


## Memorandum

**To:** Benton County Board of Commissioners

**From:** Jeffrey G. Condit 

**Subject:** Code Interpretation and the Proper Weighing of Evidence (Conditional Use Permit Application No. LU-24-027)

**Date:** September 12, 2025

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We represent Valley Landfills, Inc. (the “Applicant”), in the above-noted conditional use permit application (CUP). The Applicant has appealed the decision of the Benton County Planning Commission to deny the application. The scope of review by the Benton County Board of Commissioners (the “Board”) on appeal is “de novo,” meaning that the Board is not limited by the Planning Commission’s decision or the record below, but can consider new evidence and argument and reach an independent decision on the merits. *See* BCC 51.840. The Planning Commission’s decision, however, misconstrued the applicable law and did not appropriately weigh the evidence or adequately explain why it found certain evidence more credible or weighty than conflicting evidence in the record. The purpose of this memorandum is to outline the appropriate interpretation of the Code and weighting of evidence in the context of the Planning Commission’s decision.

**I. The Planning Commission misapplied Benton County Code (“BCC” or the “Code”) 53.215.**

The Key Criteria for Approval are set forth in BCC 53.215:

The decision to approve a conditional use permit shall be based on findings that:

- (1) The proposed use does not seriously interfere with uses on adjacent property, with the character of the area, or with the purpose of the zone;
- (2) The proposed use does not impose an undue burden on any public improvements, facilities, utilities, or services available to the area[.]

To determine the meaning of an enactment, a court applies the framework for statutory construction established in *PGE v. Bureau of Labor and Indus.*, 317 Or 606, 610-12, 859 P2d 1143 (1993) and *State v. Gaines*, 346 Or 160, 171-73, 206 P3d 1042 (2009). Under the *PGE/Gaines* framework, a court construes a statute based on its text, its context in the statutory scheme, and its legislative history. *PGE* and *Gaines* involve the construction of state statutes, but the courts have ruled that the same framework applies to construction of local enactments. See *Church v. Grant Cnty.*, 187 Or App 518, 527 n.4, 69 P3d 759 (2003), citing *Lincoln Loan Co. v. City of Portland*, 317 Or 192, 199, 855 P2d 151 (1993). Absent a special definition of a specific term used in enactment, the courts ordinarily resort to the dictionary definitions, assuming that the legislature (or, in this case, the Board) meant to use a word of common usage in its ordinary sense. Webster's Third New International Dictionary of the English Language Unabridged, Merriam-Webster Inc., Publishers, Springfield, Massachusetts, USA ("Webster's") is the preferred dictionary of Oregon courts in such circumstance.

The Applicant analyzed BCC 53.215 in Section III of its Burden of Proof using this framework, relying on Webster's to construe terms such as "adjacent" and relying on the historical interpretation of terms such as "seriously interfere" and "undue burden" as analyzed by Benton County staff during the Benton County Talks Trash ("BCTT") process. Benton County's independent consultants concurred with this interpretation in the initial and amended staff reports.

The Planning Commission decision ignored these analyses and failed to offer a reasonable alternative interpretation. One of the Commissioners suggested during deliberations that "adjacent property" should include land in the surrounding counties. This ignores the dictionary definition of "adjacent" and ignores the context in BCC 53.215 that distinguishes between impacts on "adjacent property" and the character of the "area." In addition, it fails to articulate an alternative definition of adjacent, as a decisionmaker is required to do. See *Wilson Park Neigh. Ass'n v. City of Portland*, 24 Or LUBA 98, 101-02 (1992), *aff'd*, 117 Or App 620, *rev denied*, 316 Or 142 (1993).

Comments from certain members of the Planning Commission suggested that they believed that they had unbridled discretion to interpret the code. That is error. The Commission's interpretation of the Code must be consistent with the *PGE/Gaines* framework, and a planning commission's decision is not entitled to deference on appeal. See *Gould v. Deschutes Cnty.*, 233 Or App 623, 227 P3d 758 (2010).

