Conditions of Approval

a. Feasibility

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

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

impose similar requirements. [Record 179]. 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." Petition for Review 12.

PWB stated in its final submittal:

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

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

b. Conditions of Approval

Cottrell argues:

> "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 [TCP] relating to emergency coordination, trip caps, and providing for access through construction zones. [Record 57, 168-69, 346], full list at [Record 409-32]. The effect of these conditions is to change how construction occurs." Petition for Review 12.

PWB responds that the assignment of error is insufficiently developed for review; "Although the conditions, and proposed revisions to conditions, span 22 pages

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

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

> "petitioner's recitation of specific statements made by the city council members related to the requirements for the specific zone for which they were considering a zone change and overlay request – which, under the circumstances represented a conclusion that the

application did not comply with relevant standards – and intervener's statements in response[.]" *Id.* at 732.

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

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

Cottrell's first assignment of error is denied.

OAN'S FIRST ASSIGNMENT OF ERROR

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

A. Introduction

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

> "(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." (Emphasis added.)

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."

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

> "*A use allowed under* ORS 215.213(2) or (11) or *215.283(2)* or (4) may be approved only where the local governing body or its designee finds that the use will not:
>
> "(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or

"(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use." (Emphases added.)

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

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

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

"(a) Technical and engineering feasibility;

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

"(c) Lack of available urban and nonresource lands;

"(d) Availability of existing rights of way;

"(e) Public health and safety; and

"(f) Other requirements of state or federal agencies."

We have explained that

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

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

ORS 215.283(1)(c)(A) is implemented in the county's EFU zone in MCC 39.4225(A) which governs "review uses" in the EFU zone.[11] The hearings officer found:

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[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

> "There are two segments of the pipeline that cross EFU lands. Segment 1, along Lusted Road will be outside the road right of way but will be tunneled under the ground. Segment 3 will be in the road right of way (ROW) along Lusted and Altman Roads.
>
> "Segment 1, outside of the ROW, has to comply with the additional standard in the MCC above and mirror ORS 215.283[(1)](c) and ORS 215.275 regarding utilities in the EFU that are not in the ROW. This is a much more complicated process. [PWB] addresses these standard[s] in Exhibit A.10 titled 2.C Pipeline EFU Review Application Narrative. I adopt that as finding[s] to demonstrate it meets this standard. Exhibit A.10 page 4 explains that the EFU alignment was necessary to connect the facility to the pipeline [for] 'technical and engineering' feasibility reasons. I also adopt [PWB's] legal reasoning found in its Final Rebuttal Argument, Exhibit L.1. Section E.
>
> "[PWB] correctly argues that there is no alternatives analysis requirement for the Filtration Facility itself (which I agreed to in the introduction to this decision)[.] The alternatives analysis is only required for this small portion of the pipeline that is in the EFU and outside of the ROW." Record 27-28.

As its alternatives analysis, PWB submitted a three-and-a-half-page report from RhinoOne Geotechnical dated August 9, 2022, and entitled "Geotechnical Technical Memorandum Raw Water Pipeline Alternatives from Lusted Road to Filtration Facility[,]" (RhinoOne Alternatives Analysis) which describes six potential pipeline routes that would connect the project pipeline infrastructure 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.)

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

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

B. Preservation

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

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

"**ORS 215.275**

> "The facility fails to meet the criteria in ORS 215.283(1)(c)(A) and ORS 215.275. For the purpose of complying with ORS 215.275, [PWB] cannot separate the treatment facility from the pipelines required to connect the facility to the existing water system. The treatment facility and its pipes are a single facility because the pipelines are required to connect the treatment part of the facility to the larger water system. For that reason, the proposed facility is located on both EFU and MUA-20 land. [PWB] must consider alternatives in which the entire facility can be located outside of EFU designated lands.
>
> "In this case, [PWB's] analysis of alternative pipeline routes is not sufficient and fails to comply with the alternatives analysis required by ORS 215.275. There are other alternatives in which the facility would not be located on EFU land at all and would not require any pipes to cross EFU land in order to connect to the existing water system. For that reason, [PWB] has not shown that the facility 'must be sited in an exclusive farm use zone' due to the factors outlined in ORS 215.275(2). *See also* 215.275(3). [PWB's] initial analysis of alternative sites showed that locations with the UGB exist, are available, are technically feasible, meet the project's locational requirements, and comply with public health and safety concerns. [PWB's] proposal violates ORS 215.275."

