

**From:** [VERRET Greg J](#)  
**To:** [sam Imperati](#); ["virginia gustafson lucker"](#); [CRONEY Vance M](#); ["Condit, Jeffrey G."](#); [Liz Irish](#); [Doyle, Holly](#)  
**Cc:** [Benton County Talks Trash](#); [NICHOLS Darren](#)  
**Subject:** RE: BCTT Legal/Land Use Revised Findings & Recommendations  
**Date:** Tuesday, March 7, 2023 11:02:19 AM  
**Attachments:** [BCTT Key LEGAL Findings and Recommendations 3-7-23 draft.docx](#)  
[Draft 4 LEGAL Findings and Recommendations Yeager and Pitera Comments for Subcom review 3-7-23.docx](#)

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Legal & Land Use Subcommittee:

The Key LEGAL Findings & Recommendations document attached contains the compiled comments and revisions from Vance, Jeff/Holly, Ginny and myself. Note that Ginny submitted two new findings —regarding whether the site plan and narrative in PC-83-7 were regulatory conditions of approval and regarding the procedures for evidence in a conditional use review.

Also attached in a separate document are proposed edits from Ed Pitera and Mark Yeager, received this morning. To facilitate your review, I have marked as “resolved” those comments from Mark which the subcommittee received and considered earlier (the comments are not deleted, just marked with a green checkmark).

Our objective for our meeting this afternoon will be to finalize the Findings/Recommendations.

I am in the process of updating the subcommittee’s full document, which I will send out as soon as possible. Finalizing that document will be the objective of next week’s meeting.

Thanks,  
-Greg

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**From:** VERRET Greg J <Greg.J.Verret@bentoncountyor.gov>  
**Sent:** Wednesday, March 1, 2023 4:13 PM  
**To:** sam Imperati <samimperati@icmresolutions.com>; 'virginia gustafson lucker' <v.lucker@comcast.net>; CRONEY Vance M <Vance.M.Croney@bentoncountyor.gov>; 'Condit, Jeffrey G.' <Jeff.Condit@millernash.com>; Liz Irish <lizirish@ymail.com>; Doyle, Holly <HDoyle@republicservices.com>  
**Cc:** Benton County Talks Trash <bentoncountytalkstrash@bentoncountyor.gov>; NICHOLS Darren <darren.nichols@bentoncountyor.gov>  
**Subject:** BCTT Legal/Land Use Revised Findings & Recommendations

Attached is a revised version of the Findings & Recommendations, per our discussion yesterday.

The tracked changes have been “accepted” on items we discussed. There still remain some track changes on items we did not discuss.

Comments that the group addressed, or that did not include an actionable suggestion, have been removed. There are a few remaining comments to consider.

There are two findings that we need to develop; I’ve inserted placeholders at the end of the Findings section.

- Were the site plan and narrative in PC-83-07 regulatory conditions of approval? Please look to the attached “PC-83-07 Findings & Order” and send me your input.
- Clarify when formal approval of landfilling Cell 6 (current quarry) was granted. We discussed this earlier, in light of the 2002 MOU, but we need Finding language. I’ve attached an updated analysis document to assist with this topic.

**Homework:**

**Please edit the Findings & Recommendations document with Track Changes and send back to me by 9:00am Monday 3/6.** I will compile edits and send out on Tuesday. My goal is to include the companion changes to the full narrative document at that time.

Thanks,  
-Greg

**Greg Verret**

Deputy Director for Policy & Program Development

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**My schedule: Tue 8:30-4 | Wed 8:30-4 | Thur 8:30-3 (out Mon & Fri)**

**Community Development Department has relocated. We're now located at the Kalapuya Building, 4500 SW Research Way, 2nd Floor.**

# BCTT Key Findings and Recommendations

## Draft #4 Revised 3/7/23

### Revisions/Comments in Chronological Order:

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

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### Legal Issues and Land Use Review Subcommittee

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

#### Key Findings:

- LLU F-1.** Unless a later land use approval expressly addresses whether conditions of a prior land use approval are superseded, the issue will be subject to interpretation by the local government (the Board of County Commissioners, in this case).
- LLU F-2.** Only the current franchise agreement has legal effect. The previous franchise agreement is superseded when a new agreement takes effect.
- LLU F-3.** Up-front and ongoing financial assurance to cover the cost of closure, post-closure, and corrective actions are required by DEQ. Where this preliminary line of defense fails, Oregon statute holds any person owning or controlling the disposal site liable for closure and post-closure maintenance.

**Commented [VGJ1]:** SWAC member comment: Republic Services has created a separate, stand-alone corporate entity (Valley Landfills, Inc.) as the owner of the landfill. As has happened many times throughout corporate America, VLI could easily declare bankruptcy in the event of a major environmental situation wherein the resources available were not sufficient and VLI would simply walk away.

**Commented [CVM2]:** I don’t have enough expertise in this area to weigh in. This should come from Republic.

**Commented [CJG3]:** The reason for the financial assurances is so that Republic cannot just walk away. Plus, Republic is in the landfill/solid waste hauling business; it would be incredibly damaging to its brand and to its future business for it to abandon Coffin Butte.

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

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

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

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

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

[LLU F-9.](#) Interpretation of the review criteria for a landfill-expansion conditional use permit requires determinations that are based on the facts of the specific application. The rules of statutory construction describe how ambiguous terms are to be interpreted: text, context, and legislative history. However, LUBA’s standard of review is highly deferential to the local decisionmaker’s interpretations, so if the interpretation is plausible (does not conflict with the provision’s language), LUBA (and the courts) will uphold the local interpretation. This gives the decision-maker a lot of flexibility in interpreting their own code provisions. In response to a request by the Board of Commissioners, the following four findings provide staff-provided historical information, particularly over the past 25 years, on how the

County decision-makers have interpreted these terms across the full range of conditional use applications the County reviews. They are not recommendations on how the Planning Commission and Board should interpret future applications. Restated, each body fully retains its flexibility in interpreting those terms in the context of the specific application before it.

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

**LLU F-9b.** In the phrase “character of the area” in BCC 53.215(1), how narrow or broad has “the area” typically been?

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

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

- The particular attributes of the geographic setting (including existing operations in the vicinity.)
- Is there a distinct change in the area's physical characteristics beyond a certain point (such as a change from flat land to hills or from one river basin across a ridgeline into another)?
- What features or elements give the area its character? Is it a homogenous or heterogeneous character (is there a high degree of similarity, or is it mixed)?

- How far are the effects of the proposed land use likely to extend? This may differ by particular effect—for example, the impact of noise might extend farther than visual impact (or vice versa).

