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

WAVESEER OF OREGON, LLC,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

DOUGLAS KRUTZIKOWSKY and KIM McCREADY,
Intervenors-Respondents.

LUBA No. 2019-036

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Corinne S. Celko, Portland, filed the petition for review and a reply brief, and argued on behalf of petitioner. With her on the brief was Alex J. Berger and Emerge Law Group.

D. Adam Smith, Assistant Legal Counsel, filed a joint response brief and argued on behalf of respondent.

Will Van Vactor, Bend, filed a joint response brief and argued on behalf of intervenors-respondents. With him on the brief was Van Vactor Law LLC.

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

RYAN, Board Member, concurred in the decision.

REMANDED 10/17/2019

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 DECISION

Petitioner appeals a decision by the board of county commissioners denying petitioner's application for a marijuana production facility on property zoned for exclusive farm use (EFU).

BACKGROUND

The subject property is zoned EFU and is developed with a dwelling and a barn. Record 691.[1] The property south of the subject property, known as Rhinestone Ranch, is zoned EFU and used as a family residence and working ranch that also hosts youth-oriented equestrian activities, such as horseback riding classes and camps and birthday or other celebratory event parties with ponies, in exchange for a fee. Record 12, 79, 279. The property to the east of the subject property, which we will refer to as the Dodds Road Residence, is developed with a residence and outbuildings and also hosts youth-oriented 4-H agricultural activities. Record 12, 559.

Petitioner applied to the county for administrative approval to develop an indoor marijuana production facility that would consist of three structures. The primary structure is a 36,000-square-foot structure that is planned to include areas for growing, drying, processing, and storing marijuana. Record 693. One smaller structure is planned to house electrical power systems, and another smaller

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[1] All citations to the record in this decision refer to the amended record.

structure is planned to house a water treatment system and secure waste management. Record 688. No outdoor production or greenhouses were proposed as part of the application.[2] Record 688, 693.

Oregon land use law preserves land for agricultural uses by restricting uses allowed in EFU zones to farm uses and certain non-farm uses that the legislature has determined are compatible with farming. *See* ORS 215.203(2)(a) (defining "farm use"); ORS 215.283 (providing non-farm uses permitted in EFU zones in nonmarginal lands counties); ORS 215.213 (providing nonfarm uses permitted in exclusive farm use zones in counties that adopted marginal lands system prior to 1993). Marijuana is a crop for the purpose of "farm use" as defined in ORS 215.203. ORS 475B.526(1)(a). Marijuana production involves "the manufacture, planting, cultivation, growing or harvesting of marijuana." ORS 475B.015(32)(a).[3]

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[2] The application materials state that the indoor facility is the first phase, and a later phase will include an "outdoor grow." Record 693.

[3] ORS 475B.015(32) provides:

> "(a) 'Produces' means the manufacture, planting, cultivation, growing or harvesting of marijuana.
>
> "(b) 'Produces' does not include:
>
> "(A) The drying of marijuana by a marijuana processor, if the marijuana processor is not otherwise producing marijuana; or

A county may impose reasonable regulations on marijuana production facilities. ORS 475B.486.[4] The county adopted supplemental regulations that impose restrictions on marijuana production and processing. As pertinent here, the applicable Deschutes County Code (DCC) 18.116.330(B)(7)(a)(iv) provided that marijuana production and processing uses must be located a minimum of 1,000 feet from "[a] youth activity center," "measured from the lot line of the

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> "(B) The cultivation and growing of an immature marijuana plant by a marijuana processor, marijuana wholesaler or marijuana retailer if the marijuana processor, marijuana wholesaler or marijuana retailer purchased or otherwise received the plant from a licensed marijuana producer."

ORS 475B.015(16) provides:

> "(a) 'Manufacture' means producing, propagating, preparing, compounding, converting or processing a marijuana item, either directly or indirectly, by extracting from substances of natural origin.
>
> "(b) 'Manufacture' includes any packaging or repackaging of a marijuana item or the labeling or relabeling of a container containing a marijuana item."

