10/11/19 AM 8:57 LUBA

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3
4 JIM VAN DYKE, JULIE VAN DYKE,
5 MARK VAN DYKE, VELMA VAN DYKE
6 BEN VAN DYKE, JOHN WISER,
7 LYNNE WISER, JOHN VAN DYKE,
8 SCOTT BERNARDS, RICHARD CLOEPFIL,
9 CHRISTY CLOEPFIL, TOM HAMMER,
10 CHRIS MATTSON, KELSEY FREESE,
11 MARK GAIBLER, ERIC KUEHNE,
12 HAROLD KUEHNE, JOLENE KUEHNE,
13 B.J. MATTHEWS, GORDON DROMGOOGLE,
14 GREG MCCARTHY, CELINE MCCARTHY,
15 MARYALICE PFEIFFER, TIM PFEIFFER,
16 BRYAN SCHMIDT, RUDIS LAC, LLC,
17 LEE SCHREPEL, ALLEN SITTON,
18 BROOK SITTON, LESTER SITTON,
19 DARREN SUTHERLAND, KRIS WEINBENDER,
20 LYNNE WISER, BRIAN COUSSENS,
21 ROXANNE COUSSENS, FRUITHILL, INC.,
22 and BEN VAN DYKE FARMS, INC.,
23 *Petitioners*,
24
25 vs.
26
27 YAMHILL COUNTY,
28 *Respondent*,
29
30 and
31
32 CITY OF CARLTON and FRIENDS OF YAMHELAS
33 WESTSIDER TRAIL,
34 *Intervenors-Respondents.*
35
36 LUBA No. 2019-047
37

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

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

Timothy S. Sadlo, Assistant County Counsel, McMinneville, filed a response brief and argued on behalf of respondent.

Walter R. Gowell, McMinnville, filed a response brief and argued on behalf of intervenor-respondent City of Carlton. With him on the brief was Haugeberg, Reuter, Gowell, Fredricks & Higgins, P.C.

Jennifer M. Bragar, Portland, filed a response brief on behalf of intervenor-respondent Friends of the Yamhelas Westsider Trail. With her on the brief was Tomasi Salyer Martin PC.

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

REMANDED 10/11/2019

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

1 Opinion by Rudd.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision approving construction of a 2.82-mile-long
4 multi-modal recreational trail along a former railroad right-of-way located
5 primarily on lands zoned for exclusive farm use (EFU).

6 ***AMICUS* BRIEF**

7 The Oregon Farm Bureau Federation and Yamhill County Farm Bureau
8 (together, the Farm Bureau) move to file an *amicus* brief in support of petitioners.
9 There is no opposition to the proposed brief, and it is allowed. OAR 661-010-
10 0052.

11 **FACTS**

12 The challenged decision (Yamhill County Board Order 19-94) is on
13 remand from LUBA. *Van Dyke v. Yamhill County*, __ Or LUBA __ (LUBA No
14 2018-061, Dec 20, 2018) (*Van Dyke I*). At issue in *Van Dyke I,* was a decision
15 to adopt Ordinance 904, which (1) amended the county's comprehensive plan to
16 acknowledge county ownership of a 12.48-mile segment of a former railroad
17 right-of-way, and (2) authorized construction of a 2.82-mile segment of that
18 right-of-way into a multi-modal recreational trail between the cities of Yamhill
19 and Carlton. (Record-1 445–613, the original application), (Record-1 1–444,

1 evidence submitted during the original proceedings).[1] In this opinion, we refer to
2 this 2.82-mile segment as the Trail. The right-of-way owned by the county is
3 generally 60 feet wide, with compacted ballast in the center where the former
4 railroad line was located. The 2.82-mile segment of the proposed Trail crosses
5 three drainages that will require construction of three bridges or culverts. The
6 proposed Trail includes a 12-foot wide paved pedestrian/bicycle path to be
7 constructed on the compacted ballast in the approximate center of the right-of-
8 way, along with an adjacent unpaved horse path.

9 Petitioners, who own farms along and within the vicinity of the Trail,
10 appealed Ordinance 904 to LUBA. LUBA remanded, after concluding that
11 constructing the Trail required conditional use permit (CUP) approval, including
12 application of land use approval standards implementing ORS 215.296 for
13 sections of the Trail within lands zoned EFU. *Van Dyke I.* ORS 215.296 generally
14 requires that the applicant for certain non-farm uses in EFU zones demonstrate
15 that the proposed use will not force a significant change in accepted farm
16 practices on surrounding farm lands or significantly increase the cost of such
17 practices. We sometimes refer to this standard as the "farm impacts" test or
18 standard. *See Stop the Dump Coalition v. Yamhill County*, 364 Or 432, 435 P3d
19 698 (2019) (*SDC-IV*) (explaining and applying the farm impacts test).

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[1] The record in this appeal includes the record of the original legislative proceeding in *Van Dyke I* (Record-1) and the record generated in the proceeding which we review here on remand, LUBA No. 2019-047 (Record-2).

1 On remand, a senior assistant county counsel acting on the county's behalf
2 as applicant requested on February 11, 2019, that the county initiate quasi-
3 judicial proceedings on remand to provide land use approval for the trail. Record-
4 2 2334. The request was not accompanied by an application for CUP approval.
5 On March 7, 2019, the county conducted a quasi-judicial public hearing at which
6 petitioners appeared in opposition, presenting information regarding their farm
7 operations and testimony regarding adverse impacts of the Trail on their farm
8 operations. At the conclusion of the March 7, 2019 hearing, the commissioners
9 provided the following schedule: (1) one week until 5:00 p.m., March 14, 2019,
10 for any party to submit new evidence, (2) a second week until 5:00 p.m., March
11 21, 2019, for any party to submit written rebuttal of evidence and argument
12 submitted during the first open record period; (3) an additional four days, until
13 noon on March 25, 2019, for the applicant to submit final written argument,
14 followed by (4) deliberations and decision on March 28, 2019.

15 On March 14, 2019, the last day to present new evidence, the
16 county/applicant submitted additional evidence intended to demonstrate
17 compliance with applicable land use standards, including the farm impacts
18 standard. Record-2 835–893. On the same date, in a separate non-land use
19 proceeding, the commissioners authorized county representatives to enter into a
20 contract with an engineering firm to design and provide consultative services for
21 the three bridges that must be constructed for the Trail. County representatives

1 signed the contract on March 18, 2019.[2] Petitioners' Precautionary Notice of
2 Intent to Appeal (NITA) LUBA No. 2019-038/040, Exhibit 3.

3 On March 25, 2019, the county/applicant submitted final argument,
4 consisting of proposed findings and conditions of approval. Record-2 84–150.
5 At a public hearing on March 28, 2019, the board of commissioners deliberated
6 and voted 2-1 to approve the Trail, adopting the findings and conditions of
7 approval submitted by the county/applicant. Record-2 12–83. This appeal
8 followed.

9 **INTRODUCTION**

10 Petitioners present three assignments of error, each with multiple sub-
11 assignments of error. The first assignment of error challenges the county's
12 findings under the farm impacts test. The Farm Bureau filed an *amicus* brief in
13 support of petitioners' first assignment of error. The second assignment of error
14 challenges the county's findings addressing CUP approval standards at Yamhill
15 County Zoning Ordinance (YCZO) 1202. The third assignment of error presents
16 three types of procedural challenges to the county's remand decision. In this
17 opinion, we will first address petitioners' procedural challenges under the third

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[2] Petitioners Van Dyke and Schmidt appealed to LUBA the commissioners' decision to enter into the contract, and the signed contract itself. In a final opinion and order issued this date, we dismissed those appeals for lack of jurisdiction. *Van Dyke v. Yamhill County*, __ Or LUBA __ (LUBA Nos 2019-038/040, Oct 11, 2019).

1 assignment of error, then the substantive challenges in the first and second
2 assignments of error.

3 The county, intervenor-respondent City of Carlton (Carlton), and
4 intervenor-respondent Friends of Yamhelas Westsider Trail (Friends) each filed
5 a response brief. The three response briefs provide non-overlapping responses to
6 each assignment and sub-assignment of error, with the county and both
7 intervenors-respondents joining the other response briefs. The county's response
8 brief addresses the first assignment of error, first subassignment, and portions of
9 the second subassignment. Carlton's response brief addresses the remainder of
10 the eight subassignments under the first assignment of error, and also the third
11 assignment of error. Friends' response brief addresses the second assignment of
12 error. Petitioners filed replies to each response brief.

13 **THIRD ASSIGNMENT OF ERROR**

14 The third assignment of error presents three types of procedural challenges
15 to the county's decision.

16 **A. First Subassignment of Error: *Ex Parte* Contacts and Bias**

17 Petitioners allege that the county commissioners received a number of *ex*
18 *parte* communications, but failed to disclose the substance of those
19 communications during the proceedings below, failed to allow petitioners to
20 cross-examine the commissioners regarding these alleged communications, and

1 failed to provide petitioners the opportunity to rebut the substance of the alleged
2 communications, as required by ORS 215.422(3).[3]

3 Petitioners' arguments regarding *ex parte* communications and bias stem
4 primarily from the fact that while the remand proceedings were ongoing, county
5 staff negotiated a contract with an engineering firm to design three bridges
6 necessary to construct the Trail, and the board of commissioners, in a separate
7 non-land use proceeding, authorized the county to enter into that contract, which
8 was signed on March 18, 2019. *See* n 2. We understand petitioners to argue that

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[3] ORS 215.422 provides, in relevant part:

> "(3) No decision or action of a planning commission or county governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:
>
> > "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
> >
> > "(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related.
>
> "(4) A communication between county staff and the planning commission or governing body shall not be considered an ex parte contact for the purposes of subsection (3) of this section."

1 county staff communications with the commissioners that occurred during this
2 non-land use process constituted "*ex parte* communications" for purposes of the
3 remand proceedings, and thus the commissioners erred in failing to disclose those
4 communications during public hearings on the remand proceeding.

5 Relatedly, petitioners argue that the fact that the commissioners approved
6 a contract to design the three bridges before the commissioners had issued land
7 use approvals for the Trail indicates that the commissioners impermissibly
8 prejudged the merits of the land use application for the Trail. According to
9 petitioners, once the commissioners authorized expending funds to design the
10 bridges, it became a foregone conclusion that the commissioners would approve
11 construction of the bridges, and the Trail, in the land use proceeding. Finally,
12 petitioners argue that the county erred in failing to adopt findings addressing
13 allegations of bias and prejudgment.

14 Carlton responds that the commissioners disclosed all *ex parte*
15 communications regarding the proposed land use approval during the public
16 hearing, and petitioners had a full opportunity to rebut such disclosures. Carlton
17 disputes that county staff communications with the commissioners, during the
18 course of the non-land use process leading to execution of the contract to design
19 the bridges, constitutes *ex parte* communications for purposes of ORS
20 215.422(3). Carlton argues that while petitioners allude to the possibility that
21 persons other than county staff may have engaged in undisclosed *ex parte*
22 communications with the commissioners, petitioners provide no evidence that

1 any such communications occurred. To the extent petitioners argue that the
2 assistant county counsel, who represented the county in its capacity as the
3 applicant for land use approval, may have engaged in *ex parte* communications
4 with the commissioners, Carlton argues that petitioners cite no evidence of any
5 such communications. Further, Carlton notes that the county adopted findings,
6 which petitioners do not challenge, rejecting claims of *ex parte* communications
7 between the assistant county counsel and commissioners. Record-2 47–48.[4]
8 Carlton also argues that neither ORS 215.422(3) nor any cited case requires the
9 county to give petitioners the right to cross-examine the commissioners regarding
10 alleged undisclosed *ex parte* communications.

11 We agree with Carlton. ORS 215.422(4) provides that communications
12 between county staff and the governing body are not *ex parte* contacts. Even if
13 county staff communications with the commissioners in the non-land use
14 proceeding leading to execution of the design contract had some bearing on
15 approval or denial of the land use application pending before the commissioners
16 in the land use proceeding, something petitioners do not substantiate, such
17 communications would be excluded from the disclosure and other obligations of
18 ORS 215.422(3). Petitioners cite no evidence that persons other than county staff
19 may have engaged in undisclosed *ex parte* communications with the
20 commissioners. We agree with Carlton that nothing in ORS 215.422 or

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[4] *See* n 1.

1 elsewhere cited to us requires the county to allow petitioners to cross-examine or
2 question the commissioners regarding the existence of undisclosed *ex parte*
3 communications.

4 Turning to the issue of prejudgment, petitioners cite to *Norvell v. Portland*
5 *Metropolitan LGBC*, 43 Or App 849, 640 P2d 896 (1979), for the proposition
6 that the county was obligated to adopt findings addressing the issues raised by
7 petitioners below regarding prejudgment and bias. Carlton responds that neither
8 *Norvell* nor any case cited by petitioners requires the commissioners to adopt
9 findings addressing whether the commissioners are biased or have prejudged a
10 land use application before them.

11 In *Norvell* the Court of Appeals held that findings addressing compatibility
12 with two statewide planning goals were inadequate, because the findings failed
13 to address a number of issues relevant under each planning goal. *Norvell* stands
14 for the proposition that, to be adequate, findings must address issues raised below
15 regarding compliance with approval criteria. *Norvell* did not involve allegations
16 of bias or prejudgment, and we are aware of no cases imposing an obligation on
17 local governments to adopt findings addressing allegations that a decision-maker
18 is biased or has prejudged the merits of a land use application. While it might be
19 prudent to address such concerns if raised below, and decision-makers may
20 choose to adopt findings addressing those concerns, we disagree with petitioners
21 that the county was *required* to adopt such findings and that the county's failure
22 to do so is, in itself, error that should result in remand.