**LLU F-9c.** In the conditional use review criterion of: *“The proposed use does not impose an undue burden on any public improvements, facilities, utilities, or services available to the area”* [BCC 53.215(2)], what constitutes a “burden” is again based on the facts of the application. - Staff reports that in past CUP applications the Planning Official, Planning Commission or Board has considered in past CUP applications a “burden” on public infrastructure and service is clearly likely “undue” if it overloads the system or causes significant degradation in terms of quality, effectiveness or timeliness of infrastructure or service. Lesser burdens may also be “undue” if the effect jeopardizes people’s health, safety, or welfare. Burdens that have typically the Board County has typically not been considered “undue” include those that can be mitigated through planned improvements, that are incremental service additions consistent with that generated by other uses in the area or that fall below an established threshold (such as road classification standards). For planned improvements to be relied upon in determining that a burden is not undue, the implementation of those improvements must be certain, such as through a condition of approval specifying the improvement and the timeline for implementation. Again, as noted in LLU F-79 above, so long as the interpretation is plausible, the decision makers have wide discretion in interpreting the term “undue burden.”

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

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

**Commented [VGJ4]:** Comma got deleted somewhere along the way, accidentally, I believe. This is an important comma.

**Commented [YM5]:** The timing of said “improvements” is critical, and “promises” to make improvements cannot be used as the basis for concluding that impacts have, in fact, been mitigated. The County’s professed and demonstrated history of not monitoring or enforcing conditions of approval results in real life undue burdens.

**Commented [CVM6]:** Improvements can be specifically identified and timelines for implementation can be set forth in conditions. That would add a higher degree of certainty and clarify expectations.

**Commented [CJG7R6]:** I agree with Vance, Plus there is no evidence that the County’s reliance on complaint-based enforcement has resulted in any burdens.

**Commented [VGJ8]:** Attempt to address Mark’s comment and Vance’s response.

**Commented [VGJ9]:** Vance: [add to full narrative] Per BCC 51.405(3), the Planning Commission has exclusive decision-making authority on land use applications for which it is the initial decision maker. BCC 77.305 states SWAC “shall review and make recommendations \* \* \* regarding the Site Development Plan Map and narrative.” BCC 77.310(2) describes the Site Development Plan. The second sentence of that section lists the elements to be included on the map. The third sentence says “[a] statement shall be placed on the map that the site plan map and narrative together are considered the Site Development Plan.” The question then is does BCC 77.305 limit SWAC’s review and recommendation to only the narrative on the site plan map? Or does the language of BCC 77.310(2) create sufficient ambiguity that “narrative” could include the entire land use application narrative.

That second option is doubtful when you consider the detail included in 77.310(2) to describe what constitutes a site plan map. It is more likely the phrase “Site Plan Map and narrative” used in 77.305 is intended to mean the elements of the map plan described in 77.310(2).

To infer “Site Plan Map and narrative” includes the entire application would draw in every element of 77.310(1), when subsection (2) deliberately only included screening and access from the list of subsection (1) land use narrative components. To include all of the subsection (1) elements would subsume subsection (2) and render it meaningless ... [1]

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

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

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

**LLU F-14.** Pursuant to long-standing LUBA case law, 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.

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

- The MOU does not address whether the County’s determination of “compliance with local requirements” includes compliance with all conditions of past land use approvals.
- The MOU indicates that, as of 11/5/2002, there were no known land use ordinance violations involving the landfill. The MOU does not describe the extent to which Benton County investigated the compliance status of any conditions of past land use approvals in preparing the MOU.
- The MOU did not negate or supersede conditions of past land use approvals.

**Commented [VGJ10]:** Submitted by Sam 2/27

**Commented [CVM11]:** I went back and looked at our memo on this point and it comes straight from LUBA decisions going back to 1997 and 1992. Perhaps this added language will clarify for the reader that this finding was not arbitrarily crafted by the subcommittee, but conveys the law according to LUBA.

**Commented [YM12]:** Unless the governing body and decision makers specifically require staff to include in the final decision all documents submitted in support of an application (which has frequently not be done in the past), then the applicant is not held to anything that is included in the application, supporting documents and applicant commitments made during that review and consideration process and those items are excluded and not required to be completed.

**Commented [VGJ13]:** Does the committee want to consider a recommendation on this point?



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

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

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

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

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

**LLU F-19.** Could a new CUP approval be conditioned on cleaning up noncompliance with existing operations?

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

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

**Commented [YM14]:** Republic is already on record regarding their position relative to this hauling franchise agreement. By signing the 10-year agreement over public objections, the County gave away all rights to make changes to the agreement. The wording in the agreement grants Republic veto power over any all possibility of improving this outdated approach to trash collection.

**Commented [VGJ15]:** To Mark’s statement, what happens if Benton County and Republic Services don’t agree on the renegotiated collection franchise agreement?

**Commented [CVM16]:** The reopener is mandatory, so that step will happen. Theoretically, it is possible the parties would not agree to any changes. Historically, Republic has been the party pushing changes, particularly those that align its unincorporated service elements with those in the incorporated areas of the county. To date, Republic has consistently expressed a willingness to engage in good-faith negotiations on reopener topics.

**Commented [CJG17R16]:** It is in Republic’s best interest to negotiate in good faith on the reopener topics.

**Commented [VGJ18]:** Comment from BCTT Workgroup meeting: Clarify for the public what is regulated and not, what is allowed and not.

**Commented [CVM19]:** I don’t know what is being asked of us.



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

**Commented [YM20]:** The CUP review criteria are discretionary and the history of noncompliance by the landfill operator and non-enforcement by Benton County clearly demonstrates that the imposition of conditions of approval to mitigate negative impacts cannot be relied on to ensure the resultant land use activity will be compatible with adjacent land uses and the character of the area.

LLU F-XX [Were the site plan and narrative in PC-83-07 regulatory conditions of approval? See “PC-83-07 Findings & Order.”]

**Commented [VGJ21]:** Comment from BCTT Workgroup meeting.

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

The conditions that were adopted through the 1983 decision, described as “conditions of development”, specified changes to be made to the applicant’s site plan. The decision did not describe these conditions as necessary to establish compliance with any approval criteria and required only submission of additional documentation and a revised narrative. They did not require substantive review or demonstration of compliance with any criterion; they required only that the revisions be submitted. Compliance with those revisions was not required as a condition of approval.

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

**Commented [G22]:** This is clunky and could use some work, but here’s a first crack at a finding.

**Commented [VGJ23R22]:** Note: Ginny also produced a longer discussion of this topic for inclusion in the subcommittee’s full report.

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

See draft analysis by Greg Verret as starting point for discussion. Potential Draft Finding: PC-83-07 has been interpreted by Benton County, including in the 2002 MOU, as authorizing landfilling of the area known as Cell 6, the current quarry. While the record in PC-83-07 is not entirely clear on that point, there is no definitive information in the reviewed records to contradict the interpretation that the County approved landfilling of the quarry.]

