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

LEE SCHREPEL, BEN VAN DYKE, BJ MATTHEWS,
GORDON DROMGOOLE, JIM VAN DYKE,
JULIE VAN DYKE, JOHN VAN DYKE, ALICE PATRIDGE,
CELINE MCCARTHY, GREG MCCARTHY,
CHRIS MATTSON, CORY VAN DYKE, and TOM HAMMER,
Petitioners,

vs.

YAMHILL COUNTY,
Respondent.

LUBA No. 2020-066

JIM VAN DYKE, JULIE VAN DYKE, BEN VAN DYKE,
MARK VAN DYKE, VELMA VAN DYKE, JOHN WISER,
LYNNE WISER, JOHN VAN DYKE, SCOTT BERNARDS,
RICHARD CLOEPFIL, CHRISTY CLOEPFIL, TOM HAMMER,
CHRIS MATTSON, KELSEY FREESE, MARK GAIBLER,
ERIC KUEHNE, HAROLD KUEHNE, JOLENE KUEHNE,
B.J. MATTHEWS, GORDON DROMGOOLE, GREG MCCARTHY,
CELINE MCCARTHY, MARYALICE PFEIFFER, TIM PFEIFFER,
BRYAN SCHMIDT, RUDIS LAC, LLC, LEE SCHREPEL,
ALLEN SITTON, BROOK SITTON, LESTER SITTON,
DARREN SUTHERLAND, KRIS WEINBENDER,
BRIAN COUSSENS, ROXANNE COUSSENS,
FRUITHILL, INC., and BEN VANDYKE FARMS, INC.,
Petitioners,

vs.

YAMHILL COUNTY,
Respondent.

LUBA No. 2020-067

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Wendie L. Kellington, Lake Oswego, filed the petition for review and reply brief and argued on behalf of petitioners. With her on the brief were Sarah C. Mitchell and Kellington Law Group, PC.

Timothy S. Sadlo, Senior Assistant County Counsel, McMinnville, filed the response brief and argued on behalf of respondent.

Samantha J. Bayer, Salem, filed an amicus brief on behalf of the Oregon Farm Bureau Federation. With her on the brief was Mary Anne Cooper.

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

REMANDED 12/30/2020

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

Opinion by Zamudio.

NATURE OF THE DECISIONS

In LUBA No. 2020-067, petitioners appeal a board of county commissioners decision reapproving a conditional use permit for a recreational trail. In LUBA No. 2020-066, petitioners appeal a board of county commissioners decision reauthorizing a contract for the construction of a bridge along the trail route.

MOTION TO APPEAR AS AMICUS

The Oregon Farm Bureau Federation (Farm Bureau) moves for permission to appear as amicus and file a brief aligned with the interests of petitioners in this appeal. No party opposes the motion and it is allowed.[1]

BACKGROUND

This dispute involves county land use approval to develop a pedestrian trail (Trail) on county-owned property within a former railroad right-of-way corridor (corridor). This dispute involves a 2.82-mile segment that runs between the cities of Yamhill and Carlton that is largely within an area that is planned for agricultural use, zoned exclusive farm use (EFU), and actively farmed. For a portion of the Trail, the eastern half of the corridor is zoned Agriculture-Forestry Small Holding (AF-10), a zone in which the Trail is not a permitted or conditional

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[1] Farm Bureau's amicus brief in large part adopts and reiterates petitioners' arguments in the petition for review. In this decision we do not specifically identify those arguments in which the Farm Bureau joins.

use. The county plans to confine trail use in that segment to the western half of the corridor until such time as zoning regulations in the AF-10 zone are modified to allow trail use. A property adjacent to the corridor, referred to as the Bus Barn property, is zoned Heavy Industrial (HI). Similarly to the AF-10 zone, the Trail is not a permitted or conditional use in the HI zone. Thus, use of the Bus Barn property for Trail purposes will also require future zoning action.

County action related to the Trail has been the subject of four prior LUBA decisions. *Van Dyke v. Yamhill County*, 78 Or LUBA 530 (2018) (*Van Dyke I*); *Van Dyke v. Yamhill County*, ___ Or LUBA ___ (LUBA No 2019-047, Oct 11, 2019) (*Van Dyke II*); *Van Dyke v. Yamhill County*, ___ Or LUBA ___ (LUBA Nos 2019-038/040, Oct 11, 2019) (*Van Dyke III*); *Van Dyke v. Yamhill County*, ___ Or LUBA ___ (LUBA Nos 2020-032/033, June 1, 2020) (*Van Dyke IV*).

In *Van Dyke I*, we remanded a 2018 board of county commissioners decision that amended the county's comprehensive plan to acknowledge county ownership of a 12.48-mile segment of the corridor and to authorize construction of a 2.82-mile segment of the Trail. We concluded that constructing the Trail requires conditional use permit (CUP) approval, including application of ORS 215.296, sometimes referred to as the farm impacts test, for sections of the Trail zoned EFU.[2]

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[2] As explained in detail under the second assignment of error, ORS 215.296 generally requires that an applicant seeking approval for certain non-farm uses in EFU zones demonstrate that the proposed use will not force a significant change

The county instituted remand proceedings and, in March 2019, the board of county commissioners approved a CUP for the Trail (First CUP Decision). In *Van Dyke II*, we remanded that decision for further proceedings.

In *Van Dyke III*, we dismissed two appeals of (1) a board of county commissioners order authorizing the county to enter into an agreement for design and consulting services related to three proposed bridges along the Trail route and (2) the agreement itself (Design and Consulting Services Agreement). We agreed with the county that the Design and Consulting Services Agreement was not a land use decision because it did not authorize "the use or development of land." *Van Dyke III*, ___ Or LUBA at ___ (slip op at 15). For that reason, we also concluded that the Design and Consulting Services Agreement did not have any significant impacts on land use and therefore did not qualify as a significant impacts land use decision under *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982). *Van Dyke III*, ___Or LUBA at ___ (slip op at 17-19).

On January 16, 2020, the board of county commissioners issued an order authorizing the county to enter into a construction agreement (Construction Contract) for the construction of a bridge over Stag Hollow Creek, the Stag Hollow Bridge, and related approaches on county-owned property zoned EFU (First Bridge Decision). Petitioners appealed that decision, and the Construction

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in accepted farm practices on surrounding farmland or significantly increase the cost of such practices.

Contract itself, in *Van Dyke IV*.[3] On June 1, 2020, we issued our final opinion and order in *Van Dyke IV*, remanding the First Bridge Decision because we concluded that construction of the bridge requires CUP approval.

Two days prior to the issuance of our final opinion and order in *Van Dyke IV*, on May 28, 2020, the county issued Board Order 20-164, reapproving a CUP for the Trail after proceedings on remand from *Van Dyke II* (Second CUP Decision). Petitioners challenge the Second CUP Decision in LUBA No. 2020-067.

On June 11, 2020, the county issued Board Order 20-178, which "rescind[s]" the First Bridge Decision and reauthorizes the Construction Contract for the construction of the Stag Hollow Bridge (Second Bridge Decision). In the Second Bridge Decision, the county refers to and relies on the Second CUP Decision for required land use approval and concludes that the CUP proceeding "provided all of the process, and addressed all of the statutory and ordinance standards, required by LUBA's remand" in *Van Dyke IV*. Supplemental Record 1. Petitioners challenge the Second Bridge Decision in LUBA No. 2020-066.

FIRST ASSIGNMENT OF ERROR

In the first assignment of error, petitioners argue that the Second CUP Decision is "void as a matter of law" because, according to petitioners, the county

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[3] For ease of reference in this opinion, the term "petitioners" generally includes past and present petitioners without distinction.

lacked jurisdiction to issue the Second CUP Decision on remand from *Van Dyke II* while the First Bridge Decision was pending before LUBA in *Van Dyke IV*. Petitioners rely on *Standard Insurance Co. v. Washington County*, where we explained that a local government loses its jurisdiction over a challenged decision once an appeal to LUBA is perfected. 17 Or LUBA 647, 660, *rev'd on other grounds*, 97 Or App 687, 776 P2d 1315 (1989). We also explained:

> "While * * * a county cannot act further on a specific land use decision until all appeals of its decision are concluded, * * * a county still has jurisdiction over the subject property. Thus, a county could supersede its earlier decision while review is pending, with a new decision concerning the property made as a result of a separate land use proceeding. Furthermore, we note that a county's land use decisions are effective while review by LUBA and the appellate courts is pending, unless a stay is specifically granted by LUBA pursuant to ORS 197.845." *Id.* at 660 n 13.

See also id. at 655 ("[A] county continues to have jurisdiction over the property that is the subject of a decision on appeal and, therefore, has jurisdiction to adopt a new quasi-judicial or legislative decision concerning the same property, based on a separate proceeding.").

Petitioners argue that the Second CUP Decision "impermissibly modified" the First Bridge Decision while that decision was pending review before LUBA in *Van Dyke IV*. Petitioners argue that the county attempted to fix or bolster the flawed First Bridge Decision while that decision was before LUBA by providing public process and adopting findings and conclusions regarding the Stag Hollow Bridge in the Second CUP proceeding, and then relying on the Second CUP

process to support the Second Bridge Decision. Petitioners argue that the Second CUP Decision is void as a matter of law and, thus, the Second Bridge Decision is flawed because it relies on the Second CUP Decision for land use approval for the Stag Hollow Bridge, which LUBA held was required in *Van Dyke IV*.

