

BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

RIVERBEND LANDFILL CO.,  
*Petitioner,*

vs.

YAMHILL COUNTY,  
*Respondent,*

and

STOP THE DUMP COALITION,  
RAMSEY MCPHILLIPS, and  
FRIENDS OF YAMHILL COUNTY,  
*Intervenors-Respondents.*

LUBA No. 2020-093

FINAL OPINION  
AND ORDER

Appeal from Yamhill County.

Tommy A. Brooks filed the petition for review and argued on behalf of petitioner. Also on the brief was Cable Huston LLP.

No appearance by Yamhill County.

Jeffrey L. Kleinman filed a response brief and argued on behalf of intervenors-respondents.

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

AFFIRMED

04/09/2021

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

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Opinion by Ryan.

**NATURE OF THE DECISION**

Petitioner appeals a board of county commissioners decision denying its application for site design review and a floodplain development permit to expand an existing landfill.

**MOTION TO INTERVENE**

Stop the Dump Coalition, Ramsey McPhillips, and Friends of Yamhill County (intervenors) move to intervene on the side of the county. No party opposes the motion and it is allowed.

**FACTS**

Petitioner operates an existing solid waste disposal landfill located approximately three miles south of the city of McMinnville that is surrounded by land zoned exclusive farm use (EFU). In 2014, petitioner applied to the county to expand the landfill onto adjacent land zoned EFU. Solid waste disposal facilities are permitted on land zoned EFU. ORS 215.283(2)(k). However, a proposed solid waste disposal facility must satisfy ORS 215.296, which provides that the county may only approve the use if

- “the local governing body \* \* \* 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.”

1           The proposed landfill expansion has a lengthy history at LUBA and in the  
2 courts. We take the description of that history from the challenged decision:

3                           **“I.   Introduction and Background**

4           “This matter comes before the County on remand from [LUBA].  
5 [Petitioner], which owns and operates the Riverbend Landfill \* \* \*,  
6 previously submitted two applications for the enhancement and  
7 expansion of Riverbend Landfill. The first application was for Site  
8 Design Review (“SDR”) pursuant to Yamhill County Zoning  
9 Ordinance (“YCZO” or “Code”) Section 1101, and the second  
10 application was for a Floodplain Development Permit pursuant to  
11 YCZO Section 901. The stated purpose of the applications was to  
12 allow Riverbend Landfill to continue operating by expanding  
13 operations to adjacent land as other areas of the existing landfill go  
14 into final closure. The County processed both applications together.

15           “The County approved both of [petitioner’s] applications on April  
16 23, 2015 through Board Order 15-115. Participants in that  
17 proceeding sought review of the County’s order by appealing to  
18 LUBA. LUBA issued its Final Order and Opinion on November 10,  
19 2015 (LUBA No. 2015-036). LUBA concluded that ‘the county’s  
20 general approach in determining compliance with ORS 215.296(1),  
21 with respect to nuisance birds and other impacts, suffers from  
22 several analytical or methodological flaws.’ Based on that  
23 conclusion, LUBA remanded the decision back to the County ‘to  
24 conduct a new evaluation of the evidence’ and to ‘make a new  
25 determination whether [petitioner] has demonstrated that the  
26 cumulative impacts of the proposed use will not force a significant  
27 change in, or significantly increase the cost of, accepted farm  
28 practices on surrounding lands.’

29           “In its proceeding on remand, the county adopted revised and  
30 additional findings and conditions of approval and approved the  
31 application. Another appeal to LUBA (LUBA No. 2016-026)  
32 followed. That appeal resulted in the following decisions issued by  
33 LUBA and the appellate courts:

1                   “*Stop the Dump Coalition v. Yamhill County*, 74 Or LUBA 1  
2                   (2016) [(SDC I)]

3                   “*Stop the Dump Coalition v. Yamhill County*, 284 Or App  
4                   470, 391 P3d 932 (2017)

5                   “*Stop the Dump Coalition v. Yamhill County*, 364 Or 432, 435  
6                   P3d 698 (2019) [(SDC III)]

7                   “*Stop the Dump Coalition v. Yamhill County*, [79] Or LUBA  
8                   [459] (2019)

9                   “*Stop the Dump Coalition v. Yamhill County*, 299 Or App  
10                  389, 449 P3d 927 (2019)

11                 “In each instance, the county’s decision approving [petitioner’s]  
12                 application was reversed or remanded.

13                 “Ultimately, the Supreme Court of Oregon held that conditions of  
14                 approval requiring [petitioner] to purchase [neighboring] crops  
15                 (Frease farm) or to conduct litter patrols on [neighboring] farms to  
16                 pick up landfill litter (McPhillips farm) were not acceptable  
17                 conditions and could not be used to satisfy ORS 215.296. ORS  
18                 215.296 is in turn incorporated into the County’s approval standard,  
19                 YCZO 402.02(V).

