BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

STOP THE DUMP COALITION,
WILLAMETTE VALLEY WINERIES ASSOCIATION,
and RAMSEY McPHILLIPS,
Petitioners,

and

FRIENDS OF YAMHILL COUNTY,
Intervenor-Petitioner,

vs.

YAMHILL COUNTY,
Respondent,

and

RIVERBEND LANDFILL CO.,
Intervenor-Respondent.

LUBA No. 2015-036

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Jeffrey L. Kleinman, Portland, filed a petition for review and argued on behalf of petitioners.

Charles Swindells, Portland, filed a petition for review and argued on behalf of intervenor-petitioner.

Timothy S. Sadlo, County Counsel, McMinnville, filed a joint response brief and argued on behalf of respondent. With him on the brief were Thomas A. Brooks, James E. Benedict, and Cable Huston, LLP.

Thomas A. Brooks, Portland, filed a joint response brief and argued on behalf of intervenor-respondent. With him on the brief were Timothy S. Sadlo, James E. Benedict, and Cable Huston, LLP.

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

REMANDED 11/10/2015

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 a county decision approving site design review and a floodplain development permit to authorize expansion of an existing landfill on land that is zoned for exclusive farm use.

MOTION TO FILE REPLY BRIEF

Petitioners move to file a reply brief to address two alleged "new matters" raised in the response brief: (1) an argument regarding issue preclusion, and (2) an argument that an issue is waived.

The county and intervenor-respondent (Riverbend) submitted an eight-page motion to strike the reply brief. The motion both objects to the reply brief and responds to the merits of the assertions in the reply brief, without distinguishing between the two. Our rules provide no basis for a surreply brief, which is essentially what much of the motion to strike consists of. We will not attempt on our own to separate the portions of the motion to strike that are directed at arguing that the reply brief is not warranted, and those portions that argue that the reply brief is wrong. For that reason, the motion to strike the reply brief is denied.

The reply brief responds to new matters raised in the response brief, and it is allowed.

MOTION TO STRIKE JOINT RESPONSE BRIEF AND APPENDIX

Petitioners move to strike the entire joint response brief, because its text is printed in 12-point font, and its footnotes are printed in 10-point font, rather than the 14-point font required by OAR 661-010-0030(2)(d) for both text and footnotes. According to petitioners, the effect of this violation of OAR 661-010-0030(2)(d) is to allow respondents to file an overlength brief.

Violations of LUBA's rules do not warrant striking a brief or taking similar drastic remedial actions unless the violation prejudices the substantial rights of other parties. OAR 661-010-0005. Here, LUBA granted Riverbend's request to file a response brief up to 75 pages in length, to respond to the two petitions for review, which total approximately 91 pages, on the volunteered condition that if the county filed a response brief, that brief would be limited to 25 pages. In other words, LUBA limited the response briefing to a total of 100 pages. *Stop the Dump Coalition v. Yamhill County*, __ Or LUBA __ (LUBA No. 2015-036, Order on Overlength Brief), slip op 2. LUBA encouraged respondents to coordinate and minimize overlapping responses. The two respondents chose to file a single, 73-page, joint response brief. As noted, that joint response brief was not printed in 14-point font.[1] Had the brief complied with our rules, it would likely have been approximately 87 pages long, below the potential maximum of 100 pages set out in our order for two response briefs. Accordingly, petitioners have not demonstrated that respondents' rule violation warrants striking the joint response brief, or any other remedial action.

Petitioners also move to strike pages 2-16 of the Supplemental Appendix to the Joint Response Brief, which consists of various documents related to a 2014 county ordinance affecting the subject property, and the appeal of that ordinance to LUBA. The documents are not in the record of the present appeal, but respondents state that the documents are offered for the limited purpose of

[1] When notified of the rule violation, respondents requested that they be allowed to refile the Joint Response Brief with the correct font size. Due to the timing of the motion to strike and oral argument, LUBA chose not to require respondents to file an amended Joint Response Brief.

establishing that petitioners participated in the 2014 decision and appeal. Petitioners contend that respondents have established no basis for LUBA to consider documents outside the record.

We agree with petitioners. LUBA will not consider pages 2-16 of the Supplemental Appendix for any purpose in this appeal.

FACTS

In 1980, land owned by Riverbend was rezoned from Exclusive Farm Use (EFU) to Public Works-Safety (PWS), in order to allow the Riverbend landfill. The PWS zone allows a landfill; at that time, the county's EFU zone did not allow a landfill. In 2010, Riverbend proposed to expand the landfill to adjacent property also owned by Riverbend, and rezone that adjacent property from EFU to PWS. Because the county's EFU zone did not allow a landfill, the county approved an exception to Goal 3 for the expansion. In *Waste Not of Yamhill County v. Yamhill County*, 61 Or LUBA 423, *aff'd* 240 Or App 285, 246 P3d 493 (2010), *modified* 241 Or App 199, 255 P3d 496 (2011), LUBA held that because Goal 3 and related rules and the EFU statutes allow a landfill on agricultural land, an exception to Goal 3 is not an appropriate vehicle to authorize a landfill. Instead, we suggested that the county amend its EFU zone consistently with Goal 3 to allow a landfill or expansion of an existing landfill on EFU-zoned lands.

In 2011, the county amended its EFU zone to allow a landfill or expansion of an existing landfill. In 2014, the county rezoned the existing Riverbend site from PWS to EFU. That 2014 rezoning decision was appealed to LUBA, but later dismissed. *Stop the Dump Coalition v. Yamhill County*, 69 Or LUBA 376, *aff'd* 265 Or App 477, 334 P3d 992 (2014).

Riverbend subsequently filed applications for site design review and a floodplain development permit to authorize the proposed expansion. Riverbend proposed to add a new Module 10 north of the existing landfill site, and a new Module 11 southwest of the site. The proposed expansions would occupy land that qualifies as high-value farmland. Riverbend also proposed to increase the height of existing berms and add additional fill to five existing modules. The proposed expansions would add 15 years of capacity to the landfill operation, which would otherwise reach full capacity in 2017.

The surrounding area consists largely of EFU-zoned lands in various agricultural uses, described below. The county planning commission conducted evidentiary hearings on the applications. On January 15, 2015, the planning commission approved the applications, but rejected the proposed addition of Module 10. Opponents appealed the planning commission decision to the county board of commissioners, which conducted further evidentiary proceedings. The three commissioners each conducted separate site visits to the landfill. On April 23, 2015, the commissioners issued their decision denying the appeal and affirming the planning commission approvals.

This appeal followed.

FIRST ASSIGNMENT OF ERROR (Petitioners)

Petitioners argue that the county failed to follow the correct procedures in conducting site visits, and further that one commissioner failed to adequately disclose ex parte communications.

A. Site Visits

As noted, the three members of the board of commissioners conducted separate site visits to the landfill. Each commissioner was accompanied by the planning director and one of the landfill's employees, who provided a safety

escort. At each of the site visits, the employee acting as a safety escort answered the commissioners' questions about the operation of the existing leachate pond. The planning director disclosed the site visits and that communication with the safety escort at the March 12, 2015 hearing, and the three commissioners confirmed the accuracy of that report.

YCZO 1402.06(C) prohibits a commissioner from conducting a site visit to "[i]nspect the property with any party or his representative unless all parties are given such notice as the Board determines to be fair and just."[2] The county provided no notice of the site visit to petitioners or other parties. Petitioners objected to the site visits, the lack of notice, and petitioners' inability to join the site visit. The county's findings address those objections, concluding that notice was not required under YCZO 1402.06(C) because "there was no intent to inspect the property 'with any party or his representative.'" Record 74. According to the county, the communication with the safety escort was inadvertent and unplanned. Further, the findings note that the leachate pond,

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[2] YCZO 1402.060 provides, in relevant part:

> "Ex Parte Contact. In any land use application subject to a quasi-judicial hearing process, the Board, Commission, or Hearings Officer shall not:
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> "A. Communicate, directly or indirectly, with any party or his representative in connection with any issue involved except upon notice and with opportunity for all parties to participate; [or]
>
> "* * * * *
>
> "C. Inspect the property with any party or his representative unless all parties are given such notice as the Board determines to be fair and just."

the content of the inadvertent communication that occurred, is not part of the proposed expansion and the communication included no information not already in the record. *Id.* The findings also note that, even if notice is given, the county is not in a position to allow members of the public to attend a tour of private property. *Id.*

Petitioners argue that the county should have anticipated that visiting the landfill would require a safety escort, and therefore that any visit to the landfill would entail inspection of the property "with" one of the applicant's representatives. Petitioners also argue that, regardless of the content of the communications with the applicant's representative, YCZO 1402.060(C) nonetheless requires advance notice of any inspection, which was not provided.

