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

FRIENDS OF MARION COUNTY,
Petitioner,

vs.

MARION COUNTY,
Respondent,

and

HEIDI JONES, JEFF JONES,
SEASONS AT RED OAK FARM,
and AGRITAINMENT, INC.,
Intervenors-Respondents.

LUBA No. 2021-088

DEPARTMENT OF LAND CONSERVATION
AND DEVELOPMENT,
Petitioner,

vs.

MARION COUNTY,
Respondent,

and

HEIDI JONES, JEFF JONES,
SEASONS AT RED OAK FARM,
and AGRITAINMENT, INC.,
Intervenors-Respondents.

LUBA No. 2021-089

FINAL OPINION
AND ORDER

Appeal from Marion County.

Andrew Mulkey filed a petition for review and reply brief and argued on behalf of petitioner Friends of Marion County.

Steven E. Shipsey filed a petition for review and argued on behalf of petitioner Department of Land Conservation and Development.

No appearance by Marion County.

Michael J. Gelardi filed intervenors-respondents' brief and argued on behalf of intervenors-respondents.

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

REMANDED 04/21/2022

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioners appeal a board of county commissioners decision approving a conditional use permit (CUP) for a commercial activity in conjunction with farm use on land zoned for exclusive farm use (EFU).

MOTION FOR EXTENSION OF TIME

Intervenors-respondents' brief was filed on February 14, 2022. A reply brief is generally due within seven days of the date the respondent's brief is filed; however, because February 21, 2022, was a federal holiday, the reply brief here was due on February 22, 2022. OAR 661-010-0039; OAR 661-010-0075(8). On February 22, 2022, petitioner Friends of Marion County (Friends) filed a motion for an extension of time (MOET) of one day to file the reply brief and, on February 23, 2022, Friends filed the reply brief.

On March 3, 2022, intervenors-respondents (intervenors) filed an objection to the MOET, arguing that a one-day extension for the reply brief is unfair because petitioners' briefing period was prolonged by nearly 10 weeks during the period that briefing was suspended due to Friends' record objections. *See* OAR 661-010-0026(6) ("If an objection to the record is filed, the time limits for all further procedures under these rules shall be suspended."). Intervenors point out that they "had a mere two and a half weeks to respond to petitioners' two briefs." Response to MOET 3. As we understand the objection, intervenors

argue that uneven briefing periods that resulted from the record objections should result in LUBA denying the MOET for Friends' reply brief.

Intervenors do not argue or establish that the MOET fails to comply with our rules in any respect, and we grant it. However, even if the MOET were deficient, intervenors do not assert, let alone establish, that the one-day delay in filing the reply brief affected their substantial rights. Accordingly, we would consider the one-day delay a technical violation and consider the reply brief in any event. *See* OAR 661-010-0005 ("Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision.").

MOTION TO TAKE OFFICIAL NOTICE

Intervenors request that we take official notice of written testimony in the legislative history of Senate Bill 841 (2013), Oregon Laws 2013, chapter 554, section 3, codified at ORS 215.456, regarding the siting of wineries on land zoned EFU pursuant to standards that apply to commercial activities in conjunction with farm use. We regularly consider legislative history in interpreting state statutes and administrative rules, consistent with the legislative directive that LUBA "decisions be made consistently with sound principles governing judicial review."[1] ORS 197.805; *see also* ORS 174.020(1)(a) ("In the construction of a

---

[1] We do not have authority to take official notice of *local* legislative history. *Martin v. City of Central Point*, 73 Or LUBA 422, 426 (2016); *19th Street Project v. City of The Dalles*, 20 Or LUBA 440, 447-48 (1991).

statute, a court shall pursue the intention of the legislature if possible."); ORS 174.020(1)(b) ("To assist a court in its construction of a statute, a party may offer the legislative history of the statute."). We will consider the legislative history offered by intervenors to the extent that it is relevant to the disputed issues.

BACKGROUND

The subject property is 74.5 acres, zoned EFU, and developed with a single-family dwelling and a barn. The property is comprised of primarily high-value farm soils. The property is a former blueberry and nursery stock farm. The application explains:

> "[Intervenors] produced wheat crops [on] the Property in 2019 and 2020, and [intervenors] plan[ned] production of a clover crop in 2021 in the southern and western fields on the Property. [Intervenors] plan[] to produce fruits, vegetables and ornamental plants in greenhouses and in a large garden area in the central portion of the Property." Record 466.

Intervenors applied for a CUP to conduct an admission fee farm experience program (the program) for youth and families as a commercial activity in conjunction with farm use. The program would involve a range of activities related to growing and harvesting plants, as described in the application:

> "• 'Know how they grow' activities: Educational activities that utilize display plants to teach children about how crops are grown, harvested, assessed for quality and weighed. These activities are designed for groups of typically less than 30 people and will be conducted in the central portion of the Property.

