

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

3
4 GABE GARTON and LISA HAMMONDS,
5 *Petitioners,*

6
7 vs.

8
9 LAKE COUNTY,
10 *Respondent.*

11
12 LUBA No. 2021-036

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Lake County.

18
19 Andrew Mulkey filed the petition for review and argued on behalf of
20 petitioners.

21
22 No appearance by Lake County.

23
24 ZAMUDIO, Board Chair; RUDD, Board Member; RYAN, Board
25 Member, participated in the decision.

26
27 REVERSED 01/21/2022

28
29 You are entitled to judicial review of this Order. Judicial review is
30 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a board of county commissioners decision approving a conditional use permit (CUP) for a junkyard and automobile wrecking yard on land planned and zoned for agricultural use.

FACTS

The subject property is comprised of approximately 28 acres, designated Range (R) on the comprehensive plan map, and zoned Agriculture Use (A-2). The applicant applied for a CUP to obtain land use approval for an established automobile wrecking yard, disposal site, junkyard, transfer station, and wrecking yard. Record 20. The application explains that “[t]hese uses were made of the property prior to Applicant’s acquisition, and the [CUP] requested would encompass a combination of all of the aforementioned uses and any similar uses, with any reasonable conditions made a part of the permit.” *Id.* The various requested uses are defined by Lake County Zoning Ordinance (LCZO) 1.03 as follows:

“Automobile Wrecking Yard. A premises used for the storage or sale of used automobile or truck parts or for the storage, dismantling, or abandonment of junk, obsolete automobiles, trailers, trucks, machinery or parts thereof.

“Disposal Site. Land and facilities used for the disposal, handling or transfer of or resource recovery from solid wastes, including but not limited to dumps, landfills, sludge lagoons, sludge treatment facilities, disposal sites for septic tank pumping or cesspool cleaning service, transfer stations, resource recovery facilities, incinerators for solid waste, composting plants, and land and facilities previously

1 used for solid waste disposal at a land disposal site; but the term
2 does not include a facility subject to the permit requirements of ORS
3 468.740, a landfill site which is used by the owner or person in
4 control of the premises to dispose of soil, rock, concrete or other
5 similar nondecomposable material, unless the site is used by the
6 public either directly or through a solid waste collection service; or
7 a site operated by a wrecker issued a certificate under ORS 822.110
8 and approved by the County pursuant to the applicable provisions of
9 this Ordinance. (ORS 459.005(8))

10 “Junk. Old or scrap copper, brass, rope, rags, batteries, paper, trash,
11 rubber, debris, waste, or junked, dismantled, wrecked, scrapped or
12 ruined motor vehicles, or motor vehicle parts, iron, steel or other old
13 or scrap ferrous, or nonferrous materials, metal or nonmetal
14 materials. (ORS 377.605(5))

15 “Junkyard. Any establishment or place of business where there is
16 accumulated on the premises eight or more motor vehicles or an
17 equivalent volume of junk that is maintained, operated or used for
18 storing, keeping, buying or selling of junk and the term includes
19 automobile graveyards, garbage dumps and scrap metal processing
20 facilities. (ORS 377.605(6))

21 “Transfer Station. A fixed or mobile facility normally used as an
22 adjunct of a solid waste collection and disposal system or resource
23 recovery system, between a collection route and a disposal site,
24 including but not limited to, a large hopper, railroad gondola or
25 barge. (ORS 459.005(22))

26 “Wrecking Yard. Any establishment or place of business that is
27 maintained, operated or used for storing, keeping, buying, or selling
28 old or scrap copper, brass, rope, rags, batteries, paper, trash, rubber,
29 debris, waste or junked, dismantled, wrecked, scrapped or ruined
30 motor vehicles or motor vehicle parts, iron, steel, or other old or
31 scrap ferrous, or nonferrous material, metal or nonmetal materials,
32 and the term includes automobile wrecking yard, garbage dumps,
33 and scrap metal processing facilities.”

