BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JIM VAN DYKE, JULIE VAN DYKE,
MARK VAN DYKE, VELMA VAN DYKE,
RIVERVIEW FARMS INC., BEN VAN DYKE,
BEN VAN DYKE FARMS INC., BRIAN SCHMIDT,
SCOTT BERNARDS, LESTER SITTON,
BROOK SITTON, ALLEN SITTON,
TIM PFEIFFER, MARYALLICE PFEIFFER,
RICHARD CLOEPFIL, CHRISTY CLOEPFIL,
TOM HAMMER, KELSEY FREESE,
HAROLD KUEHNE, JOLENE KUEHNE,
ERIC HUEHNE, MARK GAIBLER,
GREG MCCARTHY, DARREN SUTHERLAND,
and B.J. MATTHEWS,
Petitioners,

12/20/18 AM 9:32 LUBA

and

KRIS WEINBENDER,
Intervenor-Petitioner,

vs.

YAMHILL COUNTY,
Respondent.

LUBA No. 2018-061

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Wendie L. Kellington, Lake Oswego, filed the petition for review and argued on behalf of petitioners and intervenor-petitioner. With her on the brief

was Kellington Law Group PC.

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

BASSHAM, Board Member; ZAMUDIO, Board Member, participated in the decision.

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

REMANDED 12/20/2018

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal Ordinance 904, which amends the county transportation system plan (TSP) to (1) acknowledge county ownership of a 12.48-mile segment of a railroad corridor, and (2) authorize development of a recreational trail within a 2.82-mile segment of the corridor that runs between the cities of Yamhill and Carlton.

FACTS

The rail corridor at issue is part of a longer rail corridor that was established by the Oregon Central Railroad Company in 1872, after the railroad acquired deeds to the 60-foot-wide corridor from adjoining property owners. Rail operations ceased in the early 1980s, and some of the track was removed. Since the 1990s, various groups have advocated converting the corridor to a recreational trail. In 2012, the county adopted Ordinance 880, which amended the TSP to designate the entire corridor segment within the county as a future rails-to-trails project, and recommended acquiring portions of the corridor and constructing a recreational path within the existing railroad right of way.

The county obtained grants to study a rails-to-trails conversion, including design of three bridges that must be constructed. Starting in 2015, the county held a number of planning sessions. In November 2017, the county paid the then-current owner of the rail corridor $1.4 million for a quitclaim deed to a 12.48-mile segment of the rail corridor (the corridor).

On April 3, 2018, the county initiated legislative proceedings leading to the adoption of the ordinance challenged in this appeal. The ordinance (1) acknowledges that the county owns the 12.48-mile segment of the rail corridor,[1] and (2) authorizes "immediate development" of a 2.82-mile segment that runs between the cities of Yamhill and Carlton. This 2.82-mile segment of the corridor is largely within an area that is planned for agricultural use and zoned exclusive farm use (EFU), although on a portion of the segment half of the corridor is zoned Agriculture-Forestry Small Holding District (AF-10).

Although the proceedings were conducted pursuant to county procedures that govern legislative decisions, which generally do not require individual notice, the county mailed notice of hearings to property owners within 750 feet of the corridor. On May 3, 2018, the planning commission conducted a hearing, at which petitioners, who own agricultural land adjacent to the corridor, appeared in opposition. Petitioners provided testimony regarding impacts of the proposed trail on adjoining farm practices. Among the issues raised by the Oregon Farm Bureau and others was whether proposed construction of the recreational trail required findings of compliance with ORS 215.296, which generally require findings that non-farm uses allowed in the EFU zone do not force a significant change in accepted farm practices on

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[1] Petitioners contend, and the county does not dispute, that amending the TSP to acknowledge ownership of the rail corridor was intended to facilitate obtaining future grants necessary to plan for and develop the recreational trail.

surrounding lands devoted to farm use, or significantly increase the cost of accepted farm practices on such lands. *See* n 4. In addition, opponents raised issues regarding whether the county is the legal owner of the corridor, taking the position that, notwithstanding the quitclaim deeded granted to the county, when the railroad use ceased in the 1980s the ownership of the corridor reverted to the adjoining landowners.