"• Plant identification and wildlife viewing: Guided nature walks for small groups along restored trails in the forested western portion of the Property near Champoeg Creek, as well as in the children's garden near the new workshop building and inside the workshop in the central portion of the Property.

"• U-Pick activities: Micro-harvesting activities such as sunflower seed collection for small groups of children in the central portion of the Property. These activities will allow children to be active and enjoy the outdoors while also encouraging interest in agriculture.

"• Harvest and holiday themed activities: Seasonal activities that complement the above activities, including for example corn maze, cider pressing, pumpkin toss, winter wonderland hike.

"• Retail sales of farm crops: Small scale sales designed to showcase local farm products and to complement the activities above (e.g. pumpkins and gourds, cider, hazelnuts, ornamental plants)." Record 14, 466-67.

The county planning director denied the application as inconsistent with Marion County Code (MCC) 17.136.060(D), which is discussed below and requires, in part, that a commercial activity in conjunction with farm use "be primarily a customer or supplier of farm uses" and that the commercial "products and services provided * * * be essential to the practice of agriculture."

Intervenors appealed to the county hearings officer, who also denied the application after concluding that MCC 17.136.060(D) was not satisfied. The hearings officer reasoned, "As the proposed commercial activity is primarily (both in its focus and revenue generation) an educational program for families

and children, rather than for the customer or suppliers of local farm uses, all criteria are not met." Record 311.

Intervenors appealed to the board of county commissioners, which, after a *de novo* hearing, approved the CUP. This appeal followed.

FIRST ASSIGNMENT OF ERROR (DLCD and Friends)

SECOND ASSIGNMENT OF ERROR (DLCD)

Petitioner Department of Land Conservation and Development (DLCD) and Friends (together, petitioners) argue that the county improperly construed the applicable law in granting the CUP because the proposed use is not a commercial activity in conjunction with farm use. Petitioners also argue that the county's conclusion that the proposed use is a commercial activity in conjunction with farm use is not supported by adequate findings or substantial evidence.

Statewide Planning Goal 3 (Agricultural Lands) is "[t]o preserve and maintain agricultural lands." State law restricts the uses that are allowed on agricultural land to farm uses and specified nonfarm uses. *See* ORS 215.203(1) (generally requiring that land within EFU zones be used exclusively for "farm use"); ORS 215.203(2)(a) (defining "farm use"); ORS 215.283 (identifying permitted uses on EFU land). ORS 215.283(2)(a) provides:

> "The following nonfarm uses may be established, subject to the approval of the governing body or its designee in any area zoned [EFU] subject to ORS 215.296:

"(a) Commercial activities that are in conjunction with farm use, including the processing of farm crops into biofuel not permitted under ORS 215.203(2)(b)(K) or 215.255."

A. Standard of Review

The parties dispute the standard of review. DLCD argues that uses permitted in EFU zones are established by state statute and reviewed for legal correctness. Intervenors argue that MCC 17.136.060(D) is a county code provisions and that the board of county commissioners' interpretation of the county code is entitled to deference under ORS 197.829 and *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010).

We agree with DLCD that whether the proposed use is a commercial activity that is in conjunction with farm use is an issue of state law under ORS 215.283(2)(a). MCC 17.136.060(D) implements ORS 215.283(2)(a) and must be interpreted consistently with state law. *Kenagy v. Benton County*, 112 Or App, 17, 20 n 2, 826 P2d 1047 (1992); *City of Sandy v. Clackamas County*, 28 Or LUBA 316, 319-20 (1994). The question is whether the county's construction and application of the term "[c]ommercial activities that are in conjunction with farm use" is correct.

B. Farm use

In their first assignment of error, first subassignment, Friends argues that the county failed to "adequately identify" the farm use or uses with which the program will operate in conjunction. Friends Petition for Review 26. While Friends does not clearly state the standard of review under this subassignment of

error, we understand that argument to be that (1) the county's findings are inadequate regarding the requisite farm use and (2) the county improperly construed the law by approving commercial activities that are not in conjunction with any farm use. Friends further argues that there is not substantial evidence to support a conclusion that the subject property is currently used for farm use or will be used for farm use.

As used in ORS 215.283(2)(a), "farm use" is defined in ORS 215.203(2)(a):

> "'[F]arm use' means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. 'Farm use' includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. 'Farm use' also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows. 'Farm use' also includes the propagation, cultivation, maintenance and harvesting of aquatic, bird and animal species that are under the jurisdiction of the State Fish and Wildlife Commission, to the extent allowed by the rules adopted by the commission. 'Farm use' includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection. 'Farm use' does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees or land described in ORS 321.267(3) or 321.824(3)."

Friends argues that the county failed to determine whether any of the proposed activities on the subject property qualify as a "farm use." Friends observes that the county made a number of findings related to plant propagation and use of plants on the subject property. For example, the county found that intervenors "presented information about the restoration of farm uses on the property, the current farm uses on the property, and the future farm uses on the property." Record 9. The findings also state that the program will use crops grown on the property. Record 11. The county found that intervenors "explain[ed] how [they] intend to grow fruit, vegetables, and ornamental plants in greenhouses and in a large garden area in the central portion of the property." *Id.* The findings state that the program will include sales of U-Pick crops and nursery stock from the property and processing and marketing local farm crops. Record 11-12.