1 Of the uses for which county approval was requested, only a “disposal site” is
2 identified as an allowed use in the A-2 zone, and it is allowed as a conditional
3 use. LCZO 3.04(B)(7).¹

4 After a public hearing, the planning commission adopted findings and
5 approved the CUP with conditions. The planning commission decision provides:
6 “This permit is limited to a junkyard, junk, auto-wrecking yard, wrecking yard as
7 defined in the staff report and in the [LCZO], and not to include: a transfer station
8 or waste disposal.” Record 111. Petitioners appealed the planning commission
9 decision. After a *de novo* public hearing, the board of county commissioners
10 adopted additional findings and upheld the planning commission decision. The
11 county concluded that it could authorize the junkyard and wrecking yard uses as
12 “similar uses” under a generally applicable similar use authorization process
13 provided in LCZO 20.07, which we discuss further below, combined with a
14 finding of compatibility with farm uses, which is required for the authorization
15 of nonfarm uses in the A-2 zone under LCZO 24.19(A). Record 20-23. This
16 appeal followed.

¹ LCZO 3.04(B)(7) provides as a Type II conditional use in the A-2 zone “[a] site for the disposal of solid waste approved by the governing body of a city of the county or both and for which a permit has been granted under ORS 459.245 by the Department of Environmental Quality together with equipment, facilities or buildings necessary for its operation.”

1 **FIRST ASSIGNMENT OF ERROR**

2 In the first assignment of error, in two subassignments of error, petitioners
3 argue that the county’s decision violates state law governing the uses that are
4 allowed on agricultural land. Oregon land use law preserves land for agricultural
5 uses by requiring counties to identify, inventory, and apply agricultural plan
6 designations and zoning to agricultural land. State law restricts the uses that are
7 allowed on agricultural land to farm uses and specified nonfarm uses. *See* ORS
8 215.203(1) (authorizing exclusive farm use zoning and generally requiring that
9 land within such zones be used exclusively for “farm use”); ORS 215.203(2)(a)
10 (defining “farm use”); ORS 215.283(2) (identifying permitted nonfarm uses);
11 OAR 660-033-0030 (setting out the method for identifying and inventorying
12 “agricultural land”); OAR 660-033-0120 (listing the uses that are authorized on
13 agricultural lands); OAR 660-033-0090(1) (providing, in part, that “counties
14 shall apply zones that qualify as exclusive farm use zones under ORS Chapter
15 215 to ‘agricultural land’ as identified under OAR 660-033-0030, which includes
16 land identified as high-value farmland and land not identified as high-value
17 farmland”).

18 As explained above, the subject property is planned and zoned for
19 agricultural use. The CUP approves a variety of uses, including the “receipt of
20 automobiles vehicles [*sic*], implements and other waste normally considered
21 appropriate for scrap or part resale” and “routine operations associated with
22 dismantling of equipment and vehicles.” Record 28. The decision provides that

1 the “[a]pplicant shall not store or take in household, commercial or industrial
2 garbage or rubbish, or make any in-ground or long-term storage of hazardous
3 material.” *Id.*

4 In the first subassignment of error, petitioners argue that the decision
5 impermissibly allows a vehicle dismantler use, which is not a farm or nonfarm
6 use that is authorized on agricultural land. In the second subassignment of error,
7 petitioners argue that the decision impermissibly allows a disposal site, which is
8 a use that is allowed on agricultural land under state law, without requiring the
9 applicant to first obtain a disposal site permit from the Department of
10 Environmental Quality (DEQ) or conditioning approval on the applicant
11 obtaining a DEQ permit. To the extent that the decision purports to allow any use
12 that is not allowed as a regulated disposal site on agricultural land, petitioners
13 argue that the county erred in allowing that use. We agree with petitioners for the
14 reasons explained below.