A motion to recommend approval of the draft ordinance failed, 4-4, and the planning commission ultimately voted to forward the ordinance to the board of commissioners without recommendation.

On May 11, 2015, the assistant county counsel (who was also acting as the applicant) submitted proposed findings taking the position that the proposed recreational trail is not subject to ORS 215.296. In the alternative, the proposed findings addressed the requirements of ORS 215.296 and the testimony regarding impacts on farm practices and concluded that ORS 215.296 is satisfied, based on identified means of mitigation or minimization of impacts to farm practices. Record 322.

On May 15, 2018, the board of commissioners conducted a hearing on the ordinance. At the conclusion of the May 15, 2018 hearing, the three commissioners deliberated and voted 2-1 against the proposal, with Commissioner Starrett and Olson voting against. Record 223. Following the May 15, 2018 hearing, county counsel, the county administrator and the deputy county administrator met with Commissioner Olson in a successful attempt to

persuade him to change his vote. On May 22, 2018, the county mailed notice that the board of commissioners would reconsider the May 15, 2018 vote at a May 31, 2018 formal session.

On May 30, 2018, the commissioners met in formal session. Although the notice stated that no additional testimony would be received, the commissioners allowed public testimony. At the conclusion of the session, Commissioner Olson made a motion to reconsider the original motion that was rejected on May 15, 2018. The motion to reconsider passed 2-1. On reconsideration, the motion to approve the proposed ordinance passed 2-1. Exhibit A of Ordinance 904 consists of revised findings proposed by the assistant county counsel, which include additional findings and conditions intended to ensure compliance with ORS 215.296.

This appeal followed.

INTRODUCTION

Petitioners advance six assignments of error. The fifth and sixth assignments of error involve procedural or process matters that we address first, because their resolution could affect how we resolve the remaining assignments of error. We next address the first, second and third assignments of error, which challenge the county's findings regarding compliance with ORS 215.296 and county land use regulations implementing ORS 215.296. Finally, we address the fourth assignment of error, which challenges the county's failure to

adopt findings addressing the issue raised below regarding whether the county legally owns the corridor.

FIFTH ASSIGNMENT OF ERROR

As noted, the county processed the application as a legislative action. Petitioners argue that both the county code and state law required the county to process the application under quasi-judicial procedures, subject to ORS 197.763 and local quasi-judicial equivalents. Among other things, petitioners argue that the county's failure to process the application under quasi-judicial procedures meant that petitioners were denied several procedural protections, including the right to a request continuance of the evidentiary hearing and a decision free of undisclosed ex parte contacts pursuant to ORS 215.422(3) and Yamhill County Zoning Ordinance (YZCO) 1402.

We agree with petitioners. As explained under the first and third assignments of error, discussed below, the proposed recreational path is a transportation facility or improvement allowed in the county EFU zone as a conditional use, pursuant to YCZO 402.04(N).[2] A proposed land use that

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[2] YCZO 402.04 provides, in relevant part:

> "The following uses are allowed in the Exclusive Farm Use District upon conditional use approval. Approval of these uses is subject to the Conditional Use criteria and requirements of Section 1202, and subsection 402.07(A) of this ordinance and any other provision set forth below. Applications shall be reviewed under the Type B procedure of Section 1301:

requires a conditional land use permit must be processed under quasi-judicial procedures. YCZO 402.04 specifies that conditional uses in the EFU zone are subject to conditional use criteria in YCZO 1202 and 402.07(A), and "shall be reviewed under the Type B procedure of Section 1301," which is one of the county's quasi-judicial review procedures. For that reason alone, we agree with petitioners that the county erred in processing the application under county legislative, rather than quasi-judicial, land use procedures.

