

BCTT Key Findings and Recommendations

Draft #4 Revised 3/7/23

Revisions/Comments in Chronological Order:

1. Mark Yeager comments
2. Ginny Lucker/Sam Imperati edits
3. Vance Croney comments
4. Notes from Workgroup 2/23 discussion incorporated
5. Subcommittee revisions and acceptance of changes 2/28
New Version, carrying over any unresolved edits/comments
6. Vance Croney comments
7. Jeff Condit/Holly Doyle comments/edits
8. Ginny Lucker new findings
9. Greg Verret comments/edits
10. Edits made/accepted at 3/7/23 subcomm mtg
New Version, carrying over any unresolved edits/comments

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Legal Issues and Land Use Review Subcommittee

Introduction: [Augment existing intro: Describe the group’s charge and the dual roles of legal issues and land use practice; participants; the facilitator’s invitation/request to Jeff Kleinmann to participate and his decline to do so; Ginny Lucker’s role.]

Key Findings:

LLU F-1. Do conditions of approval imposed as part of a later land use approval supersede conditions imposed as part of a prior approval? Unless a later land use approval expressly addresses whether conditions of a prior land use approval are superseded, the issue will be subject to interpretation by the local government (the Board of County Commissioners, in this case).

LLU F-2. Only the current franchise agreement has legal effect. The previous franchise agreement is superseded when a new agreement takes effect.

Commented [VGJ1]: Added the question from full report to provide context for the finding.

[LLU F-3.](#) Up-front and ongoing financial assurance to cover the cost of closure, post-closure, and corrective actions are required by DEQ. Where this preliminary line of defense fails, Oregon statute holds any person owning or controlling the disposal site liable for closure and post-closure maintenance.

[LLU F-4.](#) What legally can and cannot be conditions of any land use approvals? Conditions of approval must relate to approval criteria. To be approved, an applicant must demonstrate compliance with all discretionary approval criteria. Conditions of approval cannot substitute for compliance with applicable criteria but may be imposed to ensure the criteria are met. The county may find compliance with approval criteria by establishing that compliance is feasible, subject to compliance with a specific condition(s) of approval. A preponderance of the evidence must support a finding that the condition is “likely and reasonably certain” to result in compliance. To lessen adverse impacts on surrounding uses, the county may “impose conditions of approval to mitigate negative impacts to adjacent property, to meet the public service demand created by the development activity, or to otherwise ensure compliance with the purpose and provisions of this code.” (BCC 53.220)

[LLU F-5.](#) In reviewing a CUP for landfill expansion, the County has jurisdiction over only the proposed expansion. Existing and past operations are not within the County’s scope of review. Prior decisions are final and cannot be subjected to a new review or have additional/revised conditions of approval imposed as part of the CUP application for the expansion. The mechanism for enforcing conditions of approval is a separate process; see recommendation LLU R-9.

[LLU F-6.](#) Benton County may not prohibit a private landfill operator from accepting solid waste from outside Benton County.

[LLU F-7.](#) Is DEQ prohibited from permitting another landfill west of the Cascades? No.

[LLU F-8.](#) What does the “regional landfill” designation mean? Oregon Revised Statute (ORS) 459.005(23) defines a Regional Disposal Site as “a disposal site that receives ... more than 75,000 tons of solid waste a year from outside the immediate service area in which the disposal site is located....” The immediate service area of Coffin Butte is Benton County. Coffin Butte Landfill has received more than 75,000 tons from outside its immediate service area every year since at least 1993. Coffin Butte thus meets the definition of a regional landfill per ORS.

[LLU F-9.](#) Interpretation of the review criteria for a landfill-expansion conditional use permit requires determinations that are based on the facts of the specific application. The rules of statutory construction describe how ambiguous terms are to be interpreted: text, context, and legislative history. However, LUBA’s standard of review is highly deferential to the local decisionmaker’s interpretations, so if the

interpretation is plausible (does not conflict with the provision's language), LUBA (and the courts) will uphold the local interpretation. This gives the decision-maker a lot of flexibility in interpreting their own code provisions. In response to a request by the Board of Commissioners, the following four findings provide staff-provided historical information, particularly over the past 25 years, on how the County decision-makers have interpreted these terms across the full range of conditional use applications the County reviews. They are not recommendations on how the Planning Commission and Board should interpret future applications. Restated, each body fully retains its flexibility in interpreting those terms in the context of the specific application before it.