Friends argues that none of the findings or the evidence in the record demonstrates that intervenors currently operate or will operate a farm use, that is, "the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops." ORS 215.203(2)(a). Instead, the primary source of income from the property will be admission fees from the program, which is a nonfarm commercial use.

Friends contend that the primary purpose of the plant propagation on the property is demonstration and not obtaining a profit. Intervenors identified three plant propagation areas on the subject property: 35 acres of fields, greenhouses,

and a garden area.[2] Thirty-three acres of the 35-acre area currently produces clover. Record 364. The remaining two acres are planted in sunflowers. *Id.* The clover will be utilized in the "Know How They Grow" activity to demonstrate farming tasks such as plant and weed identification, water and nutrient management, crop quality assessment, and the weighing of crops. *Id.* The sunflowers will be used in the "Know How They Grow" and U-Pick activities. *Id.*

Friends points out that the primary purpose of the U-Pick activities is education and not selling a crop. Intervenors described the U-Pick activities as "[m]icro-harvesting activities such as sunflower seed collection for small groups of children" and explained that "[t]hese activities will allow children to be active and enjoy the outdoors while also encouraging interest in agriculture." Record 14, 467. Intervenors have leased 45 acres on an adjacent property to produce pumpkins, gourds, and ornamental corn that "will be incorporated into the Program, possibly sold as U-Pick and donated to local churches and schools to uses as fall decorations." Record 364-65. The U-Pick activities would be through invitation and sign-up only. Audio Recording, Marion County Board of Commissioners, July 28, 2021, at 1:35:10 - 1:35:55.

---

[2] The remainder of the property is a wooded riparian area along Champoeg Creek that is unsuitable for farming. Record 484.

Friends further argues that plant propagation in the greenhouses and garden area also do not constitute farm uses. Intervenors explained that the greenhouses will "feature unique crop plants such as cotton, cocoa and peanuts for use as teaching examples." Record 364. The garden area will "provide a safe area for elementary-age children to freely explore and read about crops * * * [including] safe medicinal plants and plants that 'involve' all five senses." *Id.* Friends argues that those uses are not a farm use because nothing demonstrates that plants grown in the greenhouses and garden area will be grown primarily for the purpose of obtaining a profit in money, as opposed to primarily for display or educational purposes. Intervenors described those plants as demonstrative teaching tools, not as crops raised, harvested, and sold "for the primary purpose of obtaining a profit in money." ORS 215.203(2)(a).

Intervenors do not dispute that the county was required to find a farm use in order to approve "[c]ommercial activities that are in conjunction with farm use." Again, "'farm use' means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops." ORS 215.203(2)(a); MCC 17.110.223. Intervenors point to the county finding that they "presented information about the restoration of farm uses on the property, the current farm uses on the property, and the future farm uses on the property." Record 9. Intervenors also rely on the county's condition of approval that "operation of the approved commercial activity is contingent on continued

farm use of the property, specifically on the portion of the property suitable for field crops as defined in the application." Record 14.

Intervenors respond that they have "maintained the field acres of the property in commercial crop production since * * * 2019." Intervenors-Respondents' Brief 3. Specifically, intervenors planted a wheat crop in late 2019 that was harvested in 2020. Intervenors then planted a clover crop for harvest in 2021. Record 466. Intervenors testified that both crops were sold. Audio Recording, Marion County Board of Commissioners, July 28, 2021, at 1:41:29. Intervenors testified that they intend to utilize the field acres for commercial crop production indefinitely and agreed to a condition of approval making the program approval contingent on continued farm use of the portion of the property suitable for field crops.[3] Record 14.

Intervenors also respond that the program will utilize farm crops grown on other nearby farms, including the aforementioned pumpkins, gourds, and ornamental corn that intervenors plan to produce offsite. Intervenors point to evidence that the program will purchase nursery stock from intervenor Jeff Jones's nursery business for use in the program and that the program will sell

---

[3] Intervenors do not dispute that the plant propagation in the greenhouses and garden area are specifically for use in the program as part of the commercial activity and are not farm uses. Intervenors-Respondents' Brief 4 (citing Record 248; 273-82; 364-65; 445-46; 466-68; 484).

local farm crops at retail as an element of the program. Intervenors-Respondents' Brief 4 (citing Record 156, 267-68, 467).

We understand the county to have found that the propagation of field crops on the 35-acre area of the subject property is a "farm use" of the subject property and to have conditioned its approval on the continued field crop production. Nothing in the county's decision suggests that the county concluded that the U-Pick activities or plant propagation in the greenhouses and garden area are farm uses of the subject property. The issue, then, is whether the county's finding that field crop propagation on the subject property is a farm use is adequate and supported by substantial evidence.

