**BCTT Subcommittee - A.3. Legal Issues and B.1. Land Use Review**
**DRAFT Version 7 – 12/15/2022**
**With Lucker 1/6 and Imperati 1/9 Additions**

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***Charge A: Common Understandings Tasks***

1. ***A Summary of the County's current rights and obligations to Republic Services, and vice versa, surrounding:***
    1. ***The hauling franchise;***
    2. ***The landfill CUP; and***
    3. ***What legally can and cannot be conditions of any land use approvals (e.g. past compliance, compliance with future laws, codes, and policies, DEQ compliance, reopening, limitations on what can be brought into the County from where, required facilities and practices, reporting/compliance/financial monitoring requirements, etc.)***
    4. ***Interpretation and Deference***
2. ***A Summary of the rights and obligations of other entities surrounding landfills, hauling, and sustainability initiatives, etc.:***
    1. ***Federal;***
    2. ***Tribal;***
    3. ***State (e.g. Is DEQ prohibited from permitting another landfill west of the Cascades and what does the "regional landfill" designation mean?);***
    4. ***Local Government; and***
    5. ***Summary of the step-by-step process in ORS chapter 459 and associated timing for the cross-jurisdictional approvals of landfill applications, (e.g. DEQ) including:***
        1. ***What topics are within whose authority, and***
        2. ***Whether, for example, the County can or should consider the topics it does not have permitting authority over when assessing the criteria outlined in Code section 53.215?***

***Charge B: Land Use Review Tasks***

1. ***Create a common understanding document outlining which Development Code criteria are applicable to the review of a conditional use application for landfill expansion by reviewing:***
    1. ***53.215 (Criteria)***
    2. ***77.305 (Conditional Uses)***
    3. ***77.310 (Review)***
    4. ***77.405 (DEQ)***
2. ***Review Chapters 50 and 51 for context, and then prepare a conceptual list of any other Development Code criteria the WORKGROUP recommends be applicable.***

3. ***Developing recommended guidelines for interpreting any ambiguous provisions recognizing current statutes, regulations, case law, and County precedent, etc. In doing so, refer to Comprehensive Plan for policy guidance regarding interpretation of any ambiguous Development Code provisions (see, BCC 50.015,) and Review the Planning Commission comments made during its last review of Republic Services' CUP application for context. Examples for consideration include:***
    1. ***The phrase, "Other information as required by the Planning Official" 77.310(e)***
    2. ***The terms found in Section 53.215, e.g.***
    3. ***"seriously interfere"***
    4. ***"character of the area"***
    5. ***"purpose of the zone"***
    6. ***"undue burden"***
    7. ***"any additional criteria which may be required for the specific use by this code.***
    8. ***Other: _____***
4. ***Develop protocols for the timely and broad distribution of CUP-related information to the public, other governmental entities, and internal committees, groups, and divisions.***

Additional Charge Tasks

1. Necessary Tasks to Start Planning Reopening of Existing Hauling Agreement
2. Roles, Responsibilities, and Protocols of SWAC and DSAC
3. Specific Recommended Review Criteria for the Evaluation of Landfill CUP applications
4. SWAC/DSAC, Planning Commission, and BOC Use of the Review Criteria
5. Future Timeline for Discussing any Needed Changes to the Benton County Code Flowing From WORKGROUP Recommendations

Recommendations

**Appendices**

**A.** 2022 Annual Financial Assurance Plan submitted by Valley Landfills, Inc., to DEQ

# IV. Workgroup Recommendations

## SECTION A: Develop Common Understandings

### 2) Republic Services and Benton County's Current Rights and Obligations

*A Summary of the County's current rights and obligations to Republic Services, and vice versa surrounding the hauling franchise; The landfill CUP; and What legally can and cannot be conditions of any land use approvals (e.g. past compliance, compliance with future laws, codes, and policies, DEQ compliance, reopening, limitations on what can be brought into the County from where, required facilities and practices, reporting/compliance/financial monitoring requirements, etc.)*

"… We need a very clear statement from Republic's representatives regarding which liabilities belong to VLI, vs. which liabilities Republic is legally responsible for, in the long term if Republic divests from VLI."

**Rights and obligations relative to past land use approvals**

Submitted by Vance Croney and Jeff Condit, 12/14/2022

Question: Do conditions of approval imposed as part of a later land use approval supersede conditions imposed as part of a prior approval?

Answer: Unless the later land use approval expressly addresses whether the prior approval conditions continue or cease to be applicable, the issue will be subject to interpretation by the local government. LUBA will uphold the local government's interpretation of approval conditions unless the local government has improperly construed the applicable law.

When evaluating the effect of later approval conditions on earlier approval conditions, the analysis will depend on the specific land use approvals at issue. If the later land use approval unambiguously states that the earlier approval conditions either continue or no longer apply, the express language of the later approval resolves the issue. If the later approval does not unambiguously address the issue, it is subject to interpretation by the local government, and LUBA will uphold that interpretation unless the local government has improperly construed the applicable law.

When the meaning of an earlier land use approval is disputed during review of a later land use application, the local government (here, the Benton County Board of Commissioners) will interpret the previous land use approval, including any

conditions of approval. *See M & T Partners, Inc. v. Miller*, 302 Or App 159, 164-65, 460 P3d 117 (2020); *Bradbury v. City of Bandon*, 33 Or LUBA 664 (1997).

Once the local government has made the determination, LUBA will review under ORS 197.835(9)(a)(D) to determine whether the decision maker "improperly construed the applicable law." *Dahlen v. City of Bend*, __ Or LUBA __ (LUBA No. 2021-013, June 14, 2021). That is, LUBA will review for whether the interpretation is consistent with the statutory construction rules set out in ORS 174.010 to 174.090, *PGE v. Bureau of Labor and Indus.*, 317 Or 606, 611, 859 P2d 1143 (1993), and *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). *Lennar Nw., Inc. v. Clackamas Cty.*, 280 Or App 456, 468, 380 P3d 1237 (2016). This interpretative framework requires consideration of the text, context, and purpose of the land use approval. The fact that a specific condition was included in a prior approval but was not included in a later approval is relevant to the text, context, and purpose of the later approval.

Additionally, when reviewing a local government's interpretation of its later land use approvals to determine whether prior approval conditions continue to apply, LUBA cannot insert what has been omitted or omit what has been inserted. *Lennar*, 280 Or App at 469 (citing ORS 174.010); *Gould v. Deschutes Cty.*, 322 Or App 11, 24, 518 P3d 978 (2022); *M & T Partners*, 302 Or App at 172. LUBA will also give effect to the entire text of the later land use approval to the extent possible. *See* ORS 174.010; *Willamette Oaks LLC v. City of Eugene*, 76 Or LUBA 187 (2017).

Accordingly, it is for the Benton County Board of Commissioners to determine whether the later land use approvals continued or discontinued the conditions of approval attached to earlier land use approvals. And, so long as it applies the interpretative framework outlined above, that determination will be upheld by LUBA.

**Rights and obligations relative to franchise agreements**

Only the current franchise agreement has bearing. The previous franchise agreement is superseded at the time a new agreement takes effect. The provisions of the current (2020) franchise agreement are reflected in the table below.

**Responsibility for landfill closure and post-closure obligations**

Submitted by Vance Croney and Jeff Condit, 12/12/2022

Question: Who is responsible for complying with landfill closure and post-closure obligations?

Answer: DEQ regulations require up-front and ongoing financial assurance to cover the cost of closure, post-closure, and corrective actions. 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.

DEQ regulations require up-front and ongoing financial assurance to cover the cost of closure and post-closure obligations, as well as the cost of any required corrective action. OAR 340-094-0140. The owner or operator of a landfill must provide the required financial assurance by the time DEQ issues the solid waste permit (for new landfills) or no later than October 9, 1997 (for landfills already in operation on November 4, 1993). OAR 340-094-0140(3)(a).

The owner or operator is required to update its financial assurance plan annually, and the amount of the financial assurance mechanism must be increased (or may be reduced) consistent with each financial assurance plan update. OAR 340-094-0140(6)(e). A copy of the most recent annual financial assurance plan submitted by Valley Landfills, Inc. is attached as Appendix A to this report.

The owner or operator is restricted to certain allowable "financial assurance mechanisms," each of which is designed to ensure that funds will be available to complete closure, post-closure, and corrective action obligations, even if the owner or operator becomes insolvent or otherwise fails to satisfy those obligations. The allowable financial assurance mechanisms include:

a. A trust fund whose purpose is to receive and manage funds paid by the permittee and to disburse those funds only for closure, post closure, or correction activities.
b. A surety bond guaranteeing payment into a standby trust fund for closure or post-closure activities.
c. A surety bond guaranteeing performance of closure, post-closure, or corrective action activities.
d. An irrevocable letter of credit in conjunction with a standby trust fund.
e. A closure or post-closure insurance policy guaranteeing that funds will be available to complete final closure and post-closure maintenance of the site.
f. A corporate guarantee from an entity that passes a specified financial test, and which is subject to replacement by a substitute financial assurance mechanism if the guarantor no longer meets the financial test criteria.
g. Alternative forms of financial assurance, so long as they provide an equivalent level of security as the specified mechanisms and are approved by DEQ.

OAR 340-094-0145.

Finally, if the owner or operator of the landfill fails to provide the required financial assurance, and also fails to satisfy its closure and post-closure obligations, then each

person owning or controlling the property on which the disposal site is located will be liable for those closure and post-closure obligations per ORS 459.205 and 459.268. Under a recent Oregon Supreme Court decision, both a person who actually exercises control over the site and a person with legal authority to control the site are liable for closure and post-closure activities. *Kinzua Res., LLC v. Oregon Dep't of Envtl. Quality*, 366 Or 674, 686, 468 P3d 410 (2020). Accordingly, an entity or individual with legal authority to control the site can be liable under ORS 459.205 and 459.268, even if such entity or individual does not operate the landfill or directly hold title to the site. The Oregon Supreme Court has also held that liability under ORS 459.205 and 459.268 is direct liability for that person's own failure to satisfy closure or post-closure obligations, such that ORS 63.165 (part of the Oregon Limited Liability Act) may not serve to protect a member of an LLC from such liability.

| Landfill Rights and Obligations | | | |
|---|---|---|---|
| | **Republic Right/Republic Obligation (A Republic "right" is a County "obligation" and vice versa unless another entity is noted)** | **Authority** | **Comment** |
| 1 | "Operate and maintain the Landfill as a sanitary landfill for disposal of Solid Waste" | Landfill Franchise Agreement §2(a) | |
| 2 | "Comply with Benton County's solid waste ordinance and all provisions for service as set forth in Exhibit B" (current provisions detailed in this document) | Landfill Franchise Agreement §2(a) | Exhibit B contains Benton County Code Ch. 23. |
| 3 | "Charge tipping fees." | Landfill Franchise Agreement §2(b) | County hasn't participated in rate setting since 2000 franchise agreement eliminated county oversight. Section 7(f) designates Republic information related to tipping fees to be confidential. BCC 23.505 specified rate structures are not reviewed by BOC. |
| 4 | "Operate and promote the use of a Pacific Region Composting Facility (PRCF)." | Landfill Franchise Agreement §2(c) | |

| Landfill Rights and Obligations | | | |
|---|---|---|---|
| | **Republic Right/Republic Obligation (A Republic "right" is a County "obligation" and vice versa unless another entity is noted)** | **Authority** | **Comment** |
| 5 | "Shall accept for disposal at the Landfill, Solid Waste created or generated within Benton County." | Landfill Franchise Agreement §2(d) | This guarantees Benton County residents will have access to landfill as long as it is operational. Per §11(f), if Republic is unable to take Benton County-generated waste at the landfill, it will make other permitted landfills available to Benton County Solid Waste. In that case, the tipping fee shall be the same as if solid waste was disposed of at Coffin Butte. Same rate provision applies for 6 months. |
| 6 | "All persons holding a franchise to collect and transport municipal Solid Waste in Benton County will be permitted access to the Landfill" as long as they pay the tipping fee. | Landfill Franchise Agreement §2(d) | This ensures municipalities within Benton County which franchise collection services can access Coffin Butte. BCC 23.410(7) codifies this requirement as well. |
| 7 | Residential self-haulers will be accepted. | Landfill Franchise Agreement §2(f) | $35 per residential vehicle flat fee established, to be revised by the CPI after 3 years. |
| 8 | Secure loads required and maintain litter control measures. | Landfill Franchise Agreement §2(h) | |