[LLU F-9a.](#) The first criterion requires the decision-maker to find that *"The proposed use does not seriously interfere with uses on adjacent property, with the character of the area, or with the purpose of the zone"* [BCC 53.215(1)]. In applying the term "seriously interfere", Staff reports that in past CUP applications the Planning Official, Planning Commission or Board has considered factors such as: does the proposed use make it difficult to continue uses on the adjacent property; would it create significant disruption to the character of the area; would it conflict, in a substantive way, with the purpose of the zone. As noted above, the county decision-makers have wide discretion in evaluating whether a use will "seriously interfere." In the past, "seriously interfere" has generally been applied as meaning more than an inconvenience or irritation but is a lesser threshold than rendering the uses on adjacent property impossible. Speculated effect on property values has not been a primary consideration in determining serious interference.

[LLU F-9b.](#) In the phrase "character of the area" in BCC 53.215(1), how narrow or broad has "the area" typically been?

When the County is evaluating the "character of the area", the "area" is based on the facts of each application and how far the effects of the proposed land use are likely to extend. The impacted area will be unique to each application and may differ by particular effect—for example, the impact of noise might extend farther than visual impact (or vice versa).

Because each review is unique, examining past cases for the specific distances utilized may not be illuminating. Staff reports that in past CUP applications the Planning Official, Planning Commission or Board has considered these factors in determining the character of the area and its extent include:

- The particular attributes of the geographic setting (including existing operations in the vicinity.)
- Is there a distinct change in the area's physical characteristics beyond a certain point (such as a change from flat land to hills or from one river basin across a ridgeline into another)?

- What features or elements give the area its character? Is it a homogenous or heterogeneous character (is there a high degree of similarity, or is it mixed)?
- How far are the effects of the proposed land use likely to extend? This may differ by particular effect—for example, the impact of noise might extend farther than visual impact (or vice versa).

[LLU F-9c.](#) In the conditional use review criterion of: “*The proposed use does not impose an undue burden on any public improvements, facilities, utilities, or services available to the area*” [BCC 53.215(2)], what constitutes a “burden” is again based on the facts of the application. Staff has stated that in past CUP applications the Planning Official, Planning Commission or Board has considered a “burden” on public infrastructure and service is likely “undue” if it overloads the system or causes significant degradation in terms of quality, effectiveness or timeliness of infrastructure or service. Lesser burdens may also be “undue” if the effect jeopardizes people’s health, safety, or welfare. Burdens that the County has typically not considered “undue” include those that can be mitigated through planned improvements, that are incremental service additions¹ consistent with that generated by other uses in the area or that fall below an established threshold (such as road classification standards). For planned improvements to be relied upon in determining that a burden is not undue, the implementation of those improvements must be certain, such as through a condition of approval specifying the improvement and the timeline for implementation. Again, as noted in LLU F-9 above, so long as the interpretation is plausible, the decision makers have wide discretion in interpreting the term “undue burden.”

[LLU F-9d.](#) With regard to the conditional use review criterion of BCC 53.215(3) [*“The proposed use complies with any additional criteria which may be required for the specific use by this code.”*], if the county has adopted additional code criteria that apply to a proposed use, then those code provisions would apply. This does not allow the county to apply unadopted criteria that are not in the code at the time of application. In applying for expansion in the Landfill Site zone, the BCC Chapter 77 does not adopt any additional criteria and, therefore, no additional criteria apply.