We remanded the First CUP Decision in *Van Dyke II* on October 11, 2019. *Van Dyke II* was not appealed to the Court of Appeals, and the matter was properly before the county when it processed the remand and issued the Second CUP Decision on May 28, 2020. As we explained in *Standard Insurance*, while the county lacks jurisdiction to modify a decision that is on appeal to LUBA, the county retains jurisdiction over the subject property and may issue other decisions affecting it. The Second CUP Decision and the First Bridge Decision are separate land use decisions, even though they both relate to the overall Trail project. The Second CUP Decision provides land use approval required for the development of all Trail components, including the Trail itself, trailheads, drainage structures, signage, fencing, and bridges, including the Stag Hollow Bridge. The decision on review in *Van Dyke IV* was the county's decision to authorize construction of the Stag Hollow Bridge and to enter into the Construction Contract.[4] The Second CUP Decision did not authorize the Construction Contract. The county did not issue the Second Bridge Decision until

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[4] In *Van Dyke IV*, the county disputed that the First Bridge Decision was a "[l]and use decision" subject to LUBA's review. ORS 197.015(10)(a); ORS 197.825(1).

June 11, 2020, after we issued our decision in *Van Dyke IV* and after the county issued the Second CUP Decision. The fact that the Second CUP Decision provides required land use approval for the Second Bridge Decision, and that the Second Bridge Decision refers to and relies on the Second CUP Decision, does not meld those two decisions together in a way that deprived the county of jurisdiction to issue the Second CUP Decision while *Van Dyke IV* was pending.

The first assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners argue that the county committed procedural errors during the Second CUP remand proceedings that prejudiced petitioners' substantial rights. LUBA will reverse or remand a decision where a local government fails "to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights" of the parties. ORS 197.835(9)(a)(B). A party's substantial rights include "the rights to an adequate opportunity to prepare and submit their case and a full and fair hearing." *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988).

Yamhill County Zoning Ordinance (YCZO) 1403 provides procedures for review by the board of commissioners. Such review is, by default, confined to the record. YCZO 1403.03. However, if the board decides to hold a *de novo* hearing or allow additional evidence and testimony, then the board's review is governed by the procedures that apply to an initial evidentiary hearing, including

presentation of written and oral testimony. YCZO 1402.07.[5] Presentation of oral testimony is subject to reasonable time limits set by the board chair. YCZO 1402.07(E).

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[5] YCZO 1402.07 provides:

"A. Testimony presented at hearings shall be pertinent and based upon sound reasoning, and shall be incorporated into the record unless the Chair rules such information to be excluded from the record as immaterial, or of questionable fact, intent or merit, based upon objection raised by Commission or Board members or other parties having standing in the hearing.

"B. All testimony not excluded shall become a part of the hearing record, and in addition to verbal testimony, may be presented in written form or incorporated by reference.

"C. In ascertaining whether or not the party providing testimony has standing, the chair may ask that such party identify and/or document the basis of standing, or may question the source of the information, or the interest or qualifications of the party submitting testimony, or question how the party giving testimony might be beneficially or adversely affected by the action under consideration.

"D. In the event that it is determined that a party does not have standing because the party will not be beneficially or adversely affected by the action under consideration, the Chair may direct that any prior testimony by that party be stricken from the record, and that farther testimony from the party be prohibited.

"E. The Chair may set reasonable and fair time limits for oral presentation of testimony.

On remand from *Van Dyke II*, the county decided to allow additional testimony and evidence regarding the CUP approval criteria and, thus, purported to conduct its May 21, 2020 remand hearing under the same procedures that are applicable to an initial evidentiary hearing in YCZO 1402.07. However, citing the COVID-19 pandemic, the county limited in-person oral testimony to the applicant (the county, represented by the county's attorney in this case) and one representative of all opponents of the Trail application. The county did not provide for public telephonic or web-based testimony at the remand hearing.[6] Petitioners determined that their attorney would represent them at the hearing, but objected to the limited hearing procedure.

Petitioners argue that the county's procedure that purported to allow new evidence and testimony but required petitioners to be represented by one spokesperson, and prohibited oral testimony from petitioners at the hearing, prejudiced their substantial rights to submit their case and obtain a full and fair hearing. *Muller*, 16 Or LUBA at 775. Specifically, petitioners argue that the county's procedure prejudiced their right to present oral evidence about their farm practices and establish their "credibility and veracity." Petition for Review

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> "F. Minutes of the meeting shall be accepted as the official hearing record. A verbatim transcript is not required."

[6] Petitioners point out that the board of commissioners had the ability to receive telephonic communication and did receive telephonic communication on unrelated agenda items at meetings on April 30 and May 7, 2020. Supplemental Record 88, 146.

79. Petitioners emphasize that, during the remand hearing, the board of commissioners asked petitioners' attorney specific questions about farm practices that required farmer experience and expertise to answer—expertise that the attorney did not have but that petitioners do have.

In *Pierron v. Eugene*, we explained in dicta that there is no unlimited right to oral argument during a hearing on a permit and that "[o]ral argument * * * is not necessarily an essential element in the opportunity to be heard and to present and rebut evidence. Submission of written testimony may be sufficient in most cases *with the possible exception of when the issue is credibility of witnesses*." 8 Or LUBA 113, 117 (1983) (emphasis added; citation omitted). To establish prejudice, the petitioner must meet a high bar and show "how the oral argument she was granted and her written testimony were improperly treated." *Id.* at 118.

We conclude that petitioners have made that showing here. In multiple places in the Second CUP Decision, the county dismisses the farmers' *written* testimony regarding farm impacts as "not credible," "unsupported," and "untrue," even in the absence of countervailing expert evidence. Record 23, 24, 29, 33. In addition, the county found that petitioners' attorney was not credible and characterized her testimony as follows:

> "With regard to the submittals by the attorney for the organized opposition, generally: by infusing the arguments made with invective and identifying the county as 'he,' the value, credibility and weight of the arguments made is diminished. The application is the county's application. The county is a political subdivision of the State of Oregon, it is not a male. An attempt has been made to ignore

> the appeals to emotion, name calling, fearmongering and threats presented throughout this proceeding, in her March 21, 2019 letter, and in numerous documents that the attorney for the organized opposition has submitted on second remand. As the factfinder, it is the Board's responsibility to weight the evidence and testimony it receives and the statements of witnesses and to judge the credibility of those testifying. For reasons indicated here and throughout these findings, the Board finds that, while many credible statements have been made by property owners and farmers opposing the trail, that testimony has been obscured by unsupported, hyperbolic, not-credible, sometimes deliberately false claims made and promoted by the attorney for the organized opposition that have then been repeated by her clients. There are too many of such statements made in all of her submittals, and repeated at high volume in her oral presentation to the board, to address them all separately here." Record 42.

The county did not permit petitioners to provide oral testimony. Nevertheless, the county made express and repeated findings that petitioners' written testimony was not credible or not supported. The Second CUP Decision turns, in large part, on the board's conclusions that petitioners' *written* testimony was not credible. The county expressly states that the county viewed petitioners' written testimony through the "obscured" lens of its judgment of petitioners' attorney's credibility. *See* Record 27 (describing petitioners' attorney as "the driving force for hyperbolic claims in these proceedings" and finding opponents' concerns "not credible"). In these unique circumstances, we agree with petitioners that the county's procedure prohibiting petitioners from testifying at the hearing prejudiced their substantial rights to submit their case and to receive a full and fair hearing. Accordingly, remand is required for a new hearing.

Petitioners also argue that the county erred by failing to provide a public hearing for the Second Bridge Decision. The Second Bridge Decision was issued without notice or hearing and relies on the Second CUP Decision for land use approval and public process. Petitioners argue that the Second CUP Decision exempts the Stag Hollow Bridge from compliance with the farm impacts test. However, petitioners do not demonstrate that their rights were prejudiced by the county's reliance on the CUP process to support the Second Bridge Decision in any manner that is distinguishable from petitioners' allegations of procedural error and prejudice stemming from the CUP process itself.

On remand, the county will be required to provide petitioners an opportunity to exercise the substantial rights of which they were deprived in the remand proceeding, and the county will presumably be required to adopt new or supplemental findings at the conclusion of those proceedings. Although the county may adopt different findings after a new hearing, we proceed to address petitioners' substantive assignments of error, as all of those issues are highly likely to arise on remand and be disputed again in any subsequent appeal. ORS 197.835(11)(a).

The fifth assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

As noted, ORS 215.296 provides what is sometimes referred to as the farm impacts test or standard. *See generally Stop the Dump Coalition v. Yamhill*

County, 364 Or 432, 435 P3d 698 (2019) (explaining and applying the farm impacts test). 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:
>
> > "(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."

ORS 215.203(2)(c) defines "accepted farm practice" as "a mode of operation that is common to farms of a similar nature, necessary for the operation of such farms to obtain a profit in money, and customarily utilized in conjunction with farm use." A "significant" change in an accepted farm practice is one that is likely to have an important influence or effect on that farm practice. *Stop the Dump*, 364 Or at 447. A "significant" increase in the cost of a farm practice is one that represents an influential or important increase in the cost of that farm practice. *Id.* The farm impacts test is applied to specific farm practices on individual farms. In addition, the county must consider aggregate or cumulative impacts across all farm practices on a single farm unit. *Id.* at 459. The applicant

carries the burden of proving that ORS 215.296(1) has been met. *Id.* at 460. Findings that a farmer can take measures to avoid or manage impacts from a nonfarm use do not establish compliance with ORS 215.296(1); rather, ORS 215.296(1) asks whether the non-farm use forces significant changes to farm practices or costs. *Id.*

In *Van Dyke I*, we remanded the county's decision, in part, for the county to apply the farm impacts test. In *Van Dyke II*, we remanded the First CUP Decision, in part, for the county to adopt adequate findings regarding the farm impacts test. In the Second CUP Decision, the county adopted extensive findings regarding alleged farm impacts. In the second assignment of error, petitioners challenge the county's conclusion that the farm impacts standard is satisfied.

A. The county erred by exempting a bridge and other "non-general public" improvements from farm impacts analysis.

The county determined that the Trail will satisfy the farm impacts standard, in part, by adopting conditions of approval that require fencing and signage, which the county concluded would mitigate farm impacts to a point of insignificance. Condition 2 provides:

> "(a) Prior to trail construction (*other than non-general public property access improvements including the initial bridge construction*) a Master Plan, which shall be a collaborative and coordinated effort, will be approved by the Board in a quasi-judicial land use proceeding, with notice to all property owners within 750-feet of Tax Lot 4403-01300 (the county-owned corridor), outlining additional trail design, management and mitigation measures, measures that will

help to ensure long-term minimization of conflicts between trail users and neighboring landowners.