Respondents argue, and we agree, that petitioners have not established that the county misconstrued YCZO 1402.060(C) or committed procedural error prejudicial to petitioners. As interpreted by the county, YCZO 1402.060 does not require notice of all site visits, only those in which the decision-maker intends to inspect the property "accompanied by a party or his representative." The county interpreted YCZO 1402.060(C) not to require notice if the decision maker inspects a property accompanied only by a safety escort, in circumstances in which no ex parte communications with a party or his representative are expected. Petitioners have not established that that interpretation is inconsistent with the express language, purpose or policy underlying YCZO 1402.060(C) or "implausible," under the deferential standard of review we must apply to a governing body's code interpretation under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 261, 243 P3d 776

(2010).[3] YCZO 1402.060(C) is concerned with site visits in which ex parte communications with a party or a party's representative are expected or inevitable. Ex parte communications with a safety escort regarding proposed development are not expected or inevitable. Petitioners do not dispute the county's findings that the ex parte communications that occurred were inadvertent and not related to the proposed development. Petitioners have not demonstrated that the county misconstrued YCZO 1402.060(C) or committed procedural error.

B. Inadequate Disclosure of Ex Parte Communications

Commissioner Primozich disclosed that he had had conversations with numerous people about the proposed landfill expansion, but that he did "not believe any of these encounters could be considered ex-parte contacts as they are citizen[s] exercising their right to express their opinions to their elected

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[3] ORS 197.829(1) provides:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
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> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

official [and] nothing of substance that could be rebutted by either side was discussed." Record 97. Petitioners objected below to the inadequacy of that disclosure. In response, the county re-opened the record to allow the commissioners to make additional statements regarding the substance of ex parte contacts with citizens, and allowed the parties an opportunity to offer rebuttal to those additional disclosures. The county adopted findings 242-245, concluding essentially that the county has done everything possible to place into the record the content of ex parte communications between citizens and the county commissioners, noting that during recent elections the commissioners heard many opinions from citizens regarding the proposed landfill expansion, which was one of the biggest topics of conversation in the county. Petitioners have not established that remand for additional disclosures would be capable of providing more detail regarding the substance of ex parte communications.

The first assignment of error (Petitioners) is denied.

SECOND ASSIGNMENT OF ERROR (Petitioners)

Petitioners contend that the county misconstrued the applicable law in concluding that the proposed landfill expansion is an allowed use in the EFU zone.

ORS 215.283(2)(k) allows a county to approve within the EFU zone a "site for the disposal of solid waste[.]" In 1994, OAR chapter 660, division 033, the Oregon Administrative Rule implementing Statewide Planning Goal 3 (Agricultural Lands) was amended to prohibit the establishment of new solid waste disposal sites on high-value farmland. OAR 660-033-0120, Table 1. However, under OAR 660-033-0130(18)(a), certain existing facilities, including solid waste disposal facilities, could be "maintained, enhanced or

expanded[.]"[4] In 1996, OAR 660-033-0130(18)(a) was amended to add the requirement that the existing facility must also be "wholly within a farm use zone[.]"[5]

As noted, in 1980 the existing landfill site was rezoned from EFU to PWS, specifically to allow the existing landfill. The county's EFU zone at the time did not allow a solid waste disposal site, notwithstanding the grant of authority in ORS 215.283(2)(k) for counties to allow such facilities in the EFU zone. In 2011, following *Waste Not of Yamhill County*, the county amended its EFU zone to authorize the expansion of existing landfills that are wholly within a farm use zone.[6] In 2014, the county rezoned the existing landfill site from

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[4] Similar language was added to OAR 660-033-0130(2), which is concerned with uses allowed within three miles of an urban growth boundary.

[5] OAR 660-033-0130(18)(a) presently provides:

> "Existing facilities wholly within a farm use zone may be maintained, enhanced or expanded on the same tract, subject to other requirements of law. An existing golf course may be expanded consistent with the requirements of sections (5) and (20) of this rule, but shall not be expanded to contain more than 36 total holes."

[6] Specifically, the county added YCZO 402.02(V) to its EFU zones:

> "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 site is

PWS to EFU, with the intent to allow the existing landfill operations to be expanded onto adjacent EFU-zoned land within the tract owned by Riverbend, pursuant to YCZO 402.02(V).

Under the second assignment of error, petitioners argue that the county misconstrued OAR 660-033-0130(18)(a) to authorize the expansion of a facility that in 1996 was not "wholly within a farm use zone[.]" According to petitioners, the 1996 amendment to OAR 660-033-0130(18)(a) was intended to allow facilities to be maintained, enhanced or expanded only if those facilities were "wholly within a farm use zone" in 1996, on the date the rule amendment went into effect. Because the existing landfill was zoned PWS in 1996, petitioners argue, it does not qualify for expansion onto high-value farmland under OAR 660-033-0130(18)(a).

Petitioners contend that under the county's interpretation of OAR 660-033-0130(18)(a), an existing landfill or similar use on land zoned other than EFU could "downzone" to the EFU zone, and thus gain the ability to expand onto high-value farmland within the EFU zone, contrary to the intent of the 1996 amendments, which were clearly to protect high-value farmland. According to petitioners, the county's interpretation is also inconsistent with the agricultural lands policy, at ORS 215.243(2) to "preserve the maximum amount of the limited supply of agricultural land[.]"

In addition, petitioners argue that the available legislative history of the 1996 rule amendments suggests an intent to limit expansions to facilities that

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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."

were wholly within a farm use zone as of 1996.[7] Petitioners entered into the record the staff report and the transcript of the LCDC hearing at which the amendment to OAR 660-033-0130(18)(a) and related amendments were discussed and adopted.[8] Petitioners note that the staff report explained that the

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[7] The record includes a letter dated November 25, 2014 from Richard P. Benner, former DLCD director, and a letter dated December 3, 2014, from Ron Eber, former DLCD Agricultural Lands Policy Specialist. Both were involved in the 1996 rulemaking. The letters include the authors' recollections and arguments regarding the intent behind the rulemaking. Petitioners argue that the two letters constitute legislative history for purposes of interpreting the 1996 amendments. Respondents argue, and we agree, that the post-enactment statements of legislative participants do not constitute probative legislative history. *Squier v. Multnomah County*, __ Or LUBA __ (LUBA No. 2014-074, February 2, 2015, slip op 3-4); *Salem-Keizer Ass'n of Classified Employees v. Salem-Keizer Sch. Dist. 24J*, 186 Or App 19, 26, 61 P3d 970 (2003).

[8] The December 2, 1996 staff report states, in relevant part:

> "This amendment makes clear that only those uses that currently exist **'wholly'** in a farm zone may be expanded under the provisions of this rule. Currently, this rule does not allow the approval of certain new uses on High Value Farmland but does allow existing facilities to be 'maintained, enhanced or expanded.' This amendment makes clear that the expansion of one of the prohibited uses existing in adjacent rural or urban areas into the farm zone is not allowed under the rules current 'expansion' provision. The 'expansion' provision was intended to recognize existing nonfarm uses in a farm zone and allow for some limited expansion." Record 4820 (emphasis in original).

In addition, staff testified at the December 12-13 LCDC hearing:

> "We said, No, the expansion provision is similar to a nonconforming use type of provision. It only applies to uses that were existing within the farm zone itself. So this amendment here is to clarify that it makes it explicit in our rule that the use to be

amendments make clear "that only those uses that *currently* exist 'wholly' in a farm use zone may be expanded under the provisions of this rule." Record 4820 (emphasis added). According to petitioners, the staff use of the word "currently" suggests that the rule was intended to apply only to facilities that in 1996 existed wholly within a farm use zone.