In addition, we agree with petitioners that under state law the decision must be viewed as a quasi-judicial decision. In *Strawberry Hill 4-Wheelers v. Board of Comm.*, 287 Or 591, 602-603, 601 P2d 769 (1979), the Oregon Supreme Court established a three-factor test to determine whether a land use matter is quasi-judicial or legislative:

1. Is the process bound to result in a decision?
2. Is the making of the decision bound to apply preexisting criteria to concrete facts?
3. Is the matter directed at a closely circumscribed factual situation or a small number of persons?

No factor is determinative, but answering two or three of the questions in the affirmative suggests that the matter is quasi-judicial in nature. *Id.*

"* * * * *

"N. Roads, highways and other transportation facilities and improvements not allowed under Subsections 402.02(K) or 402.04(J), subject to compliance with OAR 660-12."

Petitioners argue that all three factors point to the conclusion that the matter is quasi-judicial, and we agree. The process was initiated by a land use application that, among other things, sought final county land use approval to construct improvements for a proposed transportation facility. The county argues that the board of commissioners could have tabled proceedings on the application at any point, and was free at all times to refuse to make any decision on the application. However, the county cites to nothing in the county code or elsewhere that purports to authorize the county to refuse to make a decision on a land use application pending before it that, among other things, seeks approval to construct a transportation facility.

The second factor—application of preexisting criteria to concrete facts—also points to a quasi-judicial decision. As discussed below, the county was required to apply discretionary approval standards that implement ORS 215.296, which address impacts on farm practices on land adjoining the 2.82-mile segment of rail corridor. As noted, the county's findings in fact address compliance with ORS 215.296, address a number of specific impacts to farm practices that were raised by participants below, and impose conditions intended to mitigate or avoid such impacts.

For similar reasons, the third factor—whether the matter is directed at a closely circumscribed factual situation or relatively small number of persons—also points to a quasi-judicial decision. The county argues that the proposed 2.82-mile segment of trail, once constructed, will be enjoyed by many

thousands of bicyclists and pedestrians from across the county and the region, and further that the farm impacts addressed in the decision affect 40 different parcels and 34 different property owners. However, in the context of a transportation facility the focus under this factor is not on the number of people that will use the facility on a daily or annual basis, as otherwise this factor would suggest that approval of virtually any and all transportation facilities would constitute legislative decisions. The focus instead is on whether the characteristics of the proposed transportation facility, including its size and location, are such that the land use consequences are disproportionately concentrated on a relatively small pool of persons, as opposed to a larger region or the general population. Here, the decision approves construction of a 2.82-mile recreational path that, surrounding farmers allege, will cause specific and direct adverse impacts on a relatively small number of adjacent farm operations. We conclude that the third *Strawberry Hill* factor is met and consideration of all three factors indicates that the county's action is quasi-judicial in nature.

Accordingly, the county erred in processing the application under its legislative rather than its quasi-judicial procedures. Consequently, the county was required to process the application pursuant to quasi-judicial procedures at YCZO 1301, and further was required to conduct any land use hearings pursuant to procedures implementing ORS 197.763.

Under ORS 197.835(9)(a)(B), LUBA shall remand a decision where the local government "[f]ailed to follow the procedures applicable to the matter

before it in a manner that prejudiced the substantial rights of the petitioner." Petitioners argue that the county's failure to follow quasi-judicial procedures prejudiced their substantial rights, noting the planning commission rejected their request to continue the initial evidentiary hearing to allow submission of additional evidence, a request that the county is obligated to grant under local quasi-judicial procedures implementing ORS 197.763(6). The county generally disputes that any procedural error prejudiced petitioners' substantial rights, but does not respond to petitioners' specific allegations of prejudice for failure to comply with ORS 197.763. Accordingly, we agree with petitioners that the county's failure to follow quasi-judicial procedures implementing ORS 197.763 prejudiced their substantial rights, and that remand is necessary for the county to review the application under the appropriate quasi-judicial procedures.[3]

The fifth assignment of error is sustained.