20                 “LUBA then remanded the application to the county for the purpose  
21                 of consideration under the standard set by the Supreme Court.  
22                 [Petitioner] appealed this decision to the Court of Appeals, arguing  
23                 that LUBA erred,

24                 “when it rejected the county’s determination that landfill litter  
25                 would not cause a significant change in accepted farm  
26                 practices on the McPhillips property under ORS 215.296. In  
27                 particular, petitioner contends that LUBA improperly ignored  
28                 factual findings by the county regarding the volume of litter  
29                 escaping the landfill that, in petitioner’s view, would support  
30                 the conclusion that any change to accepted farm practices  
31                 resulting in the landfill expansion necessarily would be

1                   minimal.

2                   “*SDC [III]*, 299 Or App at 390.

3                   “The Court of Appeals rejected this argument and upheld LUBA’s  
4                   decision to remand.

5                   “In the same case, the [intervenors] and others cross-petitioned as to  
6                   LUBA’s apparent determination that cumulative impacts upon the  
7                   Frease farm were not significant under the statute. The court held  
8                   that it need not decide that question ‘because the parties, ultimately,  
9                   agree that the issue raised in it is not something in dispute. That is,  
10                  the parties agree that LUBA’s order did not eliminate the county’s  
11                  obligation to evaluate the cumulative impacts on the Frease farm on  
12                  remand.’ *Id.*

13                                   **“II. Framework of the Current Proceeding**

14                   “On April 28, 2020, [petitioner] requested in writing ‘that the  
15                   County proceed with its application on remand,’ and stated:

16                                   “To address the first issue on remand, it will be necessary to  
17                                   open the record for the limited purpose of accepting evidence  
18                                   of actual litter impacts from the landfill to the McPhillips hay  
19                                   farming practices. To address the second issue on remand, it  
20                                   is not necessary to open the record. Instead, the County can  
21                                   make findings regarding cumulative impacts based on the  
22                                   existing record (in addition to the record developed to address  
23                                   the McPhillips hay farming practices). The County should  
24                                   therefore accept only written argument with respect to the  
25                                   issue of cumulative impacts.” Record 18-20 (boldface in  
26                                   original; footnote omitted).

27                   The board of county commissioners agreed with petitioner’s proposed approach  
28                   and reopened the record for the limited purpose of accepting new evidence of  
29                   litter impacts from the landfill on the McPhillips farm.

1           After holding a hearing on remand and leaving the record open, the board  
2 of county commissioners deliberated and voted two to one to deny petitioner's  
3 applications for site design review and a floodplain permit. This appeal followed.

#### 4   **STANDARD OF REVIEW**

5           The challenged decision denies the applications, identifying several  
6 independent bases for doing so. Where a local government denies a land use  
7 application on multiple grounds, LUBA will affirm the decision on appeal if at  
8 least one basis for denial survives all challenges. *Wal-Mart Stores, Inc. v. Hood*  
9 *River County*, 47 Or LUBA 256, 266, *aff'd*, 195 Or App 762, 100 P3d 218 (2004),  
10 *rev den*, 338 Or 17 (2005). In that circumstance, the Board typically does not  
11 address challenges directed at other, alternate bases for denial.

12          Petitioner's assignments of error challenge the board of county  
13 commissioners' findings. Adequate findings set out the applicable approval  
14 criteria and explain the facts relied upon to conclude whether the applicable  
15 criteria are satisfied. *Le Roux v. Malheur County*, 30 Or LUBA 268, 271 (1995);  
16 *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992).

#### 17   **FIRST ASSIGNMENT OF ERROR**

18          The McPhillips farm is located east of the landfill. The board of  
19 commissioners concluded that, under ORS 215.296 and its local implementation  
20 at YCZO 402.02(V), the impacts of litter escaping from an expansion of  
21 petitioner's landfill onto the McPhillips farm would force a significant change in  
22 the farm practices of growing, harvesting, and baling hay and significantly

1 increase the cost of farm operations. The board of county commissioners  
2 concluded that petitioner had not demonstrated that those changes and cost  
3 increases could be mitigated to an insignificant level.

4 In its first assignment of error, petitioner argues that the county's findings  
5 are inadequate to explain why it reached that conclusion. In particular, petitioner  
6 argues that the findings are inadequate to explain (1) why the county concluded  
7 that small or minimal amounts of plastic escaping from the expanded landfill  
8 would force a *significant* change in the McPhillips farm practices, particularly in  
9 light of petitioner's proposed litter control plan; (2) whether the landfill is the  
10 source of litter on the McPhillips farm;<sup>1</sup> and (3) why the county concluded that  
11 petitioner's proposed litter control plan would not mitigate litter impacts on the  
12 McPhillips farm to an insignificant level.