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

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

LLU R-1. BCC 77.305 directs the Solid Waste Advisory Council (SWAC) to review and make recommendations regarding the Site Development Plan and Narrative submitted on a landfill-expansion CUP; however, the code does not specify what criteria or considerations that recommendation should be based on. Consistent with SWAC's bylaws and Chapter 23 of the County Code, which require SWAC to "assist the Board of Commissioners (Board) in Planning and implementing solid waste management, pursuant to BCC Chapter 23, the Benton County Solid Waste Management Ordinance", the Board of Commissioners should more clearly define SWAC's role by articulating the scope, manner and timing of SWAC's review. (If/when SWAC's overall role shifts to sustainable materials management, instances of the term "solid waste management" above should be replaced with "sustainable materials management.")

**Commented [VGJ24]:** Comment from BCTT Workgroup meeting.

**Commented [VGJ25]:** New finding submitted by Ginny 3/6/23

**Commented [VGJ26]:** Added by Greg to clarify. Most CUPs are decided by the Planning Official.

**Commented [VGJ27]:** Do you want to replace "may be" with "is final unless" ?

**Commented [YM28]:** Hopefully these recommendations are not in priority order. Limiting the role of SWAC should not be the County's highest priority in making improvements to the land use application review process. Clearly the history of lack of compliance monitoring and enforcement should be top of the list (not last).

**Commented [VGJ29]:** Consider clarifying role of SWAC's review outside of land use review process? Through interpretation of the existing code? Is this a pre-application process?

**Commented [CVM30]:** While not a detailed recommendation, don't we recommend the BOC provide more clarity re: scope, manner and timing of SWAC's review?

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

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

**LLU R-4** BCC 77.310(1) lists the information required for a conditional use application in the landfill site zone and permits the planning official to request that the applicant’s narrative include “additional information.” However, the development code does not specify how or when that information is to be requested. In the past, the Planning Official has used the statutory completeness review process to request additional information. However, in addition to the Planning Official’s review of the information after the application has been submitted, the Board could amend the code to require that the Planning Official conduct a “preapplication conference” with the applicant to discuss the information that is required. It could also require a “neighborhood meeting” before the application is filed that requires the applicant to present its proposal to the public and allow the applicant to obtain more information about the proposal. Public comment during a pre-application neighborhood meeting is not part of the formal record of the land use review and cannot be considered by decision-makers.

**LLU R-5** In addition to the two criteria listed in BCC 53.215(1) and (2), BCC 53.215(3) requires the decision maker to consider whether the “proposed use complies with any additional criteria which may be required for the specific use by this code.” Currently Chapter 77 (Landfill Site zone) does not include any additional criteria that must be considered in the review of a conditional use application for the expansion of a landfill in the landfill zone. If there are additional criteria that the Board of Commissioners determines are necessary for the review of a conditional use application in the landfill zone, the Board ~~could~~ would have to amend Chapter

**Commented [VGJ31]:** SWAC member comment: Until any role modifications are adopted in Code, the existing role for SWAC described in Chapter 73 stands.

**Commented [CVM32]:** Yes. Until, or unless the code is amended or the BOC provides specific direction to an advisory committee, what we have in place does, indeed, control.

**Commented [VGJ33]:** SWAC member comment: As written, it seems the Planning Official can require other information in the applicant’s narrative, and this other information thus becomes part of the “applicable criteria.” Therefore, the workgroup has wider latitude with its recommendations for “other information” than is conveyed here. If so, the last sentence should be deleted.

**Commented [CVM34]:** I have no objections to the draft response.

**Commented [VGJ35]:** Drafted in response to SWAC member comment, above.

77 to specify those additional approval criteria. The Board could also require that compliance with the site plan and reclamation plan (currently required by Chapter 77 to be submitted with the application) be adopted as conditions of approval of any approved conditional use permit.

**Commented [VGJ36]:** Submitted by Sam 2/27

**LLU R-6.** BCC 77.405 states, “Copies of materials submitted to the Oregon Department of Environmental Quality as a part of any permit process shall be submitted to the Planning Official. If at any time the Planning Official determines that permit application materials or conditions of DEQ permit are judged to merit public review, a Public Hearing before the Planning Commission shall be scheduled.” This provision is unclear. The subcommittee interprets this section as requiring a review if the use originally approved has been or will be modified due to the DEQ permit. The Planning Official could make such a determination using a formal “Interpretation” pursuant to BCC 51.205(1). Recommend a code amendment to clarify this provision, for example to direct staff to review the issued DEQ permit and conditions and, if discrepancies with the County’s land use approval are noted, determine whether this constitutes a “modification of a conditional use permit” (BCC 53.225) and if so, require the applicant to submit application for such modification. A workgroup recommendation on how public review of DEQ permit requirements could most benefit the public would also be helpful.

**Commented [YM37]:** This would only occur if the applicant said one thing during the land use proceeding and submitted something else to DEQ in the permit application process. But since these documents are not reviewed, not sure how any changes would be discovered. DEQ has a public review process for proposed permits and the County must engage actively in that process, which apparently doesn’t happen.

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

**Commented [VGJ38]:** The Past Land Use Approvals subcommittee or the Legal & Land Use subcommittee could consider a recommendation to more closely track alignment between the land use approved by the County and the landfill activity permitted by DEQ.

**Commented [CVM39]:** This is a confusing topic that can easily get pushed aside by busy staff. Fleshing out what happens when a DEQ permit is received would benefit everyone.

**Commented [VGJ40]:** Suggestion to address comments from Mark, Vance and the BCTT Workgroup.

**Commented [VGJ41]:** Comments from Workgroup meeting:  
Provide more context to the recommendation.  
Improve the wording to reflect providing public service.  
Explain how people can get involved in the process.  
Keep the perspective of how the average person will perceive these notifications.

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

After the parties have begun discussing what specific terms may be amended pursuant to Section 2, but no more than 60 days prior to any amendment being approved by the Board of Commissioners, the County will publish a notice that it

is seeking suggestions from the public for negotiation topics generated from the “concepts from the consensus-seeking process.”

