BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WASTE NOT OF YAMHILL COUNTY,
YAMHILL COUNTY SOIL AND WATER
CONSERVATION DISTRICT,
PHYLLICE BRADNER, FRIENDS OF
YAMHILL COUNTY, McPHILLIPS FARM, INC.,
MOMTAZI FAMILY LLC.,
YAMHILL COUNTY FARM BUREAU,
ERIN RAINEY, SHANNON COX,
and HALEY COX.
Petitioners,

vs.

YAMHILL COUNTY,
Respondent,

and

RIVERBEND LANDFILL COMPANY,
Intervenor-Respondent.

LUBA No. 2011-091

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

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

Rick Sanai, Yamhill County Counsel, McMinnville, filed a joint response brief and argued on behalf of respondent.

Tommy A. Brooks, Portland, filed a joint response brief and argued on behalf of intervenor-respondent. With him on the brief were James E. Benedict and Cable Huston et al.

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

HOLSTUN, Board Member, concurring.

AFFIRMED 04/05/2012

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal the county's adoption of a legislative text amendment to the Yamhill County Zoning Ordinance (YCZO) that adds expansion of an existing solid waste disposal facility to the list of uses allowed in the county's exclusive farm use (EFU) zone.

FACTS

ORS 215.283(2)(k) authorizes a county to approve a "site for the disposal of solid waste" on land zoned EFU.[1] Prior to the challenged amendment, the county's code allowed a solid waste disposal facility only in the county's Public Works/Safety (PWS) zone, and did not allow such facilities in its EFU zone. In 2008, intervenor-respondent (intervenor) Riverbend Landfill, Inc., which operates an existing landfill on land zoned PWS, applied to the county to expand the landfill onto neighboring land zoned EFU. In 2009, the county approved a reasons exception to Statewide Planning Goal 3 (Agricultural Land) and rezoned the neighboring land to PWS. LUBA reversed the county's decision, on the grounds that an exception is not appropriate to allow a use that Goal 3, and ORS 215.283(2)(k), already allow on agricultural lands. *Waste Not of Yamhill County v. Yamhill County*, 61 Or LUBA 423, 424, *aff'd* 240 Or App 285, 246 P3d 493 (2010), *adh'd to as modified on recons*, 241 Or App 199, 255 P3d 496 (2011) (*Waste Not I*). A permissible approach, we suggested, was for the

[1] ORS 215.283(2) provides in relevant part:

> "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."

county to amend its EFU zone to allow for the establishment or expansion of solid waste disposal facilities, as authorized by ORS 215.283(2)(k).

On June 2, 2011, the county initiated a legislative process to consider an amendment to the EFU section of the YCZO, specifically to add a new section (V) to YCZO 402.09 to allow:

> "The maintenance, expansion or enhancement of an existing site on the same tract for the disposal of solid waste 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. The use must satisfy the standards set forth in ORS 215.296(1)(a) and (b) and the standards set forth in Section 1101, Site Design Review. The maintenance, expansion or enhancement of an existing use on the same tract on high-value farmland is permissible only if the existing use is wholly within a farm use zone. No other Yamhill County Zoning Ordinance criteria or Comprehensive Plan goal or policy shall apply as an approval standard for this use." Record 1-2.

After proceedings before the planning commission and board of commissioners, the board of commissioners approved Ordinance 867 adding YCZO 402.09(V) to the county's EFU regulations. This appeal followed.

MOTION TO FILE REPLY BRIEF

Petitioners move to file a reply brief to address an alleged "new matter" in the joint response brief.[2] The county and intervenor (respondents) object, arguing that the proposed reply brief impermissibly advances new challenges to the decision.

The petition for review argues in several places that the challenged zoning text amendment must comply with the statewide planning goals, citing ORS 197.175(2)(a), and further that the amendment does not comply with certain goals and administrative rules implementing the goals.[3] In the response brief, respondents dispute the premise that a land

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[2] OAR 661-010-0039 provides that a reply brief "shall be confined solely to new matters raised in the respondent's brief."

[3] ORS 197.175(2) provides:

use regulation amendment must be evaluated for goal compliance, arguing that ORS 197.175(2)(a) is concerned only with comprehensive plan amendments and ORS 197.175(2)(d) suggests that in circumstances where the plan is not amended a land use decision, including a land use regulation amendment, need only comply with the acknowledged comprehensive plan, not the goals. As additional support, respondents noted that ORS 197.835(7) provides that LUBA shall reverse an amendment to a land use regulation if the amendment is not in compliance with the comprehensive plan, or the comprehensive plan does not contain specific policies or other provisions that provide the basis for the regulation, and the regulation is not in compliance with the statewide planning goals.[4] Respondents then noted that the challenged decision cites ORS 197.835(7) and

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"Pursuant to ORS chapters 195, 196 and 197, each city and county in this state shall:

"(a) Prepare, adopt, amend and revise comprehensive plans in compliance with goals approved by the commission;

"(b) Enact land use regulations to implement their comprehensive plans;

"(c) If its comprehensive plan and land use regulations have not been acknowledged by the commission, make land use decisions and limited land use decisions in compliance with the goals;

"(d) If its comprehensive plan and land use regulations have been acknowledged by the commission, make land use decisions and limited land use decisions in compliance with the acknowledged plan and land use regulations; and

"(e) Make land use decisions and limited land use decisions subject to an unacknowledged amendment to a comprehensive plan or land use regulation in compliance with those land use goals applicable to the amendment."

