

1                   BEFORE THE LAND USE BOARD OF APPEALS

2                                   OF THE STATE OF OREGON

3  
4                   STOP THE DUMP COALITION,  
5                   WILLAMETTE VALLEY WINERIES ASSOCIATION,  
6                                   and RAMSEY McPHILLIPS,  
7   *Petitioners,*

8  
9   and

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11                   FRIENDS OF YAMHILL COUNTY,  
12                                   *Intervenor-Petitioner,*

13  
14   vs.

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16                   YAMHILL COUNTY,  
17                                   *Respondent,*

18  
19   and

20  
21                   RIVERBEND LANDFILL CO.,  
22                                   *Intervenor-Respondent.*

23  
24   LUBA No. 2016-026

25  
26   FINAL OPINION  
27   AND ORDER

28  
29                   On remand from the Supreme Court.

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31                   Appeal from Yamhill County.

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

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36                   William Frederick Paulus, Portland, filed a petition for review and  
37                   argued on behalf of intervenor-petitioner.  
38

1 Timothy S. Sadlo, Assistant County Counsel, McMinnville, filed a  
2 response brief and argued on behalf of respondent.

3  
4 Tommy A. Brooks, Portland, filed a response brief and argued on behalf  
5 of intervenor-respondent. With him on the brief were James E. Benedict and  
6 Cable Huston LLP.

7  
8 RYAN, Board Chair; RUDD, Board Member; ZAMUDIO, Board  
9 Member, participated in the decision.

10  
11 REMANDED 05/20/2019

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

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2 **NATURE OF THE DECISION**

3 Petitioners appeal a county decision on remand from LUBA that again  
4 approves site design and floodplain development review to authorize expansion  
5 of an existing landfill on land that is zoned for exclusive farm use.

6 **FACTS**

7 This matter is on remand from the Supreme Court. *Stop the Dump*  
8 *Coalition v. Yamhill County*, 364 Or 432, 435 P3d 698 (2019) (*SDC IV*). This  
9 matter involves the interpretation and application of ORS 215.296, referred to  
10 in *SDC IV* as the farm impacts test.<sup>1</sup>

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<sup>1</sup> 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.”

1           In *Stop the Dump Coalition v. Yamhill County*, 74 Or LUBA 1 (2016)  
2 (*SDC II*), we remanded, for a second time, a county decision approving  
3 expansion of intervenor-respondent Riverbend Landfill Co.’s (Riverbend’s)  
4 solid waste landfill on land zoned exclusive farm use (EFU). In the decision  
5 challenged in *SDC II*, the county imposed two conditions of approval in order  
6 to address impacts of litter from the landfill on accepted farm practices on an  
7 adjacent farm, the McPhillips farm.<sup>2</sup> Those conditions required Riverbend to:  
8 (1) install an additional litter fence between the working face of the landfill and  
9 the McPhillips farm (condition 24); and (2) provide or pay for litter patrols of  
10 the McPhillips farm during the time of year prior to the hay harvest (condition  
11 25).<sup>3</sup> In *SDC II*, we agreed with Riverbend that the conditions of approval  
12 imposed to ameliorate the impacts on accepted farm practices on the

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<sup>2</sup> In *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341, 367-72 (2015) (*SDC I*) we explained the impacts on accepted farm practices on the McPhillips farm in some detail. We sustained two assignments of error in part concerning ORS 215.296(1).

<sup>3</sup> In *SDC II*, we sustained petitioners’ assignments of error that argued that the county had improperly construed ORS 215.296(1) as applied in *Von Lubken v. Hood River County*, 118 Or App 246, 846 P2d 1178, *rev den*, 316 Or 529 (1993) in analyzing the cumulative impacts of the landfill’s expansion on the farms that experienced multiple individual impacts that, individually, did not rise to the level of significant. We remanded for the county to determine whether “individual insignificant impacts, some of which may be additive and some which may not be, are cumulatively significant with respect to each farm that alleged multiple impacts to their farm practices.” 74 Or LUBA at 37. That basis for remand is undisturbed by the Supreme Court’s decision in *SDC IV*.

