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

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

vs.

YAMHILL COUNTY,
Respondent.

LUBA No. 2020-066

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

vs.

YAMHILL COUNTY,
Respondent.

LUBA No. 2020-067

1 FINAL OPINION
2 AND ORDER

3
4 Appeal from Yamhill County.

5
6 Wendie L. Kellington, Lake Oswego, filed the petition for review and
7 reply brief and argued on behalf of petitioners. With her on the brief were Sarah
8 C. Mitchell and Kellington Law Group, PC.

9
10 Timothy S. Sadlo, Senior Assistant County Counsel, McMinnville, filed
11 the response brief and argued on behalf of respondent.

12
13 Samantha J. Bayer, Salem, filed an amicus brief on behalf of the Oregon
14 Farm Bureau Federation. With her on the brief was Mary Anne Cooper.

15
16 ZAMUDIO, Board Member; RUDD, Board Chair; RYAN, Board
17 Member, participated in the decision.

18
19 REMANDED 12/30/2020

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

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NATURE OF THE DECISIONS

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

MOTION TO APPEAR AS AMICUS

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

BACKGROUND

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

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

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

7 County action related to the Trail has been the subject of four prior LUBA
8 decisions. *Van Dyke v. Yamhill County*, 78 Or LUBA 530 (2018) (*Van Dyke I*);
9 *Van Dyke v. Yamhill County*, ___ Or LUBA ___ (LUBA No 2019-047, Oct 11,
10 2019) (*Van Dyke II*); *Van Dyke v. Yamhill County*, ___ Or LUBA ___ (LUBA
11 Nos 2019-038/040, Oct 11, 2019) (*Van Dyke III*); *Van Dyke v. Yamhill County*,
12 ___ Or LUBA ___ (LUBA Nos 2020-032/033, June 1, 2020) (*Van Dyke IV*).

13 In *Van Dyke I*, we remanded a 2018 board of county commissioners
14 decision that amended the county’s comprehensive plan to acknowledge county
15 ownership of a 12.48-mile segment of the corridor and to authorize construction
16 of a 2.82-mile segment of the Trail. We concluded that constructing the Trail
17 requires conditional use permit (CUP) approval, including application of ORS
18 215.296, sometimes referred to as the farm impacts test, for sections of the Trail
19 zoned EFU.²

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

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

4 In *Van Dyke III*, we dismissed two appeals of (1) a board of county
5 commissioners order authorizing the county to enter into an agreement for design
6 and consulting services related to three proposed bridges along the Trail route
7 and (2) the agreement itself (Design and Consulting Services Agreement). We
8 agreed with the county that the Design and Consulting Services Agreement was
9 not a land use decision because it did not authorize “the use or development of
10 land.” *Van Dyke III*, ___ Or LUBA at ___ (slip op at 15). For that reason, we also
11 concluded that the Design and Consulting Services Agreement did not have any
12 significant impacts on land use and therefore did not qualify as a significant
13 impacts land use decision under *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d
14 992 (1982). *Van Dyke III*, ___ Or LUBA at ___ (slip op at 17-19).

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

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

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

4 Two days prior to the issuance of our final opinion and order in *Van Dyke*
5 *IV*, on May 28, 2020, the county issued Board Order 20-164, reapproving a CUP
6 for the Trail after proceedings on remand from *Van Dyke II* (Second CUP
7 Decision). Petitioners challenge the Second CUP Decision in LUBA No. 2020-
8 067.

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

17 **FIRST ASSIGNMENT OF ERROR**

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

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

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

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

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

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

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

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

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

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

7 The first assignment of error is denied.

8 **FIFTH ASSIGNMENT OF ERROR**

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

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

1 presentation of written and oral testimony. YCZO 1402.07.⁵ Presentation of oral
2 testimony is subject to reasonable time limits set by the board chair. YCZO
3 1402.07(E).

⁵ YCZO 1402.07 provides:

- “A. Testimony presented at hearings shall be pertinent and based upon sound reasoning, and shall be incorporated into the record unless the Chair rules such information to be excluded from the record as immaterial, or of questionable fact, intent or merit, based upon objection raised by Commission or Board members or other parties having standing in the hearing.
- “B. All testimony not excluded shall become a part of the hearing record, and in addition to verbal testimony, may be presented in written form or incorporated by reference.
- “C. In ascertaining whether or not the party providing testimony has standing, the chair may ask that such party identify and/or document the basis of standing, or may question the source of the information, or the interest or qualifications of the party submitting testimony, or question how the party giving testimony might be beneficially or adversely affected by the action under consideration.
- “D. In the event that it is determined that a party does not have standing because the party will not be beneficially or adversely affected by the action under consideration, the Chair may direct that any prior testimony by that party be stricken from the record, and that farther testimony from the party be prohibited.
- “E. The Chair may set reasonable and fair time limits for oral presentation of testimony.

