

Attachment A to Republic Services' September 30, 2022 Common Understandings Feedback

Legal and Interpretational Framework for Land Use Permits- Benton County

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.

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

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

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

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

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)).¹ Other criteria may also be implicated, depending on the nature of the application (e.g., if the application affects wetlands or county roads.)

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.

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 creation

¹ A landfill is also a conditional use in the Forest Conservation zone.

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.

- “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 be considered, again in the context of the existing landfill operation and the fact that landfills are allowed as a conditional use in the zone.
- “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.
- “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.