Adequate findings (1) address the applicable standards, (2) set out the facts relied upon, and (3) explain how those facts lead to the conclusion that the standards are met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992); *see also Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21, 569 P2d 1063 (1977) ("What is needed for adequate judicial review is a clear statement of what, specifically, the decision-making body believes, after hearing and considering all the evidence, to be the relevant and important facts upon which its decision is based."). A finding of fact is supported by substantial evidence if the record, viewed as a whole, would permit a reasonable person to make that finding. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988).

We agree with Friends that the findings are inadequate to support a conclusion that there is a farm use of the subject property. The county found that intervenors "presented information about * * * the current farm uses on the property" and conditioned the approval "on continued farm use of the property, specifically on the portion of the property suitable for field crops as defined in the application." Record 9, 14. Even taken together, that finding and condition do not address the primary farm use inquiry, which is whether the crops are "for the primary purpose of obtaining a profit in money." The findings identify the *evidence* relied upon—intervenors' testimony—but they do not set out any *facts* relied upon. Nor do the findings explain how any facts lead to a conclusion that the field crops are raised "for the primary purpose of obtaining a profit in money." We agree with Friends that the findings are inadequate.

We also agree with Friends that the evidence intervenors rely on establishes only that intervenors grow plants. Intervenors did not provide substantial evidence to demonstrate that the field crops were grown for the primary purpose of obtaining a profit from their harvest and sale.

Friends contends that intervenors planted clover for the primary purpose of providing a teaching tool. Indeed, intervenors testified, "What we're looking for are not necessarily crops that make a lot of money. We're looking for crops that would be interesting for the kids to see. Easy to plant. Easy to watch." Audio Recording, Marion County Board of Commissioners, July 28, 2021, at 1:20:30.

We have explained:

> "The 'primary purpose' requirement is directed at the activities that are occurring on the land, not the actual motivations of the owner or operator that conducts those activities. * * * So long as [crops] are raised, harvested and sold for a gross profit, in our view, it does not matter that the particular owner of the * * * farm may primarily be motivated to operate the * * * farm by factors other than the profit that is actually realized by raising and selling the [crops]." *Cox v. Polk County*, 39 Or LUBA 1, 7-12 (2000), *rev'd and rem'd on other grounds*, 174 Or App 332, 25 P3d 970, *rev den*, 332 Or 558 (2001).

Similarly, whether a specific crop is profitable is not dispositive of whether that crop production is a farm use. *See Wachal v. Linn County*, 78 Or LUBA 227, 242 (2018), *aff'd*, 295 Or App 668, 433 P3d 787 (2019) (concluding that hay production was a "farm use" because tax return information showed that the applicant received income from the hay production, despite that that information also demonstrated that the applicant had not profited from the activity in recent tax years).

In *Landwatch Lane County v. Lane County*, ___ Or LUBA ___ (LUBA No 2020-104, Mar 19, 2021), a local code provision required the applicant to establish that the subject tract was employed for farm use, under the same definition of farm use in ORS 215.203(2)(a). The applicant submitted testimony, aerial photos, tax filings, and a commodities report evidencing an existing cattle operation on the subject property. We reasoned that the testimony and aerial photos alone were not substantial evidence of farm use. However, we concluded that the tax filings and the commodities report constituted substantial evidence of the farm use.

Here, intervenors have simply testified that they sold the field crops with no other documentation of their production or sale. The fact that intervenors testified that the 2019 wheat crop and 2021 clover crop were "sold" is not substantial evidence to support a conclusion that those field crops were sold for a profit or grown for the primary purpose of obtaining a profit. We agree with Friends that, viewed as a whole, the record before the county and before us would not permit a reasonable person to find that the field crops were grown for the primary purpose of obtaining a profit. *Dodd*, 317 Or at 179; *Younger*, 305 Or at 360.

Given our conclusion that the findings and evidence do not establish any farm use of the subject property, we agree with Friends that the county misconstrued ORS 215.283(2)(a) by approving commercial activities in conjunction with farm use.

Friends' first assignment of error, first subassignment, is sustained.

C. In conjunction with farm use

We proceed to address petitioners' arguments that the county's conclusion that the program is "in conjunction with" farm use misconstrues the applicable law and is not supported by adequate findings or substantial evidence. The phrase "[c]ommercial activities that are in conjunction with farm use" in ORS 215.283(2)(a) is not defined by statute or administrative rule. *See* ORS 215.203 (providing definitions for purposes of EFU statutes); OAR 660-033-0020 (providing definitions for OAR chapter 660, division 33). The statutory phrase

"in conjunction with" has been interpreted in case law to describe the requisite connection between a commercial activity and a farm use. MCC 17.136.060(D) is the county codification of that interpretive case law. MCC 17.136.060(D) provides:

> "1. The commercial activity must be primarily a customer or supplier of farm uses.
>
> "2. The commercial activity must enhance the farming enterprises of the local agricultural community to which the land hosting that commercial activity relates.
>
> "3. The agricultural and commercial activities must occur together in the local community.
>
> "4. The products and services provided must be essential to the practice of agriculture."