[LLU F-10](#) SWAC’s bylaws require it to “assist the Board of Commissioners (Board) in Planning and implementing solid waste management, pursuant to BCC Chapter 23, the Benton County Solid Waste Management Ordinance.” BCC 77.305 directs the Solid Waste Advisory Council (SWAC) to review and make recommendations regarding the Site Development Plan and Narrative submitted on a landfill-expansion CUP; however, the code does not specify what criteria or considerations that recommendation should be based on. Based on SWAC’s bylaws and role in

¹ [Additions that are small relative to the total. For example, adding 10 daily vehicle trips to a road currently experiencing 300 daily vehicle trips could be considered an incremental service addition.](#)

planning and implementing solid waste management, it appears that the intent of the language in BCC 77.305 is that the Planning Commission rely on SWAC for guidance on the impacts of the Site Development Plan and Narrative on solid waste management. However, the language of BCC 77.305 does not expressly limit the scope of SWAC's recommendations.

[LLU F-11.](#) Pursuant to BCC 77.310(1)(e), to what extent may the Planning Official require additional information from an applicant for a Landfill Site Zone Conditional Use Permit? Only "other information" that relates to the approval criteria for a conditional use permit may be required under BCC 77.310(1)(e), and the applicant may choose to provide some, all, or none of the requested information. The land use decision must be based on demonstrating compliance with the code criteria, not on whether the applicant provided the requested information.

LLU F-12 BCC 77.310(1) lists the information required in the applicant's narrative submitted with a conditional use application. The information required under BCC 77.310(1) includes the documents and information required to be part of the application. During the "completeness" process, the Planning Official will consider whether the applicant's documents and information are sufficient for purposes of review of the application. A determination that an application is complete does not mean that the information satisfies the approval criteria.

LLU F-13 In addition to the list of information listed in BCC 77.310(1)(a)-(d), BCC 77.310(1)(e) allows the Planning Official to request that the conditional use application narrative include "other information". This information must relate to the approval criteria. The applicant has the discretion whether to submit the requested information. The applicant's failure to submit any requested information is relevant to the decision on the application only to the extent that the decision maker determines that the information is necessary to comply with an approval criterion.

[LLU F-14.](#) Pursuant to long-standing LUBA case law, representations and statements made by the applicant do not become conditions of approval unless those statements are specifically included or incorporated, directly or by reference, into the final decision as conditions of approval. [See LLU R-10.](#)

[LLU F-15.](#) How does the 2002 Memorandum of Understanding (MOU) fit into the Workgroup considerations? The 2002 MOU clarifies authorization for landfill activities within the Landfill Zone and establishes a point in time at which the landfill was operating in compliance with state and local requirements.

- The MOU does not address whether the County's determination of "compliance with local requirements" includes compliance with all conditions of past land use approvals.

- The MOU indicates that, as of 11/5/2002, there were no known land use ordinance violations involving the landfill. The MOU does not describe the extent to which Benton County investigated the compliance status of any conditions of past land use approvals in preparing the MOU.
- The MOU did not negate or supersede conditions of past land use approvals.

[LLU F-16.](#) Is there an opportunity for public input to determine whether an application is complete? The public may submit comments on the completeness of an application. However, the completeness process is not a review of the application's merits; only whether sufficient information has been submitted to the application's merits can be evaluated through the public hearing process. And there are no statutory or code requirements for incorporating public input on the county's administrative determination of whether an application is complete.

[LLU F-17.](#) Section 2 of the June 7, 2022, collection franchise agreement between Benton County and Allied Waste Services of Corvallis ("Republic Services") contains a mandatory limited reopener provision. Contract negotiations are not conducted in public. With that said, a process could be designed to allow public input, comment, and feedback on any provisions subject to Section 2 that may be negotiated between the parties to the agreement. The renegotiated collection franchise agreement must be agreed upon, in its entirety, by both Benton County and Republic Services.

[LLU F-18.](#) What options does the Planning Commission have if they determine that DEQ regulation of a particular parameter is inadequate or likely to be inadequate?

The County could not determine that DEQ regulation of a particular environmental parameter is inadequate to protect public health and deny the application on those grounds. The County also has no authority to interpret, apply or enforce DEQ regulations (except for regulatory programs that DEQ formally delegates to a local government, such as with on-site sewage disposal regulation.) Additionally, the County cannot assume that an activity will result in a violation of DEQ parameters when the activity hasn't happened.