[4] ORS 475B.486(2) provides, in part:

> "Notwithstanding ORS 30.935, 215.253(1) or 633.738, the governing body of a city or county may adopt ordinances that impose reasonable regulations on the operation of businesses located at premises for which a license or certificate has been issued under ORS 475B.010 to 475B.545 if the premises are located in the area subject to the jurisdiction of the city or county[.]"

affected properties listed in DCC 18.116.330(B)(7)(a) to the closest point of the buildings and land area occupied by the marijuana producer or marijuana processor."[5] We refer to that requirement in this decision as the "separation distance" or the "separation buffer." That limitation applies to marijuana production in the EFU, Multiple Use Agriculture (MUA-10), and Rural Industrial (RI) zones. DCC 18.116.330(A)(1); Record 328.

The county planning department administratively approved the application. Intervenors-respondents (intervenors) appealed that decision to the board of county commissioners, which, after a *de novo* hearing, denied the application based solely on its determination that the application did not comply with the separation buffer due to youth-related activities on the adjacent properties, the Rhinestone Ranch and the Dodds Road Residence. This appeal followed.

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[5] In this opinion, we refer to the version of DCC 18.116.330 that applied at the time the application was submitted in this case, February 7, 2018. *See* ORS 215.427(3)(a) ("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"). In October 2018, the county adopted Ordinance No. 2018-012 amending DCC chapter 18. That decision was challenged in *Deschutes Farm Bureau v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2018-036, Oct 9, 2019). The county later repealed Ordinance No. 2018-012. Those changes do not affect the applicable criteria and analysis in this case.

THIRD ASSIGNMENT OF ERROR

In the challenged decision, the board of county commissioners interpreted DCC 18.116.330(B)(7)(a)(iv) as follows:

> "The term youth activity center ('YAC') is not defined in DCC. Testimony in the record indicates the property to the south of the subject property [Rhinestone Ranch] is used for youth oriented equestrian activities for children ages 5-18 with approximately 50-70 kids coming to the property on a weekly basis. These activities are provided to the general public, in association with 4-H programs, and as part of homeschooling curriculum. Additional testimony in the record indicates the property to the east of the subject property [Dodds Road Residence] is used for regularly held 4-H related activities. Written testimony submitted by Michael Gottlieb, attorney for the property owner, indicates they, 'Host 4-H clubs from January-August every year, when club meetings and practices are held on the property bi-weekly. In addition to the residence on the property, the activities utilize an outbuilding and an outdoor facility pen.'
>
> "The applicant responded that the activities do not constitute a YAC. This is based on the opinion that the Rhinestone Ranch is a business operating on a working farm/horse ranch that offers horse-related services to both adults and children for a fee. The applicant noted these activities constitute agri-tourism or other commercial events and activities, uses that require land use approval. The applicant further opines that hosting a 4H/FFA club meeting, offering home-schooling, or having youth gatherings, does not make the residential property or ranch into [a] YAC.
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> "Based on substantial evidence in the record, the Board finds that the identified 4-H and youth oriented equestrian activities on the neighboring properties rise to the level of a YAC due to their inherent characteristic as being a place where activities center around youth on a regular basis. Both referenced properties are within 1,000 feet of the closest point of the buildings and land area proposed by the marijuana producer. Therefore, the proposal does

not comply with the separation distance requirement of DCC 18.116.330(B)(7)(a)(iv)." Record 12.

Petitioner concedes that the county is authorized to impose "reasonable limitations" on the location of a marijuana production facility. ORS 475B.486(1)(g).[6] In the third assignment of error, we understand petitioner to argue that the county interpreted DCC 18.116.330(B)(7)(a)(iv) in a manner that renders that regulation unreasonable and, therefore, the county's interpretation improperly construed applicable law in a manner that is contrary to state statute. ORS 197.835(9)(a)(D); ORS 197.829(1)(d).[7]

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[6] ORS 475B.486(1)(g) provides:

> "(1) For purposes of this section, 'reasonable regulations' includes:
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> "* * * * *
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> "(g) Reasonable limitations on where a premises for which a license or certificate may be issued under ORS 475B.010 to 475B.545 may be located."

