



MARION COUNTY BOARD OF COMMISSIONERS

Board Session Agenda Review Form

Meeting date:	October 5, 2022		
Department:	Public Works	Agenda Planning Date:	Sept. 29, 2022
		Time required:	5 min.
<input type="checkbox"/> Audio/Visual aids	None		
Contact:	Lindsey King	Phone:	503-566-4162
Department Head Signature: 			

TITLE

Consider remanding the application for Conditional Use Permit (CU) 20-044 Seasons at Red Oaks Farm/ Jeff and Heidi Jones back to the hearing's officer

Issue, Description & Background

Jeff and Heidi Jones of Seasons at Red Oaks Farm, submitted an application for a Conditional Use Permit to operate a commercial use in conjunction with farm use on a 74.5-acre parcel in an Exclusive Farm Use (EFU) zone located at 21465 Arbor Grove Road, St. Paul.

The hearings officer conducted a public hearing on the application on April 29, 2021, and issued a decision on June 21, 2021, denying the request. This decision was appealed to the board. The board then held a public hearing on July 28, 2021, continued the hearing until August 11, 2021, at which time they granted approval of the application.

The case was then appealed to the Land Use Board of Appeals (LUBA), which issued a remand of the decision on April 21, 2022. On September 22, 2022, the applicant submitted a reconsideration request in response to the LUBA remand with a modified proposal.

The board must now make a decision on the remand.

Financial Impacts:

None

Impacts to Department & External Agencies

None

Options for Consideration:

1. Hold a public hearing on the matter.
2. Remand the case back to the hearing's officer for a decision.
3. Remand the case back to the hearing's officer for a recommendation and subsequent board hearing.

Recommendation:

Staff recommends that the board remand the matter back to the hearing's officer for a recommendation.

List of attachments:

1. Reconsideration Request
2. LUBA remand
3. Board Order

Presenter:

Brandon Reich



MARION COUNTY BOARD OF COMMISSIONERS

Board Session Agenda Review Form

Copies of completed paperwork sent to the following: (Include names and e-mail addresses.)

Copies to:

Lindsey King - lking@co.marion.or.us
Brandon Reich - Breich@co.marion.or.us



GELARDI LAW

Michael J. Gelardi
541-689-3094
mike@gelardilaw.com

FILED
MARION COUNTY CLERK

22 SEP 22 P1:29

September 22, 2022

BY HAND DELIVERY AND EMAIL TO clerksoffice@co.marion.or.us
breich@co.marion.or.us; snorris@co.marion.or.us

Marion County Board of Commissioners
c/o County Clerk
555 Court Street NE
Salem, OR 97301

RECEIVED
MARION COUNTY CLERK

22 SEP 22 P1:40

Re: CU 20-044: Request for remand proceeding

Dear Commissioners,

Pursuant to ORS 215.435 and a recent opinion from the Oregon Land Use Board of Appeals (LUBA No. 2021-089), Seasons at Red Oak Farm ("Applicant") requests that the Board of Commissioners commence the remand proceeding in this case. Applicant submits the materials listed below and included with this letter in support of this request. These materials total 114 pages, inclusive of this cover letter.¹

- Exhibit A: Remand narrative
- Exhibit B: LUBA No. 2021-088/089 opinion
- Exhibit C: Applicant's August 18, 2021 proposed findings and related correspondence
- Exhibit D: County's September 7, 2021 Order No. 21-084 and adopted findings
- Exhibit E: Lease agreements with Eric Kirsch Enterprises, Inc.
- Exhibit F: Supplemental farm income evidence

¹ The Marion County Code does not contain procedures for remand proceedings in land use cases. Applicant is filing this remand request with the County Clerk because that is consistent with the procedure that applies to local land use appeals to the Board of Commissioners. *See* MCC 17.119.160.

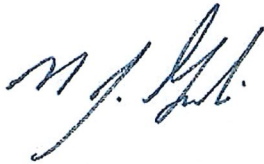
Marion County Board of Commissioners
September 22, 2022
Page 2

Exhibit G: Surrounding lands farm practices inventory (updated from 2020 version omitted from LUBA record by county)

Exhibit H: 2020 application materials omitted from LUBA record by county

Applicant also requests that the county incorporate the record of the prior local proceedings in this case, as compiled and paginated by the county for LUBA, into the record of this remand proceeding. *Del Rio Vineyards v. Jackson County*, LUBA No. 2015-104 (2016), establishes that an applicant may rely on the prior local record in a remand proceeding. Applicant refers to the prior local record throughout its remand materials according to the pagination created by the county for LUBA.

Sincerely,

A handwritten signature in dark ink, appearing to read 'M. J. Gelardi', written in a cursive style.

