

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

3  
4                   JIM VAN DYKE, JULIE VAN DYKE, BEN VAN DYKE,  
5                   BEN VAN DYKE FARMS, INC., CASEY VAN DYKE, CORY  
6                   VAN DYKE, JOHN VAN DYKE, TOM HAMMER, CHRIS  
7                   MATSON, GREG MCCARTHY, CELINE MCCARTHY,  
8                   BRYAN SCHMIDT, RUDIS LAC, LLC, LEE  
9                   SCHREPEL, FRUITHILL, INC., B.J. MATTHEWS,  
10                  GORDON DROMGOOGLE, ALLEN SITTON,  
11                  MARYALICE PFEIFFER, and TIM PFEIFFER,  
12                                   *Petitioners,*

13  
14                                   vs.

15  
16                                   YAMHILL COUNTY,  
17                                   *Respondent.*

18  
19                                   LUBA Nos. 2020-032/033

20  
21                                   FINAL OPINION  
22                                   AND ORDER

23  
24                   Appeal from Yamhill County.

25  
26                   Wendie L. Kellington, Lake Oswego, filed the petition for review and  
27                   reply brief and argued on behalf of petitioners. With her on the brief was  
28                   Kellington Law Group PC.

29  
30                   Timothy S. Sadlo, Yamhill County Counsel's Office, McMinnville, filed  
31                   the response brief and argued on behalf of respondent.

32  
33                   RYAN, Board Member; RUDD, Board Chair, participated in the decision.

34  
35                   ZAMUDIO, Board Member, did not participate in the decision.

36  
37                   REMANDED

06/01/2020

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20

**NATURE OF THE DECISIONS**

In LUBA No. 2020-032, petitioners appeal a January 16, 2020 board of county commissioners’ order (Order 20-25) authorizing the county to enter into an agreement entitled “Agreement for Yamhelas Westsider Trail (Phase 2) Project” (Construction Agreement). In LUBA No. 2020-033, petitioners appeal the Construction Agreement.

**BACKGROUND**

In January 2020, the board of county commissioners adopted Order 20-25 authorizing the county to enter into the Construction Agreement, and the county commission chair and county administrator subsequently signed the Construction Agreement on behalf of the county. The Construction Agreement states that it is for the Yamhelas Westsider Trail (Phase 2) Project, and requires the contractor to construct a bridge and related trail approaches over Stag Hollow Creek, on county-owned property zoned exclusive farm use (EFU). Similarly, the board of county commissioners’ order authorizing the county’s execution of the Construction Agreement provides that the agreement is for construction related to the Yamhelas Westsider Trail.

The Yamhelas Westsider Trail is a county proposal to develop a 12.48-mile section of a recreation trail (Trail) within a former railroad right of way.<sup>1</sup>

---

<sup>1</sup> The Trail is sometimes referred to in documents in the record as the YWT.

1 The 2.82-mile segment of the proposed Trail between the cities of Yamhill and  
2 Carlton crosses three drainages that will require construction of three bridges or  
3 culverts.<sup>2</sup>

4 The Trail has a long history at LUBA. The county's proposal to develop  
5 the Trail has been the subject of three prior LUBA decisions: *Van Dyke v. Yamhill*  
6 *County*, 78 Or LUBA 530 (2018) (*Van Dyke I*); *Van Dyke v. Yamhill County*, \_\_\_  
7 Or LUBA \_\_\_ (LUBA No 2019-047, Oct 11, 2019) (*Van Dyke II*); and *Van Dyke*  
8 *v. Yamhill County*, \_\_\_ Or LUBA \_\_\_ (LUBA Nos 2019-038/040, Oct 11, 2019)  
9 (*Van Dyke III*).

