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

MCPHILLIPS FARM, INC., HELEN PRITCHETT,  
TRUSTEE OF THE EDWARD L. PRITCHETT FAMILY  
TRUST, CARL L. BERGSTROM  
and LINDA J. BERGSTROM,  
*Petitioners,*

vs.

YAMHILL COUNTY,  
*Respondent,*

and

RIVERBEND LANDFILL COMPANY, INC.,  
*Intervenor-Respondent.*

LUBA No. 2012-027

FINAL OPINION  
AND ORDER

Appeal from Yamhill County.

William K. Kabeiseman and Carrie A. Richter, Portland, represented petitioners.

Rick Sanai, County Counsel, McMinnville, represented respondent.

Tommy A. Brooks, Portland, represented intervenor-respondent.

BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN, Board Member,  
participated in the decision.

DISMISSED

10/30/2012

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 land use compatibility statement (LUCS), concluding that a proposed expansion of an existing landfill in the county’s Public Works/Safety (PWS) zone is compatible with the county’s comprehensive plan and land use regulations.

**FACTS**

In 1980, the county adopted a Statewide Planning Goal exception and comprehensive plan and zoning amendments that approved an exception to Statewide Planning Goal 3 (Agricultural Lands) and rezoned the subject property to PWS, to allow a landfill to be constructed on the property. At that time and to the present day, a “[s]anitary landfill” is listed as a permitted use in the PWS zone. Yamhill County Zoning Ordinance (YCZO) 802.02. At the same time, the county approved a floodplain permit for the landfill to place fill in a portion of the property within a floodplain. The landfill operator then obtained a solid waste disposal permit from the Oregon Department of Environmental Quality (DEQ), and constructed berms and the initial disposal cells of the landfill.<sup>1</sup>

In 1982, the county adopted a new zoning ordinance that in relevant part subjected all development in several zones, including the PWS zone, to the requirement to obtain site design review approval, pursuant to YCZO 1100. In 1990, intervenor-respondent (intervenor) sought DEQ approval to expand the landfill footprint to create new disposal cells, and to construct a leachate holding facility. Pursuant to a request from DEQ, county staff issued a LUCS concluding that both new disposal cells and the leachate holding facility were compatible with the county’s comprehensive plan and land use regulations. After DEQ sought clarification, the county board of commissioners agreed to conduct a hearing and, in 1992, issued a decision concluding that “continued development of solid waste disposal cells

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<sup>1</sup> As we understand it, a landfill “cell” is an area of a landfill that is actively being filled with solid waste. When the cell is full it is capped with earth, and the operation moves on to a new disposal cell.

1 contemplated in the original approval of the rezone and comprehensive plan amendment  
2 remains an outright permitted use,” not subject to site design review. Record 71. However,  
3 the commissioners concluded that the leachate holding facility was an accessory facility to  
4 the landfill, which was not contemplated in the 1980 rezoning, and therefore required site  
5 design review. The 1992 decision concludes that both proposals are compatible with the  
6 county’s land use regulations, the landfill expansion because it was authorized in the 1980  
7 decision, and the leachate holding facility because it is allowed as an accessory use to that  
8 permitted use, subject to site design review. The county then required intervenor to obtain  
9 site design review for the leachate holding facility, which was subsequently approved.

10 In 2012, intervenor applied to DEQ to construct a new perimeter berm on the western  
11 side of the existing landfill, which would allow the horizontal footprint of the landfill to be  
12 expanded approximately four acres to include new disposal cells on the subject property,  
13 entirely within the area already zoned PWS.<sup>2</sup> The new berm to be constructed is a particular  
14 type, known as “mechanically stabilized earthen” (MSE) berm. An MSE berm has vertical  
15 or near vertical inner walls, which increase potential cell capacity. The MSE berms will be  
16 approximately 40 feet high, taller than the existing berms, and that extra height will also  
17 increase potential cell capacity. On March 22, 2012, the county planning manager issued a  
18 LUCS, supported by findings, concluding that the proposed expansion of the landfill,  
19 including the new MSE perimeter berm, is a permitted use under the 1980 decision, and is  
20 not subject to site design review, for the reasons set out in the 1992 decision. This appeal  
21 followed.