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

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

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

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

> "[*i*]*n order to preserve the right to challenge at LUBA the adequacy of* the adopted findings to address a relevant criterion or *the evidentiary support for such findings, a petitioner must challenge the proposal's compliance with that criterion during the local proceedings*. Once that is done, the petitioner may challenge the adequacy of the findings and the supporting evidence to demonstrate the proposal complies with the criterion. The particular findings ultimately adopted or evidence ultimately relied on by the decision

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

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

> "The critical considerations under *Lucier* and ORS 197.7[97](1) are whether issues were raised below regarding compliance with an approval criterion and, if so, whether those issues were 'raised and

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

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

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

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

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

C. Findings

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

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

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

> "Rhino One Geotechnical assembled and led a Geotechnical Technical Advisory Committee (GTAC) to provide geotechnical and seismic guidance for the Bull Run Filtration Project. The GTAC consisted of regional subject matter experts that included geologist and geotechnical engineers. The TAC members included [five listed experts].
>
> "The GTAC met on several occasions to review results of geotechnical investigations and provide guidance on how to avoid and/or mitigate project hazards and risks, including for pipeline alternatives. Pipeline alignment and construction alternatives were evaluated and refined over the course of a year. Six raw water pipeline alternatives were studied including alignments within and outside of EFU lands." Record 7696-97 (parenthetical omitted).

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[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.

The incorporated findings then discuss features of various alternatives before concluding

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

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

OAN's first assignment of error is denied.

COTTRELL'S FOURTH ASSIGNMENT OR ERROR

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

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

Cottrell's fourth assignment of error is denied.