10 In *Van Dyke I*, we remanded a 2018 board of county commissioners'  
11 decision to adopt Ordinance 904, which amended the county's comprehensive  
12 plan to acknowledge county ownership of a 12.48-mile segment of a former  
13 railroad right-of-way, and to authorize construction of a 2.82-mile segment of  
14 that right-of-way into the Trail. We concluded that constructing the Trail required  
15 conditional use permit approval, including application of Yamhill County Zoning  
16 Ordinance (YCZO) provisions that implement ORS 215.296, for sections of the  
17 Trail within lands zoned EFU.<sup>3</sup>

---

<sup>2</sup> In an order dated April 24, 2020 we granted petitioners' motion to stay the challenged decisions. *Van Dyke v. Yamhill County*, \_\_\_ Or LUBA \_\_\_ (LUBA Nos 2020-032/033, Order, Apr 24, 2020). We repeat many of the same facts set out in our April 24, 2020 order here.

<sup>3</sup> ORS 215.296 generally requires that the applicant for certain non-farm uses in EFU zones demonstrate that the proposed use will not force a significant

1 The county instituted remand proceedings, and in March 2019 the board  
2 of county commissioners approved a conditional use permit for the Trail.  
3 Petitioners appealed that decision to LUBA and that decision was the subject of  
4 *Van Dyke II*. In October 2019, in *Van Dyke II*, we remanded the county’s decision  
5 to approve a conditional use permit for the trail for further proceedings.<sup>4</sup>

6 In a related set of appeals resolved on the same date in October, 2019, in  
7 *Van Dyke III*, we dismissed two appeals of (1) a board of county commissioners  
8 order authorizing the county to enter into an agreement for the design and  
9 consulting services, and (2) the agreement itself, related to the three proposed  
10 bridges along the Trail, including the bridge over Stag Hollow Creek that is the  
11 subject of the Construction Agreement (Stag Hollow Creek bridge).<sup>5</sup> We agreed  
12 with the county that the Phase 1 agreement for design and consulting services  
13 was not a land use decision because it did not authorize “the use or development

---

change in accepted farm practices on surrounding farm lands or significantly increase the cost of such practices. YCZO 402.07 implements ORS 215.296.

<sup>4</sup> As of the date of Order 20-25, the date the Construction Agreement was signed, and the date that construction commenced, the county had not taken action on remand of our decision in *Van Dyke II*.

<sup>5</sup> That agreement covered what is generally referred to as “Phase 1” of the Trail project. Respondent’s Response to Motion for Stay, Exhibit 5, and Exhibit 7.

1 of land.” *Van Dyke III*, \_\_\_ Or LUBA \_\_\_ (LUBA Nos 2019-038/040, Oct 11,  
2 2019) (slip op at 15).<sup>6</sup>

3 Unlike the design and consulting agreements that were appealed in *Van*  
4 *Dyke III*, which related to Phase 1, the Construction Agreement and Order 20-25  
5 are related to Phase 2 of the Trail. ODOT and federal environmental  
6 documentation for the project explain that:

7 “This phase, Phase 2 Key 21358, will complete design for three  
8 bridges, but will only complete environmental clearances and  
9 permitting to construct the largest bridge crossing at Stag Hollow  
10 Creek. The [area of project impact] for this phase is a linear area  
11 extending south of OR 240 at approximately MP 0.80 (aka E. Main  
12 St./Yamhill-Newberg Hwy.) and on both sides of Stag Hollow  
13 Creek. The trail bridge concept plan shows a two-bent clear span,  
14 approximately 111 feet long by 14 feet wide on 6-inch steel pile.”  
15 Respondent’s Response to Motion for Stay, Exhibit 7, page 1.

---

<sup>6</sup> For that reason, we also concluded that the agreement did not have any significant impacts on land use and therefore did not qualify as a significant impacts land use decision under *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982). *Van Dyke III*, \_\_\_ Or LUBA \_\_\_ (LUBA Nos 2019-038/040, Oct 11, 2019) (slip op at 17-19).