| Landfill Rights and Obligations | | | |
|---|---|---|---|
| | **Republic Right/Republic Obligation (A Republic "right" is a County "obligation" and vice versa unless another entity is noted)** | **Authority** | **Comment** |
| 9 | Annual franchise fee to be paid to County. | Landfill Franchise Agreement §4(a) | Section 11(d) describes situation when uncontrollable circumstances excuse Republic from paying fees. If Republic disposes of solid waste elsewhere, but not because of uncontrollable circumstances, it must still pay franchise fee. |
| 10 | Annual host fee, based on an amount per ton of Solid Waste accepted at the landfill, will be paid to County. | Landfill Franchise Agreement §4(b) | The host fee is a credit against the franchise fee, with the franchise fee serving as the minimum amount Republic will pay County each year. |
| 11 | Until landfill expansion is approved, annual tonnage deposited at landfill is capped at 1,100,000 tons. | Landfill Franchise Agreement §5(b) | Within the tonnage cap, Republic must allow Benton County generated waste up to 75,000 annual tons. Solid waste deposited as a result of fire, flood, or other natural disasters is exempt from the tonnage cap. |
| 12 | Environmental Trust Fund to be maintained at no less than $5,000,000. | Landfill Franchise Agreement §6(a) | |
| 13 | Republic to maintain pollution liability insurance policy with minimum coverage of $10,000,000. | Landfill Franchise Agreement §6(b) | Section 6(d) requires the parties to meet every 4 years or after each 2,000,000 ton increment of solid waste is deposited to review the pollution liability insurance coverage. |

| Landfill Rights and Obligations | | | |
|---|---|---|---|
| | **Republic Right/Republic Obligation (A Republic "right" is a County "obligation" and vice versa unless another entity is noted)** | **Authority** | **Comment** |
| 14 | Following year 1 of the agreement, Republic to furnish an annual report to County. | Landfill Franchise Agreement §7(a) | Annual report on environmental condition of the landfill, "covering air, water, Solid Waste Permits, pollution controls, and related issues as determined by the parties." |
| 15 | Beginning in year 2 of the agreement, Republic to furnish remaining capacity data to County. | Landfill Franchise Agreement §7(b) | Republic to provide BOC "necessary data to confirm the remaining capacity of the Landfill as determined by both parties." Data to include methods and calculations used. |
| 16 | Other reports to be provided to County, when submitted to other agencies. | Landfill Franchise Agreement §7(c) | Public information and reports to state or federal agencies relative to operation of landfill to be provided to County. |
| 17 | All current and future state and federal laws must be complied with. | Landfill Franchise Agreement §11(a) | Codified at BCC 23.410(8) and (11). |
| 18 | Republic may only "sell, convey, transfer or assign the Landfill or any of its rights, interests, or obligations under [the franchise agreement]" with County's prior written approval. | Landfill Franchise Agreement §11(b) | |
| 19 | 90-day notice required prior to discontinuance of service. | BCC 23.410(9) | |
| 20 | **DEQ** permit required to operate landfill | ORS 459.205 | Term of permit not to exceed 10 years. ORS 459.245(d). |

| Landfill Rights and Obligations | | | |
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| | **Republic Right/Republic Obligation (A Republic "right" is a County "obligation" and vice versa unless another entity is noted)** | **Authority** | **Comment** |
| 21 | Cleanup of hazardous substance contaminating ground water | ORS 459.248 | |
| 22 | Closure of landfill site. | ORS 459.268, OAR 340-0940100 | |
| 23 | Groundwater monitoring | OAR 340-094-0080 | |
| 24 | Emissions Standards | OAR 340-236-0500 | |
| 25 | Franchise Agreement may only be reopened with "the mutual approval of both the Board and [Republic]." | BCC 23.310(2) | |
| 26 | Republic and County will "work together" to monitor the flow of C&D materials and work toward establishing a transfer facility. | Landfill Franchise Agreement §2(g) | |
| 27 | "Negotiate in good faith to establish a program to promote selfhaulers and cease activities by illegal dumpers." | Landfill Franchise Agreement §2(e) | Parties to establish a Dump-Stoppers program by July 1, 2021 with a joint report to BOC three years thereafter. |
| 28 | If landfill expansion occurs prior to 2024, host fee will be adjusted to reflect additional landfill space. | Landfill Franchise Agreement §4(c)(i) | |
| 29 | If landfill expansion occurs 2025 or later, host fee and franchise fee will be adjusted. | Landfill Franchise Agreement §4(c)(ii) | |
| 30 | Inspections of landfill by County authorized. | Landfill Franchise Agreement §7(d) | County has the right to inspect landfill for "determining [Republic's] compliance" with the franchise agreement. |

| Landfill Rights and Obligations | | | |
|---|---|---|---|
| | **Republic Right/Republic Obligation (A Republic "right" is a County "obligation" and vice versa unless another entity is noted)** | **Authority** | **Comment** |
| 31 | County may prevent interruption of service. | BCC 23.415 | If failure or interruption of service would create an "immediate and serious health hazard or serious public nuisance," the BOC, with 24-hours' written notice to Republic, authorize county personnel or other persons to temporarily provide the service. |

From Republic Services 9/30/22

**(a) The landfill franchise:** Valley Landfills, Inc., operates Coffin Butte Landfill under a Landfill Franchise and Host Agreement ("Landfill Franchise Agreement") negotiated with Benton County in accordance with Benton County Code Chapter 23 ("BCC Chapter 23"). The most recent Landfill Franchise Agreement became effective on January 1, 2021 and extends until December 31, 2040. A franchise agreement is a contract, meaning that it cannot be amended except in writing executed by both parties. Among many other provisions, the Landfill Franchise Agreement specifies that Benton County will receive franchise and host fee payments from Valley Landfills, Inc.

| | Collection Rights and Obligations | | | |
|---|---|---|---|---|
| | **Republic Right/Republic Obligation (A Republic "right" is a County "obligation" and vice versa unless another entity is noted)** | **Responsible Party** | **Authority** | **Comment** |
| 1 | Republic to provide solid waste collection and recycling services in the service areas specified in its application | Republic | Solid Waste Collection Franchise Agreement ¶1 | Service area is all of the unincorporated area of Benton County. See Map attached to application. |
| 2 | Republic to pay fee of 5% of gross cash receipts from collection service provided in service area | Republic | Board Order D2022044 ¶3 | |
| 3 | Republic to comply with applicable provisions of BCC Ch. 23 (Current provisions detailed in this document) | Republic | Board Order D2022044 ¶4 | |
| 4 | Annual submission of service/days of week map | Republic | Board Order D2022044 ¶8 | |
| 5 | Coordinate recycling efforts with solid waste collection efforts to enhance recycling/recovery and meet state goals. | Republic | Board Order D2022044 ¶9 | State goals found at ORS 459A.010. |
| 6 | Make reasonable effort to resolve customer complaints on service, record written complaints and their disposition. | Republic | Solid Waste Collection Franchise App. §5.E. | |
| 7 | Provide solid waste collection at least weekly. | Republic | BCC 23.410(1) | 23.410 provide some exceptions to this baseline requirement. |
| 8 | Provide and maintain adequate equipment to handle and dispose of or resource recover solid waste. | Republic | BCC 23.410(2) | |

| | Collection Rights and Obligations | | | |
|---|---|---|---|---|
| | **Republic Right/Republic Obligation (A Republic "right" is a County "obligation" and vice versa unless another entity is noted)** | **Responsible Party** | **Authority** | **Comment** |
| 9 | Set rate structure. | Republic, County | BCC 23.505, 23.510 | Republic proposes rates, county reviews and approves. Rate adjustments to accommodate Refuse Rate Index adjustments may not need BOC approval if contemplated in prior BOC order. |
| 10 | If County wants to consider a new solid waste service, Republic will provide written proposal within reasonable period of time, including proposed methods and costs for the service. | Republic, County | Solid Waste Collection Franchise Agreement ¶7 | Also found in Order, paragraph 7. |
| 11 | Agreement to be amended by July 1, 2024 "to include same or similar terms as the forthcoming City of Corvallis collection franchise agreement, including, but not limited to, the same termination date, as well as concepts from the consensus-seeking process." | Republic, County | Solid Waste Collection Franchise Agreement ¶2 | This provision is also found in the BOC Order granting the franchise at section 2. |

| | Collection Rights and Obligations | | | |
|---|---|---|---|---|
| | **Republic Right/Republic Obligation (A Republic "right" is a County "obligation" and vice versa unless another entity is noted)** | **Responsible Party** | **Authority** | **Comment** |
| 12 | County may prevent interruption of service. | County | BCC 23.415 | If failure or interruption of service would create an "immediate and serious health hazard or serious public nuisance," the BOC, with 24-hours' written notice to Republic, authorize county personnel or other persons to temporarily provide the service. |
| 13 | County to protect franchise rights and interests granted Republic to achieve compliance with BCC Ch. 23. | County | Solid Waste Collection Franchise Agreement ¶5 | |

From Republic Services 9/30/22

**(a)** **The hauling franchise:** Corvallis Disposal Co. dba Allied Waste Services of Corvallis (also dba Republic Services of Corvallis) ("Republic Services") provides solid-waste collection under separate franchise agreements with both Benton County and the City of Corvallis. In June of 2022, Benton County renewed Republic Services' Solid Waste Collection Franchise ("Benton County Collection Franchise") for ten years. On or before July 1, 2024, Benton County may seek to negotiate the amendment of certain terms of the Benton County Collection Franchise when Republic and the City of Corvallis negotiate the renewal of the City of Corvallis Collection Franchise.

## 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 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 may find compliance with either criterion by establishing compliance is feasible, subject to compliance with specific condition(s) of approval. If the applicant demonstrates feasibility of compliance, the County then has authority and obligation to impose conditions of approval to ensure compliance with these criteria. (For example, if limited hours of operation are necessary to establish that a use will not seriously interfere with uses on adjacent property, the decision maker may find that compliance with the criteria is feasible, subject to a condition that requires that the hours of operation be limited to a specified time period.) The decision maker 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 process only over the proposed expansion as requested in the CUP 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.

***Confirm: Does the above replace the following?***

From Republic Services 9/30/22

**(b) What legally can and cannot be conditions of any land use approvals:**

- 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.

- 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 jurisdiction. 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.

- 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. It authorizes negotiation of franchise agreements for collection and disposal of solid waste. 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.

***From County Counsel Vance Croney***

**Question: Can Benton County prohibit solid waste generated outside the county from being deposited at Coffin Butte landfill?**
**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.

In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources,* 504 U.S. 353, 112 S.Ct. 2019 (1992), Michigan enacted legislation which prohibited private landfill operators from accepting solid waste originating outside the county where the facility was located, unless otherwise authorized by the county's waste management plan. *Id.* at 353. In its challenge to that law, the landfill operator argued "that requiring a private landfill operator to limit its business

to the acceptance of local waste constituted impermissible discrimination against interstate commerce." *Id.* at 357.

As part of its analysis, the Supreme Court reexamined its holding in *Dean Milk Co. v. Madison*, 340 U.S. 349, 71 S.Ct. 295 (1951) in which the petitioner challenged a Wisconsin city ordinance "that made it unlawful to sell any milk as unpasteurized unless it had been processed at a plant 'within a radius of five miles from the central square of Madison.'" *Dean*, at 350. That local ban, as it applied to adjacent Illinois dairy producers, was found to be unconstitutional under the Commerce Clause. *Id.* But, significantly, the Court also emphasized the intrastate unconstitutionality of the ban:

> The fact that the ordinance also discriminated against all Wisconsin producers whose facilities were more than five miles from the center of the city did not mitigate its burden on interstate commerce. As we noted, it was 'immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce. *Dean* at 345, n. 4.

*Fort Gratiot*, 504 U.S. at 362-63.

Relying on *Dean* and *Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531 (1978), the Court found Michigan's ban "unambiguously discriminate[s] against interstate commerce and [is] appropriately characterized as protectionist measures that cannot withstand scrutiny under the Commerce Clause." *Fort Gratiot*, 504 U.S. at 367-68.

Pursuant to the holding in *Fort Gratiot*, and the precedent cited by the U.S. Supreme Court, Benton County may not prohibit a private landfill operator from accepting solid waste from outside Benton County.

