

From: [Paul Nietfeld](#)
To: [Coffin Butte Landfill Appeals](#)
Subject: LU-24-027 Nietfeld testimony
Date: Monday, October 20, 2025 4:33:36 PM
Attachments: [Nietfeld testimony LU-24-027 20Oct2015.pdf](#)
[LUBA 15036.pdf](#)

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Please post the attached PDF document presenting my written testimony as well as the referenced attachment to the public record for LU-24-027. My address is included in the testimony document.

Thank you,
Paul Nietfeld

October 20, 2025

Dear Benton County Commissioners,

As a retired engineer (MSEE, 1982), member of the BCTT A.1 Subcommittee (Landfill Size/Capacity/Longevity), occasional presenter to the Board on the topic of landfill intake volumes and expected revenue, and recent contributor to DSAC on a method for quarterly tracking of the Coffin Butte Landfill intake volume, I present the following points for your consideration in the LU-24-027 decision.

CONTEXT/BACKGROUND

Point 1: The current state and operation of the landfill seriously interfere with uses on adjacent property and pose an undue burden on public services.

Public testimony to the Planning Commission on LU-24-027 documented serious interference per BCC 53.215(1) in the following ways (partial list):

Odor/Stench: multiple instances of landfill stench preventing the quiet enjoyment of adjacent properties, one occasion of landfill stench disrupting the sale of a local vineyard, reports of troublesome stench several miles from the landfill site

Dispersed trash: multiple reports of trash from hauling trucks fouling county roadsides, reports of windblown trash from the working face posing a risk to livestock on adjacent property

Pollution: history of groundwater contamination, risk of current/future groundwater contamination when liner leaks develop, well-documented massive methane emissions, serious risk of waterborne (leachate) and airborne dispersion of toxic chemicals and PFAS substances

Leachate: 40+ million gallons per year at the current landfill surface area and volume, discharged into local sewer systems not designed to properly treat it, then discharged into the Willamette River from which multiple municipalities (including Adair Village) draw their drinking water

Public testimony to the Planning Commission and to the Board of Commissioners on LU-24-027 document serious burdens on public services per BCC 53.215(2) in the following ways (partial list):

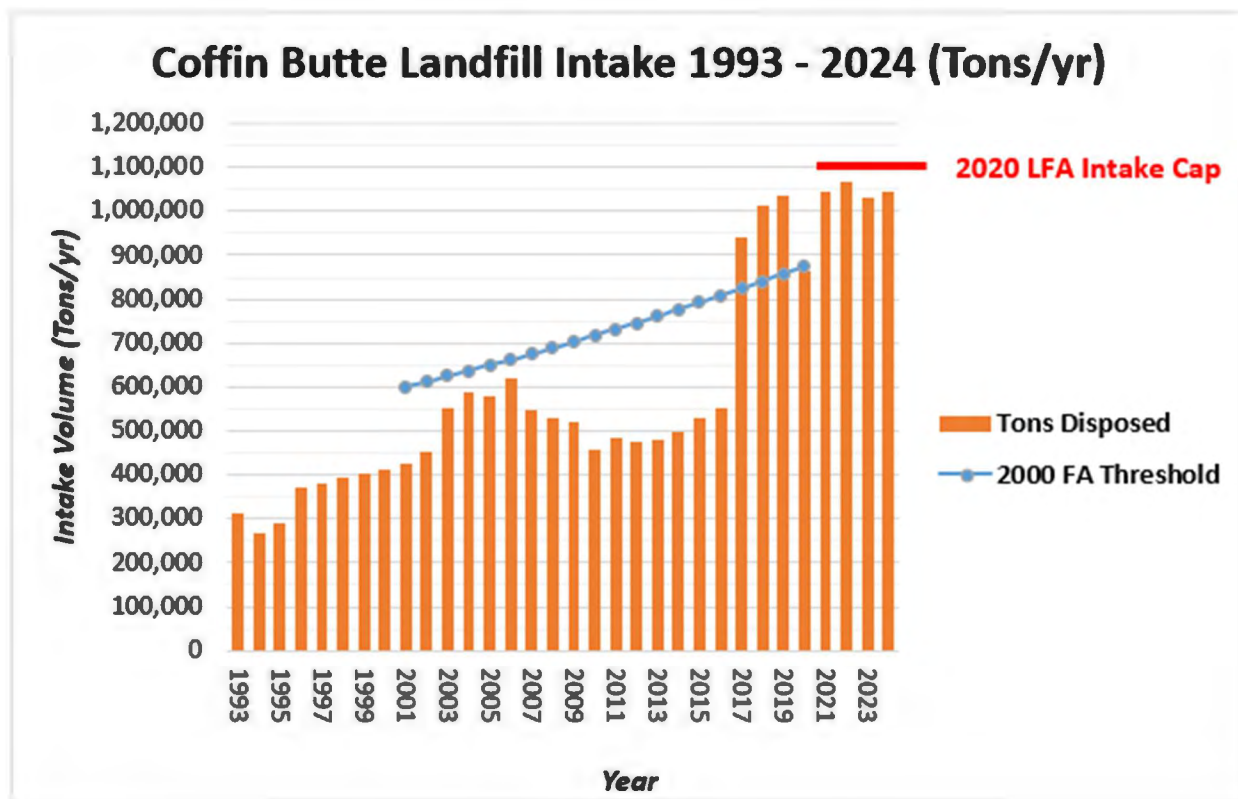
Fires and fire risk: multiple calls to the Adair Rural Fire & Rescue department to combat landfill fires while simultaneously the extreme disamenity that is the landfill threatens the department's budget by constraining growth in the property market that funds the department via taxes; risk of a serious fire event due to the extreme quantities and concentrations of methane gas documented at the landfill in the past two years