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

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

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

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

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

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

13 We conclude that petitioners have made that showing here. In multiple
14 places in the Second CUP Decision, the county dismisses the farmers’ *written*
15 testimony regarding farm impacts as “not credible,” “unsupported,” and
16 “untrue,” even in the absence of countervailing expert evidence. Record 23, 24,
17 29, 33. In addition, the county found that petitioners’ attorney was not credible
18 and characterized her testimony as follows:

19 “With regard to the submittals by the attorney for the organized
20 opposition, generally: by infusing the arguments made with
21 invective and identifying the county as ‘he,’ the value, credibility
22 and weight of the arguments made is diminished. The application is
23 the county’s application. The county is a political subdivision of the
24 State of Oregon, it is not a male. An attempt has been made to ignore

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

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

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

10 On remand, the county will be required to provide petitioners an
11 opportunity to exercise the substantial rights of which they were deprived in the
12 remand proceeding, and the county will presumably be required to adopt new or
13 supplemental findings at the conclusion of those proceedings. Although the
14 county may adopt different findings after a new hearing, we proceed to address
15 petitioners’ substantive assignments of error, as all of those issues are highly
16 likely to arise on remand and be disputed again in any subsequent appeal. ORS
17 197.835(11)(a).

18 The fifth assignment of error is sustained, in part.

19 **SECOND ASSIGNMENT OF ERROR**

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

1 County, 364 Or 432, 435 P3d 698 (2019) (explaining and applying the farm
2 impacts test). ORS 215.296 provides, in part:

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

6 “(a) Force a significant change in accepted farm or forest
7 practices on surrounding lands devoted to farm or
8 forest use; or

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

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

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

1 carries the burden of proving that ORS 215.296(1) has been met. *Id.* at 460.
2 Findings that a farmer can take measures to avoid or manage impacts from a
3 nonfarm use do not establish compliance with ORS 215.296(1); rather, ORS
4 215.296(1) asks whether the non-farm use forces significant changes to farm
5 practices or costs. *Id.*

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

12 **A. The county erred by exempting a bridge and other “non-general**
13 **public” improvements from farm impacts analysis.**

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

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

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

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

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

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

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

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

8 The first subassignment of error is sustained.

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

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

⁷ We explained in *Van Dyke II*:

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

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

10 In the second subassignment of error, petitioners argue that approval of the
11 Trail creates a new recreational area that triggers significant pesticide spray
12 restrictions on their farms based on chemical label application requirements.
13 Petitioners assert, and the county does not dispute, that farmers are required by
14 law to obey pesticide product labels. It is a violation of federal law to use a
15 pesticide in a manner inconsistent with its labeling. 7 USC § 136j(a)(2)(G)
16 (2018).⁸ Petitioners argue that the Trail forces a significant change in the use of
17 four spray-application chemicals: Gramoxone, Parazone, Lorsban, and Yuma 4E.

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

1 **1. Gramoxone and Parazone**

2 Farmers spray the herbicides Gramoxone and Parazone to kills weeds and
3 tree suckers to maintain filbert orchards adjacent to the Trail. Record 286, 287,
4 694, 700, 795. Those two herbicides contain the same active ingredient and label
5 instructions. We will refer to Gramoxone with the understanding that the same
6 analysis and conclusions apply to Parazone. Farmers testified that, if they cannot
7 spray Gramoxone, they will be forced to change their farm practices by either
8 using less effective chemicals with lesser application restrictions or hiring
9 expensive manual labor to remove weeds and suckers, which would increase the
10 cost of farm practices. Record 287, 694.