As the County governing body, the Board's interpretation of its own enactments is entitled to deference under Oregon law. *See Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). In order for deference to apply, however, the underlying criterion must be ambiguous or in conflict with another provision, and the governing body's interpretation has to be plausible. Plausibility is determined in the context of the *PGE/Gaines* analysis and prior interpretations. *See, e.g., Central Eastside Indus. Council v. City of Portland*, 74 Or LUBA 221 (2016). The Board has no authority to repeal provisions in the Comprehensive Plan and Development Code by interpretation.

Because these criteria apply to every conditional use application filed in the County, the future implications of this attempt to legislate by interpretation are significant. Because the Planning Commission misapplied the applicable criteria, the Commission's analysis was flawed throughout its decision.

Several of the Commissioners prepared personal statements, which were delivered prior to deliberation and incorporated into the findings. Some of these statements included considerations well outside the Planning Commission's scope of review under the applicable criteria and appeared to be objections to the fact that the area is designated for landfill use and that landfills are allowed under any criteria. The landfill is a permitted use and is expressly permitted to expand upon approval of a conditional use permit.

The Applicant's and the County staff's identification and interpretation of the applicable criteria are consistent with the text, context, and legislative and decisional history of the criteria. The Board should affirm these interpretations.

**II. The Planning Commission improperly failed to appropriately weigh the evidence and explain why it relied on certain evidence over substantial and weighty conflicting evidence.**

The Planning Commission decision was also not supported by substantial evidence in the record. The Commission failed to explain why it found certain evidence more credible than the exhaustive professional analyses prepared by the Applicant's experts.<sup>1</sup> It is required to do so. *See, e.g., Barkers Five, LLC v. Land Conservation & Dev. Comm'n*, 261 Or App 259, 361-62,

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<sup>1</sup> During Planning Commission deliberations, the County's legal counsel attempted to get the Commission to explain why it found certain evidence more probative and it expressly refused to do so.

323 P3d 368 (2014). The Applicant's evidence was found probative by the County's own independent experts, who recommended approval of the application with conditions.

Much of the testimony relied on by the Planning Commission was anecdotal, unsupported by citation to authority, did not plausibly link the claimed impact to the landfill, or was purely speculative. Cited evidence that was relevant was heavily outweighed by the evidence supporting approval and/or that was addressed in the Conditions of Approval. Applicant's Exhibit 67 addresses in detail the analysis of individual Commissioners contained in their personal statements incorporated into the findings.

The Board should review and weigh the conflicting evidence in the record, rely on the strongest evidence in determining compliance, and fully explain its choice. The Applicant submits that the substantial evidence in the record strongly supports approval of the CUP.

**III. The Planning Commission impermissibly considered construction impacts as part of the use. Notwithstanding this error, noise and traffic from construction will not create an undue burden on public facilities or seriously interfere with adjacent properties.**

Several Planning Commissioners found that the Applicant had failed to consider noise and traffic impacts from construction of the expansion area as part of its analysis.

As the Applicant has noted previously, construction noise is expressly exempt from the sound limits under the DEQ administrative rule regulating noise (the "DEQ Noise Rule"). OAR 340-035-0035(5)(g). In the absence of any County noise regulations, the parties have been applying the DEQ Noise Rule to determine compliance.

As the Applicant has also noted previously, construction impacts are generally not considered part of the "use" for the purposes of impact review. In the recent case of *Cottrell Cmty. Planning Org. v. Multnomah Cnty.*, LUBA No. 2023-086 (Jan. 22, 2025), the Oregon Land Use Board of Appeals ("LUBA") upheld a Multnomah County hearings officer's decision determining that the impacts from construction by the City of Portland Water Bureau of a 135-million-gallon water filtration facility and related communication tower and pipelines were not part of the water facility "use" subject to impact review. Opponents had argued that impacts of the lengthy and disruptive construction process should have been considered as part of the use for purposes of review. The Multnomah County review criteria in *Cottrell* are very similar to the conditional use criteria in the Benton County Code. Also similar to *Cottrell*, there is nothing in the Benton County Development Code that regulates construction impacts or includes such impacts as part of conditional use review.