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<sup>2</sup> Intervenor separately applied for site design review to construct or modify several new facilities, including a recycling facility, scales, maintenance facility, and leachate storage tanks. Consistent with the distinction drawn in the 1992 decision, the county required site design review approval for those facilities and, on March 21, 2012, approved them. That approval is not at issue in this appeal.

1 **JURISDICTION**

2 Intervenor moves to dismiss this appeal, arguing that the challenged LUCS falls  
3 within one or more of the exclusions to the definition of “land use decision” at ORS  
4 197.015(10)(a), and therefore is not subject to LUBA’s jurisdiction.

5 As amended in 2009 and effective January 1, 2010, ORS 197.015(10)(b)(H) provides  
6 that “land use decision” does not include a decision by a local government:

7 “That a proposed state agency action subject to ORS 197.180(1) is compatible  
8 with the acknowledged comprehensive plan and land use regulations  
9 implementing the plan, if:

10 “(i) The local government has already made a land use decision  
11 authorizing a use or activity that encompasses the proposed state  
12 agency action;

13 “(ii) The use or activity that would be authorized, funded or undertaken by  
14 the proposed state agency action is allowed without review under the  
15 acknowledged comprehensive plan and land use regulations  
16 implementing the plan; or

17 “(iii) The use or activity that would be authorized, funded or undertaken by  
18 the proposed state agency action requires a future land use review  
19 under the acknowledged comprehensive plan and land use regulations  
20 implementing the plan[.]”

21 There is no dispute that the foregoing exceptions are intended to apply to a LUCS issued by a  
22 local government concluding that a state agency action subject to ORS 197.180(1) (in the  
23 present case, modification of the DEQ permit to allow an expanded landfill) is compatible  
24 with the local government’s acknowledged comprehensive plan and land use regulations.

25 Intervenor argues that the challenged LUCS falls within the exception at ORS  
26 197.015(10)(b)(H)(i) because the county’s 1980 decision approving a goal exception and  
27 comprehensive plan and zoning amendments to allow construction of a landfill on the subject  
28 property constitutes “a land use decision authorizing a use or activity that encompasses the  
29 proposed state agency action,” for the reasons explained in the county manager’s findings  
30 and the board of commissioners’ 1992 decision. In addition, intervenor argues that the

1 challenged LUCS also falls under ORS 197.015(10)(b)(H)(ii), because a landfill is a  
2 permitted use in the PWS zone, and therefore it is “allowed without review” under the  
3 county’s acknowledged comprehensive plan and land use regulations.

4         Petitioners dispute that either exception applies. Petitioners argue that the proposed  
5 landfill expansion is not authorized by any prior county land use decision and thus does not  
6 fall within the first exception at ORS 197.015(10)(b)(H)(i). Further, petitioners contend that  
7 the proposed landfill expansion is “development” and requires site design review, and thus  
8 does not fall within the second exception at ORS 197.015(10)(b)(H)(ii). In addition,  
9 petitioners argue that the exceptions at ORS 197.015(10)(b)(H)(i) and (ii) do not apply  
10 because the existing landfill has never obtained site design review as required under the 1982  
11 zoning ordinance, and the existing landfill is therefore a non-conforming use. Because the  
12 landfill is a non-conforming use, petitioners argue, any expansion of that non-conforming use  
13 must be evaluated and approved as an alteration to the non-conforming use, and for that  
14 additional reason the expansion is neither “authorized” by a past decision nor “allowed  
15 without review.”

16         We note that, as framed by the parties, resolution of the jurisdictional issue  
17 effectively requires LUBA to resolve the likely merits of the appeal, and determine whether  
18 the county *correctly* concluded that the proposed landfill expansion was authorized under the  
19 1980 decision and does not require site design review. However, that is sometimes  
20 necessary, depending on the wording of the relevant statutory exclusion. In *Southwood*  
21 *Homeowners v. City Council of Philomath*, 106 Or App 21, 23-25, 806 P2d 162 (1991), the  
22 Court of Appeals held that where a statutory exclusion is worded such that LUBA’s  
23 jurisdiction turns on whether the decision is correct or not, LUBA must address the merits of  
24 an appeal to the extent necessary to determine whether the challenged decision falls within  
25 the statutory exclusion. *Southwood* involved a now superseded statutory exclusion for  
26 subdivisions and partitions within urban growth boundaries that are “consistent with land use

1 standards.” The Court held that in order for LUBA to determine whether the exclusion  
2 applies, LUBA must resolve the parties’ disputes on the merits whether the decision is in fact  
3 “consistent with land use standards.” On remand from the Court of Appeals, LUBA  
4 ultimately agreed with the petitioners that the decision was not consistent with one or more  
5 land use standards, concluded that jurisdiction to review the decision lay with LUBA rather  
6 than the circuit court, and remanded the decision to the city. *Southwood Homeowners Assoc.*  
7 *v. City of Philomath*, 21 Or LUBA 260 (1991).