[7] ORS 197.835(9)(a)(D) provides that LUBA "shall reverse or remand the land use decision under review if the board finds" that the local government "[i]mproperly construed the applicable law[.]"

ORS 197.829(1) provides:

> "The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

Petitioner argues that the county impermissibly interpreted "youth activity center" to include "any place where youth activities 'regularly' occur, regardless of whether property owners obtain necessary permits for the activities and events." Petition for Review 34. Petitioner argues that the county's interpretation makes it impossible for a marijuana producer to identify properties within the county where they will be able to conduct marijuana production activities because, without a recorded land use approval or permit to qualify land uses as a "youth activity center," a marijuana producer will have no notice whether any youth activity centers exist within the required separation buffer area. According to petitioner, the county's "expansive and amorphous interpretation of 'youth activity center' renders the separation distance requirement an unreasonable limitation on where a marijuana producer may be located" and violates ORS 475B.486(2). Petition for Review 35–36.

The county first responds that petitioner's argument under ORS 475B.486(2) is waived because petitioner did not present that argument to the county in the first instance, as required to preserve an issue for LUBA review

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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
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> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

under ORS 197.763(1).[8] Petitioner replies with citations to the record indicating that petitioner raised the issue before the county by asserting that the interpretation of DCC 18.116.330(B)(7)(a)(iv) that the appellants advocated, and that the county ultimately adopted, is not reasonable. Reply Brief 5 (citing record 80, 278, 279). We have reviewed those cited portions of the record. The most relevant is the following written argument petitioner submitted to the county during the local proceeding:

> "An unpermitted, unregistered, for-profit business operating on a working farm/horse ranch that offers horse-related services to both adults and children for a fee does not constitute a 'youth activity center.' If it did, the slippery slope created by such interpretation would cause illogical and unreasonable results. How would a potential applicant be able to determine if a particular property was feasible and compliant for a marijuana production use? What would prevent neighbors from merely claiming that their property engages in youth activities if no permit is required? Following this faulty logic essentially vitiates any real meaning of the term 'youth activity center,' since, according to the appellant, any property where children are present results in a 'youth activity center.'" Record 80.

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[8] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

We have previously explained that where a petitioner's arguments substantively address an uncited, applicable standard, the issue may be preserved for our review, notwithstanding the failure to cite the specific provision relied upon on appeal. *See, e.g.*, *Kine v. City of Bend*, 72 Or LUBA 423 (2015) (where a petitioner argues below that the proposal is not consistent with the comprehensive plan for reasons that are relevant considerations under several applicable comprehensive plan policies, the petitioner may challenge the adequacy of the findings that were ultimately adopted to establish consistency with those plan policies, even if the petitioner failed to cite the plan policies specifically); *Wetherell v. Douglas County*, 58 Or LUBA 101 (2008) (testimony that the applicant has not shown why a parcel formerly part of a larger ranch cannot be used in conjunction with adjacent and nearby farm properties is sufficient to raise the issue of compliance with OAR 660-033-0030(3), notwithstanding that the petitioner failed to cite the rule). Here, petitioner did not specifically cite ORS 475B.486 during the local proceeding; however, petitioner challenged the reasonableness of the interpretation that the county ultimately adopted, making essentially the same argument petitioner raises on appeal under ORS 475B.486. The county does not dispute that DCC 18.116.330(B)(7)(a)(iv) implements and must adhere to ORS 475B.486. We conclude that petitioner sufficiently preserved for our review the issue of whether the county's interpretation of DCC 18.116.330(B)(7)(a)(iv) rendered that regulation unreasonable and inconsistent with ORS 475B.486.

