Bateman Seidel

MEMORANDUM

TO: Benton County Board of Commissioners

FROM: Melissa Ryan, Outside County Counsel

DATE: February 2, 2026

RE: Response to Legal Issues Raised in Submissions During First Open Record Period

The purpose of this memorandum is to respond to legal issues raised in three submissions into the record on January 27, 2026: (1) Letter from Valley Landfills' counsel; (2) Letter from Valley Neighbors for Environmental Quality and Safety (VNEQS)' counsel (referencing submission from Mark Yeager dated January 20, 2026); and (3) Letter from David Coulombe.

1. ORS 197.830(13)(b) Allows the Reconsideration Proceeding and the County Is Allowed to Reopen the Record on Reconsideration

Valley Landfills objects to the reconsideration proceeding, and argues that the county is not allowed to reopen the record. Valley Landfills is wrong.

ORS 197.830(13)(b) provides that the local government has a unilateral right to withdraw a decision for reconsideration prior to the date set for filing the record. The statute requires the county to "affirm, modify, or reverse its decision." *Oregon Pipeline Company, LLC v. Clatsop County*, 69 Or LUBA 403, 412 (2014), *rev'd and rem on other grounds, Columbia Riverkeeper v. Clatsop County*, 267 Or App 578, 594, 341 P3d 790 (2014). LUBA has explained that nothing in ORS 197.830(13) or OAR 661-010-0021 establishes any requirements for local government proceedings after withdrawal of the decision for reconsideration. In *McElroy v. City of Corvallis*, 36 Or LUBA 185, 195, *aff'd* 162 Or App 390, 991 P2d 582 (1999), a decision issued over 25 years ago and affirmed by the Court of Appeals, LUBA explained that:

> "[w]hich local land use regulations are 'applicable,' therefore, depends upon what stage in the process the local government returns to on reconsideration. In other words, *a local government may return a decision for*

> *reconsideration to the stage of an evidentiary hearing, in which case the procedures applicable to evidentiary hearings would apply*."

Benton County Code (BCC) 51.900 repeats ORS 197.830(13)(b) nearly verbatim, and does not identify any procedures for the reconsideration proceeding. Therefore, the Board of Commissioners determined that the Board would look to the procedures that apply to an appeal to the Board of Commissioners of a Planning Commission decision in BCC 51.840 to determine how to manage the proceedings on reconsideration. Those procedures allow the county to accept new evidence. County planning staff recommended reopening the record to include the November 6, 2025 Pre-Enforcement Notification Letter from DEQ to Valley Landfills (DEQ Letter) because county staff concluded the DEQ Letter was potentially relevant evidence that related to the applicable approval criteria. The Board accepted the recommendation, and additionally provided the opportunity for persons to respond to that evidence in a lengthy open record period, and allowed Valley Landfills to submit is final written argument at the conclusion.

Below are other examples of local governments that have reopened the record after withdrawing a decision for reconsideration.

- In *Beyond Toxics v. City of Eugene*, LUBA No. 2024-063, Feb 20, 2025, Beyond Toxics appealed a zone verification decision that concluded that a proposed use was allowed in the zone. The city withdrew the decision for reconsideration and reopened the record to accept new evidence and argument from anyone. The city then issued its decision on reconsideration, concluding that the proposed use was not an allowed use in the zone. The applicant then appealed the decision on reconsideration in *Eugene Clean Fuels, LLC v. City of Eugene*, LUBA No. 2025-007, July 23, 2025.

- In *McDougal v. Lane County*, LUBA No. 2018-025, Nov 26, 2018, after the applicant requested withdrawal in order for the county to consider new, recently discovered information in the county surveyor's files that county planning staff believed could be pertinent to the approval criteria for a partition, the county withdrew the decision denying the application for

> reconsideration. The board of commissioners returned the decision to the hearings officer, who reopened the record and accepted additional evidence and argument from the applicant, and the intervenor at LUBA, Landwatch Lane County. The hearings officer then issued a decision approving the partition application, and the board of county commissioners adopted the decision. Landwatch Lane County appealed that decision to LUBA in *Landwatch Lane County v. Lane County*, 80 Or LUBA 19 (2019).