8 The exclusions at ORS 197.015(10)(b)(H) are worded in a similar manner to the  
9 exclusion at issue in *Southwood*, in that they apply only if the local government determines  
10 that the proposed agency action is *compatible* with its plan and regulations because it (1) was  
11 authorized in a prior decision, (2) does not require review, or (3) is required to undergo future  
12 land use reviews. Under the reasoning in *Southwood*, the jurisdictional question cannot be  
13 simply resolved based on the fact that the decision on its face concludes that the agency  
14 action is compatible for one of the reasons listed in ORS 197.015(10)(b)(H)(i) through (iii).  
15 LUBA must determine whether the local government *correctly* concluded that the agency  
16 action is compatible for one of those listed reasons, which in turn entails resolving the likely  
17 merits of the appeal.

18 This is a rather odd result, because if one of the exclusions to the definition of “land  
19 use decision” in ORS 197.015(10)(b)(H) applies, then exclusive jurisdiction to review the  
20 LUCS decision lies in circuit court, via writ of review. ORS 34.020, ORS 34.102. This  
21 means that if LUBA concludes that the local government was correct that the agency action  
22 is compatible with its plan and regulations for one of the listed reasons, and therefore the  
23 exclusion at ORS 197.015(10)(b)(H) applies, the challenged LUCS decision can be  
24 transferred to circuit court for review, if transfer has been requested pursuant ORS 34.102

1 and OAR 661-010-0075(11).<sup>3</sup> However, such circuit court review would make little sense in  
2 that circumstance, because LUBA would have just resolved the only likely merits of the  
3 appeal. Nonetheless, that appears to be what *Southwood* requires.

4 There is one possible basis to distinguish *Southwood*. In *Southwood*, the  
5 jurisdictional question turned on whether the city correctly concluded that the subdivision  
6 was “consistent with land use standards.” If the answer was yes, the exclusion applies; if the  
7 answer was no, then the exclusion did not apply and the city’s decision was a land use  
8 decision subject to LUBA’s review. In the present case, the county concluded that the state  
9 agency action is compatible with its plan and regulations, because the landfill expansion was  
10 authorized by the 1980 decision, and does not require site design review. Those conclusions  
11 on their face appear to bring the LUCS decision within one of the exclusions at ORS  
12 197.015(10)(b)(H)(i) or (ii). As noted, petitioners dispute that either exclusion applies,  
13 arguing that site design review and/or nonconforming use alternation approval is required.  
14 However, that argument, in essence, is an argument that the county should have concluded  
15 that the agency action is compatible with the county’s plan and regulations, because “future  
16 land use review” is required. Such a decision would likely fall within the *third* exclusion at

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<sup>3</sup> OAR 661-010-0075(11) provides, in relevant part:

“Motion to Transfer to Circuit Court:

- “(a) Any party may request, pursuant to ORS 34.102, that an appeal be transferred to the circuit court of the county in which the appealed decision was made, in the event the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12).
- “(b) A request for a transfer pursuant to ORS 34.102 shall be initiated by filing a motion to transfer to circuit court not later than 14 days after the date a respondent’s brief or motion that challenges the Board’s jurisdiction is filed. \* \* \*
- “(c) If the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12), the Board shall dismiss the appeal unless a motion to transfer to circuit court is filed as provided in subsection (11)(b) of this rule, in which case the Board shall transfer the appeal to the circuit court of the county in which the appealed decision was made.”