However, as respondents argue, interpreting OAR 660-033-0130(18)(a) to limit "maintenance, expansion or enhancement" to existing uses that were wholly within a farm use zone in 1996 or on the date the rule became effective would insert a significant qualification into the text of the rule that is simply not present. LCDC knows how to limit a rule provision to development that existed as of a certain date, as demonstrated by several contextual rule provisions. *See, e.g.*, OAR 660-033-0130(2)(c) (certain nonconforming uses may be expanded if the use was established prior to January 1, 2009); OAR 660-033-0130(7) (a personal-use airport lawfully existing as of September 13, 1975, shall continue to be allowed); OAR 660-033-0130(36) (allowing community centers to provide services to veterans only in a facility that is in existence on January 1, 2006). LCDC also knows how to make a rule applicable only to development that was in place or had qualifying characteristics prior to the date the rule became effective. *See* OAR 660-023-0180(1)(c) (defining "existing site" for purposes of the Goal 5 aggregate rule as a site that was included in an inventory of significant aggregate sites in an acknowledged plan on September 1, 1996, the date the rule became effective).

> expanded has to be wholly within the farm zone. You can't have something in a rural residential exception, or an Urban Growth Boundary, or some other designation and expand it out into the farm zone." Record 4678 (LCDC Transcript of December 12-13, 1996 Hearing).

Where LCDC fails to specify that a rule is limited to uses that existed or possessed qualifying characteristics on the date the rule is adopted, or other specified date, it would "insert what has been omitted" to interpret the rule to include such a limitation. ORS 174.010.

It is important to recognize that the qualifiers "existing" and "wholly within a farm use zone" were not adopted at the same time. As originally adopted in 1994, OAR 660-033-0130(18)(a) authorized expansion of an existing facility onto high-value farmland. Like later iterations, the 1994 version of the rule included no temporal qualifications, other than the facility must be "existing." Under the 1994 rule, a solid waste disposal facility could be approved on non-high-value farmland after 1994, pursuant to ORS 215.283(2)(k) and OAR 660-033-0130(5), and yet be deemed "existing" for purposes of subsequent expansion of the facility onto high-value farmland. In other words, the 1994 rule did not limit expansions to facilities that "existed" in 1994 or any other date. In 1996, when the qualifier "wholly within a farm use zone" was added, LCDC also chose not to add any temporal qualifications. Because the 1994 rule was not limited to facilities that existed in 1994, and potentially could apply to facilities lawfully established after 1994, the addition of the phrase "wholly within a farm use zone" did not implicitly limit application of the rule to facilities that, in 1996, existed wholly within a farm use zone.

There is no doubt, based on the legislative history quoted at n 8, that the intent of the 1996 amendment was to prevent expansion of a facility that existed in a non-EFU zone, *e.g.* a rural residential zone or land within an urban growth boundary, from expanding from that non-EFU zone into an EFU-zoned parcel that qualifies as high-value farmland. That is the specific scenario that

the amendment was intended to address. LCDC apparently did not consider the scenario presented here: where an existing facility is rezoned from an EFU zone to a non-EFU zone, then back to an EFU zone, with the result that the existing facility is "wholly within a farm use zone" at the point in time when the applicant seeks expansion. Had LCDC considered such a scenario, it might well have added express temporal qualifications or other limitations to OAR 660-033-0130(18)(a) to preclude such an expansion, as it has done with other rules. Such a limitation would be more protective of high-value farmland than OAR 660-033-0130(18)(a) as presently written. However, OAR 660-033-0130(18)(a) as presently written includes no express or implicit limitations to that effect. If LCDC believes such limitations are warranted, LCDC must amend the rule to so provide.

The county also adopted findings that reject applying OAR 660-033-0130(18)(a) to preclude the proposed expansion, on the grounds that it would "create an absurdity in light of earlier rulings by LUBA and the Court of Appeals." Record 24. As noted, LUBA and the Court of Appeals rejected the county's attempt to take an exception to Goal 3 to allow the proposed expansion, ruling that because Goal 3 allows such an expansion, the exception process was not a vehicle to accomplish that end. LUBA suggested that the county could accomplish that end by amending its EFU zone to authorize expansion, consistent with ORS 215.283(2)(k), Goal 3 and the Goal 3 rule, and rezone the property to EFU, and the county did so. In its present findings, the county stated:

> "If [the county] were to now determine that the Goal 3 implementing rules did not allow the expansion, a Goal 3 Exception would be necessary, but that Exception would be unavailable. The County already addressed this possibility as part

> of its Zone Change decision last year when FOYC [Friends of Yamhill County] raised this same issue. The County concluded that LUBA and the Court of Appeals could not have intended such an outcome. No party has offered the [County] a reason that it must reconsider this argument that was already decided as part of the Zone Change and which was part of a decision that applied directly to the same parcels of land at issue in this proceeding." Record 24-25.

Petitioners challenge the above-quoted finding, arguing that the county fails to establish that the 2014 zone change from PWS to EFU had any kind of preclusive effect on the issues that can be raised in the present appeal. In the response brief and the reply brief the parties engage in an extended argument regarding whether the doctrine of issue preclusion applies, such that the issue of whether rezoning the subject property to EFU is sufficient to bring the existing facility "wholly within a farm use zone" for purposes of OAR 660-033-0130(18)(a) cannot be relitigated in the present appeal.[9]

The county's above-quoted finding is in the nature of an alternative finding, in case OAR 660-033-0130(18)(a) is properly interpreted to prohibit the proposed expansion. Because we have not interpreted OAR 660-033-0130(18)(a) to that effect, we need not resolve the parties' dispute regarding

[9] Respondents note that the doctrine of issue preclusion applies where five requirements are met, commonly referred to as the "Nelson Factors:" (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to the final decision on the merits in the prior proceeding; (3) the party sought to be precluded has had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding, and (5) the prior proceeding was the type of proceeding to which the courts will give preclusive effect. Response Brief 11, citing several LUBA cases based on *Nelson v. Emerald People's Utility Dist*., 318 Or 99, 103, 862 P2d 1293 (1993).

issue preclusion and the effect of the county's 2014 zone change from PWS to EFU on the issues that can be raised in the present appeal of the site plan review approval.

In sum, petitioners have not demonstrated that the county misconstrued OAR 660-033-0130(18)(a). The second assignment of error (Petitioners) is denied.

THIRD ASSIGNMENT OF ERROR (Petitioners)

ORS 215.283(2)(k) allows a solid waste disposal facility on EFU-zoned land if "a permit has been granted under ORS 459.245 by the Department of Environmental Quality [DEQ.]" Similarly, YCZO 402.02(V), which the county adopted in 2011 to partially implement ORS 215.283(2)(k), allows the expansion of an existing facility "for which a permit has been granted under ORS 459.245 by [DEQ.]"

In addition, part of the proposed expansion is within the floodplain Overlay (FP) district. YCZO 901.06 requires that the applicant obtain a floodplain development permit, and demonstrate that "[a]ll applicable permits have been obtained from federal, state or local governmental agencies[.]" YCZO 901.06(D).

Petitioners argue that the record does not include any evidence that Riverbend has a current DEQ permit to authorize continued operation of the landfill. Petitioners note that the only copy of the facility's 1999 DEQ permit in the record shows that that permit expired in 2009. Record 3639.

The county found that the facility's DEQ permit was extended and is in effect.[10] Respondents cite to Record 3248, a December 10, 2012 letter from DEQ noting that the facility's 1999 permit "has been administratively extended," and Record 3247, an undated list of DEQ-permitted facilities in the state, which lists the Riverbend landfill.

We agree with respondents that a reasonable person could conclude from the record that DEQ has granted the landfill an operating permit, and that the permit remains in effect. The 1999 permit has been extended at least once, so its stated expiration date of 2009 is not an indication that it has expired. Although the record does not indicate the date the extended permit will expire, petitioners offer no reason to believe that it is currently expired, or that Riverbend is currently operating without DEQ approval. To eliminate any uncertainty on this point, the county imposed a condition that requires Riverbend to provide a copy of the current DEQ permit prior to undertaking any expansion. That is sufficient to ensure compliance with ORS 215.283(2)(k) and YCZO 901.06(D).

The third assignment of error (Petitioners) is denied.

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[10]Alternatively, the county interpreted ORS 215.283(2)(k) and YCZO 402.02(V) to not require a DEQ permit in hand as a prerequisite to county site design review approval, as long as the county requires, as a condition of approval, that intervenor obtain a DEQ permit before commencing the expansion. The county imposed such a condition. Petitioners challenge that alternative disposition of this issue. Because we affirm the county's primary finding that intervenor has obtained a DEQ permit, we need not address petitioners' challenges to the alternative findings.