The County could potentially determine that DEQ's regulation of a particular parameter is inadequate to prevent the proposed land use from seriously interfering with uses on surrounding properties. However, the County must articulate why DEQ's requirements are insufficient, and the County typically lacks the expertise or personnel to determine whether a particular environmental parameter is being exceeded. Alternatively, the County could require that specified mitigations be implemented, which is simpler to monitor than the level of certain emissions.

[LLU F-19.](#) Could a new CUP approval be conditioned on cleaning up noncompliance with existing operations?

A new CUP cannot require as a condition of approval that an existing operation on a different property be modified or that noncompliance be rectified. Enforcement procedures (see Chapter 31 of the Benton County Code) would have to address the noncompliance. See recommendation R-9.

LLU F-20. Is compliance/noncompliance with conditions of past land use approvals a topic that can be considered in any way during a new land use application?

Generally, the new proposal must be evaluated on its own merits relative to the approval criteria. However, the current non-compliance of an existing land use condition could provide information that the Planning Commission considers in developing a condition on a new application. If an application is made to expand an existing land use that is currently out of compliance with a condition of approval of a previous decision, and that noncompliance is causing issues for surrounding land uses, noncompliance of the original land use decision is not in itself grounds to deny the new application. However, the decision-maker could potentially look at the fact of existing noncompliance in evaluating whether that noncompliance is causing the existing land use to “seriously interfere” with uses on surrounding properties, . That fact can then be used as evidence in evaluating whether the proposed land use complies with the review criteria because the same land use in a similar location was seriously interfering with surrounding uses even though it was subject to conditions of approval. If a condition of a past decision was insufficiently drafted to ensure compliance, the decision maker could craft and impose a more clearly drafted condition on the new application.. Past conditions superseded by subsequent decisions or changes in the law could not form a basis for such analysis. [To Do: Need to address the relationship between this finding and R-7. Also, finding language needs fine-tuning.]

LLU F-21 Were the site plan and narrative in PC-83-7 regulatory conditions of approval?

No.

The Board adopted the applicant’s site plan and narrative in PC-83-07 as “findings” but did not specifically adopt them as conditions of approval. Findings are not conditions of approval. Rather, they explain how the decision was reached and the facts the decision maker relied on to determine compliance with a criterion. For compliance with specific findings to be enforceable they must be made conditions of approval.

The conditions that were adopted through the 1983 decision, described as “conditions of development”, specified changes to be made to the applicant’s site plan. Compliance with those revisions was not required as a condition of approval; the conditions required only that the revisions be submitted. The decision did not describe these revisions as necessary to establish compliance with any approval

criteria and required only submission of additional documentation and a revised narrative.

Because a) the site plan and narrative, while relied upon as findings, were not made conditions of approval, and because b) the conditions imposed in PC-83-07 that required changes to the site plan did not require those changes on the basis that they were necessary to establish compliance with any criterion but rather required only that they be submitted, the site plan and narrative are not conditions approval of PC-83-07.

LLU F-22 Clarify when formal approval of landfilling Cell 6 (current quarry) was granted.

Land Use File PC-83-7 has been interpreted by Benton County, including in the 2002 MOU, as authorizing landfilling of the area known as Cell 6, the current quarry. While the record in PC-83-07 does not clearly specify that the portion of the property containing the current quarry is authorized for landfilling, the Board of Commissioners' findings in PC-83-7 state that 194 acres are approved for landfilling on the property north of Coffin Butte Road; that the total area of the property in the LS zone is approximately 266 acres; and that 59.23 acres of the LS zone are located south of Coffin Butte Road. That leaves approximately 207 acres north of Coffin Butte Road. Given that several areas are clearly shown on the 1983 site plan as being designated open space/buffer, there is no possible configuration of 194 acres out of the 207 acres total that does not include the current quarry area. The quarry area was included in the area approved for landfills by PC-83-7.

LLU F-23 The County's decision on a conditional use permit must be based on the evidence submitted into the record. Evidence must be submitted into the record before the record is closed. The Planning Commission makes the initial decision on a conditional use application to expand the landfill, and the record includes all evidence submitted into the record before the Planning Commission makes its decision. The Planning Commission's decision may be appealed to the Board of Commissioners. The Board considers the record of the decision being appealed (all evidence and testimony submitted to the Planning Commission) and any new evidence or testimony that is submitted into the record at the Board's appeal hearing. The record closes either at the end of the final hearing on the application, or if there has been a request to leave the record open before the end of the final hearing, on the date specified at that hearing.

