BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RIVERBEND LANDFILL COMPANY, Petitioner, vs. YAMHILL COUNTY, Respondent, and DIANE E. KNOTT, MICHAEL R. WESTPHAL, and LILLIAN E. FREASE, Intervenors-Respondent.	LUBA No. 92-114 FINAL OPINION AND ORDER

Appeal from Yamhill County.

Timothy V. Ramis and James M. Coleman, Portland; and Jeffery W. Ring and G. Frank Hammond, Portland, filed the petition for review. With them on the brief was O'Donnell, Ramis, Crew & Corrigan; and Heller, Ehrman, White & McAuliffe. Timothy V. Ramis and Jeffery W. Ring argued on behalf of petitioner.

John M. Gray, Jr., County Counsel, McMinnville, filed a response brief and argued on behalf of respondent.

Linda K. Williams, Portland, filed a statement in lieu of brief on behalf of intervenors-respondent.

KELLINGTON, Referee; SHERTON, Chief Referee; HOLSTUN, Referee, participated in the decision.

REMANDED IN PART/REVERSED IN PART 02/02/93

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals an ordinance (Measure 36-1) entitled "Yamhill County Groundwater Protection and Landfill Siting Ordinance," adopted by the people of Yamhill County pursuant to the initiative power extended to them under Article IV, section 1(5), of the Oregon Constitution.[1]

MOTION TO INTERVENE

Diane E. Knott, Michael R. Westphal, and Lillian E. Frease move to intervene on the side of respondent. Petitioner does not object, and the motion is allowed.

FACTS

The challenged ordinance, among other things, precludes the siting, construction or expansion of landfills that would (1) be located within 500 feet of a 100 year floodplain, (2) accept waste from outside the State of Oregon, or (3) accept more than a specified percentage of waste from outside of the county.

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[1]Article IV, section 1(5), of the Oregon Constitution provides, in relevant part:

> "The initiative and referendum powers reserved to the people by subsections (2) and (3) of this section are further reserved to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district. * * *"

The initiative and referendum powers extended by Article IV, Section 1(5) extend to the electorate of Yamhill County. See Allison v. Washington County, 24 Or App 571, 548 P2d 188 (1976); see also La Grande/Astoria v. PERB, 281 Or 137, 141 n 3, 576 P2d 1204, adhered to on rehearing, 284 Or 173 (1978).

FIFTH ASSIGNMENT OF ERROR

> "The county erred by enacting Sections 2 and 3 of the landfill ordinance, which facially discriminate against interstate commerce in violation of the Commerce Clause of the United States Constitution."

Petitioner argues that Sections 2 and 3[2] of the challenged decision:

> "* * * effectively ban the importation into the County of all out-of-state solid waste and severely restrict the importation of out-of-county solid waste in clear violation of the Commerce

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[2]Section 2 of the challenged ordinance provides the county planning department is prohibited from:

> "* * * accept[ing] any applications for the siting of any landfill that intends to accept, or intends to apply for permits to accept and store any waste
>
> "A. from outside the State of Oregon or the territorial boundaries of the United States in any amount whatsoever, or
>
> "B. from outside the boundaries of Yamhill County in volume or weight in excess of twenty five percent (25%) of the waste generated and accepted from within Yamhill County yearly for storage at such facility."

Section 3 of the challenged ordinance provides the county planning department is prohibited from:

> "* * * accept[ing] any applications for building modification, alteration or expansion of any facility that includes landfill facilities that intend to accept, or intend to apply for permits to transfer, treat, store or accept any waste
>
> "A. from outside the State of Oregon or the territorial boundaries of the United States in any amount whatsoever, or
>
> "B. from outside the boundaries of Yamhill County in volume or weight in excess of twenty five percent (25%) of the waste generated and accepted from within Yamhill County yearly for storage at such facility."

Clause of the United States Constitution."[3] Petition for Review 27.