13 The county adopted approximately 18 pages of single-spaced findings  
14 explaining its conclusion that the proposed expansion would force a significant  
15 change in and significantly impact the cost of farm operations on the McPhillips  
16 farm. Record 22-40. A significant portion of those findings explain the county's  
17 conclusions that the landfill is the source of litter on the McPhillips farm and that

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<sup>1</sup> Petitioner also challenges the county's reliance on the testimony of one farmer, Ellingson, regarding the source of the litter, which petitioner argues the county rejected in its original earlier decision. Petition for Review 10. However, petitioner does not refer to or acknowledge Ellingson's updated, 2020 testimony on the same issue, which the county did not reject in the 2020 remand proceedings.



1 litter, in particular plastics, escaping from an expanded landfill onto the  
2 McPhillips farm would force a significant change in farm practices and  
3 significantly increase the cost of operations. Record 22-29. The findings  
4 summarize the testimony and evidence from farmers on which the county relied  
5 to reach those conclusions and explain why the county did not find other  
6 testimony on the issue persuasive.<sup>2</sup> Those findings are adequate. *Heiller*, 23 Or  
7 LUBA at 556.

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<sup>2</sup> Regarding the source of the litter, the county found:

“[T]he record is clear that whatever the benefits of the first litter fence (if any), large amounts of litter from the landfill made their way onto the farm and, as LUBA has itself found, resulted in significant changes in accepted farm practices and significant increases in the costs of those practices for McPhillips.” Record 23.

Regarding the significance of the impacts from the litter, the county found:

“Based upon the testimony of Mr. McPhillips, Mr. Kuehne, Marilyn Walster, and other farmers, we find that the accepted farm practice for hay farmers is to grow, harvest and sell hay without the need to remove garbage, including plastic debris. Based upon the testimony of Mr. McPhillips and other farmers discussed above, we find that even very small—[petitioner’s] so-called ‘minimal’—amounts of trash, especially plastic, which are borne onto McPhillips’ hayfield, can, do and will force a significant change in accepted farm practices on his farm adjacent to the landfill, or significantly increase the cost of accepted farm practices on that farm, or both. As LUBA has held, the issue here is not the volume of litter which escapes, but the significance of the impacts in the form of changes to accepted farm practices.” Record 28.

1           In 10 pages of single-spaced findings, the county explained in great detail  
2 why it concluded that petitioner's litter control plan was not sufficient to mitigate  
3 the impacts to farm practices to an insignificant level, describing the litter control  
4 plan and the testimony on which it relied to reach that conclusion. Record 29-39.  
5 Those findings are more than adequate to explain the county's conclusion.

6           In addition, although petitioner's argument is phrased as a challenge to the  
7 findings, petitioner appears to also challenge the evidence supporting the  
8 county's decision and the county's choice to rely on testimony and evidence from  
9 farmers over testimony and evidence from petitioner's consultants. "Substantial  
10 evidence exists to support a finding of fact when the record, viewed as a whole,  
11 would permit a reasonable person to make that finding." *Dodd v. Hood River*  
12 *County*, 317 Or 172, 179, 855 P2d 608 (1993) (citing *Younger v. City of Portland*,  
13 305 Or 346, 351-52, 752 P2d 262 (1988)). To the extent that petitioner's  
14 argument alleges that the county's decision is not supported by substantial  
15 evidence in the whole record, we reject that argument.

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          In response to one farmer, Bacon, who testified in support of the application,  
the county found:

          "Mr. Bacon farms hazelnuts on land leased from [petitioner], and  
\* \* \* his comments are not objective. Indeed, \* \* \* a 'condition of  
the lease to [Bacon] (and any other farmer who leased land from  
[petitioner])' requires that they not actively oppose the operation of  
the landfill. We find that Mr. Bacon's ongoing economic  
relationship with the applicant undermines his testimony." Record  
29.

1 To the extent that petitioner's argument challenges the county's choice to  
2 rely on certain evidence over other evidence, the choice between conflicting  
3 evidence belongs to the local government. *Friends of Deschutes County v.*  
4 *Deschutes County*, 49 Or LUBA 100, 105 (2005). Petitioner has not established  
5 that the county's decision is not supported by substantial evidence.

6 Finally, in a portion of the first assignment of error, petitioner challenges  
7 the county's credibility finding that it could not rely upon petitioner's  
8 commitment to addressing litter impacts through its proposed litter control plan  
9 in light of prior and ongoing compliance issues at the existing landfill. However,  
10 as those findings note, they are not essential to the county's decision and are  
11 extraneous.<sup>3</sup> Accordingly, any inadequacy in those findings provides no basis for  
12 reversal or remand of the decision.