Overwhelming of county resources: Benton County has been unable to enforce conditions of approval, dedicate staff or resources for onsite inspection, investigation of citizen complaints, tracking of citizen health in the neighborhood of the landfill, pollution monitoring, or other services that might be expected by the citizens of a county hosting the state's second largest landfill

Housing stock and property tax loss: the landfill has displaced and/or precluded housing from multiple residential zoned parcels in the landfill area, resulting in loss of potential property taxes, and even more importantly, loss of housing units that could serve the citizens of the region

Liability risk: Difficult to quantify (I am not a statistician) but clearly evident risk exposure in the event of a serious high-cost failure at the landfill, *over the life of the landfill and years or decades into the post-closure era*. Note that the franchisee is shielded through a corporate layer structure that might be used to limit their liability in the event of a serious, costly problem.

Many of these interferences and burdens increase with the volume of waste in place and many increase with the intake rate. Both the volume of waste in place and the intake rate have increased dramatically since 2016. In testimony before the Planning Commission, multiple citizens noted an increase in serious interference on their property corresponding to the roughly doubling of the intake rate since 2016, as shown in the chart below.



Data/plot from BCTT Final Report, P. 620, with 2023 and 2024 intake volumes added by author

It is easy to understand why many of the serious interferences occur: landfills, particularly large high-volume landfills such as Coffin Butte, are inherently noisy, smelly, pollution-emitting industrial-scale operations; their business is handling and concentrating massive volumes of waste. In the case of the Coffin Butte landfill, this waste includes not only Municipal Solid Waste but also sewage sludge, industrial waste, medical waste and animal carcasses.

Republic Services does take some steps to mitigate these interferences (disclosure: I am a beneficial owner of Republic Services common stock), but has apparently chosen to limit these mitigation efforts in the interest of operational ease and profit maximization (e.g. truncated/incomplete surface emission methane monitoring, use of tarps rather than soil to cover the majority of the landfill

surface, failure to cover the exposed working face properly at the end of every workday, disposing of leachate into municipal sewer systems not designed to properly treat it, etc.).

Compounding the franchisee's truncated mitigation efforts, the government of Benton County has contributed to the landfill's burden on citizens by failing to provide adequate oversight:

- Complete lack of enforcement of conditions of approval, including no legal action to address apparent violations of conditions of approval.
- No staff or resources assigned for onsite inspection, pollution monitoring (even at the level of consulting and logging Carbon Mapper data), formal investigation of citizen complaints, monitoring of potential health risks associated with the landfill, or enforcement duties.

Point 2: The addition of Cell 6 will increase these burdens and risks and extend them in time

At roughly 14 million cubic yards, Cell 6 (in the cavity left by the former quarry) will increase waste in place by over 50% relative to the entire volume accumulated over the 80-year life of the landfill (from roughly 1945 through 2025). This is by far the largest cell ever undertaken at Coffin Butte. Filling of this cell was started in early 2025, and was quietly allowed to proceed by Benton County with no Planning Commission review, no public discussion, and no cell-specific constraints or conditions. The fact that no review of the Site Development Plan was undertaken for this cell is yet more evidence that the landfill is already posing an undue burden on Benton County public services.