With respect to MCC 17.136.060(D)(1), the county found:

> "The commercial activity being proposed will include sales of U-pick crops and nursery stock from the property. The proposed commercial activity is primarily (both in its focus and revenue generation) a farm educational program for families and children, that promotes farming and farm related practices. This creates both a customer and supplier of farm use by educating potential future farmers." Record 11-12.

The county concluded that program participants are customers and supplies of farm uses. We explained above that the findings and the record do not identify any farm use on the subject property. No findings or evidence support a conclusion that plants grown on the property constitute a farm use. Accordingly,

the county's findings that the program participants are "customers" of a farm use is not supported by adequate findings or substantial evidence.

We understand the county to have concluded that the program is a supplier of farm uses because the program could produce future agricultural workers. The county found that "[i]t is the hope and belief that the Program will spark an interest in an agricultural career in children visiting from outside the immediate area. There is a basis to determine that the Program will, in fact, secure the long-term supply of agricultural workers." Record 11. Petitioners argue that the county misconstrued "in conjunction with" in ORS 215.283(2)(a) and "supplier" in MCC 17.136.060(D)(1), and that the county's finding that the program will supply future farm workers is not supported by substantial evidence.

A summary of the case law from which MCC 17.136.060(D)(1) derives is instructive. A commercial activity in conjunction with farm use is a conditional use, determined on a case-by-case, fact-specific basis. *Friends of Yamhill County v. Yamhill County*, 255 Or App 636, 651, 298 P3d 586 (2013). In *City of Sandy v. Clackamas County*, 28 Or LUBA 316 (1994), the city challenged county approval of a CUP for commercial activities that are in conjunction with farm use consisting of large truck sales; truck, trailer, and other equipment rental; sale of portable storage buildings; mailbox, UPS, and fax services; and construction of a 4,800-square-foot building to house the operation.

We looked to case law construing "[c]ommercial activities that are in conjunction with farm use." Examples of commercial activities that have

qualified as being in conjunction with a farm use include a winery that bought and processed grapes from agricultural enterprises in the area. *Craven v. Jackson County*, 308 Or 281, 779 P2d 1011 (1989). Similarly, a hop warehouse that stored hops grown by commercial hop growers and sold string and burlap used in hop production qualified as a commercial activity in conjunction with farm use. *Earle v. McCarthy*, 28 Or App 541, 560 P2d 665 (1977). Finally, a farm implement and irrigation equipment dealership qualified as a commercial activity in conjunction with farm use. *Balin v. Klamath Cty*, 3 LCDC 8, 19 (1979).

In *City of Sandy*, we concluded that those cases "stand for the relatively straightforward proposition that a commercial activity in conjunction with farm use must be either exclusively or primarily a customer or supplier of farm uses." 28 Or LUBA at 321. We explained that,

> "even if a commercial activity primarily sells to farm uses, that may not be sufficient to allow the commercial activity to qualify as a commercial activity in conjunction with farm use. There is a second inquiry that must be satisfied. The products and services provided must be 'essential to the practice of agriculture.' While farmers must eat and farm equipment frequently operates on gasoline, that is not sufficient to make grocery stores or gas stations commercial activities in conjunction with farm use. The connection must be closer to the 'essential practice of agriculture.'" *Id.* at 322.

We concluded that the disputed uses in *City of Sandy* were not commercial activities in conjunction with farm use. We explained:

> "[T]here is no reason to believe the trucks, trailers, and equipment intervenor is authorized to sell and rent under the [CUP], will be purchased or rented exclusively or primarily by farms or farmers in

> the area. The same holds true for the mailbox, UPS and fax services. There is evidence that *some* of intervenor's expected sales and rentals will be to farm uses, but it is equally clear from the record that there is a potentially large number of customers for the items and services intervenor will offer that are *not* farm uses. The record in this case is inadequate to demonstrate sales and rentals will be primarily to farm uses in the area and, for that reason, is inadequate to demonstrate that the authorized use is a 'commercial activity in conjunction with farm use.'" *Id.* (emphasis in original; footnote omitted) (citing *Chauncey v. Multnomah County*, 23 Or LUBA 599, 606-07 (1992)).

MCC 17.136.060(D)(1) and (4) reflect the analyses in *City of Sandy*. The county's finding that the program is a "supplier" of farm uses is intermingled with the county's finding that the program is "essential to the practice of agriculture," as required by MCC 17.136.060(D)(4). The county found:

> "Commercial use in conjunction with farm use is not typically associated with children and family extracurricular activities, however the proposed commercial use is designed to promote farming to youths with the intent of creating future farmers.
>
> "* * * * *
>
> "Based on the information provided, the Board finds that [intervenors'] proposed program is essential to the practice of agriculture in that it promotes agriculture as a valued Oregon enterprise, actively markets local agricultural products, and helps to train new generations of agricultural workers. The proposed program builds consumer interest in Oregon agriculture and contributes to the inspiration of youth to pursue a career in agriculture." Record 12-13.