Michael Gelardi

**BEFORE THE BOARD OF COMMISSIONERS
FOR MARION COUNTY, OREGON**

In the Matter of the)	Case No. 20-044
Application of:)	Clerk's File No. 5820
Seasons at Red Oak Farm)	Conditional Use
(Jeff and Heidi Jones))	
)	

ORDER 21-084

This matter came before the Marion County Board of Commissioners for a public hearing at its regularly scheduled public meeting held on July 28, 2021, and continued on August 11, 2021, to consider an appeal of a hearings officer approval of an application of Seasons at Red Oak Farm, for a conditional use permit for a commercial activity in conjunction with farm use, located at 21465 Arbor Grove Road NE, St. Paul.

The Board, after having considered the hearings officer's decision, the Clerk's file, and the testimony and evidence contained in the record and provided at the hearing, makes the following order.

IT IS HEREBY ORDERED that the Board adopts the findings contained in Exhibit A, attached, as its own and approves an application for a conditional use permit for a commercial activity in conjunction with farm use subject to the conditions of approval listed in Exhibit B, attached.

DATED at Salem, Oregon this 7th day of September 2021.

MARION COUNTY BOARD OF COMMISSIONERS



Chair

 9-8-2021

Commissioner

 9/9/2021

Commissioner

JUDICIAL NOTICE

Oregon Revised Statutes, Chapter 197.830, provides that land use decisions may be reviewed by the Land Use Board of Appeals by filing a notice of intent to appeal within 21 days from the date this Order becomes final.

Findings of Fact

The Board of County Commissioners, after careful consideration of the testimony and evidence in the record, adopts the following findings of fact:

1. The subject property is designated Primary Agriculture in the Marion County Comprehensive Plan. The major purpose of this designation and the correspondent Exclusive Farm Use (EFU) zone is to promote the continuation of commercial agricultural operations.
2. The property is located on the south side of McKay Road NE, at its intersection with Arbor Grove Rd. NE, located at 21465 Arbor Grove Road, NE, St. Paul (T4S, R2W, Section 14, Tax Lots 100, 200, and 300). The parcel was subject of a Partition (P81-36) and is considered a legal lot for land use purposes. The property contains a single-family home and farm related buildings.
3. Surrounding properties in all directions are zoned EFU and are in farm use.
4. According to the Soil Survey for Marion County Area Oregon, the subject property is comprised of 99% high-value farm soils.
5. Applicants seek to establish an educational farm experience program for youth and families as a commercial activity in conjunction with farm use in the existing structures with a proposal for a new structure. The applicants are proposing that this experience be aimed at families and children, with collaborations with local, social, and agricultural organizations, including schools, businesses, Future Farmers of America, 4-H, and Fusion Marketing. The proposal will include educational and recreational activities that highlight farm uses including U-pick activities, harvest and holiday themed activities, retail sales of local farm products, plant identification, and wildlife viewing.
6. Applicants originally stated that the primary source of income will be admission fees and that there will be no standard operating hours and those visitors will be in large groups (i.e., school buses). At the Board hearing the applicant stated the days and hours of operations and program activities are by appointment only, Tuesday-Saturday between 9:00 a.m. and 5:00 p.m. These appointments will be limited to three groups per week, at no more than four hours at a time. These conditions of operation are found in condition

number 9.

7. The Marion County Planning Division requested comments on the application from various governmental agencies:

Public Works Land Development and Engineering Permits requested that the following be included in the land use decision:

ENGINEERING REQUIREMENTS

- A. Complete access work under the issued Access Permit for the separate commercial access to serve program.
- B. Transportation System Development Charges (SDCs) may be assessed for the proposed change- in-use on the prior constructed agricultural storage building for which use will reportedly be incorporated into the proposed farm experience program.

Marion County Building Inspection commented that a building permit, change of use or occupancy permit may be required.

St Paul Fire District commented that proposed development shall meet access and water supply requirements as outlined within the 2019 Oregon Fire Code.

All other contacted agencies either did not respond or stated no objection to the proposal.

Additional Findings of Fact and Conclusions of Law

8. Under MCC 17.119.020, a conditional use application may only be filed by certain people, including the lessee of the property subject to the application. The application was submitted by “Seasons at Red Oak Farm (Jeffery and Heidi Jones)”. The application indicates that Seasons at Red Oak Farm is the lessee of the subject property. The application was filed by the appropriate persons. MCC 17.119.020 is satisfied. MCC 17.119.025 requires certain signatures to be part of an application, including the owner of the subject property. The statutory warranty deed recorded in county records at reel 4198, page 461 shows Agritainment, Inc., an Oregon corporation, owns the subject property. The Oregon Secretary of State website indicates that Jeffery Jones is the president of Agritainment, Inc. As a condition of approval, Agritainment, Inc. shall be required to sign the application, by

Exhibit A

Jefferey Jones, its president. The application states: "Applicant Seasons at Read Oak Farm LLC ('Applicant') seeks a conditional use permit for commercial activity in conjunction with farm use pursuant to ORS 215.283(2)(a) and MCC 17.136.050(D)(2). Applicant proposes a farm experience program for children and families to learn about and enjoy local agriculture and wildlife."