[4] ORS 197.835(7) provides:

"[LUBA] shall reverse or remand an amendment to a land use regulation or the adoption of a new land use regulation if:

"(a) The regulation is not in compliance with the comprehensive plan; or

"(b) The comprehensive plan does not contain specific policies or other provisions which provide the basis for the regulation, and the regulation is not in compliance with the statewide planning goals."

adopts a finding that the statewide planning goals do not apply to the subject land use regulation amendment, because the county comprehensive plan includes "specific policies that serve as the basis for the amendment," policies which the county identifies in its decision. Record 10; *see* n 5. Respondents argue that the petition for review fails to assign error to or otherwise challenge the board of commissioners' finding that the comprehensive plan includes "specific policies" that govern the disputed land use regulation amendments and that that failure means that petitioners are precluded from arguing that the amendment is subject to review for compliance with the goals under ORS 197.835(7)(b). Response Brief 6-7.

In the reply brief, petitioners devote much of their argument to disputing that the decision adequately identifies "specific policies" in the comprehensive plan that provide a basis for the land use regulation amendment. We agree with respondents that that argument in the reply brief is, in essence, a new challenge to the adequacy or correctness of the county's finding at Record 10 that "specific policies" in the comprehensive plan provide the basis for the land use regulation amendment. The respondents' reliance on ORS 197.835(7)(b) to dispute petitioners' premise that the land use regulation amendment must comply with the goals is arguably a legitimate "new matter" warranting a reply brief. But in replying to such a response, petitioners cannot advance a new challenge to a finding or a portion of the decision that was unchallenged in the petition for review. In this circumstance, the reply brief must be limited to arguing that it was unnecessary to assign error to the unchallenged finding or that failure to challenge the finding in the petition for review should not affect LUBA's resolution of the assignment of error at issue. *McGovern v. Crook County*, 60 Or LUBA 177, 181 (2009), *aff'd* 234 Or App 365, 228 P3d 736 (2010); *VanSpeybroeck v. Tillamook County*, 56 Or LUBA 184, 187, *aff'd* 221 Or App 677, 191 P3d 712 (2008).

Because portions of the proposed reply brief properly address "new matters," we accept the reply brief, but with the caveat that we will not consider any argument in the reply brief that constitutes, in essence, a challenge to the adequacy or correctness of the county's finding that "specific policies" in the comprehensive plan provide a basis for the zoning code amendment for purposes of ORS 197.835(7)(b). The motion to strike is granted, in part, and the reply brief accepted, in part.

FOURTH AND EIGHTH ASSIGNMENTS OF ERROR

As noted above, the county adopted a finding that because "specific policies" in the comprehensive plan provide the basis for the land use regulation amendment, there is no need to consider whether the amendment complies with the statewide planning goals.[5] Nonetheless, the county adopted alternative findings that address a number of goals, including Goals 6 (Air, Water and Land Resources Quality) and 9 (Economic Development). Under the fourth and eighth assignments of error, petitioners challenge the county's alternative findings that the challenged text amendment is consistent with Goals 6 and 9.

Respondents argue, and we agree, that petitioners' challenge to the county's alternative findings of compliance with Goals 6 and 9 does not provide a basis for reversal or remand, absent a successful challenge to the county's primary conclusion that specific comprehensive plan policies provide the basis for the amendment for purposes of ORS 197.835(7)(b). *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 170-71

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[5] Specifically, the county found:

> "* * * Pursuant to ORS 197.835(7), an amendment to a land use regulation must be in compliance with an acknowledged comprehensive plan or, if the comprehensive plan does not contain specific policies or provisions that serve as the basis for the regulation, must be in compliance with the Statewide Planning Goals. As discussed in more detail below in Section II.2 [*sic*: should be Section I.2], the Board finds that the legislative amendment is consistent with the County's acknowledged Comprehensive Plan, which contains specific policies that serve as the basis for the amendment. Even if the County's Comprehensive Plan did not contain such policies, the Board finds that the amendment is consistent with the Statewide Planning Goals as set forth in more detail below." Record 10.

(1998), *aff'd* 158 Or App 1, 970 P2d 685 (1999). In *Rogue Valley*, the city's decision included a finding that specific plan policies provided a basis for the amendment and the city's decision set out those specific plan policies. In the petition for review, the petitioners argued that the amendment was inconsistent with Statewide Planning Goal 10 (Housing), but failed to challenge or assign error to the finding that specific policies provided the basis for the amendment. At oral argument, the petitioners attempted to argue that the policies the city relied upon were not specific enough, but LUBA ultimately concluded that "[i]n view of the city's unchallenged finding that the cited plan policies and other provisions make the statewide planning goals inapplicable to the [code amendment], we reject petitioners' contention that the [amendment] violates Goal 10 and the Goal 10 administrative rule." *Id.* At 170-71.