In addition to the risks, harms and burdens already associated with the existing landfill, Cell 6 adds to these by significantly increasing the waste in place and the duration of intake. Furthermore, Cell 6 adds additional risks by virtue of its configuration: a landfill cell constructed in an excavated cavity with a steep, sharp basalt face, extending below the natural ground level to near or into the previously-existing water table. These characteristics raise concerns of increased risk of liner failure and resultant groundwater contamination.

Note that the new Cell 6 risk factors also exist in the proposed expansion cell(s). Prudent stewardship of the land and of the citizens would argue strongly for careful, long-term monitoring of the effects of Cell 6 before allowing any similar cell(s) to be developed.

Point 3: Benton County does not need a new landfill site

The 2020 Landfill Franchise Agreement guarantees Benton County landfill space through the year 2040 and over that period guarantees Benton County a minimum of \$2.5M in Franchise Fees per year, regardless of intake volumes. County Counsel Croney, who assisted in negotiating this agreement, should be consulted to confirm these claims and clarify any caveats that might apply; such consultation should of course be entered into the public record for this matter.

From an environmental damage and risk standpoint, siting a new landfill operation in the Soap Creek valley makes no more sense than siting it elsewhere in Benton County, for example near Alsea or in Kings Valley. Benton County prides itself on stewardship of the land, care for the environment, and protection of its citizens; a new unneeded landfill site established in any of these scenic, productive locations would be strongly at odds with these values.

Smart counties are already taking serious steps toward a post-closure future; there are other viable options.

LU-24-027

Point 4: The proposed expansion cell(s) would yet again increase interferences, burdens and risks

For guidance on extrapolating the harms, serious interferences, and undue burdens on public services documented in part above to the reasonable expectations for the proposed expansion cell(s), note the following from Page 34 of the LUBA 2015-036 Final Opinion and Order (Riverbend Landfill decision, attached):

"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." [Highlight added.]

I am not a lawyer. I suggest you ask retained counsel to comment, in the public meeting and for the record, on this section of the LUBA 2015-036 Final Opinion and Order with respect to applicability in the matter of LU-24-027.

If the stated LUBA opinion is as it seems in terms of interpretation as standard English, the well-documented serious interferences and undue burdens posed by the existing landfill, including those reasonably extrapolated for Cell 6, would be increased in magnitude and duration by the new landfill cell(s) proposed by LU-24-027.

The existing landfill does seriously interfere and pose undue burdens per BCC 53.215(1) and 53.215(2) as detailed in public testimony to the Planning Commission and Board of Commissioners in hearings on LU-24-027. The additional harms posed in magnitude and duration by the proposed new landfill cell(s) would clearly fail these code tests, requiring a vote to deny LU-24-027.

SUMMARY

The current landfill seriously interferes with uses on adjacent property.

The current landfill poses an undue burden on public services.

The expansion proposed in LU-24-027 would add to these serious interferences and undue burdens.

Per BCC 53.215(1) and BCC 53.215(2), LU-24-027 should be denied.

I ask you to vote to stop making this problem worse, so that we can begin to repair the damage to our land and to our community.

Vote to deny LU-24-027.

*Paul Nietfeld
37049 Moss Rock Dr.
Soap Creek Valley, Oregon*

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
10
11 FRIENDS OF YAMHILL COUNTY,
12 *Intervenor-Petitioner,*
13
14 vs.
15
16 YAMHILL COUNTY,
17 *Respondent,*
18
19 and
20
21 RIVERBEND LANDFILL CO.,
22 *Intervenor-Respondent.*

23
24 LUBA No. 2015-036

25
26 FINAL OPINION
27 AND ORDER
28

29 Appeal from Yamhill County.

30
31 Jeffrey L. Kleinman, Portland, filed a petition for review and argued on
32 behalf of petitioners.

33
34 Charles Swindells, Portland, filed a petition for review and argued on
35 behalf of intervenor-petitioner.

36
37 Timothy S. Sadlo, County Counsel, McMinnville, filed a joint response
38 brief and argued on behalf of respondent. With him on the brief were Thomas
39 A. Brooks, James E. Benedict, and Cable Huston, LLP.