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

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

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

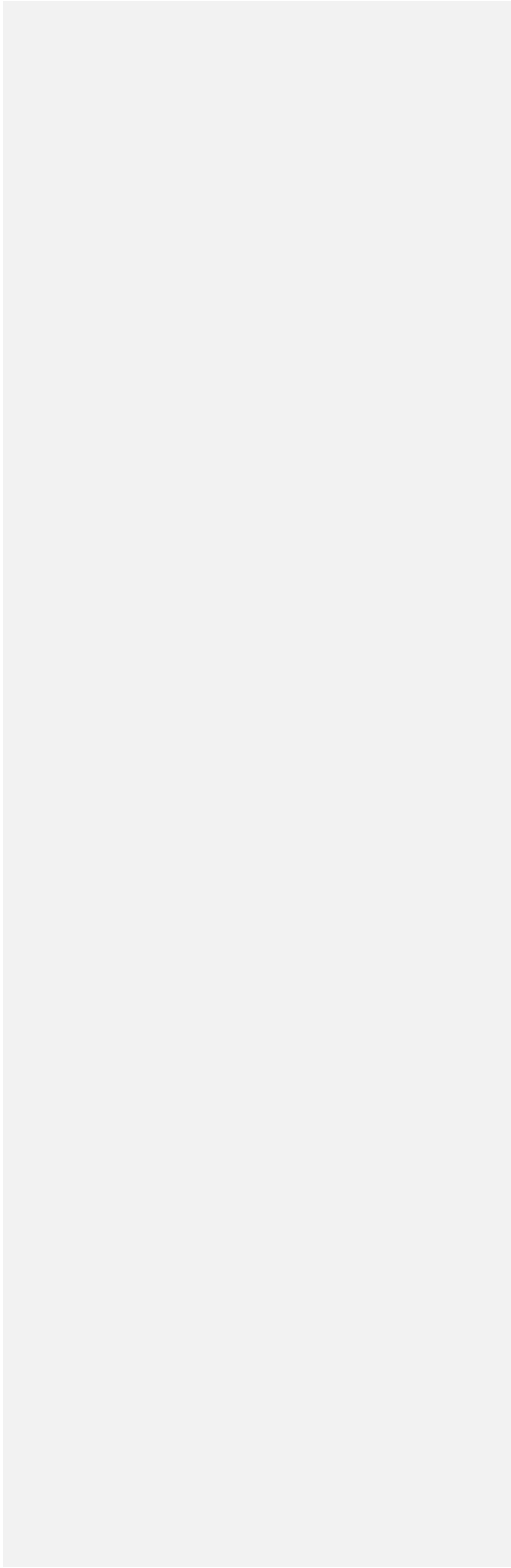
The renegotiated collection franchise agreement must be agreed upon, in its entirety, by both Benton County and Republic Services. At such time as the terms have been agreed upon, and the Board is satisfied that public input has been adequately included or addressed in the renewed agreement, the franchise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

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

- What enforcement mechanisms exist within the County Code?
- Is there a mandamus option or a private right of action option?
- What is missing?
- What provisions and procedures do other counties have, particularly counties that host a privately operated landfill?

|

DRAFT



Vance: [add to full narrative]

Per BCC 51.405(3), the Planning Commission has exclusive decision-making authority on land use applications for which it is the initial decision maker. BCC 77.305 states SWAC “shall review and make recommendations \* \* \* regarding the Site Development Plan Map and narrative.” BCC 77.310(2) describes the Site Development Plan. The second sentence of that section lists the elements to be included on the map. The third sentence says “[a] statement shall be placed on the map that the site plan map and narrative together are considered the Site Development Plan.” The question then is does BCC 77.305 limit SWAC’s review and recommendation to only the narrative on the site plan map? Or does the language of BCC 77.310(2) create sufficient ambiguity that “narrative” could include the entire land use application narrative.

That second option is doubtful when you consider the detail included in 77.310(2) to describe what constitutes a site plan map. It is more likely the phrase “Site Plan Map and narrative” used in 77.305 is intended to mean the elements of the map plan described in 77.310(2).

To infer “Site Plan Map and narrative” includes the entire application would draw in every element of 77.310(1), when subsection (2) deliberately only included screening and access from the list of subsection (1) land use narrative components. To include all of the subsection (1) elements would subsume subsection (2) and render it meaningless.

So, while I understand SWAC’s argument, I don’t believe it is the intent of BCC 77.305 to expand its scope of review beyond that described in BCC 77.310(2).

This is definitely something the subcommittee should weigh in on before anything goes out.



# BCTT Key Findings and Recommendations – Draft #4

## Legal Issues and Land Use Review Subcommittee

### Key Findings:

**LLU F-1.** Unless a later land use approval expressly addresses whether conditions of a prior land use approval are superseded, the issue will be subject to interpretation by the local government (the Board of County Commissioners, in this case) without notification to the public involved in the original land use approval.

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

**LLU F-3.** Valley Landfills, Inc. (VLI) Up-front and ongoing is required by DEQ to provide financial assurance statements annually to cover-fund the cost of landfill closure and 30 years of post-closure care, and corrective actions are required by DEQ. As of 2022, funding the estimated \$16.2 million for landfill closure and \$5.7 million for 30 years of post-closure care based on a 2.93% annual inflation rate per DEQ guidance. The \$5.7 million amount is includes the cost of continued use of Corvallis’s public wastewater treatment plant for leachate disposal. Where this preliminary line of defense fails, Oregon statute holds any person owning or controlling the disposal site liable for closure and post-closure maintenance.

**LLU F-???** VLI owns 740 acres of land in total (ASSOCIATED WITH THE LANDFILL?). Of that property, the area permitted for landfill encompasses approximately 178.0 acres inside the site’s landfill zoning boundary. To date, the developed landfill footprint consists of approximately 123.5 acres. Of the 123.5 acres, approximately 41.7 acres have already received final closure. The remaining property under VLI ownership is undeveloped buffer property and the administrative offices for the facility. (Reference in County Records: Exhibit I Reclamation Plan Republic Services Coffin Butte Landfill September 2021, cbl 2022 financial assurance recertification (provide link)).

**LLU F-?X?** VLI is the “Owner” and Coffin Butte Landfill is the “Operator” identified in DEQ SOLID WASTE DISPOSAL SITE PERMIT (Municipal Solid Waste Landfill) SWDP 306 Expiration Date: June 30, 2030. (provide link)

**Commented [EP1]:** Reinsurance

The waste industry surety business with bond penalty amounts of \$1.2 million or less are ceded on a quota share basis with 50% being reinsured. Bonds with penalty amounts greater than \$1.2 million up to \$20 million are reinsured under a variable quota share agreement ranging from 50% to 85% ceded based on the bond penalty amount. Evergreen’s aggregate cover for its contract surety business is covered under a 75% quota share basis on the first \$5 million in losses. Evergreen generally limits its retention to \$3.0 million on any one bond via its quota share and facultative reinsurance programs

**Commented [YM2]:** Financial assurance for required closure and post-closure costs have nothing to do with liability protection and remedial actions required to respond to environmental catastrophes such as groundwater and surface water contamination, air pollution, landfill fires, etc.