In the reply brief, petitioners argue that *Rogue Valley* is distinguishable because in that case LUBA actually reviewed the plan policies the city relied upon and found them sufficiently specific for purposes of ORS 197.835(7)(b). In the present case, petitioners argue in the reply brief, the policies the county relies upon are not sufficiently specific, and therefore the goals must be applied. As noted above, the latter argument is, in essence, a challenge to the county's finding that the plan includes "specific policies" providing a basis for the amendment, and we will not consider such a challenge raised for the first time in a reply brief. In any case, we disagree with petitioners that *Rogue Valley* is distinguishable. In *Rogue Valley*, we quoted in a footnote some of the plan policies the city relied upon, and commented that those policies are "somewhat more specific" than the policies we rejected as insufficiently specific in *Melton v. City of Cottage Grove*, 28 Or LUBA 1 (1994), and *Ramsey v. City of Portland*, 23 Or LUBA 291, *aff'd* 115 Or App 20, 836 P2d 772 (1992). 35 Or LUBA at 170. Nonetheless, we resolved the assignment of error based on the petitioner's failure to assign error to or otherwise challenge the city's findings in the petition for review, and did not conclude that the cited policies were sufficiently "specific" for purposes of ORS

197.835(7)(b) or resolve the assignment of error on that basis. Admittedly, as petitioners point out in the reply brief, a footnote attached to the final sentence in our discussion includes language that can be read to characterize our resolution of the Goal 10 challenge as a conclusion that the "cited plan policies are sufficient[.]" 35 Or LUBA at 171, n 35. However, the point of footnote 35 was that our resolution of the petitioners' Goal 10 challenge provided an additional basis for rejecting the petitioners' earlier assignment of error that the city should have applied Goal 5, not that the cited plan policies were sufficiently specific to invoke ORS 197.835(7)(b).

In short, the present case is materially indistinguishable from *Rogue Valley*, and we agree with respondents that petitioners' failed to include an assignment of error or other challenge to the county's primary finding, pursuant to ORS 197.835(7), that the amendment is consistent with the county's comprehensive plan, and that the plan includes "specific policies" that are the basis for the amended regulation. That unchallenged finding makes it unnecessary for LUBA to review petitioners' challenge to the county's alternative findings that the amendment is consistent with Goals 6 and 9. Even if the county's alternative findings concluding that the amendment is consistent with Goals 6 and 9 are inadequate or erroneous, any error does not provide a basis for reversal or remand if the land use regulation amendment is consistent with such specific comprehensive plan policies.

Finally, under the fourth assignment of error, petitioners include an argument that the county's Goal 6 findings improperly "delegate" the power to amend the county's legislation to another government entity, in violation of Article I, section 21 of the Oregon Constitution.[6] Specifically, petitioners argue that the county erred in relying upon the Department of Environmental Quality (DEQ) to ensure that any landfill expansion that

[6] Article I, section 21 of the Oregon Constitution provides that "[n]or shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution * * *."

occurs pursuant to YCZO 402.09(V) complies with applicable DEQ environmental regulations and hence complies with Goal 6. This argument is almost certainly obviated by petitioners' failure to challenge the county's primary finding regarding application of the statewide planning goals, for purposes of ORS 197.835(7). To the extent we must consider petitioners' arguments under the Delegation Clause of the Oregon Constitution, we reject those arguments. Petitioners do not explain how relying upon DEQ to enforce DEQ's *own* regulations could possibly delegate to DEQ the ability to amend the *county's* land use regulations, or make the "taking effect" of the county's regulations "depend" upon DEQ's authority, in contravention of the Delegation Clause.

The fourth and eighth assignments of error are denied.

FIRST ASSIGNMENT OF ERROR

Under the first assignment of error, petitioners argue that the county's alternative finding of compliance with Statewide Planning Goal 12 (Transportation) is inadequate, and that the county failed to address whether the legislative text amendment adding a new use to the county's EFU zone is consistent with the Transportation Planning Rule (TPR), at OAR 660-012-0060, which implements Goal 12. In relevant part, OAR 660-012-0060(1) provides that a local government must put in place certain measures if an "amendment" to a "land use regulation" would "significantly affect an existing or planned transportation facility" in any of the ways specified in the rule.[7]

[7] OAR 660-012-0060 was amended, effective January 1, 2012. Because the amended version of OAR 660-012-0060 would potentially apply on any remand of the county's legislative text amendment decision, we quote the current version of OAR 660-012-0060(1), which provides:

> "(1) If an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation (including a zoning map) would significantly affect an existing or planned transportation facility, then the local government must put in place measures as provided in section (2) of this rule, unless the amendment is allowed under section (3), (9) or (10) of this rule. A plan or land use regulation amendment significantly affects a transportation facility if it would:

We concluded above that petitioners' failure to challenge the county's finding pursuant to ORS 197.835(7) that specific comprehensive plan policies provide a basis for the text amendment means that we cannot remand the county's decision for any error the county may have committed in its findings addressing compliance with Statewide Planning Goals 6 and 9. That conclusion applies with equal force to petitioners' challenge to the county's Goal 12 findings under this assignment of error.

