

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 WASTE NOT OF YAMHILL COUNTY,
5 YAMHILL COUNTY SOIL AND WATER
6 CONSERVATION DISTRICT, YAMHILL COUNTY
7 FARM BUREAU, WILLAMETTE VALLEY
8 WINERIES ASSOCIATION, WILLAMETTE RIVERKEEPER,
9 MOMTAZI FAMILY LLC, ROB STUART, R. STUART CO.,
10 THE EYRIE VINEYARDS, BILL HANSON, PANTHER CREEK
11 CELLARS, YOUNGBERG HILL VINEYARDS & INN,
12 WAYNE BAILEY, YAMHILL VALLEY VINEYARDS,
13 DENIS BURGER, ERIN RAINEY, SHANNON COX,
14 HALEY COX AND MCPHILLIPS FARMS, INC.,
15 *Petitioners,*

16
17 vs.

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19 YAMHILL COUNTY,
20 *Respondent,*

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22 and

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

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27 LUBA No. 2010-002

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29 FINAL OPINION
30 AND ORDER

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32 Appeal from Yamhill County.

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34 William K. Kabeiseman filed the petition for review and argued on behalf of
35 petitioners. With him on the brief was Jennifer M. Bragar and Garvey Schubert Barer.

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37 Fredric Sanai, Yamhill County Counsel, McMinnville, filed the joint response brief
38 and argued on behalf of respondent.

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40 Tommy A. Brooks, Portland, filed the joint response brief and argued on behalf of
41 intervenor-respondent. With him on the brief was James E. Benedict and Cable Huston.

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

07/06/2010

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

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NATURE OF THE DECISION

Petitioners appeal a decision by the county approving a comprehensive plan amendment, a zone change, and an exception to Statewide Planning Goal 3 (Agricultural Lands).

FACTS

Intervenor-respondent Riverbend Landfill Company, Inc. (Riverbend) owns and operates a landfill on approximately 212 acres of land zoned Public Works/Safety (PWS). Yamhill County Zoning Ordinance (YCZO) 802.02(D) allows landfills to be sited only in the PWS zone. Riverbend sought approval to expand its existing landfill onto adjacent land it owns that is zoned Exclusive Farm Use (EFU), in order to accommodate additional waste and extend the landfill’s operating lifetime.¹ In order to accomplish the proposed change in the comprehensive plan and zoning designation for approximately 99 acres of Riverbend’s property from EFU to PWS, Riverbend sought an exception to Statewide Planning Goal 3 under OAR 660-004-0020 and 660-004-0022, the “reasons” exception process.

¹ The county’s decision describes the land to be rezoned as follows:

“Approximately 99 acres west of the existing landfill * * * will be rezoned from Recreational Commercial/RC (‘RC’) and EFU to PWS. This area will serve as the area for landfill disposal operations. Tax Lot 400 (63 acres) is currently zoned EFU and the majority of this property supports a poplar tree farm that is irrigated with leachate from the existing landfill and eventually harvested for dimensional lumber or pulp. Tax Lot 401 is currently zoned RC (25 acres) and EFU (11 acres). The majority of this land is developed as a recreational vehicle park and operated under a lease with [Riverbend].

“Approximately 10 acres southwest of the landfill * * * will be rezoned from EFU to PWS for ancillary facilities (including a storage yard and leachate treatment facilities). No landfill disposal activities are proposed or will be allowed in this area due to the zoning change from EFU to PWS.

“Approximately 19 acres to the north of the landfill * * * will be rezoned from EFU to PWS for ancillary facilities (including a public drop-off/recycling area and surface water facilities). No landfill disposal activities are proposed or will be allowed in this area due to the zoning change from EFU to PWS.” Record 8.

1 The planning commission recommended denial of the applications, and the board of
2 commissioners held public hearings on the applications and voted to approve the
3 applications. This appeal followed.

4 **FOURTH ASSIGNMENT OF ERROR**

5 In their fourth assignment of error, petitioners argue that the county erred in
6 approving an exception to Goal 3. According to petitioners, the rules governing the
7 exceptions process prohibit the county from approving a Goal 3 exception for a plan
8 amendment or zone change from resource land to a non-resource designation where the use
9 that is proposed by the exception is one that is allowed by Goal 3. According to petitioners,
10 landfills are uses that are allowed by Goal 3, pursuant to ORS 215.283(2)(k) and OAR 660-
11 033-0120, and the fact that the YCZO does not allow landfills on EFU land has no bearing
12 on whether landfills are uses allowed by *Goal 3*.²

13 OAR 660-004-0020 and 660-004-0022 contain the standards for allowing a reasons
14 exception to Goal 3. In relevant part, OAR 660-004-0022 provides that:

15 “[a]n exception Under Goal 2, Part II(c) can be taken *for any use not allowed*
16 *by the applicable goal(s)*. The types of reasons that may or may not be used to
17 justify *certain types of uses not allowed on resource lands* are set forth in the
18 following sections of this rule * * *.” (Emphases added.)

