

From: [CRONEY Vance M](#)
To: "Sam Imperati"; [Liz Irish](#); [Condit, Jeffrey G.](#); [Doyle, Holly](#)
Cc: [VERRET Greg J](#); [REDICK Daniel](#); [NICHOLS Darren](#)
Subject: RE: Draft agenda - Legal & Land Use Subcommittee - Meeting 3
Date: Monday, November 14, 2022 11:56:20 AM
Attachments: [image002.png](#)
[Conditions of land use approval 11-14-2022.docx](#)

Here is the memo Jeff and I put together describing what can, and what cannot, be conditions of approval in land use proceedings. Thanks. Vance.

From: Sam Imperati <samimperati@icmresolutions.com>
Sent: Thursday, November 10, 2022 6:41 PM
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Cc: VERRET Greg J <Greg.J.VERRET@co.benton.or.us>; REDICK Daniel <daniel.redick@Co.Benton.OR.US>; NICHOLS Darren <darren.nichols@Co.Benton.OR.US>
Subject: FW: Draft agenda - Legal & Land Use Subcommittee - Meeting 3

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Legal Eagles:

I am forwarding Greg's material for our 11/15/22, 3PM meeting. Greg will provide an updated version of the evolving Subcommittee Meetings Report on Tuesday.

I hope your weekend will be/was enjoyable.

Thanks, Sam

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From: VERRET Greg J <Greg.J.VERRET@co.benton.or.us>
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Subject: Draft agenda - Legal & Land Use Subcommittee - Meeting 3

Sam, let me know what you think of this agenda, or just make changes willy-nilly (legal term).

Attached is an updated version of the Master Document – Daniel, can you replace the version on the

website with this one?

I will have an updated version of the Subcommittee Meetings Report document on Tuesday.

Thanks!

-Greg

What legally can and cannot be conditions of any land use approvals

From Vance Croney, Benton County Counsel, and Jeff Condit, Attorney at Law – 11/14/2022

Benton County's Development Code describes conditional uses as "land uses which may have an adverse effect on surrounding uses in a zone." BCC 53.205. To lessen the adverse impacts, 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.

A successful CUP application must demonstrate that compliance with all discretionary approval standards is "feasible." *Meyer v. City of Portland*, 7 Or LUBA 184 (1983), *aff'd* 67 Or App 274 (1984). Conditions of approval are not a substitute for compliance with approval standards. *See, e.g., Hodge Or. Props. v. Lincoln County*, 194 Or App 50 (2004). Conditions of approval may be imposed to flesh out the details of how compliance will be achieved "and assure those criteria are met." *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447 (1992). Accordingly, conditions of approval must relate to approval criteria. *Harra v. City of West Linn*, 77 Or LUBA 136 (2018). If a condition of approval is imposed in order to comply with an approval criterion, substantial evidence in the record must support a finding that the condition is "likely and reasonably certain" to result in compliance. *Gould v. Deschutes County*, 227 Or App 60, 606-607 (2009).

The existing landfill and expansion area are located on property specially designated for a landfill site on the comprehensive plan and zoning maps. *See Benton County Zoning Map, BCC ch. 77 and Benton County Comprehensive Plan, Additional Adopted Documents, pg. 4*. The expansion requires CUP approval by the County under criteria **that focus on negative off-site impacts**. The applicant is required to demonstrate it is feasible that the expansion (a) does not "seriously interfere" with uses on adjacent property, with the character of the area or with the purpose of the zone, and (b) does not impose an "undue burden" on public improvements or services available to the area. If the applicant demonstrates feasibility of compliance, the County then has authority to impose conditions of approval to ensure compliance with these criteria but does not have authority to impose conditions unrelated to the criteria. *Caster v. City of Silverton*, 560 Or. LUBA 250, 256-60 (2008). Attachment "A" to this memo provides further detail on the interpretation of the CUP criteria.

The County only has jurisdiction under the CUP over the proposed expansion as requested in the application. Existing and past operations are not within the County's scope of review. Prior decisions are final and cannot be revisited or collaterally attacked as part of the CUP application for the expansion. *See, e.g., Beck v. Tillamook Cnty.*, 313 Or 148, 153, 831 P2d 678 (1992). Any future application would have to be judged under the standards and criteria in effect at the time of the application.

Although both Corvallis Disposal Co. dba Allied Waste Services of Corvallis and Valley Landfills, Inc. are subsidiaries of the same parent company, the collection franchise for Benton County ("Benton County Collection Franchise") (as well as that of the City of Corvallis) is comprised of a separate operation which is distinct from the landfill operations. Neither collection franchise agreement constitutes a land use decision which are subject to review through a CUP process. *See* ORS 197.015(10).

Both the Benton County Collection Franchise and the Landfill Franchise Agreement are controlled by BCC Chapter 23. BCC Chapter 23 is not a land use regulation. See ORS 197.015(10). It, along with ORS 459.065(1)(a) and 459.085(1)(b) authorizes negotiation of franchise agreements for collection and disposal of solid waste. ORS 459.005(10) defines a franchise as “a franchise, certificate, contract or license issued by a local government unit authorizing a person to provide solid waste management services.” A franchise is not a land use and the Benton County Development Code does not apply to franchise agreements. Because BCC Chapter 23 is a business regulation separate from the land use process, the County has no legal authority to require changes to the Benton County Collection Franchise or the Landfill Franchise Agreement in conjunction with the review of a CUP for the landfill expansion. Any changes to the Franchise Agreements must be negotiated between the parties.

ORS 459.095(1) preempts local government’s authority to adopt regulations or impose conditions that conflict with DEQ regulations.