1 ORS 197.015(10)(b)(H)(iii), and would not be reviewable by LUBA. Notably, petitioners do  
2 not argue that the agency action is *incompatible* with the county’s plan and regulations, only  
3 that future land use reviews are required.<sup>4</sup> In this respect, the present case is different from  
4 the circumstances in *Southwood*. In *Southwood*, if we agreed with the petitioners (as we  
5 ultimately did) that the city’s decision was not consistent with land use standards, then the  
6 exclusion did not apply and, because no other exclusion applied, the decision was subject to  
7 our review. In the present case, if we agree with petitioners that the proposed landfill  
8 expansion requires site design review and/or nonconforming use review, and therefore the  
9 exclusions at ORS 197.015(10)(b)(H)(i) or (ii) do not apply, it seems hard to avoid the  
10 conclusion that the exclusion at ORS 197.015(10)(b)(H)(iii) *should* apply instead.

11 However, we decline to distinguish *Southwood* on this basis. In the present case, the  
12 county did not in fact base its compatibility determination on a finding that “future land use  
13 review” is required. For an exclusion in ORS 197.015(10)(b)(H) to apply, we believe the  
14 decision must purport to fall within the exclusion or on its face fall within the exclusion. We  
15 do not think it appropriate for LUBA to resolve the jurisdictional dispute based on a *different*  
16 exclusion than the one the decision purports to fall under, based on findings that the local  
17 government might have made, but did not.

18 In any case, we need not address the effect of the exclusion at ORS  
19 197.015(10)(b)(H)(iii), because for the following reasons, we agree with intervenor that the  
20 county manager correctly concluded that (1) the 1980 decision authorized the use of the  
21 PWS-zoned property as a landfill, including expansions of that landfill on the property, (2)

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<sup>4</sup> Because the exclusions at ORS 197.015(10)(b)(H) are expressly limited to *compatibility* determinations based on the three reasons listed in the statute, a LUCS decision that a state agency action is *not* compatible with the local government’s plan or land use regulations would not fall within the exception, and such a decision presumably would be a land use decision subject to LUBA’s review. It is not clear to us why the legislature would wish some LUCS decisions to be subject to review in circuit court, and other LUCS decisions to be subject to LUBA’s review, but that is the apparent effect of the statute.

1 the proposed expansion does not require site design review, and (3) the LUCS challenged in  
2 the present appeal therefore falls within the exception to LUBA's jurisdiction at ORS  
3 197.015(10)(b)(H)(i). We do not resolve the parties' dispute over whether the second  
4 exception at ORS 197.015(10)(b)(H)(ii) applies.

5 The county concluded in its findings that the DEQ action is compatible with the  
6 county's plan and land use regulations because the 1980 decision to plan and zone the  
7 property PWS to allow a landfill contemplated the continued development of that landfill  
8 over the entire property, and therefore the proposed landfill expansion requires no further  
9 authorization and is not subject to site design review.<sup>5</sup> As support for that conclusion, the

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<sup>5</sup> The county's findings state, in relevant part:

- “2. The County finds that the continued development of Riverbend Landfill involving the creation, redesign, or expansion of waste disposal cells within the Public Works/ Safety ('PWS') Zone is an outright permitted use.
- “3. The County finds that no land use approvals made by the County in the past have imposed restrictions on the lateral or vertical development of the landfill, or the continued operation of the landfill, within the PWS Zone.
- “4. In arriving at the conclusions in Finding 2 and Finding 3, the County reviewed the prior land use applications authorizing the development of Riverbend Landfill. It is clear from those prior authorizations that the County has already made a land use decision authorizing the use that is encompassed by RLI's proposal for the MSE berm. In May 1980, the Yamhill County Board of Commissioners ('Board') approved an application for a plan amendment and zone change for the development of Riverbend Landfill, then owned by RLI's predecessor. At the time the zone change was granted, the County operated under the provisions of its 1976 zoning ordinance. Under the 1976 ordinance, the landfill was an outright permitted use in the PWS district. The 1976 ordinance did not require site design review for the development of any permitted uses, including a landfill. The 1976 ordinance did not impose any height or grade restrictions on landfill development. \* \* \*
- “5. The MSE berm is a technical change only to the manner in which RLI constructs the perimeter berm of the landfill. It therefore continues the same use that was authorized in 1980, and it continues that use on the same property, all of which is zoned PWS.
- “6. \* \* \* After operations at Riverbend Landfill commenced, the County did adopt a new zoning ordinance. Although landfills remained as permitted uses in the PWS zone, that use was made subject to the site design review ('SDR') criteria of the new zoning ordinance. Because it was approved under Ordinance 76, however,