Key Recommendations:

[Recommendations will be connected to the relevant finding(s) and charge elements.]

LLU R-1. BCC 77.305 directs the Solid Waste Advisory Council (SWAC) to review and make recommendations regarding the Site Development Plan and Narrative submitted on a landfill-expansion CUP; however, the code does not specify what criteria or considerations that recommendation should be based on. Consistent with SWAC's bylaws and Chapter 23 of the County Code, which require SWAC to "assist the Board of Commissioners (Board) in Planning and implementing solid waste management, pursuant to BCC Chapter 23, the Benton County Solid Waste Management Ordinance", the Board of Commissioners should more clearly define SWAC's role by articulating the scope, manner and timing of SWAC's review. [Interpreting County Code is within the Board's purview, but amending that code effects a more permanent result. As an initial step, the Board could issue an official interpretation of SWAC's role pursuant to Chapter 23. As a subsequent step, the Board could initiate amendments to Chapter 23 and/or Chapter 77 which would then proceed through a public hearings process.](#) (If/when SWAC's overall role shifts to sustainable materials management, instances of the term "solid waste management" above should be replaced with "sustainable materials management.")

LLU R-2. Amendments to the Development Code may be needed to create a clear and legally consistent process for SWAC's involvement in reviewing a CUP. Pursuant to the Development Code as written, the only criteria that a CUP decision can be based upon are those of BCC 53.215, and the Planning Commission is the decision-making body. Yet, the code states an ambiguous role for SWAC in that process and seems to imply that other considerations beyond those of BCC 53.215 should go into the decision-making process. This needs clarification.

LLU R-3. BCC 77.310 states that "*The applicant for a conditional use permit shall provide a narrative which describes: * * * Other information as required by the Planning Official.*" [BCC 77.310(1)(e)] The workgroup could make recommendations regarding what "other information" would be helpful in a narrative. However, any committee recommendations would have to be limited to information related to the applicable criteria and could not expand that criteria. "Additional information" required by the Planning Official does not become part of the applicable criteria. BCC 77.310 states only what the applicant's narrative shall include; it does not identify criteria for SWAC's review of a CUP application. This absence contributed to the subcommittee's recommendation in LLU R-2.

LLU R-4 BCC 77.310(1) lists the information required for a conditional use application in the landfill site zone and permits the planning official to request that the applicant's narrative include "additional information." However, the development code does not specify how or when that information is to be requested. In the past, the Planning Official has used the statutory completeness review process to request additional information. However, in addition to the Planning Official's review of

the information after the application has been submitted, the Board could amend the code to require that the Planning Official conduct a “preapplication conference” with the applicant to discuss the information that is required. It could also require a “neighborhood meeting” before the application is filed that requires the applicant to present its proposal to the public and allow the applicant to obtain more information about the proposal. Public comment during a pre-application neighborhood meeting, as with other public comment submitted before the application is complete and notification is sent, is not part of the formal record of the land use review and cannot be considered by decision-makers. The record includes only public comment submitted after formal notification has been sent to affected parties stating that the comment period is open.

LLU R-5 In addition to the two criteria listed in BCC 53.215(1) and (2), BCC 53.215(3) requires the decision maker to consider whether the “proposed use complies with any additional criteria which may be required for the specific use by this code.” Currently Chapter 77 (Landfill Site zone) does not include any additional criteria that must be considered in the review of a conditional use application for the expansion of a landfill in the landfill zone. If there are additional criteria that the Board of Commissioners determines are necessary for the review of a conditional use application in the landfill zone, the Board would have to amend Chapter 77 to specify those additional approval criteria. The Board could also require that compliance with the site plan and reclamation plan (currently required by Chapter 77 to be submitted with the application) be adopted as conditions of approval of any approved conditional use permit.