Petitioner cites numerous federal cases interpreting the Commerce Clause to state that in the absence of some reason to treat out-of-state waste differently than in-state waste (apart from the origin of the waste), local laws that discriminate against interstate commerce in solid waste violate the Commerce Clause. Fort Gratiot Sanitary Landfill, Inc., v. Michigan Dept. of Natural Resources, ____ US ____, 112 S Ct 2019, 2024, 119 L Ed2d 139 (1992) (Fort Gratiot); Chemical Waste Management, Inc. v. Hunt, ____ US ____, 112 S Ct 2009, 2012, 119 L Ed2d 121 (1992); City of Philadelphia v. New Jersey, 437 US 617, 627, 98 S Ct 2531, 57 L Ed2d 475 (1978). In addition, the local government bears the burden of establishing that there are no non-discriminatory alternatives available to protect a legitimate local interest that is served by the local law. Fort Gratiot, supra, 112 S Ct 2027; see also Hunt v. Washington State Apple Advertising Comm'n, 432 US 333, 353, 97 S Ct 2434, 2446-47 53 L Ed2d 383 (1977). Further, that it is a county rather than a state which imposed the challenged regulation of interstate commerce in solid waste,

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[3]Article 1, Section 8(3), of the Constitution of the United States provides that Congress has the power:

"To regulate Commerce * * * among the several states * * *."

does not change the constitutional analysis concerning the regulation. Fort Gratiot, supra, 112 S Ct 2025-26.

No party offers any nondiscriminatory reason to justify the requirements of Measure 36-1, Sections 2 and 3 that treat out-of-state waste differently than in-state waste, and we are unaware of any. In addition, no party argues there are no non-discriminatory alternatives available to protect a legitimate local interest that is served by Sections 2 and 3, and we cannot say there are none. Therefore, Sections 2 and 3 of the challenged decision violate the Commerce Clause. Accordingly, we sustain the fifth assignment of error.

The next issue is whether our determination that Sections 2 and 3 are unconstitutional requires that we reverse the decision challenged in this appeal in its entirety. That question depends upon whether we may sever the unconstitutional provisions from the balance of the ordinance.

The challenged decision contains a severability clause.[4] It is well established that when interpreting a statute, the legislature has:

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[4]Section 9 of the challenged ordinance provides:

> "The sections of this Act are severable. If any section or sections are ruled invalid for any reason by the court of last resort, all other sections shall be unaffected and remain in effect." Record 5.

> "* * * expressed a strong general preference in favor of severability[.] [W]e can find the * * * requirement not severable only if (1) it is apparent that the legislature would not have enacted the statue without that provision, or (2) resulting parts of the statute would be incomplete and incapable of being executed in accordance with the legislative intent." Gilliam County v. Dept. of Environmental Quality, 114 Or App 369, 380-81, _____ P2d _____ (1992).

These rules apply to the severability of local enactments as well. See Ackerly Communications v. City of Gresham, 18 Or LUBA 541, 550-51 (1989).

Here, the challenged ordinance contains four other regulatory sections which do not discriminate against waste from other states. These sections contain various requirements applicable to the operation and siting of existing and proposed landfills within Yamhill County. These sections are not dependent upon Sections 2 and 3. In addition, the severability clause is a clear statement of the intent of the electorate that the ordinance remain effective, even if portions are declared invalid. Accordingly, we sever Sections 2 and 3, and consider petitioner's remaining assignments of error as they apply to the balance of the challenged ordinance.

FIRST ASSIGNMENT OF ERROR

> "The landfill ordinance is not supported by the required findings necessary to comply with state and local law."

SECOND ASSIGNMENT OF ERROR

> "The landfill ordinance was enacted without coordination with affected governmental agencies in violation of comprehensive plan policies."

FOURTH ASSIGNMENT OF ERROR

> "The landfill ordinance was enacted in violation of procedural requirements required by state law."

Under these assignments of error, petitioner argues that the challenged decision erroneously fails to include supporting findings demonstrating compliance with various state statutes, statewide planning goals (goals), comprehensive plan provisions and provisions of the Yamhill County Zoning Ordinance (YCZO).