1 After the board of county commissioners adopted Order 20-25 and after the  
2 Construction Agreement was signed, construction of the Stag Hollow Creek  
3 bridge commenced in March 2020.<sup>7</sup> These appeals followed.<sup>8</sup>

#### 4 **JURISDICTION**

5 LUBA has exclusive jurisdiction to review “land use decisions.” ORS  
6 197.825(1). ORS 197.015(10)(a) defines “[l]and use decision” in relevant part as  
7 a “final decision or determination made by a local government” that “concerns”  
8 the application of a comprehensive plan provision or land use regulation.  
9 Generally, a local government decision “concerns” the application of a  
10 comprehensive plan provision or land use regulation if the plan provision or land  
11 use regulation is actually applied in making the decision, or should have been  
12 applied in making the decision. *Jaqua v. City of Springfield*, 46 Or LUBA 566,  
13 574 (2004). Therefore, whether or not the county actually applied a land use  
14 regulation in making the challenged decisions is not dispositive, if it was legally  
15 required to do so.

16 In its response to the motion for stay, the county moved to dismiss the  
17 appeals on the basis that the challenged decisions are not “[l]and use decisions”

---

<sup>7</sup> According to the county, as of March 31, 2020, \$283,678 had been spent on construction under the Construction Agreement. Respondent’s Response to Motion for Stay 8.

<sup>8</sup> Petitioners own or lease property adjacent to or near segments of the Trail or the proposed trailhead. Petition for Review, Exhibit C.

1 as defined in ORS 197.015(10)(a) because the county was not required to apply  
2 any “land use regulation.”<sup>9</sup> In its initial motion to dismiss, the county argued that  
3 the challenged decisions were not required to apply any land use regulations  
4 because (1) “no land use approval is necessary for the county to build a \* \* \*  
5 bridge for access from one part of its property to another part,” and (2) the “use  
6 \* \* \* [is] allowed outright under ORS 215.283(1)(s) and YCZO 402.02(R) [as a  
7 [f]ire service facilit[y] providing rural fire protection services].”<sup>10</sup> Respondent’s  
8 Preliminary Motion to Dismiss 10-11, 16. In the response brief, the county  
9 restates and amplifies its arguments regarding jurisdiction.

10 According to the county, the challenged decisions are not land use  
11 decisions because no land use approval is required to build the bridge “so long as  
12 the bridge \* \* \* [is] not used in a way that requires conditional use authority or  
13 site design review.” Response Brief 18. The county argues that nothing in the  
14 decisions approves *use* of the bridge for purposes of a recreation trail, and that

---

<sup>9</sup> ORS 197.015(10)(b) lists a number of exclusions to the definition of “[l]and use decision” at ORS 197.015(10)(a). The county does not argue that the decisions are excluded from the definition of land use decision under any provision of ORS 197.015(10)(b).

<sup>10</sup> Our order granting the motion for stay established a briefing schedule in order for the parties to present us with more focused arguments on jurisdiction and on the merits of the appeals. In resolving the jurisdictional issue, we have considered all of the parties’ pleadings.

1 the bridge is an “access bridge.”<sup>11</sup> Response Brief 20. Essentially, we understand  
2 the county’s position to be that the YCZO regulates only uses, and not  
3 development, of EFU-zoned property.

4 Petitioners argue that the challenged decisions are land use decisions  
5 because they authorize construction of a transportation facility, which YCZO  
6 402.04(N) identifies as a conditional use in the EFU zone.<sup>12</sup> Conditional uses  
7 require a demonstration of compliance with YCZO 402.07, the county’s  
8 implementation of ORS 215.296, as well as YCZO 1202.02(B), (D) and (E).

9 Petitioners also argue that for the same reasons, the decisions are  
10 “permits,” *i.e.*, the “discretionary approval of a proposed development of land  
11 under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and  
12 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto.”  
13 ORS 215.402(4); Petition for Review 1. That is so, petitioners argue, because the

---

<sup>11</sup> YCZO 202 defines “use” as “[t]he purpose for which land or a building or structure is used, designed, arranged or intended, or for which it is occupied or maintained.”

<sup>12</sup> YCZO 402.04(N) provides that:

“The following uses are allowed in the Exclusive Farm Use District upon conditional use approval[:]

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

1 decisions authorize “the \* \* \* development of land,” and require the exercise of  
2 significant discretion in applying YCZO 402.07.

