

**From:** [Sam Imperati](#)  
**To:** [Benton County Talks Trash](#)  
**Subject:** FW: Aspirational promises  
**Date:** Monday, December 12, 2022 3:08:08 PM  
**Attachments:** [image001.png](#)  
[Liz 12-15-2022 presentation to BCTT.pdf](#)

---

**CAUTION:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

**ICM** **Sam Imperati, JD | Executive Director**  
resolutions 11524 SW Vacuna Ct. | Portland, OR 97219-8901  
 (P) 503.244.1174 | (C) 503.314.1156 | (F) 503.244.1038  
[SamImperati@ICMresolutions.com](mailto:SamImperati@ICMresolutions.com)  
[ICMresolutions.com](http://ICMresolutions.com)

---

**From:** CRONEY Vance M <[Vance.M.CRONEY@Co.Benton.OR.US](mailto:Vance.M.CRONEY@Co.Benton.OR.US)>  
**Sent:** Monday, December 12, 2022 2:57 PM  
**To:** 'Liz Irish' <[lizirish@ymail.com](mailto:lizirish@ymail.com)>; Sam Imperati <[samimperati@icmresolutions.com](mailto:samimperati@icmresolutions.com)>  
**Cc:** Condit, Jeffrey G. <[Jeff.Condit@millernash.com](mailto:Jeff.Condit@millernash.com)>; Doyle, Holly <[HDoyle@republicservices.com](mailto:HDoyle@republicservices.com)>;  
VERRET Greg J <[Greg.J.VERRET@co.benton.or.us](mailto:Greg.J.VERRET@co.benton.or.us)>  
**Subject:** RE: Aspirational promises

I tried to send this earlier today, but I'm not sure it was actually sent. So, I'm trying again. My comments are in the document. Thanks. Vance.

---

**From:** Liz Irish <[lizirish@ymail.com](mailto:lizirish@ymail.com)>  
**Sent:** Sunday, December 11, 2022 12:41 PM  
**To:** Sam Imperati <[samimperati@icmresolutions.com](mailto:samimperati@icmresolutions.com)>  
**Cc:** Condit, Jeffrey G. <[Jeff.Condit@millernash.com](mailto:Jeff.Condit@millernash.com)>; Doyle, Holly <[HDoyle@republicservices.com](mailto:HDoyle@republicservices.com)>;  
CRONEY Vance M <[Vance.M.CRONEY@Co.Benton.OR.US](mailto:Vance.M.CRONEY@Co.Benton.OR.US)>; VERRET Greg J  
<[Greg.J.VERRET@co.benton.or.us](mailto:Greg.J.VERRET@co.benton.or.us)>  
**Subject:** Re: Aspirational promises

**CAUTION:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Please look over the presentation first draft. I would love feedback. This is out of my wheel house and want to be sure this is done well.

I have a brief "slide" set, but felt it would be better if we handed out the what I will be saying for them to just have a simple visual.

Also, I was unable to find any notes on what we talked about last in regards to who is responsible for the landfill once it is closed. I know we spoke about the DEQ going back and

finding a responsible party. The corner lot downtown was used that use to be a gas station as an example. Do we have something vetted and wrtitten I can insert?

Also, Sam you wanted 12 points. I do not have 12. Please let me know if I missed somethings that need to be addressed? Please break out the red pens and let me know!

Thanks for your patience everyone. This being just before Christmas, it has been a tough schedule.

Liz Irish

On Dec 9, 2022, at 6:20 PM, Sam Imperati <[samimperati@icmresolutions.com](mailto:samimperati@icmresolutions.com)> wrote:

Greetings:

I would like to have this included in the Legal Sub's work for our 12/15 meeting.

Where are you on this?.

Thanks, Sam

<image001.png>

---

**From:** CRONEY Vance M <[Vance.M.CRONEY@Co.Benton.OR.US](mailto:Vance.M.CRONEY@Co.Benton.OR.US)>

**Sent:** Thursday, December 1, 2022 3:48 PM

**To:** VERRET Greg J <[Greg.J.VERRET@co.benton.or.us](mailto:Greg.J.VERRET@co.benton.or.us)>; Sam Imperati <[samimperati@icmresolutions.com](mailto:samimperati@icmresolutions.com)>; Liz Irish <[lizirish@ymail.com](mailto:lizirish@ymail.com)>; Condit, Jeffrey G. <[Jeff.Condit@millernash.com](mailto:Jeff.Condit@millernash.com)>; Doyle, Holly <[HDoyle@republicservices.com](mailto:HDoyle@republicservices.com)>

**Subject:** Aspirational promises

Greg:

At our last Legal Issues Subcommittee meeting I committed to finding case law addressing aspirational promises or application elements and whether they become conditions of approval. As you and I posited at the meeting, the answer is no, aspirational promises do not become conditions of approval unless those promises are specifically included or incorporated into the final decision.