13 In conclusion, the county's 18 pages of single-spaced findings are adequate  
14 to explain why it concluded that ORS 215.296 and YCZO 402.02(V) were not  
15 met with respect to the McPhillips farm.

16 The first assignment of error is denied.

17 **SECOND ASSIGNMENT OF ERROR**

18 In *SDC I*, we sustained the petitioners' assignments of error that argued  
19 that the county had improperly construed ORS 215.296(1), as applied in *Von*

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<sup>3</sup> The findings explain that "[t]his portion of our discussion is not essential to our decision, as we would come to the same conclusion without going further. However, these points are still worth addressing for the record." Record 40.

1    *Lubken v. Hood River County*, 118 Or App 246, 846 P2d 1178, *rev den*, 316 Or  
2    529 (1993), in analyzing the cumulative impacts of the landfill's expansion on  
3    the farms that experienced multiple individual impacts which, individually, did  
4    not rise to the level of significant. We remanded for the county to determine  
5    whether "individual insignificant impacts, some of which may be additive and  
6    some which may not be, are cumulatively significant with respect to each farm  
7    that alleged multiple impacts to their farm practices," *SDC I*, 74 Or LUBA at 37.  
8    That basis for remand was undisturbed by the Supreme Court's decision in *SDC*  
9    *III*. Accordingly, the county's remand proceedings considered "[w]hether  
10   evidence in the record[] demonstrates the presence or absence of significant  
11   cumulative impacts to accepted farm practices (including the costs of those  
12   practices) from the existing landfill and the proposed expansion area." Record  
13   21.

14        The county concluded that, in addition to the singular impacts from plastics  
15   escaping from the landfill and onto the McPhillips farm, there are significant  
16   cumulative impacts to the McPhillips farm practices from litter washing up due  
17   to periodic flooding, litter being transported by birds from the landfill to the farm,  
18   and litter escaping garbage trucks and depositing on McPhillips farm fields.  
19   Record 43-49. The county also concluded that there are significant cumulative  
20   impacts to the Redmond-Noble farm. Record 49-50.

21        In its second assignment of error, petitioner argues that the county's  
22   findings are inadequate to explain how the individual identified impacts to the

1 McPhillips farm rise to a level of significance when viewed cumulatively.  
2 Petitioner also challenges some of the county's findings regarding impacts to the  
3 Redmond-Noble farm.

4 As explained above, the challenged decision is a decision denying the  
5 applications. Where a local government denies a land use application on multiple  
6 grounds, LUBA will affirm the decision if at least one basis for denial survives  
7 all challenges. *Wal-Mart Stores*, 47 Or LUBA at 266. Addressing alternate bases  
8 for denial once LUBA has affirmed at least one valid basis for denial would result  
9 in rendering what are essentially advisory adjudications, which is not consistent  
10 with the statutory mandate that LUBA's review be conducted pursuant to sound  
11 principles of judicial review. ORS 197.805.

12 In our resolution of the first assignment of error, we confirmed the  
13 adequacy of the county's findings in explaining why it concluded that the  
14 application failed to satisfy ORS 215.296 and YCZO 402.02(V) with respect to  
15 impacts to the McPhillips farm. That conclusion alone provides the county a  
16 sufficient, independent basis to deny the application. Accordingly, we do not  
17 reach the second assignment of error.

### 18 **THIRD ASSIGNMENT OF ERROR**

19 In its third assignment of error, petitioner argues that the county's findings  
20 are inadequate to explain why it denied the application for a floodplain  
21 development permit. Petitioner notes that "the County appears to assume that its  
22 disposition of the Site Design Review application takes care of the Floodplain

1 Development Permit, too, but it does not expressly state that conclusion.” Petition  
2 for Review 19.

3 Intervenor’s respond that the issue presented in the third assignment of error  
4 was not preserved pursuant to ORS 197.835(3) and that petitioner may not raise  
5 it for the first time at LUBA. While we tend to disagree with intervenors that the  
6 issue was required to be preserved, we need not resolve that issue because we  
7 reject petitioner’s premise in the first instance.

8 It is clear from the application, the county’s first decision, and the  
9 challenged decision that the application for a floodplain development permit was  
10 necessary for the portions of the proposed landfill expansion that intruded onto  
11 the floodplain, as depicted on the proposed site plan. However, any development  
12 at all in the floodplain was contingent on an approved site plan that depicted  
13 development in the floodplain. Petitioner does not argue otherwise and does not  
14 explain why the county, having denied the site plan review application, was  
15 required to adopt findings applying the floodplain development criteria to that  
16 contingent application. Accordingly, petitioner has not established that any  
17 failure to adopt findings regarding a contingent application provides a basis for  
18 reversal or remand of the decision.

19 The third assignment of error is denied.

20 The county’s decision is affirmed.