

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

DANIEL STADELI and JENNIFER STADELI,
Petitioners,

vs.

MARION COUNTY,
Respondent,

and

TAMMY PEREZ,
Intervenor-Respondent.

LUBA No. 2025-002

FINAL OPINION
AND ORDER

Appeal from Marion County.

J. Michael Keane filed the petition for review and reply brief and argued on behalf of petitioners. Also on the brief was Garrett Hemann Robertson P.C.

Andrew Mittendorf filed a joint respondent's brief and argued on behalf of respondent. Also on the brief were Steve Elzinga, Andrew H. Stamp, Matthew Martin, and VF Law.

Andrew H. Stamp filed a joint respondent's brief and argued on behalf of intervenor-respondent. Also on the brief was Matthew Martin, Andrew Mittendorf, Steve Elzinga, and VF Law.

BASSHAM, Board Member; ZAMUDIO, Board Chair, participated in the decision.

WILSON, Board Member, did not participate in the decision.

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REMANDED

07/07/2026

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

NATURE OF THE DECISION

Petitioners appeal a board of commissioners decision approving a conditional use permit for a nonfarm dwelling.

FACTS

The subject property is a triangle-shaped 2.17-acre parcel zoned for exclusive farm use (EFU).¹ The property is undeveloped except for a small storage building built in 2008.

The property is surrounded on all three of its sides by active farm operations, except for a small acreage homesite to the west that predates the statewide planning program. Petitioners' hazelnut operation is adjacent to the north, across a county road. Their hazelnut operation requires spraying pesticides, herbicides, fungicides and insecticides at various times of the year, subject to state and federal regulations. The hazelnut operation frequently employs mechanical equipment to mow, shred and harvest, which generates dust.

Intervenor-respondent (intervenor), the applicant below, applied to the county for a dwelling not in conjunction with farm use (nonfarm dwelling), to be located in the center of the subject parcel. County regulation requires a 200-foot setback from property lines for new dwellings within the EFU zone. Due to the

¹ Testimony in the record indicates that the property was created many decades ago when the owner of a farm tract refused to pay property taxes on a 2.17-acre portion of the property, and the county acquired ownership of that portion for nonpayment of taxes. Record 394.

1 parcel's size and shape, the proposed dwelling location would be only 50 feet
2 from the three property boundaries. Accordingly, intervenor also sought an
3 adjustment to the 200-foot setback requirement, to reduce the setback to 50 feet.
4 The proposed dwelling location is approximately 100 feet from the southern edge
5 of petitioners' orchard.

6 The county planning director approved the conditional use application and
7 adjustment. Petitioners, with 14 other surrounding property owners, appealed the
8 planning director's decision to the hearings officer. The hearings officer
9 conducted a hearing and, on November 8, 2024, issued a decision approving the
10 permit and adjustment. Petitioners appealed the hearings officer's decision to the
11 board of commissioners. Staff recommended that the commissioners decline
12 review on the appeal, because the county had already exceeded the 150-day
13 deadline set out at ORS 215.427(1)(a) to issue a final decision on the application,
14 and the applicant had not consented to extend that deadline. The commissioners
15 agreed, and on December 19, 2024, issued Order No. 24-126, which denied the
16 appeal, and affirmed the hearings officer's decision.

17 This appeal followed.

18 **FIFTH ASSIGNMENT OF ERROR**

19 Marion County Code (MCC) 17.136.060(A) is a county standard
20 governing conditional uses in the EFU zone, and requires a finding that the
21 proposed use "will not force a significant change in, or significantly increase the
22 cost of, accepted farm or forest practices on surrounding lands devoted to farm

1 or forest use.” MCC 17.136.060(A)(1). MCC 17.136.060(A) implements ORS
2 215.296(1), which similarly requires that to approve nonfarm dwellings and other
3 non-farm uses on EFU-zoned lands the applicant must demonstrate that the
4 proposed use will not “[f]orce a significant change in accepted farm or forest
5 practices on surrounding lands devoted to farm or forest use,” or “[s]ignificantly
6 increase the cost of accepted farm or forest practices on surrounding lands
7 devoted to farm or forest use.” As shorthand, we will refer to this standard as the
8 “farm impacts test.”

9 Under the farm impacts test, a “significant” change in an accepted farm
10 practice or increase in the cost of an accepted farm practice is one that will have
11 an important influence or effect on the farm. *Stop the Dump Coalition v. Yamhill*
12 *County*, 364 Or 432, 458, 435 P3d 698 (2019). For each relevant accepted farm
13 practice, if the applicant cannot prove both elements of the test without conditions
14 of approval, the local government must consider whether, with conditions of
15 approval, the applicant will meet the farm impacts test. *Id.*

16 In the present case, adjoining farmers identified a number of farm practices
17 that, they argued, would be impacted by the proposed nonfarm dwelling. The
18 most detailed evidence came from petitioners, whose hazelnut orchard is located
19 at its closest point 10 feet from the 40-foot-wide county right of way, 100 feet
20 north of the proposed dwelling location, and directly upwind of the subject
21 property in prevailing summer conditions. Petitioners testified that the orchard
22 operation requires frequent applications of pesticides, fungicides, herbicides, and

1 insecticides, as well as mowing, shredding and harvesting with heavy equipment,
2 which raises dust that can blow south onto the subject property.² Application of
3 pesticides, etc. must comply with state and federal regulations, which require
4 certain buffer zones, depending on the chemicals and techniques being used.
5 Petitioners provided evidence that current regulations for one of the common

² Petitioner Dan Stadeli stated:

“Using just our orchard as an example to illustrate how a non-farm dwelling cannot meet this condition, I submit that for all the 44 times we are mechanically passing through our orchard during normal annual orchard operations, we will be forced to alter our practices due to this non-farm dwelling being directly downwind and too close to our orchard.

“We will also be forced to remove a significant portion of our orchard on the southern end to create a physical separation from this parcel due to multiple other government agencies’ requirements and/or regulations. As a licensed pesticide applicator, I will not be able to meet the required buffer regulated by OHSA, Oregon Department of Agriculture, and EPA. I could face fines and/or the loss of my license if the now EFU parcel becomes a dwelling site.