1 We turn next to the question of whether petitioners have demonstrated in
2 this appeal that the commissioners impermissibly prejudged the merits of the land
3 use proposal before them. To obtain reversal or remand based on bias or
4 prejudgment, petitioners must demonstrate actual bias, not merely apparent bias.
5 *Columbia Riverkeepers v. Clatsop County*, 267 Or App 578, 602, 341 P3d 790
6 (2014).[5] Further, it is not sufficient to show some evidence of bias or

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[5] In *Columbia Riverkeeper*, the Court of Appeals explained:

> "The bar for disqualification is high; no published case has concluded that disqualification was required in quasi-judicial land-use proceedings. An elected local official's 'intense involvement in the affairs of the community' or 'political predisposition' is not grounds for disqualification. Involvement with other governmental organizations that may have an interest in the decision does not require disqualification. An elected local official is not expected to have no appearance of having views on matters of community interest when a decision on the matter is to be made by an adjudicatory procedure.
>
> "In addition to those general observations, there are three salient principles from the case law that define and drive our analysis in this case. *First,* the scope of the 'matter' and 'question at issue' is narrowly limited to the specific decision that is before the tribunal. *Second,* because of the nature of elected local officials making decisions in quasi-judicial proceedings, the bias must be actual, not merely apparent. And *third,* the substantive standard for actual bias is that the decision maker has so prejudged the particular matter as to be incapable of determining its merits on the basis of the evidence and arguments presented. *Beck v. City of Tillamook,* 113 Or App 660, 662-63, 833 P2d 1327 (1992) (adopting LUBA's statement of the standard for prejudgment bias)." 267 Or App 578, 602 (emphases in original).

prejudgment in a governing body decision maker. Petitioners must show that the decision maker "had so prejudged [the matter] as to be incapable of rendering a decision on the merits of the evidence and arguments presented." *Id.* at 608.

Here, petitioners cite the fact that the commissioners voted to enter into a bridge design contract with an engineering firm, approximately two weeks before issuing the county's land use decision to approve construction of the bridges and the Trail. Because the contract represented a commitment of a significant amount of money, petitioners argue that the real decision to approve the bridges (if not the Trail) was made in the non-land use proceeding leading to the contract, and that the concurrent land use proceeding was merely a *pro forma* exercise, a foregone conclusion.

The county's March 28, 2019 decision (Yamhill County Board Order 19-94) to approve the Trail was made on remand of the county's initial decision to adopt Ordinance 904, which ordinance the county erroneously believed was sufficient to authorize construction of the Trail. Those initial legislative proceedings leading to adoption of Ordinance 904 involved a public hearing at which petitioners appeared and presented evidence and argument that, among other things, the proposed Trail did not comply with the farm impacts test at ORS 215.296. The commissioners disagreed, adopting findings that the proposed Trail complied with ORS 215.296. As noted, in *Van Dyke I*, we remanded the initial decision in part for more adequate findings on the farm impacts test, and other applicable approval criteria, including the CUP standards at YCZO 1202. On

March 7, 2019, on remand, the commissioners conducted a second public hearing, at which petitioners again presented evidence and argument that the Trail did not comply with the farm impacts test and other applicable standards. At that point, after an initial public hearing and an initial decision to approve the Trail, followed by a second public hearing on remand and the close of the evidentiary record, it would be very strange if based on the evidence presented in both the initial and remand proceedings the commissioners had not formed *some* initial opinion on the merits of whether the Trail *could be* approved under the applicable land use standards. Such predisposition in a remand proceeding is an unavoidable consequence of human nature. Whatever the degree of predisposition or prejudgment present in March 14, 2019, it was apparently sufficient for the commissioners, in their *proprietary capacity as owner of the railroad right-of-way*, to vote on that date to expend public funds to hire an engineering firm to design the three bridges that will be necessary to construct the Trail. The question on appeal is whether the degree of prejudgment exhibited by that March 14, 2019 vote was such that the commissioners, *in their representative capacity as land use decision makers in the land use proceeding*, had thereby become incapable of determining the merits of the land use application, based solely on the evidence and arguments presented in the initial and remand proceedings.

We conclude the answer is no. The chronology in the present case more plausibly suggests that causation moved in the opposite direction: the evidence

1 presented in the initial and remand land use proceedings at that point was
2 sufficient to convince the commissioners—in their proprietary capacity as the
3 property owner—that land use approval was likely, and therefore it was an
4 acceptable financial risk to spend money for bridge design prior to obtaining final
5 land use approval.[6]

6 Petitioners have the burden on appeal of demonstrating that the
7 commissioners were *incapable* of determining the merits of the land use
8 application, based solely on the evidence and arguments presented in the initial
9 and remand proceedings. That is an extremely difficult standard to meet. We
10 conclude that petitioners have not met that burden. Whatever judgment formed
11 the basis for the commissioners' decision on March 14, 2019, to take the risk of
12 expending money for bridge design work prior to land use approval was based,
13 most probably, on the commissioners' tentative evaluation of the evidence and
14 arguments presented in the initial and remand land use proceedings. That
15 judgment of financial risk did not, as far as petitioners have established, commit

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[6] As we understand it, the actual timing of the March 14, 2019 decision to authorize county representatives to enter into the bridge design contract may have been driven in part by the need to complete design work in time to begin construction of the main bridge by fall 2019, and complete construction by early spring 2020, which was apparently a condition or requirement of a grant that the county obtained from the Oregon Department of Transportation (ODOT) for design and construction of the proposed Trail. If so, that calculus presumably also played a role in the commissioners' evaluation of the financial risk of spending money for bridge design prior to obtaining final land use approvals.

the commissioners to approve the land use matter before them, or otherwise render them incapable of determining the merits of the land use matter. Accordingly, petitioners' arguments regarding bias and prejudgment do not provide a basis for reversal or remand.

The Third Assignment of Error, First Subassignment is denied.

B. Second Subassignment of Error: New Evidence

As noted, on March 25, 2019, the senior assistant county counsel, representing the county as the applicant, submitted draft findings and conditions of approval, as part of the applicant's final written argument. Record-2 91–150. Petitioners argue that one of the proposed conditions, Condition (1)(e), which the commissioners ultimately adopted, includes or is based on "new evidence." Consequently, petitioners argue, the county was required to allow petitioners to rebut that new evidence.

ORS 197.763(6)(e) provides that "the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant's final submittal shall be considered part of the record, but shall not include any new evidence." ORS 197.763(9) defines "argument" and "evidence" as follows:

> "(a) 'Argument' means assertions and analysis regarding the satisfaction or violation of legal standards or policy believed relevant by the proponent to a decision. 'Argument' does not include facts.
>
> "(b) 'Evidence' means facts, documents, data or other information offered to demonstrate compliance or noncompliance with the

> standards believed by the proponent to be relevant to the decision."

As proposed and adopted, Condition 1(e) states:

> "At the location of the intersection of the trail corridor with the right-of-way of Fryer Road, the county shall continue the trail corridor fencing west [along Fryer Road] to the western boundary of the Dromgoole property (the part of the property that is zoned EF-80), unless the property owner provides written notice to the county that the owner does not wish to have a fence installed. *The county shall have no responsibility to extend the corridor fencing in this manner if a fence is installed at this location as part of the approved 12-acre solar installation planned to abut the trail at its intersection with the Dromgoole property adjacent to Fryer Road.*" Record-2 149 (emphasis added).

Petitioners contend that Condition 1(e) introduces "new evidence" into the record, namely, that a 12-acre solar farm is planned to abut the trail, and that the solar farm may include a fence along Fryer Road, in which case the county would not install a fence of its own along Fryer Road. Petitioners argue that the county's failure to allow petitioners to rebut Condition 1(e) prevented petitioners from raising issues regarding whether a fence around the solar farm would be as capable of preventing dogs, people, and trash from entering adjacent farm properties as the fence that the county would otherwise install.

Carlton argues that Condition 1(e) was intended to address concerns raised by one farmer, a petitioner, that fencing should be extended along Fryer Road to prevent trail users from trespassing onto that farmer's land at the intersection of the Trail and Fryer Road. Carlton argues that petitioners should not be surprised that Condition 1(e) includes a contingency to address the possibility that one of

the petitioners would convert the land to a solar farm, a non-farm use. Carlton also argues generally that petitioners do not have a right to "rebut" conditions of approval or a right to challenge, during the proceedings below, the efficacy of a condition.

It is not clear to us whether the contingency included in Condition 1(e) constitutes "new evidence" within the meaning of ORS 197.763(6)(e) and (9). Whether a solar farm is sited at the intersection of the Trail and Fryer Road, and the characteristics of a fence surrounding that non-farm use, have no obvious bearing on compliance or noncompliance with any approval standards that apply to the Trail. Nonetheless, as explained under the first assignment of error, below, remand is necessary for the county to adopt new findings, based on new evidence, regarding compliance with the farm impacts test, including the efficacy of the fence the county proposes to construct between the Trail and surrounding land in farm use. If petitioners wish to raise new issues regarding the solar farm and fencing that might arise under the contingent terms of Condition 1(e), the county should provide an opportunity for petitioners to do so.

The Third Assignment of Error, Second Subassignment is denied.

C. Third Subassignment of Error: Application Requirements and Evidentiary Submittals

In a portion of this subassignment of error, petitioners contend that the county committed procedural error by failing to require the county/applicant to submit a CUP application on remand. As noted, in *Van Dyke I*, LUBA held that

1 the county can approve construction of the Trail only pursuant to a quasi-judicial
2 procedure, specifically the county's "Type B" quasi-judicial procedure, which is
3 typically used for discretionary permit approvals. YCZO 1301.01(B)(2) provides
4 under the "Type B" procedure that the applicant must "submit an application to
5 the Department on a form prescribed by the Director." According to petitioners,
6 the county application form requires certain information, including the precise
7 footprint of the proposed use, site plans showing the proposed use and the
8 surrounding area, and a written explanation of how the application complies with
9 approval criteria. However, petitioners argue that on remand the
10 county/applicant submitted no CUP application of any kind, or any of the
11 information required by the application form. Instead, petitioners argue, the
12 county/applicant initiated the remand proceeding simply by submitting a letter to
13 the county requesting that the county conduct proceedings on remand. Record-2
14 2334. According to petitioners, on remand the county/applicant submitted no
15 application and no materials at all in support of the application until March 14,
16 2019, seven days *after* the public hearing. Record-2 835–93. Petitioners argue
17 that it was only at that point that it became clear that the scope of the proposed
18 conditional use included only the 2.82-mile segment of the Trail proposed for
19 immediate construction, not the entire 12.48-mile portion of the railroad right-of-
20 way owned by the county, which was the subject of Ordinance 904. Petitioners
21 contend that their substantial rights were prejudiced, because not until a week
22 *after* the hearing did petitioners know that the scope of the proposed conditional

use included only the 2.82-mile segment, and not the entire 12.48-mile segment that is the subject of Ordinance 904, and accordingly petitioners had to expend scarce time and resources addressing both segments at the public hearing.

Carlton responds that the staff report issued seven days before the hearing, and notices sent to all petitioners, which included maps of the 2.82-mile segment, make it clear that the scope of the proposed conditional use included only the 2.82-mile segment of the right-of-way proposed for immediate development, and did not include the entire 12.48-mile right-of-way owned by the county. Record-2 2316–562. If petitioners were confused on that point, Carlton argues, it was not due to any procedural error by the county. With respect to YCZO 1301.01(B)(2), Carlton argues that the planning director has the discretion under that code provision to accept the original legislative application as the CUP application, for purposes of the remand proceeding, and to accept the information in the original legislative record as the information required by the CUP application form.

We agree with Carlton that petitioners have not demonstrated that any procedural error the county committed on remand prejudiced petitioners. ORS 197.835(9)(a)(B) (LUBA may remand for procedural error that prejudices the substantial rights of the petitioner). The original legislative application proposed initial development of only the 2.82-mile segment of the 12.48-mile right-of-way owned by the county. The staff report and notices sent on remand indicated that the scope of the CUP sought on remand included only the 2.82-mile segment. Record-2 2316–562. For whatever reason, petitioners chose to present evidence

at the public hearing opposing development of the entire 12.48-mile right-of-way owned by the county, although neither Ordinance 904 nor anything submitted by county staff or the county/applicant on remand suggested that the scope of the proposed CUP included more than 2.82-mile segment proposed for development in the original application.

To the extent petitioners argue that the county/applicant failed to provide a narrative addressing compliance with the CUP criteria or waited until the end of the open record period following the hearing to submit evidence to establish whether the proposed Trail complied with the CUP standards at YCZO 1202, petitioners fail to establish that they were prejudiced by either action. Record-2 835–93. Accordingly, petitioners' arguments under this subassignment of error have not established a basis for reversal or remand. However, as discussed below, remand is necessary in any case for the county to conduct new evidentiary proceedings and adopt new findings under the farm impacts test. If on remand petitioners wish an additional opportunity to respond to any evidence the county/applicant submitted during the open record period regarding compliance with YCZO 1202, the county should provide that opportunity.

The Third Assignment of Error, Third Subassignment is denied.

The Third Assignment of Error is denied.

FIRST ASSIGNMENT OF ERROR

In *Van Dyke I*, we remanded the county's initial legislative decision in part for more adequate findings addressing the farm impacts standard at ORS

215.296(1), and the county implementation at YCZO 402.07. ORS 215.296 provides in relevant 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 farming 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."[7]

A "significant" change in accepted farm practices is one that is likely to have an important influence or effect on the farm practice at issue. *SDC-IV*, 364

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[7] After county approval of the conditional use permit, ORS 215.203 was amended, pursuant to House Bill (HB) 2844, to refer to "accepted farm practice." We refer to the version of 215.203 that was applicable to the conditional use permit approval.

Or 432, 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 applicant and county must also consider aggregate or cumulative impacts across all farm practices on a single farm unit. *Id.* at 459–60.

In eight subassignments of error, including multiple sub-subassignments of error, petitioners challenge the county's findings of compliance with the farm impacts standard, and the conditions the county imposed to ensure compliance with the standard.

A. First Subassignment of Error: Farm Impacts

Petitioners challenge the findings addressing three specific allegations that the Trail significantly impacts farm practices on surrounding farms. The findings generally conclude with respect to each type of impact that the impact is not significant, or can be rendered insignificant with conditions.

1. Setbacks for Pesticide Use

Some of petitioners' farms adjoin the 60-foot right-of-way where the Trail will be located, and farming activities on some of those farms abut and even enter the right-of-way. The Trail itself will occupy only a portion of the 60-foot right-of-way.