# Topic Areas Benton County Can or Cannot Regulate
## -- Summary Table –

*Draft 11/15/2022; Greg Verret, Benton Co. Community Development*

| *Topic Area* | *Primary Jurisdiction* | *County Allowed to Regulate?* | *Notes* |
|---|---|---|---|
| Wetlands | Department of State Lands | Yes, if the County has identified significant wetlands at the site in a wetland inventory adopted through the Statewide Planning Goal 5 procedure. | No significant wetlands are identified in the vicinty of the landfill on the County's adopted inventory. |
| Groundwater quality | DEQ | No [needs vetting] | County can regulate the impact of one land use on another. |
| Groundwater quantity | OWRD | No. Statute precludes. | County can regulate the impact of one land use on another. |
| Noise | DEQ | Yes. DEQ has adopted noise standards but does not enforce. County may apply (only) those standards and enforce. | |
| Odors | DEQ | ??? | |
| Methane emissions | | | |
| Wildlife | | | |
| Stormwater runoff | | | |
| Point-source discharge to surface waters | | | |
| | | | |

# IV. Workgroup Recommendations

## SECTION A: Develop Common Understandings

### 1) A chronological history of key Coffin Butte Landfill topics

### E) Reporting requirements

| # | Authority | Reporting Requirement |
|---|---|---|
| 1 | Landfill Franchise Agreement: | Operational Reports |
| 2 | | Capacity Reports |
| 3 | | Other Reports: copies relative to the operation of the landfill (Benton County & Valley Landfills, Inc., 2020) |
| 4 | OAR Chapter 340, Divison 94: "(13) Records" (Oregon Secretary of State, 2022) | (A) Daily listing by load of the volume or weight of solid waste received; |
| 5 | | (B) Monthly and quarterly accumulations of amounts of daily waste received." |
| 6 | DEQ Solid Waste Permit Reporting Requirements (GeoLogic Associates, 2021) | Operating Record |
| 7 | | Daily amount of each waste type received and approved alternative daily cover |
| 8 | | If applicable, every quarter, record the amount of each material recovered for recycling or other beneficial purpose. |
| 9 | | Solid Waste Disposal Report/Fee Calculation form. |
| 10 | | Wasteshed Reporting (as part of the Opportunity to Recycle Reporting) |
| 11 | | Retain copies of all records and reports for 10 years after their creation. |
| 12 | | Update all records to reflect current conditions at the facility |
| 13 | | Annual Environmental Monitoring Report (AEMR) |
| 14 | | Statement of compliance |
| 15 | | Annual leachate treatment report |
| 16 | | Split sampling submittal |
| 17 | DEQ NPDES Permit (Geo-Logic Associates, 2021) | Quality Assurance and Quality Control (QA/QC) |
| 18 | | Monthly monitoring results |
| 19 | Federal Fish and Wildlife Depredation Permit (Geo-Logic Associates, 2021) | Annual Report |

| # | Authority | Reporting Requirement |
|---|---|---|
| # 20 | Oregon Title V Operating Permit for Site Air Emissions (Geo-Logic Associates, 2021) | Excess emissions reporting |
| 21 | Oregon Title V Operating Permit for Site Air Emissions (Geo-Logic Associates, 2021) | Permit deviations reporting |
| 22 | | Semi-annual and annual reports |
| 23 | | Monthly reports |
| | | |

From Republic Services 9/30/22

a) **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.

i. **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.

ii. **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.

iii. **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.

iv. **City of Corvallis wastewater disposal permit:** Subject to an annual inspection as well as weekly monitoring and monthly reporting to the City.

v. **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.

# IV. Workgroup Recommendations

## SECTION A: Develop Common Understandings

1. ***A Summary of the County's current rights and obligations to Republic Services, and vice versa, surrounding:***
    ***4. Interpretation and Deference***

*Memo prepared by Vance Croney, Benton County Counsel (10/27/2022). Reviewed and concurred with by Jeff Condit and Holly Doyle, attorneys for Republic Services (11/2/2022).*

To: Legal Issues Subcommittee
From: Vance M. Croney, Benton County Counsel and Jeffrey G. Condit, Attorney at Law
Date: Oct. 28, 2022
Question: How are ambiguous terms interpreted and what deference is given to that interpretation?
Answer: The rules of statutory construction describe how ambiguous terms are to be interpreted and then, when an interpretation is made, as long as it is plausible, LUBA's standard of review is highly deferential to that interpretation.

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An ambiguous term is one that is typically undefined by statute or code. *See State v. Arnold*, 302 Or. App. 765, 772 (2020). If the term is then capable of two or more plausibly reasonable explanations, it is ambiguous. *Hoffman Const. Co. of Alaska v. Fred S. James & Co. of Oregon*, 313 Or 464, 470-71 (1992). When confronted with an ambiguous term, the decision-making body engages in a form of statutory construction.

*PGE v. Bureau of Labor and Indus.*, 317 Or 606, 611 (1993) and *State v. Gaines*, 346 Or 160 (2009) establish a framework for interpreting statutes based upon text, context, and legislative history. This same framework also applies to the interpretation of local code provisions. *Church v. Grant County*, 187 Or App 518, 527 n.4 (2003) (citing *Lincoln Loan Co. v. City of Portland*, 317 Or 192, 199 (1993)).

The text is the best evidence of intent: If a term in 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 then reaches an interpretation of the ambiguous term, which then gives rise to the next question: How much deference is given to the governing body's interpretation?

The Oregon legislature and the state Supreme Court have both answered this question. ORS 197.829 reads:

(1) The Land Use Board of Appeals 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.

ORS 197.829 is framed within LUBA's jurisdiction because appeal of land use decisions are made to LUBA.

The Oregon Supreme Court applied and explained the breadth of this statute when it reviewed the City of Medford's interpretation of its development code: "[W]hen a governing body is responsible for enacting an ordinance, it may be assumed to have a better understanding than LUBA or the courts of its intended meaning. * * * [T]hat assumption is equally relevant to * * * the governing body's intention." *Siporen v. City of Medford*, 349 Or. 247, 258 (2010).

The Court found when a local government interprets its own development code, it is "entitled to the deference described in ORS 197.829(1)." *Id.* And the extent of that deference is substantial: [W]hen a local government plausibly interprets its own land use regulations by considering and then choosing between or harmonizing conflicting provisions, that interpretation must be affirmed, as held in *Clark v. Jackson County*, 313 Or. 508 (1992) and provided in ORS 197.829(1)(a), unless the interpretation is inconsistent with *all* of the "express language" that is relevant to the interpretation, or inconsistent with the purposes or policies underpinning the regulations. (emphasis in original)
*Id.* at 259.

When LUBA assesses whether an interpretation is "plausible," the standard of review is "highly deferential" to the governing body and the "existence of a stronger or more logical interpretation does not render a weaker or less logical interpretation 'implausible.'" *Mark Latham Excavation, Inc. v. Deschutes County*, 250 Or. App. 543, 555 (2012), quoted in *Crowley v. City of Hood River*, 308 Or. App. 44, 52 (2020).

Thus, as long as the Benton County Board of Commissioners' interpretation of its development code is plausible, LUBA must defer to that interpretation. It should be noted, 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.

In addition, the exercise of interpreting a code or statutory provision only applies if the term is ambiguous; deference can't be use to amend a code in the guise of an interpretation. *Central Eastside Indus. Council v. City of Portland*, 74 Or LUBA 221 (2016).

# IV. Workgroup Recommendations
## SECTION A: Develop Common Understandings

### 3) Other Entity Rights and Obligations

A Summary of the rights and obligations of other entities surrounding landfills, hauling, and sustainability initiatives, etc. The following table list questions for various federal, state, tribal, and local entities regarding rights and obligations. The table includes preliminary research relating to entity roles and authority. Each entity will be contacted and asked to respond to these questions, to help provide more information.

| | Other Entity Rights and Obligations | | | | | |
|---|---|---|---|---|---|---|
| | **Agency** | **Question** | **Right or Obligation** | **Responsible Party** | **Authority** | **Comment** |
| 1 | | What are DEQ's rights and obligations regarding groundwater associated with landfills? | 459.248 Cleanup of hazardous substance contaminating ground water. In addition to any other authority granted by law, if the Department of Environmental Quality finds that ground water is contaminated with a hazardous substance originating at a land disposal site, the department may require cleanup of the hazardous substance pursuant to authority under ORS 465.200 to 465.545. As used in this section, "hazardous substance" has the meaning given that term in ORS 465.200. [1993 c.526 §3] (State of Oregon, 2021) | Republic Services, Oregon DEQ | ORS 459.248 | |

| | | | | | | |
|---|---|---|---|---|---|---|
| 2 | | | (6) Additional Requirements to Protect or to Monitor Potential Threats to Groundwater. When a person applies to construct a new or expanded landfill cell at a municipal solid waste landfill, the Department shall evaluate the need to provide protection to groundwater in addition to the requirements of 40 CFR, Part 258, Subpart D. The Department shall also evaluate whether the specific conditions at the site require an enhanced ability to monitor potential threats to groundwater in addition to the requirements in 40 CFR, Part 258, Subpart E. The evaluation shall be based on site-specific data, including but not limited to location, geography, hydrogeology and size of the site. To assist in the Department's evaluation, the applicant shall provide necessary relevant data. The Department may require a secondary leachate collection system, and/or leak detection system, or other design or technology providing equivalent protection to the environment if the Department determines that:<br>(a) There is significant potential for adverse impact to groundwater from the proposed cell; or | Republic Services, Oregon DEQ | OAR 340-094-0060 | |

| | | | | | | |
|---|---|---|---|---|---|---|
| | | | (b) Additional measures are necessary to provide adequate monitoring of potential threats to the groundwater. | | | |

| | Other Entity Rights and Obligations | | | | | |
|---|---|---|---|---|---|---|
| | Agency | Question | Right or Obligation | Responsible Party | Authority | Comment |
| 3 | | | Groundwater Monitoring and Corrective Action<br><br>If a municipal solid waste landfill is subject to 40 CFR, Part 258 as provided in 40 CFR, §258.1, the owner or operator shall comply with groundwater monitoring and corrective action requirements in 40 CFR, Part 258, Subpart E. Consistent with those requirements, all municipal solid waste landfill owners and operators shall also comply with this rule: (See rule for more detail) | Republic Services, Oregon DEQ | 340-094-0080 | |

| | Other Entity Rights and Obligations | | | | | |
|---|---|---|---|---|---|---|
| | Agency | Question | Right or Obligation | Responsible Party | Authority | Comment |
| 4 | | | (4) Sensitive Hydrogeological Environments. In addition to the requirements of 40 CFR, Part 258, Subpart B, no person shall establish or expand a landfill in a gravel pit excavated into or above a water table aquifer or other sensitive or sole source aquifer, or in a wellhead protection area, where the Department has determined that:<br><br>(a) Groundwater must be protected from pollution because it has existing or potential beneficial uses (OAR 340040-0020); and<br><br>(b) Existing natural protection is insufficient or inadequate to minimize the risk of polluting groundwater. | Republic Services, Oregon DEQ | 340-094-0030 | |

| | Other Entity Rights and Obligations | | | | | |
|---|---|---|---|---|---|---|
| | Agency | Question | Right or Obligation | Responsible Party | Authority | Comment |
| 6 | | What are DEQ's rights and obligations regarding leachate associated with landfills? | (3) Leachate. In addition to the requirements of 40 CFR, Part 258, Subpart D, any person designing or constructing a landfill shall ensure that leachate production is minimized. Where required by the Department, leachate shall be collected and treated or otherwise controlled in a manner approved by the Department. Leachate storage and treatment impoundments shall be located, designed, constructed and monitored, at a minimum, to the same standards of environmental protection as municipal solid waste landfills. | Republic Services, Oregon DEQ | OAR 340-094-0060 | |
| 7 | | What are DEQ's rights and obligations regarding noise associated with landfills? | 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. | | OAR 340-035-0030, OAR 340-035-0110 | |

| | Other Entity Rights and Obligations | | | | | |
|---|---|---|---|---|---|---|
| | **Agency** | **Question** | **Right or Obligation** | **Responsible Party** | **Authority** | **Comment** |
| 8 | | What are DEQ's rights and obligations regarding odors associated with landfills? | (4) Gas Control. No person shall establish, expand or modify a landfill such that:<br><br>(a) The concentration of methane (CH4) gas at the landfill exceeds 25 percent of its lower explosive limit in facility structures (excluding gas control or gas recovery system components) or its lower explosive limit at the property boundary;<br><br>(b) Malodorous decomposition gases become a public nuisance. | Republic Services, Oregon DEQ | OAR 340-094-0060 | |

| | | | | | | |
|---|---|---|---|---|---|---|
| 10 | | What fugitive methane emissions standards and monitoring is required by the landfill? | ii. Air Quality Permit<br>(1) All sources subject to this division must have an Oregon Title V Operating Permit that assures compliance by the source with all applicable requirements in effect as of the date of permit issuance. (Oregon Secretary of State, n.d.-a)<br><br>340-239-0100<br>Landfills with Greater Than or Equal to 200,000 Tons of Waste-in-Place<br><br>(4) The owner or operator of a landfill having greater than or equal to 200,000 tons of waste-in-place must submit an annual Waste-in-Place Report to DEQ pursuant to OAR 340-239-0700(3)(e) and an annual Methane Generation Rate Report, pursuant to OAR 340-2390700(3)(f), until the owner or operator submits a Closure Notification pursuant to OAR 340-239-0700(3)(a). The initial Waste-in-Place Report and Methane Generation Rate Report submitted by a landfill pursuant to sections (1), (2) or (3) shall satisfy this requirement for the initial year it applies to a landfill.<br><br>340-239-0800 | Republic Services, Oregon DEQ | 340-218-0010<br><br>340-239 | |