We agree with the county's reasoning that the fact that the program is not a typical type of commercial activity in conjunction with farm use is not

dispositive.[4] Agricultural practices are diverse, and the types of commercial activities that are in conjunction with farm uses may be equally diverse. Whether the commercial activities are in conjunction with farm use depends on the relationship between the commercial activities and farm uses. *See Friends of Yamhill County*, 255 Or App at 650 ("[T]he type of activity proposed is not necessarily the determining factor; rather, * * * 'to be "in conjunction with farm use," the commercial activity must enhance the farming enterprises of the local agricultural community to which the EFU land hosting that commercial activity relates.'" (Quoting *Craven*, 308 Or at 289.)).

We also agree with the county's conclusion that farm workers are essential to the practice of agriculture. However, the major flaw in the county's reasoning is that there is no evidence that the agricultural entertainment and educational

---

[4] In the local proceeding in this appeal, DLCD and the Oregon Department of Agriculture submitted a letter describing the types of commercial activities that typically qualify as being in conjunction with farm use:

> "Commercial activities conducted in conjunction with farm use ('CACFU') typically involve the processing, packaging, treatment, and wholesale distribution and storage of a product primarily derived from farm activities in the local agricultural community or the retail sale of products, supplies and services needed by the local agricultural community to support the commercial production and harvesting of agricultural products. Examples of commonly permitted CACFU uses include seed cleaning and coating, the manufacture and sale of fertilizer, farm equipment servicing and repair, milk processing and bottling, hay feed pressing and hauling, and facilities for wine production." Record 190-91.

experience that the program provides will produce motivated and qualified farm workers. While encouraging an interest in agriculture and agricultural work may be laudable goals consistent with the preservation of productive agricultural land, we agree with petitioners that there is no substantial evidence in the record to support a finding that the program will result in a supply of agricultural workers.

There is no direct connection between the program and a supply of agricultural workers. Unlike a circumstance in which a farmer needs a specialized piece of equipment and a business provides that equipment, such as in *Balin* and *Earle*, the program does not address a farm use demand. The hypothesized connection between participating in the program and a future career in agriculture is too remote and speculative. Some children who participate in the program may choose to work in agriculture and others may choose a different career. The fact that one goal of the program is to encourage an interest in agriculture does not transform the commercial activity into one that is "primarily a * * * supplier of farm uses." MCC 17.136.060(D)(1). Similarly, the speculative and remote connection between the program and the production of agricultural workers does not support a conclusion that the program provides "products and services" that are "essential to the practice of agriculture." MCC 17.136.060(D)(4).

We agree with petitioners that the program is not a commercial activity in conjunction with farm use. The program is not proposed to support or supplement farm uses. Instead, the program is proposed as the primary use of the subject property. To put it in the parlance of the Court of Appeals, the program is "the

tail wagging the dog." *Craven v. Jackson County*, 94 Or App 49, 54, 764 P2d 931 (1988), *aff'd*, 308 Or 281, 779 P2d 1011 (1989) ("There is, of course, a risk of the tail wagging the dog in many situations where secondary activities are permitted because they serve primary ones[.]").[5]

We conclude that the county erred in finding that the program satisfies MCC 17.136.060(D) and qualifies as a commercial activity that is in conjunction with farm use for purposes of ORS 215.283(2)(a).

DLCD's and Friends' first assignments of error are sustained.

DLCD's second assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR (Friends)

A commercial activity that is in conjunction with farm use must satisfy what is commonly referred to as the farm impacts test, which requires the applicant to establish and the local government to find that the nonfarm use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use. ORS 215.296; MCC 17.136.060(A)(1).[6] The farm impacts test applies on a farm-by-

---

[5] Maybe more accurately for the circumstances here, there is no identified dog, and the county has erred by accepting a tail as sufficient.

[6] ORS 215.296 provides, in part:

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

farm and farm-practice-by-farm-practice basis and requires (1) the applicant to identify the surrounding lands, the farms on those lands, the accepted farm practices on each farm, and the impacts of the proposed nonfarm use on each farm practice; (2) the local government to determine whether the proposed nonfarm use will force a "significant" change to, or cost increase in, an accepted farm practice, as that term is ordinarily used; and (3) if there is a significant

---

> "(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
>
> "(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.
>
> "(2) An applicant for a use allowed under ORS 215.213(2) or (11) or 215.283(2) or (4) may demonstrate that the standards for approval set forth in subsection (1) of this section will be satisfied through the imposition of conditions. Any conditions so imposed shall be clear and objective."