3 Petitioners dispute the county’s characterization, in its pleadings and  
4 response brief, of the decisions as authorizing construction of an “access bridge”  
5 to provide “fire control” services, and as a “[f]ire service facilit[y] providing rural  
6 fire protection services” under ORS 215.283(1)(s). Petitioners’ Response to  
7 Preliminary Motion to Dismiss 3. Petitioners point out that nothing in the record  
8 supports the county’s theory in its pleadings and response brief that the bridge is  
9 a “[f]ire service facilit[y].” *Id.*

10 For the reasons explained below, we conclude that the challenged  
11 decisions are “land use decisions” because they required the application of  
12 provisions of the YCZO. We also conclude that the challenged decisions are  
13 “permits” as defined in ORS 215.402(4).

14 **A. Land Use Approval is Required Prior to Construction**

15 First, we reject the county’s argument that it may construct the bridge and  
16 related trail improvements prior to securing land use approval, as long as the  
17 improvements are not used for trail purposes until land use approval is later  
18 obtained. The Stag Hollow Creek bridge and trail improvements that Order 20-  
19 25 and the Construction Agreement authorize to be constructed are part of the  
20 Trail proposal, and accordingly are part of a larger proposed “transportation  
21 facility” for which conditional use approval is required. *See Van Dyke I*, 78 Or  
22 LUBA 530, 534 (2018) (concluding that the Trail proposal is a proposal for a

1 “transportation facility,” a conditional use in the EFU zone under YCZO  
2 402.04(N)). The county has failed to develop an argument that it may segment a  
3 project requiring a conditional use permit into parts that may not, individually,  
4 require land use approval. Even if, however, the bridge is viewed as a stand-alone  
5 component of a larger “transportation facility,” the fact remains that the bridge  
6 itself is a transportation facility, and therefore a conditional use in the EFU  
7 zone.<sup>13</sup>

8 In addition, as petitioners point out, ORS 215.190 and its implementation  
9 at YCZO 1406.02 prohibit construction of a building or structure in violation of  
10 ORS 215 or the YCZO.<sup>14</sup> The bridge is a “structure” as defined in YCZO 202  
11 and, as explained above, is a transportation facility, a conditional use in the EFU  
12 zone.<sup>15</sup> The county therefore is prohibited from constructing a transportation

---

<sup>13</sup> OAR 660-012-0005(30) defines “Transportation Facilities” to mean “any physical facility that moves or assist[s] in the movement of people or goods including facilities identified in OAR 660-012-0020 but excluding electricity, sewage and water systems.”

<sup>14</sup> YCZO 1406.02 provides: “No person shall locate, construct, maintain, repair, alter, or use a building or other structure or use or transfer land in violation of this ordinance or any ordinance lawfully adopted by Yamhill County.”

<sup>15</sup> YCZO 202 defines “structure” in relevant part as “[s]omething constructed or built and having a fixed base on, or fixed construction to the ground or another structure.”

ODOT and federal environmental documentation for the project explain that:

1 facility improvement prior to obtaining required land use approvals for that  
2 improvement in accordance with the YCZO.<sup>16</sup> Accordingly, we reject the  
3 county’s argument that the county may authorize or engage in construction of a  
4 transportation facility in the EFU zone without first concluding that the  
5 provisions of ORS 215.296/YCZO 402.07 are met.

6 **B. The Bridge Construction is Discretionary Development**

7 To the extent the county argues that the bridge and associated trail  
8 improvements are not the “development” of land within the meaning of ORS  
9 215.402(4), we reject that argument. The YCZO does not include a general  
10 definition of “development.”<sup>17</sup> YCZO 201.01(F) provides that terms not defined

---

“The trail bridge concept plan shows a two-bent clear span,  
approximately 111 feet long by 14 feet wide on 6-inch steel pile.”  
Respondent’s Response to Motion for Stay, Exhibit 7, page 1.