1
2 Thomas A. Brooks, Portland, filed a joint response brief and argued on
3 behalf of intervenor-respondent. With him on the brief were Timothy S. Sadlo,
4 James E. Benedict, and Cable Huston, LLP.
5

6 BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN Board
7 Member, participated in the decision.
8

9 REMANDED 11/10/2015
10

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

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.

1 Violations of LUBA's rules do not warrant striking a brief or taking
2 similar drastic remedial actions unless the violation prejudices the substantial
3 rights of other parties. OAR 661-010-0005. Here, LUBA granted Riverbend's
4 request to file a response brief up to 75 pages in length, to respond to the two
5 petitions for review, which total approximately 91 pages, on the volunteered
6 condition that if the county filed a response brief, that brief would be limited to
7 25 pages. In other words, LUBA limited the response briefing to a total of 100
8 pages. *Stop the Dump Coalition v. Yamhill County*, __ Or LUBA __ (LUBA
9 No. 2015-036, Order on Overlength Brief), slip op 2. LUBA encouraged
10 respondents to coordinate and minimize overlapping responses. The two
11 respondents chose to file a single, 73-page, joint response brief. As noted, that
12 joint response brief was not printed in 14-point font.¹ Had the brief complied
13 with our rules, it would likely have been approximately 87 pages long, below
14 the potential maximum of 100 pages set out in our order for two response
15 briefs. Accordingly, petitioners have not demonstrated that respondents' rule
16 violation warrants striking the joint response brief, or any other remedial
17 action.

18 Petitioners also move to strike pages 2-16 of the Supplemental Appendix
19 to the Joint Response Brief, which consists of various documents related to a
20 2014 county ordinance affecting the subject property, and the appeal of that
21 ordinance to LUBA. The documents are not in the record of the present appeal,
22 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.

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

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

6 **FACTS**

7 In 1980, land owned by Riverbend was rezoned from Exclusive Farm
8 Use (EFU) to Public Works-Safety (PWS), in order to allow the Riverbend
9 landfill. The PWS zone allows a landfill; at that time, the county's EFU zone
10 did not allow a landfill. In 2010, Riverbend proposed to expand the landfill to
11 adjacent property also owned by Riverbend, and rezone that adjacent property
12 from EFU to PWS. Because the county's EFU zone did not allow a landfill, the
13 county approved an exception to Goal 3 for the expansion. In *Waste Not of*
14 *Yamhill County v. Yamhill County*, 61 Or LUBA 423, *aff'd* 240 Or App 285,
15 246 P3d 493 (2010), *modified* 241 Or App 199, 255 P3d 496 (2011), LUBA
16 held that because Goal 3 and related rules and the EFU statutes allow a landfill
17 on agricultural land, an exception to Goal 3 is not an appropriate vehicle to
18 authorize a landfill. Instead, we suggested that the county amend its EFU zone
19 consistently with Goal 3 to allow a landfill or expansion of an existing landfill
20 on EFU-zoned lands.

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

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

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

18 This appeal followed.

19 **FIRST ASSIGNMENT OF ERROR (Petitioners)**

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

23 **A. Site Visits**

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

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

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

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:

"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."

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

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

12 Respondents argue, and we agree, that petitioners have not established
13 that the county misconstrued YCZO 1402.060(C) or committed procedural
14 error prejudicial to petitioners. As interpreted by the county, YCZO 1402.060
15 does not require notice of all site visits, only those in which the decision-maker
16 intends to inspect the property “accompanied by a party or his representative.”
17 The county interpreted YCZO 1402.060(C) not to require notice if the decision
18 maker inspects a property accompanied only by a safety escort, in
19 circumstances in which no ex parte communications with a party or his
20 representative are expected. Petitioners have not established that that
21 interpretation is inconsistent with the express language, purpose or policy
22 underlying YCZO 1402.060(C) or “implausible,” under the deferential standard
23 of review we must apply to a governing body’s code interpretation under ORS
24 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 261, 243 P3d 776

1 (2010).³ YCZO 1402.060(C) is concerned with site visits in which ex parte
2 communications with a party or a party's representative are expected or
3 inevitable. Ex parte communications with a safety escort regarding proposed
4 development are not expected or inevitable. Petitioners do not dispute the
5 county's findings that the ex parte communications that occurred were
6 inadvertent and not related to the proposed development. Petitioners have not
7 demonstrated that the county misconstrued YCZO 1402.060(C) or committed
8 procedural error.