MCC 17.136.060(A) provides, in part:

> "The following criteria apply to all conditional uses in the EFU zone:
>
> "(1) The use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use. Land devoted to farm or forest use does not include farm or forest use on lots or parcels upon which a non-farm or non-forest dwelling has been approved and established, in exception areas approved under ORS 197.732, or in an acknowledged urban growth boundary."

change, the local government to determine whether the applicant has demonstrated that the nonfarm use meets the test with conditions of approval. *Stop the Dump Coalition v. Yamhill County*, 364 Or 432, 444-45, 435 P3d 698 (2019).

The county found:

> "The surrounding properties are zoned EFU and are currently in agricultural use of various sizes. The primary practices in the immediate area are grass seed, hazelnuts, peaches, and a larger raspberry farm. The proposed learning experience would occur in the local community without disruption to surrounding farm operations. [Intervenors] presented evidence at the hearing of support for the proposal in the neighboring area, as well as the educational benefits of such a program. [Intervenors] emphasize the nexus between educational experience on a farm and the intergenerational upholding of the practices of agriculture. [Intervenors] indicated their intention to coordinate with surrounding lands, farm, and forest owners to ensure the activities do not interfere with periodic agricultural traffic needs. The testimony of adjacent neighbors also indicates that the farm experience program would not force a significant change in their accepted farm practices on surrounding lands. This use is expected to be low impact; therefore the costs incurred by neighboring farms will not be affected by the proposed activities. MCC 17.136.060(A)(l) will be satisfied." Record 9-10.

Friends argues that the county's conclusion that the farm impacts test is satisfied misconstrues the law, is based on inadequate findings, and is not supported by substantial evidence. We agree.

The county's findings identify crops "in the immediate area" but do not identify the surrounding lands, the farms on those lands, the accepted farm

practices on each farm, and the impacts of the proposed nonfarm use on each farm practice, as required by the farm impacts test. Without a more detailed description of the surrounding area, the individual farms in that area, and the farm practices on those farms, it is not possible for the county to determine whether the proposed nonfarm use will force a "significant" change to, or cost increase in, an accepted farm practice.

Friends also argues that no evidence in the record identifies the accepted farm practices utilized on surrounding farmland. The application states that "there are a variety of farm crops grown on surrounding lands including grass seed, hazelnuts, tree fruits, berries, livestock and timber," but it does not specify the location of these operations. Record 470. The application also states that the farm practices on these farms include various combinations of hand labor, mechanical work, and chemical inputs, but it does not elaborate on these general categories of farm practices or specify which farms use what practices. *Id.*

As Friends explain, the county's failure to identify accepted farm practices on surrounding lands makes it impossible to analyze the potential impacts of the proposed use on such practices. *See Schellenberg v. Polk County*, 21 Or LUBA 425, 442 (1991) ("Without an adequate identification of the accepted farming practices on surrounding lands, the county's findings cannot explain why the proposed use will not cause a significant change in or increase the cost of such practices.").

In *Schellenberg*, the county approved a 36-hole golf course as a conditional use in an EFU zone. The county's findings acknowledged that the surrounding land contained commercial farms producing grain, grass seed, and dairy without identifying their specific locations. With respect to the accepted farm practices utilized on the surrounding farms, the county found that aerial spraying was not used, but it did not identify any other practices. The county's findings described the expected impacts of the proposed use, but they did not relate those impacts to the accepted farming practices in the area. Instead, the findings relied on conclusory statements that farmers testified that the proposed use would not force any change in or increase the cost of their farming practices. We concluded that, without an adequate identification of the accepted farming practices on surrounding lands, such findings were inadequate to demonstrate compliance with the farm impacts test.

Similar to the findings in *Schellenberg*, here, the county's findings for the farm impacts test fail to identify the surrounding farms and the accepted farm practices on those farms. Without an adequate identification of the accepted farming practices on surrounding lands, the county's findings cannot explain why the proposed use will not cause a significant change in or increase the cost of such practices. The county impermissibly relied on unidentified "testimony of adjacent neighbors" that the program would not force a significant change in their accepted farm practices on surrounding lands. Record 9. We agree that the county's findings misconstrue the required inquiry and are inadequate.

Friends argues, for example, that the county's findings and the record do not determine the amount of traffic or number of people that will attend the program, making it impossible to determine the impact of the proposed use on nearby farming practices. With respect to farm impacts, the county found that intervenors "indicated their intention to coordinate with surrounding lands, farm, and forest owners to ensure the activities do not interfere with periodic agricultural traffic needs." *Id.* Elsewhere in the decision, the county found that intervenors "have not submitted a traffic impact analysis (TIA) or other documentation regarding traffic generated by the proposed use or its various parts, but [intervenors] noted that visitors will arrive in large groups, often on school buses." Record 10. Condition 9 limits the number of groups attending proposed activities per week, but it does not specify how many people may attend each group activity.[7] Record 15.