FOURTH ASSIGNMENT OF ERROR (Petitioners)

As part of the 2014 zone change, the county imposed riparian area restrictions based on Statewide Planning Goal 5 "safe harbor" provisions at OAR 660-023-0090, specifically restrictions on certain development within 100 feet of the stream banks in the southern portion of the landfill site. Generally, permanent alterations within the riparian area are prohibited, with the express exception of "roads" that are designed and constructed to minimize intrusion into the riparian area. Further, permanent alterations are allowed if the applicant demonstrates "equal or better protection for identified resources will be ensured through restoration of Riparian Areas, enhanced buffer treatment or similar measures[,]" as long as such alterations do not "occupy more than 50 percent of the width of the Riparian Area measured from the upland edge of the area." Ordinance 887, Exhibit D, Section 5.

Riverbend proposed development activities within the 100-foot setback area, including (1) an access road and (2) an enhanced perimeter berm. The county approved the access road, finding that it is "designed and constructed to minimize intrusion into the riparian area." The county approved the enhanced berms based on findings that proposed riparian area improvements will ensure equal or better protection for riparian resources, and that the berms will not occupy more than 50 percent of the width of the riparian area.

Petitioners argue that the county erred in several respects, discussed below.

A. Stream Channel Relocation

Petitioners first argue that the county erred in approving creation of a new stream channel, which will result in permanent alteration of the riparian area and removal of riparian vegetation that is prohibited by Ordinance 887.

Respondents note that the proposed relocation to the stream channel is part of the riparian area improvements that the county approved pursuant to Ordinance 887, Exhibit D, Section 5. Respondents argue, and we agree, that riparian area improvements used to demonstrate that proposed permanent alterations equally or better protect riparian resources and therefore comply with Section 5 are not themselves "permanent alterations" that are prohibited in the riparian area.

B. Access Road

The county found that the proposed access road would minimize intrusions into the riparian area, for several reasons set out at in Findings 98-101. Record 36-37. Petitioners do not challenge those reasons, but argue that "[a]n elevated structure (i.e. a bridge across the riparian area) would minimize intrusion. Alternatively, an access road from the existing entrance facility would minimize intrusion or eliminate intrusion entirely." Petition for Review 34. Respondents argue, and we agree, that petitioners' arguments do not provide a basis for reversal or remand. Petitioners do not identify error in the county's findings and conclusions that the proposed access road minimizes intrusions into the riparian area. Instead, petitioners appear to contend that there are other designs (a bridge, an access road located elsewhere) that could also minimize intrusions into the riparian area. However, that there may be other means to provide access while minimizing intrusions does not demonstrate that the county erred in approving the proposed access road, absent a developed challenge to the finding that the proposed road minimizes intrusion into the riparian area.

C. Culvert

The proposed access road and the proposed riparian improvements include 240 feet of culvert. Petitioners argue that the culvert itself qualifies as a structure and a permanent alteration in the riparian area, and therefore the culvert can be approved only if it is independently justified under one of the exemptions in Ordinance 887, Exhibit D.

Respondents argue that the culvert does not require independent justification, as it is part of the road and the riparian improvements that are either exempt from the prohibition on permanent alterations or part of the justification for approved permanent alterations. We agree with respondents.

D. Water-Related and Water-Dependent Uses

Section 3 of Ordinance 887, Exhibit D, authorizes "removal of vegetation necessary for the development of water-related or water-dependent uses." Petitioners argue that the access road and enhanced berms will entail the removal of vegetation, but neither of those improvements are water-related or water-dependent uses, and therefore the improvements are prohibited by Section 3.

Respondents argue, and we agree, that Section 3 does not apply to limit an access road or other alteration that is approved under other sections of Ordinance 887, Exhibit D, to alterations that are water-related or water-dependent uses. Read together with all sections of Exhibit D, it is clear that Section 3 is not concerned with vegetation removal that is necessary to construct a permanent alteration that is approved under other sections of Exhibit D.

The fourth assignment of error (Petitioners) is denied.

FIFTH ASSIGNMENT OF ERROR (Petitioners)
FIRST ASSIGNMENT OF ERROR (Friends of Yamhill County)

Under these assignments of error, petitioners and intervenor-petitioner Friends of Yamhill County (FOYC) challenge the county's findings that the proposed expansion complies with ORS 215.296(1), which requires a finding that the proposed use will not force a significant change in accepted farm practices, or significantly increase the cost of such practices, on surrounding lands.[11] The findings sometimes refer to this test as the "Farm Impacts criteria." We sometimes refer to the test as the "significant change/cost standard."

The significant change/cost standard was adopted in 1989, and it represents the principal limitation and approval standard for non-farm uses that

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[11] ORS 215.296 provides, in relevant part:

> "(1) A use allowed under ORS 215.213 (2) or (11) or 215.283 (2) or (4) may be approved only where the local governing body or its designee finds that the use will not:
>
> > "(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
> >
> > "(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.
>
> "(2) An applicant for a use allowed under ORS 215.213 (2) or (11) or 215.283 (2) or (4) may demonstrate that the standards for approval set forth in subsection (1) of this section will be satisfied through the imposition of conditions. Any conditions so imposed shall be clear and objective."

are conditionally allowed on agricultural land under ORS chapter 215. ORS 215.296 does not include a definition or description of what constitutes a "significant" change or "significantly increased" cost, or how that standard is to be applied. In *Von Lubken v. Hood River County*, 118 Or App 246, 250, 846 P2d 1178 (1993), the Court of Appeals observed that the word "significant" "connotes a question of degree that is more a matter of fact than of law." The court rejected a proposed definition of "significant" that would have proscribed changes or increased costs that are "anything more than trivial or frivolous." *Id.* The court did not provide a definition of "significant."[12] In addition, the court held that ORS 215.296(1) requires the county to consider the "cumulative effects" of all impacts, and the county may not simply consider impacts to farm practices in isolation from each other. *Id.* at 251.

Turning to the present case, Riverbend submitted an initial farm impacts assessment to demonstrate compliance with ORS 215.296(1), and supplemented that assessment with four letters from its consultants. The parties and decision refer collectively to the initial assessment and its four supplements as the "FIA." The decision addresses ORS 215.296(1) in findings 112 through 186, and generally relies on the FIA to conclude that the proposed expansion meets the significant change/cost standard.

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[12] Because the term "significant" is undefined, and of common usage, it is permissible to consult dictionary definitions. The most pertinent definition of "significant" in *Webster's Third New International Dictionary* (2002), 2116, appears to be "**3 a :** having or likely to have influence or effect **:** deserving to be considered[.]" Because ORS 215.296(1) is framed in the negative (the applicant must demonstrate that the proposed use "will not" force a significant change, etc.), it seems appropriate to consider related antonyms such as the term "insignificant," which Webster's defines in relevant part as "**e :** of little size or importance[.]" *Id.* at 1169.

Petitioners advance mostly interpretative or methodological challenges to the county's findings. FOYC advances a variety of mostly evidentiary challenges to the county's findings. We address those challenges below.

A. Petitioners' Arguments

1. Incorporation of the FIA as findings

As noted, the county incorporated the FIA by reference as additional findings. The FIA consists of five documents totaling over 200 pages. The county specified that "in the event of a conflict between these Findings and the FIA, the FIA shall govern." Record 41. Petitioners first argue that the attempted incorporation of hundreds of pages of evidence as findings, while making those incorporated documents controlling in the case of any conflict with the county's findings, is overbroad and must fail, because it makes it difficult for the parties and LUBA to determine what constitutes the county's governing findings, in the case of unspecified conflicts between the adopted and incorporated findings. *See Hess v. City of Corvallis*, __ Or LUBA __ (LUBA No 2014-040, October 28, 2014), slip op 8-9 (an attempt to incorporate as findings unspecified documents in the record is ineffective, and therefore the local government cannot rely on such documents to defend against findings challenges).

Respondents argue that the county's findings identify by date and title the five documents that constitute the FIA, and adequately incorporate by reference those documents as findings. Record 40. We agree with respondents. While it may be odd to declare that an evidentiary document incorporated by reference as findings governs in the event of conflict with the decision-maker's own findings, no party identifies any conflict between the

county's adopted and incorporated findings, so we need not address whether adopting such a conflict resolution scheme is erroneous or ineffective.