On the merits, the county responds that the youth-oriented equine activities on the Rhinestone Ranch are farm uses permitted outright in the EFU zone. ORS 215.203(2)(a); DCC 18.04.030.[9] The county also argues that the youth-related activities at the Dodds Road Residence are accessory to the residential and farm uses on that property. Response Brief 4. According to the county, those issues were decided by staff during the local proceeding and, thus, petitioner is precluded from arguing on appeal that those unpermitted uses cannot reasonably constitute youth activity centers. In support of that argument, the county points to county staff testimony during a board of county commissioners' work session on January 23, 2019, at which the board of commissioners received information from county planning staff in preparation for deliberation on the local appeal in this case. Record 31. At that work session, county planning staff explained that petitioner had argued that the horse-related uses on the Rhinestone Ranch constitute a farm use and not a youth activity center. The county planning staff opined the "equine use on the property for training, riding and education * * * appears to qualify as farm use." Record 31. The county also points to the original staff report, which supported the administrative approval, in which staff opined

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[9] ORS 215.203(2)(a) and DCC 18.04.030 define "farm use," in relevant part, as follows:

> "'Farm use' also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows."

that the 4-H youth agricultural "activities are a function of, and accessory to, the residential and farm uses of the adjacent property" and thus, did not constitute a youth activity center. Record 382.[10]

The county argues those determinations constitute separate final land use decisions that petitioner did not challenge by filing separate appeals and, thus, those decisions may not be challenged in this decision. The county is mistaken. The county planning staff report was an initial administrative decision that was appealed to the board of commissioners. It was not a "final" decision within the meaning of ORS 197.015(10)(a) or OAR 661-010-0010(3). Similarly, the county planning staff's verbal statement during a work session is not a land use decision, but merely a statement made during a work session as part of the board of county commissioners' proceeding that concluded in the final decision challenged in this appeal. The board of county commissioners did not incorporate or otherwise adopt those staff determinations in its final decision. *See* Record 10 (adopting

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[10] Staff found:

> "[A] 'youth activity center' would necessarily require land use review, either an administrative determination or conditional use permit, and would not be allowed outright as part of residential or agricultural use or any accessory use thereto. Since no such permits have been obtained by any property within 1,000 feet of the subject property, staff finds that no permitted 'youth activity center' exists in this area. Further, staff finds the noted 4-H related activities are a function of, and accessory to, the residential and farm uses of the adjacent property. * * *" Record 382.

only a portion of the staff report, but not adopting the findings of compliance with DCC 18.116.330(B)(7)(a)(iv)).

More importantly, the county is mistaken that those staff determinations are dispositive in this appeal. We assume for the purpose of this decision that the county is correct that the Rhinestone Ranch equine use is a farm use that does not require separate land use approval, and the 4-H related activities at the Dodds Road Residence are accessory to the residential use. However, those assumptions do not answer the primary question presented by petitioner: whether the county could properly characterize farm uses and residential uses that "center around youth on a regular basis" to also constitute "youth activity center(s)" so as to preclude marijuana production on EFU-zoned property within the separation distance.

The phrase "youth activity center" is not defined in the DCC and does not appear in any other section of the DCC. "Youth activity center" is not an identified permitted use in the EFU zone, either as an outright permitted use, accessory use, or conditional use. *See generally* DCC Chapter 18.16 (providing uses permitted in the EFU zone). Differently, marijuana production is a farm use that is permitted in the EFU zone, subject only to reasonable restrictions adopted by the county as authorized by ORS 475B.486(2). The essential question is whether the county's interpretation of DCC 18.116.330(B)(7)(a)(iv) demonstrates that the regulation is reasonable under ORS 475B.486, as applied by the county to deny to the application in this case.