**Commented [VGJ3R2]:** Comment reviewed by subcomm earlier.

LLU F-?Y? VLI is the legal entity providing financial assurance for the current closure plans (cbl 2022 financial assurance recertification, 5Reclamation Plan - Closure-Post Closure Plan Report Final (provide links)

LLU F-?Y? VLI is the legal entity providing financial assurance for the current closure plans (cbl 2022 financial assurance recertification, 5Reclamation Plan - Closure-Post Closure Plan Report Final (provide links)

LLU F-?a? VLI – a \$2.5 million annual revenue corporation - assures their \$21 million landfill closure financial assurance obligation with financial instruments from Evergreen National Indemnity Company, Mayfield Heights, OH (<https://www.evergreen-national.com/>)

LLU F?b? In 2019, Evergreen had assets of about \$56 million and relied on reinsurance for bonds in amounts greater than \$1.2 million. ([https://insurance.ohio.gov/static/Company/Examination+Reports/2019 Exams/Ev ergreen+National+Indemnity+12-31-19+Exam+Report.pdf](https://insurance.ohio.gov/static/Company/Examination+Reports/2019_Exams/Ev ergreen+National+Indemnity+12-31-19+Exam+Report.pdf)

LLU F-?b? Republic Services, Inc. – a \$11 Billion annual revenue corporation - does not provide financial assurance for closing Coffin Butte Landfill.

LLU F?c? Coffin Butte Landfill is owned and operated by Republic Services of Corvallis, Limited Partnership, which is a subsidiary of Republic Services, Inc.

LLU F?d? Oregon statute holds any person owning or controlling the disposal site *at the point in time closure rules are triggered* is liable for closure and post-closure maintenance. As of March 2023, the responsible entity is VLI with Republic Services of Corvallis, Limited Partnership next in line. Check if the owner is unable to perform the work, the landfill would likely become a CERCLA (Superfund) site. There is no foreseeable path for liabilities to fall solely on Benton County, but the County may have to contribute a share based on a criteria to be negotiated. **The Legal Subcommittees needs to address this topic – it is a public 'hot button'. DO NOT RELY ON EWP'S WRITING)**

**(LEGAL SUBCOMMITTEE SHOULD CHECK THIS PARAGRAPH WITH DEG's AUDREY O'BRIEN) [THIS IS MOSTLY FROM THE LEGAL SUBCOMMITTEE'S ORIGINAL FINDING. IT IS ASSUMED THAT THE LEGAL SUBCOMMITTEE PROVIDED THE OREGON STATUTE CITATIONS**

Recommendation provided immediately below for ease of reviewing the issue.

LLU ?Ra? Benton County should ascertain if current closure plans and associated financial assurance are sufficient to implement all Conditions of Approval triggered by closure of the landfill or are to be enforced once the landfill is closed.

**Commented [EP4]:** Assessing the financial soundness of Evergreen is well beyond my capability. Information from the US Treasury website suggests about a \$5 million limitation on any single bond Evergreen issues (for government work?) but amounts above that may be covered by other financial mechanisms; Evergreen National Indemnity "Company (NAIC #12750) ...UNDERWRITING LIMITATION b: \$4,294,000." and "Please note that the underwriting limitation published herein is on a per bond basis but this does not limit the amount of a bond that a company can write. Companies are allowed to write bonds with a penal sum over their underwriting limitation as long as they protect the excess amount with reinsurance, coinsurance or other methods as specified at 31 CFR 223.10-11. Please refer to Note (b) at the end of this publication. (<https://www.fiscal.treasury.gov/surety-bonds/circular-570.html>) "

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**Commented [YM5]:** Financial assurance for required closure and post-closure costs have nothing to do with liability protection and remedial actions required to respond to environmental catastrophes such as groundwater and surface water contamination, air pollution, landfill fires, etc.

**Commented [VGJ6R5]:** Comment reviewed by subcomm earlier.

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LLU ?Rb? Benton County should have a process to monitor changes in landfill ownership and assess the impact of any changes on implementing all Conditions of Approval triggered by closure of the landfill or are to be enforced once the landfill is closed.

LLU ?Rb? Benton County should have a professional, independent, credentialed third party assess the County's potential financial exposure to the landfill closure. The assessment should be made available to the public.

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

LLU F-5. In reviewing a CUP for landfill expansion, the County ~~has jurisdiction over~~ may consider only the proposed expansion. Existing and past landfill operations are not within the County's scope of review. ~~However~~ prior land use decisions are final and remain enforceable. Prior land use decisions cannot be subjected to a new review or have additional/revised conditions of approval imposed as part of the CUP application for the expansion.

LLU F-6. Benton County may not prohibit a private landfill operator from accepting solid waste from outside Benton County. A 1998 ....(needs to say why and link to supporting material)

LLU F-7. Ambiguous terms. The rules of statutory construction describe how ambiguous terms are to be interpreted: text, context, and legislative history. However, LUBA's standard of review is highly deferential to the local decisionmaker's interpretations, so if the interpretation is plausible (does not conflict with the provision's language), LUBA (and the courts) will uphold the local interpretation. This gives the decision-maker a lot of flexibility in interpreting their own code provisions.

LLU F-8. ~~Is~~ DEQ is not prohibited from permitting another landfill west of the Cascades. ~~?~~ No.

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**Commented [YM7]:** Conditions of approval are meaningless words on paper unless they are monitored and enforced. The County readily admits that it has never monitored or enforced conditions of approval and has no resources available to monitor or enforce any future conditions of approval. See Land Use Subcommittee Findings.

**Commented [YM8]:** Prior conditions of approval (1983) required visual screening to shield the public view of the landfill. It was never implemented by the operator or enforced by the County. Is the County saying here that no future conditions of approval can be imposed to require that screening? The operator and the County are equally responsible for the lack of implementation and enforcement of many prior conditions of approval. That fact certainly can be considered as part of any future land use application, use application.

**Commented [VGJ9R8]:** Comment reviewed by subcomm earlier.

**Commented [YM10]:** The operator certainly could voluntarily limit the sources of waste accepted at the landfill.

**Commented [VGJ11R10]:** Comment reviewed by subcomm earlier.

**Commented [YM12]:** The fact is that DEQ is actively working to close landfills west of the Cascades and has not sited a new municipal landfill west of the Cascades in decades.

**Commented [VGJ13R12]:** Comment reviewed by subcomm earlier.

LLU F-9. What does theThe designation “regional landfill” has multiple interpretations. One meaning based on a geographical area served is reflected in the 1974 agreements establishing Coffin Butte and limiting the service area to three counties. Another meaning is based on receipt of more than 75,000 tons of solid waste per year as defined in Oregon Revised Statute (ORS) 459.005(23) (add date adopted).