2. Accepted Farm Practices

The county found that it need consider only "accepted farm practices," which did not include "domestic or commercial uses that are only farm-related." Record 41. Citing to the ORS 215.203(2)(c) definition of the similar term "accepted farm practice," the county concluded that it need consider only "modes of operation, common to farms of a similar nature, and which are necessary for the operation of such farms to obtain a profit in money." Record 41.[13] Accordingly, the county declined to consider agricultural activities that were conducted as a hobby or other personal use, and activities that are not shown to be "common and necessary." *Id.*

Petitioners argue that the county erred in too narrowly circumscribing the scope of "accepted farm practices" to exclude some common farm practices, and to place on surrounding farmers the burden of demonstrating that their farm practices are "common and necessary." However, petitioners do not identify any specific practices that the county failed to consider under ORS 215.296(1), or identify any findings that appear to place the burden on farmers to demonstrate that their farm practices are common to farms of a similar nature and necessary to obtain a profit in money. Absent a more developed argument, petitioners' arguments regarding the county's understanding of the scope of

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[13] ORS 215.203(2)(c) provides as follows:

> "As used in this subsection, 'accepted farming practice' means a mode of operation that is common to farms of a similar nature, necessary for the operation of such farms to obtain a profit in money, and customarily utilized in conjunction with farm use."

"accepted farm practices" as that term is used in ORS 215.296(1) does not provide a basis for reversal or remand.

3. Surrounding Lands

The county identified "surrounding lands" as all lands within one mile of the landfill, but also considered impacts on farm lands more distant than one-mile, if there is "compelling evidence that a particular impact beyond one mile from the landfill is substantially attributable to the landfill[.]" Record 41-42.

Petitioners argue that the county erred to the extent it refused to consider impacts on farm practices on lands more than one mile distant from the landfall under its "compelling evidence" test. We agree with petitioners that "compelling evidence" that impacts are attributable to the landfill is not a limitation the county can apply consistent with ORS 215.296(1) to limit evaluation of testimony from area farmers regarding impacts on their farm practices. We see no basis in the statute for the county to apply a different, and much more onerous, evidentiary standard on some participants, but not others, based on geographic distance. As discussed below, one of the key issues in this appeal is the extent to which the landfill is responsible for certain alleged impacts on farm practices on surrounding lands, for example with respect to impacts caused by nuisance birds. We note that, despite the fact that the applicant has the ultimate burden to demonstrate that landfill impacts do not cause significant change in, or significantly increase the cost of farm practices on surrounding lands, the county did not require the applicant to demonstrate by "compelling evidence" or any similar standard that the landfill is not responsible for impacts caused by nuisance birds etc., to farm practices on *adjacent* farm parcels, despite that close proximity. The county is free to take into account all relevant evidence, including proximity to the landfill, in

determining whether the applicant had demonstrated that the significant change/cost standard is met, but the county is not free to impose different evidentiary standards on different participants based on their proximity (or any other consideration).

In its findings, the county concluded that "it is not required to evaluate [the testimony of farmers outside the one-mile study area] because there is no persuasive or compelling evidence that any such alleged impacts are a direct result of the landfill." Record 53. In the alternative, the county did adopt findings that address the testimony of farmers outside the one-mile study area. Record 54-56 (Findings 177-181). However, it seems reasonably clear that the county applied the "compelling evidence" standard not only to the initial question of whether it must consider testimony of farmers outside the one-mile study area, but also in evaluating that testimony under its alternative findings.

4. Quantifiable or Verifiable Data

In Finding 120, the county commented that its analysis of farm impacts "must be based in large part on quantifiable or verifiable data." Record 42. Because the county must determine whether impacts will cause a "significant" change in farm practices, the county stated that testimony of impacts on farm practices must describe both the impact and the degree of impact, in order for the county to evaluate whether the significant change/cost standard is met or not.[14]

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[14] Finding 120 states, in relevant part:

> "The Board also finds that its analysis and findings relating to Farm Impacts must be based in large part on quantifiable or verifiable data. Because the Board must determine if a potential impact forces a 'significant' change in farm practices or

Petitioners argue that Finding 120 imposes a test that ORS 215.296(1) does not require or permit. According to petitioners, if a farmer provides credible testimony that the proposed landfill will cause a significant change in accepted farm practices, or increase the cost of accepted farm practices, the county cannot discount that testimony altogether because the farmer does not also quantify the degree of change or the amount of increased costs. Petitioners contend that Finding 120 effectively shifts from the applicant the burden of establishing that the proposed use will *not* impact accepted farm practices to a degree that is significant, and imposes on surrounding farmers the burden of establishing, through testimony that quantifies the increase in cost and establishes precisely the nature and extent of forced changes in accepted farm practices, that the proposed use *will* significantly impact accepted farm practices.

Respondents argue that Finding 120 simply indicates that the county will give more weight or credibility to testimony that provides quantification of the degree of significance, over testimony that does not. Respondents contend

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> 'significantly' increases the costs of farm practices, evidence asserting the proposed use does not meet the Farm Impacts criteria must describe both the alleged impact and the degree to which that impact might reasonably be expected to impact Farm Practices. *Without some evidence of the degree of significance, the evidence cannot support a finding that the criteria are not met.* And without evidence of the degree of an alleged impact, neither the Board nor the applicant can consider mitigation measures that could reduce a potentially significant impact to an acceptable level. This is especially important in the context of a quasi-judicial proceeding where the sponsor of the evidence may be the only one with access to that information and the procedures do not allow for cross-examination or other compelled discovery to verify the evidence." Record 42 (emphasis added).

Finding 120 does not state that the county would give no weight or credibility to testimony that does not include a quantification of costs or an estimate of the degree of forced change. However, that position is difficult to square with the language of Finding 120, which states that "[w]ithout some evidence of the degree of significance, the evidence cannot support a finding that the criteria are not met." That language suggests, to us, that testimony without a statement of the amount of increased cost or *degree* of forced change in accepted farm practices is not competent evidence in determining whether the significant change/costs standard is met. If so, we agree with petitioners that in Finding 120 the county misconstrued the applicable law.

We also agree with petitioners that Finding 120 seems to shift the burden to the farmer/opponents to demonstrate that the increased costs and forced changes in accepted farm practices attributable to the landfill will be significant. It does not appear to us that the county required any similar quantification from the applicant, who of course has the initial and ultimate burden of proof on this question. The county is certainly free to conclude that more detailed testimony regarding impacts, changes and costs is more persuasive than less detailed testimony, but it cannot apply a different standard on opponents than it does to the applicant, the party with the burden of demonstrating compliance with ORS 215.296(1).

Perhaps the clearest example of this burden-shifting is with respect to nuisance bird impacts, discussed below. The county found, and it is undisputed, that the landfill attracts some nuisance birds, which cause some adverse impacts on surrounding farm lands. However, the county appears to fault farmer/opponents for failing to quantify the number of nuisance birds attributable to the landfill, and the extent of changes or increased costs to

accepted farming practices that are attributable to nuisance birds attracted to the landfill, as opposed to nuisance birds that would otherwise be present on farm lands in the absence of the landfill. However, the county does not fault Riverbend for failing to provide the same quantification of the number of birds attributable to the landfill, even though Riverbend has the burden of proof.

We do not mean to suggest that the county, in adopting its ultimate conclusions regarding compliance with the significant increase/cost test, must deny an application based solely on a farmer's testimony that the use will cause a change in or increase the cost of accepted farm practices. The county must evaluate all the competent evidence on that point, and might conclude, notwithstanding such testimony, either that the proposed landfill expansion does not significantly change or significantly increase the costs of accepted farming practices, considering the whole record, or that the proposed use complies with the significant change/cost test based on conditions of approval that reduce impacts below the significance threshold. What the county cannot do, however, is what Finding 120 appears to do: articulate a test under which the county disregards opposition testimony that does not quantify the cost increase or precisely document the nature and extent of forced changes in accepted farm practices, and effectively shifts to farmer/opponents the burden of demonstrating noncompliance with ORS 215.296(1). Remand is necessary to correct that analytical error.

5. Odors, Noise and Visual Impacts

In Finding 125, the county identifies six types or sources of impacts on surrounding farm practices: litter, water quality, air particulates, traffic, nuisance bird attraction, and rodent/pest attraction. Record 44. Findings 127-

166 address these six types or sources of impacts. Petitioners fault the county for failing to also address impacts from odor, noise and visual impacts.

