

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 ART KAMP and ROBERT BURCHFIELD,
5 *Petitioners,*

6
7 vs.

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9 WASHINGTON COUNTY,
10 *Respondent,*

11 and

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13 GRABHORN INC. dba LAKESIDE
14 RECLAMATION LANDFILL,
15 *Intervenor-Respondent.*

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17 LUBA No. 2007-116

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20 FINAL OPINION
21 AND ORDER

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23 Appeal from Washington County.

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25 Art Kamp and Robert Burchfield, Beaverton, represented themselves.

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27 Christopher A. Gilmore, Assistant County Counsel, Hillsboro, represented
28 respondent.

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30 Wendie L. Kellington, Lake Oswego, represented intervenor-respondent.

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

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35 DISMISSED

08/28/2007

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

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NATURE OF THE DECISION

Petitioners appeal a county resolution that adopts a revised franchise agreement between the county and a landfill.

MOTION TO INTERVENE

Grabhorn Inc. (intervenor) moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

JURISDICTION

The county and intervenor move to dismiss this appeal, arguing among other things that the challenged decision is not a land use decision subject to LUBA’s jurisdiction.

The Board’s jurisdiction is limited in relevant part to review of land use decisions. ORS 197.825(1). As relevant here, ORS 197.015(11)(a)(A) defines “land use decision” to include “[a] final decision or determination made by a local government or special district that concerns the adoption, amendment or application of” the statewide planning goals, a comprehensive plan provision, a land use regulation or a new land use regulation.

The challenged resolution adopts a revised franchise agreement between the county and intervenor’s landfill. The resolution states that the “primary impact” of the revised agreement is to set a new maximum rate that intervenor can charge for disposal of dry waste at the landfill. The only county code provision cited in the resolution is Washington County Code (WCC) 8.08.650, which provides that the county shall conduct rate hearings annually.¹ WCC 8.08.650 is not a land use regulation and petitioners do not contend that it is.

¹ WCC 8.08.650 is part of WCC Title 8, Health and Safety, and provides:

“Rate hearings shall be held annually, and not otherwise, by the board unless that board finds the public health, safety or welfare justifies a hearing on less than an annual basis. New rates shall become effective thirty days after the decision of the board which shall publish the rate schedule proposed by the franchisee not less than ten days prior to rate hearings and shall publish any new rate schedules prior to the effective date of such schedule.”

1 Petitioners argue that the resolution is a land use decision because the revised
2 agreement also establishes an annual cap of 175,000 tons that can be disposed at the landfill,
3 a cap that was determined based on evaluation of transportation and neighborhood impacts.

4 Petitioners cite to a staff memorandum stating that

5 “The updated agreement will include an annual 175,000 tonnage cap. This is
6 based on an analysis conducted by the planning and engineering firm of
7 McKeever/Morris and previously approved by [the county Solid Waste
8 Advisory Committee]. The cap was set based on impacts of the facility on the
9 transportation system and neighborhood, taking into account volumes
10 necessary to make the facility economically viable and provide for a
11 reasonable landfill life. This cap however was not included in the 2000
12 franchise agreement. The annual total waste accepted by Lakeside [landfill]
13 has averaged approximately 75,000 tons since 2001.” May 9, 2007
14 Memorandum from the County Solid Waste Supervisor to the County Board
15 of Commissioners, 3, Exhibit A-7 to Respondent’s Motion to Dismiss.

16 Petitioners argue based on that staff memorandum that “the findings applied and interpreted
17 land use regulations as outlined in the Washington County CDC [Community Development
18 Code] in determining impacts on the transportation system and neighborhood.” Response to
19 Motions to Dismiss 4. Petitioners also allege that the challenged resolution is a “de facto
20 determination of nonconforming use” for the landfill, part of a pattern of county decisions
21 over many years that have incrementally allowed the landfill to expand without formal land
22 use approvals. Notice of Intent to Appeal 3.

23 The county and intervenor argue that petitioners fail to identify any comprehensive
24 plan provision or CDC land use regulation that was applied in the course of adopting the
25 challenged resolution, and have therefore failed to establish that the resolution is a land use
26 decision as defined at ORS 197.015(11)(a)(A). We agree with respondents. As far as we can
27 tell from the staff memorandum, the tonnage cap was initially determined and approved prior
28 to 2000, when the original franchise agreement was adopted, although not incorporated into
29 the original franchise agreement at that time. Petitioners cite to no indication that the county
30 considered or applied any comprehensive plan or land use regulation in the course of
31 determining or applying that tonnage cap prior to 2000, much less in the current proceeding

1 that lead to the decision that is the subject of this appeal. Simply because the county may
2 have considered “impacts of the facility on the transportation system and neighborhood” in
3 determining that tonnage cap originally or in incorporating that tonnage cap in the agreement
4 that is before us in this appeal does not mean that either decision concerned the application of
5 any comprehensive plan provision or land use regulation.

6 Similarly, petitioners have not established that adopting a revised franchise
7 agreement between the landfill and the county constitutes a de facto nonconforming use
8 determination. The resolution makes no determination whatsoever about the lawfulness or
9 status of the landfill operation, and in relevant part simply agrees to a new maximum rate and
10 a maximum tonnage cap.

11 It is petitioners’ burden to establish our jurisdiction over the challenged decision.
12 Because petitioners have not met that burden, we must dismiss this appeal.