SIXTH ASSIGNMENT OF ERROR

As noted, the application initially failed to gain approval at the May 15, 2018 board of commissioners' meeting. However, on May 30, 2018, the commissioners met and voted 2-1 to reconsider their May 15, 2018 decision and ultimately voted 2-1 to approve the application. Petitioners argue that the May

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[3] Petitioners also advance arguments under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. Because we sustain the fifth assignment of error on sub-constitutional grounds, there is no need to address petitioners' constitutional arguments.

15, 2018 denial was the county's final decision, because the motion for reconsideration was improper under YCZO 900, section 5.02, which provides:

> "A motion to reconsider any item may be made only by a commissioner who voted with the majority on the question or a commissioner who was absent for the vote. Such a motion can be made only at the same meeting that the original motion was adopted, or at the next formal session."

Petitioners contend that the motion to reconsider was improper because the "item" voted on at the May 31, 2018 meeting—approval or denial of the application based on modified findings and additional conditions of approval—was not the same "item" that was the subject of the May 15, 2018 vote resulting in denial of the application. Because the findings and conditions were modified, petitioners argue, the matter before the commissioners was not the same "item" and therefore YCZO 900, section 5.02 does not provide a basis to reconsider the county's otherwise final May 15, 2018 denial.

The county does not respond to petitioners' arguments regarding the meaning of "item" and whether YCZO 900, section 5.02 is properly understood to allow reconsideration of an item that, following the initial vote, has been modified. Nonetheless, petitioners' arguments do not provide a basis for reversal or remand. As explained, remand is necessary for the county to conduct new proceedings that comply with quasi-judicial procedures, the result of which will be a new vote on whether or not to approve the application. Accordingly, there is no point in resolving petitioners' challenges to the alleged error in reconsidering the May 15, 2018 denial.

We do not reach the sixth assignment of error.

FIRST AND THIRD ASSIGNMENTS OF ERROR

Under the first assignment of error, petitioners challenge the county's finding that the application is not subject to the standards in ORS 215.296(1).[4] Petitioners also challenge the county's alternative findings of compliance with ORS 215.296. Alternatively, petitioners argue that even if ORS 215.296 does not apply to the proposed transportation facility, the facility is a conditional use under the county's EFU zone, and therefore subject to YCZO 402.07(A), which implements ORS 215.296 in identical terms. For the same reason, petitioners argue under the third assignment of error that the application is subject to the conditional use standards at YCZO 1202, which the county failed to address. Finally, petitioners argue that a portion of the rail corridor is within the AF-10

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[4] ORS 215.296(1) provides:

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

zone, a residential zone in which a transportation facility of this kind is not authorized at all.

As discussed under the fifth assignment of error, remand is necessary in any event for the county to conduct new evidentiary proceedings consistent with ORS 197.763, which will result in a new decision based on a different evidentiary record and, most likely, different findings. Accordingly, we address here only the legal issues raised by the parties regarding the applicable criteria. For the reasons below, we agree with petitioners that the proposed facility is a conditional use in the county EFU zone and hence subject to the standards at YCZO 402.07(A) and 1202. Because the standards at YCZO 402.07(A) replicate the standards at ORS 215.296, we need not resolve whether ORS 215.296 applies directly. Finally, because the decision must be remanded for a new decision based on new evidentiary proceedings, we do not reach petitioners' adequacy and evidentiary challenges to the county's present findings of compliance with ORS 215.296.

A. YCZO 402.04(N)

As noted above, Ordinance 904 approves the "immediate development" of a 2.82-mile segment of the rail corridor as a recreational bicycle and pedestrian path, including construction of a bridge. Under the third assignment of error, petitioners argue that the approved development is a "transportation facility[y] or improvement[]" listed as a conditional use in the county EFU zone

under YCZO 402.04(N). *See* n 2. YCZO 402.04(N) authorizes as a conditional use in the EFU zone:

> "Roads, highways and other transportation facilities and improvements not allowed under Subsections 402.02(K) or 402.04(J), subject to compliance with OAR 660-12."