Petitioners' challenges under OAR 660-012-0060 may be different. Arguably, OAR 660-012-0060 applies by its own terms, independent of Goal 12, and we may review petitioners' challenges under that rule, notwithstanding that we lack authority under ORS 197.835(7) to remand based on petitioners' Goal 12 challenges. For purposes of this opinion, we assume that to be the case.

That said, we question whether the OAR 660-012-0060 can be meaningfully applied to a land use regulation amendment such as the present one, a legislative text amendment that simply adds a use that is already authorized by the statutory EFU zone to the list of uses

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"* * * * *

"(c) Result in any of the effects listed in paragraphs (A) through (C) of this subsection based on projected conditions measured at the end of the planning period identified in the adopted TSP. As part of evaluating projected conditions, the amount of traffic projected to be generated within the area of the amendment may be reduced if the amendment includes an enforceable, ongoing requirement that would demonstrably limit traffic generation, including, but not limited to, transportation demand management. This reduction may diminish or completely eliminate the significant effect of the amendment.

"(A) Types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;

"(B) Degrade the performance of an existing or planned transportation facility such that it would not meet the performance standards identified in the TSP or comprehensive plan; or

"(C) Degrade the performance of an existing or planned transportation facility that is otherwise projected to not meet the performance standards identified in the TSP or comprehensive plan."

allowed in the county's EFU zone. The parties cite no case, and we are aware of none, that has applied OAR 660-012-0060 to a legislative text amendment of this kind. The typical circumstance in which OAR 660-012-0060 is applied involves a quasi-judicial comprehensive plan map amendment or zoning map amendment that allows new uses on specific properties previously designated or zoned for less traffic-intensive uses, almost always to facilitate proposed development of the property redesignated or rezoned.

It is true that under OAR 660-012-0060(1) the rule applies without express limit to any "amendment" to a "land use regulation[.]" That language on its own is broad enough to include a legislative text amendment to a county EFU zone such as an amendment to YCZO 402.09. There is some context in the rule that suggests a narrower scope, however. We note that some of the measures set out in OAR 660-012-0060(2) to mitigate the traffic impacts of an amendment that has been determined under OAR 660-012-0060(1) to significantly affect a transportation facility appear to presume a specific development proposal. *See* OAR 660-012-0060(2)(b) (provision of facilities, improvements or services "adequate to support the proposed land uses"); OAR 660-012-0060(2)(d) (providing other measures as a "condition of development").[8] *See also* OAR 660-012-0060(6) (setting out how to determine "whether

[8] OAR 660-012-0060(2) (2012) provides:

> "If a local government determines that there would be a significant effect, then the local government must ensure that allowed land uses are consistent with the identified function, capacity, and performance standards of the facility measured at the end of the planning period identified in the adopted TSP through one or a combination of the remedies listed in (a) through (e) below, unless the amendment meets the balancing test in subsection (2)(e) of this section or qualifies for partial mitigation in section (11) of this rule. A local government using subsection (2)(e), section (3), section (10) or section (11) to approve an amendment recognizes that additional motor vehicle traffic congestion may result and that other facility providers would not be expected to provide additional capacity for motor vehicles in response to this congestion.
>
> "(a) Adopting measures that demonstrate allowed land uses are consistent with the planned function, capacity, and performance standards of the transportation facility.
>
> "(b) Amending the TSP or comprehensive plan to provide transportation facilities, improvements or services adequate to support the proposed land uses consistent with

proposed land uses would affect or be consistent with planned transportation facilities as provided in sections (1) and (2)" in mixed-use, pedestrian-friendly areas).

Moreover, the causative analysis that is at the heart of a "significantly affects" determination under OAR 660-012-0060(1) works only if the plan or zoning amendment allows uses within a circumscribed area, such that it is possible to analyze the traffic impacts of specific uses on nearby transportation facilities. It is difficult to imagine how a county could possibly conduct such an analysis on a legislative text amendment that affects the county's entire EFU zone, which may include thousands of separate parcels that could potentially be developed or redeveloped with a new use allowed in the EFU zone, and hundreds of potentially affected intersections and transportation facilities.[9]

> the requirements of this division; such amendments shall include a funding plan or mechanism consistent with section (4) or include an amendment to the transportation finance plan so that the facility, improvement, or service will be provided by the end of the planning period.
>
> "(c) Amending the TSP to modify the planned function, capacity or performance standards of the transportation facility.
>
> "(d) Providing other measures as a condition of development or through a development agreement or similar funding method, including, but not limited to, transportation system management measures or minor transportation improvements. Local governments shall, as part of the amendment, specify when measures or improvements provided pursuant to this subsection will be provided.
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> "(e) Providing improvements that would benefit modes other than the significantly affected mode, improvements to facilities other than the significantly affected facility, or improvements at other locations, if the provider of the significantly affected facility provides a written statement that the system-wide benefits are sufficient to balance the significant effect, even though the improvements would not result in consistency for all performance standards."