**[FYI REASON FOR CHANGES: From the information presented by the Legal Subcommittee, it is unclear what the Statute is intended to address. Looking at the November 2022 input from DEQ, the statutes intent seems to be to allow a county hosting a landfill to charge fees for hosting disposal and requires the formation of public boards to oversee operations. I could not find anything that requires a host county to accept wastes from outside the host county. It is requested the Legal Subcommittee look at the legislative record and the Solid Waste sections of the statute.**

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

LLU F-??V Coffin Butte received wastes from outside its original three county geographically based service area every year since at least 1993. This is at least five years before a 1998 (NEED TO GET DATE. A 1993 DATE WOULD CHANGE THIS FINDING) court decision prohibiting a county hosting a landfill from limiting the service area of a privately held waste disposal firm.

LLU F-10a. The review criteria for a landfill-expansion conditional use permit require subjective determinations in the context of a specific application. In the criterion of “The proposed use does not seriously interfere with uses on adjacent property, with the character of the area, or with the purpose of the zone” [BCC 53.215(1)], the term “seriously interfere” has generally been interpreted in Benton County land use decisions as: does the proposed use make it difficult to continue uses on the adjacent property; would it create significant disruption to the character of the area; would it conflict, in a substantive way, with the purpose of the zone. As noted above, the county decision-makers have wide discretion in evaluating whether a use will “seriously interfere.” In the past, “seriously interfere” has generally been applied as meaning more than an inconvenience or irritation but is a lesser threshold than rendering the uses on adjacent property impossible.

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**Commented [VGJ14]:** This refers to an 11/3/22 email from Brian Fuller, DEQ, in which he quotes the definition of "regional disposal site" from ORS 459 and also quotes ORS 459.310 through 459.330. The text of Brian's email:

"I wanted to provide some additional Oregon statutes regarding a Regional Disposal site. From a DEQ solid waste permitting perspective there is no substantive differences in a solid waste landfill permit for a regional landfill and a "non-regional" landfill, the requirements are the same. The law does put some requirements on the county and grants authority for the county to impose a surcharge."

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**Commented [YM15]:** The CUP review criteria do not only apply to landfill expansion proposals. This effort to provide criteria guidance for a predicted new application is ill conceived and is an attempt to prejudice decision makers in advance of an upcoming land use proceeding.

**Commented [VGJ16R15]:** Comment reviewed by subcomm earlier.

**Commented [YM17]:** "difficult" in whose opinion? If a property owner can't be outside the home or work in the field because the noise or stench is disruptive or intolerable, does that qualify as "difficult"?

**Commented [VGJ18R17]:** Comment reviewed by subcomm earlier.

**Commented [YM19]:** How many times during the spring, summer and fall does a property owner have to limit outdoor activities such as working the fields, gardening, patio gatherings, biking, hiking, etc., because of noise, traffic, stench, etc., for it to exceed the threshold of "inconvenience or irritation?" It is clearly not an inconvenience for decision makers that do not live, work or recreate in the vicinity.

Speculated effect on property values has not been a primary consideration in determining serious interference.

**LLU F-10b.** In the phrase “character of the area” in BCC 53.215(1), how narrow or broad has “the area” typically been?

In determining how broadly to define “the area” for purposes of evaluating the character of the area, how far are the effects of the proposed land use likely to extend? This may differ by particular effect—for example, the impact of noise might extend farther than visual impact (or vice versa).

The phrase “the character of the area” must be interpreted and applied in each land use application review. Because each review is unique, examining past cases for the specific distances utilized may not be illuminating. Key factors that are considered in determining the character of the area and its extent include:

- The particular attributes of the geographic setting (including the existing landfill operation in the case of Coffin Butte.)
- Is there a distinct change in the area's physical characteristics beyond a certain point (such as a change from flat land to hills or from one river basin across a ridgeline into another)?
- What features or elements give the area its character? Is it a homogenous or heterogeneous character (is there a high degree of similarity, or is it mixed)?
- How far are the effects of the proposed land use likely to extend? This may differ by particular effect—for example, the impact of noise might extend farther than visual impact (or vice versa).

[Language in this finding needs fine-tuning.]

**LLU F-11.** In the conditional use review criterion of: “*The proposed use does not impose an undue burden on any public improvements, facilities, utilities, or services available to the area*” [BCC 53.215(2)], 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 jeopardizes people's health, safety, or welfare. Burdens that have typically not been considered “undue” include those that can be mitigated through planned improvements that are incremental service additions consistent with that generated by other uses in the area or that fall below an established threshold (such as road classification standards). Again, as noted in LLU F-7

**Commented [VGJ20R19]:** Comment reviewed by subcomm earlier.

**Commented [YM21]:** The negative effective of landfill siting on property values has been studied and documented, and it is not “speculated.” The fact that the County has failed to previously consider land use impacts on nearby property values is not relevant.

**Commented [VGJ22R21]:** Comment reviewed by subcomm earlier.

**Commented [YM23]:** This is where the County and Republic argue that because a dump already exists, doubling or tripling the size of the dump is consistent with “the character of the area.”

**Commented [VGJ24R23]:** Comment reviewed by subcomm earlier.

**Commented [YM25]:** And so goes the argument - the fact that there is already a massive industrial operation existing in the midst of forest conservation, agricultural, and rural residential zones and land uses makes it OK to expand it.

**Commented [VGJ26R25]:** Comment reviewed by subcomm earlier.

**Commented [YM27]:** A massive industrial operation, that began as a tiny burn dump in World War II, situated in the midst of wetlands, forests, agricultural and rural residential land uses does not justify the expansion of this incompatible use to bring it into even closer proximity to those other existing land uses.

**Commented [VGJ28R27]:** Comment reviewed by subcomm earlier.

**Commented [YM29]:** The visual impact is not limited by the number of nearby or adjacent properties but also includes the number of people impacted daily by the land use while traveling by or on nearby roadways.

**Commented [VGJ30R29]:** Comment reviewed by subcomm earlier.

**Commented [YM31]:** For example, the transportation and dumping of landfill leachate into the Willamette River does jeopardize people's health, safety and welfare.

**Commented [VGJ32R31]:** Comment reviewed by subcomm earlier.

**Commented [YM33]:** The timing of said “improvements” is critical, and “promises” to make improvements cannot be used as the basis for concluding that impacts have, in fact, been mitigated. The County's professed and demonstrated history... [1]



above, so long as the interpretation is plausible, the decision makers have wide discretion in interpreting the term “undue burden.”

**LLU F-12.** With regard to the conditional use review criterion of BCC 53.215(3) [*“The proposed use complies with any additional criteria which may be required for the specific use by this code.”*], if the county has adopted additional code criteria that apply to a proposed use, then those code provisions would apply. This does not allow the county to apply unadopted criteria that are not in the code at the time of application. In applying for expansion in the Landfill Site zone, the BCC Chapter 77 does not adopt any additional criteria and, therefore, no additional criteria apply.