<sup>16</sup> YCZO 202 defines “construction” as “[t]he placement of construction materials in a permanent position and fastened in a permanent manner. Where excavation, demolition, or removal of an existing structure has substantially begun preparatory to rebuilding, such excavation or demolition or removal shall be deemed to be construction, provided that work shall be carried on diligently. Installation of a septic tank/drainfield shall be considered construction.”

We are unpersuaded by the county’s argument that “no building permits are required for construction of the bridge.” Respondent’s Preliminary Motion to Dismiss 10. Whether a building permit is required for construction does not affect whether an activity qualifies as construction.

<sup>17</sup> ORS 215.402(4), the provision that defines “permit” for counties, does not include a definition of “development.” However, the city analogue to ORS 215.402(4), is found at ORS 227.160(2). ORS 227.215(1) defines “development”

1 in the YCZO “shall be construed according to their common, ordinary and  
2 accepted meaning.” *Webster’s Third New Int’l Dictionary* 618 (unabridged ed  
3 2002) defines “development” as follows:

4 “1 : the act, process, or result of developing : the state of being  
5 developed : a gradual unfolding by which something (as a plan or  
6 method, an image upon a photographic plate, a living body) is  
7 developed <a new development in poetry> : gradual advance or  
8 growth through progressive changes : EVOLUTION <a stage of  
9 development> : a making usable or available < well worth  
10 development>.”

11 A decision that authorizes construction of a concrete bridge over a creek, and trail  
12 approaches, is a decision that makes something usable or available, and  
13 authorizes development according to the dictionary meaning of development.

14 **C. The Bridge is Not a Fire Service Facility**

15 Finally, we reject the county’s theory that the bridge is authorized in the  
16 EFU zone as a “[f]ire service facilit[y] for rural fire protection services.” ORS  
17 215.283(1)(s). The county argues that because the bridge has been designed to  
18 serve large fire vehicles, and because the county intends to use the road for “fire

---

for purposes of Chapter 227 as “a building or mining operation, making a material change in the use or appearance of a structure or land, dividing land into two or more parcels, including partitions and subdivisions.”

In the context of flood plain development, YCZO 202 defines development as “any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation, or drilling operations or storage of equipment or materials located within the area of special flood hazard.”

1 control,” the bridge qualifies as a “[f]ire service facilit[y] for rural fire protection  
2 services.” Respondent’s Preliminary Motion to Dismiss 17. However, other than  
3 its affidavit that the bridge has been designed to carry “all legal loads, including  
4 full-size fire trucks, smaller ‘brush’ style fire trucks, and other common  
5 emergency vehicles,” the county’s theory is not supported. Respondent’s  
6 Response to Motion for Stay, Exhibit 9. Rather, the record supports the  
7 conclusion that the Stag Hollow Creek bridge is a part of the Trail proposal.

8         The description of the construction work in the Construction Agreement is  
9 “the project known as Yamhelas Westsider Trail (Phase 2) Project.” Record 2.  
10 The call for bids calls for work that “will consist of constructing a prestressed  
11 slab bridge, trail approaches, and other items detailed in the plans and  
12 specifications[.]” Supplemental Record 4. The plans and specifications describe  
13 the work in part as “[c]onstruct Stag Hollow Creek Bridge No. YWT-1.”  
14 Supplemental Record 29. Environmental documentation for the project  
15 references the Trail and our decision in *Van Dyke I*. Respondent’s Response to  
16 Motion for Stay, Exhibit 7, page 1.

17         We also do not think that the legislature intended to authorize as a  
18 permitted use in the EFU zone a pedestrian bridge that can also carry large fire  
19 vehicles as a “[f]ire service facility[y] providing rural fire protection services.”  
20 ORS 215.283(1)(s). Moreover, the county does not explain why the related trail  
21 approaches authorized by the decisions qualify as a fire service facility. The  
22 county has not established that the Stag Hollow Creek bridge and trail

1 improvements qualify as a “[f]ire service facilit[y] for rural fire protection  
2 services” authorized in ORS 215.283(1)(s).<sup>18</sup>

3 In conclusion, the challenged decisions are land use decisions because they  
4 authorize the discretionary approval of proposed development of land for a use  
5 that is a conditional use under the YCZO.