The county found that pesticide and herbicide application is an accepted farm practice on farms adjoining the Trail. Record-2 24. Petitioners cite to

1 evidence that the label for one of the herbicides commonly applied, Gramoxone,
2 includes warnings not to use "around" recreational parks or playgrounds.
3 Record-2 2066. Petitioners cite to a letter from a staff person at the Oregon
4 Department of Agriculture (ODA) to the effect that, based on dictionary
5 definitions, "around" means "[i]n the vicinity of; near or close-by," and that the
6 label restriction could "preclude applications in fields adjacent to the trail or
7 sensitive sites identified in product labeling." Record-2 1629. Petitioners also
8 cite to testimony that some farmers use pesticides, Lorsban and Yuma 4E, that
9 require up to a 100-foot setback from sensitive sites such as "pedestrian
10 sidewalks" or "outdoor recreational areas." Record-2 2094, 2250. Petitioners
11 argue that farmers are required by law to obey pesticide product labels, and that
12 converting the railroad right-of-way to a new recreational facility means that
13 farmers must now create a setback on their properties and cease applying certain
14 pesticides within that setback area. Petitioners contend that inability to apply
15 pesticides on a portion of the fields adjoining the Trail represents a significant
16 change in farm practices. According to petitioners, the county's findings
17 erroneously characterized this testimony to be limited to pesticide drift or
18 overspray from adjoining fields onto the county-owned Trail, and rejected that
19 testimony on the grounds that adjoining farmers have no right to allow pesticides

1 to "drift" onto another property.[8] [9] Petitioners contend that the testimony on this

2 point has nothing to do with drift or overspray, but rather with setbacks that are

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[8] 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.

[9] The findings state, in relevant part:

> "With regard to spraying, state and federal law currently prohibit the spraying of pesticides and/or herbicides and/or fungicides (herein, 'pesticides') or other substances potentially harmful to human health on people or on property other than property owned or otherwise under the control of the farm operator. Pesticide labels, generally, indicate that they should not be sprayed on workers or on others, on livestock or other animals, or applied in a manner likely to cause them to 'drift' off-site. (see ORS 634.372(2) and (4)). Some labels state that they should not be used 'around' certain uses [where] the public is likely to be, with no specific definition of 'around,' and apparently leaving it to the best judgment of the applicator, Farmers or spray operators who allow pesticides to drift can currently be held 'strictly liable' because such activities can be considered 'abnormally dangerous.' Actions for trespass and negligence are currently not foreclosed by right-to-farm laws, even as those laws provide limited protection to farm operators for pesticide use that is 'done in a reasonable and prudent manner.' (See ORS 30.939). It is not the county or anyone else associated with the trail or its use that is proposing rules that might limit spraying within the boundaries of a farm, and any increased cost due to a new administrative rule adopted by the federal or state government is not a cost that can logically be attributed to users of the proposed trail. Overspray is not an accepted farm practice." Record-2 24–25.

1 mandated under pesticide labeling when the application area is near a recreational
2 facility such as the proposed Trail, even in the complete absence of actual or
3 potential drift or overspray.

4 The county responds that petitioners err to the extent they argue that it is
5 an "accepted farming practice" to overspray or allow pesticides to drift onto
6 adjoining property. We agree with the county on that point. As the findings
7 note, state law generally prohibits application of pesticides in a manner that
8 causes pesticide drift off-site onto other property, and such off-site applications
9 would likely not be protected under Oregon's Right-to-Farm laws. *See* ORS
10 30.930(2) (defining "[f]arming practice" for purposes of the Right-to-Farm law
11 to mean a mode of operation that is a generally accepted, reasonable and prudent
12 method that complies with applicable laws); *see also* ORS 30.939 (governing use
13 of pesticides as a farming practice). The county correctly concluded that
14 applying pesticides in a manner that causes overspray or drift onto adjoining
15 properties is not an accepted farming practice, for purposes of ORS 215.296(1).

16 We understand petitioners to argue, however, that the labels for some
17 pesticides and herbicides, such as Gramoxone, effectively require a setback of an
18 undefined width from certain sensitive uses, such as recreational areas, regardless
19 of whether drift occurs or not. Similarly, petitioners argue that some pesticides,
20 such as Yuma 4E, specify a minimum setback of up to 100 feet from sensitive
21 uses such as residential and recreational areas. Because the Trail will be located
22 adjacent to fields where such pesticides and herbicides are currently applied

1 without any required setback, petitioners argue that affected farmers will
2 necessarily have to supply the appropriate setback on their own lands, and cease
3 use of certain pesticides and herbicides within the appropriate setback area, which
4 will constitute a significant change in the accepted farming practice of applying
5 pesticides and herbicides.

6 Finding 11.8.5 addresses Gramoxone, concluding that the prohibition on
7 applying it "around" recreational areas is unclear, but appearing to agree with the
8 definition cited in the ODA letter that "around" suggests that Gramoxone should
9 not be applied in "close proximity" to the Trail.[10] However, the findings conclude

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[10] Finding 11.8.5 states, in relevant part:

> "With regard to a warning on the Gramoxone label: the phrase 'Do not use around home gardens, schools, recreational parks, golf courses or playgrounds' is unclear in the use of the term 'around,' and appears to suggest that it should not be used in close proximity to such a use or facility. Gramoxone is an herbicide. Other than the warning not to use it 'around' the specified uses, there is no basis, on the label or elsewhere, to conclude that the Van Dykes cannot continue to use the herbicide on their own property. There is also no reasonable basis for concluding that the Van Dykes cannot manage spray applications along the edges of their fields to avoid overspray, or to avoid spraying in a manner that requires that they use the property of others and public rights-of-way as a buffer for their spray activities. The trail itself is anticipated to occupy a 12-foot paved surface and adjacent horse path within a 60-foot wide corridor. As explained elsewhere in these findings, farm operators must comply with established legal spray setbacks for farmworkers and others on their own property, but are not otherwise constrained with regard to neighboring properties. In any case, the responsibility for using any pesticide product lies with the person applying the pesticide.

1 that "there is no basis, on the label or elsewhere, to conclude that the Van Dykes
2 cannot continue to use the herbicide on their own property." Record-2 68. The
3 findings suggest it is possible for farmers to spray all portions of their fields
4 without the need for internal or external buffer areas and without causing
5 overspray or drift, if farmers make minor changes to the way they apply
6 pesticides and herbicides, such as not spraying when they see people on the Trail.
7 Elsewhere the findings suggest that farmers can spray at night, when Trail usage
8 would be minimal.[11] Record-2 25–26. Finding 11.8.5 characterizes such minor

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> Currently, good sight distances along the Van Dyke fields will make it possible to know whether anyone is on the trail, and to act accordingly. That is not a 'significant' farm impact, it is an inconvenience of the kind that farmers operating along public rights-of-way and borders with neighboring property owners have always dealt with, mostly in a responsible manner as the bulk of testimony received by the Board confirms. The same is true regarding reasonable effort to schedule spraying when it is less likely that anyone will be on the trail. It is also possible that the Master Plan can address additional warning signs posted during and following spray activities, and use of temporary barricades to temporarily close the trail. Those warnings, barricades and other protocols are not for the purpose of meeting the farm impact test because overspray is not an accepted farm practice. They are offered in the interest of good coordination and cooperation between the county and its neighbors and in the interest of avoiding negative impacts to farmers or the farm economy." Record-2 68–69.

[11] Finding 8.8.5 states:

> "Under existing spray regulations, it is possible that reasonable and prudent precautions can be taken, at little cost, to minimize potential conflicts between farmers and/or spray operators and trail users. It

may be possible to schedule spraying in the early morning or at other times when trail use is light. One spray applicator indicated that, when possible, he sprays in the evening or at night; when wind conditions are more favorable, bees are not active and sunlight does not break down the chemical spray. Sign details will be established through the master planning process, which is scheduled to begin at the time of these findings. Posted signs will include clear notice that the trail is for day use only. Even during the night, spray operators are required to avoid spraying the property of others, whether or not there are people or animals located there. Signs can be posted on the trail at both ends of a stretch of trail near locations where spraying is scheduled to take place. Such signs are currently available, and have been seen in use along the corridor near Gaston. Temporary barriers, with signage, might be employed to prevent trail users from risking contact with pesticide drift. These matters should be addressed in the master planning process, but it is feasible to post warning signs and to erect temporary barriers on the trail to accommodate spray applicators, and such measures should be allowed if doing so may reduce risks to farmers of possible complaints or lawsuits. The added inconvenience to farm operators is not part of the farm impact standard calculus, because overspray is not an accepted farm use under any circumstances. Such measures, taken whenever necessary (and as to be addressed in the master plan) along with fencing and signage, reduce the risk of increased insurance premiums and potential lawsuits arising from trail use to a level at which those risks and expected costs cannot be considered significant. Such measures help to make coping with trail use adjacent to farm uses no different in terms of risk management than farming adjacent to a State Highway, county road, or other public road. State law already requires that farmers and spray operators be trained in proper methods of applying pesticides and that they follow the label instructions of the spray being applied. Off-site pesticide drift is never allowed. The county, or other trail manager is capable of cooperating fully with neighboring farm operations to ensure that reasonable and prudent steps are taken by all parties to avoid accidental poisoning of trail users." Record-2 25–26.

changes as mere inconveniences, not amounting to "significant" changes or increased costs. The findings dispute that the farmers are entitled to any kind of external buffer area on the adjoining county-owned right-of-way, but note that the Trail itself will occupy only a portion of the 60-foot right-of-way. We understand the county to conclude that any alleged need for an internal buffer on adjacent farm land based on the Gramoxone label is eliminated by the fact that the paved path and horse path will be located in the approximate center of the 60-foot-wide right-of-way, which means that there will be a *de facto* external buffer, perhaps as much as 24 feet in width, between adjacent farm land and people or animals using the Trail.

The findings do not address the pesticides Lorsban and Yuma 4E, which have warning labels that require setbacks from residential and recreational areas varying from 10 feet for ground spraying at certain application rates up to 100 feet for aerial spraying at certain application rates. Record 2094, 2250. In its response brief, the county argues that the Van Dykes use ground spraying, not aerial spraying, and hence would require only a 10-foot setback, which could easily be provided on the Van Dykes' property without significant changes to farm practices. Further, the county argues that while it has no obligation to provide a buffer on its 60-foot-wide right-of-way, the paved portion of the right-of-way used by people and animals will be more than 10 feet from the Van Dykes' property.

1 We agree with petitioners that the county's findings regarding setbacks
2 required by pesticide and herbicide labels are inadequate and fail to demonstrate
3 compliance with the farm impacts test. First, based on the evidence cited to us
4 with respect to Gramoxone, Lorsban and Yuma 4E, and perhaps other pesticides
5 and herbicides, a setback of some kind is required between the application area
6 and certain sensitive uses, such as recreational areas, and that setback is required
7 independently of a prohibition on drift or overspray. In other words, a farm
8 operator must comply with the applicable setback, even if on a particular day the
9 wind is blowing in a direction that would prevent any drift toward a nearby
10 sensitive use and no overspray occurs. Consequently, it could certainly be the
11 case that a farm operator would be required to provide a setback on their land due
12 to a proposed sensitive use (recreation) on adjoining land, even if there is zero
13 potential for drift or overspray. Second, the labels in the record appear to require
14 a setback from certain "areas," not a setback from people or animals that are
15 present, so the county's suggestion that farmers could simply wait to spray until
16 no one is seen using the Trail does nothing to obviate the need to comply with
17 the appropriate setback. Third, the county appears to presume that any setback
18 or buffer area must be measured from the edge of the paved Trail (or perhaps the
19 horse path; it is not clear where the horse path will be located within the right-of-
20 way). However, again the labels cited to us appear to require setbacks from
21 sensitive "areas," which in the case of a recreational facility such as the Trail may
22 include adjacent undeveloped areas within the right-of-way if dogs or children

1 might wander off the paved trail. The sensitive area is not necessarily limited to
2 the paved portion of the Trail.

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

17 Based on the labels cited in the record, the appropriate width of setbacks
18 for those pesticides and herbicides with numeric setbacks depends on several
19 variables, including application rates and method of delivery. Some of the farms
20 adjoining the Trail apparently use aerial application, which generally requires a
21 larger setback, while others use ground sprays from booms, or other methods,
22 which require smaller setbacks. As we acknowledged above, applying pesticides

1 in a manner that causes overspray or drift onto adjoining properties is not an
2 accepted farming practice for purposes of ORS 215.296(1). The setback from
3 sensitive uses that is required on individual farms, based on pesticide label
4 restrictions, therefore must be determined based upon application methods which
5 avoid overspray and drift. The county will likely need to conduct further fact-
6 finding on these points to determine the appropriate setbacks for different farm
7 operations, and to gather the information needed to determine whether the
8 appropriate setback forces a significant change in farm operations.

9 The First Assignment of Error, First Subassignment, Sub (1) is sustained.

10 **2. Seed Certification and Grass Isolation Strips**

11 Petitioners provided testimony that at least one adjoining farm operation
12 (the Van Dykes) grows high-quality grass seed on both sides of the right-of-way,
13 grass seed which is certified to be free of contamination from weeds. To obtain
14 this certification, the Van Dykes have in past years sprayed the railroad right-of-
15 way to prevent weeds, which allows certified grass seed to be grown up to the
16 borders of their farm property on both sides of the right-of-way, without fear of
17 contamination. Effectively, this practice allowed two fields to be treated as a
18 single continuous field for purposes of certification. The Van Dykes testified that
19 in the absence of spraying on the right-of-way, they would have to create
20 "isolation strips" on either side of the right-of-way up to 465 feet wide, to prevent
21 weed seeds and other contaminants from the right-of-way from impacting the
22 certified grass fields and causing them to lose the financially valuable

1 certification. In effect, they would have to shrink the scope of the certified fields,
2 and would be able to grow only uncertified grass seed within 465 feet on either
3 side of the right-of-way, which petitioners argue would force a significant change
4 in farm practices and result in a significant decrease in crop value, because
5 uncertified grass seed is far less valuable.