[9] Petitioners point out, correctly, that in the present case the amendment allows only expansion of *existing* solid waste disposal facilities, of which there are apparently seven in the county. The task of analyzing the traffic impacts of potentially expanding seven specific facilities under OAR 660-012-0060 would not be nearly as daunting as analyzing potential development of all EFU-zoned parcels in the county. However, the larger point remains the same: if the TPR applies to all legislative text amendments to a county's EFU zoning that implement the EFU statutes, then there will be circumstances where the county will have to conduct a TPR analysis involving significant numbers of EFU-zoned parcels and many transportation facilities in the county located in or near EFU-zoned lands.

Even if OAR 660-012-0060 is generally intended to apply to legislative text amendments, it is possible that legislative text amendments implementing the statutory EFU provisions are different. The statutory EFU provisions predate the statewide planning program, and list the uses that must be and may be allowed on agricultural lands as defined under Goal 3. The statutory EFU zone has always authorized a long list of non-farm uses as outright or conditionally permitted uses in the EFU zone. Over the years, the legislature has added a number of uses to the list of uses allowed in the EFU zone, and frequently amends ORS 215.213 and 215.283 to provide for new or expanded uses. ORS 197.646(1) requires local governments to amend their comprehensive plan and land use regulations to implement new statutory requirements. Under petitioners' view, every time a county legislatively amends its EFU zone to implement statutory changes to the uses allowed in the EFU zone, the county would be required to first conduct a TPR analysis, potentially of all EFU-zoned parcels in the county and all transportation facilities that might be affected by potential development under the amendment, through the end of the applicable planning period. As a result of that review the county would presumably either not amend its EFU zone to allow any new or amended EFU zone uses that might significantly affect transportation facilities or take one or more of the mitigation measures authorized by the TPR before amending the county's EFU zone to allow the new or amended EFU zone uses. That task could be so onerous and time-consuming that counties would choose instead to violate the ORS 197.646(1) requirement to adopt implementing amendments. Arguably, the legislature does not intend that administrative rules such as OAR 660-012-0060 be applied when a local government adopts a legislative text amendment to conform its EFU zone to the statutory EFU provisions.

We need not speculate on this point further, because the county argues, and we agree, that the county's Goal 12 findings and the record are adequate to demonstrate that the

amendment to allow landfill expansion in the EFU zone is consistent with OAR 660-012-0060.

Because the challenged decision is a legislative rather than a quasi-judicial decision, there is no generally applicable requirement that the decisions be supported by findings, although the decision and record must be sufficient to demonstrate that applicable criteria were applied and required considerations were indeed considered. *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16, n 6, 38 P3d 956 (2002). With respect to evidence, the record of a legislative decision must provide an "adequate factual base," which is equivalent to the requirement that a quasi-judicial decision be supported by substantial evidence in the whole record. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 378, *aff'd* 130 Or App 406, 882 P2d 1130 (1994). Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993).

As part of its alternative Goal 12 findings, the county concluded that the amendment "does not have direct or secondary effects on the county's transportation system." Record 17. Petitioners argue that that finding is inadequate to demonstrate compliance with OAR 660-012-0060, because it does not address the specific question posed by OAR 660-012-0060(1), whether the amendment "significantly affects" any transportation facilities. Respondents argue that the county is not required to use magic words, particularly in support of a legislative decision like the one at issue in this appeal, and that the county's finding is sufficient, because an amendment that does not have any direct or secondary effect on the county's transportation system cannot possibly "significantly affect" a transportation facility within the meaning of OAR 660-012-0060(1). We agree with respondents that if the county's finding that the legislative text amendment does not have direct or secondary effects on the county's transportation system is supported by an adequate factual base, then it is sufficient to demonstrate that the amendment is consistent with OAR 660-012-0060.

Turning to the evidence in the record cited to us, respondents note that the present record includes the record of the 2009 decision approving expansion of the Riverbend landfill at issue in *Waste Not I*, in which the county concluded based on traffic studies that the expansion would not significantly affect any existing or planned transportation facility for purposes of Goal 12 and OAR 660-012-0060. Respondents argue that that conclusion was based, in part, on the nature of the proposed expansion to Riverbend landfill, which was nearing capacity and needed to expand onto adjoining EFU-zoned land to accommodate its existing solid waste stream. Respondents cite to findings that the limited nature of the expansion, to continue at the same level of operations as the existing use, played a significant role in the county's approval. 2009 Record 5-6. Respondents argue that the 2009 record "demonstrates that continuation of an existing solid waste disposal site, such as a landfill, results in prolonged life of the site's current operations rather than an increase in the intensity of an existing operation." Joint Response Brief 9.

The evidence the county cites to from the 2009 record is not particularly compelling support for the county's finding that the amendment to allow expansion of existing landfills in the county has no direct or secondary effects on the county's transportation system. Nonetheless, it lends *some* support to the county's position that landfill expansions are typically driven by the need for additional land to accommodate the landfill's existing waste stream, and as such the expansion does not generate additional traffic above that generated by the existing facility, but simply continues the traffic generated by the existing facility at approximately the same level of intensity. At oral argument, petitioners disputed that position, arguing that it is possible that a landfill expansion could result in an absolute increase in landfill operations and hence traffic generation. That may be true, but petitioners cite no evidence supporting that argument, and the only evidence we are cited suggests the contrary.