1 McPhillips farm *in toto* ameliorated those impacts to a level that was not  
2 significant under the farm impacts test.

3 In order to address impacts from nuisance birds on accepted farm  
4 practices on nearby farms, including marketing fruit directly to the public on  
5 the Frease farm, the county imposed several conditions.<sup>4</sup> Those conditions  
6 require Riverbend to (1) increase its falconry program to six days per week  
7 (condition 22); and (2) contract with the United States Department of  
8 Agriculture (USDA) to provide adaptive bird management services (condition  
9 23). In addition, with respect to the impacts on the Frease farm in particular,  
10 the county imposed two additional conditions to minimize the impacts from  
11 nuisance birds on that farm that require Riverbend to purchase the entire crop  
12 of cherries and berries produced by the farm at market price (conditions 26 and  
13 27). In *SDC II*, we also agreed with Riverbend that the four conditions of  
14 approval imposed to ameliorate the impacts on accepted farm practices on the  
15 Frease farm ameliorated those impacts to a level that was not significant.

16 In *SDC IV*, the Supreme Court agreed with petitioners that ORS  
17 215.296(2) does not allow conditions that “force farmers to engage in a  
18 negotiation with a nonfarm use to obtain payment for the impacts to their  
19 operation,” such as conditions 26 and 27. 364 Or at 461. As a result, the county

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<sup>4</sup> The Frease farm is located approximately one-half mile from a proposed new module for the landfill. The farm has a large hazelnut orchard, a five-tree cherry orchard, and a small berry operation, as well as operates a “U-pick” harvest, marketing fruit directly to the public. 74 Or LUBA at 23.

1 may not rely on conditions 26 and 27 to find that impacts to the Frease farm are  
2 mitigated to a level that makes the changes to accepted farm practices on the  
3 Frease farm not significant. The Supreme Court also agreed with petitioners  
4 that condition 25 did not have the effect of ameliorating in any way the impact  
5 on the McPhillips farm from having to conduct litter patrol and waste cleanup,  
6 because the accepted farm practices on the McPhillips farm will be changed by  
7 having to conduct litter patrols “[r]egardless of whether McPhillips or  
8 Riverbend pays[.]” 364 Or at 462. The Supreme Court remanded to LUBA to  
9 reconsider “whether the county correctly determined that the change in  
10 accepted farm practices was not substantial before it remands to the county.”  
11 *Id.*

#### 12 **ASSIGNMENT OF ERROR (Petitioners)**

13 One question we must answer here is whether conditions 22 and 23,  
14 standing without conditions 26 and 27, are sufficient to make the changes to  
15 accepted farm practices on the Frease farm not significant.<sup>5</sup> The second  
16 question we must answer here is whether condition 24, requiring Riverbend to  
17 install an additional litter fence between the working face of the landfill and the  
18 McPhillips farm, is sufficient without condition 25 to make the changes to  
19 accepted farm practices on the McPhillips farm not “significant.”

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<sup>5</sup> The Supreme Court held that “[a] ‘significant change’ or increase in cost is one that will have an important influence or effect on the farm.” 364 Or at 458.

1           **A.     Frease Farm**

2           In *SDC II*, we explained that the owner of the Frease farm testified that  
3 she had to completely cease direct and indirect sales of cherries and berries due  
4 to concerns regarding contamination and disease, and that she experienced  
5 increased costs to control fungus on her hazelnut orchard. 74 Or LUBA at 23.  
6 While the county rejected her claims and determined that the impacts on her  
7 fruit and nut operations due to the impact of bird scat from nuisance birds that  
8 are attracted to the landfill on hazelnut, cherry and berry operations did not rise  
9 to a level of significance, the county also imposed Conditions 22 and 23 in  
10 order to ensure that nuisance birds attracted to the landfill will not force  
11 significant changes in farm practices, or significantly increase the cost of farm  
12 practices.<sup>6</sup> Condition 22 requires Riverbend to increase its existing falconry  
13 program from two to four days, to six days per week between October 15th and  
14 March 15th of each year, the winter months when nuisance bird populations are  
15 highest and grass-seed plantings most vulnerable. Condition 23 requires  
16 Riverbend to contract with the USDA to provide additional adaptive  
17 management bird control measures.