"(b) The purpose of land use review of the draft Master Plan is to receive testimony and evidence regarding the proposed fence design, materials, construction and maintenance as the basis for findings that the fence proposed by the draft plan prevents or minimizes potential impacts to farm costs or practices from trespass, trespass related impacts, or blowing litter to a level at which they can no longer be considered significant. The entire plan will be subject to review by the Board, but the findings required for approval will be limited to review necessary to address ORS 215.296 and YCZO 402.07(A) with regard to the fence as required by LUBA in its remand of [the First CUP Decision]." Record 75 (emphasis added).

In the first subassignment of error, petitioners argue that the county misconstrued the farm impacts standard by exempting the Stag Hollow Bridge and other improvements from the farm impacts test. According to petitioner, the exemption in Condition 2 conceivably authorizes the county to construct components of the Trail without applying the farm impacts test or requiring mitigation of significant farm impacts. We agree.

In *Van Dyke IV*, the county argued that it was not required to obtain land use approval for the Stag Hollow Bridge construction, so long as that bridge was not used for Trail purposes unless and until the county obtained land use approval for the Trail. We rejected that argument and concluded that the county could not develop portions of the Trail without first obtaining CUP approval and applying the farm impacts test. The county adopted the Second CUP Decision and

Condition 2 prior to our decision in *Van Dyke IV*, and it appears to have adopted the reasoning that we rejected in *Van Dyke IV*.

The county responds that "[t]he bridge itself has nothing to do with the farm impacts test." Response Brief 27. We agree with petitioners that the exemption in Condition 2 misconstrues the applicable law. As we explained in *Van Dyke IV*, the county must obtain CUP approval for the Stag Hollow Bridge and other Trail components, including satisfying the farm impacts test.

The first subassignment of error is sustained.

B. The county erred by concluding that spray application of pesticides and herbicides are not accepted farming practices to which the Trail will force a significant change.

The farm practice of spraying crops has been a recurring issue over the course of this extended land use dispute. In *Van Dyke II*, we agreed with the county that overspray from adjacent farms onto the county's property is not an accepted farm practice.[7] However, we agreed with the petitioners that the county

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[7] We explained in *Van Dyke II*:

> "As we understand it, 'drift' and 'overspray' are somewhat different things. 'Drift' refers to circumstances where pesticide is directed to an intended, limited area, but due to wind shifts or other environmental factors the pesticide droplets 'drift' outside the intended spray area onto other property. 'Overspray' is a similar concept but involves operator error, where the operator accidentally sprays outside the designated spray area. Overspray is presumably more of a problem with aerial spraying than ground applications." *Van Dyke II*, ___ Or LUBA at ___ n 8 (slip op at 25 n 8).

was required to respond to petitioners' argument that the Trail would force them to supply spray setbacks on their own lands and cease use of certain pesticides and herbicides within the appropriate setback area, which petitioners argued is a significant change in the accepted farm practice of applying pesticides and herbicides. We observed that "[t]he county will likely need to conduct further fact-finding on these points to determine the appropriate setbacks for different farm operations, and to gather the information needed to determine whether the appropriate setback forces a significant change in farm operations." *Van Dyke II*, ___ Or LUBA at ___ (slip op at 33).

In the second subassignment of error, petitioners argue that approval of the Trail creates a new recreational area that triggers significant pesticide spray restrictions on their farms based on chemical label application requirements. Petitioners assert, and the county does not dispute, that farmers are required by law to obey pesticide product labels. It is a violation of federal law to use a pesticide in a manner inconsistent with its labeling. 7 USC § 136j(a)(2)(G) (2018).[8] Petitioners argue that the Trail forces a significant change in the use of four spray-application chemicals: Gramoxone, Parazone, Lorsban, and Yuma 4E.

[8] 7 USC section 136j(a)(2)(G) provides: "It shall be unlawful for any person * * * to use any registered pesticide in a manner inconsistent with its labeling[.]"

1. Gramoxone and Parazone

Farmers spray the herbicides Gramoxone and Parazone to kills weeds and tree suckers to maintain filbert orchards adjacent to the Trail. Record 286, 287, 694, 700, 795. Those two herbicides contain the same active ingredient and label instructions. We will refer to Gramoxone with the understanding that the same analysis and conclusions apply to Parazone. Farmers testified that, if they cannot spray Gramoxone, they will be forced to change their farm practices by either using less effective chemicals with lesser application restrictions or hiring expensive manual labor to remove weeds and suckers, which would increase the cost of farm practices. Record 287, 694.

At the time of our decision in *Van Dyke II*, the Gramoxone label provided: "DO NOT USE AROUND HOME GARDENS, SCHOOLS, RECREATIONAL PARKS, GOLF COURSES OR PLAYGROUNDS." Record 1504. The term "around" is not defined by the labels or in federal administrative rules. Petitioners cite a letter from an Oregon Department of Agriculture (ODA) pesticides program manager opining that, based on dictionary definitions, "around" means "[i]n the vicinity of; near or close-by," and that the label restriction could "preclude applications in fields adjacent to the trail or sensitive sites identified in product labeling." *Van Dyke II* Record 1629.[9]

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[9] The Record in these consolidated appeals incorporates the record of the First CUP Decision that we remanded in *Van Dyke II*. We cite that record as "*Van Dyke II* Record."

In *Van Dyke II*, we remanded for further findings regarding pesticide and herbicide spray applications. We explained:

> "We conclude that remand is necessary for the county to adopt more adequate findings regarding any setback or buffer required by pesticide or herbicide labeling. In doing so, the county will likely have to make specific factual findings about specific setbacks required by particular chemicals on particular farming operations on surrounding farmlands, and whether operation of each setback would force a significant change in farm practices. Specifically, the county must adopt findings addressing application of Gramoxone, Lorsban, Yuma 4E and any other pesticide, herbicide, etc., identified in the record that may require a setback of some kind from the Trail. The setback for Gramoxone appears to be most problematic, as it does not provide a numeric setback, but instead prohibits application 'around' recreational areas, which the county understood to mean in 'close proximity to.' The county will likely need to conduct further fact-finding to determine what is an appropriate setback for those farms using Gramoxone." *Van Dyke II*, ___ Or LUBA at ___ (slip op at 32).

During the period between our decision in *Van Dyke II* and the remand proceedings, the Gramoxone label was amended to provide: "NEVER USE THIS PRODUCT IN RESIDENTIAL OR PUBLIC RECREATIONAL SETTINGS (E.G., HOMES, HOME GARDENS, SCHOOLS, RECREATIONAL PARKS, GOLF COURSES, AND/OR PLAYGROUNDS)." Record 34, 879. ODA interprets the new Gramoxone label statement as not changing the meaning of those application restrictions. Record 631-34. Petitioners observe that the new label does not delineate the boundaries of "recreational settings," which results in an ambiguity similar to the prior label term "around."

Differently, the county gave dispositive weight to the label change and concluded that the removal of the term "around" and inclusion of the term "in" means that the Gramoxone label does not require any kind of setback from the Trail. The county found:

> "There is no prohibition on the use of Gramoxone in fields adjacent to the trail, other than standard setbacks that all farm operators would employ in an abundance of caution and out of respect for their neighbors as much as to reduce the risk of overspray or drift onto neighboring properties to reasonable levels." Record 34.

The county relied on its own interpretation of the terms "in" and "around" and did not provide any expert testimony that contradicts ODA's and the farmers' interpretation of the Gramoxone label.

Petitioners argue, and we agree, that in the absence of expert testimony supporting the county's label interpretation, we should accept the farmers' and ODA's interpretation of the Gramoxone label. The farmers and ODA do not specify a numeric setback for Gramoxone application, but petitioners emphasize ODA's opinion that the prohibition of application in and around recreational areas could preclude application of Gramoxone in significant portions of farmland adjacent to the Trail.

We agree with petitioners that the county erred by failing to do what we instructed it to do on remand in *Van Dyke II*—namely, make specific factual findings addressing application of Gramoxone, including the appropriate setback and whether operation of each setback would force a significant change in farm

practices. Thus, remand is required. On remand, it should be clear to the county that, as an evidentiary matter, it is not sufficient for the county to rely on its own reasoning with respect to the accepted farm practice of spray application of chemicals—including interpretation of restrictions contained on pesticide and herbicide labels. We agree with petitioners that the testimony of farmers, the applicators, and ODA, an agricultural practice regulatory body, weigh heavily in petitioners' favor. In light of the farmers' and ODA's assertions explaining with specificity why the Trail will force a significant change in accepted farm practices on surrounding lands devoted to farm use, and absent countervailing expert testimony, the county's conclusion that ORS 215.296 is met with respect to Gramoxone and Parazone is not supported by substantial evidence.

2. Lorsban and Yuma 4E

Farmers apply the pesticides Lorsban and Yuma 4E to control insect pests. Record 287. Lorsban and Yuma 4E are applied to filbert orchards by air blast sprayers into the leaves of the trees. Both of those pesticides require a minimum 10-foot setback from "sensitive sites," which are areas frequented by non-farmworkers and include "pedestrian sidewalks" and "outdoor recreational areas." Supplemental Record 716, 738. The setback distance is measured from the edge of the sensitive site to the edge of the application site. In *Van Dyke II*, we concluded that the sensitive site is "not necessarily limited to the paved portion of the Trail" and that it may also include "adjacent undeveloped areas within the right-of-way if dogs or children might wander off the paved trail." ___

Or LUBA at ___ (slip op at 31-32). Accordingly, the Trail creates a new sensitive site that changes where farmers may spray Lorsban and Yuma 4E. Farmers must adhere to a 10-foot setback on the farmers' property.