11 At the time of our decision in *Van Dyke II*, the Gramoxone label provided:
12 “DO NOT USE AROUND HOME GARDENS, SCHOOLS, RECREATIONAL
13 PARKS, GOLF COURSES OR PLAYGROUNDS.” Record 1504. The term
14 “around” is not defined by the labels or in federal administrative rules. Petitioners
15 cite a letter from an Oregon Department of Agriculture (ODA) pesticides
16 program manager opining that, based on dictionary definitions, “around” means
17 “[i]n the vicinity of; near or close-by,” and that the label restriction could
18 “preclude applications in fields adjacent to the trail or sensitive sites identified in
19 product labeling.” *Van Dyke II* Record 1629.⁹

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

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

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

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

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

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

10 The county relied on its own interpretation of the terms “in” and “around” and
11 did not provide any expert testimony that contradicts ODA’s and the farmers’
12 interpretation of the Gramoxone label.

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

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

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

12 2. **Lorsban and Yuma 4E**

13 Farmers apply the pesticides Lorsban and Yuma 4E to control insect pests.
14 Record 287. Lorsban and Yuma 4E are applied to filbert orchards by air blast
15 sprayers into the leaves of the trees. Both of those pesticides require a minimum
16 10-foot setback from “sensitive sites,” which are areas frequented by non-
17 farmworkers and include “pedestrian sidewalks” and “outdoor recreational
18 areas.” Supplemental Record 716, 738. The setback distance is measured from
19 the edge of the sensitive site to the edge of the application site. In *Van Dyke II*,
20 we concluded that the sensitive site is “not necessarily limited to the paved
21 portion of the Trail” and that it may also include “adjacent undeveloped areas
22 within the right-of-way if dogs or children might wander off the paved trail.” ____

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

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

11 The county first found that the farmers asserted an unfounded right to use
12 the county’s right-of-way as a spray buffer. From that premise, the county
13 concluded that the Trail will not force a significant change in accepted farm
14 practices because, as we explained in *Van Dyke II*, “[t]he county correctly
15 concluded that applying pesticides in a manner that causes overspray or drift onto
16 adjoining properties is not an accepted farming practice, for purposes of ORS
17 215.296(1).” *Id.* at ___ (slip op at 26).

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

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

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

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

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

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

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

14 **3. Mitigation Measures**

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

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

5 The second subassignment of error is sustained, in part.

6 **C. Other Farm Impacts**

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

11 **1. Application Exclusion Zones**

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

1 During the remand proceedings, the farmers argued that the Trail impacts
2 their spray operations under the Federal Environmental Protection Agency’s
3 (EPA) AEZ rule for outdoor pesticide application. 40 CFR § 170.405(a)(1)(i)
4 (2016) (EPA AEZ).¹⁰ The EPA AEZ excludes all persons other than trained and

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

“(1) The application exclusion zone is defined as follows:

“(i) The application exclusion zone is the area that extends 100 feet horizontally from the application equipment in all directions during application when the pesticide is applied by any of the following methods:

“(A) Aerially.

“(B) Air blast application.

“(C) As a spray using a spray quality (droplet spectrum) of smaller than medium (volume median diameter of less than 294 microns).

“(D) As a fumigant, smoke, mist, or fog.

“(ii) The application exclusion zone is the area that extends 25 feet horizontally from the application equipment in all directions during application when the pesticide is applied not as in § 170.405(a)(1)(i)(A)-(D) and is sprayed from a height of greater than 12 inches from the planting medium using a spray quality (droplet spectrum) of medium or larger (volume median diameter of 294 microns or greater).

“(iii) There is no application exclusion zone when the pesticide is applied in a manner other than those

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

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

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

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

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

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

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

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

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

18 “Note: Oregon OSHA has declined to adopt 40 CFR 170.405(a). In
19 Oregon OAR 437-004-6405 applies.

20 “This rule applies in Oregon where workers or other people are
21 adjacent to pesticides being applied in outdoor production areas that
22 are within the boundaries of the establishment. This rule becomes
23 effective January 1, 2019.

1 “Note: Nothing in these rules affects separate statutory or regulatory
2 requirements such as the buffer zone requirement related to aerial
3 herbicide applications in forestry operations (ORS 527.672).” OAR
4 437-004-6405.