1 county attached to its decision and relied upon the board of commissioners' 1992 decision,  
2 which reached essentially the same conclusion for purposes of a then-proposed expansion of  
3 the same landfill.<sup>6</sup>

4 Petitioners dispute that the 1980 decision qualifies as a "land use decision authorizing  
5 a use or activity that encompasses the proposed state agency action." According to  
6 petitioners, the 1980 decision simply approved a goal exception, comprehensive plan and  
7 zoning map amendments necessary to rezone the property to PWS, but did not specifically  
8 "authorize" the Riverbend Landfill, and certainly did not "authorize" any and all future

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Riverbend Landfill's operation and design plan, which includes the landfill's  
perimeter berm, is not subject to the County SDR process \* \* \*.

“\* \* \* \* \*

“8. The land use approvals granted by the County in 1980 remain in effect, and need not  
be renewed because there has been no change in the use of the site as a landfill. The  
operation and continued development of the landfill will be contained within the  
original site approved by the zone change and plan amendment authorized in 1980.”  
Record 3-4

<sup>6</sup> The county's findings continue:

“9. The above findings are consistent with the County's prior interpretation of its zoning  
ordinance and RLI's land use authorization at Riverbend Landfill. In 1992, RLI  
applied to DEQ for an expansion of its then-existing solid waste disposal permit to  
accommodate a larger landfill and new facilities such as a leachate holding pond. \*  
\* \*

“10. \* \* \* [A]t the request of RLI, the County held a public hearing on the issue.  
Following that hearing, the Board issued Order No. 92-282, concluding that the  
landfill portion of the proposed expansion remained an outright permitted use,  
because the 1980 application contemplated the natural and progressive development  
of landfill cells throughout the entire PWS portion of the RLI's property. With  
respect to the new ancillary facilities that were not included as part of the original  
application in 1980, such as the leachate holding pond, the Board arrived at the  
opposite conclusion and determined such facilities would have to go through the  
SDR process.

“\* \* \* \* \*

“12. With these findings, the County confirms that the continued development of solid  
waste disposal cells contemplated in the original approval of the rezone and  
comprehensive plan amendment remains an outright permitted use.” Record 3-5.

1 expansions of the landfill. Petitioners argue that to “authorize” a use or activity that  
2 “encompasses” the proposed state agency action the prior land use decision must specifically  
3 and expressly approve the action, in this case the landfill expansion.

4 Further, petitioners argue that in 1982 when the county adopted a new zoning  
5 ordinance requiring that all development in the PWS zone satisfy site review design  
6 standards, the Riverbend landfill became a non-conforming use. According to petitioners,  
7 any expansion of that non-conforming use is therefore an “alteration” that requires review  
8 and approval under the county’s code and state law. Petitioners contend that no county  
9 decision, including the 1992 expansion decision, has approved any landfill expansion as an  
10 alteration of a non-conforming use, or applied site design review standards to the existing  
11 landfill or any landfill expansion other than the leachate holding facility, and for that reason  
12 no county decision has “authoriz[ed] a use or activity that encompasses the proposed state  
13 agency action.” Petitioners argue that it is inconsistent with nonconforming use law to  
14 understand the 1980 or 1992 decisions to “authorize” the proposed expansion, for purposes  
15 of ORS 197.015(10)(b)(H)(i).

16 Intervenor responds that in 1980 the county approved a goal exception for the specific  
17 purpose of allowing development of the Riverbend Landfill on the subject property, and  
18 issued all permits then required for the landfill, including a floodplain permit to allow fill to  
19 be placed in a portion of the property that is located in the floodplain.<sup>7</sup> Intervenor argues  
20 that, as the board of commissioners recognized in their 1992 decision, the 1980 decision  
21 imposed no restrictions on the lateral or vertical development of the landfill, and  
22 contemplated that the entire 229-acre property would be sequentially developed as a landfill.

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<sup>7</sup> The area of the landfill at issue in this appeal apparently is not located within the floodplain, and does not require a floodplain permit.