ORS 215.283 provides uses permitted in exclusive farm use zones in non-marginal land counties. ORS 215.283(2)(a) provides that 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, is a nonfarm use that may be established, subject to the approval of the governing body or its designee in any area zoned for exclusive farm use. MCC 17.136.050(D)(2) provides uses permitted in exclusive farm use zones subject to obtaining a conditional use permit for commercial activities in conjunction with farm use, and subject to MCC 17.136.060(D), discussed below.

9. MCC 17.136.010 contains the EFU zone purpose statement:

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

To encourage large-scale farm operations the EFU zone consolidates contiguous lands in the same ownership when required by a land use decision. It is not the intent in the EFU zone to create, through land divisions, small-scale farms. There are sufficient small parcels in the zone to accommodate those small-scale farm operations that require high-value farm soils. Subdivisions and planned developments are not consistent with the purpose of this zone and are prohibited.

Exhibit A

To minimize impacts from potentially conflicting uses it is necessary to apply to non-farm uses the criteria and standards in OAR 660-033-0130 and in some cases more restrictive criteria are applied to ensure that adverse impacts are not created.

The EFU zone is also intended to allow other uses that are compatible with agricultural activities, to protect forests, scenic resources and fish and wildlife habitat, and to maintain and improve the quality of air, water and land resources of the county.

Non-farm dwellings generally create conflicts with accepted agricultural practices. Therefore, the EFU zone does not include the lot of record non-farm dwelling provisions in OAR 660-033-0130(3). The provisions limiting non-farm dwellings to existing parcels composed on Class IV-VIII soils [OAR 660 033- 0130(4)] are included because the criteria adequately limit applications to a very few parcels and allow case-by-case review to determine whether the proposed dwelling will have adverse impacts. The EFU zone is intended to be a farm zone consistent with OAR 660, Division 033 and ORS 215.283.”

MCC 17.136 provisions are intended to carry out the purpose and intent of the EFU zone. If applicable MCC 17.136 and related criteria are met, the proposed use will be in harmony with the purpose and intent of the zone. The criteria are discussed below.

10. In granting a conditional use, the Board shall determine any conditions necessary for the public health, safety or welfare, or to protect safety of persons working or residing in the area, or for the protection of property or improvements in the neighborhood. As conditioned, MCC 17.119.070(C) would be met.

MCC 17.136.060(A)

11. Under MCC 17.136.060(A), the following criteria apply to all conditional uses in the EFU zone:
 - A. 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.
 - B. Adequate fire protection and other rural services are or will be available when the

use is established.

- C. The use will not have a significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality.
 - D. Any noise associated with the use will not have a significant adverse impact on nearby land uses.
 - E. The use will not have a significant adverse impact on potential water impoundments identified in the Comprehensive Plan, and not create significant conflicts with operations included in the Comprehensive Plan inventory of significant mineral and aggregate sites.
2. Farm practices. Under *Schellenberg v. Polk County*, 21 Or LUBA 425, 440 (1991), a three-part analysis is required to determine whether a use will force a significant change in or significantly increase the cost of farm or forest practices on surrounding lands devoted to farm use. First, the county must identify the accepted farm and forest practices occurring on surrounding farmland and forestland. The second and third parts of the analysis require that the county consider whether the proposed use will force a significant change in the identified accepted farm and forest practices, or significantly increase the cost of those practices.

Applicants have 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. 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. Applicants presented evidence at the hearing of support for the proposal in the neighboring area, as well as the educational benefits of such a program. Applicants emphasize the nexus between educational experience on a farm and the intergenerational upholding of the practices of agriculture. Applicants 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)(1)

will be satisfied.

12. Adequate services. Utility lines are available on the subject property. The subject property is not within a Sensitive Groundwater Overlay (SGO) zone. Applicants state that no development will occur in wetland areas or within the creek, which will maintain natural fish and wildlife habitat.

The subject property is located on the south side of McKay Road NE at the intersection with Arbor Grove Rd. NE. Applicants have not submitted a traffic impact analysis (TIA) or other documentation regarding traffic generated by the proposed use or its various parts, but applicants noted that visitors will arrive in large groups, often on school buses. As limited and conditioned, transportation facilities will be adequate. The property is served by Marion County Sheriff's Department for public safety and Marion County Fire District #1 for fire protection. Sewage disposal is provided by private septic system and any expansion shall require additional authorization which is a condition of approval. With the noted conditions, adequate services will be provided. As conditioned, MCC 17.136.060(A)(2) will be satisfied.