| | Other Entity Rights and Obligations | | | | | |
|---|---|---|---|---|---|---|
| | Agency | Question | Right or Obligation | Responsible Party | Authority | Comment |
| | | | Test Methods and Procedures<br><br>When required as provided in OAR 340239-0100 through 340-239-0700, the owner or operator of a landfill must comply with the test methods and procedures for monitoring and measurements in this rule. (Oregon Secretary of State, n.d.-b) | | | |

| | Other Entity Rights and Obligations | | | | | |
|---|---|---|---|---|---|---|
| | **Agency** | **Question** | **Right or Obligation** | **Responsible Party** | **Authority** | **Comment** |
| 12 | | Can or should the County consider DEQ permitting topics when assessing the local land use application criteria? | 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. | | | |
| 13 | Oregon Department of Fish and Wildlife (ODFW) | a. What restrictions does the landfill have regarding wildlife? | . (3) Endangered Species. In addition to the requirements of 40 CFR, Part 258, Subpart B, no person shall establish, expand or modify a landfill in a manner that will cause or contribute to the actual or attempted: (a) Harassing, | Republic Services, Oregon | OAR 340-094-0030 | |

| | Other Entity Rights and Obligations | | | | | |
|---|---|---|---|---|---|---|
| | Agency | Question | Right or Obligation | Responsible Party | Authority | Comment |
| 14 | | | harming, pursuing, hunting, wounding, killing, trapping, capturing or collecting of any endangered or threatened species of plants, fish, or wildlife; (b) Direct or indirect alteration of critical habitat which appreciably diminishes the likelihood of the survival and recovery of endangered or threatened species using that habitat. (Oregon Secretary of State, 2022) | | | |
| 15 | Oregon Department of State Lands (DSL) | What are the rights and obligations both retained and delegated by DSL, which are associated with landfills, hauling, and materials management? | | | | |

| | Other Entity Rights and Obligations | | | | | |
|---|---|---|---|---|---|---|
| | **Agency** | **Question** | **Right or Obligation** | **Responsible Party** | **Authority** | **Comment** |
| 16 | Water Resource Commission | What are the rights and obligations both retained and delegated by Water Resource Commission, which are associated with landfills, hauling, and materials management? | | | | |
| 17 | Oregon Department of Transportation (ODOT) | What are the rights and obligations both retained and delegated by ODOT, which are associated with landfills, hauling, and materials management? | | | | |

| | Other Entity Rights and Obligations | | | | | |
|---|---|---|---|---|---|---|
| | **Agency** | **Question** | **Right or Obligation** | **Responsible Party** | **Authority** | **Comment** |
| 19 | Metro | What are the rights and obligations associated with landfills, hauling, and materials management? | a. Financial Reporting | Republic Services, Metro | Designated Facility Agreement, Metro Contract No. 936520 (Metro, 2019) | |
| 20 | City of Corvallis | What are the rights and obligations both retained and delegated by Corvallis, which are associated with landfills, hauling, and materials management? | a. Stormwater Discharge Reporting | Republic services, City of Corvallis | City of Corvallis Industrial Wastewater Discharge Permit No. 5 | |
| 21 | | | Solid Waste Collection Franchise, negotiations with the hauler heavily influence Benton County's agreement. | City of Corvallis, Republic Services | City of Corvallis Ordinance No. 2015-13 | |

| | Other Entity Rights and Obligations | | | | | |
|---|---|---|---|---|---|---|
| | **Agency** | **Question** | **Right or Obligation** | **Responsible Party** | **Authority** | **Comment** |
| 22 | City of Salem | What are the rights and obligations both retained and delegated by Salem, associated with landfills, hauling, and materials management? | a. Stormwater Discharge Reporting | Republic Services, City of Salem | City of Salem Wastewater Discharge Permit No. WD7577 | |



From Republic Services 9/30/22

3. **Summary of Rights and Obligations of Other Entities:**

   **(a) Federal:** Republic will provide input on this topic in the "Other Entity Rights and Obligations" document circulated on September 26, 2022.

   **(b) Tribal:** Republic will provide input on this topic in the "Other Entity Rights and Obligations" document circulated on September 26, 2022.

   **(c) State:**

   i. **Is DEQ prohibited from permitting another landfill west of the Cascades?** No.

ii. **What does the "regional landfill" designation mean?** The State of Oregon implemented and began permitting "regional landfills" in the 1970s, as a more environmentally reasonable approach to solid waste management and disposal. Coffin Butte was designated a regional landfill in 1974 under a cooperative effort between Benton, Linn, Marion, Yamhill and Polk Counties. The plan noted that "individual communities will be unable to effectively solve the economic, social, scientific and technical problems of solid waste disposal" and that a "regional approach to solid waste disposal will be necessary" for the area's economy. Today, these counties all depend upon Coffin Butte for responsible waste disposal through various contracts, requirements or other enforceable arrangements, which cannot be wished away.

***From County Counsel Vance Croney***

Oregon Revised Statute (ORS) 459.005(23) defines a Regional Disposal Site as follows:

> "Regional disposal site" means a disposal site that receives, or a proposed disposal site that is designed to receive more than 75,000 tons of solid waste a year from outside the immediate service area in which the disposal site is located. As used in this subsection, "immediate service area" means the county boundary of all counties except a county that is within the boundary of the metropolitan service district. For a county within the metropolitan service district, "immediate service area" means the metropolitan service district boundary.

The immediate service area of Coffin Butte is Benton County. To constitute a regional disposal site, Coffin Butte must have been designed to "receive more than 75,000 tons of solid waste a year" from outside Benton County.
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 statutory definition of regional disposal site was amended to remove the reference to commercial haulers and has remained substantively unchanged since that time.

The 1994 annual report submitted by Benton County's Environmental Health Department showed solid waste received at Coffin Butte from outside Benton County in 1993 totaled 250,655 tons. In every year thereafter, Coffin Butte has received solid waste in excess of 75,000 tons from outside Benton County.

While the statute uses the term "designed to receive" rather than "receives," Coffin Butte has received more than 75,000 tons of out-of-county solid waste per year and the facility is clearly designed to accommodate those volumes. Its

annual out-of-county solid waste volume exceeds the statutory threshold for meeting the definition of a regional disposal site.

Before the Oregon legislature defined regional disposal sites, Benton County established Coffin Butte as a regional disposal site through the land use process. The Board order dated May 15, 1974, declared "that the proposed Coffin Butte landfill be and is hereby approved as a regional sanitary landfill site as recommended by the Chemeketa Regional Solid Waste Program Report." The staff report accompanying that order identifies Polk, Yamhill, Marion and Linn Counties as being served by the regional sanitary landfill. Benton County Comprehensive Plan Policy 6.5.8 identifies Coffin Butte as a "Regional Sanitary Landfill."

The Chemeketa Report designated Coffin Butte as a regional landfill. Report, pg. 24. Pursuant to the Chemeketa Report, the region to be served by Coffin Butte included Polk, Yamhill, Marion, Linn and Benton Counties.
In 1988, by Board Order, Benton County included Tillamook County among the counties to be served by Coffin Butte.
In 1993-94, the Board authorized the inclusion of Lincoln County in the region.

d) **Local government** Republic will provide input on this topic in the "Other Entity Rights and Obligations" document circulated on September 26, 2022.

e) **Summary of the step-by-step process in ORS chapter 459 and associated timing for the cross-jurisdictional approvals of landfill applications…** As previously noted, a landfill expansion requires amendment to three existing environmental permits from Oregon DEQ. But due to statutory state-agency coordination requirements, DEQ will not review or act on the environmental permit modifications until the County has granted land use approval. Valley Landfills cannot begin the DEQ permitting process until it has secured a CUP from the County.

f) **What topics are within whose authority?** Please refer to previous responses.

g) **Whether County can or should consider the topics it does not have permitting authority over when assessing the criteria outlined in Code section 53.215.** Please see response to Section 2(b).

## *Charge B: Land Use Review Tasks*

1. ***Create a common understanding document outlining which Development Code criteria are applicable to the review of a conditional use application for landfill expansion by reviewing:***
    1. ***53.215 (Criteria)***
    2. ***77.305 (Conditional Uses)***
    3. ***77.310 (Review)***
    4. ***77.405 (DEQ)***
2. ***Review Chapters 50 and 51 for context, and then prepare a conceptual list of any other Development Code criteria the WORKGROUP recommends be applicable.***
3. ***Developing <u>recommended guidelines for interpreting any ambiguous provisions</u> recognizing current statutes, regulations, case law, and County precedent, etc. In doing so, refer to Comprehensive Plan for policy guidance regarding interpretation of any ambiguous Development Code provisions (see, BCC 50.015,) and Review the Planning Commission comments made during its last review of Republic Services' CUP application for context. Examples for consideration include:***
    1. ***The phrase, "Other information as required by the Planning Official" 77.310(e)***
    2. ***The terms found in Section 53.215, e.g.***
    3. ***"seriously interfere"***
    4. ***"character of the area"***
    5. ***"purpose of the zone"***
    6. ***"undue burden"***
    7. ***"any additional criteria which may be required for the specific use by this code.***
    8. ***Other: _____***
4. ***Develop protocols for the timely and broad distribution of CUP-related information to the public, other governmental entities, and internal committees, groups, and divisions.***

## BACKGROUND

From Benton County Staff Memo 10/5/22

***How does a land use decision get made in Benton County?***

1. Application submitted:
    a. form;
    b. fee;
    c. documentation to support a demonstration of compliance with the applicable criteria in the Development Code (and, in some instances, in state law).
2. 150-day clock[1] starts. County must reach a final decision within 150 days after county planning official deems the application complete.
3. County must determine whether application is complete within 30 days. If Planning Official determines application is "incomplete" (i.e., missing any of the documentation required by "c." above) must notify applicant within 30 days of application submittal.
    a. Once application is complete or applicant directs application to proceed without the missing information, 150-day clock starts.
4. Notification is mailed to nearby property owners and other interested parties identifying a public comment period. Public notice in newspaper.
5. Staff researches and prepares a report evaluating the proposal relative to the applicable criteria.
6. Depending on type of application, Planning Official either issues a decision or recommendation to Planning Commission.
    a. If Planning Official issues a decision, notice of decision is mailed as in #4.
    b. 14-day appeal period; if no appeal, decision is final.
7. If appealed, or for land use applications that go directly to the Planning Commission, a Planning Commission hearing is scheduled. Notice of the hearing is mailed as in #4, above.
8. Planning Commission receives staff presentation, applicant presentation, public testimony, applicant's rebuttal.
    a. Planning Commission may ask questions of any testifiers.
    b. Planning Commission may (and if requested by any participant must) keep record open for additional written testimony or may continue hearing for additional oral testimony.
    c. Planning Commission deliberates, votes to approve or deny the application.

[1] Discussed further in separate section below.

9. Notice of Planning Commission decision is sent to, at minimum, all participants. Practice has been to mail as in #4, above.
    a. 14-day appeal period.
    b. If no appeal, decision is final decision
10. If appealed, Board of Commissioners hearing is scheduled. Process is the same as for Planning Commission hearing (#9, above)
11. Board of Commissioners decision is final local decision, and must be issued within 150-days after application is deemed complete.
12. Notice of Board of Commissioners decision mailed to, at minimum, all participants.
    a. 21-day appeal period
    b. Appeal is to the Oregon Land Use Board of Appeals and from there to the Oregon Court of Appeals and then to the Oregon Supreme Court. Federal constitutional issues (such as regulatory takings of property without just compensation) may be appealed to the U.S. Supreme Court.

***Decision-making Process for Planning Commission or Board of Commissioners***

A) Criteria applicable to the land use proposal are identified.
    - County criteria are all within the Benton County Development Code
    - Some instances where state rules or statute are directly applicable; examples:
        i. Exceptions to a statewide planning goal
        ii. Expansion of an urban growth boundary

B) Decision-makers consider available evidence in determining whether the proposed use complies with the applicable criteria. When the criteria are subjective, this analysis (either explicitly or implicitly) involves interpretation of what the criteria mean. Evidence and testimony can address the interpretation of the criteria as well as whether the proposal meets the criteria.
    - Staff research and analysis
    - Public testimony, including from other agencies
    - Members of the Planning Commission or Board of Commissioners are discouraged from doing their own research as that can lead to issues or perception of bias or ex parte contact.

C) A motion is made; deliberations (oral discussion of the matter) are held by the decision-making body, including reasons why the proposal does or does not comply with the applicable criteria, and a vote is taken. If the motion fails, another motion is made, and so on, until a motion approving or denying the application passes.