Further, although not entirely on point, in *Columbia Riverkeeper*, the Court of Appeals rejected Oregon Pipeline Company's (OPC's) attempt to limit the proceedings on reconsideration to modification of the findings in support of the original decision, noting that the statute allows a local government to "reverse" its decision:

> " * * * OPC asserts that ORS 197.830(13)(b) only allows a local government on reconsideration to correct any legal defects in the original decision and does not allow the local government to adopt an entirely new decision. We agree with LUBA that the statute does not place any substantive limitations on a local government's right to withdraw a decision for reconsideration, as long as it is within the time constraints identified in the statute. The statute allows the county to 'affirm, modify or reverse its decision,' and the county's decision on reconsideration was a permissible choice to reverse its original approval decision." 267 Or App at 591, n 9.

2. The Reconsideration Proceeding Does Not Violate ORS 215.427

ORS 215.427(1) provides that:

> "the governing body of a county or its designee shall take final action on an application, including resolution of all appeals under ORS 215.422, within the shortest applicable period of the following periods, all of which begin on the date that the application is deemed complete: (a) 150 days[.]"

The Board of Commissioners took final action approving Valley Landfills' application on November 17, 2025, within the extended 150-day deadline. That

decision was appealed to LUBA, and the county subsequently withdrew the decision for reconsideration within the time permitted in ORS 197.830(13)(b).

Valley Landfills argues that the county's decision to withdraw the decision that was appealed to LUBA for reconsideration was "for the purpose of avoiding the requirements in ORS 215.427." The county understands this argument to refer to ORS 197.835(10)(a)(B), which provides that in an appeal of a decision to deny an application:

> "[LUBA] shall reverse a local government decision and order the local government to grant approval of an application for development *denied by the local government* if the board finds:
>
> > "* * * (B) That the local government's action was for the purpose of avoiding the requirements of ORS 215.427."

Valley Landfills' argument fails for two reasons. First, the Board of Commissioners' November 17, 2025 decision *approved* the application, so ORS 197.835(10)(a)(B), which could apply when an application is *denied*, has no relevance.

More importantly, the Court of Appeals rejected the same argument in *Columbia Riverkeeper.* In *Columbia Riverkeeper*, the board of commissioners made a decision on November 8, 2010 approving the application, within the 150-day deadline. That decision was appealed to LUBA by Riverkeeper. The county withdrew the decision for reconsideration, and after holding an on the record hearing to accept additional argument and to deliberate anew, the board of commissioners voted to modify its initial decision by denying the application and adopting findings in support of the denial.

The applicant, OPC, appealed the decision on reconsideration to LUBA, and argued to LUBA and then to the Court of Appeals that the county's process violated the 150-day rule in ORS 215.427. The Court concluded that ORS 215.427 and ORS 197.830(13)(b) are distinct processes:

> "We concluded in [*State ex rel Oregon Pipeline v. Clatsop County*, 253 Ore. App. 138, 288 P3d 1024 (2012), *rev den*, 353 Ore. 428, 299 P.3d 889 (2013)] that (1) for purposes of the 150-day deadline the county took 'final action' on November 8, 2010 and (2) *the subsequent withdrawal and reconsideration process are distinct from ORS 215.427*. Those conclusions, as a matter of logic, preclude the conclusion that actions taken by the board after the board has taken final action could be for the purposes of avoiding the 150-day deadline. Once the county has taken 'final action' for purposes of ORS 215.427, subsequent actions by the county cannot logically be for the purpose of avoiding doing what it has already done. LUBA did not err in recognizing that our decision in *Oregon Pipeline* precludes a conclusion that actions taken after November 8, 2010, could be considered 'for the purpose of avoiding the [150-day deadline] requirement[ ] of ORS 215.427.'." (Emphasis added.)