**LLU F-13.** BCC 77.305 directs the Solid Waste Advisory Council (SWAC) to review and make recommendations on a landfill-expansion CUP; however, the code does not specify what criteria or considerations that recommendation should be based on. SWAC’s overall role, as articulated in its bylaws: “assist the Board of Commissioners (Board) in Planning and implementing solid waste management, pursuant to BCC Chapter 23, the Benton County Solid Waste Management Ordinance.” 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.

**LLU F-14.** Pursuant to BCC 77.310(1)(e), to what extent may the Planning Official require additional information from an applicant for a Landfill Site Zone Conditional Use Permit? Only “other information” that relates to the approval criteria for a conditional use permit may be required under BCC 77.310(1)(e), and the applicant may choose to provide some, all, or none of the requested information. The land use decision must be based on demonstrating compliance with the code criteria, not on whether the applicant provided the requested information.

**LLU F-15.** 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.

**LLU F-16.** How does the 2002 Memorandum of Understanding (MOU) dated November 5, 2002 fit into the Workgroup considerations? The 2002 MOU clarifies authorization for landfill activities within the Landfill Zone and establishes references a November 18, 2000 LUCS, a point in time at which the landfill was operating in compliance with state and local requirements.

- The MOU does not address whether the County’s response to LUCS section 7 determination of “compliance” ...complies with all applicable local land use requirements. does not mean the landfill is includes in compliance with all conditions Conditions of Approval of past land use approvals decisions. The

**Commented [YM34]:** This is an inappropriate effort to muzzle the SWAC and limit public involvement and input into the larger issue of solid waste management and the impacts of this massive industrial operation in rural Benton County.

**Commented [VGJ35R34]:** Comment reviewed by subcomm earlier.

**Commented [YM36]:** Chapter 23.005(15) - “Solid Waste Management” means the prevention or reduction of solid waste, management of the storage, collection, transportation, treatment, utilization, processing and final disposal of solid waste, recycling, reuse and material or energy recovery from solid waste and facilities necessary or convenient to such activities.

**Commented [VGJ37R36]:** Comment reviewed by subcomm earlier.

**Commented [YM38]:** Unless the governing body and decision makers specifically require staff to include in the final decision all documents submitted in support of an application (which has frequently not be done in the past), then the applicant is not held to anything that is included in the application, supporting documents and applicant commitments made during that review and consideration process and those items are excluded and not required to be completed.

**Commented [YM39]:** Staff and Republic have asserted in multiple settings that this document exonerates both the County and Republic from all non-compliance instances prior to November 5, 2002. There is strong disagreement with this interpretation of the MOU and another opinion has been presented by the Land Use Subcommittee.

**Commented [VGJ40R39]:** Comment reviewed by subcomm earlier.

**Commented [EP41]:** The LUCS is a DEQ document. Provide DEQ’s interpretation of this LUCS document. Bolding added to point out the LUCS precedes the MOU by two years. Suggest the “point in time compliance” argument be revisited/abandoned.

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County's response to ~~did respond to the~~ LUCS section 7b emphasizes this point entry

*"7b. If no, identify reasons for noncompliance or list requirement(s) that that applicate must comply with before LUCS consistency can be determined " Land use compatibility at the landfill is contingent on the continued compliance with all other County Codes and agreements including but not limited to Benton County Code Chapter 23, the operators franchise agreement, and the Environmental Trust Agreement."*

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- ~~The MOU indicates that, as of 11/5/2002, there were no known land use ordinance violations involving the landfill. The MOU~~ No documentation was presented does not describe the extent to which Benton County investigated the compliance status of any conditions of past land use approvals in preparing the 2000 LUCS or 2002 MOU.
- The MOU did not and could not negate or supersede ~~conditions~~ Conditions of Approval from past land use approvals.

**LLU F-17** Is there an opportunity for public input to determine whether an application is complete? The public may submit comments on the completeness of an application. However, the completeness process is not a review of the application's merits; only whether sufficient information has been submitted to the application's merits can be evaluated through the public hearing process. And there are no statutory or code requirements for incorporating public input on the county's determination of whether an application is complete.

**LLU F-18** Section 2 of the June 7, 2022, collection franchise agreement between Benton County and Allied Waste Services of Corvallis ("Republic Services") contains a limited reopener provision. Contract negotiations are not conducted in public. With that said, a process could be designed to allow public input, comment, and feedback on any provisions subject to Section 2 that may be negotiated between the parties to the agreement. The renegotiated collection franchise agreement must be agreed upon, in its entirety, by both Benton County and Republic Services.

**LLU F-19** What options does the Planning Commission have if they determine that DEQ regulation of a particular parameter is inadequate or likely to be inadequate?

The County could not determine that DEQ regulation of a particular environmental parameter is inadequate to protect public health and deny the application on those grounds. The County also has no authority to interpret, apply or enforce DEQ regulations. (Except for regulatory programs that DEQ formally delegates to a local government, such as with on-site sewage disposal regulation.)

**Commented [YM42]:** Republic is already on record regarding their position relative to this hauling franchise agreement. By signing the 10-year agreement over public objections, the County gave away all rights to make changes to the agreement. The wording in the agreement grants Republic veto power over any all possibility of improving this outdated approach to trash collection.



Additionally, the County cannot assume that an activity will result in a violation of DEQ parameters when the activity hasn't happened.

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

**LLU F-20** Could a new CUP approval be conditioned on cleaning up noncompliance with existing operations?

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

**LLU F-21** Is compliance/noncompliance with conditions of past land use approvals a topic that can be considered in any way during a new land use application?

Generally, the new proposal must be evaluated on its own merits relative to the approval criteria. However, the non-compliance of an existing land use condition could provide information that the Planning Commission considers in crafting a condition on a new application. If an application is made to expand an existing land use that is currently out of compliance with a condition of past approval and that noncompliance is causing issues for surrounding land uses, noncompliance of the original land use is not in itself grounds to deny the new application.

However, the decision-maker could potentially look at the existing noncompliance, consider whether that noncompliance is causing the existing land use to "seriously interfere" with uses on surrounding properties, and consider that as evidence toward determining whether the proposed land use complies with the review criteria because the same land use in a similar location was seriously interfering with surrounding uses even though it was subject to conditions of approval. Past conditions superseded by subsequent decisions or changes in the law could not form a basis for such analysis. [To Do: Need to address the relationship between this finding and R-7. Also, finding language needs fine-tuning.]