<u>From Republic Services Addendum 9/30/22</u>

**Overview of the Land Use Framework.** Under Oregon land use law, an application for a land use permit is considered "quasi-judicial" (as opposed to legislative) because the local government is judging whether an applicant has submitted sufficient evidence to demonstrate compliance with the applicable criteria. As part of the quasi-judicial process, an applicant is entitled to an impartial decision-maker, the ability to present and rebut evidence, and a written decision applying the adopted criteria to the facts subject to review by the Oregon Land Use Board of Appeals (LUBA). A local government may not apply criteria or policy choices outside the applicable code criteria. ORS 215.416(8)(a). An applicant is statutorily entitled to approval or denial of its application based upon the standards and criteria in effect at the time of the application (this requirement is called the "no changing-of-the-goalposts" rule). ORS 215.427(3). If the local government desires to change the applicable criteria, it must first go through the post-acknowledgement plan amendment (PAPA) process, which is subject to notice; review by the Land Conservation and Development Commission; compliance with the comprehensive plan and Statewide Land Use Planning Goals; and the public hearing and adoption process. Such amendments are applicable to applications after the date the new regulations become effective, but can't be retroactively applied to prior approvals or pending applications filed prior to the effective date of the amended regulations.

## INTERPRETING CODE PROVISIONS

From Benton County Staff Memo 10/5/22

Provisions that are mandated by state law must be interpreted consistent with state law and the case law that bears on that state law.

> Example: whether a property qualifies for a farm-related dwelling is spelled out in Oregon Administrative Rule (OAR).
> Example: the "conditional use" criteria for exclusive farm use zones are specified in ORS 215.296

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).
> Example: the provisions of the Landfill Site zone (Chapter 77).

From Republic Services Addendum 9/30/22

**Rules of Statutory Construction.** *PGE v. Bureau of Labor and Indus.*, 317 Or 606, 611, 859 P2d 1143 (1993) and *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009) establish a framework for interpreting statutes based upon text, context, and legislative history. This same framework also applies to the interpretation of local code provisions. *Church v. Grant County*, 187 Or App 518, 527 n.4, 69 P3d 759 (2003) (citing *Lincoln Loan Co. v. City of Portland*, 317 Or 192, 199, 855 P2d 151 (1993)).

The text is the best evidence of intent: If a term in 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 use 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.

From Benton County Staff Memo 10/5/22

***Role of a Recommendation from the Workgroup as to Interpretation of Terms***

1. The recommendation would not have the force of law unless it were to be adopted into the Benton County Development Code. That said, County staff and decision-making bodies would reference or draw upon such a recommendation.
2. The recommendation would provide the Planning Official with valuable information and perspective to consider in evaluating what makes a given application "complete."
    a. An application that does not have sufficient documentation/evidence for evaluation but is not deemed "incomplete" within the first 30 days means that decision-makers may have insufficient information to make the best decision and/or face time-pressure to comply with the 150-day clock.

b. Having adequate information for evaluating the extent, nature and potential impacts of a proposed use is key to the land use process serving the public's interests.

3. The recommendation, submitted as testimony during the public comment period of a land use application review, would be valuable to the Planning Commission and Board of Commissioners as they apply subjective criteria to a given application.
    a. The forethought and analysis that would go into such a recommendation is typically highly valued and appreciated by those decision-making bodies.
    b. Because of the time limits on land use review processes, it is not always possible to fully consider such questions of interpretation once an application is before the decision-making body.

Without such a recommendation, the County and the community risks a situation similar to what occurred with the last CUP review, in which the 150-day time limit constrains the ability of the community to have a thoughtful examination and discussion of all elements involved in a complex topic like this one.

From Republic Services Addendum 9/30/22

**Applicable Criteria.** As noted above, the applicable criteria are the criteria for approval of the proposed development at the time of the application and depend in part on the nature of the application. At a minimum, a landfill expansion would have to comply with the conditional use review criteria in Benton County Development Code (BCC) Chapter 77 (Landfill Site (LS)), as identified in the 2021 staff report. If the proposed expansion extends onto Forest Conservation-zoned property, the application would also have to comply with the conditional use criteria in BCC Chapter 60 (Forest Conservation (FC)).[2] Other criteria may also be implicated, depending on the nature of the application (e.g., if the application affects wetlands or county roads.)

***Subjective/Ambiguous Terms***
**Conditional Use Review:**

From Republic Services Addendum 9/30/22
**The Terms Found in BCC 53.215.** As noted above, all of the terms in BCC 53.215 have to be interpreted under the rules of statutory construction discussed above. The legislative and decisional history included on the Work Group website indicates that the purpose for

[2] A landfill is also a conditional use in the Forest Conservation zone.

creation of the Landfill Site zone was to recognize the existence of the landfill and to support its continued operation.

There are typically two types of allowed uses in a particular zone: uses permitted outright, subject to siting and occasionally design standards; and conditional uses, which are uses that tend to be higher-impact and are reviewed to ensure that any negative impacts can be mitigated. Accordingly, a landfill expansion by the County is approvable under criteria that focus on potential off-site impacts: The applicant is required to demonstrate that the expansion (1) does not "seriously interfere" with uses on adjacent property, with the character of the area, or with the purpose of the zone, and (2) does not impose an "undue burden" on public improvements or services available to the area. The decisional history posted on the Work Group website indicates that these criteria should be considered in the context of the existing operation—e.g., whether a proposed expansion creates impacts that exceed or are more significant than the impacts of the existing landfill operation.

> ***53.215 Criteria.*** *The decision to approve a conditional use permit shall be based on findings that:*
> *(1) 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;*
>
> From Benton County Staff Memo 10/5/22
>
> The term "seriously interfere" is crucial to the determination of whether a proposed conditional use can be approved, and it is a quite subjective term. The term is not defined in Benton County Code. These criteria are locally derived and thus this term is not defined by state law or case law. Over at least the past twenty years, "seriously interfere" has generally been interpreted as: does the proposed use make it difficult to continue uses on 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. "Seriously interfere" has been applied as meaning more than an inconvenience or irritation to neighboring property residents, but is a lesser threshold than rendering impossible the uses on adjacent property.
>
> Hypothetical examples: A building that obstructs a portion of the view from a neighboring residence typically is not, by itself, serious interference. A noise-generating use such as an auto-repair shop locating next to an established meditation retreat center could be considered as seriously interfering with the use on the adjacent

property if the noise could not be mitigated and would make it difficult to continue the land use on the neighboring property.

Note that staff recalls no instances in which the potential or perceived effect on property values was a primary element in the determination of whether a proposed use "seriously interferes."

In the findings adopted by the Planning Commission in the matter of the 2021 conditional use permit for expansion of Coffin Butte landfill (File No. LU-21-047; see attachment), the meaning of the term "seriously interfere" is not explicitly addressed. The Planning Commission identified a number of impacts to adjacent properties and the broader area and did not find it necessary to parse the term "seriously interfere" in order to reach a conclusion that the proposal did seriously interfere with uses on adjacent property, the character of the area and the purpose of the zone. Nonetheless, the Planning Commission's findings are useful to this charge topic in that they identify the types of concerns that are likely to be important in considering whether any future landfill-related conditional use permit application can be approved. A future application would be formally evaluated on its own merits, not in relation to the previous application, but the Planning Commission's findings provide information as to what applicants and decision-makers in the future would do well to consider.

From Republic Services Addendum 9/30/22

- "Seriously interfere." Starting with the common meaning of the text, "seriously interfere" means that some interference is allowable as long as it does not significantly interfere with surrounding uses. As noted above, the degree of impacts of the expansion has to be considered in the context of the existing landfill operation.
- "Character of the area." Same analysis as noted above—whether the proposed expansion will seriously interfere with the character of the area when compared to the existing operation.
- "Purpose of the zone." The purpose of the Landfill Site zone is to recognize and support the operation of the landfill. If land in other zones is included as part of an expansion, the purpose of those zones must considered, again in the context of the existing landfill operation and the fact that landfills are allowed as a conditional use in the zone.

*(2) The proposed use does not impose an undue burden on any public improvements, facilities, utilities, or services available to the area; and*

From Benton County Staff Memo 10/5/22

The term "undue burden" is not defined. In practice, it has been applied generally as follows. A burden on public infrastructure and service is clearly "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 of the added burden is to jeopardize the health, safety or welfare of other people. Burdens that have typically not been considered "undue" include those that can be mitigated through planned improvements (particularly in cases where road improvements will be funded by the applicant as a condition of approval); burdens that are incremental service additions consistent with that generated by other uses in the area; burdens that fall below an established threshold (such as road classification standards that are tied to traffic levels).

From Republic Services Addendum 9/30/22

"Undue burden." Again, this phrase recognizes that some additional burden on public facilities and services is allowed as part of an expansion as long as it is not "undue," and is again considered in the context of the burdens created by the existing operation.

*(3) The proposed use complies with any additional criteria which may be required for the specific use by this code.*

From Benton County Staff Memo 10/5/22

Additional criteria are those that, by their terms, apply to the land use or property in question. In the case of a landfill conditional use permit, the provisions of BCC 77.305 and 77.310 are additional criteria.

From Republic Services Addendum 9/30/22

"Any additional criteria which may be required for the specific use by this code." If the proposed expansion implicates other code provisions in effect at the time of application (see examples above), then those code provisions would apply. This is not a license to apply unadopted criteria that are not in the code at the time of application or to require information about a topic that is not relevant to compliance with an applicable criterion.

***Not cited in the charge but relevant:***

***53.220 Conditions of Approval.*** *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. On-site and off-site conditions may be imposed. An applicant may be required to post a bond or other guarantee pursuant to BCC 99.905 to 99.925 to ensure compliance with a condition of approval. Conditions may address, but are not limited to: [list of 12 topic areas]* Conditions of approval are limited to those that are necessary in order for the proposed use to comply with applicable criteria.

***Provisions in the Landfill Site Zone Regarding a Conditional Use Application:***

***77.305 Conditional Uses Approved by the Planning Commission.*** *Any proposal to expand the area approved for a landfill within the Landfill Site Zone is allowed by conditional use permit approved by the Planning Commission. The Benton County Environmental Health Division and the Solid Waste Advisory Council shall review and make recommendations through the Planning Official to the Planning Commission regarding the Site Development Plan Map and narrative. The Oregon Department of Environmental Quality shall be given an opportunity to review and comment on any proposal which may affect this site. [Ord 26I, Ord 90-0069]*

From Benton County Staff Memo 10/5/22

This section directs the Solid Waste Advisory Council (SWAC) to review and make recommendations; however, the code does not specify what criteria or considerations that recommendation should be based on. There are several options for how SWAC could develop its recommendation. One option is that SWAC could review the Site Development Plan Map and narrative relative to the conditional use criteria in BCC 53.215, the same as the Planning Commission would do. A second option would be to review the site plan and narrative relative to BCC 77.310; in other words, confirming that the topic areas in 77.310 are adequately described. A third option is to consider the site plan and narrative from the perspective of meeting the County's objectives related to solid waste management, as articulated in Benton County Code Chapter 23 (Solid Waste Management). This third option is staff's recommendation. Option 1 would put SWAC into the realm of the Planning Commission, which is the body with land use expertise and tasked with considering the BCC 53.215 criteria, when SWAC's expertise is on questions of solid waste management. Option 2 limits SWAC's role and fails to benefit the County by SWAC's expertise. Option 3 is consistent with SWAC's overall role as articulated in its bylaws.

The workgroup may wish to provide a recommendation on the general purpose of SWAC's review of a conditional use permit and may also wish to recommend more specific questions or considerations for SWAC in such reviews. In the case of LU-21-047, staff provided SWAC with suggested questions to consider in their review of the proposal, emphasizing that SWAC was free to use or not use the questions to structure their review. Those questions were:

1. Is the proposed expansion consistent with long-term plans for the landfill site?
2. Is the proposal consistent with principles of responsible solid waste management?
3. What (solid waste management) benefits do you see to the proposed expansion?
4. What potential (solid waste management) negative effects do you see? Are there ways to minimize or mitigate those effects, or do you think the proposal should be rejected?