PORTION OF GBSD'S SECOND ASSIGNMENT OF ERROR PHCA'S FIRST ASSIGNMENT OF ERROR, SECOND THROUGH FOURTH SUBASSIGNMENTS

A. Introduction

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

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

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

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

B. Area Selected

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

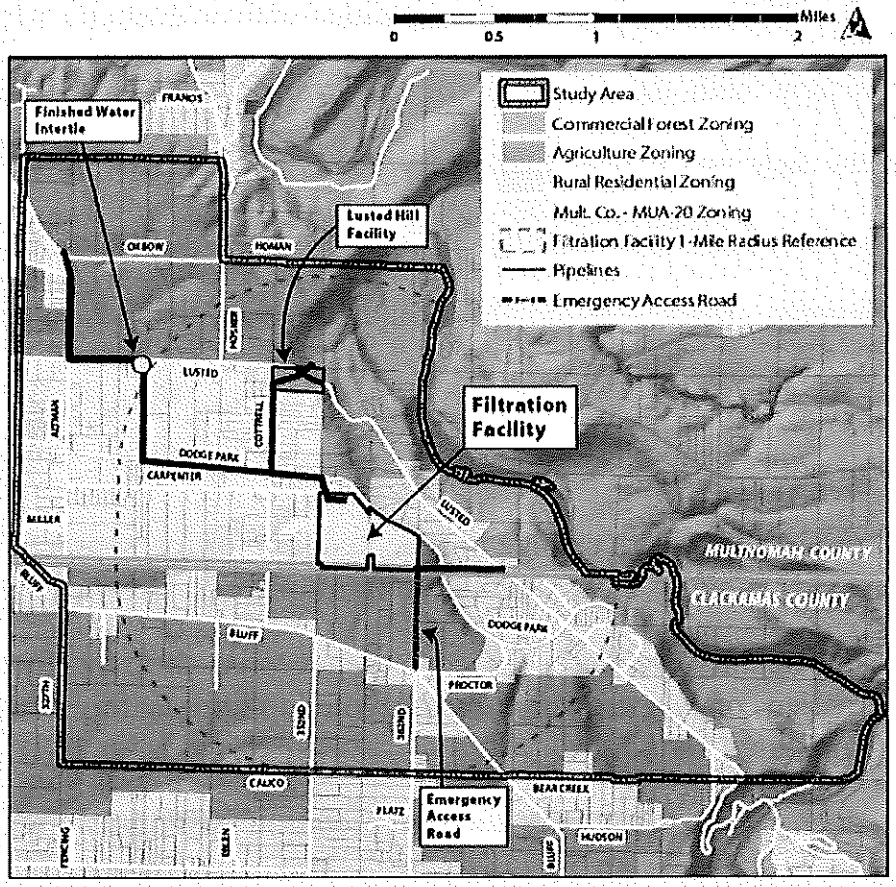

Figure 9. Consolidated Land Use Study Area with Generalized Zoning

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

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

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

> "Use will not:
>
> "1. Force a significant change in accepted farm or forest practices on *surrounding lands* devoted to farm or forest use; nor
>
> "2. Significantly increase the cost of accepted farm or forest practices on *surrounding lands* devoted to farm or forest use" (Emphases added.)

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

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

PHCA's second subassignment of error is denied.

C. Area Character

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

1. Description of Residential Character

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

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

"Residential development is the predominant rural development

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

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

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

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[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).

7904-05 (footnote omitted).

The description of residential uses in the area are more expansive than that recognized by GBSD and is more than a statement that the area is "generally residential."

GBSD's subassignment of error is denied.

2. Description of Roads

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

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

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

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

GBSD's subassignment of error is denied.

D. Rationale for the Area Selected

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

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

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

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

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[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).

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

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

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

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

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

consideration roadways and topographical features which clearly divide areas of the counties." Record 195.

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

These subassignments of error are denied

E. Hearings Officer's Conclusion that the Use is Consistent with the Character of the Area

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

a. Inadequate Findings Subassignment of Error

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

The hearings officer found, in part:

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

> zones. To narrow it down, what is evaluated under these criteria is the final uses and not the construction of these uses. I find that, as conditioned, the final uses, the filtration plant, the pipelines underground, and the intertie site meet these criteria and are consistent with the character of the area. I adopt the staff findings above as my findings. * * *
>
> "I agree with [PWB] that the code allows impacts from these conditional uses to be mitigated by conditions." Record 41.

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

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[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."

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

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

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[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."

b. Conflicting Findings Assignment

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

PHCA's third subassignment of error is denied.

c. Incorrect Conclusion Assignment

i. GBSD

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

GBSD quotes the following hearings officer finding:

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

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

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

GBSD's assignment of error is denied.

ii. PHCA

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

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

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

> "We value all of the features that make this a rural place, including quiet open spaces, vistas or productive farm and forest lands and of Mt. Hood, country road[s], healthy air, soils and streams and a night sky where we can clearly see the [stars].
>
> "We envision that the Orient and Pleasant Home rural centers will continue to prosper within defined areas in order to provide for the needs of residents and visitors. We want our roads to continue to [serve as the] transportation network for the area, while remaining usable for people enjoying the country and accessing the Sandy River, with opportunities for exercise by walking, running, bicycling and horseback riding." PHCA's Intervenor-Petitioner's Brief 31 (quoting MCCP 1-26, brackets added).

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

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[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.