Farmers testified that, if they cannot spray Lorsban and Yuma 4E, they will be forced to either remove crops within the setback area or not spray pesticides within the setback area, which would likely result in infestation and crop loss in the unsprayed area that could spread into other areas. Alternatively, the farmers could apply other pesticides that do not have the same setback restrictions, but they would then lose the ability to rotate pesticides in order to reduce pest resistance, which could also result in infestation and crop loss.

The county first found that the farmers asserted an unfounded right to use the county's right-of-way as a spray buffer. From that premise, the county concluded that the Trail will not force a significant change in accepted farm practices because, as we explained in *Van Dyke II*, "[t]he county correctly concluded that applying pesticides in a manner that causes overspray or drift onto adjoining properties is not an accepted farming practice, for purposes of ORS 215.296(1)." *Id.* at ___ (slip op at 26).

However, as we also explained in *Van Dyke II*, petitioners' argument does not rely on any asserted right to apply overspray or allow drift onto the county's property. Instead, we explained:

> "We understand petitioners to argue, however, that the labels for some pesticides and herbicides, such as Gramoxone, effectively require a setback of an undefined width from certain sensitive uses,

> such as recreational areas, regardless of whether drift occurs or not. Similarly, petitioners argue that some pesticides, such as Yuma 4E, specify a minimum setback of up to 100 feet from sensitive uses such as residential and recreational areas. Because the Trail will be located adjacent to fields where such pesticides and herbicides are currently applied without any required setback, petitioners argue that affected farmers will necessarily have to supply the appropriate setback on their own lands, and cease use of certain pesticides and herbicides within the appropriate setback area, which will constitute a significant change in the accepted farming practice of applying pesticides and herbicides." *Id.* at ___ (slip op at 26-27).

The county essentially adopted the same findings on remand, reasoning that, because the county has no obligation to accommodate the farmers' spray buffer on county property, the Trail will not force a significant change in accepted farm practices.

Petitioners argue that the county mischaracterizes the accepted farm practice at issue. The farmers do not assert a right to use county property to allow overspray or drift. Instead, petitioners argue, as they did in *Van Dyke II*, that the approval of the nonfarm Trail use triggers previously inapplicable spray restrictions. In other words, farmers currently spray up to the property line between county property and farm property as an accepted farm practice. Under that practice, farmers are not required to employ setbacks from the county's property because it is not a "sensitive site." The county's conversion of the corridor to the Trail conditional recreational use creates a sensitive site that requires spray setbacks on the farmers' property. We agree with petitioners that the county's statement that the farmers have no right to use county property for a

spray buffer does not address the farm impacts issue presented by the approval of the Trail adjacent to farmland.

Petitioners also argue, and we agree, that the county's conclusion that it is "reasonable, prudent, and feasible" for farmers to accommodate a 10-foot setback from county property on farm property and employ spray methods to avoid applying any pesticides or herbicides to the Trail as a sensitive site is not supported by any evidence that contradicts the farmers' testimony. Moreover, the farm impacts test obligates the county, as the applicant for a nonfarm use, to accommodate the farm use. The farmers are not obligated to accommodate the Trail by changing their accepted farm practices, even if that change is "reasonable, prudent, and feasible." In approving the CUP, the county erred by failing to properly analyze the Trail's significant impact on farm spraying practices.

3. Mitigation Measures

The county improperly concluded that the farm spraying practices are not accepted farm practices. Nevertheless, the county adopted mitigation measures such as signage and potential coordinated trail closures to allow spraying near the Trail "not for the purpose of meeting the farm impact test," but instead "in the interest of avoiding negative impacts to farmers or the farm economy." Record 71. Petitioners argue that those voluntary measures are not clear and objective conditions and do not reduce impacts to a point of insignificance. We tend to agree with petitioners that the county's proposed mitigation measures are not

sufficient to mitigate the impacts to a point of insignificance; however, that issue is not presented by the county's decision that is before us in this appeal. Accordingly, that argument provides no basis for reversal or remand of the challenged decisions.

The second subassignment of error is sustained, in part.

C. Other Farm Impacts

In the third subassignment of error, petitioners argue that the county's evaluation of other farm impacts misconstrues the applicable law and that the county's conclusions with respect to those impacts are not supported by substantial evidence.

1. Application Exclusion Zones

In *Van Dyke II*, we explained that an Oregon Occupational Health and Safety Administration (OSHA) rule imposes an Application Exclusion Zone (AEZ) of up to 150 feet from pesticide application equipment when in operation. OAR 437-004-6405 (OSHA AEZ). The OSHA AEZ surrounds the application equipment, moving as the equipment moves. Under the OSHA AEZ, employers must generally ensure that employees and others who are not trained applicators are not within the AEZ during pesticide application. In *Van Dyke II*, we agreed with the county that the OSHA AEZ plays no role in evaluating whether the Trail complies with the farm impacts test because that rule does not obligate farmers to change their spray operations for people outside of the farm. ___ Or LUBA at ___ (slip op at 38-39).

During the remand proceedings, the farmers argued that the Trail impacts their spray operations under the Federal Environmental Protection Agency's (EPA) AEZ rule for outdoor pesticide application. 40 CFR § 170.405(a)(l)(i) (2016) (EPA AEZ).[10] The EPA AEZ excludes all persons other than trained and

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[10] 40 CFR § 170.405(a) (2016) governs outdoor pesticide application and provides:

> "(1) The application exclusion zone is defined as follows:
>
> "(i) The application exclusion zone is the area that extends 100 feet horizontally from the application equipment in all directions during application when the pesticide is applied by any of the following methods:
>
> "(A) Aerially.
>
> "(B) Air blast application.
>
> "(C) As a spray using a spray quality (droplet spectrum) of smaller than medium (volume median diameter of less than 294 microns).
>
> "(D) As a fumigant, smoke, mist, or fog.
>
> "(ii) The application exclusion zone is the area that extends 25 feet horizontally from the application equipment in all directions during application when the pesticide is applied not as in § 170.405(a)(1)(i)(A)-(D) and is sprayed from a height of greater than 12 inches from the planting medium using a spray quality (droplet spectrum) of medium or larger (volume median diameter of 294 microns or greater).
>
> "(iii) There is no application exclusion zone when the pesticide is applied in a manner other than those

protected pesticide handlers and extends 100 feet horizontally from the application equipment in all directions when a pesticide is applied aerially, by air blast application, as a fine-droplet spray, or as a fumigant, smoke, mist, or fog. *See* n 10.

Petitioners distinguish the OSHA AEZ from the EPA AEZ because OSHA regulates workplace safety and health, whereas the EPA more broadly regulates activities that affect human health and the environment. Petitioners assert that the EPA AEZ is not limited to farm workers or farm boundaries. Petitioners explain that the EPA AEZ requires a pesticide applicator to "immediately suspend a pesticide application if any worker *or other person*, other than an appropriately trained and equipped handler involved in the application, is in the [AEZ]." 40 CFR § 170.505(b) (2016) (emphasis added). Petitioners also cite EPA guidance which provides that the requirement that the handler suspend the application if

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covered in paragraphs (a)(1)(i) and (a)(1)(ii) of this section.

"(2) During any outdoor production pesticide application, the agricultural employer must not allow or direct any worker or other person, other than an appropriately trained and equipped handler involved in the application, to enter or to remain in the treated area or an application exclusion zone that is within the boundaries of the establishment until the application is complete.

"(3) After the application is complete, the area subject to the labeling-specified restricted-entry interval and the post-application entry restrictions specified in § 170.407 is the treated area."

anyone is in the AEZ is not limited to farm boundaries but applies to any area within the AEZ while the application is ongoing. Supplemental Record 181.

According to petitioners, spray application of pesticides must immediately cease if any person using the Trail enters the 100-foot EPA AEZ. In the event that the Trail is heavily used, or individual trail users move slowly or linger on the Trail for extended periods, the farmers explain that they may lose significant time in the spray application and potentially miss the "spray window" wherein daytime and weather conditions are right for spray application. The farmers argue that delay in spraying could increase costs for labor, chemicals, and equipment use and that the inability to spray at the proper time could result in pest infestations.

The county did not evaluate whether the Trail significantly impacts the farmers' spray operation vis-à-vis the EPA AEZ. Petitioners contend that the county failed to both recognize and address the significant impact of the Trail on farm practices in compliance with the EPA AEZ.

The county responds that OSHA expressly did not adopt the EPA AEZ regulation as state law, citing the OSHA AEZ, which provides, in part:

> "Note: Oregon OSHA has declined to adopt 40 CFR 170.405(a). In Oregon OAR 437-004-6405 applies.
>
> "This rule applies in Oregon where workers or other people are adjacent to pesticides being applied in outdoor production areas that are within the boundaries of the establishment. This rule becomes effective January 1, 2019.

> "Note: Nothing in these rules affects separate statutory or regulatory requirements such as the buffer zone requirement related to aerial herbicide applications in forestry operations (ORS 527.672)." OAR 437-004-6405.

Neither party has fully briefed the import of the first "note" in the OSHA AEZ that disavows the EPA AEZ. As we understand it, the county argues that because OSHA did not adopt the EPA AEZ, complying with the EPA AEZ is not an accepted farm practice. Petitioners argue that the fact that OSHA did not adopt the EPA AEZ as an OSHA *workplace* safety regulation does not make the EPA AEZ inapplicable, and compliance with the EPA AEZ is an accepted farm practice that would be significantly impacted by the Trail.

While it is not entirely clear to us that the EPA AEZ is applicable law that governs pesticide application in Oregon, neither is it clear to us that compliance with the EPA AEZ is not an accepted farm practice, regardless of whether it is applicable law. The farmers' position is that they must, and do, comply with the EPA AEZ in spray application of pesticides as a normal and accepted farm practice on farms adjacent to the Trail. In the absence of countervailing expert testimony, we accept as true the farmer-applicators' contention that compliance with the EPA AEZ is an accepted farm practice. Accordingly, the county erred by not analyzing the Trail impacts with respect to the EPA AEZ, and remand is required for the county to adopt more adequate findings on this point.