15 **A. The county impermissibly allowed a vehicle dismantler use on**
16 **agricultural land.**

17 A “disposal site” is allowed as a conditional use in the A-2 zone. LCZO
18 3.04(B)(7). As discussed further below, ORS 215.283(2)(k) provides that the
19 county may allow on agricultural land a “site for the disposal of solid waste
20 approved by the governing body of a city or county or both and for which a permit
21 has been granted under ORS 459.245 by [DEQ] together with equipment,
22 facilities or buildings necessary for its operation,” subject to the farm impacts

1 test, ORS 215.296. The disposal site allowed under LCZO 3.04(B)(7) must meet
2 the standards of the disposal site allowed under ORS 215.283(2)(k).

3 A “dismantler” is a business that buys and sells motor vehicles for the
4 purpose of disassembling, dismantling, recycling, and/or crushing those vehicles.
5 ORS 801.236.² A “motor vehicle” is defined broadly to mean a vehicle that is
6 self-propelled or designed for self-propulsion. ORS 801.360. Petitioners argue,
7 and we agree, that the CUP allows the applicant to operate a dismantler use. The
8 permit explains that the applicant’s “business can perform routine operations
9 associated with dismantling of equipment and vehicles.” Record 28. The
10 permitted uses “include the receipt of automobiles, vehicles, implements and

² ORS 801.236 provides:

“(1) ‘Dismantler’ means a person who is engaged in the business of:

“(a) Buying, selling, dealing in or processing, except for processing into scrap metal, motor vehicles for the purpose of destroying, salvaging, dismantling, disassembling, reducing to major component parts, crushing, compacting, recycling or substantially altering in form; or

“(b) Buying, selling, dealing in or processing motor vehicle major component parts that are stocked in the inventory of the business, if the buying, selling, dealing in or processing of major component parts is not part of a business selling new vehicles or repairing vehicles.

“(2) ‘Dismantler’ does not include a scrap metal business as defined in ORS 165.116.”

1 other waste normally considered appropriate for scrap or part resale.” *Id.* As
2 defined in LCZO 1.03, quoted above, a “junkyard” entails the “buying or selling
3 of junk,” and “junk” includes “motor vehicles” and “motor vehicle parts.” The
4 applicant’s use of the property as a junkyard, automobile wrecking yard, or
5 wrecking yard includes activities that meet the definition of “dismantler.” ORS
6 801.236.

7 Petitioners explain that state law distinguishes between solid waste
8 disposal site activities and motor vehicle dismantling activities. ORS
9 459.005(8)(b)(D) establishes that a “disposal site” does not include “[a] site
10 operated by a dismantler issued a certificate under ORS 822.110.”

11 The approved use, including the dismantler use, is not a “farm use” as
12 defined by ORS 215.203(2)(a).³ ORS 215.283, ORS 215.284, and OAR 660-033-

³ ORS 215.203(2)(a) provides:

“As used in this section, ‘farm use’ means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. ‘Farm use’ includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. ‘Farm use’ also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows. ‘Farm use’ also

1 0120 provide an exclusive list of the nonfarm uses that are allowed on agricultural
2 land, which does not include a “dismantler” use. The county regulations for the
3 A-2 zone also do not permit that use. The county’s decision to allow a junkyard,
4 junk, an automobile wrecking yard, and a wrecking yard allows uses of
5 agricultural land that are not allowed under state law. Accordingly, we agree with
6 petitioners that the decision violates ORS 215.203, ORS 215.283, OAR 660-033-
7 0090, and OAR 660-033-0120 and is prohibited as a matter of law. As explained
8 further below under the second assignment of error, the county may not use a
9 local, generally applicable similar use authorization process to authorize a use of
10 agricultural land that is not permitted by ORS 215.283 or OAR 660-033-0120.