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

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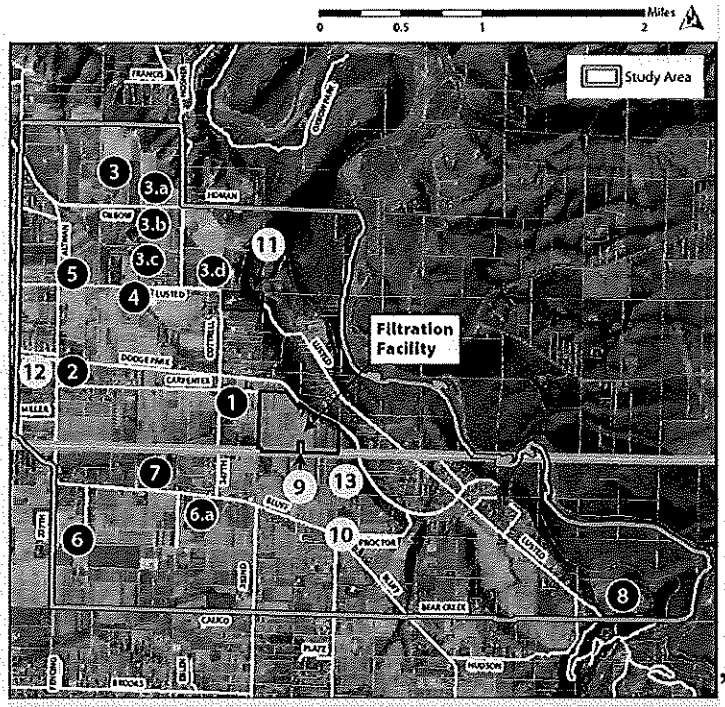
[21] PWB is required to install a delineated paved pedestrian route per condition E(1)(c) which states:

> "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.

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

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

> "Mid- to large-scale agricultural operations (nurseries and agricultural processing) are the predominant agricultural type and land use in the project area. Rec[ord] 7893. Seven of the project area nurseries and agricultural processing operations had a 2020 average employee count of 86, with two of the businesses having employee counts at or exceeding 200. Rec[ord] 7895. In contrast, the project will have a maximum of 26 employees, with only 10 on the largest shift. Rec[ord] 79011. The closest nursery is located just west of the filtration facility site on Carpenter Lane and includes three loading docks with access onto Carpenter Lane. Rec[ord] 7897. The filtration facility will see an average of five trucks per working day. Rec[ord] 7911. Mid- and large-scale nurseries are shown on the map below in the darker blue.
>
> "There are also five public facilities within the study area (in the map's lighter blue), Including PWB's Lusted Hill Treatment Facility located a half mile north of the filtration facility (number 11); the existing large water tanks for Pleasant Home Water District (number 9) surrounded on three sides by the filtration facility site; and a large photovoltaic solar power utility facility just to the south (number 13.) Record 7896.



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

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

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

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

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

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

PHCA's fourth subassignment of error is denied.

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

PORTION OF RFPD10'S SECOND ASSIGNMENT OF ERROR

GBSD'S THIRD ASSIGNMENT OF ERROR

MCC 39.7515(F) requires that the hearings officer determine that the community service use "[w]ill not create hazardous conditions[.]" The phrase "hazardous conditions" is not defined in the MCC. The individual terms "hazardous" and "conditions" are also not defined in the MCC. "Generally, when an enacting body like a city council has not defined a term used in its law, we assume that the body used the words consistent with their ordinary meanings." *City of Eugene v. Comcast of Oregon II, Inc.*, 263 Or App 116, 128, 333 P3d 1051 (2014), *aff'd*, 359 Or 528, 375 P3d 446 (2016). The hearings officer found, in part:

> "As an initial matter, I interpret [MCC 39.7515(F)] to mean the application will not create a significant or continuous hazardous condition. Almost any application in the area could create a hazardous condition. The introduction of one new vehicle on the road incrementally increases the chance for a hazardous condition. Almost all uses listed under the Community Services could create hazards just by the nature of their operations: playgrounds, parks, reservoirs, dumps, landfills[,] etc. If any hazard was the test, then none of these would be allowed. I do not believe that is what the legislation intended.
>
> "I agree with [PWB's] interpretation of the context of this legislation. [PWB's] Final Rebuttal page 196-197. I agree that the interpretation of 'hazardous condition' means something that is continuously being in a hazardous state not something that could