Petitioner cites *Diesel v. Jackson County*, 284 Or App 301, 391 P3d 973 (2017), in support of its argument that the county's interpretation results in an unreasonable limitation on marijuana production. In *Diesel*, the petitioner challenged two county ordinances that amended the Jackson County Land Development Ordinance pursuant to *former* ORS 475B.340(1)(a) and (g) (2015), *renumbered as* ORS 475B.486 (2017), which allowed local governments to adopt "reasonable conditions on the manner in which a marijuana producer licensed under [the state's recreational marijuana program] may produce marijuana[,]" and "[r]easonable limitations on where a premises for which a license has been issued [to produce marijuana] may be located." *Diesel v. Jackson County*, 74 Or LUBA 286, 288 (LUBA Nos 2016-039/055, Sep 13, 2016), *aff'd*, 284 Or App 301, 391 P3d 973 (2017) (quoting *former* ORS 475B.340(1)(a) and (g) (2015)). The amendments allowed marijuana production in EFU, forest, and industrial zones, but did not allow marijuana production in rural residential zones. Relying on federal First Amendment case law, the petitioner argued that to establish that the regulations were reasonable, the county was required to establish that the regulations serve a substantial government interest. We rejected that argument, reasoning that the use of the phrase "reasonable regulation" "does not mean that the legislature intended to import into review of local zoning codes the doctrines and standards of review that courts have applied to First Amendment speech cases." *Diesel*, 74 Or LUBA at 296.

ORS 475B.486 lists types of regulations that "reasonable regulations" include. However, the term "reasonable" is not defined in the statutes regulating marijuana production. In *Diesel*, we observed that "reasonable" is defined in the dictionary as "[1] b: being or remaining within the bounds of reason: not extreme: not excessive * * *; c: MODERATE : as (1) not demanding too much[.] *Webster's Third New Int'l Dictionary* 1892 (unabridged ed 2002)." *Diesel*, 74 Or LUBA at 297.

We also reviewed legislative history and observed that one legislator commented that a local regulation would be unreasonable if a local government

> "* * * use[s] their local zoning code to effectively eliminate marijuana businesses or grow sites in their communities by, for example, finding zones in which it is very difficult to site these businesses, or putting them on the edge of town where nobody wants to go or in some other way making it so difficult for these businesses to be sited that the businesses won't site in their communities." Audio Recording, House of Representatives, HB 3400, June 24, 2015, 1:45:30–1:46:03 (statement of Representative Ken Helm)." *Diesel*, 74 Or LUBA at 297.

We explained that, in that case, "the concerns stated by that legislator about the reasonableness of zoning regulations do not appear to be present" because the county's regulations allowed marijuana production in the EFU zone and on lands zoned farm and forest, which is a significant land area in the county. *Id.* Accordingly, we concluded that the county's regulations were reasonable.

The petitioner sought judicial review of our decision, and the Court of Appeals affirmed, noting twice that the court's decision was limited to the facts

of that case and the arguments presented by the petitioner, and that their holding did not "define what is a 'reasonable regulation' of marijuana * * * for all purposes." *Diesel*, 284 Or App at 312.

Diesel is of limited usefulness in this case. *Diesel* does not include any broadly applicable ruling regarding what does and does not constitute a reasonable regulation of marijuana production. That case is also factually and legally distinguishable. *Diesel* concerned the county's prohibition of marijuana production in rural residential zones. Differently, here, the county regulation limits, and in this case, prohibits, marijuana production on EFU-zoned property due to surrounding youth-oriented activities within the separation buffer.

In this case, petitioner does not argue that the county's interpretation of the youth activity center separation buffer effectively eliminates marijuana production sites in Deschutes County. Instead, petitioner argues the county's interpretation of the youth activity center separation buffer, as applied in this case, creates too much uncertainty for an applicant for marijuana production to establish that the application satisfies DCC 18.116.330(B)(7)(a)(iv).