9 **B. Inadequate Disclosure of Ex Parte Communications**

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

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:

- "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
- "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

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

14 The first assignment of error (Petitioners) is denied.

15 **SECOND ASSIGNMENT OF ERROR (Petitioners)**

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

19 ORS 215.283(2)(k) allows a county to approve within the EFU zone a
20 “site for the disposal of solid waste[.]” In 1994, OAR chapter 660, division
21 033, the Oregon Administrative Rule implementing Statewide Planning Goal 3
22 (Agricultural Lands) was amended to prohibit the establishment of new solid
23 waste disposal sites on high-value farmland. OAR 660-033-0120, Table 1.
24 However, under OAR 660-033-0130(18)(a), certain existing facilities,
25 including solid waste disposal facilities, could be “maintained, enhanced or

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

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

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

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

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

13 Petitioners contend that under the county’s interpretation of OAR 660-
14 033-0130(18)(a), an existing landfill or similar use on land zoned other than
15 EFU could “downzone” to the EFU zone, and thus gain the ability to expand
16 onto high-value farmland within the EFU zone, contrary to the intent of the
17 1996 amendments, which were clearly to protect high-value farmland.
18 According to petitioners, the county’s interpretation is also inconsistent with
19 the agricultural lands policy, at ORS 215.243(2) to “preserve the maximum
20 amount of the limited supply of agricultural land[.]”

21 In addition, petitioners argue that the available legislative history of the
22 1996 rule amendments suggests an intent to limit expansions to facilities that

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.”

1 were wholly within a farm use zone as of 1996.⁷ Petitioners entered into the
2 record the staff report and the transcript of the LCDC hearing at which the
3 amendment to OAR 660-033-0130(18)(a) and related amendments were
4 discussed and adopted.⁸ Petitioners note that the staff report explained that the

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

1 amendments make clear “that only those uses that *currently* exist ‘wholly’ in a
2 farm use zone may be expanded under the provisions of this rule.” Record
3 4820 (emphasis added). According to petitioners, the staff use of the word
4 “currently” suggests that the rule was intended to apply only to facilities that in
5 1996 existed wholly within a farm use zone.

6 However, as respondents argue, interpreting OAR 660-033-0130(18)(a)
7 to limit “maintenance, expansion or enhancement” to existing uses that were
8 wholly within a farm use zone in 1996 or on the date the rule became effective
9 would insert a significant qualification into the text of the rule that is simply
10 not present. LCDC knows how to limit a rule provision to development that
11 existed as of a certain date, as demonstrated by several contextual rule
12 provisions. *See, e.g.*, OAR 660-033-0130(2)(c) (certain nonconforming uses
13 may be expanded if the use was established prior to January 1, 2009); OAR
14 660-033-0130(7) (a personal-use airport lawfully existing as of September 13,
15 1975, shall continue to be allowed); OAR 660-033-0130(36) (allowing
16 community centers to provide services to veterans only in a facility that is in
17 existence on January 1, 2006). LCDC also knows how to make a rule
18 applicable only to development that was in place or had qualifying
19 characteristics prior to the date the rule became effective. *See* OAR 660-023-
20 0180(1)(c) (defining “existing site” for purposes of the Goal 5 aggregate rule as
21 a site that was included in an inventory of significant aggregate sites in an
22 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).

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

5 It is important to recognize that the qualifiers “existing” and “wholly
6 within a farm use zone” were not adopted at the same time. As originally
7 adopted in 1994, OAR 660-033-0130(18)(a) authorized expansion of an
8 existing facility onto high-value farmland. Like later iterations, the 1994
9 version of the rule included no temporal qualifications, other than the facility
10 must be “existing.” Under the 1994 rule, a solid waste disposal facility could
11 be approved on non-high-value farmland after 1994, pursuant to ORS
12 215.283(2)(k) and OAR 660-033-0130(5), and yet be deemed “existing” for
13 purposes of subsequent expansion of the facility onto high-value farmland. In
14 other words, the 1994 rule did not limit expansions to facilities that “existed” in
15 1994 or any other date. In 1996, when the qualifier “wholly within a farm use
16 zone” was added, LCDC also chose not to add any temporal qualifications.
17 Because the 1994 rule was not limited to facilities that existed in 1994, and
18 potentially could apply to facilities lawfully established after 1994, the addition
19 of the phrase “wholly within a farm use zone” did not implicitly limit
20 application of the rule to facilities that, in 1996, existed wholly within a farm
21 use zone.