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

Defining the "condition" portion of "hazardous condition" the findings state:

> "[T]he term 'condition' cannot be ignored or read out of the criterion. ORS 174.010 (code interpretation cannot 'insert what has been omitted or omit what has been inserted.') The relevant definition of 'condition' is a 'mode or state of being.' Therefore, the most reasonable interpretation of the term 'hazardous condition' is something that is continually in the state of being hazardous, not the risk that a hazardous situation could arise at any point in the future, as broadly suggested by RFPD10 and other project opponents.
>
> "Another key element of the criterion that cannot be disregarded in a plain reading of the code language is that the proposed conditional use will not 'create' a hazardous condition. As discussed [elsewhere], several of the risks identified by project opponents already exist on the site or in the surrounding area. In those cases, even if those risks could be considered a hazardous condition, the project will not 'create' those conditions." Record 331-32 (footnote omitted).

A. Misconstruction of Law

1. RFPD10's and GBSD's first subassignments of error[23]

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

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

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[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.

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

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

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

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

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[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.)

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

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

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

Neither of these provisions discusses "urban-scaled" utilities and we understand that the water facility will serve, in part, rural areas.[25] The hearings officer's

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[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.

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

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

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

> "As part of land use permit approval, impose conditions of approval that mitigate off-site effects of the approved use when necessary to:
>
> "1. Protect the public from the potentially deleterious effects of the proposed use; or
>
> "2. Fulfill the need for public service demands created by the proposed use."

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

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

These subassignments of error are denied.

B. Application of Law

1. Operational Impacts

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

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

PWB responds that the "character of the area" is evaluated in the hearings officer's response to MCC 39.7515(A), and the hearings officer was not required to address it in its response to MCC 39.7515(F)'s hazardous condition criterion. We agree.

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

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

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

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

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

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

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

These assignments of error are denied.

2. Conditions of Approval Generally

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

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

This subassignment of error is denied.

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

RFPD10'S FIRST ASSIGNMENT OF ERROR

1000 FRIENDS' FIRST ASSIGNMENT OF ERROR

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

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

A. 1000 Friends' First Assignment of Error

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

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

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

> regional landfills, a type of 'public service.' The 'public facilities' standard provides:
>
> "The Approval Authority shall find that: * * *
>
> "'(B)(9) Public Facilities and Services – where all such facilities necessary to serve the landfill are either available or programmed for the area[.]' MCC 39.7615(B)(9)." Respondent's Brief 52.

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

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

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

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

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

1000 Friends' first assignment of error is denied.

B. RFPD10's First Assignment of Error

1. RFPD10's First and Second Subassignments

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

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

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

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

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

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[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.

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

RFPD10's first and second subassignments of error are denied.

2. RFPD10's Third Subassignment

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

RFPD10's third subassignment of error is denied.

3. RFPD10's Fourth Subassignment of Error

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

RFPD10's fourth subassignment of error is denied.

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

OAN'S SECOND ASSIGNMENT OF ERROR

OAN's second assignment of error is that the hearings officer misconstrued the MUA-20 farm impacts test codified in MCC 39.7515 and erred in concluding that the MUA-20 farm impacts test is less strict than the EFU farm impacts test at ORS 215.275. 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."

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

At Record 3557, OAN stated:

> "The purpose of this letter is to set out the legal framework for the evidence that will be presented by fact witnesses at the hearing in this matter, especially as to the county's protection of ongoing, accepted farm practices under MCC 39.7515(C). The impacts of [PWB's] proposed facility and related pipelines, and especially those impacts arising during the projected five-year construction period, would result in continuous, ongoing violation of this provision. In any event, as we will explain, PWB has come nowhere near meeting its burden of proof herein and apparently perceives no need to do so.
>
> "The Farm Impacts Test
>
> "The fundamental approval criteria for the proposed Community Service use are contained in MCC 39. Section 39.7515(C) requires a showing that:

"(C) The use will not:

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

Record 3557 does not set out an interpretation of the MUA-20 farm impacts test. However, at Record 3558, OAN continues the introduction provided at Record 3557:

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

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

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

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

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

"(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or

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

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

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

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

OAN's second assignment of error is denied.[28]

OAN FOURTH ASSIGNMENT OF ERROR

A. Misconstruction of Law

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

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

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[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).