6 The county rejected this argument, concluding that adjoining farmers had
7 established no legal right to spray the right-of-way, and that spraying adjoining
8 property without permission from the landowner is not an accepted farm practice
9 for purposes of the farm impacts test.[12] We agree with the county that the practice
10 of spraying the right-of-way without permission of the property owner or other
11 legal right to do so is not an "accepted farming practice." Petitioners fault the

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[12] In Finding 11.8.2, the county stated:

> "The county accepts as true that the Van Dykes have been spraying the corridor to protect their own crops, but rejects the claim that they ever had the right to spray the property, without permission, while it was owned by [Union Pacific] UP or under county ownership. The county is willing to cooperate with the Van Dykes with the goal of preventing nuisance plant species from growing in the corridor, but it is not an 'accepted farm practice' to spray the property of another without permission, even if doing so increases farm profits. The Van Dykes claim massive losses in farm income based on something they know is not true–the claim first made in this land use process that they have the current right to 'control' the corridor. The corridor has never been part of any tax lot that they own, as shown on every tax lot map in the record. It is not an 'accepted farm practice' to exercise control over the land of others without permission." Record-2 67.

1 county for failing to give effect to their claims of a prescriptive easement or
2 similar legal right to continue spraying the right-of-way. However, as we
3 explained in *Van Dyke I,* and discuss further below, neither the county nor LUBA
4 is in a position to resolve the merits of petitioners' various claims to own, control,
5 or use the right-of-way. Only the circuit court can resolve those claims, and
6 petitioners presented no evidence that the appropriate judicial body has done so.
7 We agree with the county that for purposes of the farm impacts test, the county
8 is not required to regard as an "accepted farming practice" the use of property
9 that the affected farmer has not established the right to use or control. If adjoining
10 farmers are now forced to provide isolation strips to maintain their certifications
11 because they can no longer spray the right-of-way, that is not a consequence of
12 the proposed Trail.

13 The First Assignment of Error, First Subassignment, Sub (2) is denied.

14 **3. Application Exclusion Zones (AEZ)**

15 In January 2019, the Oregon Occupational Health and Safety
16 Administration (OSHA) adopted an administrative rule that imposes an
17 "Application Exclusion Zone" of up to 150 feet from pesticide application
18 equipment when in operation. OAR 437-004-6405. As we understand it, the
19 AEZ is not fixed geographically, but surrounds the application equipment,
20 moving as the equipment moves.[13] Under the rule, employers must generally

[13] OAR 437-004-6405(3) provides:

1 ensure that employees and others who are not trained applicators are not within
2 an AEZ during pesticide application.

3 During the proceedings below, petitioners' cited guidance published by the
4 ODA indicating that to comply with the rule farmers must, in ODA's opinion,
5 temporarily suspend pesticide application in circumstances where spray
6 equipment is operated close to property borders, the AEZ extends off the property
7 being sprayed, and people are present within that off-site AEZ. Record-2 1018;
8 *see also* Record-2 1632 (e-mail from ODA staff). Petitioners argued to the county
9 that because the AEZ can extend to off-site properties farmers will be forced to
10 significantly change their pesticide application practices in circumstances when
11 people are present on the Trail within an AEZ that extends off the farm property.
12 Petitioners argue that farmers will have to cease applying pesticides close to
13 property boundaries, or incur the expense of hiring spotters to tell the applicator
14 when persons are present on the Trail.

15 The county rejected those arguments, primarily because the county
16 understood petitioners to be arguing that they have the right to overspray or allow

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> "Application Exclusion Zone (AEZ): The AEZ is an area that moves with and exists in relationship to the application equipment. The number of feet shown is the horizontal radius of the area surrounding the application equipment during the application process and may extend beyond the treated area. It extends downward from that horizontal plane to the ground."

1 drift onto the right-of-way.[14] On appeal, petitioners argue that these findings
2 mischaracterize the issue. According to petitioners, the OSHA rule imposes
3 obligations on farmers regardless of whether overspray can or does occur. We
4 agree with petitioners that the issue presented is not resolved by simply

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[14] The county adopted several findings on this point, including:

> "9.9.5 [Petitioners] then placed into the record additional guidance from the Oregon Department of Agriculture (ODA). In that guidance, ODA indicates that that 'The Application Exclusion Zone (AEZ) requires that an applicator suspend the pesticide application if a person or individuals on an adjoining site may be within an established AEZ. Applicators utilizing ground spray equipment must suspend the application if persons or individuals on the adjoining site are within 25 feet of the pesticide application, 100 feet if utilizing airblast or aerial application. The applicator must evaluate the conditions and may resume application only if the application may be continued without resulting in contact with individuals off of the target site.'
>
> "9.9.6 ODA's advice is logical, but it is not found in any rule adopted by Oregon OSHA or ODA. The likely reason that ODA's advice is not found in any adopted rule is because it is illegal for farm operators to spray property that does not belong to them, whether there are people or animals present, or not. * * *
>
> "9.9.7 The argument being made repeatedly by [petitioners]–that the presence of people on the trail affects the farm practices or costs–can only be correct is farm operators currently have the right to spray property that does not belong to them, as long as there are no people there. The county is only required to analyze potential impacts to 'accepted farm practices' taking place on neighboring farms. It is not an accepted farm practice, currently, for a farm operator to spray or over spray the private property of others, or government owned property or rights-of-way." Record-2 40.

1 concluding that farmers have no right to spray adjoining property. If the OSHA
2 rule requires that farmers take action in circumstances where an AEZ extends to
3 off-site property, as the ODA guidance says it does, then the presence of persons
4 using the Trail within an AEZ could potentially trigger impacts for adjoining
5 farmers for purposes of the farm impacts test, even in the complete absence of
6 overspray or drift. For example, if wind or other environmental conditions were
7 such that it is physically impossible to spray an adjoining property, the applicator
8 would still have to comply with the rule and its requirements.

9 The findings go on to reject ODA's view that the OSHA rule imposes
10 obligations on farmers with respect to persons on off-site properties, even in
11 circumstances where an AEZ would extend onto adjoining property. The
12 findings cite the testimony of OSHA personnel that the rule is intended to protect
13 only farmworkers or others, such as occupants of labor housing, who are present
14 on the farm on which pesticides are applied, and is not intended to protect persons
15 located on adjoining properties. The county's response brief elaborates on those
16 findings, arguing that OSHA's authority extends only to workplace safety and
17 that the new rule explicitly imposes obligations only with respect to workers and
18 occupants of labor housing.

19 We agree with the county that OAR 437-004-6405 does not impose
20 obligations on farmers with respect to persons on off-site properties, even in
21 circumstances where an AEZ extends off-site. The plain language of the rule
22 explicitly imposes obligations only with respect to employees of the farm

operator and others, such as farmworkers' families, who occupy buildings on the farm. All of the obligations imposed by the rule concern persons and structures that are located on the property being sprayed and that are within the farm operator's control. For example, the main obligations imposed under the rule are to exclude workers and occupants of labor housing from the AEZ, and to seal enclosed agricultural structures. Nothing in the rule states, or suggests, that a farm operator has obligations *under the rule* to take action with respect to persons or structures located off-site, over which the operator presumably has no control.

In short, the county correctly concluded that OAR 437-004-6405 does not require adjoining farmers to take action to protect persons or structures located off-site. Other laws and administrative rules certainly may, but OAR 437-004-6405 does not. Accordingly, OAR 437-004-6405 plays no role in evaluating whether the proposed Trail complies with the farm impacts test.

The First Assignment, First Subassignment of Error, Sub (3) is denied.

The First Assignment, First Subassignment of Error is sustained in part.

B. Second Subassignment of Error: Conditions to Reduce Farm Impacts

Petitioners contend that the county erred in concluding that conditions imposed will reduce three types of alleged impacts to insignificance, or otherwise ensure compliance with the farm impacts test.[15]

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[15] Petitioners raised three subassignments of error under the Second Subassignment of Error. We have split the first subassignment of error into two;

1 **1. Fencing**

2 To address potential impacts from Trail users on farm operations, such as 3 trespass, trash, dogs harassing livestock, etc., the county imposed Condition 1(a), 4 requiring that the county/applicant construct a fence between the Trail and 5 adjoining farms.[16] Under Condition 1(d), the county will negotiate with certain

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accordingly, we address four subassignments of error under the Second Subassignment of Error.

[16] Condition 1 provides, in relevant part:

> "Prior to formally opening a multi-modal trail in the segment of corridor between State Highway 240 and the City of Carlton:
>
> "(a) Fencing, capable of preventing dogs and people from entering adjacent farm fields, shall be installed by the county along the entire trail segment, unless an owner of adjacent land indicates that such fencing is not necessary to separate that owner's land from the trail corridor; and
>
> "(b) Signage shall be installed at each point of trail entry from a public right-of-way or trailhead, directing and warning trail users not to trespass onto adjacent lands; not to touch, pet, or otherwise harass livestock; indicating that agricultural uses are taking place in the area, and to expect potential dust, noise, agricultural and pesticide smells; and indicating that, at designated agricultural trail crossings, delays may occur, and that farm operators and machinery have the right-of-way over pedestrians and other trail users.
>
> "* * * * *
>
> "(d) The county will seek to enter into good-faith negotiations with the Van Dykes, the Eramos, Dromgoole and the McCarthys and/or their successors in interest to establish for each of these owners a license to cross the corridor at an

1 farmers to grant a license to cross the right-of-way to access fields on the other
2 side, via gates in the proposed fence. Condition 5 provides that the details of
3 fence and gate construction would be established during a subsequent master
4 planning process. Record-2 73.

5 Petitioners and the Farm Bureau argue that the conditions regarding
6 fencing and gates are flawed in several respects, and are insufficient to reduce
7 impacts to insignificance and ensure compliance with the farm impacts test. First,
8 petitioners and the Farm Bureau argue that the fence required by Condition 1(a)
9 is inadequate, because the findings and conditions do not specify (1) the materials
10 that will be used to construct the fence, (2) how the fence will be designed, and
11 (3) when the fence will be built. Under Condition 5, such details will be
12 determined during the master planning process, but petitioners and the Farm
13 Bureau argue that the master planning process is not a land use process, and
14 petitioners will have no formal opportunity to provide testimony or input on fence
15 materials or design. Further, petitioners and the Farm Bureau argue that
16 Condition 1(a) is flawed because it allows individual farmers to opt out of having
17 any fencing installed along their property boundary, leaving gaps that would
18 potentially allow trespassers to circumvent the fences installed to protect other
19 farms. Finally, petitioners and the Farm Bureau dispute that the signage required

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appropriate location or locations, to access fields owned or controlled by them that are currently separated by the trail corridor or to otherwise provide access across the corridor necessary for farming purposes." Record-2 72.

1 by Condition 1(b) will do much to reduce potential for trespass, harassment of
2 livestock, etc.

3 We generally agree with petitioners and the Farm Bureau that relying on
4 the future master planning process to determine critical details such as fence
5 design, materials, construction and maintenance is a problematic approach to
6 ensuring compliance with ORS 215.296(1). The proposed fence is the primary
7 means identified by the county to prevent or reduce to insignificance a host of
8 farm impacts, most prominently trespass but also a variety of other potential
9 impacts such as preventing trash from blowing onto fields, preventing Trail users
10 from disturbing livestock, and reducing contaminants that might threaten food
11 safety certifications. Condition 1(a) specifies only that the proposed fence must
12 be "capable of preventing dogs and people from entering adjacent farm fields."
13 If preventing physical trespass from dogs and people were the only purpose of
14 the fence, and the record included evidence that a wide variety of fences could
15 satisfy that purpose, it might be sufficient to impose such a general condition,
16 and leave determinations regarding design, materials, etc., to a subsequent
17 administrative proceeding. But the county relies on the proposed fence to address
18 a wide variety of different potential impacts, which might require different fence
19 designs, materials, construction techniques and maintenance routines, in order to
20 ensure that the Trail will not cause significant impacts on farm practices.

21 Some of the alleged impacts are farm-specific, involving specific types of
22 livestock or particular crops with food safety certifications potentially threatened

by contamination. However, the county/applicant proposed no particular design or materials for the fence, and the record includes no evidence cited to us regarding the efficacy of different designs or materials to address or ameliorate all of the potential impacts on farming practices raised by opposing farmers. Those farmers therefore had no opportunity in this proceeding to address the adequacy of any particular design or materials. Instead, the county simply punted all determinations regarding fence design, materials, construction, etc., to a subsequent master planning process that does not offer opportunity for public hearing or other public input.

ORS 215.296(2) provides that the applicant "may demonstrate that the standards for approval set forth in subsection (1) of this section will be satisfied through the imposition of conditions. Any conditions so imposed shall be clear and objective." In our view, given 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

1 or objective conditions of approval regarding installation of a fence, because it
2 leaves the applicant and county unfettered discretion, in a subsequent
3 administrative proceeding, to determine the type and design of the fence, and the
4 materials used, that will be installed.

5 Further, petitioners argue, and we agree, that Condition 1(a) is not clear
6 and objective, even with respect to its sole specification, that the fence be
7 "capable of preventing dogs and people from entering adjacent farm fields."
8 Depending on what "capable of preventing" means, the results could range from
9 a four-foot-high picket fence to a 10-foot steel wall topped with razor wire, or
10 anything in between. And, as noted, Condition 1(a) specifies nothing, even in
11 the vaguest terms, with respect to any source of impact on farm practices other
12 than physical trespass by dogs or persons.

13 It is permissible for a local government to find compliance with an
14 applicable approval criterion, based on substantial evidence in the record that
15 considers different feasible solutions to an identified problem, but nonetheless
16 condition approval on subsequent administrative proceedings to determine which
17 of the feasible solutions considered should be adopted. *Meyer v. City of Portland*,
18 67 Or App 274, 678 P2d 741, *rev den*, 297 Or 82 (1984). However, in the present
19 case, the county decision maker did not consider evidence regarding the
20 effectiveness of the proposed fence to address various different types of alleged
21 farm impacts, because no specific fence was proposed, or any evidence submitted
22 regarding a specific fence or a range of fence types, designs and materials.

1 Instead, the county essentially deferred all consideration on these points to the
2 master planning process, which does not provide for a public hearing or input.
3 That was error. *Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017
4 (2007).

5 Finally, petitioners argue that the provision allowing adjacent landowners
6 to opt out of installing a fence on their property line undermines the effectiveness
7 of any fence, and hence compliance with ORS 215.296, because the gaps created
8 in the fence line could allow dogs and other trespassers to circumvent the fences
9 installed to protect other farms. No party cites any findings or evidence
10 evaluating whether the proposed fence would be still be effective at preventing
11 trespass with a gap or multiple gaps in the fence line. We agree with petitioners
12 that on remand the county must consider that issue and adopt appropriate findings
13 or modifications to Condition 1(a).