19 OAR 660-004-0000(2) provides:

² ORS 215.283(1) and (2) specify the uses that are allowed under Goal 3. ORS 215.283(2) provides:

“The following nonfarm uses may be established, subject to the approval of the governing body or its designee in any area zoned for exclusive farm use subject to ORS 215.296:

“ * * * * *

“(k) A site for the disposal of solid waste approved by the governing body of a city or county or both and for which a permit has been granted under ORS 459.245 by the Department of Environmental Quality together with equipment, facilities or buildings necessary for its operation.”

OAR 660-033-0120 includes identical language authorizing solid waste disposal sites.

1 “An exception is a decision to exclude certain land from the requirements of
2 one or more applicable statewide goals in accordance with the process
3 specified in Goal 2, Part II, Exceptions. The documentation for an exception
4 must be set forth in a local government’s comprehensive plan. Such
5 documentation must support a conclusion that the standards for an exception
6 have been met. The conclusion shall be based on findings of fact supported by
7 substantial evidence in the record of the local proceeding *and by a statement*
8 *of reasons which explain why the proposed use not allowed by the applicable*
9 *goal should be provided for.* The exceptions process is not to be used to
10 indicate that a jurisdiction disagrees with a goal.” (Emphasis added.)

11 Petitioners rely on the Court of Appeals’ decision in *DLCD v. Yamhill County*, 183 Or App
12 556, 53 P3d 462 (2002) in support of their argument. *DLCD v. Yamhill County* involved a
13 challenge to the county’s approval of a reasons exception to allow the applicant to site a non-
14 farm dwelling on a 10-acre parcel zoned EFU. The court reversed LUBA’s determination
15 that the reasons exception process was available as an alternative to seeking approval for the
16 proposed nonfarm dwelling under the county’s EFU zone.³ The court concluded:

17 “* * * [t]here is no basis in either the relevant statutes or the rules from which
18 to conclude that a ‘use not allowed by the applicable goal,’ OAR 660-004-
19 0000(2), includes uses that specifically *are* permitted by the applicable goal
20 under some circumstances. Rather, a use that is permitted under the
21 applicable goal must conform to the requirements of the goal. It is only when
22 a use is *not* permitted at all under the applicable goal that the exceptions
23 process may come into play.” *Id.* at 562 (emphases in original.)

24 The court rejected the county’s argument that the language in OAR 660-004-0000(2)
25 referring to a “proposed use not allowed by the applicable goal” referred only to proposed
26 uses that are permitted outright under subsection 1 of ORS 215.283, and that because
27 nonfarm dwellings only may be allowed under subsection 2 of ORS 215.283 and ORS
28 215.284 subject to satisfaction of additional standards imposed by the local government,
29 those uses are not “allowed by the applicable goal.” The court determined that the context of
30 the rule demonstrates that “the exceptions process is not designed to allow plan amendments

³ ORS 215.284, one of the EFU zone statutes, specifically authorizes nonfarm dwellings and sets out standards that limit approval of such dwellings.

1 and zone changes in order to permit uses that are, in fact, allowed by the applicable goals.”
2 *Id.* at. 561.

3 Intervenor and the county (respondents) answer that *DLCD v. Yamhill County* is
4 distinguishable because in that case, the applicant had available in the YCZO a path to
5 approval of a nonfarm dwelling because the YCZO replicated the ORS 215.284 standards
6 governing nonfarm dwellings, whereas in the present appeal the YZCO does not allow
7 landfills as a permitted use on EFU land, even though Goal 3 and the EFU zoning statutes
8 would allow the county to include landfills as a permissible use in its EFU zone. According
9 to respondent, “[Riverbend] has no alternative course for achieving the same result
10 (expanding the landfill) without taking an exception and rezoning the property. Although
11 state law potentially allows a solid waste disposal site in the EFU zone, a solid waste
12 disposal site is allowed in Yamhill County only on land zoned PWS. The only option for
13 [Riverbend] is to rezone the property, which requires an exception.” Combined Response
14 Brief 39.

15 We agree with petitioners that *DLCD v. Yamhill County* controls our decision in the
16 present appeal. The relevant question under the rules governing the exceptions process is
17 whether the proposed use is allowed by the *goals*. The fact that the *county* has chosen not to
18 allow landfills on EFU land in the county is immaterial in determining whether landfills are
19 uses allowed by *Goal 3*. The holding in *DLCD v. Yamhill County* requires that we reverse
20 the county’s decision. Under the holding in *DLCD v. Yamhill County*, the county may not
21 approve an exception to allow a use that is allowed by Goal 3 and the statutory EFU zone. If
22 the county wishes to allow landfills on agricultural land, it must amend its EFU zone to allow
23 them under the standards set forth in the statutory EFU zone, with any supplementary
24 regulation that the county wishes to adopt. *Brentmar v. Jackson County*, 321 Or 481, 496,
25 900 P2d 1030 (1995).

1 The fourth assignment of error is sustained. Since Riverbend proposes an exception
2 to rezone property for use as a landfill, a use that is allowed by Goal 3, the exception is
3 prohibited as matter of law. Accordingly, under OAR 661-010-0071(1)(c), the decision must
4 be reversed.

5 The county's decision is reversed.⁴

⁴ Because we sustain the fourth assignment of error and conclude that the decision is prohibited as a matter of law, we need not address petitioners' remaining assignments of error.