> arbitrary distance." 67 Or LUBA at 319-20 (internal citations omitted).

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

> "Stated differently, 'surrounding lands' for purposes of ORS 215.296(1) are those lands in such proximity to the proposed ORS 215.213(2) and ORS 215.283(2) conditional use that the externalities or sensitivities of the proposed use could potentially cause significant changes in or significantly increase the cost of accepted farm practices on nearby lands." *Id.* at 321.

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

B. Adequacy of Findings

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

C. Substantial Evidence

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

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

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

> "The potential area of impact to transportation of farm crops was a factor in the selection of the Surrounding Lands and was evaluated based on operational and, later, construction traffic evaluations from Global Transportation Engineering.
>
> "The fact that some nursery loads are filled by two or more nurseries, some of which might be long distances from the [PWB] projects, does not require a study area larger than is defined in the [PWB] reports. Both for operations and construction traffic, Global Transportation Engineering evaluated key intersections in the

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

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

OAN's fourth assignment of error is denied.

OAN THIRD ASSIGNMENT OF ERROR

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

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

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

> "[T]here is no evidence that [a transportation demand management plan] would feasibly eliminate significant impacts on farm practices and the costs of those practices as required by MCC 39.7515(C).
>
> "In this regard, we do not intend criticism of county [t]ransportation staff. They worked with only the limited information provided by PWB and without the volume of evidence of farm practices to be adduced at your hearing. As a result, they necessarily failed to propose workable condition to the extent that that conditioning is permissible and can or will be effective here." Record 3564-65.

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

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

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

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

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

OAN's third assignment of error is denied.

1000 FRIENDS' SECOND ASSIGNMENT OF ERROR[29]

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

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[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).

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

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

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

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

We proceed to the application of the state statute farm impacts test. We understand the pipelines on EFU lands to be authorized as utility facilities necessary for public service, a use authorized by ORS 215.283(1) and ORS 215.275, not ORS 215.283(2) and ORS 215.296.[30] ORS 215.275(5) is, however,

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[30] ORS 215.283 states, in relevant part:

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

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

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> "(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."

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

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

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

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

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

1000 Friends' second assignment of error is denied.

1000 FRIENDS' THIRD ASSIGNMENT OF ERROR

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

1000 Friends' third assignment of error is denied.

COTTRELL THIRD ASSIGNMENT OF ERROR

A. Introduction

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

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

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[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."

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

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

B. First Subassignment of Error

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

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

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

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

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

> "Support the siting and development of community facilities and services appropriate to the needs of rural areas while avoiding adverse impacts on farm and forest practices, wildlife, and natural and environmental resources including views of important natural landscape features."

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

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

The MCCP chapter 5's introduction includes the statement:

> "This chapter provides an overview of conditions and planning issues associated with *natural resources* and environmental quality, along with Comprehensive Plan policies and strategies to address them, including the following topics:
>
> "• Water quality and erosion control
>
> "• Rivers, streams, and wetlands
>
> "• Wildlife habitat
>
> "• Air quality, and noise and lighting impacts
>
> "• Scenic views and sites
>
> "• Tree protection
>
> "• Wilderness areas
>
> "• Mineral and energy resource" MCCP 5-2 (emphasis added).