ORS 215.130(1) provides:

> "Any legislative ordinance relating to land use planning or zoning shall be a local law within the meaning of, and subject to, ORS 250.155 to 250.235 [governing the exercise of the powers of initiative and referendum]."

This statement indicates the legislature contemplated that legislative land use decisions could be adopted by the electorate. The challenged decision is a legislative land use decision enacted by the electorate of Yamhill County. There is nothing of which we are aware that exempts legislative land use decisions from the procedural and substantive requirements applicable to the enactment of

legislation affecting land use.[5] As such, the challenged decision is subject to the requirements governing legislative land use decisions. See Allison v. Washington County, supra (exercise of legislative authority concerning land use by the electorate is subject to compliance with laws governing county planning and zoning).

No statute or appellate court case requires that all legislative land use decisions be supported by findings. Von Lubken v. Hood River County, 22 Or LUBA 307, 313 (1991). However, in order for this Board to perform its review function, it is necessary either that legislative land use decisions be accompanied by findings of compliance with relevant legal standards or that respondents explain in their briefs how the challenged legislative decision complies with applicable legal standards. Id., at 314. Here, the only argument offered for why the decision does

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[5]In Dan Gile and Assoc., Inc., v. McIver, 113 Or App 1, 5-6, 831 P2d 1024 (1992), the Court of Appeals suggested that land use decisions made by the electorate, by their nature, could not comply with the substantive and procedural requirements of land use law. Specifically, the court stated the following concerning a county decision adopted by referendum:

> "* * * When the only decision to be made is a land use decision, to which specific land use provisions and requirements must be applied, the governing body must, and the electorate cannot, follow the procedures or be confined to the substance of those requirements. * * *" Id., at 5.

This statement makes sense in the context of the referendum process, where the local governing body first adopts a land use decision and refers it to the voters for their approval. However, it does not apply to a decision adopted pursuant to initiative process, because in that process a city or county governing body has no occasion to make a land use decision.

not violate the standards cited by petitioner is that the decision was adopted by the electorate.

We reject this argument. As stated above, there is no statutory exemption from the requirements applicable to legislative decisions for decisions adopted by initiative. By way of example, we do not see any reason why legislative decisions adopted by the electorate should be exempt from coordination requirements. As a practical matter, satisfying coordination requirements may be more difficult for the electorate than for a governing body. However, practical difficulties do not excuse compliance with coordination requirements. Further, we find no persuasive reason why a legislative decision adopted by the electorate should be exempted from the requirements of ORS 197.610 to 197.625, regarding the provision of notice to the Department of Land Conservation and Development (DLCD) regarding postacknowledgment comprehensive plan and land use regulation amendments.[6]

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[6]ORS 197.615(1) states:

> "* * * The text and findings [of the adopted amendment] must be mailed or otherwise submitted [to DLCD] not later than five working days after the final decision by the governing body. * * *" (Emphasis supplied.)

However, all other provisions of ORS 197.610 to 197.625, including other subsections of ORS 197.615, refer to "local government." In Riverbend Landfill v. Yamhill County, ___ Or LUBA ____ (LUBA No. 92-114, Order on Motion to Dismiss, November 30, 1992), we determined the term "local government" includes both the county government and the electorate. No party argues that this single reference to "governing body" makes any difference in the scope of the responsibilities of the electorate in

In short, petitioner contends the challenged decision, which includes a comprehensive plan amendment, fails to comply with various statutory standards, goals, local comprehensive plan provisions and zoning ordinance standards. While the challenged decision contains a limited number of conclusory determinations, those determinations do not establish compliance with the standards cited by petitioner. Therefore, in the absence of some explanation of how the challenged decision complies with those standards or why those standards are inapplicable (other than because the decision was adopted by the electorate), we cannot determine that the decision complies with those standards.

The first, second and fourth assignments of error are sustained.

THIRD ASSIGNMENT OF ERROR

> "The landfill ordinance is not supported by the required factual basis."