2. Aerial Application of Pesticides

Petitioners aerially apply pesticides to their filbert orchards. Petitioners submitted testimony from aerial spray applicators stating that they will not

aerially apply pesticides near the Trail due to the risk of complaints and potential litigation from Trail users. Record 224, 630, 790. Petitioners argue that the Trail will force them to cease aerial application of pesticides.

The county found that impacts to aerial spraying are not significant because overspray or drift onto the Trail from aerial spraying is not an accepted farm practice. Record 61. The county reasoned that the Trail would not constitute an impediment to aerial spraying because aerial spraying appears to currently occur on farm property in the county that is transected by or adjacent to other existing public rights-of-way. Record 69. Nevertheless, the county imposed a condition of approval that provides:

> "The county shall notify each property owner adjacent to the trail corridor of the option to provide 72-hour notice to the county prior to aerial spraying of herbicides, pesticides, fungicides or other dangerous chemicals. Upon receiving 72-hour advance notice of such spraying, trail managers shall post 'Danger-Pesticide Spraying in Progress—Trail Closed' signs in appropriate locations to prevent access to the identified trail segment until spraying is completed or until notified by the spray operator that the area is safe to enter." Record 76-77.

Petitioners argue that the Trail will force a significant change in aerial spraying by foreclosing the practice. Petitioners also argue that the condition of approval does not reduce that impact to insignificance and, in fact, forces another change to the aerial spraying farming practice. A farmer has a limited spray window based upon pest presence, weather conditions, and the aerial sprayer's availability. A 72-hour waiting period may close the limited spray window.

The county responds that no law prevents aerial application of pesticides on the farms adjacent to the Trail and that the county is not responsible for managing or responding to the aerial applicators' risk analysis.

The county's decision and argument misinterpret the farm impacts standard and improperly shift the evidentiary burden. The issue is not whether any law prevents aerial application of pesticides on the farms adjacent to the Trail. The issue is whether the county's proposed nonfarm use of the county's property forces a change in the accepted farm practice of aerial application of pesticides on those farms. The burden is on county to demonstrate that its nonfarm use will not force a significant change. The county has not done so. Based on the farmers' evidence, and the absence of countervailing evidence, we agree with petitioners that a reasonable person would not conclude that the Trail will not prevent farmers from conducting the farm practice of aerially applying pesticides on some portion of their farms. The county's decision misinterprets the farm impacts standard and is not supported by substantial evidence.

3. Trail Drainage Impacts

The county intends to pave a 12-foot surface for the Trail. The Trail corridor crosses three drainageways, including Stag Hollow Creek and two unnamed drainages. The Stag Hollow Bridge is designed to cross Stag Hollow Creek, and the county intends to install two culverts to allow the Trail to cross the other two drainages. The findings state that it is

"feasible for the county to comply with all applicable law with

regard to the installation of the two culverts, and with regard to any other drainage issue raised in this proceeding or existing in the county's right-of-way. Managing 700 miles of county roads, the county is in excellent position to manage stormwater related to the right-of-way, just as or better than railroad companies did for over 100 years. * * *

"* * * * *

"* * * The culverts are being designed by engineers and hydrologists to be properly sized to convey all anticipated, existing stormwater and to hold the same vehicle loads as Stag Hollow Bridge." Record 11-13.

Petitioners argue that runoff from the Trail will result in field flooding and decreased productivity and that the two culverts will exacerbate drainage issues, causing damage to pasture and crops. In addition, petitioners argue that Trail runoff will contain contaminants such as horse and dog feces and artificial chemicals from the Trail components that will cause food safety and contamination problems.

The county found:

"Opponents have recently claimed that stormwater drainage from the facility, once 12-feet of it is paved, will destroy their farms and create other havoc. The county's corridor is at least 60 feet wide, which is the size of a typical county road right-of-way. The county routinely manages stormwater where paved surfaces are twice as wide as the proposed trail, in rights-of-way that are 60 feet wide or less, and has been routinely paving previously graveled roads in the county, for years, while effectively managing stormwater. Sixty feet is more than ample room to manage all stormwater runoff that could ever be 'generated' by newly paved surfaces of the corridor. In its treatment of stormwater with regard to the trail, the county has sought and obtained the advice of an engineering firm, to ensure that all stormwater facilities related to the corridor are appropriately

> sized and correctly installed. For these reasons, it is highly likely that, in construction of the trail, the county will be able to solve existing stormwater issues raised by opponents and any potential stormwater increases owning to the addition of new impervious surfaces." Record 20.

Petitioners argue that the county's decision fails to address farm impacts from modified drainage. We agree. The county's findings reduce to a statement that, because the county manages county roads, the paved Trail and culverts will be correctly engineered to handle drainage and stormwater. The findings do not address whether the Trail will result in new drainage patterns and how the stormwater will be managed to avoid contamination of adjacent farmland. The findings simply dismiss the farmers' concerns. We agree with petitioners that the county's findings regarding farm impacts from Trail-related drainage are inadequate.

4. Food Safety and Seed Certification Impacts and Fencing Condition

Petitioners argue that the Trail will cause trespass and contamination from weed seed, trash, and feces that will significantly impact farmers' seed and food safety certifications. The county dismissed general contamination concerns as "unsupported allegations." Record 23. The county found that trespass could cause a significant impact to farm practices, but concluded that impact would be mitigated to a point of insignificance by Condition 2, quoted above, which requires master planning and fencing to avoid trespass. Record 30. Condition 2(b) provides, in part:

> "The purpose of land use review of the draft Master Plan is to receive testimony and evidence regarding the proposed fence design, materials, construction and maintenance as the basis for findings that the fence proposed by the draft plan prevents or minimizes potential impacts to farm costs or practices from trespass, trespass related impacts, or blowing litter to a level at which they can no longer be considered significant." Record 75.

Petitioners argue that Condition 2 is not sufficient to mitigate the impacts from trespass and contamination and is not clear and objective, as required by ORS 215.296(2).[11] We agree. First, as explained above, Condition 2 improperly excludes "non-general public property access improvements including the initial bridge construction." Thus, Condition 2 does not prevent potential trespass from the "non-general public," which we understand to mean county employees and agents, such as construction crews.

Second, Condition 2 does not define "trespass related impacts," so it is not "clear and objective" and it does not support a conclusion that all of the farmers' trespass-related concerns will be mitigated to a point of insignificance. Those concerns include Trail users entering farm property and coming into contact with pesticides and herbicides, as well as weed seed, trash, and feces contamination. Thus, it is not "clear and objective" what design requirements will apply to the fence. In the absence of those specifications, the county erred in relying on

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[11] As we discuss below, an applicant for a nonfarm use on EFU land may demonstrate that the farm impacts standard "will be satisfied through the imposition of conditions. Any conditions so imposed shall be clear and objective." ORS 215.296(2).

Condition 2 to find that trespass-related impacts will be mitigated to a point of insignificance.

The third subassignment of error is sustained.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

An applicant for a nonfarm use on EFU land may demonstrate that the farm impacts standard "will be satisfied through the imposition of conditions. Any conditions so imposed shall be clear and objective." ORS 215.296(2). Petitioners argue that the county misconstrued ORS 215.296 by concluding that it could satisfy the farm impacts standard by imposing Condition 2, which requires a subsequent master planning process. Petitioners argue that ORS 215.296 requires compliance with the farm impacts standard prior to approval of the nonfarm use and does not permit a local government to defer compliance to a subsequent process through a condition of approval.

Petitioners first argue that the county is precluded from relying on a master planning process to satisfy the farm impacts standard because, in *Van Dyke II*, we concluded that the county must determine compliance with ORS 215.296 on remand. Petitioners rely on the law of the case doctrine enunciated *Beck v. City of Tillamook*, 313 Or 148, 150, 831 P2d 678 (1992), which provides that parties are foreclosed from raising issues at LUBA that were conclusively decided against them by a prior LUBA decision in the same proceeding.

The county responds, and we agree, that the *Beck* doctrine does not prevent the county from adopting and defending a condition of approval relying on a subsequent master planning process. The First CUP Decision relied on a condition of approval requiring installation of a fence that, in turn, relied on a subsequent master planning process. In *Van Dyke II*, we remanded that decision, in part, because the findings and condition did not specify (1) the materials that will be used to construct the fence, (2) how the fence will be designed, and (3) when the fence will be built. Under the county's condition, those details were to be determined during a subsequent master planning process that did not provide for public participation. We reasoned:

> "[G]iven the centrality of the proposed fence to the county/applicant's demonstration of compliance with ORS 215.296(1), it was incumbent on the county/applicant to propose a particular type or design of fence, with sufficient detail regarding materials and construction to allow the participants and the county decision maker an opportunity to evaluate the fence's effectiveness to address the different types of impacts it is intended to address. With such evidence in the record, the county decision maker would be in a position to make sustainable findings regarding compliance with ORS 215.296(1), and to impose clear and objective conditions of approval to ensure compliance. Absent such evidence, it is difficult if not impossible to craft clear or objective conditions of approval regarding installation of a fence, *because it leaves the applicant and county unfettered discretion, in a subsequent administrative proceeding, to determine the type and design of the fence, and the materials used, that will be installed.*
>
> "* * * * *
>
> "It is permissible for a local government to find compliance with an

> applicable approval criterion, based on substantial evidence in the record that considers different feasible solutions to an identified problem, but nonetheless condition approval on subsequent administrative proceedings to determine which of the feasible solutions considered should be adopted. *Meyer v. City of Portland*, 67 Or App 274, 678 P2d 741, *rev den*, 297 Or 82 (1984). However, in the present case, the county decision maker did not consider evidence regarding the effectiveness of the proposed fence to address various different types of alleged farm impacts, because no specific fence was proposed, or any evidence submitted regarding a specific fence or a range of fence types, designs and materials. Instead, the county essentially deferred all consideration on these points to the master planning process, *which does not provide for a public hearing or input*. That was error. *Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007)." *Van Dyke II*, ___ Or LUBA at ___ (slip op at 43-45) (emphases added).