***77.310 Conditional Use Review.***

*(1) The applicant for a conditional use permit shall provide a narrative which describes:*
*(a) Adjacent land use and impacts upon adjacent uses;*
*(b) Future use of site as reclaimed, and impacts of that reclamation on adjacent uses;*
*(c) Provisions for screening of the site from public roads and adjacent property;*
*(d) Egress and ingress; and*
*(e) Other information as required by the Planning Official.*

*(2) A site plan map shall accompany a conditional use permit application. The map shall contain at least a scale, north arrow, assessor map numbers, location of existing landfill, access, proposed alteration, leachate treatment or monitoring areas surface water systems, and existing and proposed screening (location and types of materials). A statement shall be placed on the map that the site plan map and narrative together are considered as the Site Development Plan. A signature block shall be included for the date the approval is given and the signature of the Planning Official indicating approval.*

*(3) A conditional use permit application shall contain a reclamation plan describing present efforts and future reclamation plans related to the site.*

*(4) The following environmental and operational considerations shall be reviewed prior to changes in the documents referenced above:*
*(a) Geology;*
*(b) Groundwater and surface water;*
*(c) Soil depth and classification, and erosion control factors;*
*(d) Slope; and*
*(e) Cover material availability, transportation, and use.*

<u>From Benton County Staff Memo 10/5/22</u>

These provisions are less subjective than the provisions discussed earlier but there is still room for interpretation in terms of, for example, what should be included in a narrative to adequately describe the items listed in (1)(a) through (d). Recommendations from the workgroup in this area would be helpful. The workgroup could also recommend "other information" that the Planning Official should require in order to have an adequate understanding of the proposal. Note that the Planning Official can only require information that is relevant to applicable criteria.

From Republic Services Addendum 9/30/22

**Other Information as Required by the Planning Official (BCC 77.310(e)).** This is information the Planning Official may require as part of the applicant's narrative in order to demonstrate compliance with the applicable criteria. This is not authority to require information unrelated to a criterion for approval. As noted above, an application must be judged under the applicable criteria in effect at the time of application.

Croney Draft 1

***BCC 77.310 -- Landfill Site Zone -- Conditional Use Review.***

***(1) The applicant for a conditional use permit shall provide a narrative which describes:***
***(a) Adjacent land use and impacts upon adjacent uses;***
***(b) Future use of site as reclaimed, and impacts of that reclamation on adjacent uses;***
***(c) Provisions for screening of the site from public roads and adjacent property;***
***(d) Egress and ingress; and***
***(e) Other information as required by the Planning Official.***

**Question:** 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?

**Answer:** Only "other information" that relates to the approval criteria for a conditional use permit may be required under BCC 77.310(1)(e).

**Discussion:** An application to expand the landfill disposal area requires a conditional use permit. BCC 77.305. The criteria for conditional use permits are set forth in BCC 53.215, which states:

> 53.215 Criteria. The decision to approve a conditional use permit shall be based on findings that:

> (1) 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;
> (2) The proposed use does not impose an undue burden on any public improvements, facilities, utilities, or services available to the area; and
> (3) The proposed use complies with any additional criteria which may be required for the specific use by this code.

BCC 53.215(3) is an application requirement; not an approval criterion. allows the criteria to include consideration of the information set forth in BCC 77.310, It permits the Planning Official to ask the applicant to provide "other information." But, any "other information" must relate to the approval criteria set forth in BCC 53.215.

In *Murphy Citizens Advisory Committee v. Josephine County*, 25 Or LUBA 312 (1993), petitioner asserted information required by the local code had not been submitted by the applicant and that such omission rendered the application deficient. *Id.* at 320. LUBA rejected the argument, saying:

> Thus, in order for a petitioner to obtain reversal or remand of a challenged decision because required information is missing from the subject application, petitioner must argue that the missing information is not found elsewhere in the record, and must explain why the missing information is necessary to determine compliance of the proposed development with applicable approval standards. In this case, petitioner does not relate the allegedly missing site plan information to specific requirements of JCZO 15.218(1)-(24), does not respond to intervenor's argument and citations that some of the allegedly missing information is found elsewhere in the record, and does not explain how the missing information prevents determination of compliance with applicable site plan or conditional use permit approval standards. (emphasis added)

*Id.* See also *Venable v. City of* Albany, 33 Or LUBA 1 (1997); *Hopper v. Clackamas County*, 15 Or LUBA 413, 418 (1987); *Hershberger v. Clackamas County*, 15 Or LUBA 401, 408-09 (1987).

With any land use application, one of the roles of the Planning Official is to identify information that is needed for the decision maker to determine whether the applicable criteria have been met. As emphasized by LUBA, such information must relate to the approval criteria.

The identification of "other information" most commonly occurs during the first 30 days after an application has been submitted. This timeframe is when the Planning Official reviews the initial application to determine whether it is complete. If the Planning Official asks the applicant to submit additional information, it can be for two purposes: (1) to provide planning staff with enough information to allow it to review and render a decision or recommendation. *Sperber v. Coos County*, 56 Or LUBA 763, 770 (2008); see also *Frewing v. City of Tigard*, 59 Or LUBA 23, 31 (2009); or (2) "to allow or request that the applicant submit additional information believed necessary to satisfy the applicable approval standards." *Frewing* at 31.

In either case, the applicant may choose to provide all, some or none of the identified information. The failure to provide identified information is not grounds for denial of the application. If the applicant fails to provide additional information, or provides inadequate information, the issue then becomes an evidentiary matter. Once the application has been deemed complete (by staff or the applicant upon notification to county of refusal to submit additional information), staff reviews the application, based on the submitted information, and makes a determination or recommendation to approve or deny the application, based on whether the applicant has submitted substantial evidence sufficient to meet the approval criteria. This process is now codified for counties in ORS 215.427.

If the application is one that goes to the Planning Commission, it is the job of the planning commission to determine whether to approve or deny the application based upon whether the evidence submitted into the record during the hearing process demonstrates that the applicant has complied with each and every criterion for approval. The County's job as the trier of fact is determine whether a preponderance of the evidence supports approval under the applicable criteria. *Friends of Yamhill County v. Yamhill County*, 351 Or 219, 246-247 (2011).

On appeal, LUBA reviews a County determine to determine whether it is supported by substantial evidence in the record. "Substantial evidence in the record" is evidence that a "reasonable person" would rely on to make a decision when considering all of the evidence in the record including any conflicting evidence. See e.g., *Younger v. City of Portland*, 305 Or 346, 353-57, 752 P2d 262 (1988). LUBA will uphold the local government's evidentiary determination if its conclude that "a reasonable decision maker could decide as the local government did in view of all the evidence in the record," i.e., evidence that supports and detracts from the decision.

***77.405 Review of DEQ Permits.*** *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.*

From Benton County Staff Memo 10/5/22

This provision is unusual and a bit unclear. How the Planning Official would determination that "permit application materials or conditions of DEQ permit are judged to merit public review" is subjective. Furthermore, the kind of public hearing is not specified. Typically, a public hearing results from an application submitted by a property owner which is then reviewed relative to code criteria and approved or denied. But this code provision does not state that the property owner shall submit an

application or that this provision constitutes a re-opening of the previous land use approval. The code may intend that a public hearing (more of a public conversation?) be held in which the terms of the DEQ permit are discussed but with no land use action to occur. Or the code may be obliquely stating that if the Planning Official determines that what the applicant proposes to DEQ or what DEQ permits is different from what the County has given land use approval to, then an application for a revised conditional use permit is required. This is already required by BCC 53.225[3], but the lack of cross-reference or use of similar terminology in section 77.405 is confusing. Staff has not had opportunity to carefully consider the language of this section, but initial interpretation is that 77.405 simply requires new review of a conditional use permit if, as described in 53.225, the use originally approved has been modified.

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

## CUP Introductory Language

### Current Draft as of 12/20/22 with Lucker 1-6-23 Suggestion

This document contains a historical summary of land use actions[4] including adopted conditions of approval for past land use applications and Conditional Use Permits (CUPs) relevant to the Coffin Butte Landfill. It provides the context needed to better understand how we got to where we are now. Our goals for this section included:

1) Identify and organize the relevant documents;
2) Explain the key points clearly;
3) Identify areas of agreement on whether the various conditions of approval remain applicable or inapplicable today; and
4) Identify areas of agreement on the current status of compliance, monitoring, and enforcement.

For context, Benton County's Development Code (BCC) 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).

[3] 53.225 Modification of a Conditional Use Permit. An original applicant or successor in interest may request that a conditional use permit be modified if a change in circumstance has occurred since approval which would justify a change in the permit. Such application shall be processed as a new request for a conditional use permit.

[4] Findings of Fact, notices of decision, conditions of approval, zone changes, code adoptions, code amendments, etc.

Implementation of the land use decision conditions of approval are required to ensure that the proposed land use complies with the Development Code and the resultant land use activity, assuming compliance with the conditions of approval is compatible with adjacent land uses. However, to be effective, the conditions of approval must be monitored and enforced.

Implementation of the land use decision conditions of approval are required to ensure that the proposed land use complies with the Development Code. Uses allowed in a given zone have already been deemed to have a sufficient level of compatibility. Therefore, a finding of "compatibility with adjacent land uses" is not required, per se. However, a land use must be found to "not seriously interfere with uses on adjacent property" and conditions of approval may be imposed "to mitigate negative impacts to adjacent property." ~~However, the application of the Development Code provides the specific criteria for general compatibility~~. Those conditions must be complied with, monitored, and enforced to be effective.

Conditions of approval must be related to and necessary to ensure compliance with approval criteria. They cannot expand the approval criteria; nor can they substitute for a finding of compliance with a criterion for approval. Rather, after the decision maker has determined compliance, or feasibility of compliance, with approval criteria, conditions may be imposed to ensure compliance with those criteria. BCC 53.215 establishes the approval criteria for conditional use permits in Benton County. All conditions of approval must relate to those approval criteria. Accordingly, for conditional use permits for landfill expansion in the Landfill Site Zone, conditions of approval may be imposed to mitigate negative impacts to adjacent property in order for the decision maker to find that "[t]he proposed use does not seriously interfere with uses on adjacent property, with the character or the area, or with the purpose of the zone"; and that "the proposed use does not impose an undue burden on any public improvements, facilities, utilities or services available to the area." (BCC 53.215(1) and (2).[5] To be effective, conditions must be monitored and enforced.

Compliance with the required conditions of approval is the responsibility of the applicant. The County, along with DEQ, etc., is responsible for monitoring and enforcement. In Benton County, monitoring, and enforcement are complaint-driven (by residents, businesses, the traveling public, other governmental entities, or others) because Benton County has acknowledged it did not and does not have the resources to actively monitor or enforce the landfill conditions of approval. This is also true for other land use decisions in Benton County.

The Benton County Talks Trash Workgroup (BCTT) was not charged with deciding the actual legal status of the factual and legal issues raised herein. The "common understandings" noted identify the BCTT's consensus agreements. Where there was no consensus, the differing points of

[5] BCC 53.2145(3) includes a criterion that "the proposed use complies with any additional criteria which may be required for the specific use by this code. BCC chapter 77 does not include any additional criteria for expansions to landfills in the Landfill Site Zone.

views have been documented for consideration by the Benton County Board of Commissioners and others. Additionally, each workgroup member was given the opportunity to share their views, be they supportive or oppositional, as noted in Appendix X.

***The CUP sub-subcommittee raised the following.***

December 9, 2022

Hi Sam -

We (Catherine, Ed and Mark) need a broader discussion with other subcommittees and possibly the larger Workgroup before we can move toward completing our review regarding compliance with the substantive requirements of some past land use decisions.

Many of the land use documents we reviewed are structured with a land use decision that addresses both administrative matters like who is signing the decision, under what authority, etc., as well as substantive "conditions" the applicant must meet. In these cases, it is relatively easy to make a meaningful decision on whether the applicant complies with the substantive requirements or conditions. An example is CP-74-01 that addresses establishing the landfill and the geographical area it was to serve.

In other cases, the land use decision contains what needs to be done regarding the administrative matters while the substantive requirements or applicant commitments are contained in documents that are adopted as part of the entire package but are not specifically called out on the face page of the decision. In contrast to CP-74-01, in PC-83-07 for example, many of the "conditions" are mechanical like "**1.** Cross reference the narrative and the map in both documents." What is missed by just looking at the "condition" is the substantive information concerning the Site Plan, slopes and terracing, County oversight, leachate management, visual screening, land reclamation, and recycling.

A more limited interpretation of compliance with land use actions that only includes review of the administrative conditions of development or approval does not allow for the proper assessment of compliance with the substantive land use requirements.

A more detailed analysis is provided below in support of the request to ensure that we include the review of substantive requirements included in a land use approval as part of our work in preparing the Compliance with Past Land Use Actions and Their Status document of the A2 subcommittee is presented below. The example is PC-83-07.