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

1 the amendment was intended to address. LCDC apparently did not consider the
2 scenario presented here: where an existing facility is rezoned from an EFU
3 zone to a non-EFU zone, then back to an EFU zone, with the result that the
4 existing facility is “wholly within a farm use zone” at the point in time when
5 the applicant seeks expansion. Had LCDC considered such a scenario, it might
6 well have added express temporal qualifications or other limitations to OAR
7 660-033-0130(18)(a) to preclude such an expansion, as it has done with other
8 rules. Such a limitation would be more protective of high-value farmland than
9 OAR 660-033-0130(18)(a) as presently written. However, OAR 660-033-
10 0130(18)(a) as presently written includes no express or implicit limitations to
11 that effect. If LCDC believes such limitations are warranted, LCDC must
12 amend the rule to so provide.

13 The county also adopted findings that reject applying OAR 660-033-
14 0130(18)(a) to preclude the proposed expansion, on the grounds that it would
15 “create an absurdity in light of earlier rulings by LUBA and the Court of
16 Appeals.” Record 24. As noted, LUBA and the Court of Appeals rejected the
17 county’s attempt to take an exception to Goal 3 to allow the proposed
18 expansion, ruling that because Goal 3 allows such an expansion, the exception
19 process was not a vehicle to accomplish that end. LUBA suggested that the
20 county could accomplish that end by amending its EFU zone to authorize
21 expansion, consistent with ORS 215.283(2)(k), Goal 3 and the Goal 3 rule, and
22 rezone the property to EFU, and the county did so. In its present findings, the
23 county stated:

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

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

9 Petitioners challenge the above-quoted finding, arguing that the county
10 fails to establish that the 2014 zone change from PWS to EFU had any kind of
11 preclusive effect on the issues that can be raised in the present appeal. In the
12 response brief and the reply brief the parties engage in an extended argument
13 regarding whether the doctrine of issue preclusion applies, such that the issue
14 of whether rezoning the subject property to EFU is sufficient to bring the
15 existing facility “wholly within a farm use zone” for purposes of OAR 660-
16 033-0130(18)(a) cannot be relitigated in the present appeal.⁹

17 The county’s above-quoted finding is in the nature of an alternative
18 finding, in case OAR 660-033-0130(18)(a) is properly interpreted to prohibit
19 the proposed expansion. Because we have not interpreted OAR 660-033-
20 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).

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

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

7 **THIRD ASSIGNMENT OF ERROR (Petitioners)**

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

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

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

1 The county found that the facility’s DEQ permit was extended and is in
2 effect.¹⁰ Respondents cite to Record 3248, a December 10, 2012 letter from
3 DEQ noting that the facility’s 1999 permit “has been administratively
4 extended,” and Record 3247, an undated list of DEQ-permitted facilities in the
5 state, which lists the Riverbend landfill.

6 We agree with respondents that a reasonable person could conclude from
7 the record that DEQ has granted the landfill an operating permit, and that the
8 permit remains in effect. The 1999 permit has been extended at least once, so
9 its stated expiration date of 2009 is not an indication that it has expired.
10 Although the record does not indicate the date the extended permit will expire,
11 petitioners offer no reason to believe that it is currently expired, or that
12 Riverbend is currently operating without DEQ approval. To eliminate any
13 uncertainty on this point, the county imposed a condition that requires
14 Riverbend to provide a copy of the current DEQ permit prior to undertaking
15 any expansion. That is sufficient to ensure compliance with ORS
16 215.283(2)(k) and YCZO 901.06(D).

17 The third assignment of error (Petitioners) is denied.

¹⁰Alternatively, 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.

1 **FOURTH ASSIGNMENT OF ERROR (Petitioners)**

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

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

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

23 **A. Stream Channel Relocation**

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

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

8 **B. Access Road**

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

1 **C. Culvert**

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

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

11 **D. Water-Related and Water-Dependent Uses**

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

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

25 The fourth assignment of error (Petitioners) is denied.

1 **FIFTH ASSIGNMENT OF ERROR (Petitioners)**

2 **FIRST ASSIGNMENT OF ERROR (Friends of Yamhill County)**

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

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

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."