14 The First Assignment of Error, Second Subassignment, Sub (1) is
15 sustained.

16 **2. Gates**

17 Petitioners argue that adjoining farmers have historically crossed the right-
18 of-way to access fields they own on either side, and that the county's proposed
19 solution to avoid impacting this historic practice is to negotiate with farmers to
20 provide licenses to cross the right-of-way, install gates in the fence to allow farm
21 equipment to pass through, and post signage to warn Trail users that farm
22 equipment may cross the Trail. *See* n 16. Petitioners complain that this solution

is inadequate to reduce impacts on farm practices, and in fact creates new significant impacts. Petitioners cite testimony by farmers that the gates required in many cases must be large enough to allow passage of large farm equipment, *e.g.*, sprayers with 100-foot long booms, and that the delay for operators to open, pass through, and close two sets of large gates multiple times per day and perhaps multiple times per hour, represents a significant impact on farm practices in itself. Further, petitioners argue that the county's gate solution will significantly increase the cost of farm practices, if farmers must hire extra workers to open and close gates and flag the right-of-way to prevent conflicts with Trail users.

The county found that the farmers involved have not demonstrated any legal right to cross the county-owned right-of-way to access their fields. The findings conclude that crossing the right-of-way without a legal right or permission from the property owner is not an "accepted farm practice," and that the county's offer to negotiate in good faith to grant licenses to cross the right-of-way represents only an accommodation, not a measure to prevent significant impacts to accepted farm practices, for purposes of the farm impacts test. Record-2 127–28 (Finding 10.3.7).

We agree with the county that using another's property to move farm equipment without a legal right or permission to do so is not an "accepted farm practice" for purposes of ORS 215.296(1). Accordingly, if the farmers who choose to obtain a license from the county pursuant to Condition 1(d) suffer inconvenience in using gates through the fence, such inconveniences need not be

1 evaluated as impacts on accepted farm practices, for purpose of the farm impacts
2 test.

3 The First Assignment of Error, Second Subassignment, Sub (2) is denied.

4 **3. Impacts on Spraying Practices**

5 Petitioners argued below that the Trail will significantly impact pesticide
6 and herbicide spraying practices, because farmers will feel compelled to alter or
7 delay spraying near the Trail when people are present, for fear of triggering
8 complaints or lawsuits. The county generally rejected this line of argument as
9 based on concerns about drift and overspray, which the county concluded is not
10 an accepted farm practice. The county's findings suggest that if farmers choose
11 to voluntarily refrain from spraying at times when people are present on the Trail,
12 due to fears of generating complaints about drift or overspray, they should choose
13 to spray early in the morning or at night when Trail usage will be light. As an
14 accommodation, the county imposed a condition allowing farmers to provide the
15 county with 72-hour notice of spraying, and the county would then post signs
16 closing the Trail at the time designated for spraying. However, the county
17 concluded that any changes in spraying practices that might occur due to farmers'
18 concerns to avoid drift or overspray need not be evaluated as impacts on accepted
19 farm practices, because drift and overspray are not accepted farm practices, and
20 farmers are already obligated to avoid drift and/or overspray onto adjoining
21 property, whether people are present or not.

On appeal, petitioners dispute that changing spraying practices due to the presence of people on the Trail concerns drift or overspray. We understand petitioners to argue that the presence of people on the Trail may cause farmers to change spraying practices as a precaution, and to avoid the perception of drift or overspray, even in circumstances where neither is likely. If so, petitioners argue, then the county's suggestion that farmers change their spraying times to avoid daytime hours, and try to schedule spraying times 72 hours in advance, impermissibly shifts the burden to farmers to mitigate significant impacts to accepted farming practices.

We agree with the county that, to the extent farmers choose to refrain from or delay spraying out of concern to avoid drift or overspray when they observe persons on the Trail, such actions are not evaluated as impacts to accepted farming practice, because farmers already have an obligation to avoid drift and overspray. Stated differently, it is an accepted farming practice to take action to avoid drift and overspray, so choosing to take such actions does not force a "change" in accepted farm practices.

However, we understand petitioners to argue that some farmers may choose to refrain from or delay spraying even in circumstances where drift and overspray are unlikely and no restraint is needed, out of concern to avoid complaints or lawsuits from inaccurate *perceptions* of drift or overspray, for example if Trail users smell pesticide odors and believe, inaccurately, that they have been sprayed or otherwise exposed to pesticides. If that is petitioners'

1 argument, the county adopted findings addressing perceived overspray and odor,
2 concluding that to the extent concerns regarding perceived overspray and odor
3 might prompt farmers to change pesticide spray practices, the signage required
4 by conditions of approval is intended to reduce the likelihood of complaints or
5 lawsuits.[17] Although petitioners argue here and elsewhere that signage will not
6 be effective in reducing complaints to due to odors, a reasonable person could
7 conclude based on substantial evidence in the record that signage will reduce the
8 likelihood of complaints based on pesticide odor. We agree with the county that
9 petitioners' arguments under this subassignment of error do not provide a basis
10 for reversal or remand.

11 The First Assignment, Second Subassignment of Error, Sub (3) is denied.

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[17] The county adopted several findings concluding that signage will be effective at educating and warning Trail users regarding odors, dust, etc., including:

> "9.9.12 Even though the county is not required by the farm impact standards to address practices that are not 'accepted farm practices,' it adopted conditions as part of Ordinance 904 to minimize perceptions that trail users might have when they smell pesticides but may not be receiving a dangerous dose of it–signage. For the first segment of trail, many trail users, who may live on neighboring properties or in Yamhill or Carlton, are already going to know the difference between a pesticide smell and being doused with it. It will be obvious to most users that they are passing through farmland, and therefore they may encounter pesticide smells, dust, and odors normally associated with farm operations." Record-2 41 (underscoring in original).

1 **4. Food Safety**

2 Some adjoining farmers expressed concerns regarding contamination of
3 certain crops, *e.g.*, hazelnuts, which are harvested in a manner that makes them
4 vulnerable to contamination from litter and fecal material. Farmers argued that
5 an impermeable and substantial fence is necessary to prevent contamination from
6 human and canine waste from Trail users answering calls of nature in or near
7 adjoining orchards. In its findings, the county responded that the fence required
8 by conditions of approval, in addition to vegetation that might be planted on the
9 right-of-way between the 12-foot wide paved Trail and nearby orchards, would
10 reduce the chance of trespassing and thus reduce the chance of contamination to
11 insignificance.[18]

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[18] The county findings state, in relevant part:

> "[B]ecause of the way hazelnuts are harvested, it is important that fecal matter and litter not be deposited on the floor of the orchard, where they might end up in the harvested nuts. The potential for that kind of farm impact is minimized by the installation of fencing. Many filbert orchards in Yamhill County exist in close proximity to county roads and State Highways, and face the same types of risks, without fencing. Usually, the onus is on farm operators to decide the level of risk they can accept, and to manage their property accordingly, by installing fences and/or surveillance equipment, or not. In this case, the county is required, by a condition of approval, to fence the entire corridor. It is not that the risk of contamination does not exist–it is that it is minimized to a level at which it can no longer be considered significant. The trail is expected to occupy only 12 feet of the (generally) 60-foot wide corridor. There is therefore the possibility of either planting the remaining corridor with vegetation that provides additional buffering between trail uses

1 As discussed above, the county deferred to the master planning stage any
2 determinations regarding the proposed fence, other than that it be "capable of
3 preventing dogs and people from entering adjacent farm fields." As we
4 understand the testimony, the concern is not limited to trespassers entering fields
5 and orchards to defecate, but also to windblown or water-borne microorganisms
6 from fecal material deposited adjacent to fields and orchards, within the right-of-
7 way. As petitioners argue, Trail users caught short will seek to get as far from
8 the paved portion of the Trail as possible.[19] The decision before us does not
9 require that the fence be impermeable, or capable of preventing litter or
10 windblown or waterborne waste from entering adjoining fields. Because the
11 county punted to the master planning stage almost all determinations regarding
12 fence design and materials, as well as any vegetation to be planted within the
13 right-of-way, the county is no position to adopt adequate findings, supported by
14 substantial evidence, addressing the issues raised regarding potential impacts to
15 food safety raised below.
16 The First Assignment, Second Subassignment of Error, Sub (4) is
17 sustained.

> and agricultural practices, or of allowing neighbors to farm portions of the corridor under county license. In either case, it is not likely that trail users will be picking up feces from the trail and throwing it into nearby filbert orchards[.]" Record-2 68.

[19] As discussed elsewhere, the county does not propose to provide any restrooms at access points.

1 The First Assignment, Second Subassignment of Error is sustained in part.

2 **C. Subassignment of Error 3: Increased Complaints**

3 Petitioners argued below that by bringing large numbers of people adjacent
4 to farm operations, the proposed Trail would result in a significant increase in the
5 number of complaints filed with the ODA, complaints regarding pesticide odors,
6 dust and noise from farm equipment, etc. Petitioners cite to testimony that the
7 ODA complaint investigation process, although it seldom results in a finding of
8 violation, is onerous, time-consuming and expensive for farmers. To avoid
9 dealing with a significant number of new complaint investigations, petitioners
10 argue that farmers may choose to reduce or avoid farm practices that are likely to
11 generate complaints, which could result in significant changes to established farm
12 practices.

13 The county rejected that argument as speculative.[20] The county also
14 adopted findings concluding that the 2.82-mile Trail segment approved in this

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[20] The county's findings state, as relevant:

> "8.8.6 Testimony has also been received indicating that the smell of a pesticide might drift off of the property to which it is applied, and that trail users who smell it might think they had been sprayed, leading to expensive complaints and time-consuming inspections of farm operators by governmental agencies. However, these impacts, which are attributed to the perception of individuals who smell pesticides and who would then create bureaucratic headaches for farmers, are speculative. * * *

1 decision is intended for local users who are presumably familiar with agricultural
2 operations and less likely to file complaints than the general public. Finally, the
3 county cited testimony that signage required by condition of approval can be
4 effective in warning and educating Trail users about agricultural odors, dust,
5 noise, etc., potentially reducing the number of complaints that might otherwise
6 be filed.

7 On appeal, petitioners dispute the characterization of their arguments as
8 "speculative." However, the county's characterization seems accurate. Based on

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> "8.8.7 Testimony has also been received indicating that signage can be effective in both warning and educating trail users about potential farm odors, pesticide odors, dust, noise, and/or smoke that visitors may experience while using the trail. Signage can also be used to warn trail users of the prohibitions on touching or interacting with livestock maintained on private property; of trespassing on private property; of littering; of vandalism and/or camping in the corridor or on adjacent lands. Appropriate signage at trailheads and at appropriate locations along the trail can effectively minimize potential conflicts between trail visitors and farming uses and practices. The segment of trail in question will be installed with access from Highway 240 (once the [Heavy Industrial] HI zone text is amended) and from the City of Carlton. There will be no parking or trailhead installed under this approval, and there will be 'no parking for trail users' or similar signs posted where the trail crosses Fryer Road. This segment of trail is being constructed for local use by the residents of Yamhill and Carlton. Although it may one day be a link in a regional trail, its intended and expected use at present is by persons who live in the area or are visiting Yamhill or Carlton. Such residents and visitors, more likely than not, know the difference between smelling pesticides and being sprayed with them." Record-2 26.

the evidence cited to us, it is possible that the Trail *might* lead to more complaints to the ODA, but it might not. It is possible that some unidentified farmers *might* respond to an increased number of complaints that *might* occur by changing unidentified farm practices, but they might not. It is possible that some of those unidentified changes *might* be significant, but they might not. Petitioners' arguments and evidence on this point are too unfocused and speculative for the county to meaningfully address in findings. Petitioners' challenges to the findings and conditions regarding complaints to ODA do not provide a basis for reversal or remand.

The First Assignment of Error, Third Subassignment is denied.

D. Subassignment of Error 4: Prescriptive Easement

Petitioners argued below that some of the adjoining farmers may have an unadjudicated prescriptive easement to cross over the right-of-way, and to enter the right-of-way to spray pesticide and manage weeds. The county generally rejected those arguments, and petitioners challenge the county's findings, arguing that the county erred in failing to recognize their unadjudicated claims of a prescriptive easement. However, as discussed above, neither the county nor LUBA have the authority to resolve claims of adverse possession or a prescriptive easement. Such claims can be resolved only in circuit court. The county's findings on this point are surplusage, and petitioners' challenges to those findings do not provide a basis for reversal or remand.

The First Assignment of Error, Fourth Subassignment is denied.

1 **E. Subassignment of Error 5: Fire and Emergency Services**

2 Petitioners argue that the county's findings addressing fire risks and
3 emergency services are inadequate and fail to demonstrate compliance with the
4 farm impacts standard.

5 The Yamhill Fire Protection District, one of two fire districts the Trail is
6 located within, submitted comments expressing concerns about access and the
7 ability of the Trail surface and three bridges to accommodate some emergency
8 vehicles. The county adopted findings addressing those concerns, as issues
9 relevant to the CUP standards at YCZO 1205, which we discuss below.[21] Under
10 this subassignment of error, petitioners argue that those findings are inadequate
11 to demonstrate compliance with ORS 215.296(1). However, it is not clear to us
12 why access to the Trail and the adequacy of the Trail infrastructure are relevant
13 issues under the farm impacts test. The closest petitioners come to articulating
14 some connection between Trail access issues and impact *on accepted farm*
15 *practices* is to cite to one farmer's speculation that, due to limited Trail access,

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[21] The county adopted a number of findings on fire and emergency response, including:

> "[A]ll police and emergency services will be available along the trail, which will have good emergency access at several locations. Two fire districts serve the trail segment in question, including one that has its main fire station abutting the trail at its southern terminus. A developed trail will provide greater access for fire response vehicles to areas adjacent to the trail than are available now." Record-2 28.

1 emergency personnel might respond to emergencies on the Trail by driving
2 emergency vehicles across farm fields, damaging crops or disturbing livestock.
3 It is not clear under this scenario how emergency personnel would get through
4 the fence between the Trail and adjoining properties. The farmer's speculation
5 on this point has no other support in the record cited to us, and the county did not
6 err in failing to adopt findings to address that speculation in addressing the farm
7 impacts standard.