For this review, we looked at the PC-83-07 BOC Notice of Decision, the staff report and the applicant's documents submitted in support of the land use request. Beginning with the BOC Notice of Decision (attached for reference):

Reference PC-83-07 - Board of Commissioners Findings of Fact Conclusion of Law and Order dated June 15, 1983 (excerpted from PC-83-07(C)(1) file page 25 (italics added):

> "4. The *Board expressly adopts as findings the following documents*, which are on file in the Benton County Community Development Department located at 180 Fifth Street, Corvallis, Oregon:
> a. *Staff Report; File No. PC - 83- 7, including Appendices 1, 2, and 3*
> b. *Site Plan Review for the Coffin Butte Landfill*
> c. Application of Valley Landfills, Inc.
> d. Background Review for the Proposed Coffin Butte Landfill Expansion
> e. State Planning Goal Exception for Coffin Butte Landfill"

Continuing with that review of documents, we looked at the ORDER portion of the BOC decision (italics added):

PC-83-07 Board of Commissioners ORDER (excerpted from page 3 of the Order also shown on page 25 of PC-83-07(C)(1):

> "Based on the above, it is ORDERED hereby as follows:
> The requests by Valley Landfills, Inc. for Comprehensive Plan Text and Map Amendments, Zoning Ordinance and Zoning Map Amendments *and a Site Development Plan approval, as indicated specifically in the Staff Report (paragraph 4a above),* are hereby Approved subject to the following conditions:….."

The document goes on to list 13 specific conditions to be met. These conditions are made up of the Planning Commission recommended conditions plus those submitted to the County by DEQ on April 13, 1983 (shown on pages 8 and 9 of PC-83-07(C)(2)).

Then we looked to the Staff Report that recommended conditions be included to require the applicant to update documents to provide more details as to what was going to be done should the application be approved.

PC-83-07 – STAFF REPORT pages 7 and 8 – "That the Planning Commission recommend to the Board of Commissioners approval of the Coffin Butte Landfill Site Development Plan based on the findings contained in the staff report and subject to the following Conditions of Development" (excerpted from PC-03-07(C)(2) pages 11-29.

> "1. Cross reference the narrative and the map in both documents.
>
> 2 Expand the narrative statement, Section (1. a. ii), on reclamation to include the physical configuration of the completed landfill areas and. method of maintenance of the proposed pasture uses. Include a statement regarding the effects of methane and internal heat generation on the long term maintenance of the pasture and include irrigation plans if proposed.

3. Describe in more detail in the narrative, the method of screening: include a description of the location, height, width, depth and physical composition of the berm; and include the type and location of vegetative screening; and include a statement regarding the long term maintenance of the berm and vegetative screens.

4. Include in the narrative the anticipated chemical composition of any leachate material to be used for irrigation south of Coffin Butte Road; and include documentation that the material to be utilized as irrigation meet federal and state standards for any run- off that may leave the property lines.

5. Include in the narrative a review of the Environmental and Operational Factors in Art. XXX. 05. A. 1.( f) for the approximately 10 acres proposed' for addition to the landfill area.

6. Provide a detailed reclamation plan that sets form the anticipated physical characteristics of the " terracing" including an average height and width of the terracing, provide documentation that the site is physically available to be reclaimed in this manner.

7. Submit for review by the Development Director a plan detailing the proposed method Valley landfills shall use to protect the small ponds found on the Northeast corner of the property."

Finally, since the Site Plan Review was specifically adopted by the BOC, we looked to that document to provide additional substantive requirements applicable to this land use request.

The Site Development Plan for the approved land use is contained in the document titled SITE PLAN REVIEW FOR THE COFFIN BUTTE LANDFILL – excerpted from page 1 of Jeffery R. Tross document in the record for PC-83-07. See pages 3-8 of file PC-83-07(C)(3) – italics added.

> "This report is provided in conformance with the requirement of the " Site Development Plan" section of the Landfill Site Zone for a narrative description of the Coffin Butte Landfill site plan and operating characteristics. *This report includes the information required by Conditions of Development Nos. 1 - 7 contained in the Staff Report and adopted by the board of Commissioners."*

This analysis clearly demonstrates the need to look beyond the administrative conditions associated with any land use approvals to ensure that there is a clear understanding of substantive requirements or commitments associated with a particular land use application and/or approval.

In this way, the work of evaluating the status of prior land use requests and compliance with substantive requirements can be completed.
The documents that have been used as reference materials are included as attachments.

Submitted by:
Mark Yeager
Ed Pitera
Catherine Biscoe

***Do statements in a land use application, in which the applicant says they will do certain things, become binding?***

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. While a statement that is not incorporated as a condition of approval is not part of the final *decision* it is still part of the *record*. Not everything in the record is part of the 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 included in the final decision either by direct statement or by reference. Both will suffice to bring a necessary

component from the record into the decision. For example, a condition of approval requiring the applicant to establish the proposed use "as described in the application" binds the applicant to establishing the use in the manner they described in their application. That said, it is best practice for the approving authority to specifically identify parameters or other details which the applicant has proposed and which are particularly important to ensure that the use, over time, complies with the review criteria. For example, if limited hours of operation are necessary to mitigate interference with surrounding uses and the applicant states that the hours of operation will be 9am to 5pm, it is best to explicitly state those hours as a condition of approval.

**2002 MOU ISSUE**

www.co.benton.or.us/sites/default/files/fileattachments/community_development/page/8136/landfill_mou_2002.pdf

**Question:** How does the 2002 Memorandum of Understanding fit into the Workgroup considerations?
**Answer:** The 2002 Memorandum 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.

**Discussion**: In 2002 Benton County and Valley Landfills, Inc. (VLI) executed a Memorandum of Understanding (MOU) Relating to Land Use Issues. The purpose of this document was to clarify the parties' understanding of how VLI could expand landfill activities into cells within the landfill area.

The MOU was created because knowledgeable, involved personnel, at both Benton County and VLI had changed such that little institutional memory remained to guide land use issues at the landfill site. More specifically, without knowledgeable individuals familiar with the history of the various land use approvals, it was unclear whether VLI had authority to expand landfill disposal operations within either the landfill areas or the landfill zone. The MOU clarified those questions. Specifically, the MOU states:
1. VLI "is entitled to conduct all forms of landfill activities, including but not limited to the placement of solid waste, consistent with State and local regulations with the 194 acres as designated within the Landfill Zone which is north of Coffin Butte Road." MOU, pg. 3, §(16)(a).
2. VLI "will not conduct, without the prior approval of Benton County and the State of Oregon, the placement of solid waste on the approximate 56 acres, within the landfill zone which it owns south of Coffin Butte Road." MOU, pg. 3, §(16)(b).
3. "Since 1996, Benton Co. has signed the Land Use Compatibility Statements, hereinafter referred to as (LUCS), indicating to DEQ that the landfill was being operated in compliance with Benton County Ordinances." MOU, pg. 3, §14.

4. "Based upon the LUCS statement, DEQ has reviewed and found that the operations of the landfill are in compliance with the state law. The last approval from DEQ was granted in 2000." MOU, pg. 3, §(15).
5. The MOU was reviewed by the Solid Waste Advisory Council (SWAC) on Aug. 27 and Sept. 24, 2022. The Benton County Board of Commissioners considered the MOU at its Nov. 5, 2002 meeting at which the MOU was "placed on the agenda * * * for public discussion prior to signature." MOU, pg. 4, §§(16)(g) and (h).

Thus, the MOU acknowledges VLI's authority to utilize existing or future cells within the 194-acre landfill area north of Coffin Butte Road without additional approval from Benton County. Conversely, County and State approval are required before VLI may dispose of waste on the 56 acres in the Landfill Zone south of Coffin Butte Road. Related landfill activities such as collection and management of leachate are permitted, without additional County approval, on the 56 acres south of Coffin Butte Road. MOU, pg. 3, §(16)(c).

Additionally, section 14 states Benton County signed LUCS documents verifying the landfill was operating in compliance with local ordinances. DEQ acted upon that verification to find Coffin Butte was operating in compliance with local land use regulations and state laws and regulations as of 2000. Sections 14 and 15 of the MOU provide evidence that there were no land use violations at the landfill as of November 5, 2002, when the Benton County Board of Commissioners executed the MOU.

## 150-Day Time Limit on Land Use Application Review

**DRAFT – Not reviewed by full Legal & Land Use Subcommittee**

Prepared by Darren Nichols and Greg Verret, Benton County Community Development Department; Vance Croney, Benton County Counsel.

The following was prepared to provide an understanding of the legal requirements for the County to process a land use application and to address the question that has arisen as to whether the public can provide input to the determination of whether an application is complete.

## Legal Requirements.

In Oregon, the statutory time limit for a local government to reach a final decision on a land use application is specified by ORS 215.427[6] [restated in Benton County

[6] The governing body of a county or its designee shall take final action on all other applications for a permit . . . including resolution of all appeals under ORS 215.422 . . . within 150 days after the application is deemed complete.

Development Code BCC 51.535]. That time limit is 150 days[7] from the time that an application is deemed complete, which must occur within the first 30 days after the application was filed. Pursuant to the Benton County Development Code, the determination of completeness is made by the Planning Official.

An application for land use action may be submitted at any time, following submittal procedures put in place by the County. Once an application is submitted, the Planning Official shall determine whether the application is complete and shall, within 30 days of the application's filing, notify the applicant of exactly what information if any is missing from the application. If the application was deemed incomplete and the applicant subsequently makes the application complete, then the 150-day clock starts on the date the additional information was submitted. If the applicant submits in writing that they will provide no additional information, then the clock starts on the date of that submittal.

What constitutes a complete application is in some ways a factual determination but can also involve subjective determinations, depending on the application and what impacts may need to be mitigated. Clearly, if the applicant fails to address one of the applicable criteria, the application is incomplete. Less clear is when the applicant addresses all the criteria but falls short of providing substantial evidence, in the Planning Official's determination. In either case, the Planning Official may determine that application is incomplete. If the applicant disagrees, there is no appeal process; the applicant may simply state that no additional information will be submitted. At that point, whether the application is "complete" or not is moot; the land use review process must commence.

If the County does not take final action on an application within 150 days of the date the application is deemed complete, "the applicant may elect to proceed with the application according to the applicable provisions of the county comprehensive plan and land use regulations or to file a petition for a writ of mandamus." [8] In other words, the applicant "may either elect to continue with the application process or file a petition for writ of mandamus to compel the county to approve the application. Where the applicant elects to continue with the application process after the deadline, a subsequent county decision approving or denying the application is not void or moot because it is issued after the applicable deadline."[9] Upon filing a petition for writ, jurisdiction for all decisions regarding the application, including settlement, shall be with the circuit court.[10]

[7] The time limit is 120 days if the application regards mineral aggregate extraction or if the property is located within an urban growth boundary.
[8] ORS 215.429
[9] Oregon Land Use Board of Appeals opinion in *Davis v. Polk County, 58 Or LUBA 1 (2008).*
[10] ORS 215.429

Of course, whether the application is "complete" or not, the absence of certain information from an application may lead to a determination by the decision maker (Planning Official, Hearings Officer, Planning Commission or Board of Commissioners) that one or more specific criteria are not met. The purpose of the 30-day completeness review is to attempt to provide the decision maker with the necessary information to make an informed decision; it does not *ensure* that the information provided is adequate.

The applicant may choose to pause the 150-day clock by stating in writing the time period for which they want the clock paused. The maximum allowable duration of any or all such pauses (or extensions of the 150-day time limit) is 215 days, for a total time of 365 calendar days from the time an application is deemed complete.

**Implementation and Practice Considerations.**

***Is there opportunity for public input to the determination of whether an application is complete?***

There are no statutory or code requirements for public input on whether an application is complete. "Completeness" does not indicate that the applicant has satisfied the applicable approval criteria; it is intended to determine whether the applicant has submitted sufficient information for the decision maker to evaluate the application against the approval criteria. Even if the Planning Official determined an application incomplete and requested additional information, the applicant is not required to provide that information if it does not believe it is necessary. If members of public believe that the information submitted is not adequate to demonstrate compliance with the approval criteria, the public hearing process is intended to ensure that the public can assert that position on the record before the decision maker.

The determination of whether an application is complete must happen fairly quickly. With a complex application, such as a landfill expansion, reviewing the submitted materials and the applicable criteria in sufficient detail to determine whether the application is complete often takes substantial time. Because of this, having guidelines identified prior to receiving an application is preferrable to having to review an application once it has been submitted. Benton County would greatly value the BCTT Workgroup's insights identifying elements that should be considered in deeming that a land use application concerning the landfill is "complete."

The process at Benton County is an internal review process conducted by professional planning staff, augmented by input from other agencies relevant to a given land use

application. The Development Code does not preclude the Planning Official from obtaining input from the public during this process. The 30-day window for the determination presents challenges to obtaining and meaningfully reviewing public input and incorporating it into the determination, but the public could be given opportunity to comment during this time. Hypothetically, if the County was prepared for and expecting a particular land use application, it could, upon receipt of the application, post the submitted materials, send email notification to members of the public, and set a time certain in which members of the public would be welcome to submit comments on the completeness of the materials.