1           Intervenor is correct that the goal exception statement adopted by the county in 1980,  
2 as the basis for rezoning the property from an agricultural zone to PWS, was justified based  
3 on development of the entire 229-acre property as a landfill. The exceptions statement and  
4 other documents adopted as part of the 1980 decision specifically contemplated that the  
5 landfill operation would expand incrementally over time, with filled disposal cells capped,  
6 reclaimed and placed back into agricultural production, while the active landfill operation  
7 would move on to new disposal cells. Record 109, 114, 120-21. In our view, the 1980  
8 decision is sufficient to “authoriz[e] a use or activity that encompasses” construction of  
9 future disposal cells for the Riverbend Landfill, because the 1980 decision expressly  
10 contemplated the continued expansion of the landfill through construction of new disposal  
11 cells. The county manager correctly concluded that the 1980 decision sufficiently  
12 “authorized” expansions of the landfill, for purposes of ORS 197.015(10)(b)(H)(i).

13           Notwithstanding that the 1980 decision authorized continued expansion of the  
14 landfill, it is possible that in adopting the 1982 ordinance the county might have intended to  
15 subject future landfill expansions, or at least some types of landfill expansions, to site design  
16 review.<sup>8</sup> However, any uncertainty on that point was resolved by the county commissioners’  
17 1992 decision. In that decision, the commissioners specifically clarified that they did *not*  
18 intend continued expansion of the landfill as contemplated in the 1980 decision to be subject  
19 to site design review under the 1982 ordinance.<sup>9</sup> The basis for that conclusion was a

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<sup>8</sup> As noted above, in that case the county would likely find that “future land use reviews are required,” for purposes of the exclusion at ORS 197.015(10)(b)(H)(iii), in addition to or instead of finding that a prior decision “authorized” the expansion.

<sup>9</sup> The 1992 decision states, in relevant part:

“New required accessory uses such as a new leachate storage lagoon or new holding tanks, would be permitted uses (as accessory to a sanitary landfill). However, because those uses would be facilities, establishment of the uses would be subject to site design review under the 1982 ordinance. The County draws a distinction between the primary landfill cell

1 memorandum from county counsel, which the commissioners incorporated into their  
2 decision. The county counsel’s memorandum distinguished between the continued  
3 development of the landfill cells authorized by the 1980 decision, and not subject to site  
4 design review, and development of new “facilities” such as the leachate holding facility,  
5 which county counsel and the commissioners concluded *is* subject to site design review  
6 under the 1982 ordinance. While the exact basis for that distinction is not explained in either  
7 the memorandum or decision, it is reasonably clear that the county commissioners believe  
8 that the site design review provisions of the 1982 ordinance apply only to new, unauthorized  
9 development, and that development previously authorized in a prior, final land use decision  
10 does not require site design review.

11           Petitioners argue that the 1992 decision is not relevant or controlling in this appeal,  
12 because it concerned the expansion of a different area of the Riverbend Landfill, and did not  
13 involve construction of a MSE-type berm. However, petitioners have not demonstrated that  
14 the location of the expansion or any other factual distinction is significant. While the MSE-  
15 type berm will be taller and constructed differently than the existing berms, petitioners do not  
16 dispute that the MSE-type berms will serve the same function as the existing berms: to form  
17 a perimeter and cell wall for solid waste disposal cells. The 1980 exception did not specify  
18 the type of berms to be used and as far as we can tell MSE type berms could have been used  
19 from the beginning.

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development which was contemplated in the original application and the development of modified or new facilities proposed or required as accessory uses to landfill operations.

“The continued development of solid waste disposal cells contemplated in the original approval of the rezone and comprehensive plan amendment remains an outright permitted use. No land use approvals made by the County imposed restrictions on the lateral or vertical development of the Landfill within the PWS zone. Issues relative to the engineering or environmental safety or appropriateness of landfill design and operation were left to be addressed by DEQ in its review of the Landfill’s operating permit.” Record 71.