Although petitioner does not cite ORS 215.416(8)(a), petitioner's reasonableness argument invokes that statute, which requires that permit approval standards and criteria set out in local regulations inform interested parties of the basis on which an application will be approved or denied.[11] *See Lee*

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[11] ORS 215.416(8)(a) provides:

v. City of Portland, 57 Or App 798, 802–03, 646 P2d 662 (1982) (interpreting parallel provisions of ORS 227.173(1) applicable to cities); *Spiering v. Yamhill County*, 25 Or LUBA 695, 715 (1993); *Hoffmann v. Deschutes County*, 61 Or LUBA 173, 229, *aff'd*, 237 Or App 531, 240 P3d 79, *rev den*, 349 Or 479 (2010); *see also Davenport v. City of Tigard*, 121 Or App 135, 141, 854 P2d 483 (1993) (observing that the terms "standards and criteria," "assure both proponents and opponents of an application that the substantive factors that are actually applied and that have a meaningful impact on the decision permitting or denying an application will remain constant throughout the proceedings").

There is no dispute that marijuana is a crop for purposes of farm use. ORS 475B.526(1)(a). Thus, as a starting point, marijuana production is an allowed farm use on property that is zoned EFU. ORS 215.203. We agree with petitioner that the county's broad interpretation of "youth activity center" is unreasonable because there is no way for an applicant to determine if a particular EFU-zoned property could be used for marijuana production. Instead, the county interpretation would allow the county to deny a marijuana production application

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> "Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole."

when any neighboring property owner testified that youth-oriented activities regularly occur on a neighboring property within the separation buffer. Those youth-oriented activities may occur outdoors, or in a farm structure, as part of an existing farm use, or may occur in and around a residence as accessory to a residential use. In any event, a property owner or applicant would not have any practical way of identifying whether those youth-oriented activities are occurring within the separation buffer surrounding any particular EFU-zoned property. As applied in this case, the county's interpretation of youth activity center is so amorphous and uncertain that we conclude it is unreasonable.

In so concluding, we emphasize the fact that the term "youth activity center" is undefined and not used elsewhere in the DCC. In addition, while we doubt whether a youth-oriented farm use or residential use could limit a farm use on property that is zoned EFU, it may be that, under different facts and circumstances, the county could interpret the undefined phrase "youth activity center" in a manner that would not violate ORS 215.416(8)(a) or ORS 475B.486.[12] However, as applied in this case, the county's interpretation of "youth activity center" is contrary to ORS 215.416(8)(a) and ORS 475B.486.

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[12] As noted above, petitioner concedes that the county is authorized to impose "reasonable limitations" on the location of a marijuana production facility under ORS 475B.486(1)(g). Petitioner does not address the tension among ORS 475B.526(1)(a), ORS 215.203, and ORS 475B.486(1)(g). It is not clear to us that ORS 475B.486(1)(g) authorizes a county to impose a local regulation that could be interpreted and applied in a manner that entirely prohibits marijuana

The third assignment of error is sustained.

FIRST AND SECOND ASSIGNMENTS OF ERROR

In the first assignment of error, petitioner challenges the county's interpretation of "youth activity center" as inconsistent with the express language of DCC 18.116.330(B)(7)(a)(iv). In the second assignment of error, petitioner argues that the county's recognition of unpermitted or accessory uses on the Rhinestone Ranch and the Dodds Road Residence to prohibit marijuana production misconstrues applicable law and is not supported by adequate findings or substantial evidence.

We remand the county's decision as inconsistent with ORS 215.416(8)(a) and ORS 475B.486 under the third assignment of error. Accordingly, we need not and do not reach the first and second assignments of error.