“I am estimating that approximately 162 trees would need to be removed to create this buffer. The input costs for buying, planting, and growing these trees to this point is around \$99.53 per tree for a total of \$16,123.86. The future gross income lost by removing these trees from the production over the lifespan of the orchard will be approximately \$96,000. This brings the total loss to around \$112,123.86. I am calculating these costs using an Oregon State University Extension Service published document ‘Orchard Economics Study’ which I have attached. This loss of income will severely impact our ability to financially support the remaining orchard operations.” Record 397.

1 chemicals they use require a minimum buffer zone of 75 to 102 feet, depending
2 on the application method, rate, and area covered, but can require buffer zones of
3 between 120 to 202 feet, depending on other variables. Record 134. Petitioners
4 estimated that to comply with current regulations they would be required to rip
5 out 162 hazelnut trees, with a total loss of \$112,123.86. Record 397. Petitioners
6 also testified that the regulations change periodically, and such changes could
7 require increased buffer zones compared to the current minimums. Petitioners
8 further argued that hazelnut orchards, even if successful, have a limited lifespan,
9 and most orchard operators employ or plan for alternative farm uses, such as grass
10 seed or Christmas trees. Petitioners cited evidence that such uses commonly
11 require chemical applications that can require up to 300-foot buffer zones. Record
12 134.

13 The hearings officer generally rejected petitioners' arguments, and
14 concluded that, given there is "at least 120 feet" between the dwelling and
15 petitioner's hazelnut operation, the dwelling will not cause any significant change
16 or increase costs to the current accepted farm practice.³ The hearings officer also

³ The hearings officer's findings state, in relevant part:

"[Petitioners] argue that they would be severely limited or prevented from managing their orchard and operating according to industry standards both in the present and in the future. Possible concerns about future operations are speculative, but the impact to current farming operations must be considered. Specifically, [petitioners] address concerns that their current farming practices would be

1 cited the fact that some dwellings and outbuildings in the area, including
2 petitioners' own dwelling, are located closer to the orchard than would be the
3 proposed dwelling. The hearings officer confined their analysis to petitioners'
4 current farm practices, and declined to consider any future or potential practices,
5 as impermissibly speculative. Finally, the hearings officer agreed with
6 intervenor's argument that any spray drift outside the application area would be
7 illegal.

8 Petitioners argue that the hearings officer misconstrued the farm impacts
9 test and that the hearings officer's findings of compliance with the farm impacts
10 test are inadequate and not supported by substantial evidence.⁴ First, petitioners

impacted by their ability to comply with chemical application buffer zones. [Petitioners] state that their application method requires a minimum of 75 or 102 feet.

"[Intervenor] states that there are already outbuildings, shops, and residences, including [petitioners'] residence, that are already closer to the trees subject to spray application. [Intervenor] also establishes that Mascher Road is a 40 foot right of way, and the proposed residence would have a 50 foot setback from Mascher Road. The site proposed by [intervenor] is at least 120 feet from [petitioners'] trees, which achieves a sufficient setback for current spray usage. [Intervenor] argues that it is unknown specifically which chemical sprays would be applied by [petitioners] as well as the rate of application. [Petitioners] note that the EPA continues to modify registrations for existing chemicals. The possibility of additional requirements in the future are speculative." Record 12.

⁴ To be adequate for review, findings must (1) identify the relevant approval standards; (2) set out the facts believed and relied upon by the local decision maker; and (3) explain how those facts lead to a decision that the proposal

1 note a numerical error in the findings, indicating that the proposed dwelling is
2 120 feet from the nearest part of the orchard, when the evidence in the record is
3 that the dwelling location is 100 feet from the orchard (50-foot setback, 40-foot
4 right of-way, 10 feet to the nearest row of hazelnut trees). Petition for Review
5 36-37 (citing Record 112).

6 In their joint respondent's brief, the county and intervenor (together,
7 respondents) do not dispute that the actual distance between the orchard and
8 proposed dwelling is 100 feet, but argue that any misstatement does not
9 undermine the hearings officer's conclusion that the distance between the
10 hazelnut operation and proposed dwelling is sufficient to ensure that the dwelling
11 is not affected by chemical spray and dust from orchard operations to any degree
12 that would cause petitioners to change their current practices. Respondents argue
13 that the main chemical discussed by petitioners, Vapam HL, has a minimum
14 buffer area of 102 feet only if applied using the "drench" method, which
15 petitioners do not state that they use. Indeed, respondents note that petitioners do
16 not clearly state that they currently use Vapam HL at all, only that it is commonly
17 used in hazelnut orchards.

18 However, we cannot tell from the findings that the hearings officer would
19 have reached the same conclusion had they appreciated that the distance between

complies with the approval standards. *Heiller v. Josephine County*, 23 Or LUBA
551, 556 (1992). Substantial evidence is evidence that a reasonable decision-
maker could rely on to draw a conclusion. *Younger v. City of Portland*, 305 Or
346, 358-60 (1988).

1 the orchard and proposed dwelling is 100 feet, rather than 120 feet. The hearings
2 officer's "no significant change/increase" finding appears to rely heavily on the
3 incorrect 120-foot distance, which apparently led the hearings officer to believe
4 that the proposed dwelling is safely outside any possible minimum buffer area.
5 Based on the evidence cited to us, the minimum buffer area could be 102 feet and
6 potentially larger, depending on a host of variables.

7 Relatedly, we disagree with respondents that the farm impacts analysis is
8 necessarily limited to the chemical application variables and scenarios that
9 petitioners currently employ in their orchard operation. As we understand the
10 evidence, chemical application is an accepted and common farm practice with
11 respect to orchards, but exactly what chemicals are applied, at what times and
12 frequency, what rate and method, with what precautions, are subject to a host of
13 variables and circumstances, to be determined by the applicator, in this case, by
14 the farm operator, who is a licensed and certified applicator.⁵ An outbreak of one
15 kind of pest may require application of a different chemical than typically used,
16 or different rates and methods. Weather conditions, climate changes, new legal

⁵ No party disputes that a farm operator who is a licensed and certified applicator qualifies as an expert when it comes to chemical applications on that farm operation. While intervenor's legal representatives critiqued petitioners' testimony and evidence during the proceedings below, as well as on appeal, we are not cited to any countervailing evidence, and no expert evidence, submitted into the record regarding chemical applications on the property, minimum buffer areas, etc.