We agree with the county that the law of the case doctrine did not prohibit it from attempting to adopt a clear and objective condition of approval, including a subsequent master planning process, to satisfy the farm impacts standard. However, we agree with petitioners that the county's fencing and master planning condition does not satisfy the farm impacts standard.

The county argues that it may defer demonstration of satisfaction of the farm impacts standard to a subsequent master planning process, under the analysis set out in *Meyer* and *Gould*, and consistent with our decision in *Van Dyke II*, so long as the master planning process provides for a public hearing.

Gould is instructive. That case concerned a conceptual master plan (CMP) for a destination resort. The local approval criterion at issue required the county to "find from substantial evidence in the record" that "[a]ny negative impact on fish and wildlife resources will be completely mitigated so that there is no net

loss or net degradation of the resource." Deschutes County Code (DCC) 18.113.070(D). The county approved the CMP and did not postpone a determination that the project complies with DCC 18.113.070(D). Instead, the county implicitly concluded that the applicant's wildlife impact mitigation plan was sufficiently certain to allow a present determination of consistency with that approval criterion. We found that the findings were "adequate" to explain compliance with DCC 18.113.070(D). On judicial review, the Court of Appeals reversed and remanded, explaining that "[t]he county might have, but did not, postpone determination of compliance with that standard until the final master plan approval step and infuse that process with the same participatory rights as those allowed in the CMP approval hearing." 216 Or App at 162.

Generally, there are two pathways that a local government may permissibly take with respect to finding compliance with mandatory approval criteria in a two-stage land use permit approval process. First, a local government may find in the first-stage proceeding that all applicable approval standards can feasibly be satisfied with conditions of approval. In that case, the local government must make a feasibility finding by identifying and imposing conditions of approval that are "possible, likely and reasonably certain to succeed" in satisfying the criteria. *Meyer*, 67 Or App at 280 n 5. In those instances, the public has no participatory rights in the second-stage proceeding, which is usually an administrative step such as engineering review and approval. Alternatively, a local government may, in some instances, defer a finding of

compliance with certain approval criteria and the establishment of any conditions of approval necessary to ensure satisfaction of the criteria. *Gould v. Deschutes County*, 57 Or LUBA 403, 412 (2008). In these instances, the local government need not make any feasibility findings; however, the local government must provide in the second-stage proceeding the same participatory rights as those provided in the first-stage proceeding. *Id.* at 413-16.

In this case, we understand the county to have found that the farm impacts standard is satisfied in all respects except with respect to potential trespass, which the county found could be satisfied through Condition 2. The county effectively deferred its determination of whether the Trail will cause significant trespass-related farm impacts to the master planning process. The county argues that, because Condition 2 requires a public hearing on the fence design, its decision to defer that determination to a second-stage proceeding is permissible under *Gould*.

While the county is generally correct that two-stage land use proceedings are permissible, we conclude that this case is distinguishable from *Gould*. *Gould* involved a local code provision requiring a wildlife impact mitigation plan. That criterion did not require clear and objective conditions. Differently, this case concerns the farm impacts standard in state statute, which requires clear and objective conditions. We agree with petitioners that ORS 215.296(2) prohibits a substantive punt for a second-stage determination of farm impacts, Trail design, and mitigation measures. As we explained in *Van Dyke II*, the county must propose a fence design, with sufficient detail regarding materials and

construction to allow participants an opportunity to evaluate the fence's effectiveness in addressing the different types of farm impacts it is intended to address, before the county may rely on that fence design to determine that any impacts are mitigated to a point of insignificance.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that the county misconstrued the CUP standards of YCZO 1202.02, which are:

> "A. The use is listed as a conditional use in the underlying zoning district;
>
> "B. The use is consistent with those goals and policies of the Comprehensive Plan which apply to the proposed use;
>
> "C. The parcel is suitable for the proposed use considering its size, shape, location, topography, existence of improvements and natural features;
>
> "D. The proposed use will not alter the character of the surrounding area in a manner which substantially limits, impairs or prevents the use of surrounding properties for the permitted uses listed in the underlying zoning district;
>
> "E. The proposed use is appropriate, considering the adequacy of public facilities and services existing or planned for the area affected by the use; and
>
> "F. The use is or can be made compatible with existing uses and other allowable uses in the area."

Petitioners do not specify the standard of review applicable to the fourth assignment of error, as required by OAR 661-010-0030(4)(d), which provides, in

part, that "[e]ach assignment of error must state the applicable standard of review." We are required to affirm a local governing body's interpretation of its own land use regulations if the interpretation is not inconsistent with the express language, purpose, or policy of the comprehensive plan or land use regulations. ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010) (applying ORS 197.829(1) standard).[12] We review the board of commissioners' interpretations of the county CUP standards under that deferential standard.

Adequate findings set out the applicable approval criteria and explain the facts relied upon to conclude whether the applicable criteria are satisfied. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). "Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a

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[12] ORS 197.829(1) 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
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

reasonable person to make that finding." *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993) (citing *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988)).

A. Compatibility with Existing Uses

YCZO 1202.02(F) requires the county to establish that the Trail "is or can be made compatible with existing uses and other allowable uses in the area." In the First CUP Decision, the county's findings of compliance with this standard relied solely upon its erroneous findings of compliance with the farm impacts test. On remand from *Van Dyke II*, the county explained that, while evidence related to farm impacts played into its analysis, it differentiated that standard from the farm impacts standard. Record 20-21.

The county found that farm and rural residential uses are existing and allowable uses in the area. With respect to farm uses, the county explained that it

> "specifically does not believe that the rigorous analysis imposed on the county by appellate courts related to the farm standard is useful or appropriate in complying with subsection (F). The purpose of the standard is to require consideration of such uses, and to impose conditions to ensure compatibility with existing and allowable uses.
>
> "The emphasis in subsection (F) is on identifying potential incompatibilities, and * * * establishing conditions to improve compatibility, not to completely foreclose all potential incompatibility, which is impossible. To that end, the county is imposing significant conditions on the development of the trail, to improve compatibility between the trail and existing and allowable uses, to meet the standard as the county interprets it. The use is or can be made compatible with existing uses and other allowable uses in the area. Based on the conditions of approval (which subsection

> (F) specifically contemplates as a way to ensure reasonable compatibility) and in part on other findings and evidence regarding compatibility, suitability of the parcel and the availability of services, the proposed use is or can be made compatible with farm and residential uses and other uses allowed in the area. With conditions, the proposed trail will be compatible with existing uses and other allowable uses in the area." Record 21.

In the sixth subassignment of error, petitioners argue that the Trail is not compatible with existing and allowable farm uses in the area. Petitioners argue that the county's findings are inadequate because they do not respond to Trail impacts on pesticide spraying practices and contaminated stormwater drainage.

The county responds that its findings refer to and are based on its detailed "farm focused" findings. Response Brief 67. While the county does not identify any specific "farm focused" findings, it cites Section 11 of the Second CUP Decision, which includes findings that address specific farm operations adjacent to the Trail. Record 56-74. The problem with that general citation is that, without more specific findings, it is not possible for us to distinguish between the farm-focused findings supporting the county's flawed farm impacts analysis under ORS 215.296 and the findings on which the county relies to satisfy what it clearly considers a distinct compatibility analysis under YCZO 1202.02(F). Accordingly, we agree with petitioners that the county's findings regarding compatibility are inadequate to establish that that standard is satisfied.

The sixth subassignment of error is sustained.

B. Facilities and Services

YCZO 1202.02(E) requires the county to establish that the Trail "is appropriate, considering the adequacy of public facilities and services existing or planned for the area affected by the use." Petitioners assert two subassignments of error relating to this CUP criterion.

1. Heavy Industrial Zone

With respect to YCZO 1202.02(A)—which requires that the proposed use be listed as a conditional use in the underlying zoning district—the county found that that the Trail is a transportation facility and improvement, which is listed as a conditional use in the EFU zone. YCZO 402.04(N). The county explained that the Trail is not listed as a use allowed outright or conditionally in the AF-10 or HI zones, so that the Trail development requires future zoning amendments to allow the use in those zones.[13] The Second CUP Decision states that the county has initiated proceedings to amend the text of the AF-10 and HI zones to allow trail uses and opines that "[n]o state law prohibits trails or transportation facilities

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[13] In *Van Dyke I*, we observed that "a portion of the rail corridor adjoins a residential area zoned AF-10, and the AF-10 zone apparently extends to the midpoint of the rail corridor, so in that portion half of the corridor is zoned EFU and half AF-10." 78 Or LUBA at 542. We agreed with petitioners that the proposed recreational trail is prohibited in the AF-10 zone because the trail use is not listed in YZCO 501.02 and 501.03, which list the permitted and conditional uses allowed in the AF-10 zone, and because YZCO 501.04 states that "[u]ses of land and water nor specifically mentioned in this section are prohibited in the AF-10 District." *Id.* at 542 n 8.

in AF-10 or HI zones, and it is feasible for the county to amend those zones to allow such facilities." Record 13.

The county found that, "unless and until text amendments are made to the zoning ordinance, trail development will not take place within the HI zone, or the AF-10 zone, but will be confined to the 30-foot wide western side (zoned EF-80) of the corridor where it is adjacent to the AF-10 zone." Record 8. Condition 3 provides, in part, that "[n]o trail development is allowed under this approval in any zone where the proposed use is not an allowed use, prior to zone text amendments to add such a use to the list of uses allowed outright or conditionally in the zone." Record 75-76. Condition 1(c) provides, in part:

> "Following zoning ordinance text amendments to accommodate trail/transportation facility uses in the county's HI zone, the entrance to the trail from Highway 240 and the Bus Barn property shall be located on the north boundary of the Bus Barn property adjacent to the west boundary. Following amendments to the county's HI zone text, a trailhead and trail parking shall be established on the Bus Barn property * * * or at an equivalent, alternative location and arrangement." Record 75.