**Key Recommendations:**

**LLU R-1.** Consistent with SWAC's bylaws and Chapter 23 of the County Code, SWAC's role in reviewing a landfill-expansion CUP should be from the perspective of solid

**Commented [YM43]:** While this may be true from a strictly legal perspective and thus should not be cited in any decision, the CUP review criteria are discretionary and the history of noncompliance by the landfill operator and non-enforcement by Benton County clearly demonstrates that the imposition of conditions of approval to mitigate negative impacts cannot be relied on to ensure the resultant land use activity will not seriously interfere with surrounding land uses and the character of the area.

**Commented [VGJ44R43]:** Comment reviewed by subcomm earlier.

**Commented [YM45]:** The CUP review criteria are discretionary and the history of noncompliance by the landfill operator and non-enforcement by Benton County clearly demonstrates that the imposition of conditions of approval to mitigate negative impacts cannot be relied on to ensure the resultant land use activity will be compatible with adjacent land uses and the character of the area.

**Commented [YM46]:** Hopefully these recommendations are not in priority order. Limiting the role of SWAC should not be the County's highest priority in making improvements to the land use application review process. Clearly the history of lack of compliance monitoring and enforcement should be top of the list (not last).

waste management (see LLU F-13). The Board of Commissioners should more clearly define SWAC's role by articulating a scope of review. Examples of areas that may be appropriate for SWAC to comment on: Is the proposed expansion consistent with long-term plans for the landfill site? Is the proposal consistent with the 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? (If/when SWAC's overall role shifts to sustainable materials management, instances of the term "solid waste management" above should be replaced with "sustainable materials management.")

**Commented [YM47]:** This is a conclusion and recommendation that is not supported by the language in the Code. This is simply an effort to limit public engagement in the critical process of developing a sustainable path forward for solid waste management in Oregon (since most of the waste coming to Coffin Butte is from outside Benton County).

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

**Commented [YM48]:** This is simply an effort to limit public engagement in the critical process of developing a sustainable path forward for solid waste management in Oregon (since most of the waste coming to Coffin Butte is from outside Benton County).

**Commented [VGJ49R48]:** Comment reviewed by subcomm earlier.

**LLU R-3.** BCC 77.310 states that "*The applicant for a conditional use permit shall provide a narrative which describes: \* \* \* Other information as required by the Planning Official.*" [BCC 77.310(1)(e)] The workgroup could make recommendations regarding what "other information" would be helpful in a narrative. However, any committee recommendations would have to be limited to information related to the applicable criteria and could not expand that criteria.

**LLU R-4.** BCC 77.405 states, "*Copies of materials submitted to the Oregon Department of Environmental Quality as a part of any permit process shall be submitted to the Planning Official. If at any time the Planning Official determines that permit application materials or conditions of DEQ permit are judged to merit public review, a Public Hearing before the Planning Commission shall be scheduled.*" This provision is unclear. The subcommittee interprets this section as requiring a review if the use originally approved has been or will be modified due to the DEQ permit. The Planning Official could make such a determination using a formal "Interpretation" pursuant to BCC 51.205(1). Recommend code amendment to clarify this provision. A workgroup recommendation on how public review of DEQ permit requirements could most benefit the public would also be helpful.

**Commented [YM50]:** Historically, neither the Planning Official nor the Planning staff have taken the time to review any of the materials submitted by DEQ.

**Commented [VGJ51R50]:** Comment reviewed by subcomm earlier.

**Commented [YM52]:** This would only occur if the applicant said one thing during the land use proceeding and submitted something else to DEQ in the permit application process. But since these documents are not reviewed, not sure how any changes would be discovered. DEQ has a public review process for proposed permits and the County must engage actively in that process, which apparently doesn't happen.

**LLU R-5.** If the County provides an opportunity for public input into the determination of application completeness – the first step in the regulatory process, the information provided to the public should explain the application process in simple language and provide instructions on how and when to participate in manner that such public input is considered public testimony on the merits of the application. ~~include a caution that the County is not required to, and may not have the time to,~~

~~address or incorporate the public input into the completeness determination, and that such public input is not considered public testimony on the merits of the application.~~

**LLU R-6**

A process to allow public input, comment, and feedback on any provisions subject to Section 2 of the collection franchise agreement between Benton County and Allied Waste Services of Corvallis (“Republic Services”) (PLEASE RECHECK IF THESE ARE THE ACTUAL LEGAL ENTITIES INVOLVED WITH THIS FRANCHISE) could be designed as follows:

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

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

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

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

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

**LLU R-7**

Per LLU F-5 and F-20b, because existing and past operations are not within the County’s scope of review of a new conditional use permit application south of Coffin Butte Road, the subcommittee recommends that the County decision-makers prioritize addressing topics that would be relevant to review of a new CUP application and de-prioritize in-depth evaluation of existing and past operating approvals.

**Commented [YM53]:** This process and the executed agreement have been carefully worded to exclude any meaningful public input into improving the hauling and collection franchise agreement. The County signed an agreement that gives Republic total veto power over any changes to the agreement, thereby severely limiting any opportunity for meaningful change in an outdated practice.

**Commented [VGJ54R53]:** Comment reviewed by subcomm earlier.

**Commented [YM55]:** While this may be true from a legal perspective, the CUP review criteria are discretionary and the history of noncompliance by the landfill operator and non-enforcement by Benton County clearly demonstrates that the imposition of conditions of approval to mitigate negative impacts cannot be relied on to ensure the resultant land use activity will not seriously interfere with surrounding land uses and the character of the area.

In this case, past performance and non-compliance as well as non-enforcement of conditions is a strong indicator of future non-compliance and needs to be carefully considered when reviewing any future expansion application and reliance on conditions of approval to make things right.

**Commented [VGJ56R55]:** Comment reviewed by subcomm earlier.

LLU R-8

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

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

**Commented [YM57]:** This is the most important recommendation. Per Benton County staff, conditions of approval have not been previously and are not now actively monitored or enforced. Therefore, conditions of approval designed to mitigate negative impacts cannot be relied on as a means of making an application suitable for approval by the governing bodies.

**Commented [VGJ58R57]:** Comment reviewed by subcomm earlier.

**Commented [YM59]:** Forcing the members of the public to use their own money to sue the County and the operator for the County's negligence and the operator's violations? That does not seem appropriate at all.

**Commented [VGJ60R59]:** Comment reviewed by subcomm earlier.

**Commented [YM61]:** It seems to me that the whole system is broken, is designed to aid the applicant, and needs to be rebuilt with an equal emphasis on protecting the public interests. Somebody just needs to care.

**Commented [VGJ62R61]:** Comment reviewed by subcomm earlier.

The timing of said "improvements" is critical, and "promises" to make improvements cannot be used as the basis for concluding that impacts have, in fact, been mitigated. The County's professed and demonstrated history of not monitoring or enforcing conditions of approval results in real life undue burdens.