1 requirements, and many other variables may periodically dictate changes to
2 chemical applications. Accordingly, we disagree with respondents that
3 petitioners must specify exactly which chemicals they currently use and how, and
4 that the impact analysis must be limited only to the currently employed
5 chemicals, rates, methods, etc.

6 Respondents cite *Dierking v. Clackamas County*, 38 Or LUBA 106, 120,
7 *aff'd*, 170 Or App 683, 13 P3d 1018 (2000), for the proposition that the farm
8 impact test requires only a “present-tense assessment of actual, implemented
9 farming practices.” Joint Respondent’s Brief 38 (quoting *Dierking*, 38 Or LUBA
10 at 120). However, *Dierking* does not support that proposition, at least as broadly
11 stated. *Dierking* involved alleged impacts of a cellular tower on the petitioner’s
12 planned, but not yet implemented, herb and botanical farm operation. We
13 generally agreed with the county that the farm impacts test did not require the
14 applicant and county to “anticipate and consider the accepted farming practices
15 that might be associated with every possible farm use to which surrounding lands
16 may be put in the future.” *Dierking*, 38 Or LUBA at 121. However, we held the
17 county was required to consider impacts on the petitioner’s future herb and
18 botanical farm operation, because the operation was more than a hypothetical or
19 merely possible use of the property. *Id.* at 121-22. Importantly, the petitioner’s
20 plans had developed to the point where the petitioner could describe the specific
21 farming practices that could be employed. In the present appeal, petitioners
22 specifically described commonly accepted orchard practices that could be

1 employed in their existing orchard operation, when and if conditions warrant.
2 Such practices are not merely hypothetical or speculative. *Dierking* does not
3 support respondents' broad argument that the farm impacts test is limited to the
4 chemical application practices that petitioners currently employ on their orchard;
5 if anything, *Dierking* suggests the opposite. Accordingly, we agree with
6 petitioners that the hearings officer misconstrued the farm impacts test in
7 confining the farm impacts analysis to current chemical application practices.

8 Petitioners next challenge the hearings officer's reliance on the fact that
9 several existing dwellings and outbuildings in the area, including petitioners'
10 own dwelling, are closer than 120 feet to the orchard operations. Aside from the
11 miscalculation of the actual 100-foot distance, petitioners argued that they
12 submitted evidence below that, at least for some chemicals, the farm operator's
13 own dwelling, other farm dwellings, non-residential agricultural buildings, and
14 roadways are excluded from chemical application buffer zone requirements (*i.e.*,
15 such uses may be within the buffer zone), but that other types of dwellings, such
16 as nonfarm dwellings, may not be located within the buffer zone. Record 134. On
17 appeal, petitioners argue that the hearings officer failed to address this testimony,
18 but erroneously concluded that if the proposed nonfarm dwelling is no closer to
19 the farm operation than the farm dwellings in the area, including the farm
20 operator's own dwelling, it follows that the proposed dwelling cannot
21 significantly change or increase the cost of accepted farm practices.

1 We agree with petitioners that the hearings officer's reasoning on this point
2 does not support the conclusion that the farm impacts test is met. The hearings
3 officer did not address evidence that, at least for some chemicals, farm dwellings
4 and buildings do not count, for purposes of the minimum buffer zone. In any case,
5 it does not follow from the existence of farm dwellings and buildings close to the
6 orchard operation that a proposed nonfarm dwelling at a similar distance cannot
7 significantly change or increase the cost of accepted farm practices. Farm
8 dwellings and buildings are not subject to the farm impacts test, and by their
9 intrinsic nature assist farm use and practices. Farmers may mitigate adverse
10 impacts on their own residential use, or on that of adjoining farmers, or may
11 tolerate adverse impacts of farm practices, their own or neighboring farmers, for
12 economic and reciprocal reasons. A nonfarm dwelling offers no such options or
13 trade-offs. A nonfarm dwelling is inherently in tension with farm use and
14 practices, and therefore allowed in the EFU zone only if the applicant
15 demonstrates and the county finds that the dwelling does not significantly change
16 farm practices or increase their cost. If the evidence indicates that a nonfarm
17 dwelling would cause a farmer to make significant changes to accepted farm
18 practices to avoid impacts to a nonfarm dwelling, that the farmer has chosen to
19 tolerate similar impacts on their own residential use or that of adjoining farmers
20 does not avoid or render insignificant the changes triggered by the nonfarm
21 dwelling. Accordingly, we agree with petitioners that remand is necessary for the
22 hearings officer to adopt adequate findings regarding the farm impacts test,

1 supported by substantial evidence, free of the above-described errors in applying
2 the farm impacts test.

3 Finally, petitioners fault the hearings officer for failing to address their
4 arguments regarding the 100-foot Application Exclusion Zone (AEZ) required
5 by both state and federal law. Petitioners argue that federal law, at 40 CFR section
6 170.405(a)(2) (2023), requires the applicator to ensure that no person other than
7 trained workers are within the 100-foot AEZ, regardless of whether such persons
8 are on or off the establishment, and suspend application if such persons are
9 present. Petitioners argue that a significant portion of the subject property is
10 within 100 feet of application sites, thus within the AEZ, requiring petitioners to
11 prevent untrained persons from being in the AEZ and suspending application if
12 such persons are present.

13 The only finding the hearings officer adopted regarding the AEZ is to agree
14 with intervenor that “the OSHA [Occupational Safety and Health
15 Administration] bulletin makes clear that the spray [AEZ] is intended to protect
16 agricultural workers and that drift outside the application area is already illegal.”
17 Record 112. The “OSHA bulletin” referred to is apparently an FAQ from the
18 Oregon OSHA submitted by intervenor, at Record 322. Petitioners submitted a
19 more detailed Oregon OSHA document, at Record 138-225.