MCCP chapter 5 states in part:

> "Figures [in MCCP chapter 5] illustrate riparian areas (creeks, streams, rivers and other bodies of water) that have been inventoried and identified as *significant riparian resources* in the rural areas of the [c]ounty. Riparian areas labeled as SEC Water Resource (SEC-WR) and SEC Steams (SEC-S) are those streams subject to the [c]ounty's Significant Environmental Concern overlays for water resources and streams respectively.
>
> "* * * * *
>
> "Multnomah County protects water quality, ecological function, and wildlife habitat associated with streams and rivers through the [c]ounty's Significant Environmental Concern (SEC) overlay zones for streams and water resources (SEC-s and SEC-wr), scenic

> waterways (SEC-sw), significant wetlands (SEC-w) wildlife habitat (SEC-h), and Willamette River Greenway (WRG)." MCCP 5-3 (emphasis added).

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

> "Once these resources are identified, Goal 5 requires an Economic, Social, Environmental, and Energy analysis to determine which Goal 5 natural resources will be protected. Importantly there, OAR 660-023-0030(6) states:
>
> > "'Local governments may determine that a particular resource site is not significant, provided that they maintain a record of that determination. Local governments shall not proceed with the Goal 5 process for such sites and shall not regulate land uses in order to protect such sites under Goal 5.'"
>
> "Thus, Goal 5 clearly distinguishes between natural resources that can be regulated in a local code under Goal 5 and Goal 5 resources that cannot, as a matter of law, be regulated under a local code." Record 229-30.

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

> "This is not to say that the [c]ounty could not adopt another program to protect non-significant resources, unrelated to Goal 5. But the [c]ounty has not done that here. The [c]ounty has expressly determined 'natural resources' are defined as those resources that have been inventoried and evaluated as significant and thus are

subject to regulations that minimize impact on the resource." Record 231.

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

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

MCC 39.5540, "Criteria for Approval of SEC Permit" provides, in part:

> "The SEC designation shall apply to those *significant natural resources*, natural areas, wilderness areas, cultural areas, and wild and scenic waterways *that are designated SEC on [the] Multnomah County Zoning Map*."

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

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

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

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

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

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

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

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[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 MCCP glossary states that it

> "includes common definitions of terms used in the [MCCP] and is intended as a convenience to help readers better understand some of the terms used in the [MCCP]. 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." MCCP App B, at 2.

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

Cottrell's misconstruction of law assignment of error is sustained.

C. Second Subassignment of Error

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

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

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

PWB does not respond to Cottrell's assertion that the hearings officer did not accept PWB's argument that MCCP chapter 5 established the scope of natural resources required to be considered. Petition for Review36 n 6; Cottrell Reply 4. We agree with PWB that the hearings officer adopted the PWB findings with respect to MCCP policies 5.5, 5.6, 5.7, 5.11, 5.14, 5.18, 5.25, 5.26, 5.27, 5.40, 5.41, and 5.43. Record 43. We agree with Cottrell, however, that consistency with applicable MCCP policies is required by a different approval criterion. For the reasons set forth in our resolution of the third assignment of error's first

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

D. Third Subassignment of Error

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

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

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

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

The hearings officer concluded:

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

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

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

This subassignment of error is sustained.

E. Fourth Subasignment of Error

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

PWB explains that

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

> SEC-h zoned surface areas through the use of trenchless boring below the surface. Rec[ord] 7149." PWB's Intervenor-Respondent's Brief 3-4.

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

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

> "Regarding night-migrating birds, PWB's wildlife expert conceded that communication towers and guy wires 'can pose risks to night-migrating birds' but rejected any need to inventory or study the effects of those risks because the tower design will follow US Fish and Wildlife recommendations to 'minimize' the risk to birds. Rec[ord]1805. PWB and its experts refused to do what the criterion required and, for this reason alone, the findings not only lack substantial evidence, they fail to provide any evidence that the criterion is satisfied. These findings are insufficient and non-responsive to the no 'adverse effect' obligation.
>
> "The county failed to require any systematic evaluation of the natural resource qualities of the properties and made no effort to determine what adverse effects to those identified qualities will result from this development." Petition for Review 40.

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

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

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[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.

SUMMARY

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

The county's decision is remanded.