13. Significant adverse impact. The property is not in an SGO zone or state groundwater limited area. The site is not in a geologic hazard or floodplain overlay zone. No MCCC-identified major or peripheral big game habitat or watershed areas are on or near the subject property. An approved on-site wastewater disposal system will protect water quality and soil and slope stability. With a condition requiring septic system approval, MCC 136.060(A)(3) will be satisfied.
14. Noise. Applicants state that they will follow all state and local noise standards. MCC 136.060(A)(4) will be satisfied.
15. Water impounds/mineral and aggregate sites. No MCCC identified mineral and aggregate sites or potential water impounds are on or near the subject property. MCC 17.136.060(A)(5) is satisfied.

MCC 17.136.060(D)

16. Under MCC 17.136.060(D), commercial activities in conjunction with farm use are subject to the following criteria:

Exhibit A

- A. The commercial activity must be primarily a customer or supplier of farm uses.
 - B. The commercial activity must enhance the farming enterprises of the local agricultural community to which the land hosting that commercial activity relates.
 - C. The agricultural and commercial activities must occur together in the local community.
 - D. The products and services provided must be essential to the practice of agriculture.
17. Primarily a customer or supplier of farm uses. Applicants propose a learning experience for youth and families per the applicant statement. The Applicants present "three separate lines of evidence to demonstrate compliance with the county's customer/supplier standard. The three presented positions are (1) The proposed Program will use crops grown on the property and other nearby farms; (2) Specific crops grown on the property will be used in each element of the proposed Program. The Applicants also indicate that they have an affiliated nursery business, Fusion Marketing. (3) The proposed Program is a supplier of farm uses because the Program is to help secure the long term supply of agricultural workers.

Applicants explain how Applicants intend to grow fruit, vegetables, and ornamental plants in greenhouses and in a large garden area in the central portion of the property. Applicants describe a U-pick activity with such farm crops, involving a "know how they grow" program involving demonstrations of farming tasks, harvesting activities, holiday activities, and purchasing local farm crops for retail sale. It is proposed that Applicants are primarily a customer or supplier of farm uses by purchasing or otherwise utilizing farm crops in Program activities."

Applicants posit that the Program is a supplier of farm uses because the purpose of the Program is to help secure the long term supply of local agricultural workers. It 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.

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. This criterion is met.

18. Enhance farming enterprises in local agricultural community. The proposed learning experience will enhance local farming enterprises by developing a market for other local farm crops and the labor to manage local farms. This criterion is met.
19. Occur together in the local community. 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. This criterion is met.
20. Products and services essential to the practice of agriculture. The Applicants assert that Oregon courts and the state legislature have long recognized that building consumer interest and market demand for local farm crops is essential to Oregon agriculture. The Applicant argues that the county's "essential to the practice of agriculture" standard is met because the Program is designed to market local farm crops and to promote local agriculture. Applicant clearly identifies how the commercial activity provided is essential to the practice of agriculture through marketing local farm crops and promoting local agriculture. 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.

Applicants would be receiving local farm crops and then processing and marketing the crops; here, Applicants are primarily focusing on the education of local, farm-related customers.

Applicant here argues that a motivated and qualified agricultural workforce is essential to the practice of agriculture, and argues that the proposed use will inspire and train young people to pursue careers in Oregon agriculture. Witness Tom Harbolt indicated that his livelihood is in agriculture, and he cannot find enough qualified workers who are interested in agriculture as a career. Mr. Harbolt posits that as there is less funding in education, exposure to agriculture as an educational experience will expose people at a young age to the possibility of a career in agriculture. Mr. Harbolt testified that there is a nexus between the educational experience and upholding the practice of agriculture. Mr.

Exhibit A

Harbolt also stated that he was not raised on a farm, supporting the idea that agricultural careers are not solely for those individuals raised on a farm.

Witness Nicole Sharpe testified in support of the Application. Ms. Sharpe lives adjacent to the subject property, and testified that she would have benefitted by an agricultural educational experience in her farming activities and agrees that the agricultural experience for children is important for appreciation and interest in agriculture as a career.

Witness Steve Catts testified in support of the Application. Mr. Catts testified that Jeff Jones was instrumental in getting him into agriculture. Mr. Catts believes that the agricultural education experience would contribute to interest in agriculture as a career. There are limited opportunities for horticulture and mechanic programs in schools, a need for managers in the agriculture industry, and he believes that the educational program proposed by Applicant is desperately needed to bring interest in agriculture as a career.

Opponents to the proposed conditional use brought up several complaints regarding the proposed use. One opponent stated the farm's primary income should be from farm use, not admission fees. If a use is determined to be a commercial activity in conjunction with farm use, it would be able to generate income from that use on farm land under the county zoning code. Other opponents made arguments regarding safety of roadways, specifically McKay Road access, loss of farm lands to non-farming practices, and that the proposal is not a supplier or customer of farm use. If a use is determined to be a commercial activity in conjunction with farm use, it is a use allowed on farm land and conditions can be placed on the approval to minimize any potential conflict with surrounding uses. The hours of operation and the size of the groups visiting the property will ensure that the roadway network can support the proposed use.