20 Respondents argue that under state OSHA regulations the AEZ is
21 concerned only with protecting agricultural workers, not other persons who may
22 be present within an AEZ that extends off the application site. Respondents cite

1 two cases to support that proposition: *Van Dyke v. Yamhill County*, 80 Or LUBA
2 348, 372 (2019), and *Schrepel v. Yamhill County*, 81 Or LUBA 895, 915 (2020).
3 *Van Dyke* addressed state OSHA regulations and indeed concludes that the state
4 regulations do not protect off-site persons present within the state AEZ. *Schrepel*,
5 however, addressed federal rules promulgated under the Environmental
6 Protection Agency (EPA), the same federal regulations cited by petitioners in this
7 case. In *Schrepel*, we noted that the EPA rules expressly obligate the applicator
8 to protect non-workers present with the AEZ, even if the AEZ extends off-site.
9 We remanded the decision for the county to analyze the impacts of the proposed
10 off-site recreational use within the federal AEZ. 81 Or LUBA at 915.

11 In the present case, the hearings officer addressed only the state OSHA
12 requirements, and did not address petitioners' arguments raised under the *federal*
13 AEZ regulations. As noted, those regulations appear to impose obligations on
14 applicators with respect to off-site persons within the AEZ, independent of
15 minimum buffer requirements imposed under other regulations. Respondents
16 argue that to the extent federal AEZ regulations impose obligations on petitioners
17 to protect persons on the subject property, approving the proposed dwelling will
18 not *increase* those obligations over existing conditions, because intervenor and
19 others frequently visit the property to maintain it, care for animals, and use the
20 existing shop building. Record 132. We understand respondents to argue that the
21 lack of findings addressing the federal AEZ is not a basis for remand, because
22 the hearings officer could find based on the above-cited evidence that approving

1 the dwelling would not impose any additional obligations on petitioners under
2 the federal AEZ than already exist.

3 Respondents' argument seems premised on ORS 197.835(11)(b), which
4 provides that defective findings need not warrant remand, if the parties identify
5 relevant evidence in the record that "clearly supports" the decision. However,
6 respondents do not expressly invoke ORS 197.835(11)(b), or attempt to
7 demonstrate that the evidence cited "clearly supports" a finding of compliance
8 with the farm impacts test on this point. Accordingly, we decline to resolve
9 petitioners' findings challenge based on the statute.

10 Respondents note that the hearings officer quoted the Oregon OSHA FAQ
11 document to the effect that "drift outside the application area is already illegal."
12 Record 12. Further, respondents cite to *Van Dyke*, 80 Or LUBA at 365 for the
13 proposition that overspray or drift onto adjoining properties is not an accepted
14 farming practice. We understand respondents to argue that if applicable
15 regulations impose obligations on petitioners within the 100-foot AEZ or within
16 a buffer area, such obligations would necessarily be based on concerns about
17 "overspray" or "drift" and thus cannot constitute accepted farming practices.
18 However, respondents have not established that that is the case. Nothing cited to
19 us in the Oregon OSHA FAQ or *Van Dyke* indicate that chemical applications
20 that might occur within required AEZ or buffer areas are necessarily
21 characterized as drift or overspray. Further, as we noted in *Schrepel*, complying

1 with applicable regulations governing chemical applications is an accepted
2 farming practice. 81 Or LUBA at 915.

3 For the foregoing reasons, we agree with petitioners that the findings are
4 inadequate and remand is necessary for the hearings officer to address in the first
5 instance the issues raised below regarding the federal AEZ, as well as the farm
6 impacts test related to the nonfarm dwelling, as discussed above.

7 The fifth assignment of error is sustained.

8 **SECOND ASSIGNMENT OF ERROR**

9 MCC 17.136.070(A)(1) requires that a nonfarm dwelling be set back at
10 least 200 feet from any abutting parcel in farm use.⁶ That 200-foot setback may

⁶ MCC 17.136.070(A) provides, in part:

- “1. Dwellings. A special dwelling setback of 200 feet from any abutting parcel in farm use or timber production is required.
- “2. Accessory Buildings. A special setback of 100 feet is required for buildings accessory to a dwelling from any abutting parcel in farm use or timber production.
- “3. Adjustments. The special setbacks in subsections (A)(1) and (2) of this section may be reduced if it is determined, concurrently with any land use application or as provided in [c]hapter 17.116 MCC, that a lesser setback will meet the following review criteria for alternative sites:
 - “a. The site will have the least impact on nearby or adjoining forest or agricultural lands.

1 be adjusted, if the applicant demonstrates that a lesser setback meets four
2 standards, including that the selected site “will have the least impact on nearby
3 or adjoining forest or agricultural lands.” MCC 17.136.070(A)(3)(a).

4 Intervenor proposed to locate the dwelling in the geographic center of the
5 triangle, 50 feet equidistant from each property line. The hearings officer granted
6 an adjustment from 200 feet to 50 feet, concluding that the reduced setback
7 “would maintain the intent of the Special Setback Code and meet the criteria
8 found in [MCC 17.136.070(A)(3)(a) through (d)].” Record 17-18.⁷

“b. The site ensures that adverse impacts on forest operations and accepted farming practices on the tract will be minimized.

“c. The amount of agricultural and forestlands used to site access roads, service corridors, the dwelling and structures is minimized.

“d. The risks associated with wildfire are minimized.”

⁷ The hearings officer’s findings addressing MCC 17.136.070(A)(3) consist entirely of the following:

“As discussed in Findings and Conclusions * * *, setback standards as laid out in subsection [MCC 17.136.070](A)(1) and (A)(2) are physically impossible or are impractical due to the size and configuration of the parcel.

“[Intervenor] states and Planning agreed that a reduced special setback of 50 feet from any property line for both the proposed dwelling and any future accessory structures would maintain the intent of the Special Setback Code and meet the criteria found in subsection [MCC 17.136.070(A)(3)(a) through (c)]. The subject

1 Petitioners argue that the hearings officer's findings are conclusory and
2 fail to address the actual language of the four adjustment standards at MCC
3 17.136.070(A)(3), and thus are inadequate to demonstrate that the proposed
4 adjustment meets those standards. Further, petitioners argue that the findings are
5 not supported by substantial evidence.