The traffic study the county relied on in making the 2009 decision to allow the Riverbend landfill to expand concluded that growth in landfill operations is driven by population growth in the county. 2009 Record 2930. For purposes of estimating traffic generated by the proposed expansion, the traffic study appeared to assume that the expansion would replace the existing landfill, which was nearing capacity, with the only increases in traffic generation attributable to incremental population increases in the county over 20 years, and resulting incremental increases in the waste stream, not the expansion itself. On its face, that is a reasonable assumption. The traffic generated by a landfill is largely represented by trucks hauling waste from population centers. The amount of waste generated, and the resulting number of trips to and from the landfill, is unlikely to vary much over time, except through population changes or other factors reflecting changes in the volume of waste generated. It is reasonable to presume that a typical landfill expansion would not represent an expansion in the intensity of the landfill operation, the amount of waste handled, but rather simply a change in the physical location of the operation, without any increase in traffic generation. Although petitioners speculate that a landfill expansion could represent an increase in operational intensity, and hence traffic generation, we are cited to no evidence supporting that speculation. In our view, a reasonable person could find, based on the evidence in the whole record, that amending the county EFU zone to potentially allow the expansion of an existing landfill will have no direct or secondary effects on the county's transportation system. In the context of a legislative text amendment like the present one, we believe the decision and evidence in the record are sufficient to demonstrate that the amendment is consistent with OAR 660-012-0060.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Ordinance 867 includes a clause stating that "an emergency having been declared to exist," therefore the ordinance, "being necessary for the health, safety, and welfare of the

citizens of Yamhill County," is effective immediately rather than 90 days later, the date the ordinance would go into effect without an emergency clause. Record 2.

Petitioners argue that the county erred in concluding that an emergency exists. First, petitioners note that the ordinance does not actually declare that an emergency exists, it only states that an emergency has been declared to exist. More importantly, petitioners argue, there is no explanation or evidence supporting the county's conclusion that an emergency exists. Petitioners acknowledge that extreme deference is paid to a local government's declaration that an emergency exists, warranting an earlier effective date for an ordinance. *Greenberg v. Lee* , 196 Or 157, 248 P2d 324 (1952); *Joplin v. Ten Brook*, 124 Or 36, 263 P 893 (1928). However, petitioners argue that a bare assertion of an emergency without actually declaring an emergency or providing any supporting facts or reason is insufficient.

Respondents argue that the record includes evidence that landfills in the county may run out of capacity, and that evidence is sufficient to support the county's declaration of an emergency. Respondents also argue that even if the county erred in declaring an emergency, any error is harmless, because absent the declaration the ordinance would have gone into effect 90 days later, in this case on December 21, 2011. We agree with respondents that the ordinance, fairly read, declares an emergency and that the record supports that declaration, sufficient to surpass the low threshold described in *Greenberg* and *Joplin*. In addition, petitioners have not established that any error the county might have made in declaring an emergency warrants remand. If the declaration is invalid, the only apparent consequence is that the ordinance became effective 90 days later instead of on adoption. The ordinance is now effective in either case, and petitioners do not explain what point would be served by remanding the ordinance under these circumstances.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

As noted, the county adopted a set of alternative findings addressing the statewide planning goals, beginning with Goal 3. At the end of its Goal 3 findings, the county stated:

> "The Board finds, that because the legislative amendment is specifically allowed by Goal 3, it is consistent with all other Statewide Planning Goals. The Board also finds that a use expressly allowed by Goal 3 cannot be inconsistent with any other Statewide Planning Goal." Record 12.

Under the third assignment of error, petitioners argue that the county erred in concluding that a use allowed by one goal is necessarily consistent with all other statewide planning goals. We generally agree with petitioners that that statement, broadly phrased, is incorrect. All goals must be given equal weight. ORS 197.340(1). As petitioners argue, the fact that Goal 10, for example, requires the county to provide for the housing needs of its citizens does not grant the county a free hand to ignore restrictions in Goal 4 or its implementing administrative rule that limit residential development of forest lands.

That said, as noted above, the non-farm uses allowed on agricultural lands subject to Goal 3 are almost entirely determined by statute, specifically the uses allowed on farm land under ORS 215.213(1) and (2), and 215.283(1) and (2). In this sense, Goal 3 is different from other goals. To the extent there is actual conflict between a statute and a goal, the latter must give way.[10] Where the legislature adopts a statute that requires or authorizes a county to allow a non-farm use on agricultural land, any tension between a county ordinance implementing the statute and an applicable statewide planning goal or administrative rule implementing a goal must be resolved with that fundamental hierarchy in mind.

In any case, petitioners have not established that any error in the county's above-quoted statement warrants reversal or remand. The statement has no apparent significance in

[10] Any such actual conflict would presumably be temporary, as the Land Conservation and Development Commission would almost certainly amend the goal to conform to the statute.

this appeal, because the county went on to adopt findings addressing all statewide planning goals. Further, as explained above, petitioners' failure to challenge the county's finding that specific comprehensive plan policies provide the basis for the amendment means that we lack authority to reverse or remand the challenged ordinance for noncompliance with the goals. In short, any error the county made in concluding that a use allowed under Goal 3 cannot be inconsistent with any other statewide planning goal is harmless error.