8 Adjoining farmers also expressed concern that if the Trail is approved their
9 insurance costs may go up, due to (1) increased chance of fires started by Trail
10 users, which could burn insured crops, livestock, buildings, etc., and (2) liability
11 claims against farmers if a fire starts on farm property and injures Trail users.
12 We understand petitioners to argue that these issues are relevant under the farm
13 impacts test, because buying insurance is an "accepted farm practice," and an
14 increase in insurance premiums would represent an increase in the "cost of
15 accepted farm * * * practices" for purposes of ORS 215.296(1)(b).

16 The county adopted several findings rejecting that claim and similar claims
17 regarding insurance premiums and liability.[22] We have examined the findings

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[22] The county's findings on this point include:

> "9.12.3 Testimony from many trail supporters and published literature support a conclusion that, although public trails are located on or through farmland in every part of the country, there is no evidence to date that such trails have increased the number or consequences of lawsuits against farmers, or increased their risks of

and evidence cited to us, and conclude that petitioners have not demonstrated that the county's findings on these points are inadequate or unsupported by substantial evidence.

The First Assignment of Error, Fifth Subassignment is denied.

F. Subassignment of Error 6: Traffic Impacts

The county/applicant did not propose to provide any parking for vehicles and horse trailers at any of the county access points for the 2.82-mile segment of Trail. Farmers testified that county roads providing access to the Trail are currently inadequate, with small shoulders, and no parking areas or sidewalks, and those narrow roads are frequently used by farm equipment and trucks moving from field to field, or to markets. Without any provisions for parking near access points, farmers expressed concern that Trail users would park vehicles and horse trailers in or near farm driveways and access points, or on the shoulders of the narrow roads, making it more difficult to move large farm equipment. Farmers also argued that without a traffic study of some kind there is no basis to conclude that the Trail will not cause traffic congestion on county roads, impeding movement of farm vehicles.

The county rejected those concerns, concluding no parking need be provided for Trail users, because most users would be locals who would access

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lawsuits or their cost of obtaining insurance coverage. That testimony and literature support the opposite conclusion." Record-2 45.

1 the Trail by foot or bicycle.[23] To the extent non-locals used the Trail, the county

2 found that non-locals would likely park on city streets at either end of the Trail,

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[23] The county's findings state, in relevant part:

> "10.8 The approval sought in this case will allow the county to continue development of a trail, devoted exclusively for the use of walkers, bicyclists and equestrians, connecting the cities of Yamhill and Carlton. Without formal trailheads, there is no single destination for motor vehicle traffic, and there is therefore no traffic to measure. To the extent trail users do not live in close proximity to Yamhill or Carlton and need to drive to one of those towns to park in order to access the trail, they will likely be parking on city streets in either of the two cities, neither of which has indicated concerns in that regard.
>
> "10.9 No trailhead is proposed for NE Fryer Road. A condition of approval requires that the intersection of the trail with NE Fryer Road be posted with 'No Trail Parking,' 'Caution, Trail Crossing,' and 'Caution, Trail Crossing Road' or similar signs, of a type common to existing public trails.
>
> "10.10 No trailhead is currently proposed at the Bus Barn. A condition of approval requires that the entrance to the trail from Highway 240 and the Bus Barn property both be posted with 'No Trail Parking' signs, and that the county seek from the City of Yamhill and ODOT permission to appropriately mark the shoulder of Highway 240 to make the shoulder safer for trail users accessing the trail from the City of Yamhill.
>
> "10.11 Once it is clear that the county has land use authority to develop the trail through the EFU district, the cities, which both support and are planning for development of the trail, are more likely to move forward with their own plans, which could include trailheads and/or trail parking within either or both cities. These matters will be addressed in the master planning process that is scheduled to begin soon. Until then, the kind of facility being

1 and not access the Trail in the middle via county access points. The county
2 concluded that no traffic study was required by law, and further that without
3 trailheads or established destinations, there would be no way to measure traffic
4 or parking associated with the Trail.

5 We agree with petitioners that the county's findings regarding parking and
6 potential interference with farm vehicle movement are inadequate. The county
7 presumes that most users will not use a vehicle to reach the Trail's access points,
8 but there is apparently no evidence, or at least none cited to us, supporting this
9 presumption. The county proposes no parking at county trail access points, and
10 in fact will post signs prohibiting parking at those trail access points, but that is
11 not a basis to presume there will be *no* parking near county access points. The
12 evidence cited to us suggests that Trail-related vehicle or trailer parking that
13 occurs on county roads or private driveways near county access points could
14 restrict passage of large farm vehicles. While it may be that no law requires a
15 traffic study to evaluate the adequacy of Highway 47 or county roads, and without

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proposed does not generate any direct traffic that will have any impact on Fruithill or on individual farmers located along the corridor. Traffic on Highway 240 will not be affected because persons approaching the trail will mostly be approaching it from the City of Yamhill by way of an existing sidewalk and highway shoulder. If traffic on Highway 47 is impacted at all, it will be a positive impact because users of that road will have a non-motorized option for traveling between the cities of Yamhill and Carlton. No traffic study was required by law in this case, and none is necessary to address traffic anywhere within the EFU area under consideration." Record-2 52–53.

1 proposed Trailheads there is no destination to help distinguish Trail-related
2 traffic from background traffic, it is not clear why the county cannot generate a
3 parking demand study, based on reasonable assumptions supported by substantial
4 evidence, to determine parking demand at access points. The record apparently
5 includes no parking demand information of any kind. We agree with petitioners
6 that the county's findings on parking and potential interference with large farm
7 vehicle movement are conclusory and not supported by substantial evidence.
8 The First Assignment of Error, Sixth Subassignment is sustained.
9 **G. Subassignment of Error 7: Cumulative Impacts**
10 Generally, the county must consider whether the proposed non-farm use
11 significantly impacts farm practices on each farm unit on surrounding farmlands,
12 by examining impacts on each individual farm practice. However, the Court of
13 Appeals and the Supreme Court have held that a county must also consider the
14 *cumulative* impacts of the proposed non-farm use across *all* farm practices on a
15 farm unit, that is, whether insignificant impacts to individual farm practices
16 might, in the aggregate, significantly impact the farm unit. *SDC-IV*, 364 Or at
17 458; *Von Lubken v. Hood River County*, 118 Or App 246, 846 P2d 1178, *rev den*,
18 316 Or 529 (1993).
19 In the present case, the county adopted findings concluding that (1) all
20 impacts to specific farm practices on each farm unit are, considered individually,
21 insignificant or rendered insignificant with conditions, and (2) the cumulative or
22 aggregate sum of insignificant impacts across all farm practices on a farm unit do

1 not cross the threshold of significance for any farm unit. For purposes of this
2 subassignment of error, petitioners do not challenge those findings. Instead,
3 petitioners argue that the county erred in failing to also consider the cumulative
4 impact of insignificant impacts on *all* farm practices across *all* farm units on
5 surrounding lands.

6 In the decision under review in *SDC-IV*, the Court of Appeals considered
7 and rejected the argument that ORS 215.296(1) requires a determination of the
8 cumulative significance of impacts across all farm units on surrounding lands.
9 *Stop the Dump v. Yamhill County*, 284 Or App 470, 495-96, 391 P3d 932 (2017)
10 (*SDC-III*).[24] On review, the Supreme Court found it unnecessary to reach the

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[24] The Court of Appeals held in *SDC-III*:

> "On review, petitioners argue LUBA erred in not requiring the county to consider 'the significance of the impacts occurring on multiple farms, viewed cumulatively.' We observe that that requirement is not imposed by *Von Lubken*, which required only an analysis of the cumulative impacts on an individual farm. 118 Or App at 251, 846 P2d 1178. Nonetheless, petitioners argue, the text of ORS 215.296(1) does not preclude that test of cumulative impacts, and, furthermore, they assert that the more rigorous examination would be consistent with the intent of the statute to 'maximize agricultural uses and minimize non-agricultural uses.' We disagree.
>
> "Contrary to petitioners' contentions, the text of the statute requires an evaluation of 'accepted farm or forest practices on surrounding lands devoted to farm or forest use.' ORS 215.296(1)(a) and (b). As we stated in *Von Lubken*, the purpose of ORS 215.296(1) is to address the concern that 'agricultural uses not be displaced by or

1 petitioners' challenge to that conclusion, because no party had properly preserved

2 the issue before LUBA. However, the Court commented:

3 "Our decision does not foreclose another party in another case from
4 arguing that the cumulative impacts test requires also considering
5 more than the aggregate of multiple less-than-significant impacts on
6 each farm. However, we raise the question whether petitioners'
7 position on the cumulative impacts analysis runs counter to the
8 farm-focused test for individual changes to accepted farm practices
9 or increases in costs of those practices." *SDC-IV*, 364 Or at 459-60.

10 In the present appeal, petitioners urge LUBA to adopt the position that the

11 Supreme Court questioned in *SDC-IV*, and hold that ORS 215.296(1) requires the

12 county to evaluate the cumulative significance of impacts on all farm practices

13 on all impacted farms, in addition to evaluating impacts on individual farms, the

14 so-called "farm-focused" approach.

15 We decline the invitation. The text of ORS 215.296(1) is silent regarding

16 evaluation of cumulative impacts, and the obligation to conduct an analysis of

17 cumulative impacts, even on individual farms, must be derived from the statutory

18 context, as the Court of Appeals did in *Von Lubken*. Petitioners cite no statutory

19 context suggesting that the legislature intended to require counties to conduct the

20 Herculean task of attempting to evaluate whether multiple insignificant impacts,

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subjected to interference from non-farm uses.' 118 Or App at 250, 846 P2d 1178. A nonfarm use that does not significantly displace or interfere with accepted farm practices at a particular farm in the surrounding lands does not displace or interfere with accepted farm practices in the surrounding lands at all. The whole is equal to the sum of its parts." 284 Or App at 495-96.

affecting multiple farm units with potentially very different farm practices and circumstances, and possibly subject to different, farm-specific conditions of approval, cumulatively exceed the significance threshold. Because farm practices may differ widely from farm unit to farm unit, even for farms that produce the same kind of agricultural commodity, we decline to read the text of ORS 215.296(1) so broadly as to require a cumulative impacts analysis beyond individual farm units.

Finally, even though the issue is technically unsettled, the Court of Appeals in *SDC-III* clearly rejected the position petitioners advocate for in this appeal. Petitioners in the present appeal offer no new or compelling reasons to reach a different conclusion than the one the Court of Appeals reached. While the Supreme Court did not foreclose the possibility that a party in another case might demonstrate some basis to adopt a broad cumulative impacts analysis, the court commented that such a broad cumulative impacts analysis might run "counter to the farm-focused test for individual changes to accepted farm practices or increases in costs of those practices." *SDC-IV*, 364 Or at 459-60.

That comment is *dicta*, but nonetheless not something we or petitioners can ignore. In the face of that *dicta*, the burden is on petitioners to demonstrate that adopting a broad cumulative impacts analysis would *not* run counter to the farm-focused test. Petitioners make no attempt to do so.

1 The First Assignment of Error, Seventh Subassignment is denied.[25]

2 **H. Subassignment of Error 8: Conditions of Approval**

3 As noted, ORS 215.296(2) authorizes the county to establish compliance
4 with the farm impacts test in ORS 215.296(1) by imposing clear and objective
5 conditions. However, permissible conditions cannot themselves cause
6 significant changes to accepted farm practices, even if the conditions mitigate the
7 direct adverse impact of the proposed non-farm use. *SDC-IV*, 364 Or at 460.

8 Petitioners argue that the county imposed a number of conditions to
9 establish compliance with ORS 215.296(1) that are either not clear and objective,
10 or that impermissibly cause significant changes in accepted farming practices.

11 The county imposed eight conditions of approval. Petitioners challenge
12 Conditions 1(a), (b), (c), (d), 2, 4, 5, 6 and 8. Carlton responds that some of the
13 challenged conditions are not intended to demonstrate compliance with ORS
14 215.296(1), and are thus not subject to ORS 215.296(2), but are meant only as
15 accommodations. Carlton argues that Conditions 1(d), 2, 6 and 8 are examples
16 of such accommodations. We first address these conditions.

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[25] We note that, because under other assignments and subassignments of error we remand the present decision for new evaluation of impacts on certain farm practices on individual farms, it follows that on remand the county must also reevaluate its farm-focused cumulative impacts analysis, in light of the findings and evidence on remand.

1 **1. Conditions 1(d), 2, 6 and 8**

2 Condition 1(d) provides that the county will enter into good faith
3 negotiations with certain farmers to grant them licenses to cross the right-of-
4 way.[26] As discussed above, the county did not err in concluding that it is not an
5 "accepted farm practice" to use another's property without permission.
6 Accordingly, we agree with Carlton that Condition 1(d) is not intended or
7 necessary to demonstrate compliance with ORS 215.296(1), and is offered only
8 as an accommodation. Consequently, if farmers taking advantage of the county's
9 offer experience changes to farm practices in the course of exercising access to
10 the right-of-way granted under a license, those changes do not offend ORS
11 215.296(2).

12 Condition 2 provides that prior to construction of the 2.82-mile Trail the
13 county will adopt a final master plan for the entire length of the Trail, outlining
14 "additional" design, management and mitigation measures.[27] As discussed

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[26] Condition 1(d) states:

> "The county will seek to enter into good-faith negotiations with the Van Dykes, the Eramos, Dromgoole and the McCarthys and/or their successors in interest to establish for each of these owners a license to cross the corridor at an appropriate location or locations, to access fields owned or controlled by them that are currently separated by the trail corridor or to otherwise provide access across the corridor necessary for farming purposes." Record-2 72.

[27] Condition 2 provides:

1 above, the county erred in failing to make critical determinations regarding the
2 design and materials used for the proposed fence in this CUP proceeding. That
3 particular error must be corrected on remand. However, the county expressly did
4 not rely on the master plan process to establish compliance with any requirement
5 of ORS 215.296(1). Other than complaining that the master plan process is a
6 discretionary process, and hence not "clear and objective," petitioners make no
7 attempt to establish that Condition 2 was imposed, or is necessary, in order to
8 establish compliance with ORS 215.296(1).