6 Respondents argue that the adjustment standards at MCC
7 17.136.070(A)(3) are borrowed from the "Siting Standards for Dwellings and
8 Structures in Forest Zones" at OAR 660-006-0029(1), which set forth siting
9 standards for dwellings in forest zones. As such, respondents argue that these
10 borrowed standards are clearly "siting" standards, meant to determine where the
11 best site to locate the dwelling on the property is, among considered alternatives,
12 not whether the dwelling should be sited at all. For that reason, respondents
13 contend, the standards are designed to locate the site on the property that has the
14 "least impact" on farm and forest lands, and will "minimize" adverse impacts.
15 Respondents argue that in other circumstances more detailed findings might be
16 required to evaluate alternative sites, but in the present case the small size and

parcel is served by the Silverton Suburban Fire District and is not
located in a forest, meeting criterion [MCC 17.136.070](A)(3)(d).
Therefore, the criteria are met.

"Applicant establishes that other properties in the area have less than
a 200 feet setback, and that the setback is appropriate for the size
and shape of the property. Therefore, the criteria are met." Record
17-18.

1 triangular shape of the parcel dictate only one location: in the geographic center
2 of the property, 50 feet from each of the three property lines, and equidistant from
3 the three surrounding farm uses. Respondents submit that in the present
4 circumstances the findings sufficiently explain how the relevant facts lead to the
5 conclusion that the proposed location complies with the four adjustment criteria.

6 We agree with petitioners that the findings fail to address the four
7 standards at MCC 17.136.070(A)(3) and are therefore inadequate. The main
8 conclusion is that the reduced setback would “maintain the intent of the Special
9 Setback Code and meet the criteria found in subsection MCC
10 17.136.070(A)(3)(a) through (c)].” Record 18. However, the intent of the Special
11 Setback Code is not one of the standards. The conclusion that the first three
12 criteria are met is a bare conclusion, without any attempt to explain why each of
13 the standards are met. The findings do not explain why a location in the
14 geographic center of the parcel has the “least impact on nearby or adjoining forest
15 or agricultural lands[,]” or minimizes adverse impacts on adjoining farm uses.
16 Respondents argue that the record does not suggest that any adjoining farm use
17 demands any more setback than other adjoining farm uses, but that argument begs
18 the question. There is apparently also no evidence in the record that the adjoining
19 farm operations are all *equally* sensitive to impacts of the proposed dwelling.

20 As respondents argue, MCC 17.136.070(A)(3) requires an evaluation of
21 alternative sites and a determination which site has the least impacts or minimizes
22 impacts. Intervenor and the hearings officer did not evaluate any sites other than

1 the geographic center, based on the implicit assumption that that location would
2 have the least impacts. But that assumption lacks any evidentiary foundation, and
3 is not demonstrated in any analytical findings. As discussed under the fifth
4 assignment of error, the adjoining orchard operation is subject to a specific set of
5 buffer and exclusion zones. A similar level of sensitivity may not govern the crop
6 operations on the other two sides. It could be that locating the dwelling just
7 outside the buffer and AEZ zones, but closer to the two crop operations, or closer
8 to the small-acreage homesite to the west, might represent the alternative with
9 the “least impact.” We don’t know because intervenor did not present evidence
10 on alternative sites, and the hearings officer adopted only conclusory findings
11 evaluating the MCC 17.136.070(A)(3)(a) - (c) standards.

12 As to the MCC 17.136.070(A)(3)(d) requirement to choose the alternative
13 site that minimizes the risk of wildfires, the hearings officer found only that the
14 “subject parcel is served by the Silverton Suburban Fire District and is not located
15 in a forest, meeting criterion (A)(3)(d).” Record 18. However, we agree with
16 petitioners that this finding does not explain why the adjustment standard is met.
17 Nothing in the text of MCC 17.136.070(A)(3)(d) suggests that wildfires are
18 limited to forest settings, and the fact that the entire parcel is within a fire district
19 does nothing to demonstrate that the proposed location, compared to alternative
20 sites, would minimize the risk of wildfire. For all we know, there are one or more
21 locations on the property, in a cleared area or near the road, that would
22 “minimize” the risk of wildfire compared to alternative sites on the property.

1 Finally, the hearings officer states that intervenor “establishe[d] that other
2 dwellings in the area less than a 200 feet setback” from property boundaries, and
3 thus “the setback [for the subject property] is appropriate for the size and shape
4 of the property.” Record 18. Petitioners argue, and we agree, that both elements
5 of this finding bear no relationship to any of the four adjustment standards.
6 Petitioners also argue that it is not supported by substantial evidence, citing to
7 evidence that all other dwellings in the area are farm dwellings, Measure 37 or
8 Measure 49 dwellings, dwellings that predate the land use program, or other
9 dwelling types that are not subject to the special setback requirement, which
10 applies only to dwellings that are not in conjunction with farm use. Even if there
11 were other nonfarm dwellings in the area with adjusted setbacks under MCC
12 17.136.070(A)(3), that circumstance would have no obvious bearing on which
13 location on the subject property has the least impact on farm uses, or minimizes
14 impacts on farm uses.

15 For the foregoing reasons, we agree with petitioners that remand is
16 required for the hearings officer to adopt more adequate findings addressing the
17 four MCC 17.136.070(A)(3) standards, supported by substantial evidence.

18 The second assignment of error is sustained.

19 **FIRST ASSIGNMENT OF ERROR**

20 MCC 17.119.070(B) requires a demonstration that a proposed conditional
21 use “will be in harmony with the purpose and intent of the zone.” The purposes

1 of the county's EFU zone are set out in MCC 17.136.010, which states in relevant
2 part:

3 "The purpose of the EFU * * * zone is to provide areas for continued
4 practice of commercial agriculture. It is intended to be applied in
5 those areas composed of tracts that are predominantly high-value
6 farm soils as defined in OAR 660-033-0020(8). These areas are
7 generally well suited for large-scale farming. It is also applied to
8 small inclusions of tracts composed predominantly of non-high-
9 value farm soils to avoid potential conflicts between commercial
10 farming activities and the wider range of non-farm uses otherwise
11 allowed on non-high-value farmland. Moreover, to provide the
12 needed protection within cohesive areas it is sometimes necessary
13 to include incidental land unsuitable for farming and some pre-
14 existing residential acreage."