Based on the information provided, the Board finds that the Applicant's 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. This criterion is met.

EXHIBIT B

CONDITIONS: The following conditions must be met before a building permit can be obtained or the approved use established:

1. Agritainment, Inc. shall sign the application as the owner of the subject property, by Jeffrey Jones, its president.
2. The applicant shall obtain all required permits from the Marion County Building Inspection Division including any onsite sewage disposal requirements.
3. The applicants shall provide a detailed site plan for review of development standards in Marion County Zoning Code (MCZC), such as parking, access, signs and setbacks. The detailed site plan shall significantly conform to the site plan submitted with the proposal. Minor variations are permitted upon review and approval by the Planning Director.
4. The approved commercial activity is limited to the use proposed in the application, specifically the five elements of the farm experience program listed below:
 - a. "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.
 - b. 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 a children's garden near the new workshop building and inside the workshop in the central portion of the Property.
 - c. 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.
 - d. Harvest and holiday themed activities: Seasonal activities that complement the above activities, including for example corn maze, cider pressing, pumpkin toss, winter wonderland hike.
 - e. 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)
5. In order to ensure that the commercial activity remains incidental and secondary to farm use of the property, 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.
6. Any light used to illuminate a parking or loading area shall be directed away from any abutting properties or public streets.
7. Any sign placed on the property shall meet the standards in Chapter 17.191 MCC.
8. Applicant must submit proof that Applicant has provided at least 9 parking spaces that are 9' x 17' as required by MCC 17.118.050 and 17.118.070(D)(1), plus the three disabled-accessible spaces proposed by Applicant.

EXHIBIT B

9. 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. Applicant will instruct groups to avoid McKay Road and instead reach the property from the south.
10. Failure to continuously comply with the conditions of approval may result in this approval being revoked. Any revocation may be appealed in accordance with Marion County Code Title 17.

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

1 FINAL OPINION
2 AND ORDER
3

4 Appeal from Marion County.
5

6 Andrew Mulkey filed a petition for review and reply brief and argued on
7 behalf of petitioner Friends of Marion County.
8

9 Steven E. Shipsey filed a petition for review and argued on behalf of
10 petitioner Department of Land Conservation and Development.
11

12 No appearance by Marion County.
13

14 Michael J. Gelardi filed intervenors-respondents' brief and argued on
15 behalf of intervenors-respondents.
16

17 ZAMUDIO, Board Chair; RUDD, Board Member; RYAN, Board
18 Member, participated in the decision.
19

20 REMANDED 04/21/2022
21

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

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

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

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

11 **MOTION TO TAKE OFFICIAL NOTICE**

12 Intervenor's request that we take official notice of written testimony in the
13 legislative history of Senate Bill 841 (2013), Oregon Laws 2013, chapter 554,
14 section 3, codified at ORS 215.456, regarding the siting of wineries on land zoned
15 EFU pursuant to standards that apply to commercial activities in conjunction with
16 farm use. We regularly consider legislative history in interpreting state statutes
17 and administrative rules, consistent with the legislative directive that LUBA
18 "decisions be made consistently with sound principles governing judicial
19 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).

1 statute, a court shall pursue the intention of the legislature if possible.”); ORS
2 174.020(1)(b) (“To assist a court in its construction of a statute, a party may offer
3 the legislative history of the statute.”). We will consider the legislative history
4 offered by intervenors to the extent that it is relevant to the disputed issues.

5 **BACKGROUND**

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

10 “[Intervenors] produced wheat crops [on] the Property in 2019 and
11 2020, and [intervenors] plan[ned] production of a clover crop in
12 2021 in the southern and western fields on the Property.
13 [Intervenors] plan[] to produce fruits, vegetables and ornamental
14 plants in greenhouses and in a large garden area in the central
15 portion of the Property.” Record 466.

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

20 “• ‘Know how they grow’ activities: Educational activities that
21 utilize display plants to teach children about how crops are
22 grown, harvested, assessed for quality and weighed. These
23 activities are designed for groups of typically less than 30
24 people and will be conducted in the central portion of the
25 Property.

- 1 “• Plant identification and wildlife viewing: Guided nature
2 walks for small groups along restored trails in the forested
3 western portion of the Property near Champoeg Creek, as
4 well as in the children’s garden near the new workshop
5 building and inside the workshop in the central portion of the
6 Property.
- 7 “• U-Pick activities: Micro-harvesting activities such as
8 sunflower seed collection for small groups of children in the
9 central portion of the Property. These activities will allow
10 children to be active and enjoy the outdoors while also
11 encouraging interest in agriculture.
- 12 “• Harvest and holiday themed activities: Seasonal activities that
13 complement the above activities, including for example corn
14 maze, cider pressing, pumpkin toss, winter wonderland hike.
- 15 “• Retail sales of farm crops: Small scale sales designed to
16 showcase local farm products and to complement the
17 activities above (e.g. pumpkins and gourds, cider, hazelnuts,
18 ornamental plants).” Record 14, 466-67.