3. There Are No Undisclosed Ex Parte Contacts

ORS 215.422(3) provides that

> "No decision or action of a planning commission or county governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:
>
> > "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
> >
> > "(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related."

a. Valley Landfills' Allegations

Valley Landfills asserts that the Commissioners failed to disclose their receipt of the DEQ Letter after the record closed at the hearing immediately following receipt of the DEQ Letter. Valley Landfills is wrong. November 17, 2025 was the first hearing following the communication where action was considered and taken on the landfill application. The minutes of the November 17, 2025 hearing reflect that each commissioner disclosed that they had received multiple emails containing the DEQ letter after it was issued on November 6, 2025. The minutes also reflect that the Chair gave persons present the opportunity to rebut any disclosed ex parte contacts. Valley Landfills representatives were present at that meeting and did not avail themselves of the opportunity. Valley Landfills may not now argue that there are undisclosed ex parte contacts or that they have not been given the opportunity to rebut the disclosed ex parte contacts.

b. VNEQS Allegations

VNEQS speculates that Chair Malone may have failed to disclose unspecified ex parte contacts that may have occurred as a result of the Chair's participation in meetings as a legislative appointee and the Chair of the Oregon Legislatures' Joint Task Force on Municipal Solid Waste in the Willamette Valley. VNEQS asserts that it was entitled to query Chair Malone regarding possible ex parte contacts and potential bias.

VNEQS is wrong. First, there is no statutory or common law right of a participant in a land use proceeding to engage in a fishing expedition regarding potential ex parte contacts or bias. *Lane County School Dist. 71 v. Lane County*, 15 Or LUBA 608, 609-10 (1987) (no statute or LUBA rule of procedure authorizes fishing expeditions for possible ex parte contacts or bias); *see also Redside Restoration Project One, LLC v. Deschutes County*, LUBA Nos 2024-082/083/085, Feb 21, 2025 (footnote omitted) (slip order at 13-14) (same).

Second, LUBA has defined ex parte contact as

> "[a]n ex parte communication is a communication between a party and a decision-maker, made outside the hearing process, *concerning a decision or action before the decision-maker*." *Oregon Shores Conservation Coalition v. Coos County*, 81 Or LUBA 839, 846 (2020) (emphasis added.)

LUBA has also required a showing that the ex parte contacts were relevant to the issues before the local governmental body:

> "[I]n order to provide a basis for remand based on ex parte contacts, there must be some indication that the communication had something to do with the factual determinations or legal standards that govern approval or denial of *the application*." *Link v. City of Florence*, 58 Or LUBA 348, 353 (2009) (emphasis added).

Thus, Chair Malone's participation on a legislative task force evaluating municipal solid waste in the Willamette Valley is not "a communication," is not related to the application, and there is no violation of the ex parte statute's requirements. Further, Chair Malone's participation on the task force is not evidence of bias. To demonstrate actual bias, a party must identify "explicit statements, pledges, or commitment that the local official has prejudged *the specific matter before the tribunal*." *Columbia Riverkeeper v. Clatsop County*, 267 Or App 578, 609-10 (2014). VNEQS' allegations fall far short of this demonstration.

4. Comprehensive Plan Provisions Are Not Approval Criteria

David Coloumbe asserts that the Board of Commissioners' original decision is inconsistent with various quoted and cited comprehensive plan policies (David Colombe January 27, 2026 Letter, Page 8). First, this is a new issue that is outside of the scope of the reconsideration proceeding, which the Board of Commissioners has in its discretion limited to issues regarding the DEQ PEN Letter as it relates to applicable approval criteria. Second, Mr. Coulombe does not explain why any of the quoted comprehensive plan provisions are approval criteria for the landfill

application. Plan policies from the Benton County Comprehensive Plan do not apply as approval criteria for a conditional use.