6 The county’s motion to dismiss is denied.<sup>19</sup>

7 **SECOND AND FIFTH ASSIGNMENTS OF ERROR**

8 In their second assignment of error, petitioners argue that the county  
9 improperly construed YCZO 402.04(N) in failing to apply the provisions of  
10 YCZO 402.07 and YCZO 1202.02 to the decisions. ORS 197.835(9)(a)(D). In

---

<sup>18</sup> We have explained that decisions regarding applications for uses that are listed in ORS 215.283(1) (and its marginal lands counties’ counterpart at ORS 215.213) may not be subject to additional county regulations, but they are subject to statutory standards, and may also be subject to rules adopted by the Land Conservation and Development Commission (LCDC). *Keith v Washington County*, 66 Or LUBA 80, 86-87 (2012) (citing *Lane County v. LCDC*, 325 Or 569, 583, 942 P2d 278 (1997)).

LCDC has adopted OAR 660-033-0120, and the Table that accompanies the rule lists “[f]ire service facilit[y] for rural fire protection services” as an allowed use that “may require notice and the opportunity for a hearing because the authorization qualifies as a land use decision[.]” We note that YCZO 402.09 contains standards and limitations for the EFU zone, including access requirements, clear vision area requirements, and height limitations.

<sup>19</sup> Because we conclude that the challenged decisions are statutory land use decisions, we need not address petitioners’ alternative argument that the decisions qualify as significant impacts decisions under *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982).

1 their fifth assignment of error, petitioners argue that the county committed a  
2 procedural error that prejudiced their substantial rights in failing to provide the  
3 notice of the decisions that is required under YCZO 1301.01(B) and ORS  
4 215.416(11). ORS 197.835(9)(a)(B).

5 We concluded above in our resolution of the jurisdictional question that  
6 the challenged decisions are land use decisions. Accordingly, we agree with  
7 petitioners that the county was required but failed to apply YCZO 402.07 and  
8 YCZO 1202.02 to the decisions. We also concluded above that the decisions are  
9 “permits.” Accordingly, the county was required to provide notice under YCZO  
10 1301.01(B) and ORS 215.416(11). The county does not dispute that it did not  
11 apply the YCZO provisions, and does not dispute that it did not provide notice in  
12 accordance with YCZO 1301.01(B).

13 Accordingly, for the reasons explained above, the second and fifth  
14 assignments of error are sustained.

15 **REMAINING ASSIGNMENTS OF ERROR**

16 Petitioners’ first, third, and fourth assignments of error all include  
17 variations on the same argument that the county erred in failing to process the  
18 decisions according to the procedures that apply to permits.<sup>20</sup> We sustain above

---

<sup>20</sup> Petitioners argue that the county improperly construed the applicable law, exceeded its jurisdiction, made a decision not supported by substantial evidence in the record, and made an unconstitutional decision in failing to apply YCZO 402.07, YCZO 1202.02 and the procedures in YCZO 1301.01(B).

1 the second and fifth assignments of error, and remand the decisions for the county  
2 to follow the procedures applicable to permits and to apply YCZO 402.07 and  
3 YCZO 1202.02 to the decisions. Accordingly, it would be premature to address  
4 petitioners' other assignments of error.

5 We do not address the first, third, or fourth assignments of error.

6 **DISSOLUTION OF STAY**

7 In an order dated April 24, 2020, we granted petitioners' motion requesting  
8 a stay of the challenged decisions pending a final opinion and order by LUBA in  
9 this appeal. The county subsequently filed a motion for reconsideration of our  
10 April 24, 2020 order. With the issuance of this final opinion and order, the stay  
11 is dissolved. *Meyer v. Jackson County*, 73 Or LUBA 1, 26 (2016); *Save Amazon*  
12 *Coalition v. City of Eugene*, 29 Or LUBA 335, 342 (1995). Accordingly, we need  
13 not address the county's motion for reconsideration of our order.

14 The county's decision is remanded.