Even though it is not required to analyze construction impacts under the DEQ Noise Rule or the Benton County Code per *Cottrell*, the Applicant nonetheless asked its traffic and noise consultants to amend their analyses to include the impacts from construction. Even considering those impacts, the amended analyses show that the traffic and noise arising from construction activities will not create an undue burden or seriously interfere with uses on surrounding properties. See Applicant's Exhibit 67.

#### **IV. The Planning Commission improperly ignored proposed conditions of approval.**

The Planning Commission's decision also ignored the robust conditions of approval proposed by County staff and the Applicant. The County's independent experts concluded that these conditions would result in compliance with the applicable criteria. The basis for the Commission's decision appeared to be that the Applicant will not comply with the conditions and the County will not enforce the conditions. In point of fact, the Applicant proposed a condition that would require it to provide significant funding to the County for the sole purpose of monitoring compliance and enforcing conditions of approval at the landfill. This demonstrates the Applicant's commitment to compliance and provides the County with the means to ensure compliance.

In addition to the condition funding county enforcement, the Applicant proposed additional conditions in order to address issues raised during public testimony, including:

- A condition imposing a replacement tonnage cap to address concerns about expiration of the franchise tonnage cap upon approval of the CUP.
- Substantial additional conditions relating to the prevention of litter, including collecting litter from adjacent properties at the request of owners.
- A condition to add a water truck for firefighting purposes.
- A condition to require the Applicant to monitor groundwater quality and quantity and to require mitigation, including drilling of new private wells, if impacts occur.

Much of commentary in the individual Commissioners' statements ignored the mitigation provided by these additional conditions and the prior conditions of approval.

Almost every land use decision includes at least some conditions of approval. An assumption that conditions will be ignored or not enforced is speculative and is not an appropriate basis for

denial. These conditions of approval will give the County the means and methods to ensure that the expansion will not have negative impacts on the adjacent properties or the area.

**V. The Planning Commission should have deferred to the Oregon Department of Environmental Quality (DEQ) and the United States Environmental Protection Agency (EPA) on the regulation of methane and PFAS.**

As cited in the Applicant's Burden of Proof, DEQ has exclusive jurisdiction over the areas it regulates, and the statute preempts local authority from applying standards inconsistent with its rules. As noted in Applicant's Exhibit 7, a letter from Civil & Environmental Consultants, Inc., the Applicant faces a significant state permitting process following approval of this CUP before it can begin depositing solid waste in the expansion area. Exhibit 7 details the permit modifications that will be required for the Applicant to move into the expansion area and the requirements for compliance and ongoing monitoring. DEQ regulates air quality requirements (methane, hydrogen sulfide, odor), leachate regulation and disposal, and protection of both ground and surface water, as well as protection for floodplains, wetlands, geotechnical/seismic considerations, and critical habitat. The Applicant will have to demonstrate compliance with all of these criteria in these areas to obtain modifications to the required permits. The permitting process is a public process and the Applicant is confident based on its experience at the County level that each and every permitting requirement will be highly scrutinized.

The County does not have the expertise or the regulatory framework in place to second-guess or supersede the state and federal regulatory process. The Applicant must comply with any applicable regulation as it is adopted, regardless of the proposed expansion. The County must rely on that process.

**VI. Conclusion.**

The Applicant has met its burden for proof to demonstrate compliance with the applicable criteria. The landfill can be expanded in a safe and reasonable manner that preserves a significant County resource and will not have significant negative impacts on adjacent properties and the character of the area. The Applicant respectfully requests that the Board approve the CUP.