The third assignment of error is denied.

FIFTH, SIXTH, AND SEVENTH ASSIGNMENTS OF ERROR

YCZO 1207.01(D) requires that approval of a legislative ordinance amendment shall include findings showing that the amendment is consistent with any applicable comprehensive plan goals and policies. Section II(A) of the Yamhill County Comprehensive Plan (YCCP), entitled "Land and Water," includes two goals and a number of policies addressing agricultural lands. YCCP Section V(A) includes a goal and policies addressing air, water and land resources quality.

The county adopted findings and incorporated by reference other findings concluding that the amendment is consistent with the goals and policies in YCCP Sections II and V. The findings are general, and for the most part do not separately discuss the language of the goals or the specific policies set out in Sections II and V.[11] Record 21-24. Petitioners argue under

[11] The county's findings addressing YCCP Section II state, in relevant part:

> "The Board finds that the limitation of the legislative amendment to existing solid waste disposal facilities and the requirement that any facility operating under the amendment undergo Site Design Review will ensure that development occurs in an orderly, efficient, and economic manner within defined boundaries consistent with Policy [1A] under Goal 1 of the Comprehensive Plan Section II.A. Such an approach minimizes impacts on the conservation and viability of farm lands for the production of crops and livestock. The Board finds that the viability of commercial farm uses in the general vicinity of existing solid waste disposal facilities, including farmland employed by the wine industry, has not been diminished by the presence or operation of existing facilities. The Board finds that enacting the legislative amendment to potentially allow the continued operation of solid waste disposal facilities will not have additional impacts to nearby farm uses and that the County will realize long term benefits to balance the minimal loss of farm lands to non-farm uses.

these assignments of error that the county's findings are inadequate to address three specific policies. We address each contention in turn.

A. YCCP Section II(A), Policy 1H.

YCCP Section II(A), Policy 1H states that it is the county's policy that "[n]o proposed rural area development shall substantially impair or conflict with the use of farm or forest land, or be justified solely or even primarily on the argument that the land is unsuitable for farming or forestry or, due to ownership, is not currently part of an economic farming or forestry enterprise."

Petitioners argue that an expanded landfill authorized pursuant to YCZO 402.09(V) will necessarily violate Policy 1H, because it would remove agricultural land from farm production. Further, petitioners argue that an expanded landfill could conflict with farm uses on nearby lands. According to petitioners, more adequate findings addressing Policy 1H are needed to explain the county's apparent conclusion that YCZO 402.09(V) is consistent with Policy 1H.

We question whether Policy 1H is an applicable comprehensive plan policy, for purposes of evaluating the challenged legislative text amendment under YCZO 1207.01(D). Policy 1H is concerned with "proposed" rural area development, and it proscribes using certain justifications to approve that development. The legislative text amendment does not concern any "proposed" development and could not possibly concern any of the proscribed justifications for development.

Even if Policy 1H is an applicable plan policy for purposes of YCZO 1207.01(D), the county found that "the County will realize long term benefits to balance the minimal loss of

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"* * * *

"Based on the foregoing, the Board finds that the legislative amendment is consistent with Section II of the County's Comprehensive Plan." Record 21-22.

farm lands to non-farm uses[.]" Record 22; *see* n 11. The county clearly does not understand Policy 1H, as petitioners apparently do, to prohibit any expanded landfill because it would remove land from farm use. Under petitioners' preferred interpretation of Policy 1H, the county could not allow *any* of the non-farm uses that ORS 215.283(2) authorizes on EFU land, because any such uses would necessarily remove land from farm use. The county's EFU zones allow most of the uses listed in ORS 215.283(2), which does not suggest that the county shares petitioners' view of Policy 1H.

With respect to whether expanded landfills would "substantially impair or conflict with" the use of farm or forest land, petitioners cite to testimony from farmers regarding adverse impacts from existing landfills, and argue that the county's finding that expanded landfills "will not have additional impacts to nearby farm uses" is not supported by substantial evidence. Respondents cite to countervailing evidence of viable agricultural operations notwithstanding nearby landfills. We agree with respondents that a reasonable person could conclude from the record as a whole, as the county did, that the viability of commercial farm uses near existing solid waste disposal facilities has not been diminished by operation of existing facilities, and that allowing existing landfills to expand will not have additional impacts on nearby farm uses. Those findings are adequate to address Policy 1H, to the extent it is applicable, and are supported by substantial evidence.

B. YCCP Section II(A), Policy 2A

YCCP Section II, Policy 2A states that "Yamhill County will continue to preserve those areas for farm use which exhibit Class I through IV soils as identified in the Capability Classification System of the U.S. Soil Conservation Service." Policy 2A is clearly based on Goal 3, which requires that agricultural lands "shall be preserved and maintained for farm use," and defines "agricultural lands" in the Willamette Valley (which includes the county) to include lands with predominantly Class I through IV soils "as identified in the Soil Capability Classification System of the United States Soil Conservation Service."