18           The question we must answer here is whether conditions 22 and 23 are  
19 sufficient to ensure that nuisance birds attracted to the landfill will not  
20 significantly change accepted farm practices on the Frease farm, or

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<sup>6</sup> The county also imposed conditions 26 and 27 which, as explained above, the Supreme Court concluded are not authorized by ORS 215.296(2).

1 significantly increase the cost of such practices. In *SDC II*, we explained in  
2 detail the impetus for condition 22, which expands Riverbend's existing  
3 falconry program to a level that is intended to reduce the number of nuisance  
4 birds in the area due to the landfill operation that feed or roost on nearby farms  
5 below the point where that extra increment of nuisance birds in the area does  
6 not force additional significant changes or increased costs on nearby farmers.  
7 74 Or LUBA at 21. We concluded that a reasonable decision maker could  
8 conclude that Riverbend has demonstrated that with conditions 22 and 23, the  
9 nuisance bird populations attracted to the landfill will not significantly change  
10 farm practices or significantly increase the cost of farm practices on nearby  
11 farms, including the Frease farm. 74 Or LUBA at 22-23. Even without  
12 conditions 26 and 27, the Supreme Court's decision did not disturb that  
13 conclusion.

14 **B. McPhillips Farm**

15 In *SDC II*, we explained that we tended to agree with petitioner that there  
16 was not substantial evidence in the record to support the county's conclusion  
17 that having to patrol for litter that escaped the landfill, either by wind or by  
18 bird, was not a significant change in the McPhillips farm's accepted farm  
19 practices. However, we concluded that with conditions 24 and 25 together, the  
20 county had reduced the impacts to a level that was not significant. Under *SDC*  
21 *IV*, the county and we may not rely on condition 25 to determine whether the  
22 impacts from having to patrol for litter are significant. We may only consider



1 condition 24, which requires the county to install a second fence between the  
2 working face of the landfill and the McPhillips farm to capture more trash that  
3 escapes the landfill before it enters onto the McPhillips farm.

4 Condition 24 requires Riverbend to install an additional litter fence  
5 between the working face of the landfill and the McPhillips farm.<sup>7</sup> In *SDC II*,  
6 after extensively reviewing the parties' arguments and evidence regarding the  
7 effectiveness of the existing litter fence, and noting the lack of quantification of  
8 how effective the existing fence is at intercepting landfill trash, we held that:

9 "[w]hile the county can reasonably find that the second litter fence  
10 will reduce somewhat the amount of landfill trash that reaches the  
11 McPhillips property, Condition 24 may not be a sufficient basis in  
12 itself to conclude that the need for the litter patrols and other  
13 measures McPhillips testified to has been eliminated or reduced  
14 below the level of significance." 74 Or LUBA at 13.

15 We now conclude, based on the evidence discussed in *SDC II*, that condition  
16 24 requiring installation of a second fence between the working face of the  
17 landfill and the McPhillips farm is not a sufficient basis in itself to conclude  
18 that the need for litter patrols and other measures has been reduced below the  
19 level of significance. A reasonable decision maker could not conclude that

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<sup>7</sup> Condition 24 provides:

"24. Until Riverbend Landfill no longer receives waste for landfilling, the Applicant shall provide additional litter fencing between the working face of the landfill and the McPhillips farm." 74 Or LUBA at 10-11 n 9.

1 even after implementation of condition 24, landfill litter would not cause a  
2 significant change in accepted farm practices on the McPhillips property,  
3 because there is no quantification in the record of how effective the existing  
4 fence is at intercepting landfill trash.

5       Petitioners' assignment of error is sustained, in part.

6       The county's decision is remanded.

## Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2016-026 on May 20, 2019, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 20th day of May, 2019.

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