9 Condition 6 provides that the county will negotiate in good faith with farm
10 operators to manage the right-of-way in a manner that prevents contamination of
11 certified crops that are subject to certifications.[28] In an earlier subassignment of

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> "Prior to trail construction (other than initial bridge construction) a final plan or master plan, which shall be a collaborative and coordinated effort, will be approved by the Board, 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." Record-2 72.

[28] Condition 6 provides:

> "During the master planning process, the county shall negotiate, in good faith, with farm operators seeking or maintaining crop certifications, corridor vegetation and management protocols necessary to prevent contamination of such crops through cross-pollination or crop contamination. Maintenance of appropriate trail corridor vegetation and management protocols established by the parties will be continued as long as necessary to maintain the

1 error, we rejected petitioners' argument that the Trail significantly impacts
2 certified crop practices because farmers will no longer be able to spray the right-
3 of-way to control weeds, concluding that spraying property that belongs to
4 another is not an accepted farm practice. As a consequence, some farmers may
5 have to install isolation strips on their property to maintain crop certifications. If
6 so, we concluded, that consequence is not a result of Trail approval, but rather a
7 result of the fact that the farmers can no longer spray property that does not
8 belong to them. Viewed against this background, it is clear that Condition 6
9 represents an accommodation to those farmers, rather than an attempt to mitigate
10 impacts on accepted farm practices subject to the farm impacts test. Accordingly,
11 petitioners' arguments that Condition 6 is inconsistent with ORS 215.296(2) and
12 insufficient to ensure compliance with ORS 215.296(1) do not provide a basis for
13 reversal or remand.

14 Condition 8 provides that the county will notify each adjoining farmer of
15 the option of providing a 72-hour notice prior to aerial spraying, on receipt of
16 which the county will post signs closing the Trail at the designated time.[29] The

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certifications sought or obtained by neighboring property owners, or subsequent replacement certifications." Record-2 73.

[29] Condition 8 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

1 findings supporting Condition 8 state that it is intended to address concerns about
2 aerial overspray, in a spirit of "coordination and cooperation," but it is not
3 intended to ensure compliance with ORS 215.296(1), because overspray onto
4 property not owned by the farm operator is not an accepted farm practice.
5 Record-2 60 (findings 11.3.4). We agree with Carlton that because Condition 8
6 addresses overspray, and overspray is not an accepted farm practice, Condition 8
7 is offered only as an optional accommodation, and is therefore not subject to ORS
8 215.296(2).

9 These sub-subassignments of error are denied.

10 **2. Condition 1(a)**

11 As noted, Condition 1(a) requires installation of fencing "capable of
12 preventing dogs and people from entering adjacent farm fields[.]" We have
13 already determined that Condition 1(a) is inadequate, in part because it leaves
14 key determinations regarding fence design and materials to a subsequent approval
15 process that does not provide for public input.

16 This sub-subassignment of error is sustained.

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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-2 73.

1 **3. Condition 1(b)**

2 Condition 1(b) requires that signage be installed that educate and warn
3 Trail users against trespass, etc., and to expect potential dust, noise, agricultural
4 and pesticide smells, etc.[30] Petitioners and the Farm Bureau argue that while
5 signage is a step in the right direction, there is no evidence in the record that
6 signage is sufficient to prevent trespass and a host of other evils opponents
7 associate with the Trail.

8 The county cited testimony that signage "can be effective" in warning and
9 educating trail users about trespassing, disturbing livestock, potential farm odors,
10 pesticide odors, dust, noise, and smoke that visitors may experience while using
11 the trail. Record-2 26. But the findings do not rely upon signage alone to reduce
12 the impacts of trespass, etc., but on a combination of signage, the fence, and other
13 conditions. That signage may not be sufficient in itself to prevent trespass, etc.,
14 does not mean that it will not contribute to the sum total of measures designed to
15 reduce the impacts of trespass, etc., to insignificance. Petitioners and the Farm

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[30] Condition 1(b) provides:

> "Signage shall be installed at each point of trail entry from a public right-of-way or trailhead, directing and warning trail users not to trespass onto adjacent lands; not to touch, pet, or otherwise harass livestock; indicating that agricultural uses are taking place in the area, and to expect potential dust, noise, agricultural and pesticide smells; and indicating that, at designated agricultural trail crossings, delays may occur, and that farm operators and machinery have the right-of-way over pedestrians and other trail users." Record-2 72.

1 Bureau concede as much by acknowledging that signage is a step in the right
2 direction. We conclude that petitioners and the Farm Bureau have not
3 demonstrated any legal error or insufficiency in Condition 1(b).

4 This sub-subassignment of error is denied.

5 **4. Condition 1(c)**

6 Condition 1(c) requires the county to post "no parking" signs at the Bus
7 Barn access point.[31] This condition was presumably imposed to discourage Trail
8 parking at the Bus Barn access point until such time as the county develops a
9 formal trailhead at that location, with parking and restrooms. Petitioners argue,
10 however, that in the interim the "no parking" restriction will force Trail users to
11 park on the highway shoulder or in the parking area of a fruit-processing plant
12 called Fruithill, located across Highway 240 from the Bus Barn, potentially
13 blocking access to Fruithill.

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[31] Condition 1(c) provides:

> "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. Both the trail entrance and the Bus Barn entrance shall be posted with 'No Trail Parking' signs. The county will seek from the City of Yamhill and ODOT permission to appropriately mark the shoulder of Highway 240/Main Street to make the shoulder safer for trail users accessing the trail from the City of Yamhill." Record-2 72.

1 The county generally rejected claims of impact to Fruithill for purposes of
2 ORS 215.296, because Fruithill is located on land zoned for heavy industrial (HI)
3 use, across the highway and separated by the Bus Barn property from the Trail.
4 We understand petitioners to argue that the Fruithill property is within the
5 "surrounding" area for purposes of ORS 215.296(1), and that it is irrelevant that
6 the Fruithill property is not zoned for farm use, and that no farming directly
7 occurs on the property, because fruit processing is a type of accepted farm
8 practice. However, petitioners have not demonstrated that parking associated
9 with a fruit processing facility on land zoned for industrial use constitutes a "farm
10 practice" for purposes of ORS 215.296(1) or (2).[32]

11 This sub-subassignment of error is denied.

12 **5. Condition 4**

13 Condition 4 requires the county post "No Trail Parking" signs at all county
14 access points until such time as a traffic study is conducted.[33] Condition 4 is

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[32] Alleged impacts to Fruithill may be reviewable under other standards, such as the CUP standards at YCZO 1202, discussed under the third assignment of error.

[33] Condition 4 states:

> "No trailhead is approved as part of this permit. Until an additional traffic study is conducted and approvals obtained, the intersection of the trail with Highway 240 and the Bus Barn; both the north and south shoulders of NE Fryer Road; and the trail intersection with Roosevelt Street shall be posted with 'No Trail Parking' signs. Additional 'Caution, Trail Crossing,' and 'Caution, Trail Crossing

apparently an attempt to discourage non-locals from using the Trail, until the county decides to build formal trailheads and parking areas, and thus reduce interim impacts of vehicle and trailer parking on nearby farm operations. However, as discussed above, the "No Trail Parking" restriction may actually exacerbate that problem, by encouraging Trail users to park on road shoulders or near farm driveways in a way that could restrict passage of large farm vehicles. As discussed, there is apparently no evidence in the record supporting the county's assumptions regarding parking demand, and remand is necessary for the county to reevaluate those assumptions, based on substantial evidence. In doing so, the county should also reevaluate Condition 4.

This sub-subassignment of error is sustained.

6. Condition 5

Condition 5 requires in relevant part that details of Trail and gate construction will be determined in the master planning process, but specifies that the Trail will have a 12-foot wide paved surface and removable bollards at access points, to facilitate emergency access.[34] Petitioners complain that the county is

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> Road' or similar signs, of a type common to existing public trails shall be posted on both the north and south shoulders of Fryer Road at its intersection with the trail." Record-2 73.

[34] Condition 5 states:

> "Details of trail and gate construction shall be established through the master planning process and as specified in a Master Plan approved by the Board. Construction shall include a 12-foot wide

1 relying upon the discretionary master planning process to determine details of
2 Trail construction intended to mitigate significant farm impacts for purposes of
3 ORS 215.296. However, except with respect to the issues surrounding the
4 proposed fence, discussed above, petitioners have not demonstrated that any
5 details of Trail construction to be determined in the master planning process have
6 a role in finding or ensuring compliance with the farm impacts test.

7 Petitioners also fault Condition 5 for failing to specify trail and bridge
8 design standards to ensure that emergency response vehicles up to 60,000 pounds
9 in weight can drive the entire length of the 2.82-mile segment of the Trail. We
10 address similar arguments below, under the CUP standards, and remand for the
11 county to adopt more adequate findings regarding fire and emergency access
12 under those standards. Here, petitioners argue that Condition 5 is inadequate for
13 purposes of ensuring compliance with ORS 215.296(1). However, as discussed
14 above with respect to fire and emergency services, petitioners fail to link any trail
15 or bridge design specifications regarding emergency vehicle access to any
16 impacts on accepted farm practices that can be reviewed under ORS 215.296.

17 Accordingly, this sub-subassignment of error is denied.

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paved surface. Removable bollards, of a type common to public trail construction or as recommended in the Master Plan shall be installed at or near the intersection of the trail corridor with State Highway 240; at the north and south intersections of the trail with Fryer Road; and at or near the intersection of the trail with Roosevelt Street." Record-2 73.

1 The First Assignment of Error, Eighth Subassignment is sustained in part.

2 The First Assignment of Error is sustained in part.

3 **SECOND ASSIGNMENT OF ERROR**

4 Under the second assignment of error, petitioners challenge the county's

5 findings of compliance with the CUP criteria at YCZO 1202.

6 **A. First Subassignment of Error: Character of the Surrounding**
7 **Area**

8 YCZO 1202.02(D) requires a finding that the "proposed use will not alter

9 the character of the surrounding area in a manner which substantially limits,

10 impairs or prevents the use of surrounding properties for the permitted uses listed

11 in the underlying zoning district."

12 In its findings, the county identified the character of the surrounding area

13 as "rural, and oriented towards farming."[35] Because the 2.82-mile segment of the

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[35] The findings on YCZO 1202.02(D) state:

> "Regarding criterion (D), the proposed use is a passive-use trail to connect the cities of Yamhill and Carlton and the schools of the Yamhill-Carlton School District. The transportation and recreational uses envisioned are decidedly low impact compared to vehicular transportation uses that occur near the proposed trail and throughout Yamhill County, in close proximity to residential, commercial and farm uses. The 'character of the surrounding area' is rural, and oriented towards farming. Significant testimony was received from the farming community that a passive-use trail is not compatible with farm uses, and especially not the farm uses taking place adjacent to the corridor. That testimony described the character of the area as a forbidding place where children and

1 Trail is intended for local users, and involves what the county characterized as a
2 low-impact passive recreational use, the county concluded that the Trail does not
3 alter the character of the surrounding area.

4 Petitioners argue that the 2.82-mile segment is part of a longer regional
5 recreational trail that the county intends to construct, within the 12.48-mile right-
6 of-way the county owns. Petitioners contend that the longer regional trail will
7 attract large numbers of urban visitors from outside the local rural area, and the
8 resulting influx of urban trail users will change the rural and agricultural character
9 of the surrounding area.

10 Friends respond, and we agree, that the county did not err in evaluating
11 under YCZO 1202.02(D) only the use actually proposed for conditional use
12 approval—a 2.82-mile recreational trail—and not the longer regional trail that

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animals are not safe from being sprayed with pesticides, and where trail users will commit criminal acts against each other and render the area unsuitable for farming. The Board rejects that view as overblown and hyperbolic. For the reasons stated here and in addressing the farm impact standards, the character of the proposed use is such that it will not substantially limit, impair or prevent the use of surrounding properties for the permitted uses listed in the EF-80 zone. Under Oregon law, 27 separate categories of non-farm uses are allowed in farm zones as conditional uses. Many of those uses are routinely approved by all Oregon counties, who impose appropriate conditions to reduce potential impacts, as is specifically allowed by Oregon law and the county's zoning ordinance. With conditions imposed by the Board, the proposed trail will not alter the character of the area in a manner that limits, impairs or prevents the use of surrounding properties for permitted uses." Record-2 20–21.

1 the county might someday seek to develop. Even if we accept petitioners'
2 premise that the longer regional trail is likely to draw many non-local visitors,
3 that regional trail is not the proposed conditional use, and need not be evaluated
4 under YCZO 1202.02(D) in this proceeding.

5 Petitioners next challenge the county's finding that the 2.82-mile Trail will
6 not "substantially limit[], impair[] or prevent[] the use of surrounding properties"
7 for permitted farm uses. YCZO 1202.02(D). To support that conclusion, the
8 county relied on incorporated findings of compliance with the farm impacts test,
9 at ORS 215.296(1). The problem with that approach, as petitioners argue, is that
10 if LUBA remands under the farm impacts test for any reason, then LUBA must
11 also remand under YCZO 1202.02(D), because the county did not purport to
12 adopt independent findings sufficient to establish compliance with YCZO
13 1202.02(D). Because LUBA remanded the county's decision under the farm
14 impacts test for several reasons, remand is also required for the county to
15 reevaluate compliance with YCZO 1202.02(D), based on the findings and
16 evidence generated on remand.

17 Finally, petitioners argue that the county's reliance on the fact that state
18 law allows 27 different non-farm uses in farm zones does not lend any support to
19 the conclusion that the particular use proposed in this application complies with
20 YZCO 1202.02(D). We agree with petitioners.

21 The Second Assignment of Error, First Subassignment is sustained in part.

B. Subassignment of Error 2: Adequacy of Public Facilities

YCZO 1202.02(E) requires a finding that "[t]he proposed use is appropriate, considering the adequacy of public facilities and services existing or planned for the area affected by the use[.]" Petitioners dispute the findings that the proposed use is appropriate, considering the adequacy of three types of public facilities: fire and emergency services, transportation, and trailhead/restrooms.