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

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

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

3 Intervenor’s appealed to the board of county commissioners, which, after a
4 *de novo* hearing, approved the CUP. This appeal followed.

5 **FIRST ASSIGNMENT OF ERROR (DLCD and Friends)**

6 **SECOND ASSIGNMENT OF ERROR (DLCD)**

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

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

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

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

4 **A. Standard of Review**

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

11 We agree with DLCD that whether the proposed use is a commercial
12 activity that is in conjunction with farm use is an issue of state law under ORS
13 215.283(2)(a). MCC 17.136.060(D) implements ORS 215.283(2)(a) and must be
14 interpreted consistently with state law. *Kenagy v. Benton County*, 112 Or App,
15 17, 20 n 2, 826 P2d 1047 (1992); *City of Sandy v. Clackamas County*, 28 Or
16 LUBA 316, 319-20 (1994). The question is whether the county’s construction
17 and application of the term “[c]ommercial activities that are in conjunction with
18 farm use” is correct.

19 **B. Farm use**

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

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

7 As used in ORS 215.283(2)(a), "farm use" is defined in ORS
8 215.203(2)(a):

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

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

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

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

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

8 Friends points out that the primary purpose of the U-Pick activities is
9 education and not selling a crop. Intervenor described the U-Pick activities as
10 “[m]icro-harvesting activities such as sunflower seed collection for small groups
11 of children” and explained that “[t]hese activities will allow children to be active
12 and enjoy the outdoors while also encouraging interest in agriculture.” Record
13 14, 467. Intervenor has leased 45 acres on an adjacent property to produce
14 pumpkins, gourds, and ornamental corn that “will be incorporated into the
15 Program, possibly sold as U-Pick and donated to local churches and schools to
16 use as fall decorations.” Record 364-65. The U-Pick activities would be through
17 invitation and sign-up only. Audio Recording, Marion County Board of
18 Commissioners, July 28, 2021, at 1:35:10 - 1:35:55.

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

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

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

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

3 Intervenor respond that they have “maintained the field acres of the
4 property in commercial crop production since * * * 2019.” Intervenor-
5 Respondents’ Brief 3. Specifically, intervenors planted a wheat crop in late 2019
6 that was harvested in 2020. Intervenor then planted a clover crop for harvest in
7 2021. Record 466. Intervenor testified that both crops were sold. Audio
8 Recording, Marion County Board of Commissioners, July 28, 2021, at 1:41:29.
9 Intervenor testified that they intend to utilize the field acres for commercial crop
10 production indefinitely and agreed to a condition of approval making the program
11 approval contingent on continued farm use of the portion of the property suitable
12 for field crops.³ Record 14.

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

³ Intervenor 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. Intervenor-Respondents’ Brief 4 (citing Record 248; 273-82; 364-65; 445-46; 466-68; 484).

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

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

11 Adequate findings (1) address the applicable standards, (2) set out the facts
12 relied upon, and (3) explain how those facts lead to the conclusion that the
13 standards are met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992);
14 *see also Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21,
15 569 P2d 1063 (1977) (“What is needed for adequate judicial review is a clear
16 statement of what, specifically, the decision-making body believes, after hearing
17 and considering all the evidence, to be the relevant and important facts upon
18 which its decision is based.”). A finding of fact is supported by substantial
19 evidence if the record, viewed as a whole, would permit a reasonable person to
20 make that finding. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608
21 (1993); *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988).

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

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

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

22 We have explained:

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

10 Similarly, whether a specific crop is profitable is not dispositive of whether that
11 crop production is a farm use. *See Wachal v. Linn County*, 78 Or LUBA 227, 242
12 (2018), *aff’d*, 295 Or App 668, 433 P3d 787 (2019) (concluding that hay
13 production was a “farm use” because tax return information showed that the
14 applicant received income from the hay production, despite that that information
15 also demonstrated that the applicant had not profited from the activity in recent
16 tax years).

17 In *Landwatch Lane County v. Lane County*, ___ Or LUBA ___ (LUBA No
18 2020-104, Mar 19, 2021), a local code provision required the applicant to
19 establish that the subject tract was employed for farm use, under the same
20 definition of farm use in ORS 215.203(2)(a). The applicant submitted testimony,
21 aerial photos, tax filings, and a commodities report evidencing an existing cattle
22 operation on the subject property. We reasoned that the testimony and aerial
23 photos alone were not substantial evidence of farm use. However, we concluded
24 that the tax filings and the commodities report constituted substantial evidence of
25 the farm use.