15 The hearings officer identified the purpose and intent of the EFU zone, to
16 "promote and protect the commercial agricultural operations[]" within the zone.
17 Record 5. The hearings officer found that, given the existence of other dwellings
18 and outbuildings in close proximity to farm operations, the proposed dwelling is
19 unlikely to "cause disharmony," and thus complied with the "in harmony"
20 standard:

21 "The Marion County Code requires that a conditional use be 'in
22 harmony with the purpose and intent of the zone.' MCC
23 17.119.070(B). [Intervenor] establishes that there are ongoing farm
24 operations and residences located in the area around the subject
25 property. Because there are numerous shops and outbuildings and
26 four residences closer to the active farming operations, it is unlikely
27 that the addition of one residence on land that has not been farmed
28 (and may not reasonably be farmed) would cause disharmony with
29 the purpose and intent of the zone." Record 12.

1 Petitioners challenge this finding, arguing that the hearings officer misconstrued
2 the “harmony” standard and adopted findings not supported by substantial
3 evidence.

4 Petitioners contend that the hearings officer misconstrued MCC
5 17.119.070(B) to mean “unlikely” to “cause disharmony” with the purpose and
6 intent of the EFU zone. Petitioners argue that the express language of MCC
7 17.119.070(B) requires an affirmative demonstration that the proposed
8 conditional use is in “harmony” with the purpose and intent of the EFU zone, not
9 the lesser and very different showing that the use is “unlikely * * * to cause
10 disharmony” with the purpose and intent of the EFU zone. Record 12.

11 Petitioners also argue that the challenged finding is not supported by
12 substantial evidence. According to petitioners, the four dwellings in the area
13 referenced by the hearings officer are farm dwellings, Measure 37 or Measure 49
14 dwellings, or dwellings that pre-date the land use program, all of which are
15 allowed by state law to exist in EFU zones in close proximity to farm operations
16 without a required showing of harmony with the purpose and intent of the EFU
17 zone. Petitioners argue that, given the fundamental difference in nature between
18 other dwellings in the area and the proposed nonfarm dwelling, the fact that other
19 dwellings in the area are located in proximity to farm operations provides no
20 evidentiary support for the conclusion that the proposed nonfarm dwelling
21 satisfies the harmony standard. Petitioners argue that all the evidence in the
22 record is to the contrary, citing to testimony from petitioners and other area

1 farmers that the proposed nonfarm dwelling would adversely impact farm
2 operations in the area.

3 Initially, respondents argue that, because the board of commissioners
4 affirmed the hearings officer's decision as the county's final decision, the
5 commissioners necessarily adopted the hearings officer's code interpretations.
6 Accordingly, respondents argue, LUBA's standard of review over petitioners'
7 challenge to the hearings officer's interpretation is subject to the deferential
8 standard of review set out in ORS 197.829(1)(a) through (c) and *Siporen v. City*
9 *of Medford*, 349 Or 247, 243 P3d 776 (2010), that applies to review of a
10 governing body's interpretations of its local land use provisions.⁸ As framed in
11 *Siporen*, we must affirm a governing body's interpretation of a local land use
12 regulation that is "plausible." 349 Or at 259.

⁸ ORS 197.829(1) provides, in relevant part:

"[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the [B]oard 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; [or]

"(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

1 Petitioners do not dispute that we must apply a deferential standard of
2 review to the hearings officer's interpretation of MCC 17.119.070(B).⁹ However,
3 petitioners argue that, even under a deferential standard of review, the hearings
4 officer's interpretation of the MCC 17.119.070(B) harmony standard cannot be
5 affirmed, because it is inconsistent with the express language of the provision,
6 and its purpose and underlying policies, which are to protect the EFU zone.

7 Respondents contend that the hearings officer interpreted MCC
8 17.119.070(B) to be met as long as the proposed conditional use "is unlikely to
9 cause disharmony," that is, does not cause or worsen conflicts with commercial
10 agricultural operations, at least any greater impacts than the impacts of existing
11 dwellings and outbuildings. Joint Respondent's Brief 8. Respondents contend

⁹ Generally, a hearings officer's code interpretation is not entitled to the deferential standard of review set out in ORS 197.829(1)(a) through (c) and *Siporen*, but instead is subject to review for legal correctness. *Gage v. City of Portland*, 319 Or 308, 317, 877 P2d 1187 (1994). However, if the governing body expressly adopts the hearings officer's interpretation as its own, or impliedly does so by adopting the hearings officer's decision as the governing body's own, then LUBA must apply the deferential standard of review appropriate for a governing body's interpretation of its local legislation. *Derry v. Douglas County*, 132 Or App 386, 391-92, 888 P2d 588 (1995). The deferential standard of review does not apply if the governing body declines to review the hearings officer's decision, and its disposition of the appeal supports no inference of intent to adopt the hearings officer's code interpretations. *Gutoski v. Lane County*, 141 Or App 265, 268, 917 P2d 1048 (1996). Petitioners do not cite *Gutoski* or argue that the board of commissioners' summary denial of their appeal means that the commissioners did not adopt the hearings officer's interpretations as their own. Accordingly, we assume, as the parties do, that we defer to the interpretation of the local code provision MCC 17.119.070(B) in the hearing officer's decision.

1 that that interpretation is a plausible interpretation of the “in harmony” standard,
2 consistent with its express language, purpose and underlying policy.

3 As we understand the hearings officer’s re-phrasing of the MCC
4 17.119.070(B) “in harmony” standard, to mean something like “not cause
5 disharmony,” the standard is met even if the proposed conditional use has adverse
6 impacts on commercial agricultural operations, as long as such adverse impacts
7 are no greater than that caused by existing dwellings and outbuildings in the area.
8 We agree with petitioners that such an interpretation is inconsistent with the
9 express language of MCC 17.119.070(B), and its purpose and underlying policy.