1. Adequacy of Fire and Emergency Services

As noted, the Fire Chief of the Yamhill Fire Protection District testified that, in his opinion, providing adequate fire and emergency services requires that (1) the three bridges to be built to serve the Trail are certified to support a 60,000-pound load, and (2) the 12-foot wide paved Trail surface is supplemented with turn-outs every 400 feet, turnouts that are 10 feet wide and 30 feet long. Record-2 1637. The Fire Chief also stated that, because the Trail is county-owned and generates no tax revenue, the cost of providing fire and emergency services to Trail users must come from the Fire District's already tight budget, which will "create a major hardship" for the Fire District. Record-2 1638. In addition, a former Fire Chief testified that, for fire safety, the Trail should be built in compliance with the Oregon Fire Code requirements for a Fire Apparatus Access Road for areas outside urban growth boundaries. Record-2 1641. The former Fire Chief also stated that to provide adequate fire response there must be water available, at sufficient pressures, along the entire length of the Trail. *Id.*

1 The county found that it is "feasible" to construct the bridges to allow
2 access by all emergency vehicles, but stated that bridge design would be
3 determined in the master plan process.[36] The findings do not address the Fire

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[36] The findings state, in relevant part:

> "6.1.2 The trail segment under review is located within two fire districts. The chief of the Yamhill Fire Protection District testified regarding his concerns about fire and fire access, but also indicated that a 12-foot wide paved surface, as proposed, would accommodate fire and emergency vehicles. He also asked questions regarding funding for fire and other emergency services that are all fair questions that should be answered by the people who live and work within the District, but are not necessary to resolve in this proceeding. The proposed trail may one day be part of a regional trail, with trailheads and expectations for regional use. That is not what is proposed in Docket G-01-18. Paving a 12-foot by 2.82-mile foot and bicycle path connecting a city of just over 1,000 residents with a city of just over 2,000 residents is unlikely to 'create a major hardship' for the Yamhill Fire Protection District, funding or otherwise. The southern segment of the proposed trail is served by the New Carlton Fire District which has not commented. Its Main Station (built in 2009) abuts the trail at its southern terminus at Roosevelt Street in Carlton. It is feasible to provide direct access to the trail from the Districts Main Station for emergency vehicles.
>
> "6.1.3 A Master Plan will address bridge construction, and whether bridges should be built to allow use by emergency vehicles. The Board finds that it is feasible to construct the bridges to allow access, in an emergency, by emergency vehicles including police cars, police four-wheel off-road vehicles (currently available and maintained by the Sheriff's Office), most ambulances, and trucks commonly owned by fire districts to transport water and firefighting crews. Access to most of the trail corridor to all of these vehicles is feasible, without bridges, from Fryer Road (a county road) and from

1 District's testimony regarding the need for turn-outs, or the former Fire Chief's
2 recommendation to design the Trail to Fire Apparatus Access Road
3 specifications. The findings dismiss the Fire District's concerns regarding budget
4 hardships. Ultimately, the county imposed no conditions regarding fire and
5 emergency access, except to require removable bollards at access points.

6 Petitioners argue that the county's findings and conditions regarding fire
7 and emergency access are inadequate. We agree with petitioners. The findings
8 do not address focused expert testimony that fire and emergency access is
9 inadequate unless the Trail and its bridges are built to certain standards. The
10 findings and response briefs cite to no evidence disputing that expert testimony.
11 In the face of that undisputed expert testimony, it is insufficient to state, without
12 *any* supporting evidence, that it is "feasible" to design the Trail and bridges to
13 provide adequate fire and emergency access, and then punt all determinations
14 regarding Trail and bridge design to the master planning process. *See Meyer*, 67
15 Or App at 282-82 (conditioning approval to a subsequent administrative process

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Roosevelt Street through arrangement with the City of Carlton, Most, if not all, of the questions asked by the Yamhill Fire Protection District Director have been answered in these findings. The remainder should be raised through his participation in the master planning process. The Board finds that adequate police, fire protection and emergency services are currently available to serve users of the trail and surrounding property owners. It is feasible to complete the design of the trail as envisioned, with proper grade, clearance, site vision, drainage, road base, bridges, horizontal clearance, and access to accommodate police, fire and ambulance services." Record-2 21–22.

1 to evaluate specific geotechnical studies is permissible if the local government
2 first determines that the applicable approval criterion is met, based on substantial
3 evidence that solutions to certain geotechnical problems posed by the project are
4 "feasible," *i.e.* possible, likely and reasonably certain to succeed).

5 Remand is necessary for the county to address the expert testimony
6 regarding what Trail and bridge design elements are necessary to achieve
7 compliance with YCZO 1202.02(E), and adopt conditions sufficient to ensure
8 that those design elements are implemented in any subsequent administrative
9 process.[37]

10 With respect to water, the county found that there are fire hydrants at either
11 end of the Trail, but did not address the former Fire Chief's testimony that
12 adequate fire services require that water be available, at sufficient pressures,
13 along the length of the Trail. We agree with petitioners that remand is warranted
14 to address that issue.

15 The county dismissed the Fire District's statement that, without additional
16 tax revenue, providing fire and emergency services to the Trail would create a
17 "major hardship" for the Fire District. Record-2 1638. Petitioners argue that
18 while inadequate Fire District funding is not something that can be resolved in

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[37] If the county decides on remand that turnouts or wider paved areas are necessary to ensure adequate fire and emergency access, then that necessary design feature may require re-evaluation of findings addressing impacts to farm practices under ORS 215.296(1) that are based on the presumption that there would only be a 12-foot wide paved path within the 60-foot right-of-way.

1 this proceeding, the county must nonetheless determine whether the Fire District
2 can provide adequate fire and emergency services to the Trail, notwithstanding
3 current financial limitations. Petitioners argue that the county must at a minimum
4 impose a condition allowing the Trail to go forward only if sufficient new tax
5 revenue is raised to ensure adequate fire and emergency services.

6 We disagree with petitioners. The Fire Chief did not state, at least
7 explicitly, that the Fire District could *not* provide adequate services with respect
8 to the Trail without additional revenue. The question under YCZO 1202.0(E) is
9 not whether the Trail will create financial hardships for the Fire District but
10 whether adequate fire and emergency services are available. Nothing in the Fire
11 Chief's comments suggests that the Fire District cannot provide adequate fire and
12 emergency services with respect to the Trail.

13 The Second Assignment of Error, Second Subassignment, Sub (1) is
14 sustained in part.

15 **2. Adequate Transportation Facilities**

16 The county's findings addressing transportation facilities under YCZO
17 1202.02(E) consist of a single sentence: "The corridor has existing roads and
18 access to serve the proposed use." Record-2 22. Petitioners argue that this
19 finding is inadequate, as it ignores evidence in the record that county roads
20 providing access to the Trail are currently inadequate. Petitioners also cite the
21 evidence discussed above, regarding the impacts of Trail parking on road
22 shoulders near county access points.

1 Friends respond that the county adopted other findings regarding
2 transportation impacts that help demonstrate, for purposes of YCZO 1202.02(E),
3 that the Trail is served by adequate transportation facilities. Friends cite findings
4 that this segment of the Trail is intended for local use, for pedestrians and
5 bicyclists in the cities of Yamhill and Carlton to travel back and forth on the Trail
6 instead of riding or walking along the only existing connection, Highway 47.
7 Friends cite findings that the county anticipates that few local users will drive to
8 the Trail. Friends also notes findings that Trail approval will not cause any
9 transportation facility to fail to meet any performance standards or degrade the
10 performance of any transportation facility such that it would not meet applicable
11 performance standards.

12 We agree with petitioners that the county's one-sentence finding at
13 Record-2 22 is insufficient to establish that the Trail is served by adequate
14 transportation facilities. The finding merely notes that roads exist to access the
15 Trail, but says nothing about their condition or adequacy. The other findings
16 Friends cite do not, in our view, make up for that deficiency. The county
17 presumes that only locals will use the Trail, and that few if any locals will drive
18 to or park near the Trail in order to access it. But there is no evidence in the
19 record cited to us that supports those presumptions. That the Trail will not cause
20 any transportation facility to fail or degrade below performance standards does
21 not mean that existing facilities are adequate to serve the proposed use. On
22 remand, the county must adopt more adequate findings, supported by substantial

1 evidence, regarding whether the proposed use is served by adequate
2 transportation facilities.
3 The Second Assignment of Error, Second Subassignment, Sub (2) is
4 sustained.
5 **3. Trailhead and Restrooms**
6 The findings discuss the possibility that the county-owned Bus Barn
7 property may someday be rezoned and developed as a trailhead with restrooms,
8 but note such development is not proposed or approved as part of this decision.
9 Petitioners dispute that the Bus Barn property can be rezoned to allow it to be
10 approved as a trailhead or that, if rezoned, a trailhead at the Bus Barn could gain
11 approval under the farm impacts test.
12 Friends respond, and we agree, that petitioners' arguments challenging
13 development that was not proposed and not approved do not provide a basis to
14 reverse or remand the decision before us.
15 The Second Assignment of Error, Second Subassignment, Sub (3) is
16 denied.
17 The Second Assignment of Error, Second Subassignment is sustained in
18 part.
19 **C. Subassignment of Error 3: Consistent with Comprehensive Plan**
20 YCZO 1202.02(B) requires a finding that "[t]he use is consistent with
21 those goals and policies of the Comprehensive Plan which apply to the proposed
22 use[.]" The county's findings under YCZO 1202.02(B) address only the

1 comprehensive plan goals and policies that the county has adopted in recent years
2 that specifically concern the Yamhelas Trail. Record-2 18–19. However,
3 petitioners cited below to a number of comprehensive plan goals and policies that
4 concern the protection of agricultural land, water, fish and wildlife and open
5 spaces. Petitioners also argued that the county's Transportation System Plan
6 (TSP) includes applicable goals and policies. On appeal, petitioners argue that
7 these goals and policies also "apply to the proposed use," and thus the county
8 erred in failing to adopt findings addressing them.

9 Friends respond that the county impliedly concluded that the only
10 comprehensive plan goals and policies that apply to the proposed Trail are those
11 that refer to the Trail, and the agricultural goals and policies cited by petitioners
12 are not applicable. Friends argue that this implicit "interpretation" of the county
13 comprehensive plan is entitled to deference on review, pursuant to ORS
14 197.829(1); *see Alliance for Responsible Lane Use in Deschutes County v.*
15 *Deschutes County*, 149 Or App 259, 942 P23d 836 (1997), *rev dismissed as*
16 *improvidently allowed*, 327 Or 555 (1998) (a governing body's interpretation of
17 local land use provisions that is implicit in its findings, and adequate for review,
18 is entitled to a deferential standard of review).

19 We disagree with Friends that the county findings include an implicit
20 interpretation, at least one that is adequate for review, to the effect that the goals
21 and policies cited by petitioners do not apply to the proposed use, for purposes of
22 YCZO 1202.02(B). The findings do not mention any other comprehensive plan

1 goals and policies, and we have no way of discerning whether the county believed
2 those goals and policies to be inapplicable, and if so why, or whether the county
3 simply overlooked them.

4 Although Friends do not cite it, we note the county adopted a finding under
5 YCZO 1202.02(B) that "Findings of consistency with the comprehensive plan
6 and statewide land use planning goals were made as part of Ordinance 904, and
7 will be carried through and into any instrument adopted on remand to allow the
8 proposal to proceed." Record-2 18. Ordinance 904 is the county's initial
9 legislative decision that was remanded in *Van Dyke I*. It is possible that the
10 county meant that the initial findings supporting Ordinance 904 consider whether
11 the Trail is consistent with all comprehensive plan goals and policies, potentially
12 including the goals and policies cited by petitioners. However, without some
13 assistance from the parties, we will not attempt to determine whether those
14 findings in fact address the comprehensive plan goals and policies petitioners
15 cite. On remand the county should clarify its intent on this point, and if needed
16 adopt findings addressing any comprehensive plan goals and policies it deems to
17 be applicable.

18 The Second Assignment of Error, Third Subassignment is sustained.

19 **D. Subassignment of Error 4: Suitable for the Proposed Use**

20 YCZO 1202.02(C) requires a finding that "[t]he parcel is suitable for the
21 proposed use considering its size, shape, location, topography, existence of
22 improvements and natural features[.]" The county adopted findings concluding

1 that the 2.82-mile segment of the right-of-way is suitable for the proposed Trail,
2 considering five of the six considerations listed in YCZO 1202.02(C), with the
3 exception of "location." Record-2 19–20.

4 Petitioners fault the county for failing to adopt any findings regarding
5 whether the right-of-way is suitable for the proposed Trail, considering
6 "location." Further, petitioners argue that the location of the right-of-way is not
7 suitable for a Trail, because it runs through the middle of an intensively farmed
8 section of the county, causing a number of conflicts with farm uses.

9 Friends argue that the absence of any finding addressing "location" is not
10 a basis for reversal or remand, because the county was very aware that the right-
11 of-way is located in the middle of farmland, and the county adopted a large
12 number of findings addressing that fact, under the farm impacts test.

13 We will not attempt to determine whether the county's findings under the
14 farm impacts test are an adequate substitute for considering suitability due to
15 "location" for purposes of YCZO 1202.02(C). Because the county's decision
16 must be remanded in any event, we also remand under this subassignment of error
17 so that the county can adopt findings addressing the locational consideration
18 required by YCZO 1202.02(C).

19 The Second Assignment of Error, Fourth Subassignment is sustained.

20 **E. Fifth Subassignment of Error: Compatibility**

21 YCZO 1202.02(F) requires a finding that "[t]he use is or can be made
22 compatible with existing uses and other allowable uses in the area."

1 The county's finding of compliance with YCZO 1202.02(F) relies entirely
2 on its findings of compliance with the farm impacts standard and the conditions
3 imposed under that standard.[38] The flaw in that approach is that, as petitioners
4 argue, because we remand the decision under the farm impacts test and several
5 conditions, we must also remand under YCZO 1202.02(F).
6 The Second Assignment of Error, Fifth Subassignment is sustained.
7 The Second Assignment of Error is sustained in part.
8 The county's decision is remanded.

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[38] The county's findings state:

> "Regarding criterion (F), the use is or can be made compatible with existing uses and other allowable uses in the area. The 'existing uses' and 'allowable uses' in the area are discussed throughout these findings, Findings establishing compliance with the farm impact standards (below) also establish compliance with this standard. For reasons stated elsewhere in these findings, the proposed use is or can be made compatible with 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-2 22.