In the first subassignment of error, petitioners argue, essentially, that the approval is premature for those sections of the Trail planned to be located on AF-10- and HI-zoned land and, pursuant to ORS 215.427(3), sometimes referred to as the goal-post rule, the county is prohibited from approving the Trail conditioned on future rezoning.[14] Petitioners also argue that the county's CUP

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[14] ORS 215.427(3)(a) provides:

approval for the Trail sections that are zoned EFU impermissibly and erroneously relies on the development of public facilities—restrooms, water, sewer, fire hydrant, emergency vehicle access, and trailheads—on property that is zoned HI, where those uses are not currently allowed.

The county responds, and we agree, that the goal-post rule in ORS 215.427(3) insulates an applicant from changes to law that occur after the application is submitted. Petitioners have not demonstrated that that statute prohibits approval of multi-phase development or approvals conditioned on subsequent land use proceedings.

The county further responds that the Second CUP Decision does not approve any uses in the HI or AF-10 zones but, instead, defers those decisions to a future land use proceeding. As we understand it, the parties' dispute under YCZO 1202.02(A) presents a chicken-and-egg problem with respect to YCZO 1202.02(E). In support of its conclusion that YCZO 1202.02(E) is satisfied, the county found:

"[T]he Bus Barn property owned by the county is large enough, has

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> "If the application was complete when first submitted or the applicant submits additional information, as described in subsection (2) of this section, within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

> water, subsurface sewage disposal and electricity, and it is feasible that the Bus Barn property can accommodate its current use and also serve as a trailhead with restroom facilities and other amenities for trail users. The site currently has electrical service. A proposed condition of approval will require that a portable toilet be maintained at the bus barn and at the southern trail terminus, for use by trail patrons. A proposed ordinance scheduled to be heard by the Planning Commission at an upcoming hearing includes changes to the HI zone applicable to the Bus Barn, to allow development of trail related uses." Record 17.

The Second CUP Decision relies on facilities being developed in the HI zone without conditioning Trail development in the EFU zone on a future zoning amendment that would actually allow those facilities to be developed in the HI zone. Thus, the Second CUP Decision allows Trail development on EFU-zoned property potentially prior to zone amendments that are required before Trail-supporting public facilities can be developed on the Bus Barn property.

As noted, YCZO 1202.02(E) requires that the county determine that the conditional use "is appropriate, considering the adequacy of public facilities existing *or planned* for the area affected by the use." (Emphasis added.) The county implicitly interpreted YCZO 1202.02(E) to allow the county to rely on future planned actions to support a finding that the conditional use will be supported by adequate public facilities. Petitioners have not established that interpretation is inconsistent with the express language, purpose, or policy of YCZO 1202.02(A) or YCZO 1202.02(E). Thus, we must affirm the county's interpretation and application of those provisions. Relatedly, in the fifth subassignment of error, petitioners argue, in part, that the Second CUP Decision

improperly relies on water, sewer, and a fire hydrant at the Bus Barn property. We reject that argument for the same reasons.

The first subassignment of error is denied.

The fifth subassignment of error is denied, in part.

2. Adequacy of Facilities and Services

a. Trail Access from Highway 240

Trail users must navigate 1,000 feet along Highway 240 to travel between the city of Yamhill and the northern terminus of the Trail. That section of road is a two-lane highway with a posted speed limit of 40 miles per hour, narrow shoulders, and no bike lanes or sidewalks. That section also includes a bridge with no designated area for nonmotorized crossing. In the fifth subassignment of error, petitioners argue, in part, that the Trail is not supported by adequate transportation facilities with respect to that section of Highway 240.

The county found:

> "The purpose of the trail is to provide a transportation option for persons to travel between the cities of Yamhill and Carlton on foot, bicycle and horse. From the information submitted, it appears that there is a more than adequate shoulder on the Bus Barn property and as part of the State Highway, to support a conclusion that it is feasible to provide a safe connection between the City of Yamhill and the proposed trail. The one constricting location—a small bridge on Highway 240—is problematic, but it is a problem that can be address[ed] by signage and striping until a better solution can be obtained by working with ODOT or through grant funding available from ODOT." Record 56.

Again, YCZO 1202.02(E) requires that the county determine that the conditional use "is appropriate, considering the *adequacy* of public facilities existing or planned for the area affected by the use." (Emphasis added.) "Adequacy" is not defined in the YCZO and is a subjective term. *See Webster's Third New Int'l* Dictionary 25 (unabridged ed 2002) (defining "adequate" as "equal to, proportionate to, or fully sufficient for a specified or implied requirement; *often* **:** narrowly or barely sufficient **:** no more than satisfactory"). Petitioners' argument challenges the county's judgement that the Highway 240 connection is an "adequate" public facility to serve the Trail. However, petitioners have not established that the county's conclusion is inconsistent with the express language, purpose, or policy of YCZO 1202.02(E). Thus, we must affirm the county's interpretation and application of that provision.

b. Fire Control Services

Petitioners also argue that the Trail is not supported by adequate fire control services. "The nature of the fire risk along the proposed trail is similar to a wildland fire, specifically, small brushy fuels, grasses and/or dried crops." Record 19. Both the Yamhill and Carlton fire districts serve the area in which the Trail is proposed.

The chief of the Yamhill Fire Protection District testified that his district's response personnel are mostly volunteers and that providing fire service to the Trail "would create a major hardship." *Van Dyke II* Record 1637-38. The chief of the Carlton Fire District testified that his district's main fire station's access to

the right-of-way is currently overgrown with brush. Record 1782. The Carlton Fire District Chief also testified that brush along the Trail should be cleared to reduce fire danger and suggested that the county install fire hydrants along the corridor. *Id.*; Record 19. He also testified that it is uncertain whether there can be adequate fire service for the Trail due to a lack of funding for fire personnel. Record 1782.

The county did not respond to the Yamhill Fire Protection District Chief's concerns and rejected the Carlton Fire District Chief's assessment and suggestions. Record 19. The county found that fire protection facilities are adequate because the Trail is within both fire districts and will be accessible to fire "brush engines," which are the type of engines used to fight the types of fires anticipated along the Trail. *Id.*

Petitioners argue, and we agree, that the county improperly rejected and failed to address expert testimony without the support of countervailing expert testimony regarding fire suppression. Instead, the county appears to have relied on its own nonexpert assessment of fire risks and fire suppression resources. The county's findings regarding fire service adequacy are inadequate and not supported by substantial evidence.

The fifth subassignment of error is sustained, in part.

C. Suitability of the Parcel for Trail Use

YCZO 1202.02(C) requires a finding that "[t]he parcel is suitable for the proposed use considering its size, shape, location, topography, existence of

improvements and natural features[.]" In *Van Dyke II*, we remanded the First CUP Decision for the county to adopt findings regarding whether the right-of-way is suitable for the Trail, considering its "location," and that is the only issue before us under subsection (C). ___ Or LUBA at ___ (slip op at 85-86).

With respect to the parcel's location, the county found:

> "The 'location' of the county's ownership ('parcel'), Tax Lot 4403-01300, extends almost to the City of Gaston at its northern terminus to south of Gun Club Road as its southern terminus—12.48 miles. The property is a pre-existing transportation corridor that is generally 60 feet wide, and wider in places (including in the area that includes a segment of Stag Hollow Creek, where it is 80 feet wide). It includes [the Bus Barn property]. Even along the AF-10 segment of the corridor, the corridor in the EF-80 zone currently available for trail uses is 30-feet wide. The county has initiated proceedings to amend the text of the AF-10 and HI zones to allow trail uses. In the A[F]-10 area (a residential zone, currently being farmed adjacent to the trail) trail uses are expected to occupy only 12 feet of the width of the corridor, and can be accommodated within the existing EF-80 half of the trail. For most of the corridor, that leaves a potential buffer area of up to 24 feet on both sides of the proposed trail. Adjacent to the AF-10 segment, the buffer available between the proposed trail and uses in the EF-80 zone is 18 feet, with a 30-foot buffer between trail uses and uses in the AF-10 zone.
> * * *
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> "* * * * *
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> "The location of the parcel allows a trail located within it to directly connect two important Yamhill County cities that share a unified school district. It is easy to consider athletic teams of those schools using the corridor to train, and school children riding in groups or on their own to and from school. The location—connecting two communities by foot—is something that was lost when Highway 47 became crowded with semi-tractor trailers and automobiles, and

> inherently dangerous for pedestrians and bicyclists. Due in part to the location of the parcel, so close to Yamhill and transecting Carlton, people of all ages will be able to enrich their connections between the two communities and with the countryside around them and the farming taking place on those lands. As for claims of petitioners' that the location is unacceptable because it traverses farmland, that position cannot be correct. Seven hundred miles of county roads are located adjacent to, and transect farms throughout Yamhill County, and many more miles of public roads. Since the beginning of Yamhill County, those roads, many of them 'market roads,' have been considered an essential part of farming and were necessary to get crops and other farm products to market." Record 12-14.

The Second CUP Decision explains that YCZO 1202.02(C) "is a local standard that the Board interprets as focusing on the suitability of the parcel itself based on the characteristics of the parcel." Record 14. The county expressly does not rely on findings regarding the farm impacts standard to address subsection (C). *Id.*

In the third subassignment of error, petitioners argue, as they did in *Van Dyke II*, that the location of the right-of-way is not suitable for the Trail because it runs through the middle of an intensively farmed section of the county, causing a number of conflicts with farm uses. The county responds that it focused on the "location" of the Trail corridor in a geographic sense, *i.e.*, that the corridor connects the cities of Yamhill and Carlton and allows for safe, nonmotorized travel. We agree with the county that that interpretation must be affirmed under our deferential standard of review.

The third subassignment of error is denied.