1 are conditionally allowed on agricultural land under ORS chapter 215. ORS
2 215.296 does not include a definition or description of what constitutes a
3 “significant” change or “significantly increased” cost, or how that standard is to
4 be applied. In *Von Lubken v. Hood River County*, 118 Or App 246, 250, 846
5 P2d 1178 (1993), the Court of Appeals observed that the word “significant”
6 “connotes a question of degree that is more a matter of fact than of law.” The
7 court rejected a proposed definition of “significant” that would have proscribed
8 changes or increased costs that are “anything more than trivial or frivolous.”
9 *Id.* The court did not provide a definition of “significant.”¹² In addition, the
10 court held that ORS 215.296(1) requires the county to consider the “cumulative
11 effects” of all impacts, and the county may not simply consider impacts to farm
12 practices in isolation from each other. *Id.* at 251.

13 Turning to the present case, Riverbend submitted an initial farm impacts
14 assessment to demonstrate compliance with ORS 215.296(1), and
15 supplemented that assessment with four letters from its consultants. The
16 parties and decision refer collectively to the initial assessment and its four
17 supplements as the “FIA.” The decision addresses ORS 215.296(1) in findings
18 112 through 186, and generally relies on the FIA to conclude that the proposed
19 expansion meets the significant change/cost standard.

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.

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

4 **A. Petitioners' Arguments**

5 **1. Incorporation of the FIA as findings**

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

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

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

3 2. **Accepted Farm Practices**

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

13 Petitioners argue that the county erred in too narrowly circumscribing the
14 scope of "accepted farm practices" to exclude some common farm practices,
15 and to place on surrounding farmers the burden of demonstrating that their
16 farm practices are "common and necessary." However, petitioners do not
17 identify any specific practices that the county failed to consider under ORS
18 215.296(1), or identify any findings that appear to place the burden on farmers
19 to demonstrate that their farm practices are common to farms of a similar nature
20 and necessary to obtain a profit in money. Absent a more developed argument,
21 petitioners' arguments regarding the county's understanding of the scope of

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."

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

3 **3. Surrounding Lands**

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

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

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

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

14 **4. Quantifiable or Verifiable Data**

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

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

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

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

‘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).

1 Finding 120 does not state that the county would give no weight or credibility
2 to testimony that does not include a quantification of costs or an estimate of the
3 degree of forced change. However, that position is difficult to square with the
4 language of Finding 120, which states that “[w]ithout some evidence of the
5 degree of significance, the evidence cannot support a finding that the criteria
6 are not met.” That language suggests, to us, that testimony without a statement
7 of the amount of increased cost or *degree* of forced change in accepted farm
8 practices is not competent evidence in determining whether the significant
9 change/costs standard is met. If so, we agree with petitioners that in Finding
10 120 the county misconstrued the applicable law.

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

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

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

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

22 **5. Odors, Noise and Visual Impacts**

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

1 166 address these six types or sources of impacts. Petitioners fault the county
2 for failing to also address impacts from odor, noise and visual impacts.

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

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

13 **6. Economic Analysis**

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

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

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

7 We generally agree with petitioners that the kind of conclusions drawn in
8 the longitudinal study have little direct bearing on the question posed by ORS
9 215.296(1), and certainly should not have been given “great weight” in
10 evaluating compliance with the statute. There is no logical connection between
11 the fact that the lands devoted to farm use in the vicinity of the existing landfill
12 have remained stable or even expanded over the years and the question of
13 whether the landfill has significantly changed or significantly increased the
14 cost of accepted farm practices on those surrounding farms. It is quite possible
15 that farm use has remained viable *despite* significant changes or significant
16 increases in the costs of accepted farming practices, or indeed *because* changes
17 and cost increases have allowed farm operations to continue despite the
18 impacts of the landfill.

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

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

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

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

8 **B. FOYC’s Arguments**

9 FOYC challenges the county’s findings regarding a number of specific
10 impacts.

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

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

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

4 **1. Litter Impacts**

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

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

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

1 McPhillips also testified at a hearing:

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

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

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

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

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

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

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

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

14 2. Nuisance Birds

15 Findings 146-157 address impacts from nuisance birds attracted to the
16 trash available in the open “working face” of the landfill. A number of area
17 farmers testified to adverse impacts from dense flocks of birds, including`
18 crows, gulls, starlings and pigeons that, they allege, the landfill draws to the
19 area. Finding 146 concedes that the landfill draws “some” nuisance birds and
20 those birds cause “some” impacts to area farm practices. However, the county
21 concludes, such impacts have not been and “will not be significant.” Record
22 47.