Petitioners argue that it is inconsistent with Policy 2A to allow a non-farm use such as an expanded landfill on any land with Class I through IV soils, *i.e.* agricultural land, because it removes the land from farm use and thus fails to "preserve those areas for farm use."

Again, from the county's findings addressing Section II it is evident that the county does not interpret any policy in Section II to prohibit allowing non-farm uses on agricultural lands. Petitioners argue nonetheless that Policy 2A reflects the county's choice to exercise its ability to regulate more restrictively or even prohibit non-farm uses of agricultural land that are otherwise authorized under ORS 215.283(2), an option the county possesses under *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995) (a county has authority to adopt additional approval standards for uses conditionally allowed in EFU zones under ORS 215.283(2)).

However, nothing in the text or context of Policy 2A cited to us suggests that it embodies the county's intent to prohibit all non-farm uses that are allowed under ORS 215.283(2) and Goal 3. The fact that Policy 2A employs the operative language of Goal 3 suggests on the contrary that it simply reflects the county's intent to preserve agricultural lands as required by Goal 3, which as a matter of law is consistent with authorizing non-farm uses allowed under ORS 215.283(2). The county's EFU zones allow almost all of the non-farm uses authorized under ORS 215.283(2), which does not suggest that the county understands Policy 2A as petitioners to do, to reflect the choice to prohibit any non-farm uses on EFU lands. Even if Policy 2A can be understood to acknowledge that the county has the *option* of prohibiting specific ORS 215.283(2) uses otherwise allowed in the EFU zone under the statute and Goal 3, the county has clearly decided not to exercise that option in the present case. As noted, the county found that authorizing existing landfills to be expanded onto farm land will allow the county to realize long term benefits that balance the minimal loss of farm lands to non-farm uses.

C. YCCP Section V(A), Policy 1B

YCCP Section V(A), Policy 1B states that "Yamhill County will, in making land use decisions relative to industrial or other uses likely to pose a threat to air quality, consider proximity of the proposed use to residential areas and meteorological factors such as seasonal prevailing wind direction and velocity." Petitioners argue that the record is devoid of any evidence that the county considered "proximity to residential areas" or "seasonal prevailing wind direction and velocity" in approving the challenged amendment to the YCZO to allow expanded landfills in the EFU zone.

Like Policy 1H, Policy 1B is directed at a "proposed use," indicating that it is concerned with specific development proposals. That is supported by the requirement to consider "proximity to residential areas," which suggests a limited geographic focus and which would be difficult if not impossible to apply to a legislative text amendment that simply adds a new type of use to a base zone. Respondents argue, and we agree, that given the language of Policy 1B, it is not an applicable comprehensive plan policy, and therefore the absence of any evidence regarding proximity to residential areas or seasonal prevailing winds is not a basis for reversal or remand.

The fifth, sixth and seventh assignments of error are denied.

The county's decision is affirmed.

Holstun, Board Member, concurring.

As a general proposition, given the standard of review set out in ORS 197.835(7)(b), a local government is obliged to apply the statewide planning goals when amending an acknowledged land use regulation, unless the applicable comprehensive plan includes specific policies that provide the basis for the regulation. However, I believe the land use regulation amendment that is before us in this appeal is not subject to that general proposition.

Goal 3 requires that "[a]gricultural lands shall be preserved and maintained for farm use * * *." But Goal 3 also expressly states "[c]ounties may authorize farm uses and those nonfarm uses defined by [LCDC] rule that will not have significant adverse effects on accepted farm or forest practices." Solid waste disposal facilities are among the non-farm uses authorized by statute and commission rule, if they will not have significant adverse effects on accepted farm or forest practices. OAR 660-033-0090 specifically requires that "counties shall apply zones that qualify as exclusive farm use zones under ORS Chapter 215 to 'agricultural land' * * *."

Goal 3 is unique among the nineteen statewide planning goals in that it both identifies a resource for protection (agricultural land) and specifies the detailed regulatory mechanism that must be adopted to ensure such protection (the EFU zone that is set out in statute and refined by LCDC rule). Simply stated, the legislature has determined that EFU zoning is the regulatory mechanism for protecting agricultural land. So long as a local government is amending its EFU zone to more closely align the county EFU zone with the EFU zone as set out in statute and refined by LCDC rule, which is the case here, I do not believe a county is required to demonstrate that the amendment is consistent with the statewide planning goals. To require such a demonstration suggests that counties may only be entitled to amend the county EFU zone to authorize the same nonfarm uses that are authorized by statute and LCDC rule if the county can demonstrate before amending its EFU zone that in no instance could future approval of such a nonfarm use be inconsistent with any of the many planning objectives included in the statewide planning goals. I do not believe ORS 197.835(7)(b) requires such an impossible demonstration, even if there are no specific comprehensive plan policies which provide the basis for the land use regulation. Based on this reasoning alone, I believe assignments of error one, three, four and nine should be denied, although I also agree with the majority's alternative reasoning for denying those assignments of error as well.