The county's findings do not address YCZO 402.04(N) or take the position that the proposed facility is not a facility described in YCZO 402.04(N). On appeal, we do not understand the county to dispute that a recreational path of the kind approved here is a "transportation facilit[y] and improvement[]" for purposes of YCZO 402.04(N), and hence categorized as a conditional use in the county EFU zone. Nonetheless, the county argues that no conditional use permit under YCO 402.04(N) is needed in this case for the approved development, because the transportation facility is authorized in the county TSP pursuant to Ordinance 880. As noted, in 2012, the county adopted Ordinance 880, which amended the TSP to designate the entire corridor segment within the county as a future rails-to-trails project, and recommended acquiring portions of the corridor and constructing a recreational path within the existing railroad right of way. We do not understand the county to dispute that, in the absence of Ordinance 880, a conditional use permit would be required to authorize construction of the recreational path. However, the county contends that no conditional use permit is required in this case because the county's TSP already authorizes the proposed development.

We disagree with the county. That the county's TSP includes language recommending that the county acquire property to develop a transportation facility does not mean that whatever land use permits are required to actually construct the facility under the local code or state law are thereby waived. The county could of course choose to approve whatever land use permits are required under law at the same time it approves an amendment to its TSP, but the latter is not a substitute for the former, or vice versa.

The county correctly notes that a decision that determines "final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility which is otherwise authorized by and consistent with the comprehensive plan and land use regulations" is excluded from the definition of "permit" at ORS 215.402(4).[5] That class of decisions is also excluded from the definition of "land use decision" subject to LUBA's review,

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[5] ORS 215.402(4) provides:

> "'Permit' means discretionary approval of a proposed development of land under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto. 'Permit' does not include:
>
> "* * * * *
>
> "(c) A decision which determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility which is otherwise authorized by and consistent with the comprehensive plan and land use regulations[.]"

at ORS 197.015(10)(b)(D).[6] However, that class of decisions does not include land use decisions that are subject to discretionary conditional use permit approval standards. Stated differently, a decision that approves, for example, the "final engineering design" or "construction" of a transportation facility that is otherwise authorized by and consistent with a local TSP would fall within the definitional exclusions to ORS 215.402(4)(c) and ORS 197.015(10)(b)(D) only if there were no discretionary land use approval standards that must be applied to that decision, for example, if a transportation facility or improvement is an outright permitted use in the applicable zone. However, where the proposed facility is categorized as a conditional use in the applicable zone the local government can approve construction of the facility only after first addressing the applicable conditional use standards.

The county also cites to OAR 660-012-0050(3), part of the Transportation Planning Rule addressing project development.[7] We understand

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[6] ORS 197.015(10)(b)(D) excludes from the definition of "land use decision" at ORS 197.015(10)(a) a decision of a local government that "determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility that is otherwise authorized by and consistent with the comprehensive plan and land use regulations."

[7] OAR 660-012-0050(3) provides, in relevant part:

> "Project development addresses how a transportation facility or improvement authorized in a TSP is designed and constructed. This may or may not require land use decision-making. The focus of project development is project implementation, e.g. alignment,

the county to argue that approval of the proposed recreational path constitutes "project development," which need not require any land use decision-making, and that all land use authorizations necessary to approve the recreational path

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> preliminary design and mitigation of impacts. During project development, projects authorized in an acknowledged TSP shall not be subject to further justification with regard to their need, mode, function, or general location. For purposes of this section, a project is authorized in a TSP where the TSP makes decisions about transportation need, mode, function and general location for the facility or improvement as required by this division.
>
> "(a) Project development does not involve land use decision-making to the extent that it involves transportation facilities, services or improvements identified in OAR 660-012-0045(1)(a); the application of uniform road improvement design standards and other uniformly accepted engineering design standards and practices that are applied during project implementation; procedures and standards for right-of-way acquisition as set forth in the Oregon Revised Statutes; or the application of local, state or federal rules and regulations that are not a part of the local government's land use regulations.
>
> "(b) Project development involves land use decision-making to the extent that issues of compliance with applicable requirements requiring interpretation or the exercise of policy or legal discretion or judgment remain outstanding at the project development phase. These requirements may include * * * transportation improvements required to comply with ORS 215.296 or 660-012-0065(5). When project development involves land use decision-making, all unresolved issues of compliance with applicable acknowledged comprehensive plan policies and land use regulations shall be addressed and findings of compliance adopted prior to project approval."