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

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

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

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

15 The findings then address some of the testimony from area farmers regarding
16 impacts from nuisance birds, and ultimately conclude that the evidence in the
17 whole record does not show that any changes or increased costs are
18 independently attributable to birds attracted to the landfill, and that any farm
19 impacts resulting from birds that could be attributed to the landfill “do not
20 reflect a level of significance prohibited by the Farm Impacts criteria.” Record
21 49.

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

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

1 that this would be highly useful information for figuring out what portion of
2 nuisance bird impacts in the area are attributable to the landfill. However, the
3 findings seem to fault the opponents for failing to provide such information,
4 rather than the applicant, who has the ultimate burden of proving that the
5 proposed use will not significantly change or significantly increase the costs of
6 accepted farm practices. The applicant went to the trouble of preparing a
7 longitudinal economic study of farm use in the county, a study that was of
8 questionable relevance to the significant change/cost standard. A study of bird
9 populations on and near the landfill, particularly compared to a study of bird
10 populations on similar farm lands distant from the landfill, would seem to be
11 both feasible and highly useful in answering the question posed by ORS
12 215.296(1) with respect to nuisance bird impacts.

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

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

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

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

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

14 **3. Impacts on Pheasant-Raising**

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

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.

1 them to peck at each other, destroy eggs, and not reproduce in their runs.
2 Record 4294-95. In addition, McPhillips testified that he occasionally has to
3 grant permission to the falconer to enter his property to recover lost falcons,
4 who he believes fly over his property because “they have an easier time picking
5 off my poultry than they do the savvy gulls and crows at the landfill.” Record
6 4290.

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

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

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

13 **4. Odor and Visual Impacts on Farm Stands and Direct** 14 **Sales**

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

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

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

4 We disagree with respondents. To establish compliance with ORS
5 215.296(1), the applicant may initially survey farm uses on surrounding lands,
6 and identify accepted farming practices associated with those farm uses.
7 *Dierking v. Clackamas County*, 38 Or LUBA 106, 120-21 (2000). That initial
8 survey can be conducted in general terms, based on public knowledge and
9 visual indications of farm uses. However, if there is testimony regarding farm
10 uses or specific farm practices or impacts not addressed in the initial survey,
11 the county cannot solely rely on the applicant's initial survey, but must address
12 that testimony. *Id.*

13 Here, the FIA included a map that identifies a "farm stand" on tax lot
14 200 just west of the landfill, but neither the FIA nor any findings describe the
15 accepted farm practices associated with a farm stand, even generically, and no
16 findings attempt to explain why the proposed landfill expansion, will not
17 significantly change or increase the costs of accepted farm practices associated
18 with that farm stand. The absence of specific testimony regarding the farm
19 stand may mean that the county need not adopt detailed findings regarding the
20 farm stand, but does not relieve the county of the obligation of adopting at least
21 some initial findings addressing that use.

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

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

1 crops. It will also preclude my future ability to put up a farm
2 stand.” Record 147.

3 The same farmer testified:

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

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

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

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

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

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

10 “With respect to odor, the Board finds that there is no credible
11 evidence in the record to indicate that odors from the landfill are
12 the odors causing the alleged impacts at the stables. The stables
13 are in a rural area that generates many offensive odors, and the
14 record indicates the presence of other odor generators in the area,
15 including non-farm odors like the composting facility in
16 McMinnville. Even if an offensive odor in this area can be
17 attributed to the landfill, this testimony asserts that the stables lost
18 the business of a single customer as a result. The Board finds that
19 the loss of one customer is not significant, especially in light of the
20 absence of any testimony describing the number of customers that
21 continue to do business with the stables.” Record 54 (Finding
22 177).

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

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

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

8 5. **Quinoa**

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

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

1 **6. Poplars**

2 Module 11 and other landfill improvements will be located at the site of
3 an existing poplar plantation, which will be removed. FOYC argues that
4 removal of the existing poplar plantation constitutes a significant change in
5 accepted farm or forest practices, and must be evaluated under ORS
6 215.296(1). We agree with respondents that the poplar plantation to be
7 removed is located on the subject property, and is proposed to be used as part
8 of the expanded landfill operations. Accordingly, that land is not “surrounding
9 lands” for purposes of ORS 215.296(1). FOYC had not demonstrated that the
10 county erred in failing to address impacts to the poplar plantation.

11 **C. Conclusion**

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

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

26 The county’s decision is remanded.