In *Hood River Valley Residents' Committee v. City of Hood River*, 33 Or LUBA 233 (1997) a Conditional Use application included a statement of how it would comply with a grading and contour approval criteria. While the specific assignment of error alleged

the criteria was not supported by substantial evidence, LUBA ruled that allegation was immaterial: “While the planning commission adopted a finding very similar to the quoted application statement, the city council did not incorporate that finding in its decision. Petitioner has not established that the statement it described as a finding is, in fact, a part of the city’s final decision. Thus it is immaterial whether the identified statement is supported by substantial evidence in the record.” *Id.* at 234-35.

Additionally, in *Todd v. Columbia County*, 24 Or LUBA 289 (1992), one question posed was whether a local code provision had been interpreted in the final decision. LUBA found that, yes, county staff had interpreted the code provision at issue, but that “portion of the staff report was not incorporated into the board of county commissioners’ decision.” *Id.* at fn 3. As a result, LUBA found “the county has not interpreted and applied [its code] and this decision must be remanded.” *Id.* at 293.

A final decision must include all conditions the county wishes to impose on an applicant. Failure to include a condition, or finding, or interpretation in the final decision means the missing element is unenforceable or may not be relied upon when evaluating permit compliance. And, just to clarify: something can be written directly into the final decision, or the decision can incorporate something by reference. Both with suffice to bring a necessary component from the record into the decision.

I do want to point out a critical distinction. While an omitted condition is not part of the final decision, it is still part of the record. But, not everything in the record must be included in the decision.

I hope this is helpful. Thanks. Vance.

“We have to endure the discordance between imagination and fact. It is better to say, “I am suffering,” than to say, “This landscape is ugly.”

— Simone Weil

“Imagination and fiction make up more than three quarters of our real life.”

— Simone Weil

“I have only made this letter longer because I have not had the time to make it shorter.”

(*Letter 16, 1657*)”

— Blaise Pascal, [The Provincial Letters](#)

“Truth is so obscure in these times, and falsehood so established, that, unless we love the truth, we cannot know it.”

— Blaise Pascal

“It is man's natural sickness to believe that he possesses the truth.”

— Blaise Pascal

## **1. Landfill Who can use and What can go in?**

### 1. Can we limit who can put trash in the landfill.

1. Answer: No. The Commerce Clause, Art. I, §8, Cl. 3 of the U.S. Constitution, explicitly gives Congress the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” Implicit in this grant of authority is the prohibition on states (and local governments) against passage of legislation which discriminates or burdens interstate commerce. This is referred to as the “dormant Commerce Clause.” The dormant commerce clause was the basis of a decision by the United States Supreme Court in which it ruled unconstitutional a Michigan law barring out-of-state solid waste from being deposited in landfills located in Michigan counties. (Page 13 of Master Document)

### 2. Why is it called a Regional Landfill if anyone can haul waste in?

1. The definition set forth in ORS 459.005(23) was enacted in 1987, but at that time, limited the 75,000-ton threshold to solid waste received from commercial haulers. In 1993, the definition of regional disposal site was amended to remove the reference to commercial haulers and has remained substantively unchanged since that time.

## **2. How ambiguous terms are interpreted.**

### INTERPRETING CODE PROVISIONS

From Benton County Staff Memo 10/5/22

Provisions that derive not from state statute or rule but are developed and adopted by the local jurisdiction may be interpreted by the local jurisdiction, and are granted deference so long as the interpretation is plausible.

Example: Benton County’s conditional use criteria (which serve as additional criteria in

the Exclusive Farm Use zone).

If a term is not defined in the code or is not otherwise a term of art, the courts in Oregon apply a “plain, ordinary meaning” rule, where they turn to the dictionary.

Context includes provisions in the same code section and within the regulatory scheme.

Legislative intent is determined by reviewing evidence of the intent of the legislative body (in this case, the Benton County Board of Commissioners) at the time of enactment.