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

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

22 **2. Aerial Application of Pesticides**

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

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

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

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

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

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

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

16 **3. Trail Drainage Impacts**

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

22 “feasible for the county to comply with all applicable law with

1 regard to the installation of the two culverts, and with regard to any
2 other drainage issue raised in this proceeding or existing in the
3 county’s right-of-way. Managing 700 miles of county roads, the
4 county is in excellent position to manage stormwater related to the
5 right-of-way, just as or better than railroad companies did for over
6 100 years. * * *

7 “* * * * *

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

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

18 The county found:

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

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

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

15 **4. Food Safety and Seed Certification Impacts and Fencing**
16 **Condition**

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

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

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

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

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

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

3 The third subassignment of error is sustained.

4 The second assignment of error is sustained.

5 **THIRD ASSIGNMENT OF ERROR**

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

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

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

11 “[G]iven the centrality of the proposed fence to the
12 county/applicant’s demonstration of compliance with ORS
13 215.296(1), it was incumbent on the county/applicant to propose a
14 particular type or design of fence, with sufficient detail regarding
15 materials and construction to allow the participants and the county
16 decision maker an opportunity to evaluate the fence’s effectiveness
17 to address the different types of impacts it is intended to address.
18 With such evidence in the record, the county decision maker would
19 be in a position to make sustainable findings regarding compliance
20 with ORS 215.296(1), and to impose clear and objective conditions
21 of approval to ensure compliance. Absent such evidence, it is
22 difficult if not impossible to craft clear or objective conditions of
23 approval regarding installation of a fence, *because it leaves the*
24 *applicant and county unfettered discretion, in a subsequent*
25 *administrative proceeding, to determine the type and design of the*
26 *fence, and the materials used, that will be installed.*

27 “* * * * *

28 “It is permissible for a local government to find compliance with an

1 applicable approval criterion, based on substantial evidence in the
2 record that considers different feasible solutions to an identified
3 problem, but nonetheless condition approval on subsequent
4 administrative proceedings to determine which of the feasible
5 solutions considered should be adopted. *Meyer v. City of Portland*,
6 67 Or App 274, 678 P2d 741, *rev den*, 297 Or 82 (1984). However,
7 in the present case, the county decision maker did not consider
8 evidence regarding the effectiveness of the proposed fence to
9 address various different types of alleged farm impacts, because no
10 specific fence was proposed, or any evidence submitted regarding a
11 specific fence or a range of fence types, designs and materials.
12 Instead, the county essentially deferred all consideration on these
13 points to the master planning process, *which does not provide for a*
14 *public hearing or input*. That was error. *Gould v. Deschutes County*,
15 216 Or App 150, 171 P3d 1017 (2007).” *Van Dyke II*, ___ Or LUBA
16 at ___ (slip op at 43-45) (emphases added).

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

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

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

1 loss or net degradation of the resource.” Deschutes County Code (DCC)
2 18.113.070(D). The county approved the CMP and did not postpone a
3 determination that the project complies with DCC 18.113.070(D). Instead, the
4 county implicitly concluded that the applicant’s wildlife impact mitigation plan
5 was sufficiently certain to allow a present determination of consistency with that
6 approval criterion. We found that the findings were “adequate” to explain
7 compliance with DCC 18.113.070(D). On judicial review, the Court of Appeals
8 reversed and remanded, explaining that “[t]he county might have, but did not,
9 postpone determination of compliance with that standard until the final master
10 plan approval step and infuse that process with the same participatory rights as
11 those allowed in the CMP approval hearing.” 216 Or App at 162.

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

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

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

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

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

5 The third assignment of error is sustained.

6 **FOURTH ASSIGNMENT OF ERROR**

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

9 "A. The use is listed as a conditional use in the underlying zoning
10 district;

11 "B. The use is consistent with those goals and policies of the
12 Comprehensive Plan which apply to the proposed use;

13 "C. The parcel is suitable for the proposed use considering its
14 size, shape, location, topography, existence of improvements
15 and natural features;

16 "D. The proposed use will not alter the character of the
17 surrounding area in a manner which substantially limits,
18 impairs or prevents the use of surrounding properties for the
19 permitted uses listed in the underlying zoning district;

20 "E. The proposed use is appropriate, considering the adequacy of
21 public facilities and services existing or planned for the area
22 affected by the use; and

23 "F. The use is or can be made compatible with existing uses and
24 other allowable uses in the area."

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

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

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

¹² ORS 197.829(1) provides:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless [LUBA] determines that the local government’s interpretation:

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

1 reasonable person to make that finding.” *Dodd v. Hood River County*, 317 Or
2 172, 179, 855 P2d 608 (1993) (citing *Younger v. City of Portland*, 305 Or 346,
3 351-52, 752 P2d 262 (1988)).