LLU R-6. BCC 77.405 states, “Copies of materials submitted to the Oregon Department of Environmental Quality as a part of any permit process shall be submitted to the Planning Official. If at any time the Planning Official determines that permit application materials or conditions of DEQ permit are judged to merit public review, a Public Hearing before the Planning Commission shall be scheduled.” This provision is unclear. (The provision might have been codified to prior to the current state agency coordination requirements under which a land use compatibility statement (LUCS) is required as part of any application for a state permit in which local land use is implicated.) The subcommittee interprets this section as requiring a review if the use originally approved has been or will be modified due to the DEQ permit. The Planning Official could make such a determination using a formal “Interpretation” pursuant to BCC 51.205(1). Recommend a code amendment to clarify this provision, for example to state that when DEQ issues a landfill permit, the Planning Official shall review the permit and conditions of approval and, if discrepancies with the County’s land use approval are noted, determine whether this constitutes a “modification of a conditional use permit” (BCC 53.225) and, if so, require the applicant to submit application for such modification. A workgroup

recommendation on how public review of DEQ permit requirements could most benefit the public would also be helpful.

LLU R-7. The County should provide to the public a description of the purpose of the statutory completeness review process, and the scope of the information the county planning official considers at the completeness stage. That description should clearly explain how the administrative “completeness” process fits into the review of a land use application. While the county should not discourage public involvement at all stages of the review process, the public should be informed that the statutory completeness is a preliminary step that does not include any review of whether an application does or can satisfy the approval criteria; and that the public review and hearing process that follows after the application is complete provides the public an opportunity to provide evidence and arguments to the decision makers on the merits of the application. The information should clearly inform the public that any evidence or testimony submitted at the completeness stage is not part of the “record” that the decision makers will review, and that information would have to be re-submitted during the public hearing process in order for the decision makers to review it.

LLU R-8 A process to allow public input, comment, and feedback on any provisions subject to Section 2 of the collection franchise agreement between Benton County and Allied Waste Services of Corvallis (“Republic Services”) could be designed as follows:

After the parties have begun discussing what specific terms may be amended pursuant to Section 2, but no more than 60 days prior to any amendment being approved by the Board of Commissioners, the County will publish a notice that it is seeking suggestions from the public for negotiation topics generated from the “concepts from the consensus-seeking process.”

Any input received would be presented to the Board of Commissioners at a work session, at which time the Board would identify those ideas or suggestions that may be included as negotiation topics.

Following the work session and as part of the ongoing negotiations, Benton County Staff will discuss with Republic Services the topics and ideas the Board of Commissioners identified.

At such time as Benton County and Republic Services reach a tentative agreement on the renegotiated terms, Staff would bring the proposed franchise changes to the board meeting, where consideration of the amended franchise agreement would be conducted in a public hearing pursuant to BCC 23.235, which will include an opportunity for the public to present testimony. The Board could approve the agreement as presented or may direct staff to resume negotiations with Republic Services to include specific topics identified by the Board.

The renegotiated collection franchise agreement must be agreed upon, in its entirety, by both Benton County and Republic Services. At such time as the terms have been agreed upon, and the Board is satisfied that public input has been adequately included or addressed in the renewed agreement, the franchise agreement will be the subject of a public hearing and, ultimately, approval by the Board of Commissioners at a regular board meeting.

LLU R-9 Benton County should evaluate its existing system regarding compliance monitoring and enforcement to determine if there are sufficient mechanisms in place to ensure compliance with conditions of approval that the County imposes on land use approvals and, if not, recommend improvements. Elements of such an evaluation could include:

- What enforcement mechanisms exist within the County Code?
- Is there a mandamus option or a private right of action option?
- What is missing?
- What provisions and procedures do other counties have, particularly counties that host a privately operated landfill?
- The future cost of such a system, the benefits, and the consequences of not improving the current practices and procedures.

LLU R-10 In issuing land use decisions, Benton County decision-makers should:

- Draft clear findings and be certain to incorporate into the conditions of approval the items that are intended to be binding.
- State conditions of approval in clear and explicit terms and ensure that what is expected of the applicant in order to comply is readily apparent from the text of the conditions.

Commented [SI2]: I suggest this is an on-controversial addition

Commented [VGJ3]: Drafted in response to comments on F-14.

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DRAFT