were fully accomplished by the adoption of Ordinance 880. However, OAR 660-012-0050(3) provides no support for that argument. As OAR 660-012-0050(4) and (5) make clear, project development can avoid application of land use standards and decision-making only if all applicable standards have been applied and required decision-making have been made by the time of project development. The county did not, in adopting Ordinance 880 or at any other prior time, apply to the proposed facility the conditional use standards that govern development of transportation facilities in the county EFU zone under YCZO 402 and 1202. Nothing cited to us in OAR 660-012-0050 or elsewhere purports to authorize the county to waive otherwise applicable, mandatory, discretionary land use approval standards when approving a transportation facility or improvement.

In sum, we agree with petitioners that the proposed facility is a conditional use in the county EFU zone, and the county erred in failing to apply the applicable conditional use standards at YCZO 402 and 1202. Relatedly, we agree with petitioners that a decision approving a transportation facility under discretionary conditional use permit standards in YCZO 402 and 1202 is a "permit" decision as defined at ORS 215.402. *See* n 5. As a consequence, the application for the proposed transportation facility must be approved subject to procedures consistent with ORS 215.416.

The third assignment of error is sustained.

B. AF-10 Zone

As noted, 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. Petitioners argue that the AF-10 zone does not allow as a conditional or permitted use a transportation facility of this kind, and is in fact prohibited.[8]

The county does not dispute that the AF-10 zone does not allow the proposed recreational trail. However, we understand the county to argue that the prohibition on non-listed uses in the AF-10 zone cannot prevent the county from approving a non-listed recreational trail use in the AF-10 zoned portion of the corridor, because the TSP as amended by Ordinance 880 recommends that the county acquire the rail corridor and construct a trail on a portion of the corridor.[9] Although not entirely clear, the county appears to be arguing that any conflict between the AF-10 zone and the TSP must be resolved in favor of the

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[8] YZCO 501.02 and 501.03 list the permitted and conditional uses allowed in the AF-10 zone. Petitioners are correct that neither YZCO 501.02 nor 501.03 list a recreational trail or similar transportation facility as an allowed use. YZCO 501.04 states that "[u]ses of land and water nor specifically mentioned in this section are prohibited in the AF-10 District." Thus, petitioners appear to be correct that the proposed recreational trail is prohibited in the AF-10 zone.

[9] The county also suggests that AF-10's prohibition on unlisted uses cannot preclude approval of the trail because the rail corridor has been a transportation facility since 1872. Response Brief 32-33. If the county is arguing that the recreational trail represents a lawful nonconforming use in the AF-10 zone, the argument is not developed sufficiently for review.

TSP, because the TSP is part of the comprehensive plan, and hence hierarchically superior to the zoning ordinance. *See Baker v. City of Milwaukie*, 271 Or 500, 514, 533 P2d 772 (1975) (a zone cannot allow a residential density that is prohibited by the underlying comprehensive plan designation).

The county's decision does not address the AF-10 zone prohibition on unlisted uses, including transportation facilities such as the proposed trail, and nothing in the record cited to us suggests that the county even considered the issue. We agree with petitioners that remand is necessary for the county to consider that issue and adopt any findings or measures necessary to avoid or resolve conflict between the TSP and the AF-10 zone.[10]

C. ORS 215.296

Under the first assignment of error, petitioners challenge the county's conclusion that ORS 215.296 does not apply to the proposed recreational trail. Petitioners also challenge the adequacy and evidentiary support for the county's alternative findings that the requirements of ORS 215.296 are met, with the conditions imposed.