10 The hearings officer reasoned that “[b]ecause there are numerous shops
11 and outbuildings and four residences closer to the active farming operations, it is
12 unlikely that the addition of one residence on land that has not been farmed (and
13 may not reasonably be farmed) would cause disharmony with the purpose and
14 intent of the zone.” Record 12. The “shops and outbuildings” cited are
15 presumably agricultural support buildings, or other buildings accessory to uses
16 that are permitted in the EFU zone. The hearings officer appears to reason that if
17 an agricultural support building is located closer to farm operations than the
18 proposed dwelling, any adverse impacts the dwelling might have on farm
19 operations is somehow neutralized by the adverse impacts of the more proximate
20 agricultural support building. However, agricultural support buildings are, by
21 their nature, supportive of agriculture and intended to be located in close
22 proximity to the operations they support. It is not “plausible” to rely on the

1 proximity of agricultural support buildings to farm operations to conclude that
2 similarly proximate non-farm conditional uses are “in harmony” with the
3 purposes and intent of a zone that protects commercial agricultural operations.

4 Similarly, the hearings officer cites the fact that four residences in the area
5 are located closer to farm operations than the proposed dwelling, again implying
6 that the proximity of such residences somehow neutralizes any adverse impacts
7 of the proposed dwelling. However, as petitioners argue, the four residences are
8 either farm dwellings or a type of permitted dwelling that state law allows in the
9 EFU zone notwithstanding proximity to and any impacts on farm operations.
10 Dwellings in EFU zones are not fungible, and neither are their impacts. It is not
11 a plausible reading of the “in harmony” standard to conclude that the adverse
12 impacts of a nonfarm dwelling allowed as a conditional use in the county’s EFU
13 zone are somehow neutralized by the presence of dwelling types that are
14 permitted uses in the EFU zone. Nor can such an interpretation be squared with
15 the purpose and policy underlying MCC 17.119.070(B), as applied here, to
16 protect commercial agricultural operations in the EFU zone.

17 For the above reasons, we agree with petitioners that the hearings officer’s
18 findings of compliance with MCC 17.119.070(B) are not supported by
19 substantial evidence. No reasonable person would conclude that a proposed
20 conditional use is “in harmony” with the intent and purpose of the EFU zone to
21 protect commercial agricultural operations, based solely on evidence that uses
22 permitted in the EFU zone, such as agricultural support buildings or farm

1 dwellings, are located closer to farm operations than the proposed conditional
2 use.

3 The first assignment of error is sustained.

4 **THIRD ASSIGNMENT OF ERROR**

5 Petitioners argued below that the MCC 17.119.070(B) harmony standard
6 is unconstitutional, under the United States Constitution, because it is overly
7 vague and subjective, lacks clear standards, and thus can be subject to arbitrary
8 application. The hearings officer declined to address the issue. On appeal,
9 petitioners repeat those arguments, citing a variety of state and federal cases to
10 support their contention that the hearings officer's application of the harmony
11 standard violated petitioners' constitutional rights.

12 Respondents reply that the land use cases cited by petitioners all involve
13 appeals by the applicants for a land use permit of some kind, seeking to overturn
14 a denial or some adverse condition imposed under a vague or subjective land use
15 standard. *Holland v. City of Cannon Beach*, 34 Or LUBA 1, *rev'd and rem'd*, 154
16 Or App 450, 962 P2d 701, *rev den*, 328 Or 115 (1998); *Larsson v. City of Lake*
17 *Oswego*, 26 Or LUBA 515, *aff'd*, 127 Or App 647, 874 P2d 99, *rev den*, 320 Or
18 110 (1994), *cert den*, 513 US 1128 (1995); *Marineau v. City of Bandon*, 15 Or
19 LUBA 375 (1987). Similarly, the non-land-use cases cited by petitioners, such as
20 *State v. Plowman*, 314 Or 157, 838 P2d 157 (1992), are criminal cases or cases
21 where the government enforced a law against a party, who then offers as a defense
22 that the standard is void for vagueness. Respondents argue that petitioners'

1 constitutional challenge is necessarily an as-applied challenge, that MCC
2 17.119.070(B) is unconstitutionally vague as applied *to them*, but petitioners
3 offer no authority for the proposition that non-applicant participants in a land use
4 proceeding can invoke the “void for vagueness” doctrine against a decision
5 approving the land use application. In any case, respondents also dispute that the
6 MCC 17.119.070(B) harmony standard is unconstitutionally vague, citing in
7 support the reasoning in *Easterly v. Polk County*, where an applicant’s challenge
8 under the vagueness doctrine to an approval standard requiring that the
9 conditional use “will be in harmony with the purpose and intent of the zone” was
10 rejected. 59 Or LUBA 417, 421 n 3 (2009).

11 We agree with respondents. The hearings officer imposed MCC
12 17.119.070(B) on the applicant, not on petitioners. The nature of the “void for
13 vagueness” doctrine is that it functions as a shield, not a sword, for persons
14 against whom the government imposes some legal standard. Petitioners cite no
15 authority and advance no persuasive argument why the doctrine should apply to
16 them to allow an opponent of a land use application to challenge a decision
17 approving that application.

18 Further, even if circumstances could exist in which a non-applicant could
19 invoke the “void for vagueness” doctrine to obtain reversal or remand of a land
20 use decision, petitioners have not established that the present case is one of those
21 circumstances. The outcome of a successful “void for vagueness” challenge is
22 that, as the name of the doctrine suggests, the land use standard at issue becomes

1 void and inapplicable to the persons on which it was imposed. However, such an
2 outcome could not result in reversal or remand in the present case; it would
3 simply mean that MCC 17.119.070(B) would no longer apply as an approval
4 criterion with respect to intervenor's land use application. At best, such an
5 outcome would render the portion of the hearings officer's decision that finds
6 compliance with MCC 17.119.070(B) obsolete. Petitioners articulate no theory
7 under which a successful invocation of the doctrine would result in reversal of
8 the hearings officer's decision or remand for any remedial purpose. Accordingly,
9 petitioners' arguments under the third assignment provide no basis for reversal
10 or remand.

11 The third assignment of error is denied.

12 **FOURTH ASSIGNMENT OF ERROR**

13 Petitioners contend that the board of commissioners violated their due
14 process rights under the Fourteenth Amendment to the United States
15 Constitution, by summarily rejecting their local appeal, without providing a
16 hearing or opportunity to be heard, or a resolution based on the merits of the
17 appeal.

18 As explained, the commissioners voted to deny petitioners' local appeal,
19 and affirm the hearings officer's decision as the county's final decision, without
20 conducting a hearing on the appeal, because the 150-day deadline for issuing a
21 decision under ORS 215.427(1)(a) had already passed and intervenor had not
22 consented to waive that deadline.