11 The first assignment of error, first subassignment of error, is sustained.

12 **B. The county impermissibly allowed a disposal site on agricultural**
13 **land without conditioning approval on the applicant obtaining**
14 **a DEQ permit.**

15 “Solid waste” is defined to include “discarded or abandoned vehicles or
16 parts thereof.” ORS 459.005(25). Petitioners explain, and we agree, that the
17 decision approves a variety of uses and that, “[a]t the very least, the decision

includes the propagation, cultivation, maintenance and harvesting of aquatic, bird and animal species that are under the jurisdiction of the State Fish and Wildlife Commission, to the extent allowed by the rules adopted by the commission. ‘Farm use’ includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection. ‘Farm use’ does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees or land described in ORS 321.267(3) or 321.824(3).”

1 anticipates that the applicant will receive, process, and resell solid waste.”
2 Petition for Review 17. Although the CUP expressly does not permit “a transfer
3 station or waste disposal,” it expressly allows a junkyard and wrecking yard, and
4 the county’s definitions of junkyard and wrecking yard include activities that may
5 be characterized as solid waste disposal. The CUP allows the applicant to accept,
6 handle, store, and process solid waste for material recovery and recycling. For
7 example, the decision allows “the receipt of automobiles vehicles [*sic*],
8 implements and other waste normally considered appropriate for scrap or part
9 resale” and the “dismantling of equipment and vehicles.” Record 28. A “disposal
10 site” may accept and store discarded or abandoned vehicles, used oil, tires, and
11 lead-acid batteries for the limited purposes of recycling or recovery; their
12 disposal is prohibited. ORS 459.247(1), (3).

13 As stated, ORS 215.283(2)(k) provides that the county may allow to be
14 established on agricultural land a “site for the disposal of solid waste approved
15 by the governing body of a city or county or both and for which a permit has been
16 granted under ORS 459.245 by [DEQ] together with equipment, facilities or
17 buildings necessary for its operation,” subject to the farm impacts test, ORS
18 215.296. Petitioners argue that the applicant must first obtain a DEQ permit under
19 ORS 259.245 as a “condition precedent” to county approval of a disposal site and
20 operations under ORS 215.283(2)(k) and LCZO 3.04(B)(7). Petition for Review
21 19-20. In support of that argument, petitioners cite *Wilbur Residents v. Douglas*
22 *County*, 166 Or App 540, 545, 998 P2d 794 (2000).

1 *Wilbur Residents* does not stand for the proposition for which petitioners
2 cite it. In *Wilbur Residents*, DEQ issued permits for (1) a solid waste disposal site
3 on the subject property under ORS 459.245 and (2) land application of the treated
4 waste on an adjacent property under ORS 468B.050. After obtaining the DEQ
5 permits, the applicant sought county approval of only the solid waste disposal
6 site. We concluded that the county did not err in failing to consider or approve
7 the land application component of the waste management operation, which was
8 approved under a separate DEQ permit that did not apply to operations on the
9 subject property. *Wilbur Residents v. Douglas County*, 37 Or LUBA 156, 159-65
10 (1999). The Court of Appeals affirmed our decision. 166 Or App 540. The issue
11 that petitioners raise in this appeal was not disputed or decided by LUBA or the
12 Court of Appeals in *Wilbur Residents*.

13 In *Crocker v. Jefferson County*, 60 Or LUBA 317, 322, *aff'd*, 235 Or App
14 188, 230 P3d 999 (2010), we explained that ORS 215.283(2)(k) restricts a solid
15 waste disposal site from being “established” prior to DEQ permitting, but it does
16 not prohibit local government approval of such a site that is conditioned on
17 receipt of the DEQ permit prior to establishment of the site.

18 Here, the county did not err by failing to require the applicant to establish
19 that DEQ had previously issued a permit under ORS 459.245 for a solid waste
20 disposal site on the subject property. However, if the county wishes to approve a

1 solid waste disposal site under ORS 215.283(2)(k), it must condition its approval
2 on receipt of the DEQ permit.⁴

3 The first assignment of error, second subassignment of error, is sustained.

4 The first assignment of error is sustained.

5 **SECOND ASSIGNMENT OF ERROR**

6 The decision purports to authorize the junkyard and wrecking yard as
7 “similar uses” pursuant to LCZO 20.07, which provides:

8 “Authorization of Similar Uses. The Commission may authorize a
9 use that is not specifically listed in a specific Zone if the use is of
10 the same general type as other uses permitted in the subject Zone, is
11 compatible to the uses permitted in the subject Zone and upon the
12 following findings by the Commission:

13 “A. The proposed use is not specifically permitted in another
14 Zone;

15 “B. The proposed use is not more similar to uses provided for in
16 another zone; and

17 “C. That permitting the proposed use in the subject zone would
18 not be detrimental to the intent and purpose of said Zone.