As explained above, the proposed trail is a conditional use in the county EFU zone under YCZO 402.04(N), which is subject not only to the conditional use permit standards at YCZO 1202, but also the farm impact standards at

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[10] Such measures could be as simple as a condition limiting construction of the recreational trail to the EFU-zoned half of the corridor.

YCZO 402.07(A), which is the local implementation of ORS 215.296.[11] Thus, even if ORS 215.296 does not apply directly, its substantive requirements apply via YCZO 402.07(A). Accordingly, there is no need in this opinion to resolve the rather complex legal arguments regarding whether ORS 215.296 applies directly.[12]

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[11] YCZO 402.07(A) provides:

> "In the Exclusive Farm Use District, prior to establishment of a conditional use, the applicant shall demonstrate compliance with the following criteria in addition to other requirements of this ordinance:
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> "1. The use will not force significant change in accepted farming or forest practices on surrounding lands devoted to farm or forest use.
>
> "2. The use will not significantly increase the cost of accepted farming or forest practices on surrounding lands devoted to farm or forest use."

[12] Briefly, the statutory authority to allow transportation facilities such as the proposed recreational path in the county's EFU zone is ORS 215.283(3), which delegates to the Land Conservation and Development Commission (LCDC) the authority to identify which transportation facilities not authorized in ORS 215.283(1) or (2) may be allowed in the EFU zone without a goal exception, but subject to ORS 215.296. LCDC duly promulgated OAR 660-012-0065, a rule that is part of the administrative rule implementing Statewide Planning Goal 12 (Transportation Facilities). OAR 660-012-0065 applies to all rural areas, not limited to EFU lands or resource lands. OAR 660-012-0065(3) sets out a list of transportation facilities and improvements that may be approved on rural lands that do not require a goal exception. Among the listed uses are "Bikeways, footpaths and recreation trails[.]" OAR 660-012-0065(3)(h). However, OAR 660-012-0065(3) does not mention ORS 215.296. The only

Because the substantive requirements of ORS 215.296(1) and YCZO 402.07(A) are identical, the county's findings addressing the statute can also serve to address the code equivalent. However, there is no point in resolving the parties' disputes over the adequacy and evidentiary support for the present findings of compliance with ORS 215.296, because the decision must be remanded in any event for new evidentiary proceedings, and on remand the evidence and likely the findings addressing the farm impact standards will

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mention of ORS 215.296 that occurs in OAR 660-012-0065 is in subsection (5), which is specific to facilities in EFU zones and forest zones. OAR 660-012-0065(5) subjects five of the facilities listed in OAR 660-012-0065(3), not including "Bikeways, footpaths and recreation trails," to an alternatives analysis, "in addition to demonstrating compliance with the requirements of ORS 215.296[.]" That parenthetical reference to ORS 215.296 is ambiguous, and can be read in context to indicate that LCDC intended that ORS 215.296 apply *only* to the five facilities subject to the alternatives analysis under OAR 660-012-0065(5), and no other facilities listed in OAR 660-012-0065(3).

The record includes a 2015 memorandum from staff at the Department of Land Conservation and Development (DLCD), taking the position that LCDC intended ORS 215.296 to apply to recreation trails on EFU land. Record 621-22. Also in 2015, DLCD staff testified to the legislature that recreational trails allowed in the EFU zone under ORS 215.283(3) and OAR 660-012-0065 are subject to ORS 215.296. Response Brief App 3. In the findings, the county disagreed with DLCD staff, and interpreted OAR 660-012-0065 to apply ORS 215.296 only to the five facilities identified in OAR 660-012-0065(5). Although we need not and do not resolve the dispute on this point, there is no question that OAR 660-012-0065 and related administrative rules are ambiguous and unclear on this issue. LCDC may wish to consider amending OAR 660-012-0065 or OAR 660-033-0120, Table 1, to make its intent more clear.

change. Accordingly, we decline to resolve petitioners' challenges to the adequacy and evidentiary support for the present findings.

The third assignment of error is sustained; the first assignment of error is sustained in part.