1 More importantly, whatever the factual differences between the two expansions, the  
2 *legal issue* the board of commissioners addressed in its 1992 decision is precisely the same  
3 legal issue presented here: does the site design review process adopted in the 1982 ordinance  
4 apply to landfill expansions contemplated in the 1980 decision? The commissioners' answer  
5 was no, based on the distinction drawn in the incorporated county counsel memorandum  
6 between additional disposal cells contemplated by the 1980 decision and new "facilities" not  
7 contemplated in the 1980 decision. The county manager in the present case relied on that  
8 distinction and attached the 1992 decision as at least persuasive authority. While the 1992  
9 decision is not determinative or controlling here, it shows that the county has interpreted its  
10 land use regulations in the same manner that they are interpreted in this decision and  
11 demonstrates that the county is attempting to interpret its land use regulations consistently.

12 We understand petitioners to argue that the county manager erred in relying upon the  
13 1992 decision, because the board of commissioners wrongly concluded in the 1992 decision  
14 that landfill expansions authorized by the 1980 decision do not require site design review.  
15 Petitioners argue that the site design review requirement in YCZO 1101, adopted as part of  
16 the 1982 ordinance, provides that the site design review process applies to "all development  
17 in all Commercial, Industrial, and Public Facilities Districts." YCZO 1101.01. We  
18 understand petitioners to contend that the proposed landfill expansion constitutes  
19 "development" and YCZO 1101 plainly requires that "all" development in the county's  
20 Public Facilities zones undergo site design review, with no exceptions.<sup>10</sup> If so, we  
21 understand petitioners to argue, additional authorizations are necessary, and the exception at  
22 ORS 197.015(10)(b)(H)(i) does not apply.

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<sup>10</sup> As petitioners acknowledge, the YCZO does not include a definition of "development." In the absence of a code definition, it is not clear to us that construction of a MSE berm or any kind of earthen berm necessarily must be interpreted to constitute "development" for purposes of YCZO 1101, under the common understanding of that term. However, no party in this appeal contends otherwise, and we will assume without deciding that the landfill expansion constitutes "development" for purposes of YCZO 1101.

1           However, YCZO 1101 and the YCZO in general are silent regarding whether site  
2 design review provisions apply to an otherwise outright permitted use, the expansion of  
3 which was authorized in an exception and comprehensive plan amendment and zone change  
4 decision that pre-dates adoption of those design review standards. When faced with that  
5 precise question in 1992, the board of commissioners chose not to require site design review  
6 for such an expansion. That choice flows naturally, if not inevitably, from the  
7 commissioners' conclusion that the 1980 decision authorized the sequential expansion of the  
8 landfill via continued construction of new disposal cells, including new berms, within the  
9 area zoned PWS. Because petitioners cite nothing in YCZO 1101 or elsewhere that purports  
10 to compel application of the site design review provisions to development that, the county  
11 has determined, was authorized in the 1980 decision, petitioners have not demonstrated that  
12 further authorization is needed and that the exception at ORS 197.015(10)(b)(H)(i) is  
13 insufficient or does not apply to exclude the challenged decision from LUBA's jurisdiction.

14           Similarly, petitioners have not established that additional authorizations are needed to  
15 approve an alteration of a non-conforming use. Under the current county code, a landfill is a  
16 permitted use in the PWS zone, subject to site design review. That most portions of the  
17 existing landfill have not received site design review does not mean that the existing landfill  
18 is a non-conforming use, or that a proposed expansion of the landfill must be processed and  
19 evaluated as an alteration of a non-conforming use. At most, it means that a previously  
20 unauthorized expansion would require site design review. However, as explained above, the  
21 county has determined that landfill expansions contemplated by the 1980 decision were  
22 authorized by that decision and do not require site design review, and we have affirmed that  
23 conclusion. Petitioners' arguments regarding alteration of a non-conforming use do not  
24 establish that the proposed action has not been "authorized" for purposes of ORS  
25 197.015(10)(b)(H)(i).

1           Lastly, both parties cite to portions of the legislative history of the 2009 legislation  
2 codified at ORS 197.015(10)(b)(H), to argue their respective positions. We have examined  
3 the legislative history cited to us, and find nothing that sheds additional light on the question  
4 of whether the challenged decision is excluded from our jurisdiction under ORS  
5 197.015(10)(b)(H)(i).

6           For the above reasons, the challenged decision is excluded from the definition of  
7 “land use decision” pursuant to ORS 197.015(10)(b)(H)(i). Petitioners have not filed a  
8 motion to transfer this appeal to circuit court. Therefore, we must dismiss this appeal.  
9 Accordingly, the appeal is dismissed.