19 “The application for and processing procedure for a Similar Use
20 shall be as required for a Type II Conditional Use as set forth by this
21 Ordinance.” (Underscoring in original.)

⁴ The findings state that “the applicant/owner now wishes to correctly have [the proposed use] approved so that operations can continue under the proper permitting that needs to be approved by other agencies including [DEQ].” Record 21. Petitioners have not cited anything that would lead us to believe that the applicant is prohibited from obtaining a DEQ permit for an existing solid waste disposal site.

1 In the second assignment of error, petitioners argue that the county's
2 interpretation and application of LCZO 20.07 is inconsistent with the express
3 language, purpose, and underlying policy of the county's comprehensive plan
4 and land use regulations and is contrary to state law. ORS 197.829(1); *Siporen v.*
5 *City of Medford*, 349 Or 247, 243 P3d 776 (2010).

6 Under the first assignment of error, we conclude that the decision violates
7 state law because it purports to allow nonfarm uses on agricultural land that are
8 not authorized by state law or the A-2 zone, which implements state law. The
9 county may not use a similar use authorization process to allow nonfarm uses on
10 agricultural land that are not otherwise allowed under state law. ORS 215.203;
11 ORS 215.283; OAR 660-033-0090; OAR 660-033-0120. Accordingly, we agree
12 with petitioners that the county erred by relying on its similar use authorization
13 process to allow any portion of the proposed use that is not authorized by ORS
14 215.283(2)(k). To the extent that the decision approves a solid waste disposal
15 site, that use is allowed in the A-2 zone under LCZO 3.04(B)(7), which
16 implements ORS 215.283(2)(k). Accordingly, that use is "specifically listed" in
17 the A-2 zone and not subject to similar use authorization pursuant to LCZO
18 20.07.

19 The second assignment of error is sustained.

20 **DISPOSITION**

21 Petitioners request that LUBA reverse the county's decision because the
22 decision violates a provision of applicable law and is prohibited as a matter of

1 law. Petition for Review 2. We conclude that the county erred as a matter of law
2 by allowing the applicant to operate a dismantler use on agricultural land. That
3 error requires reversal. *See* OAR 661-010-0071(1)(c) (providing that LUBA shall
4 reverse a land use decision when “[t]he decision violates a provision of applicable
5 law and is prohibited as a matter of law”).

6 We also conclude that the county erred by permitting a disposal site on
7 agricultural land without conditioning approval on the applicant obtaining a DEQ
8 permit under ORS 459.245. Unlike a dismantler use, a disposal site is not
9 prohibited as a matter of law. Thus, that error requires remand. *See* OAR 661-
10 010-0071(2)(c) (providing that LUBA shall remand a land use decision for
11 further proceedings when “[t]he decision improperly construes the applicable
12 law, but is not prohibited as a matter of law”). However, LUBA is authorized by
13 statute to issue “a final order affirming, reversing or remanding the land use
14 decision,” and does not have authority to reverse in part and remand in part. ORS
15 197.835(1).⁵ Accordingly, the correct disposition is reversal.

16 The county’s decision is reversed.

⁵ ORS 197.835(1) provides:

“[LUBA] shall review the land use decision or limited land use decision and prepare a final order affirming, reversing or remanding the land use decision or limited land use decision. [LUBA] shall adopt rules defining the circumstances in which it will reverse rather than remand a land use decision or limited land use decision that is not affirmed.”