Within the above framework, the governing body’s interpretation of the code is entitled to some deference. *Siporen v. City of Medford*, 349 Or 247, 256, 243 P3d 776 (2010), stands for the proposition that a code interpretation of the governing body, as the legislative body that enacted the code in the first place, is entitled to deference as long as it is a plausible interpretation of an ambiguous provision. But the provision has to be ambiguous; deference can’t be used to amend a code in the guise of an interpretation. *Central Eastside Indus. Council v. City of Portland*, 74 Or LUBA 221 (2016). *Siporen* deference only applies to interpretations by the governing body (the Board of Commissioners) and not to interpretations of other county decision-makers, such as staff, the Planning Commission, or the Solid Waste Advisory committee

### **3. Hauling Franchise Agreement Terms and carry over**

1. Past franchise agreements are no longer relevant to the current franchise agreement. All new agreements are all new. There are no conditions carried over from previous agreements

### **4. CUP approvals and conditions and what carries over. ( See Page 12 Master Document)**

1. What legally can and cannot be conditions of any land use approval?
  1. The existing landfill and expansion area are located on property specially designated for a landfill site on the comprehensive plan and zoning maps. The expansion requires CUP approval by the County under criteria that focus on negative off-site impacts. The applicant is required to demonstrate 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. The County 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. Attachment “A” to this memo provides further detail on the interpretation of the CUP criteria.
  2. The county only has jurisdiction under the CUP over the proposed expansion as requested in the application. **Exiting and past operations are not within the county's jurisdiction. Prior decisions are final and cannot be revisited or collaterally attacked as part of the CUP application for the expansion.** Any future application would have to be judged under the standards and criteria in effect at the time of the application.
  3. The county does consider, and incorporates, DEQ’s permitting into its conditions of approval. Typically, conditions of approval will include the requirement that the applicant obtain, and maintain, the relevant and required approvals and/or permits from other regulatory agencies, e.g., DEQ, DSL, ODOT. The condition recognizes the outside agency’s jurisdiction over the issue and links the lawful status of Benton County’s permit to the applicant’s compliance with the agencies rules and regulations. If the applicant later violates, or is unable to meet the agency’s,

regulations, that failure would constitute a violation of a condition of Benton County's approval (See page 27 ORS 459.095(1) preempts local government's authority to adopt regulations or impose conditions that conflict with DEQ regulations. of Master agreement.)

**5. Future suggested best practices for Conditions for CUPs.**

1. Best Practice is to clearly state in a land use decision which if any of the prior approval conditions carry over with the new approval of CUP. This committee thinks there should be a memo on this topic with best practice.

**6. Who will be responsible for the landfill after it has been closed.**

**7. Monitoring conditions. Who is responsible.**

1. Noise and the landfill.
  1. OAR 340-030-0035 established DEQ regulation of industrial or commercial noise levels. OAR 340-030-0110 states legislative funding for DEQ's oversight of noise control was defunded in 1991
  2. Currently the County does not have the ability to fund the enforcement of noise levels

**8. Required Reporting.**

1. Reporting requirements: The environmental services industry is one of the most heavily regulated in the United States, and Coffin Butte Landfill works cooperatively with all its regulatory partners, whether they be at the federal, state, county, or local level. The following is a summary of Coffin Butte's partnerships and inspections.
2. Oregon Department of Environmental Quality (DEQ) solid waste permit: Includes semiannual inspections, semi-annual groundwater monitoring (usually in April and October); results are submitted in an annual report every month to DEQ.
3. DEQ Title V air permit: Bi-annual inspections; Coffin Butte also utilizes third-party technology to monitor landfill gas twice monthly. Results are reviewed in real time and submitted to DEQ twice a year. In addition, Coffin Butte submits monthly and semi-annual reports to DEQ on well readings, flare readings and other routine operations.
4. DEQ stormwater permit: Coffin Butte staff performs weekly and monthly visual inspections of the stormwater and stormwater related infrastructure. Stormwater monitoring (taking samples and sending them to a third-party laboratory for analysis) is conducted four times a year during rainy season and reported to DEQ quarterly. DEQ also conducts its own inspections every five years or so.
5. City of Corvallis wastewater disposal permit: Subject to an annual inspection as well as weekly monitoring and monthly reporting to the City.
6. **City of Salem wastewater disposal permit:** Subject to semi-annual inspection as well as semi-annual monitoring to the City and reporting to the City
9. Conditional Use considerations: i.e. if a use is allowed it has already been determined to be compatible with the current zoning.
10. Rights and Obligations of other entities and how that impacts considerations of Land Use Applications( Page 12 Master Document)