1 Here, intervenors have simply testified that they sold the field crops with
2 no other documentation of their production or sale. The fact that intervenors
3 testified that the 2019 wheat crop and 2021 clover crop were “sold” is not
4 substantial evidence to support a conclusion that those field crops were sold for
5 a profit or grown for the primary purpose of obtaining a profit. We agree with
6 Friends that, viewed as a whole, the record before the county and before us would
7 not permit a reasonable person to find that the field crops were grown for the
8 primary purpose of obtaining a profit. *Dodd*, 317 Or at 179; *Younger*, 305 Or at
9 360.

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

14 Friends’ first assignment of error, first subassignment, is sustained.

15 **C. In conjunction with farm use**

16 We proceed to address petitioners’ arguments that the county’s conclusion
17 that the program is “in conjunction with” farm use misconstrues the applicable
18 law and is not supported by adequate findings or substantial evidence. The phrase
19 “[c]ommercial activities that are in conjunction with farm use” in ORS
20 215.283(2)(a) is not defined by statute or administrative rule. *See* ORS 215.203
21 (providing definitions for purposes of EFU statutes); OAR 660-033-0020
22 (providing definitions for OAR chapter 660, division 33). The statutory phrase

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

5 “1. The commercial activity must be primarily a customer or
6 supplier of farm uses.

7 “2. The commercial activity must enhance the farming
8 enterprises of the local agricultural community to which the
9 land hosting that commercial activity relates.

10 “3. The agricultural and commercial activities must occur
11 together in the local community.

12 “4. The products and services provided must be essential to the
13 practice of agriculture.”

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

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

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

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

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

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

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

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

9 In *City of Sandy*, we concluded that those cases “stand for the relatively
10 straightforward proposition that a commercial activity in conjunction with farm
11 use must be either exclusively or primarily a customer or supplier of farm uses.”
12 28 Or LUBA at 321. We explained that,

13 “even if a commercial activity primarily sells to farm uses, that may
14 not be sufficient to allow the commercial activity to qualify as a
15 commercial activity in conjunction with farm use. There is a second
16 inquiry that must be satisfied. The products and services provided
17 must be ‘essential to the practice of agriculture.’ While farmers must
18 eat and farm equipment frequently operates on gasoline, that is not
19 sufficient to make grocery stores or gas stations commercial
20 activities in conjunction with farm use. The connection must be
21 closer to the ‘essential practice of agriculture.’” *Id.* at 322.

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

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

1 the area. The same holds true for the mailbox, UPS and fax services.
2 There is evidence that *some* of intervenor's expected sales and
3 rentals will be to farm uses, but it is equally clear from the record
4 that there is a potentially large number of customers for the items
5 and services intervenor will offer that are *not* farm uses. The record
6 in this case is inadequate to demonstrate sales and rentals will be
7 primarily to farm uses in the area and, for that reason, is inadequate
8 to demonstrate that the authorized use is a 'commercial activity in
9 conjunction with farm use.'" *Id.* (emphasis in original; footnote
10 omitted) (citing *Chauncey v. Multnomah County*, 23 Or LUBA 599,
11 606-07 (1992)).

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

16 "Commercial use in conjunction with farm use is not typically
17 associated with children and family extracurricular activities,
18 however the proposed commercial use is designed to promote
19 farming to youths with the intent of creating future farmers.

20 "* * * * *

21 "Based on the information provided, the Board finds that
22 [intervenors'] proposed program is essential to the practice of
23 agriculture in that it promotes agriculture as a valued Oregon
24 enterprise, actively markets local agricultural products, and helps to
25 train new generations of agricultural workers. The proposed
26 program builds consumer interest in Oregon agriculture and
27 contributes to the inspiration of youth to pursue a career in
28 agriculture." Record 12-13.

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

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

10 We also agree with the county’s conclusion that farm workers are essential
11 to the practice of agriculture. However, the major flaw in the county’s reasoning
12 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.

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

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

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

1 tail wagging the dog.” *Craven v. Jackson County*, 94 Or App 49, 54, 764 P2d 931
2 (1988), *aff’d*, 308 Or 281, 779 P2d 1011 (1989) (“There is, of course, a risk of
3 the tail wagging the dog in many situations where secondary activities are
4 permitted because they serve primary ones[.]”).⁵

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

8 DLCD’s and Friends’ first assignments of error are sustained.

9 DLCD’s second assignment of error is sustained.

10 **SECOND ASSIGNMENT OF ERROR (Friends)**

11 A commercial activity that is in conjunction with farm use must satisfy
12 what is commonly referred to as the farm impacts test, which requires the
13 applicant to establish and the local government to find that the nonfarm use will
14 not force a significant change in, or significantly increase the cost of, accepted
15 farm or forest practices on surrounding lands devoted to farm or forest use. ORS
16 215.296; 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:

1 farm and farm-practice-by-farm-practice basis and requires (1) the applicant to
2 identify the surrounding lands, the farms on those lands, the accepted farm
3 practices on each farm, and the impacts of the proposed nonfarm use on each
4 farm practice; (2) the local government to determine whether the proposed
5 nonfarm use will force a “significant” change to, or cost increase in, an accepted
6 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.”