SECOND ASSIGNMENT OF ERROR

The county's findings address whether the proposed plan amendment is consistent with the statewide planning goals. With respect to Goal 3, the findings state that due to compacted rail ballast within the corridor "[m]uch of the corridor is no longer suitable for growing crops[.]" Record 23. Petitioners challenge that finding, arguing that is not supported by substantial evidence. Petitioners cite to testimony that surrounding farmers grow crops within the rail corridor (presumably in areas not covered by rail ballast). Further, petitioners argue that whether the land remains "agricultural land" subject to Statewide Planning Goal 3 (Agricultural Lands) depends not only on whether the soils can grow crops, but also whether the land is "necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands." OAR 660-033-0020(1)(a)(C). Petitioners cite to testimony that some of the farmers who own or farm land on both sides of the corridor drive equipment across the corridor at frequent intervals during harvest operations.

The county responds that the county's findings of consistency with Goal 3 are supported by substantial evidence. The county argues that the fact that some farmers may (illegally) grow crops within the corridor does not

undermine the county's finding that much of the rail corridor is covered with compacted ballast. The county also argues that the county did not find, and did not need to find, that the rail corridor is no longer "agricultural land" for purposes of Goal 3, only that the proposed recreational path is consistent with Goal 3. We agree with the county. A recreational trail approved under the applicable standards can be consistent with Goal 3, even if the rail corridor still qualifies as "agricultural land" as defined in Goal 3. Petitioners' arguments under the third assignment of error thus do not provide a basis for reversal or remand.

The second assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

As explained above, opponents argued to the county that the county did not in fact own the rail corridor, which according to opponents' legal theory had reverted to the adjoining land owners when the railroad use ceased in the 1980s. The county's findings did not address that issue. On appeal, petitioners argue that the county has the burden to demonstrate that it is the legal owner of the rail corridor, which as a matter of law can be established only if the county files and prevails in a quiet title action in circuit court, the only review body with jurisdiction to definitely determine ownership. Alternatively, petitioners argue that even if the county does not have that burden, the county is nonetheless obligated to adopt findings addressing the issue and establishing that it is feasible for the county to prevail in a quiet title action.

The county responds that the county, as deed owner of the rail corridor, has sufficient authority, without more, to file a land use application to develop the corridor, and that the county has no obligation to establish by means of a quiet title action or any other process that no other person is the legal owner as a condition precedent to proceeding on its land use application.

We agree with the county. While the county requires the landowner or authorized agent to sign the land use application form, the undisputed fact that the applicant owns the deed to the subject property is sufficient, without more, to authorize the county to proceed on the application. The applicant is not required to file and win a quiet title action in circuit court as a condition precedent to filing the application, simply because another party disputes the applicant's title under a legal theory that can be resolved only in circuit court. In such circumstances, neither the county nor LUBA is in a position to resolve the legal dispute over whether the applicant/deed owner's title is good. For that reason, the county is also not obligated to adopt findings resolving the title dispute.

In circumstances where consent or lack of ownership has a bearing on an approval criteria, for example where proposed development relies upon a third-party easement to establish access required by code, we have held that the decision-maker may be required to impose conditions to ensure that the required easement or consent is obtained prior to construction. *See, e.g.*, *Culligan v. Washington County*, 57 Or LUBA 395 (2008) (where subdivision

relies on private easement for access but the scope of easement is disputed, the decision maker can approve the application with conditions that ensure that the dispute is resolved prior to construction). However, ownership of the subject property is not an approval criterion in the present case and has no bearing, as far as petitioners have established, on any approval criteria. We have never held that the applicant has the obligation to quiet title in the subject property where some doubt is raised during the proceedings below as to the legality of that title, or that the decision-maker is obliged to adopt findings addressing the likelihood that the applicant will prevail in a quiet title action, and we decline to so hold now. Petitioners' arguments under this assignment of error do not provide a basis for reversal or remand.

The fourth assignment of error is denied.

The county's decision is remanded.