4 **A. Compatibility with Existing Uses**

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

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

14 “specifically does not believe that the rigorous analysis imposed on
15 the county by appellate courts related to the farm standard is useful
16 or appropriate in complying with subsection (F). The purpose of the
17 standard is to require consideration of such uses, and to impose
18 conditions to ensure compatibility with existing and allowable uses.

19 “The emphasis in subsection (F) is on identifying potential
20 incompatibilities, and * * * establishing conditions to improve
21 compatibility, not to completely foreclose all potential
22 incompatibility, which is impossible. To that end, the county is
23 imposing significant conditions on the development of the trail, to
24 improve compatibility between the trail and existing and allowable
25 uses, to meet the standard as the county interprets it. The use is or
26 can be made compatible with existing uses and other allowable uses
27 in the area. Based on the conditions of approval (which subsection

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

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

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

23 The sixth subassignment of error is sustained.

1 **B. Facilities and Services**

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

6 **1. Heavy Industrial Zone**

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

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

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

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

11 “Following zoning ordinance text amendments to accommodate
12 trail/transportation facility uses in the county’s HI zone, the entrance
13 to the trail from Highway 240 and the Bus Barn property shall be
14 located on the north boundary of the Bus Barn property adjacent to
15 the west boundary. Following amendments to the county’s HI zone
16 text, a trailhead and trail parking shall be established on the Bus
17 Barn property * * * or at an equivalent, alternative location and
18 arrangement.” Record 75.

19 In the first subassignment of error, petitioners argue, essentially, that the
20 approval is premature for those sections of the Trail planned to be located on AF-
21 10- and HI-zoned land and, pursuant to ORS 215.427(3), sometimes referred to
22 as the goal-post rule, the county is prohibited from approving the Trail
23 conditioned on future rezoning.¹⁴ Petitioners also argue that the county’s CUP

¹⁴ ORS 215.427(3)(a) provides:

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

5 The county responds, and we agree, that the goal-post rule in ORS
6 215.427(3) insulates an applicant from changes to law that occur after the
7 application is submitted. Petitioners have not demonstrated that that statute
8 prohibits approval of multi-phase development or approvals conditioned on
9 subsequent land use proceedings.

10 The county further responds that the Second CUP Decision does not
11 approve any uses in the HI or AF-10 zones but, instead, defers those decisions to
12 a future land use proceeding. As we understand it, the parties’ dispute under
13 YCZO 1202.02(A) presents a chicken-and-egg problem with respect to YCZO
14 1202.02(E). In support of its conclusion that YCZO 1202.02(E) is satisfied, the
15 county found:

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

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

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

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

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

1 improperly relies on water, sewer, and a fire hydrant at the Bus Barn property.

2 We reject that argument for the same reasons.

3 The first subassignment of error is denied.

4 The fifth subassignment of error is denied, in part.

5 **2. Adequacy of Facilities and Services**

6 **a. Trail Access from Highway 240**

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

14 The county found:

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

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

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

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

19 The fifth subassignment of error is sustained, in part.

20 **C. Suitability of the Parcel for Trail Use**

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

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

5 With respect to the parcel’s location, the county found:

6 “The ‘location’ of the county’s ownership (‘parcel’), Tax Lot 4403-
7 01300, extends almost to the City of Gaston at its northern terminus
8 to south of Gun Club Road as its southern terminus—12.48 miles.
9 The property is a pre-existing transportation corridor that is
10 generally 60 feet wide, and wider in places (including in the area
11 that includes a segment of Stag Hollow Creek, where it is 80 feet
12 wide). It includes [the Bus Barn property]. Even along the AF-10
13 segment of the corridor, the corridor in the EF-80 zone currently
14 available for trail uses is 30-foot wide. The county has initiated
15 proceedings to amend the text of the AF-10 and HI zones to allow
16 trail uses. In the A[F]-10 area (a residential zone, currently being
17 farmed adjacent to the trail) trail uses are expected to occupy only
18 12 feet of the width of the corridor, and can be accommodated within
19 the existing EF-80 half of the trail. For most of the corridor, that
20 leaves a potential buffer area of up to 24 feet on both sides of the
21 proposed trail. Adjacent to the AF-10 segment, the buffer available
22 between the proposed trail and uses in the EF-80 zone is 18 feet,
23 with a 30-foot buffer between trail uses and uses in the AF-10 zone.
24 * * *