Respondents argue that odor, noise and visual impairments are addressed in special findings that address testimony of impacts on specific farm practices on specific farms. For example, Findings 168-69 addresses noise impacts on a pheasant operation on the McPhillips farm, Finding 177 addresses allegations of odor impacts on Peavine Valley Stables, while Finding 179 addresses allegations of visual impacts on wineries in the area. Record 52, 54-55.

We agree with respondents that failure to list odor, noise and visual impacts among the six types or sources of impacts listed in Finding 125 does not provide a basis for reversal or remand, if such impacts are addressed in other findings.

6. Economic Analysis

The county gave "great weight" to a longitudinal study included in the FIA concluding that lands devoted to farm operations in the vicinity of the existing landfill have remained stable, and that some farm operations have even intensified over the years.[15] Petitioners argue that the county erred in placing

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[15] Finding 185 states:

> "The Board gives great weight to the fact that the farm economy on lands within three miles of Riverbend have intensified over time. The Board specifically adopts and incorporates the longitudinal study contained in the FIA that documents this fact. The Board finds the facts and conclusions in the FIA to be the most compelling evidence that : (1) the amount of land devoted to farm uses has remained stable over time; (2) new, capital-intensive uses such as filberts have been expanded within one mile of the existing landfill and uses such as vineyards have been added in the

such weight on the longitudinal study. According to petitioners, evidence that (1) the amount of land devoted to farm use in the vicinity has remained stable over the years, (2) new farm uses have been developed, and (3) no land has been taken out of production has little direct bearing on the question posed by ORS 215.296(1): will the proposed use significantly change or significantly increase the cost of accepted farm practices on surrounding farms?

We generally agree with petitioners that the kind of conclusions drawn in the longitudinal study have little direct bearing on the question posed by ORS 215.296(1), and certainly should not have been given "great weight" in evaluating compliance with the statute. There is no logical connection between the fact that the lands devoted to farm use in the vicinity of the existing landfill have remained stable or even expanded over the years and the question of whether the landfill has significantly changed or significantly increased the cost of accepted farm practices on those surrounding farms. It is quite possible that farm use has remained viable *despite* significant changes or significant increases in the costs of accepted farming practices, or indeed *because* changes and cost increases have allowed farm operations to continue despite the impacts of the landfill.

Moreover, Finding 185 can be read to suggest that the significant change/cost threshold is not exceeded unless and until area farms actually go out of business, cease farm operations, or take land out of production. If so, the finding sets the significance threshold far too high. A farm operation may experience significant changes or significant increases in the cost of farm

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foothills farther out; and (3) no land in the Study Area has been taken out of production." Record 56-57.

operations, even if the farm operation remains profitable, and even if the farm operation is able to expand despite impacts.

Because the county incorrectly gave "great weight" to the longitudinal study, and possibly used the study's conclusions to set an erroneous threshold for establishing compliance with the significant change/cost standard, remand is necessary for the county to reevaluate compliance with ORS 215.296(1) under the correct standard.

B. FOYC's Arguments

FOYC challenges the county's findings regarding a number of specific impacts.

Initially, we note that in most cases where the significant change/cost test is applied to a proposed use, the nature and severity of the actual impacts are somewhat speculative, because the use does not yet exist. In the present case, the nature and severity of the future impacts of the expanded landfill are relatively well-known, because those impacts will likely be very similar to the impacts of the existing landfill. That is because, as the county explains, the volume of garbage processed at any one time and the operational aspects of the proposed expansion will be very similar to the existing landfill operation that the proposed expansion will effectively allow to continue.

As we understand it, a major difference between the existing and expanded landfill is the location of the "working face" of the landfill, the portion that is currently uncovered and accepting waste. Under the approved expansion, which approves a new module 11 at the southwest corner of the property, the working face of the landfill will be located in module 11 much of the time, although some existing modules within the footprint of the existing landfill will be added to. Thus, at times, the working face will be closer to

farms south and west of the landfill than it has typically been in the past, and further from farms north and east of the landfill. With that overview, we turn to FOYC's challenges to the findings regarding specific impacts.

1. Litter Impacts

Findings 127-131 address the impacts of litter on farming practices. The county found that litter can escape the facility and, if in significant volumes, could significantly impact farm practices by interfering with combine operations, cleaning and bagging seed, and harvesting operations. However, the county concluded that any litter that has escaped the existing facility and will escape the expanded facility will not be in "significant" volumes and therefore will not cause significant changes or significantly increased costs to area farmers.

The McPhillips farm is adjacent to the landfill to the northeast, generally downwind of the landfill in the prevailing winds. McPhillips testified that litter impacts from the existing landfill have caused significant changes in and increased costs to his farm operations.

> "The prevailing wind currents in the vicinity of Riverbend landfill are west to east. Trash is often blown from the landfill to the McPhillips farm. Litter is a serious issue when haying as plastic bags get caught in the balers. Furthermore, we spend a lot of time all year long picking up the plastic bags from our fields, on our roads and in our trees. We have to do it often as the plastic gets wet and then begins to get covered by crops and dirt where it eventually ends up shredded and then buried into our class 1 and 2 soils. We have a plastic bag reimbursement policy when we trade and sell our hay* * * There is no telling if garbage will show up in our product when the bales are opened up and we offer to buy those bales back. Our streams are lined with plastic bags from Riverbend landfill, especially after a flood. It takes a great deal of time and cost for our farm manager to pick up the litter * * *." Record 4289.

McPhillips also testified at a hearing:

> "We have to spend a great deal of time going all over our fields picking up the plastic before we bale, because it destroys the baling machine." Transcript of December 4, 2014 hearing, Appendix B, 29-30.

FOYC argues, and we agree, that the foregoing is specific testimony regarding changes made to McPhillips' farm operation. To avoid damaging baling machines and losing sales of hay bales, McPhillips' employees spend "a great deal of time" "all year long" removing from the fields plastic litter that originates from the landfill. That is clearly a "change" in the farm operation. Putting aside for the moment the analytical and methodological problems noted above with the county's understanding of the significance threshold, the county's findings regarding litter impacts do not squarely address whether the changes identified in the McPhillips' testimony are "significant" for purposes of ORS 215.296(1).

Finding 128 first notes that Module 11 is located on the west side of the landfill, more distant from the McPhillips property than the existing landfill modules, implying that less litter from the expanded operation will find its way to the McPhillips property compared to the existing operation. However, as FOYC notes, the county also approved adding new fill to Module 8D, which is located closer to the McPhillips property, within the footprint of the existing landfill.

Finding 129 describes the landfill's current litter management process, consisting of twice-weekly litter patrols of the east and northeast fence-line, which the findings state yields one to two trash bags twice per week. Based on this, the county concludes that the amount of litter that actually escapes the landfill is "not significant and, therefore, has not and will not cause any impact

to Farm Practices, much less significant impacts." Record 44. However, the problem with that conclusion is that the question is not whether the volume of trash blowing onto the McPhillips property is "significant," but whether changes made to the McPhillips farm practices in response to the litter that escapes, whatever that amount, are "significant." Even if the volume of trash escaping from the landfill is relatively small, as measured by the number of trash bags that must be collected within a given period of time, or any other measurement or comparison, that does not mean that the *changes* McPhillips must make to its farm operations to prevent damage to baling machines and avoid loss of hay bale sales are necessarily insignificant. The significance of those changes is what the county must evaluate under ORS 215.296(1), not the relative volume of the litter that prompts those changes.

Finding 130 is the only finding that attempts to directly address the above-quoted testimony by McPhillips. The finding responds to testimony that McPhillips has instituted a policy of refunding hay sales if plastic or litter is found within a hay bale, by noting that there is no testimony that McPhillips has ever had to actually issue any refunds, implying that litter is "has not been a problem." Record 45. The problem with that reasoning is that McPhillips testified that his employees have to spend "a great deal of time" picking up plastic from the fields, to avoid getting plastic in hay bales. That is a "change" in farm operations that is intended to remove plastic prior to baling, and hence avoiding damage to balers and the need for refunds. The success of a particular "change" in farming practices in mitigating or preventing additional impacts that would otherwise be caused by the landfill does not establish that the "change" itself is not significant, for purposes of ORS 215.296(1). Stated differently, the lack of evidence that McPhillips has had to issue refunds could

just as likely mean that the changes that McPhillips has made have been effective at catching the litter before it reaches the baler, not that the litter escaping from the landfill is "has not been a problem[.]"