1 change, the local government to determine whether the applicant has
2 demonstrated that the nonfarm use meets the test with conditions of approval.
3 *Stop the Dump Coalition v. Yamhill County*, 364 Or 432, 444-45, 435 P3d 698
4 (2019).

5 The county found:

6 “The surrounding properties are zoned EFU and are currently in
7 agricultural use of various sizes. The primary practices in the
8 immediate area are grass seed, hazelnuts, peaches, and a larger
9 raspberry farm. The proposed learning experience would occur in
10 the local community without disruption to surrounding farm
11 operations. [Intervenors] presented evidence at the hearing of
12 support for the proposal in the neighboring area, as well as the
13 educational benefits of such a program. [Intervenors] emphasize the
14 nexus between educational experience on a farm and the
15 intergenerational upholding of the practices of agriculture.
16 [Intervenors] indicated their intention to coordinate with
17 surrounding lands, farm, and forest owners to ensure the activities
18 do not interfere with periodic agricultural traffic needs. The
19 testimony of adjacent neighbors also indicates that the farm
20 experience program would not force a significant change in their
21 accepted farm practices on surrounding lands. This use is expected
22 to be low impact; therefore the costs incurred by neighboring farms
23 will not be affected by the proposed activities. MCC
24 17.136.060(A)(1) will be satisfied.” Record 9-10.

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

28 The county’s findings identify crops “in the immediate area” but do not
29 identify the surrounding lands, the farms on those lands, the accepted farm

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

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

15 As Friends explain, the county’s failure to identify accepted farm practices
16 on surrounding lands makes it impossible to analyze the potential impacts of the
17 proposed use on such practices. *See Schellenberg v. Polk County*, 21 Or LUBA
18 425, 442 (1991) (“Without an adequate identification of the accepted farming
19 practices on surrounding lands, the county’s findings cannot explain why the
20 proposed use will not cause a significant change in or increase the cost of such
21 practices.”).

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

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

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

14 Intervenor respond that, while opponents raised general concerns about
15 traffic, "no one argued that traffic generated by the Program would impact local
16 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.

1 otherwise be impacted by the Program.” Intervenor-Respondents’ Brief 8.
2 Intervenor also point to the application narrative, which describes potential
3 trespass, noise, traffic, and visual impacts and explains why the program will not
4 create those impacts. Record 470.

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

⁸ Intervenor contends 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. Intervenor points 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. Intervenor 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.

1 that evidence “clearly supports” a conclusion that the farm impacts test is
2 satisfied. ORS 197.835(11)(b).

3 Friends’ second assignment of error is sustained.

4 **SUBSTANTIVE DUE PROCESS DEFENSE**

5 In defense of the county’s decision, intervenors assert that petitioners’
6 proffered interpretation of “[c]ommercial activities that are in conjunction with
7 farm use” for purposes of MCC 17.136.060(D) and ORS 215.283(2)(a) violates
8 the Joneses’ substantive due process rights. State and local land use regulation
9 that is not rationally related to a legitimate government purpose violates the
10 substantive due process rights of affected landowners under the Fourteenth
11 Amendment to the United States Constitution. *Euclid v. Ambler Co.*, 272 US 365,
12 395, 47 S Ct 114, 71 L Ed 303 (1926); *Powell v. DLCD*, 238 Or App 678, 243
13 P3d 798 (2010).

14 The purpose of the EFU statutes and Goal 3 is to preserve and maintain
15 agricultural land for agricultural uses. Intervenors do not argue that those are not
16 legitimate government purposes. Intervenors argue that petitioners’ arguments
17 about the proper interpretation and application of ORS 215.283(2)(a) and MCC
18 17.136.060(D) are not rationally related to the purpose of the EFU statutes or
19 Goal 3. Intervenors argue:

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

1 Program. By its nature, the Program must take place on a working
2 farm. The record demonstrates that the * * * Property is a working
3 farm that is suitable for this use. * * * [Intervenors have]
4 demonstrated that the Program will not negatively impact
5 surrounding farms.

6 “Given these facts, there is no legitimate government interest in
7 prohibiting [the] Program.” Intervenors-Respondents’ Brief 30-31
8 (footnote omitted).

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

17 We reject intervenors’ substantive due process defense of the county’s
18 decision.

19 **DISPOSITION**

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

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

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

14 The county's decision is remanded.