25 “* * * * *

26 “The location of the parcel allows a trail located within it to directly
27 connect two important Yamhill County cities that share a unified
28 school district. It is easy to consider athletic teams of those schools
29 using the corridor to train, and school children riding in groups or
30 on their own to and from school. The location—connecting two
31 communities by foot—is something that was lost when Highway 47
32 became crowded with semi-tractor trailers and automobiles, and

1 inherently dangerous for pedestrians and bicyclists. Due in part to
2 the location of the parcel, so close to Yamhill and transecting
3 Carlton, people of all ages will be able to enrich their connections
4 between the two communities and with the countryside around them
5 and the farming taking place on those lands. As for claims of
6 petitioners' that the location is unacceptable because it traverses
7 farmland, that position cannot be correct. Seven hundred miles of
8 county roads are located adjacent to, and transect farms throughout
9 Yamhill County, and many more miles of public roads. Since the
10 beginning of Yamhill County, those roads, many of them 'market
11 roads,' have been considered an essential part of farming and were
12 necessary to get crops and other farm products to market." Record
13 12-14.

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

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

27 The third subassignment of error is denied.

1 **D. Character of the Surrounding Area**

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

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

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

1 In the fourth subassignment of error, petitioners argue that the Trail
2 introduces a use that is “different and harmful” to the farming uses in the
3 surrounding area, based mostly on the limitations to pesticide spray explained in
4 the farm impacts analysis above. Petition for Review 68. Petitioners argue that
5 the finding that roads coexist with farming is unresponsive to the YCZO
6 1202.02(D) standard because no roads run through the farm area that the Trail
7 bisects. Petitioners further argue that the Trail will support non-motorized travel,
8 which makes the Trail unlike a county road. Thus, petitioners argue, the county’s
9 conclusions are not supported by substantial evidence.

10 The farm impacts standard requires the county to determine that the Trail
11 will not force a significant change in accepted farm practices on surrounding
12 farmland or significantly increase the cost of such practices. YCZO 1202.02(D)
13 is a local standard that is distinct from the farm impacts standard. YCZO
14 1202.02(D) requires the county to consider the impact of the Trail on the farm
15 uses on surrounding properties and is primarily concerned with maintaining the
16 character of the area—in this case, the rural, agricultural character. The county
17 found that the Trail will not alter the character of the area, reasoning that rural
18 and farm areas are commonly transected by transportation facilities and farming
19 commonly occurs immediately adjacent to public rights-of-way. The county’s
20 interpretation of YCZO 1202.02(D) is entitled to deference. Petitioners have not
21 demonstrated that that interpretation is inconsistent with the express language,

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

3 The fourth subassignment of error is denied.

4 **E. Consistency with the Comprehensive Plan**

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

10 **1. Agricultural Policies**

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

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

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

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

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

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

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

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

9 In the second subassignment of error, petitioners argue that the Second
10 CUP Decision violates Section II(A), Goal 1, Policy H, because the Trail
11 substantially impairs or conflicts with farm use, as petitioners argue under the
12 farm impacts standard. When a comprehensive plan has overlapping or
13 conflicting policies, it is permissible for a local government to interpret and apply
14 them in a manner that balances those policies. *Milne v. City of Canby*, 46 Or
15 LUBA 213, 234, *rev’d and rem’d on other grounds*, 195 Or App 1, 96 P3d 1267
16 (2004) (citing *Waker Associates, Inc. v. Clackamas County*, 111 Or App 189,
17 194-95, 826 P2d 20 (1992) (“[A] balancing process that takes account of relative
18 impacts of particular uses on particular goals and of the logical relevancy of
19 particular goals to particular uses is a decisional necessity.”)). We defer to the
20 county’s interpretation of its own comprehensive plan and reconciliation of
21 conflicts therein.

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2. Rural Area Development Policies

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

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

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

“All proposed rural area developments shall be based on a reasonable expectation of the demand for the use of such land or facilities within a reasonable period of time and no large-scale development shall be approved without:

- “1. The submission and approval of a layout and design concept, with provision for the staging and servicing of all phases of the development;
- “2. The approval of all federal and state agencies relative in any applicable health, safety and environmental controls; and
- “3. An adequate demonstration of the financial capacity and responsibility of the proponents to complete the development and provide for operation and maintenance services.”

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

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

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

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

21 The second subassignment of error is denied.

22 The fourth assignment of error is sustained, in part.

1 **DISPOSITION**

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

14 **DISSOLUTION OF STAY**

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

20 The county’s decision is remanded.