

## MEMORANDUM

TO: Benton County Board of Commissioners  
FROM: Melissa Ryan, Outside County Counsel  
DATE: January 20, 2026  
RE: Legal Guidance for Decision on Reconsideration

### Introduction

On November 17, 2025, the Board adopted the final written decision approving Republic Services conditional use permit application to expand its existing landfill. The Board's decision was a decision on appeal of a Planning Commission decision denying the application. The Board's decision was appealed to the Land Use Board of Appeals (LUBA) in LUBA No 2025-082. On December 16, 2025, the Board voted to withdraw the decision for reconsideration pursuant to ORS 197.830(13)(b).

The purpose of this memorandum is to provide an explanation of the statutes and local laws that apply to the Board's proceedings on reconsideration.

### Statutory Right to Withdraw for Reconsideration

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. LUBA has adopted rules at OAR 661-010-0021 to implement the statute.

#### 1. Deadline for Filing Decision on Reconsideration with LUBA

OAR 661-010-0021(1) requires the county to file a copy of the decision on reconsideration "within 90 days after the filing of the notice of withdrawal *or within such other time as the Board may allow.*" (Emphasis added.)

The recommended schedule outlined in the meeting packet identifies March 17, 2026, the date of a regularly scheduled Board of Commissioners' meeting, as a potential date for adopting the written decision. If the Board chooses to adhere to its regular meeting schedule, the county would as soon as possible file a motion with LUBA seeking as little as one or two additional days and up to a week to file a

copy of the decision on reconsideration with LUBA, and outlining the county's anticipated schedule for the proceedings on reconsideration, to demonstrate that the county is moving with due haste while ensuring the right to a full and fair hearing for all participants.

## 2. Procedure on Reconsideration

LUBA has repeatedly explained that 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. *Tylka v. Clackamas County*, 28 Or LUBA 417, 425-26 (1994); *Eugene Clean Fuels LLC v. City of Eugene*, LUBA No 2025-007, July 23, 2025 (on reconsideration, a local government must follow any applicable regulations under its local code and if there are no local provisions governing local processes on reconsideration, then a local government may decide what process to use on a case-by-case basis); *ONRC v. City of Seaside*, 26 Or LUBA 645 (1994) (a local government may withdraw a decision for reconsideration under OAR 661-010-0021 and, absent local provisions to the contrary, limit its reconsideration to adoption of adequate findings).

In *McElroy v. Corvallis*, 36 Or LUBA 185, 195, *aff'd* 162 Or App 390, 991 P2d 582 (1999), LUBA explained in detail 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.* Similarly, a local government could return a decision for reconsideration to the stage of the decision maker’s deliberations, based on the record previously compiled, in which case the procedures applicable to evidentiary hearings would not apply.” (Emphasis added.)

The Benton County Code (BCC) includes BCC 51.900, which repeats ORS 197.830(13)(b) nearly verbatim and does not identify any procedures for the reconsideration proceeding. Therefore, it is up to the Board to decide the procedures that apply to the proceedings on reconsideration. It is the staff’s position

that the procedures that apply to an appeal to the Board of Commissioners of a Planning Commission decision in BCC 51.840 would apply, since the last proceeding before the Board was the appeal of the planning commission decision:

“The appellate authority shall conduct a public hearing pursuant to BCC 51.705 to 51.725 prior to deciding an appeal. The appellate authority shall review the record of the decision that is under appeal, and shall additionally consider any new evidence or testimony that is submitted into the record at the hearing. Any person may appear and be heard.<sup>1</sup> The appellate authority shall affirm, reverse, or modify in whole or in part the decision that is under appeal. The appellate authority shall not modify the decision on appeal to such a degree that the notice of the appeal does not reasonably describe the final decision, unless the appellate authority continues the public hearing for further testimony and issues new notice pursuant to BCC 51.605 to 51.625 which reasonably describes the proposed modification. The appellate authority shall adopt findings of fact supporting its decision.”

Additionally, *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973) recognizes that participants in a quasi-judicial local government land use proceeding have a right to rebut evidence. However, “there is no unlimited right to rebut rebuttal evidence, and *Fasano* does not require endless opportunities to rebut rebuttal evidence.” *Rice v. City of Monmouth*, 53 Or LUBA 55, 60 (2006), *aff’d* 211 Or App 250, 154 P3d 786 (2007). Therefore, staff recommends that if the Board reopens the record to admit new evidence, it leave the evidentiary record open on the schedule as recommended in the meeting packet, allowing the applicant the opportunity to present final argument and carry its burden of proof.

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<sup>1</sup> The requirement that a person “may appear and be heard” is subject to interpretation by the Board of Commissioners, which could interpret the phrase literally to mean the Board’s hearing of persons speaking. However, the phrase “to be heard” and the word “hearing” are legal terms of art, relating to due process rights, meaning a person has a right to a fair legal proceeding, including notice and an opportunity to present their case (evidence and arguments) before the Board. Staff recommends the Board adopt the second interpretation and allow the recommended open record period rather than take verbal testimony during a hearing, given the more than 10 hours of verbal testimony the Board has already taken in the appeal proceeding.