1 Respondents argue that petitioners fail to identify any “process” that was
2 due them under the county’s code or elsewhere, that would obligate the county
3 to provide them with a hearing or other opportunity to submit input on the
4 disposition of their local appeal of the hearings officer’s decision. Respondents
5 note that the county provided petitioners with the hearing before the hearings
6 officer that they were entitled to under ORS 215.416, in challenging the planning
7 director’s initial permit decision without a hearing. ORS 215.422(1)(a) provides
8 that a hearings officer’s decision can be appealed to the governing body,
9 “however the governing body prescribes[,]” and that the “procedure and type of
10 hearing for such an appeal or review shall be prescribed by the governing
11 body[.]” However, respondents argue that petitioners do not identify any local
12 code procedures that would prohibit the board of commissioners from disposing
13 of petitioners’ appeal in the manner and for the reason that the commissioners
14 did. Absent such an argument, respondents contend, petitioners’ due process
15 claims fail at the outset.

16 In the reply brief, petitioners identify MCC 17.111.010, 17.111.030, and
17 17.119.140 as county code provisions that entitle petitioners to notice of a hearing
18 before the commissioners, and a right to appear at the hearing. Reply Brief 3.
19 However, OAR 661-010-0039 provides that a reply brief “shall not include new
20 assignments of error or advance new bases for reversal or remand.” Petitioners
21 cannot omit an element of their due process claim in the petition for review, and
22 use the reply brief to correct that deficiency. In any case, even if we consider the

1 three cited MCC provisions, we note that MCC 17.119.160(C), concerning
2 appeals to the board of commissioners, expressly provides that on appeal of a
3 conditional use permit, the board of commissioners “may summarily, after
4 considering the application and appeal and finding that the facts therein stated do
5 not warrant any further hearings, affirm the action of the planning commission or
6 hearings officer and deny the appeal.” Nothing cited to us in the MCC, or
7 elsewhere, compels the board of commissioners to provide a hearing on a local
8 appeal, or prohibits the commissioners from summarily disposing of the appeal.
9 Petitioners have not established that the board of commissioners violated any
10 procedural obligations toward petitioners, or otherwise failed to give petitioners
11 the process they were due. *Accord Saige Timber, LLC v. Linn County*, LUBA No
12 2023-075 (Feb 2, 2024), *aff’d*, 333 Or App 643 (nonprecedential memorandum
13 opinion), *rev den*, 373 Or 81 (2024) (rejecting the petitioner’s argument that the
14 board of commissioners committed procedural error in affirming without *de novo*
15 hearing and review) (slip op at 6-8).

16 The fourth assignment of error is denied.

17 **SIXTH ASSIGNMENT OF ERROR**

18 MCC 17.136.060(A)(3) requires a finding that the proposed conditional
19 use will not have a significant adverse impact on, among other things,
20 groundwater. Opponents submitted evidence to the hearings officer regarding
21 growing groundwater constraints in the area. The hearings officer noted that the
22 subject property already has an established well with an adequate supply. The

1 hearings officer further noted the existence of a sensitive groundwater overlay
2 zone in the area, but noted that the subject property is not within that overlay
3 zone. Citing the lack of any evidence that residential use of the existing well
4 would impact groundwater, the hearings officer found compliance with MCC
5 17.136.060(A)(3), as it relates to groundwater:

6 “Appellants and Opponents raise concerns about water resources
7 and argue that placement of the nonfarm dwelling could have a
8 significant adverse impact on watersheds specifically. Opponents
9 state that wells need to be drilled deeper due to reduced availability
10 and argue that pulling water for residential use could have a
11 significant impact on groundwater. [Intervenor] argues that a single
12 residence with an already established well will not have a significant
13 adverse impact on groundwater.

14 “[Intervenor] states that there is a sensitive ground water overlay for
15 an area near the subject property which explains the Opponents
16 concern regarding water and the aquifer. However, the subject
17 property is not within that overlay zone. To demonstrate compliance
18 with the criterion, [intervenor] states in its Response that the
19 [intervenor’s] well is a good well which produces more than an
20 adequate supply of water. [Intervenor] posits that the well’s
21 adequate supply of water dispels the notion that there is a problem
22 with the aquifer. Although the availability of water is a legitimate
23 concern for the surrounding area, there is no indication that an
24 additional single-family dwelling would not be adequately served
25 by the existing well.” Record 13.

26 On appeal, petitioners argue that the foregoing findings are not supported
27 by substantial evidence, because it ignores the testimony of numerous farmers in
28 the area regarding a long-running problem with declining groundwater levels and
29 the need to deepen wells. Instead, petitioners argue, the hearings officer relies on
30 intervenor’s unsupported statement that the existing well on the property is

1 “adequate,” from which the hearings officer draws the unsupported assumption
2 that adding the dwelling to the property will not have an adverse impact on the
3 already stressed groundwater supply in the area.

4 Respondents argue that, based on the evidence that the subject property is
5 not within the nearby sensitive groundwater area and that the existing well on the
6 property is adequate, a reasonable person could draw the conclusion that the
7 proposed dwelling would not adversely impact the aquifer that the well draws
8 from. Respondents argue that the evidence opponents offered, that wells in some
9 larger undefined area have needed deepening over the years, does not undermine
10 that conclusion or compel a different conclusion.

11 We agree with respondents. While the evidence in the record regarding the
12 groundwater resource is extremely limited, the fact that the county, after study of
13 the long-standing groundwater depletion problem in the general area, chose not
14 to place the subject property within the sensitive groundwater overlay zone is
15 some evidence that the existing well on the subject property does not share in or
16 contribute to the groundwater problem in the general area. That inference is given
17 some support by the testimony that the existing well output is adequate, *i.e.*,
18 apparently not experiencing declines seen elsewhere. A reasonable decision
19 maker could rely on that evidence to conclude that the proposed dwelling would
20 not cause the existing well to adversely affect the groundwater resource. The
21 opposing testimony regarding the long history of groundwater decline elsewhere

1 in a larger undefined area is insufficient to render the evidence the hearings
2 officer relied upon insubstantial.

3 The sixth assignment of error is denied.

4 The county's decision is remanded.