Petitioner argues that the challenged decision is erroneous because it is not supported by an adequate factual basis to support the determination that a landfill within 500 feet of a 100 year floodplain conflicts with various water uses.

There is no statutory requirement that legislative decisions be supported by substantial evidence. Lima v. Jackson County, 56 Or App 619, 625, 643 P2d 355 (1982);

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adopting a legislative land use decision pursuant to ORS 197.610 to 197.625, and we do not see that it does.

Alexiou v. Curry County, 22 Or LUBA 639 (1992). However, petitioner states:

> "[Plan] Policy II(C)(i) * * * requires that in the consideration of programs and proposals where conflicting uses affecting water resources are identified the economic, social, environmental and energy consequences of the conflicting uses [must] be determined and the analysis used as a basis for decisionmaking." Petition for Review 24.

No party disputes the applicability of Policy II(C)(i) to the challenged decision, and no party contends that it was applied.

The third assignment of error is sustained.

SIXTH ASSIGNMENT OF ERROR

> "The county erred by enacting the landfill ordinance, thereby impairing both its own obligations under its franchise agreement with [petitioner], and [petitioner's] obligations to its customers, in violation of both Article I, Sec. 10 of the United States Constitution and Article I, Sec. 21 of the Oregon Constitution."

ORS 197.835(9)(a) requires that we address all issues raised in the petition for review to the "extent possible consistent with the time requirements of ORS 197.830(14)." This Board is required by ORS 197.830(14) to issue its final opinion and order in this appeal within a statutorily prescribed period, which has expired. We do not address this assignment of error because there is not time to do so.

SEVENTH ASSIGNMENT OF ERROR

> "The county erred by enacting Section 8 of the landfill ordinance, thereby incurring contingent liabilities in excess of $5,000 in violation of Article XI, Sec. 10 of the Oregon Constitution."

All parties agree that subsequent amendments to the disputed provisions of the challenged ordinance alleged to violate Article XI, section 10, of the Oregon Constitution, have eliminated the problems identified in this assignment of error. Accordingly, this assignment of error provides no basis for reversal or remand of the challenged decision.

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

> "The county erred by enacting Sections 4, 5, 6 and 7 of the landfill ordinance, which are preempted by existing state solid waste statutes and regulations."

Petitioner argues that under ORS chapter 459 (Solid Waste Control), the state has preempted the field of solid waste regulation and that neither the electorate nor the governing body of Yamhill County has authority to regulate matters concerning solid waste landfills.

We disagree. ORS 459.017(1)(a) provides that the "planning, location, acquisition, development and operation of landfill disposal sites is a matter of statewide concern." However, ORS chapter 459 contains numerous references to the power of local government to enact legislation affecting solid waste landfills. Specifically, immediately following the above declaration that landfill sites are a matter of statewide concern, ORS 459.017(1)(b) provides:

> "Local government has the primary responsibility for planning for solid waste management."

In addition, ORS 459.035 provides:

> "[The Department of Environmental Quality] shall provide to * * * local government units * * * advisory, technical, and planning assistance in development and implementation of effective solid waste management plans and practices * * *." (Emphasis supplied.)

ORS chapter 459 would have a preemptive effect if its provisions could not operate concurrently with the challenged ordinance, City of Portland v. Jackson, 111 Or App 233, 242, 826 P2d 37, rev allowed 313 Or 354 (1992); City of Portland v. Dollarhide, 71 Or App 289, 692 P2d 162 (1984), aff'd 300 Or 490 (1986), or if it expressed an intent that the legislature meant its provisions to be the exclusive means of solid waste landfill regulation. La Grande/Astoria v. PERB, supra, 281 Or at 148-49. We do not believe that either of these considerations are present to establish that ORS chapter 459 preempts Measure 36-1.

The eighth assignment of error is denied.

Sections 2 and 3 of the challenged decision are reversed, pursuant to the fifth assignment of error. The remainder of the challenged decision is remanded, pursuant to the first through fourth assignments of error.