Intervenors respond that, while opponents raised general concerns about traffic, "no one argued that traffic generated by the Program would impact local farming practices, and no one identified any farming practices that could

---

[7] Condition 9 provides:

> "The approved commercial activity is by appointment only Tuesday-Saturday and is limited to three groups per week. Group appointments must be between the hours of 9:00 am and 5:00 pm, and each appointment is limited to no more than four hours in duration. [Intervenors] will instruct groups to avoid McKay Road and instead reach the property from the south." Record 15.

otherwise be impacted by the Program." Intervenors-Respondents' Brief 8. Intervenors also point to the application narrative, which describes potential trespass, noise, traffic, and visual impacts and explains why the program will not create those impacts. Record 470.

Friends replies, and we agree, that that response impermissibly shifts the burden of proof and persuasion. The farm impacts test requires intervenors to establish and the county to find compliance therewith, which includes identifying "the surrounding lands, the farms on those lands, the accepted farm practices on each farm, and the impacts of the proposed nonfarm use on each farm practice." *Stop the Dump*, 364 Or at 444. Even if the county concludes that the use will not result in any significant impacts, substantial evidence and adequate findings must support that conclusion.[8] The county's findings are not adequate for the reasons described above. We have reviewed the application narrative to which intervenors direct us. While some of the statements therein may be evidence upon which a reasonable person could rely to conclude that the program will not generate significant impacts to surrounding farm and forest uses, we cannot say

---

[8] Intervenors contend that Friends' argument capitalizes on a county error in omitting from the record transmitted to LUBA a farm practices inventory that intervenors submitted as Exhibit E to their application. Intervenors point to a summary of that inventory in the application at Record 469 to 470. There are at least two problems with that response. First, the inventory is not in the record before us, and our review is limited to the record before us. Intervenors had the opportunity but did not object to the omission of the inventory from the record. Second, the county's findings do not refer to that inventory.

that evidence "clearly supports" a conclusion that the farm impacts test is satisfied. ORS 197.835(11)(b).

Friends' second assignment of error is sustained.

SUBSTANTIVE DUE PROCESS DEFENSE

In defense of the county's decision, intervenors assert that petitioners' proffered interpretation of "[c]ommercial activities that are in conjunction with farm use" for purposes of MCC 17.136.060(D) and ORS 215.283(2)(a) violates the Joneses' substantive due process rights. State and local land use regulation that is not rationally related to a legitimate government purpose violates the substantive due process rights of affected landowners under the Fourteenth Amendment to the United States Constitution. *Euclid v. Ambler Co.*, 272 US 365, 395, 47 S Ct 114, 71 L Ed 303 (1926); *Powell v. DLCD*, 238 Or App 678, 243 P3d 798 (2010).

The purpose of the EFU statutes and Goal 3 is to preserve and maintain agricultural land for agricultural uses. Intervenors do not argue that those are not legitimate government purposes. Intervenors argue that petitioners' arguments about the proper interpretation and application of ORS 215.283(2)(a) and MCC 17.136.060(D) are not rationally related to the purpose of the EFU statutes or Goal 3. Intervenors argue:

> "[The] Program is specifically designed to help maintain Oregon farmland by inspiring and training youth to pursue careers in agriculture. The Program also directly enhances the farming activities on the Property and nearby farms that will supply the

> Program. By its nature, the Program must take place on a working farm. The record demonstrates that the * * * Property is a working farm that is suitable for this use. * * * [Intervenors have] demonstrated that the Program will not negatively impact surrounding farms.
>
> "Given these facts, there is no legitimate government interest in prohibiting [the] Program." Intervenors-Respondents' Brief 30-31 (footnote omitted).

Intervenors' substantive due process defense depends on and derives from the same arguments that intervenors made in response to the substantive arguments in the assignments of error that we sustained above. We reject intervenors' arguments here for the same reasons. The requirement that commercial activities be allowed on agricultural land only if those activities are found and proved to be in conjunction with farm use is rationally related to the legitimate government purposes of preserving agricultural land for agricultural uses.

We reject intervenors' substantive due process defense of the county's decision.

DISPOSITION

DLCD requests remand of the county's decision. Friends requests reversal or remand. As relevant here, we will remand a land use decision when we conclude that the findings are insufficient to support the decision, the decision is not supported by substantial evidence in the whole record, or the decision improperly construes the applicable law but is not prohibited as a matter of law. OAR 661-010-0071(2)(a), (b), (d); ORS 197.835(1). We will reverse a land use

decision when we conclude that the decision violates a provision of applicable law and is prohibited as a matter of law. OAR 661-010-0071(1)(c).

Friends does not develop any argument that the program is prohibited as a matter of law. It is not obvious to us that it is. As explained above, the county's decision relies on inadequate findings that misconstrue the applicable law and that are not supported by substantial evidence. The standards for commercial activities that are in conjunction with farm use have not been met because (1) intervenors have not established any *farm use* on the property with which the commercial activities are in conjunction; (2) intervenors have not established that the commercial activities are *in conjunction with* any farm use; and (3) intervenors have not established that the commercial activities satisfy the farm impacts test. However, we cannot conclude that the program is prohibited as a matter of law. Accordingly, remand is appropriate instead of reversal.

The county's decision is remanded.