The window for public comments would necessarily be fairly narrow. There would be no obligation on the part of the Planning Official to utilize or respond to such comments, but the comments could provide a useful, broader vetting of the application. Staff has concerns that the 30-day time frame may be too short for meaningful public review and comment and that public comments could range well beyond the question of completeness which would complicate making use of such comments in the completeness determination. For these reasons, staff encourages the BCTT workgroup to provide as much input as possible regarding what is needed for a complete application prior to County receipt of an application.

***Protocols for the timely and broad distribution of CUP-related information to the public, other governmental entities, and internal committees, groups, and divisions.***

**Legal Requirements and Past Practices**
*Note: The Legal & Land Use Subcommittee is limiting its input on this topic to legal requirements and past practices, understanding that the Charge E subcommittee will use that information to help in developing recommendations for future practice.*

**DRAFT – Not reviewed by full Legal & Land Use Issues subcommittee**
Prepared by Greg Verret, Benton County Community Development Department, and Vance Croney, Benton County Counsel.

**Required Notification.** Requests for quasi-judicial land use decisions, such as an application for a conditional use permit, are subject to notification procedures mandated in ORS 215.146 and in Benton County Development Code Sections 51.605 through 51.630. The Benton County Development Code provisions reflect the statutory requirements and are designed to implement those requirements without need for reference to the statute.

Upon receipt of a land use application, the Planning Official shall determine whether the application is complete and shall, within 30 days of the application's filing, notify the applicant of exactly what information if any is missing from the application. If the application was deemed incomplete and the applicant subsequently makes the application complete, then the 150-day clock for rendering a final local decision starts on the date the additional information was submitted. If the applicant submits in writing that they will provide no additional information, then the clock starts on the date of that submittal. There is no legal requirement for notification to the public at this stage in the process. (For a complete discussion of the 150-day time limit, see the section by that name earlier in this report.)

Notice of Application: In the case of a conditional use permit or similar application, the Development Code requires physically mailed notice to the owners of property located within a certain distance of the property that is the subject of the land use application. The distance is measured from the perimeter of the subject property; any property that lies partially or fully within that distance is entitled to mailed notification. The distance of the measurement depends on the zoning of the subject property:

100 feet if located within an urban growth boundary
250 feet if outside an urban growth boundary and not within a farm or forest zone
750 feet if located within a farm or forest zone

These distances are minimums; if the County sends notice to only property owners within the specified distance, the law has been fulfilled. At the same time, the Code states an intent to notify property owners who could be affected by the proposed land use decision and states that additional notice beyond the distances listed above may be provided "where the County in its discretion deems additional notice to be appropriate.

Additionally, notice is to be sent to any neighborhood or community organization recognized by the Board of County Commissioners and whose boundaries include the site. In Benton County, the recognized community organizations are the Community Advisory Committees (CAC), of which three are currently active.[11]

In the case of a land use request that involves a public hearing, the Code also requires publication of a notice in a newspaper of general circulation within the county as well, at least 10 days prior to the hearing.

[11] The North Benton CAC, which would encompass the Coffin Butte landfill and surrounding areas, is currently not active. Activating and maintaining a CAC is no small undertaking and doing so requires both action and capacity on the part of community members and the County.

Specifically in the Landfill Site zone, which encompasses the majority of the Coffin Butte landfill and the majority of the landfill expansion area proposed in 2021, a conditional use application for landfill expansion is subject to approval by the Planning Commission. Additionally, the code requires that "the Solid Waste Advisory Council shall review and make recommendations through the Planning Official to the Planning Commission regarding the Site Development Plan Map and narrative." , in addition to review by the Planning Commission, a review by the Solid Waste Advisory Council (SWAC). The procedure for this review by SWAC is not specified in the Development Code, including whether any specific notification of the SWAC meeting should be sent out (beyond the standard public meeting notice that is sent to the newspaper) and whether SWAC should conduct a public hearing with testimony from the public or should review and discuss among SWAC members without public testimony. The criteria for SWAC's review are not specified in the Development Code, but any action of SWAC should be consistent with that Council's role as specified in its bylaws: "assist the Board of Commissioners (Board) in Planning and implementation of solid waste management, pursuant to BCC Chapter 23, the Benton County Solid Waste Management Ordinance." As such, SWAC should review the proposal and provide input from a solid waste management perspective. The Planning Commission's role is to review the proposal from a land use perspective, relative to specific criteria listed in the Development Code, and to make a decision.

Notice of Decision: When a decision is rendered on a land use request, notice of decision is required to be mailed to all people who submitted testimony. If the decision was made by the Planning Official, then notification is also required to be mailed to owners of property within a certain distance of the subject property as described above. The notice of decision describes the nature of the decision and how to appeal the decision.

Notice of Appeal: If a decision is appealed, then notice of the appeal hearing is distributed following the same procedure as for the notice of application.

**Typical Practice.** In addition to providing the notification discussed above, Benton County staff have typically utilized some or all of the following for a given land use application:

- Prior to receiving a land use application for a complex land use action, staff will encourage a **pre-application conference**. The public is not involved at this stage because an application has not been filed. The pre-application meeting is not a public meeting, is not part of the land use review process, and involves no notification to the public.

In the case of an application for a subdivision, the pre-application conference is *required* by the Development Code. A pre-application conference is not required for a landfill-related request in the Landfill Site zone. A pre-application conference is a meeting between the applicant and County staff at which staff informs the applicant of the necessary applications to file, the review criteria that will be applied, and areas of concern to review, and provides an overview of the review process. Staff from external agencies with jurisdiction are invited to participate; for example, the Oregon Department of Transportation if the proposed land use is near or accesses a state highway.

- Staff may recommend to the applicant that they hold a **public informational meeting** prior to submitting an application. There is no requirement for this in the Development Code, so it is up to the applicant whether to hold such a meeting. These meetings can be helpful for informing members of the public about a pending application as well as for the applicant to obtain input from members of the public that the applicant may choose to address through modifications of their plans prior to submitting an application. Such meetings are not part of the land use review process.
- Upon receipt of a land use application, the Planning Official determines completeness. Once the application is deemed complete, a decision-making process and schedule are determined. At the appropriate time in the schedule, the legally required notification is mailed out as described above. Additionally, typical practice in Benton County has been to notify by email a list of people who have requested notification of all land use applications or certain categories of land use applications. The mailed/emailed notifications summarize the proposed land use action and inform people how they can find out more information and how they can provide input. Additional information is available by phoning or emailing staff. For certain land use applications, staff posts the application materials on the Community Development Department website. These are typically applications that require a public hearing before the Planning Commission or applications that otherwise may generate substantial public interest. Not all applications are posted to the website due to limited staff time and the logistics of maintaining such a webpage.
- Once a decision has been made, the legally required notification is mailed as described in the prior section. While the legal requirement is that notice of a decision made at a public hearing need be mailed only to those who testified, typical practice in Benton County has been to mail notice to owners of property in the vicinity as well.

Chuck Gilbert Inquiries

The intermodal transfer station requires application to the Department of Environmental Quality for a solid waste permit to cover operations of the transfer station and material recovery.

Disposal site means land and facilities used for the disposal, handling or transfer of, or energy recovery, material recovery and recycling from solid wastes, including but not limited to dumps, landfills, sludge lagoons, sludge treatment facilities, disposal sites for septic tank
pumping or cesspool cleaning service, transfer stations, energy recovery facilities, incinerators

for solid waste delivered by the public or by a collection service, composting plants and land and facilities previously used for solid waste disposal at a land disposal site. ORS 459.005 (8)

Transfer station means a fixed or mobile facility other than a collection vehicle where solid waste is deposited temporarily after being removed from the site of generation but before being transported to a final disposal location. ORS 459.005(27).

23.010 Purpose.

In order to protect the health, safety and welfare of the people of Benton County and to provide a solid waste management program, it is declared to be the public policy of Benton County to regulate solid waste management to:

(1) Provide for a coordinated solid waste management program and administration with cities within Benton County and with other counties or cities under existing and future regional programs.

(2) Provide for cooperation and agreements between Benton County and cities and other counties involving joint or regional franchising of solid waste service.

(3) Provide standards, regulations and franchising to ensure the safe and sanitary accumulation, storage, collection, transportation and disposal or resource recovery of solid wastes and ensure maintenance of solid waste collection, resource recovery and disposal service.

"Holder" means a person to whom the Board has granted a franchise or permit. BC Chapter 23.005 (8) definitions.

23.220 Recycling or Reuse Franchise or Permit Requirements.

The Board shall specify which of the collection franchise requirements, as set forth in BCC 23.210, shall apply to specific permits. In addition:

(1) The Board may include recycling or reuse service or the education or promotion of such service in a collection franchise.

(2) In lieu of a franchise, the Board may issue a limited permit for specified service and subject to such terms and conditions as the Board may impose to carry out the policy, purpose and findings.

(3) Issuance of a recycling or reuse franchise or permit by the Board is discretionary. The grounds for issuance shall be compliance with the requirements specified by the Board. [Ord. 1, adopted March 31, 1971; Ord. 23, adopted December 17, 1980; Ord. 85-0023; Ord. 86-035]

……

The dynamics of Coffin Butte landfill is contingent on estimating a multitude of cyclical variables in order to balance solid waste materials byproducts with solid waste reuse and disposal.

These arrays of variables are the material characteristics of refuse which effect varying solid waste density volumes of material waste being placed in the landfill, and the population growth in Benton County and neighboring Counties and municipalities which average 4.40 pounds of daily waste including within 1.9 pounds of recycling per person with the increase in population growth each year (EPA 2018 data).

Also, cyclical construction starts of homes and businesses produce construction material byproducts that end in portions of recycled material and/or waste material that is disposed into the landfill.
Compounding the dynamics further are unpredictable acts of God, in particular fire and storm events, as well as highway, railway, and waterway perils that produce added waste stream material disposed into the landfill.

Questions: If an intermodal transfer station materializes,

a. Can the issues of a franchise permit for an intermodal transfer station be compliant with BC 23.220 by a qualified third party compliant with BC 23.210 (1) (2), or

b. Can the intermodal transfer station be enjoined with the current Holder (hauler) franchise agreement (discretionary), or

c. Can the intermodal transfer station be enjoined with the current disposal site agreement party (discretionary)?

12-18-22

**23.710 Ownership of Wastes.** Unless exempted under this ordinance, solid waste placed out for collection by another person is the property of the holder designated by the Board to provide service for that area. [Ord. 1, adopted March 31, 1971; Ord. 23, adopted December 17, 1980; Ord. 85-0023; Ord. 86-0035]

Questions: When a member of the community offers solid waste placed out for collections, is collection acceptance of the offer and to whom does the property transfer?

Is the franchise holder an ostensible agent of BC 23.010 … "to provide a solid waste management program" for collection and transfer of solid waste to an approved DEQ disposal site?

## ADDITIONAL TOPICS

1. Necessary Tasks to Start Planning Reopening of Existing Hauling Agreement
2. Roles, Responsibilities, and Protocols of SWAC and DSAC
3. Specific Recommended Review Criteria for the Evaluation of Landfill CUP applications
4. SWAC/DSAC, Planning Commission, and BOC Use of the Review Criteria
5. Future Timeline for Discussing any Needed Changes to the Benton County Code Flowing From WORKGROUP Recommendations

**1) Necessary Tasks to Start Planning Reopening of Existing Hauling Agreement**

**2) Roles, Responsibilities, and Protocols of SWAC and DSAC**

The SWAC and DSAC bylaws, together with Chapter 23 of the Benton County Code, provide guidance.

The role of SWAC in the review of a conditional use application for landfill expansion is addressed earlier in this document.

**3) Specific Recommended Review Criteria for the Evaluation of Landfill CUP applications**

The land use review criteria are specified in the Development Code and discussed elsewhere in this document.

The Development Code does not list specific criteria for SWAC's review of a landfill-expansion CUP and this topic is discussed earlier in this document. The Legal & Land Use Issues subcommittee suggests that the full workgroup consider:

a. making a recommendation regarding the criteria or considerations SWAC utilize in evaluating a CUP;

b. that these criteria be focused on the solid waste management aspects of the application, and

c. that the workgroup consider criteria along the lines of:

- Is the proposed expansion consistent with long-term plans for the landfill site?
- Is the proposal consistent with principles of responsible solid waste management?
- What (solid waste management) benefits do you see to the proposed expansion?

- What potential (solid waste management) negative effects do you see?
- Are there ways to minimize or mitigate those effects, or do you think the proposal should be rejected?

4. SWAC/DSAC, Planning Commission, and BOC Use of the Review Criteria
5. Future Timeline for Discussing any Needed Changes to the Benton County Code Flowing From WORKGROUP Recommendations

## SECTION D: Legal issues and Land use Review

**Introduction:**

**Key Findings:**

**Key Recommendations:**

**Additional Information:**

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