DISPOSITION

Petitioner argues that the county's decision should be reversed under OAR 661-010-0071(1)(c), which provides that LUBA will reverse a land use decision when "[t]he decision violates a provision of applicable law and is prohibited as a matter of law." Petition for Review 36. We ultimately agree with petitioner that

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production on EFU-zoned property, because such limitation may conflict with ORS 475B.526(1)(a) and ORS 215.203. *See also* ORS 215.243(4) ("Exclusive farm use zoning as provided by law, substantially limits alternatives to the use of rural land and, with the importance of rural lands to the public, justifies incentives and privileges offered to encourage owners of rural lands to hold such lands in exclusive farm use zones."). However, those issues have not been raised or briefed in this case. Thus, we note them, but do not address them further.

the county's interpretation of DCC 18.116.330(B)(7)(a)(iv) violates ORS 215.416(8)(a) and ORS 475B.486. However, petitioner has not explained why the county's denial is "prohibited as a matter of law," and it is not apparent to us that it is. We do not understand petitioner to argue that it is impossible for the county to interpret DCC 18.116.330(B)(7)(a)(iv) in a manner that is consistent with ORS 475B.486. Moreover, in the challenged final decision denying the application, the county did not decide whether the application satisfied odor control standards for indoor marijuana production, which may be an independent basis for denial if not satisfied.[13] Record 12–13. Under those circumstances, we remand the decision to the county for further proceedings. *Shadrin v. Clackamas County*, 34 Or LUBA 154 (1998).

The county's decision is remanded.

RYAN, Board Member, concurring.

I concur in the resolution of the appeal. I write separately because I would also sustain petitioner's first assignment of error and conclude that the board of county commissioners improperly construed the phrase "youth activity center." ORS 197.835(9)(a)(D). Specifically, I agree with petitioner that the board of county commissioners' interpretation of the phrase is not required to be affirmed

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[13] Petitioner incorrectly states that "all other issues have already been resolved in favor of granting Petitioner's application." Petition for Review 31.

under ORS 197.829(1)(a), because the interpretation is "inconsistent with the express language of the * * * land use regulation."

In relevant part, the board of county commissioners interpreted the phrase "youth activity center" as "a place where activities center around youth on a regular basis." Record 12. First, the board of county commissioners' interpretation improperly interprets the word "center" as a verb: "a place where activities *center around* youth on a regular basis." *Id.* (emphasis added). The word "center," however, is the noun in the phrase, modified by the adjective "youth activity." There is simply no legitimate basis for the board of county commissioners to interpret and recharacterize the word "center" as a verb, and the recharacterization significantly changes the meaning of the word from its intended usage as a noun.

Second, and relatedly, the board of county commissioners' interpretation fails to give effect to the word "center" as used in the phrase. The word "center" is not defined in the DCC. Its plain, ordinary meaning is "1h: a concentration of requisite facilities for an activity, pursuit or interest along with various likely adjunct conveniences: (shopping center), (medical center), (amusement center)." *Webster's Third New Int'l Dictionary* 362 (unabridged ed 2002). Included in the meaning of the word "center" is the term "facilit[y]," which is defined as "5b: something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end." *Id.* at 812–13. According to the plain, ordinary

meaning of "center," then, a "youth activity center" is a place "built, constructed, installed, or established" to serve or facilitate "youth activit[ies]." The board of county commissioners' interpretation does not give appropriate effect to the word "center" as used in the phrase, but rather interprets the phrase as if the word "center" is not present in the phrase.

The board of county commissioners' interpretation is also inconsistent with context provided by other usage of the word "center" in the DCC. For example, as petitioner points out, the DCC defines "community center" as "a community meeting, retreat and activity *facility* serving the social or recreational needs of community residents or visitors." DCC 18.04.030 (emphasis added). The DCC similarly defines "child care center" as "a childcare *facility* that was not constructed as a single family home that is certified to care for 12 or fewer children." *Id.* (emphasis added). For the above reasons, I would sustain petitioners' first assignment of error and conclude that the county improperly construed the phrase "youth activity center" to broadly encompass any location where "youth activities" occur, without giving effect to the word "center" as it is used in the phrase, and in a manner that is inconsistent with other uses of the word "center" in the DCC.