D. Character of the Surrounding Area

YCZO 1202.02(D) requires the county to prove that the "proposed use will not alter the character of the surrounding area in a manner which substantially limits, impairs or prevents the use of surrounding properties for the permitted uses listed in the underlying zoning district." In the First CUP Decision, the county's findings of compliance with this standard relied solely upon its erroneous findings of compliance with the farm impacts test. *Van Dyke II*, ___ Or LUBA at ___ (slip op at 74-76). On remand, the county explained that, while evidence related to farm impacts played into its analysis, it differentiated the subsection (D) standard from the farm impacts standard. Record 14-15.

The county found that the character of the area surrounding the Trail is rural and agricultural. The county observed that "[f]arming has always taken place immediately adjacent to public rights-of-way. The [Trail] corridor and uses proposed have no different or more significant impact on farming or other adjacent uses than other rights-of-way common and coexisting with farm uses in farm areas throughout the county." Record 15. The county reasoned:

> "In this case, as the Board interprets the term, 'substantial' as requiring a much greater impact than can possibly be attributed to a trail in an established transportation corridor that transects farmland, not unlike the 700 miles of county road. Humans currently have the right to drive, walk or ride their bicycles on more than 700 miles of county roads, and do not appear, in doing so, to cause any impact significant enough to 'limit, impair or prevent the use of surrounding properties for farm uses.' Farming is thriving in Yamhill County, in part because it is, generally, welcome to visitors who contribute to the local farm economy by visiting farm country." Record 16.

In the fourth subassignment of error, petitioners argue that the Trail introduces a use that is "different and harmful" to the farming uses in the surrounding area, based mostly on the limitations to pesticide spray explained in the farm impacts analysis above. Petition for Review 68. Petitioners argue that the finding that roads coexist with farming is unresponsive to the YCZO 1202.02(D) standard because no roads run through the farm area that the Trail bisects. Petitioners further argue that the Trail will support non-motorized travel, which makes the Trail unlike a county road. Thus, petitioners argue, the county's conclusions are not supported by substantial evidence.

The farm impacts standard requires the county to determine that the Trail will not force a significant change in accepted farm practices on surrounding farmland or significantly increase the cost of such practices. YCZO 1202.02(D) is a local standard that is distinct from the farm impacts standard. YCZO 1202.02(D) requires the county to consider the impact of the Trail on the farm uses on surrounding properties and is primarily concerned with maintaining the character of the area—in this case, the rural, agricultural character. The county found that the Trail will not alter the character of the area, reasoning that rural and farm areas are commonly transected by transportation facilities and farming commonly occurs immediately adjacent to public rights-of-way. The county's interpretation of YCZO 1202.02(D) is entitled to deference. Petitioners have not demonstrated that that interpretation is inconsistent with the express language,

purpose, or policy of YCZO 1202.02(D). In addition, the county's findings are based on evidence upon which a reasonable person could rely.

The fourth subassignment of error is denied.

E. Consistency with the Comprehensive Plan

YCZO 1202.02(B) requires the county to demonstrate that the Trail is consistent with applicable provisions of the Yamhill County Comprehensive Land Use Plan (Comprehensive Plan). In *Van Dyke II*, we remanded for the county to identify applicable plan provisions and adopt findings addressing compliance with them. ___ Or LUBA ___ (slip op at 83-85).

1. Agricultural Policies

Comprehensive Plan Section II(A), Goal 1, Policy H, which is applicable to agricultural lands, provides:

> "No proposed rural area development shall substantially impair or conflict with the use of farm or forest land, or be justified solely or even primarily on the argument that the land is unsuitable for farming or forestry or, due to ownership, is not currently part of an economic farming or forestry enterprise."

Section II(A), Goal 2, is "[t]o conserve Yamhill County's soil resources in a manner reflecting their suitability for forestry, agriculture and urban development and their sustained use for the purposes designated on the county plan map." With respect to Section II(A), Goal 2, the county found that the soils in the corridor are ballast and gravel and not suitable for farming. However, with respect to Section II(A), Goal 1, Policy H, the county found that the Trail is not

being "justified solely or even primarily on the argument that the land is unsuitable for farming or forestry or, due to ownership, is not currently part of an economic farming or forestry enterprise." Record 11. Instead, the findings explain, the Trail

> "is being justified for a host of public policy reasons including providing a pedestrian/bicycle connection between Yamhill and Carlton, which share a unified school district; the obvious need for present and future alternatives to internal combustion engines as a transportation priority at a time of climate change; and for the mental and physical health of a population that needs places to run, walk and ride horses." *Id.*

The county adopted its Transportation System Plan (TSP) as an element of the Comprehensive Plan in 1996. Record 9. At that time, TSP Section 5.5 provided, in part, "Yamhill County will pursue, whenever possible, conversion of abandoned rail lines through the federal 'Rails to Trails' program and seek to integrate these abandoned lines into the county's trail/bikeway system." Record 9. In 2012, the following language was added to TSP Section 5.5: "Yamhill County Supports the Hagg Lake to McMinnville Rail with Trail Project (Yamhelas Westsider Trail Project) and considers it important to both the County's rail and trail/bikeway systems." *Id.*

In the Second CUP Decision, the county reasoned that, when it amended the Comprehensive Plan to acknowledge the potential use of the rail corridor as a trail, and later identified the specific Trail project, the county "established the primacy of transportation uses in the corridor when weighed against other goals,

including the county's agricultural goals and policies." Record 11. The Second CUP Decision states that "use of the corridor for trail and rail transportation purposes outweighs all other goals raised by opponents as in conflict, including agricultural goals, and is consistent with economic goals." *Id.* In other words, the county found that, because the county had adopted the Trail in its specific location as part of the Comprehensive Plan, the county had already decided that the Trail was consistent with or paramount to other applicable Comprehensive Plan goals and policies.

In the second subassignment of error, petitioners argue that the Second CUP Decision violates Section II(A), Goal 1, Policy H, because the Trail substantially impairs or conflicts with farm use, as petitioners argue under the farm impacts standard. When a comprehensive plan has overlapping or conflicting policies, it is permissible for a local government to interpret and apply them in a manner that balances those policies. *Milne v. City of Canby*, 46 Or LUBA 213, 234, *rev'd and rem'd on other grounds*, 195 Or App 1, 96 P3d 1267 (2004) (citing *Waker Associates, Inc. v. Clackamas County*, 111 Or App 189, 194-95, 826 P2d 20 (1992) ("[A] balancing process that takes account of relative impacts of particular uses on particular goals and of the logical relevancy of particular goals to particular uses is a decisional necessity.")). We defer to the county's interpretation of its own comprehensive plan and reconciliation of conflicts therein.

2. Rural Area Development Policies

Petitioners also argue that Comprehensive Plan Section I(B), Goal 1, Policy B, applies and requires the county to submit and approve a development plan for all phases of development, obtain all required state and federal approvals, and provide evidence of financial feasibility for the Trail project.[15] The county did not address that policy in its decision, and petitioners have not cited anything in the record demonstrating that they raised that policy during the remand proceedings. However, the county does not argue that the issue is waived.

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[15] Comprehensive Plan Section I(B), Goal 1, which is applicable to rural area development, is "[t]o provide an adequate amount of land, development areas and sites to accommodate those uses which are customarily found in rural areas or require or are better suited to rural locations, without compromising the basic goal relating to urban containment and orderly urban development."

Section I(B), Goal 1, Policy B, provides:

> "All proposed rural area developments shall be based on a reasonable expectation of the demand for the use of such land or facilities within a reasonable period of time and no large-scale development shall be approved without:
>
> "1. The submission and approval of a layout and design concept, with provision for the staging and servicing of all phases of the development;
>
> "2. The approval of all federal and state agencies relative in any applicable health, safety and environmental controls; and
>
> "3. An adequate demonstration of the financial capacity and responsibility of the proponents to complete the development and provide for operation and maintenance services."

Instead, the county responds that Section I(B), Goal 1, Policy B, is inapplicable to the Trail because the Trail is not the kind of rural area development to which Section I(B), Goal 1, applies, which is primarily rural residential development. The Trail is a transportation or recreation use.

The Section I(B) Summary provides, in part:

> "Expansion of urban development into rural areas is a matter of public concern because of the unnecessary increase in costs of community services, conflicts between farm and urban activities, and the loss of open space and natural beauty around urban centers occurring as a result of such expansion."

We are not convinced that Section I(B), Goal 1, Policy B, applies only to rural residential development. The goal and its policies are directed more generally at "urban development" and "urban activities." However, we are also not persuaded that Section I(B), Goal 1, Policy B, applies to the Trail because it is not clear to us that the Trail is "urban development" or "large-scale development." The county did not make any findings responsive to this policy, either because it was not raised or because the county implicitly determined that it is not applicable. Either way, petitioners have not established that Section I(B), Goal 1, Policy B, is applicable. Thus, petitioners' argument does not provide a basis for remand.

The second subassignment of error is denied.

The fourth assignment of error is sustained, in part.

DISPOSITION

Petitioners argue that we should reverse, rather than remand, the Second CUP Decision because the county cannot, as a matter of law, mitigate the Trail's farm impacts to a point of insignificant with clear and objective conditions, as required by ORS 215.296. Petitioners argue that "no purpose is served giving the county a fifth chance at the legally impossible." Petition for Review 43. We will reverse a decision that we conclude "violates a provision of applicable law and is prohibited as a matter of law." OAR 661-010-0071(1)(c). We conclude that the Second CUP Decision does not comply with the farm impacts standard. Because the Second Bridge Decision relies on the Second CUP Decision for land use approval, the same error requires remand of both decisions. However, we are not convinced that the Trail is prohibited by the farm impacts standard as a matter of law. Accordingly, the remedy for the county's error is remand.

DISSOLUTION OF STAY

In an order dated June 19, 2020, we granted petitioners' motion for a stay of the Second Bridge Decision pending our final opinion and order. With the issuance of this final opinion and order, the stay is dissolved. *Meyer v. Jackson County*, 73 Or LUBA 1, 26 (2016); *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 335, 342 (1995).

The county's decision is remanded.