Finally, Finding 131 notes that the landfill is not the only source of litter in the area, and that other rural areas of the county also experience litter in amounts no less than around the landfill. However, again that finding does not go to the question posed by ORS 215.296(1). Even if there are other sources of litter in the area and even if the amount of litter found in other areas of the county is similar to that escaping from the landfill, there is no dispute that some landfill litter escapes onto the McPhillips fields. There also appears to be no dispute that McPhillips has made changes to its farm practices to avoid harm from that litter. The county must directly evaluate whether those changes are "significant."

2. Nuisance Birds

Findings 146-157 address impacts from nuisance birds attracted to the trash available in the open "working face" of the landfill. A number of area farmers testified to adverse impacts from dense flocks of birds, including` crows, gulls, starlings and pigeons that, they allege, the landfill draws to the area. Finding 146 concedes that the landfill draws "some" nuisance birds and those birds cause "some" impacts to area farm practices. However, the county concludes, such impacts have not been and "will not be significant." Record 47.

Findings 148-49 set out the basic rationale for that conclusion:

> "148. The landfill is not the only bird attractant in the surrounding area. Other crops, such as food crops, filberts, and grain, also attract large populations of nuisance birds. Further out, other attractant food sources exist, such as grapes at

vineyards. Urbanized areas are also major attractants of nuisance birds. In fact, the record indicates that there is a documented increase in nuisance birds throughout the entire Willamette Valley because of increased urbanization.

"149. The mere attraction of nuisance birds to the landfill does not indicate whether that attraction rises to a level significant enough to force changes in farm practices or to increase the costs of farm practices. To the contrary, it is undisputed in the record that bird control is an accepted farm practice regardless of the presence of a landfill. The Board must therefore determine if birds attracted to the landfill increase the burden on Farm Practices beyond the burden that would occur in the landfill's absence and, if so, determine whether that increase is significant." Record 47.

The findings then address some of the testimony from area farmers regarding impacts from nuisance birds, and ultimately conclude that the evidence in the whole record does not show that any changes or increased costs are independently attributable to birds attracted to the landfill, and that any farm impacts resulting from birds that could be attributed to the landfill "do not reflect a level of significance prohibited by the Farm Impacts criteria." Record 49.

FOYC argues that the county's findings misconstrue the applicable law, are inadequate, and not supported by substantial evidence. We generally agree with FOYC that analytical errors embodied in the county's findings require remand for re-evaluation of the evidence under the correct standard.

As we understand it, there is no dispute that the landfill attracts more nuisance birds than would otherwise be in the area if no landfill existed. How many more birds is apparently unknown. The findings note that "[n]o participant in this proceeding presented a detailed study of bird populations at the landfill throughout the year." Record 48. The findings seem to suggest

that this would be highly useful information for figuring out what portion of nuisance bird impacts in the area are attributable to the landfill. However, the findings seem to fault the opponents for failing to provide such information, rather than the applicant, who has the ultimate burden of proving that the proposed use will not significantly change or significantly increase the costs of accepted farm practices. The applicant went to the trouble of preparing a longitudinal economic study of farm use in the county, a study that was of questionable relevance to the significant change/cost standard. A study of bird populations on and near the landfill, particularly compared to a study of bird populations on similar farm lands distant from the landfill, would seem to be both feasible and highly useful in answering the question posed by ORS 215.296(1) with respect to nuisance bird impacts.

In any case, there also seems to be no dispute that the additional nuisance birds attributable to the landfill, whatever those numbers are, contribute to the impacts on farm practices that area farmers experienced and testified about. There also seems to be little dispute that nuisance bird impacts on farm practices, from all sources, have caused some changes to farm practices and increased some costs to area farmers. For example, McPhillips testified that he installed hundreds of 8-foot tall stakes with streamers to deter nuisance birds, and loses thousands of dollars a year in grass seed plugs destroyed by gulls. Another farmer abandoned a u-pick cherry and berry operation due to concerns regarding fecal contamination from flocks of birds, and changed to a filbert operation. Another farmer testified to witnessing crows blinding and killing ewes and newborn lambs, and has had to make operational changes and incur additional costs to protect lambs during lambing season.

The findings appear to fault the farmer/opponents for failure to specify exactly which changes or increased costs or portions thereof are attributable to nuisance birds attracted to the landfill, as opposed to nuisance birds that would otherwise be present in the area. However, such information would seem to be unavailable absent the kind of comparative study noted above. The county does not explain why it is the obligation of farmer/opponents to produce such a study or similar empirical data.

The findings also fault opposing testimony for failing to specify the "degree" of the alleged impact from nuisance birds. For example, in an apparent response to testimony that an adjacent farmer loses "thousands of dollars" each year due to gulls destroying grass plugs, the county found that "the evidence asserting impacts from gulls does not attempt to describe the degree of the alleged impact." Record 48. As discussed above, the county erred to the extent it discounted the testimony of farmer/opponents for failure to provide detailed or quantified information regarding the "degree" of impacts or the significance of impacts. As far as we can tell, the county did not require the applicant to provide detailed information or quantifications about the "degree" of impacts or the extent of impacts, notwithstanding that the applicant bears the ultimate burden of proof regarding compliance with ORS 215.296(1). The county erred to the extent it held farmer/opponents to a higher evidentiary standard than it did the applicant on this point.

At several points, the county relies upon the landfill's main control method for nuisance birds, a falconry program. *E.g.* Record 31 (the applicant "currently relies on a falconry program that uses birds of prey to scare off nuisance birds and to keep them from making the landfill a long-term foraging area"). Several farmer/opponents testified that the falconry program simply

displaces the nuisance birds onto surrounding farms. The county dismissed that testimony, by citing to testimony from the owner of the falconry company, to the effect that the "long-term impacts of the falconry program reduce bird populations in a broad area." Record 31. However, that finding is not responsive to the undisputed testimony that the falconry program displaces birds onto surrounding properties.[16] The falconry program may well reduce overall bird numbers in the area from what those numbers would be without the program, while still displacing birds from the landfill onto nearby farms. The net effect may be to reduce the population of nuisance birds in the area or on the landfill, but concentrate the remaining populations on surrounding farms.[17] If so, we agree with FOYC that the falconry program provides little assurance that the landfill will have no significant impact on farm practices on surrounding lands.

3. Impacts on Pheasant-Raising

The county identified pheasant production as one of the farm uses on surrounding lands, with associated accepted farming practices. Record 42-43. An adjacent farmer, McPhillips, submitted testimony that pheasants are especially susceptible to noise, and testified that mechanical noise from landfill operations, including simulated sounds resembling birds of prey intended to scare away nuisance birds, have the effect of terrorizing his pheasants, causing

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[16] FOYC notes testimony from the falconer that while the falconry program is not intended to encourage nuisance birds to go to neighboring farms, "they are kept away from the landfill and they seek other opportunities locally." Record 1088.

[17] McPhillips testified that the falconry program "has not significantly reduced the populations of these birds on my farm." Record 3388.

them to peck at each other, destroy eggs, and not reproduce in their runs. Record 4294-95. In addition, McPhillips testified that he occasionally has to grant permission to the falconer to enter his property to recover lost falcons, who he believes fly over his property because "they have an easier time picking off my poultry than they do the savvy gulls and crows at the landfill." Record 4290.

The county's findings gave "limited weight" to this testimony, finding that the McPhillips' pheasant operation commenced only recently. Record 52. The county noted evidence that McPhillips had only recently constructed pens, only recently acquired a state license required to raise pheasants, and had produced only recent receipts showing sales of pheasant meat. The county found that this evidence undermined McPhillips' claim that pheasant farming had been a part of his family farm for over 70 years. Apparently due to the recent nature of the pheasant operation, the county concluded that the operation "is a hobby use of the McPhillips farm outside the scope of the Farm Impacts analysis." *Id.* The county also concluded that denying approval of Module 10, which would have placed landfill activity closer to the McPhillips farm than the existing landfill, ensures that the expanded landfill will not significantly impact the McPhillips pheasant operation.

FOYC argues, and we agree, that the county's findings regarding impacts on the McPhillips' pheasant operation are inadequate. The county seems to make a credibility determination regarding McPhillips' testimony, giving "limited weight" to his statements regarding impacts, because of the apparent inconsistency between claims that his family farm has included pheasant operations for 70 years and evidence of recent pen construction, etc. FOYC argues that there is no inconsistency between a long history of pheasant

farming and recent revival of such operations. In any case, even if a pheasant operation is only a recent activity, FOYC argues that there is no basis in the record to conclude that the McPhillips' pheasant operation is only a "hobby" rather than a commercial farm use. We agree with FOYC. The findings draw no connection between the longevity of the pheasant operation and the question of whether it is a "hobby" or commercial farm use. The county identified pheasant production as a commercial farm use on surrounding lands, but identifies no reason to conclude that the McPhillips' pheasant operation should not be evaluated under the significant change/costs test, even if it is of recent origin. The findings do not address McPhillips' specific testimony regarding the impacts of landfill noise and the falconry program on his pheasant operation.

4. Odor and Visual Impacts on Farm Stands and Direct Sales

FOYC argues that the county failed to adequately address testimony from downwind farmer/opponents regarding odors and visual impacts of the landfill.

FOYC first argues that the county failed to adequately address odor and visual impacts on farm stands and other direct sales of agricultural products on surrounding farm lands. FOYC notes that the FIA identified a farm stand within the impact area, but did not describe any practices associated with that farm stand, or evaluate any impacts to the farm stand. The findings themselves do not address the farm stand or explain why impacts on the use need not be evaluated. Respondents argue that no issues were raised below regarding odor or visual impacts on the farm stand operation. Respondents contend that identifying the farm stand as a farm use is sufficient and, absent issues raised

below regarding impacts on the farm stand or associated practices, the county was not obligated to adopt specific findings describing practices associated with the farm stand or any impacts on it.

We disagree with respondents. To establish compliance with ORS 215.296(1), the applicant may initially survey farm uses on surrounding lands, and identify accepted farming practices associated with those farm uses. *Dierking v. Clackamas County*, 38 Or LUBA 106, 120-21 (2000). That initial survey can be conducted in general terms, based on public knowledge and visual indications of farm uses. However, if there is testimony regarding farm uses or specific farm practices or impacts not addressed in the initial survey, the county cannot solely rely on the applicant's initial survey, but must address that testimony. *Id.*

Here, the FIA included a map that identifies a "farm stand" on tax lot 200 just west of the landfill, but neither the FIA nor any findings describe the accepted farm practices associated with a farm stand, even generically, and no findings attempt to explain why the proposed landfill expansion, will not significantly change or increase the costs of accepted farm practices associated with that farm stand. The absence of specific testimony regarding the farm stand may mean that the county need not adopt detailed findings regarding the farm stand, but does not relieve the county of the obligation of adopting at least some initial findings addressing that use.

Second, FOYC argues that the findings fail to adequately address testimony of odor and visual impacts on direct farm sales. A farmer, Jennifer Redmond Noble, testified that the expansion

> "will significantly impact my ability to conduct direct farm sales to customers who come to my farm to purchase lamb, hay, or other

> crops. It will also preclude my future ability to put up a farm stand." Record 147.

The same farmer testified:

> "I also do direct farm sales and both the odor and landfill looming ever larger are affecting this. I sell hay, beef, and slaughter lambs currently. I sell lamb and beef to people who are very concerned about the healthiness of the point of origin for their products. One of my lamb customers saw the landfill and asked how it was affecting my farm and wondered about my water quality and consequences to my livestock from the dump. Another of my beef customers raised similar concerns. If my customers lose faith in the wholesome goodness of my products I lose sales and income. Expanding the landfill will cause more harm to my direct farm sales." Record 2292.

The FIA and the findings do not address the foregoing testimony. Respondents argue that no findings are necessary because the impacts described are speculative, or based solely on customers' alleged *perceptions* of landfill impacts, rather than on descriptions of impacts on actual farm practices or farm costs. Respondents argue that customers' perceptions of landfill impacts are not "farm practices" that must be evaluated under ORS 215.296(1).

However, respondents do not dispute that direct sales of agricultural products are accurately described as "accepted farm practices." If direct sales are reduced or eliminated by landfill impacts, including odor and visual impacts, that could constitute a "change" in accepted farm practices. Accordingly, we agree with FOYC that the county erred in failing to adopt findings addressing impacts to direct sales, in response to the foregoing testimony.

Third, FOYC cites to testimony from a boarding stable located approximately 1.75 miles north of the landfill, stating that odors from the landfill make it more difficult to have a "workable boarding business and host

equestrian events." Record 2310. The operator testified that the "powerful odor" has prevented her from expanding the operation to include trail rides. Further, the operator testified that her customers worry about water and air pollution impacts from the landfill, and related an incident where one customer placed a face mask on herself and her children when the "air quality was very bad." *Id.* In response to a suggestion that background farm odors could be the source of the smells, the operator further testified that she and her customers know the difference between farm odors and rotting garbage. Record 148.

The county adopted the following finding in response to that testimony:

> "With respect to odor, the Board finds that there is no credible evidence in the record to indicate that odors from the landfill are the odors causing the alleged impacts at the stables. The stables are in a rural area that generates many offensive odors, and the record indicates the presence of other odor generators in the area, including non-farm odors like the composting facility in McMinnville. Even if an offensive odor in this area can be attributed to the landfill, this testimony asserts that the stables lost the business of a single customer as a result. The Board finds that the loss of one customer is not significant, especially in light of the absence of any testimony describing the number of customers that continue to do business with the stables." Record 54 (Finding 177).

FOYC disputes the finding that background odors, rather than the landfill, is the source of the odors experienced at the stables. However, FOYC does not dispute the alternative finding that, even if the landfill is the source, the alleged impacts from odor are not "significant." Absent a more developed challenge to that conclusion, FOYC's arguments on this point do not provide a basis for reversal or remand.

Finally, FOYC argues that the county failed to adequately address testimony from Maysara vineyards that visual impacts of the landfill negatively

affect the vineyard's direct marketing efforts, because when patrons visit, "what they see is the view of the landfill * * *." Record 3794. The county adopted Finding 180, which concludes that only one area vineyard, which is not Maysara vineyards, has a direct view of the landfill. Record 55. FOYC does not acknowledge or challenge that finding. Absent a challenge to that finding, FOYC's arguments regarding visual impacts on Maysara vineyards do not provide a basis for reversal or remand.

5. Quinoa

Crescent Farms testified that it intended to plant quinoa, a crop new to the area, on a 28-acre field, but that its "enthusiasm has been dampened by the potential for great damage to the crop from the thousands of birds that will be moving closer to our farm as they follow the garbage to Module 11. Sea gull damage to newly sown fields has been well documented by many farmers." Record 2925. The county declined to evaluate that alleged impact, finding that it is required to review potential impacts only on current accepted farming practices, not "plans for future farming practices that are not well-developed or only speculative in nature[.]" Record 37 (Finding 178).

FOYC argues that the county's finding that Crescent Farms' plan to grow quinoa is not well-developed or only speculative in nature, and therefore need not be evaluated, is not supported by substantial evidence. However, we agree with respondents that the record reflects that Crescent Farms' plans to plant quinoa had not progressed beyond some initial research. FOYC has not demonstrated that the county erred in not addressing future plans for farm use that are speculative or not well-developed. *Dierking*, 38 Or LUBA at 121.

6. Poplars

Module 11 and other landfill improvements will be located at the site of an existing poplar plantation, which will be removed. FOYC argues that removal of the existing poplar plantation constitutes a significant change in accepted farm or forest practices, and must be evaluated under ORS 215.296(1). We agree with respondents that the poplar plantation to be removed is located on the subject property, and is proposed to be used as part of the expanded landfill operations. Accordingly, that land is not "surrounding lands" for purposes of ORS 215.296(1). FOYC had not demonstrated that the county erred in failing to address impacts to the poplar plantation.

C. Conclusion

As discussed above, the county's general approach in determining compliance with ORS 215.296(1), with respect to nuisance birds and other impacts, suffers from several analytical or methodological flaws. Those flaws include imposing a higher evidentiary standard on opponents, shifting the burden of proof to opponents, discounting testimony without quantification, while not imposing a similar burden on the applicant, overreliance on the longitudinal economic study, etc. Given those analytical flaws, remand is necessary for the county to conduct a new evaluation of the evidence free of those errors, and make a new determination whether Riverbend has demonstrated that the cumulative impacts of the proposed use will not force a significant change in, or significantly increase the cost of, accepted farm practices on surrounding lands.

The fifth assignment of error (Petitioners) and first assignment of error (FOYC) is sustained, in part.

The county's decision is remanded.