Amy Dibble

From: Cameron La Follette <cameron@oregoncoastalliance.org>
Sent: Thursday, July 11, 2024 2:24 PM
To: Planning Department
Cc: Sean Malone
Subject: ORCA testimony re HBCU 24-001, New River golf course
Attachments: ORCA to Coos PC re New River Golf Course July 2024.pdf; ORCA to WRD re Bandon Biota Transfer Applications May 2024.pdf

Dear Coos County,

Attached please find the testimony of Oregon Coast Alliance in the matter of New River golf course, HBCU 24-001, before the Coos County Planning Commission. Attached also are the comments of Oregon Coast Alliance to the Water Resources Department in the matter of the application by Bandon Biota for three water transfers relating to the proposed golf course.

Please note that if the hearing is not continued, ORCA requests the record be left open for at least **14 days**.

Please let me know you received both these attachments, opened them and placed them into the record for this matter.

Thank you,

Cameron
—
Cameron La Follette
Oregon Coast Alliance
Executive Director
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July 11, 2024

Via Email

Coos County Planning Commission
c/o Coos County Planning Department
Coos County Courthouse
250 N. Baxter
Coquille, OR 97423
planning@co.coos.or.us

Re: Oregon Coast Alliance testimony for the proposed New River Dunes Golf Course application (HBCU-24-001).

Dear Coos County Planning Commission,

On behalf of Oregon Coast Alliance (ORCA), please accept this testimony for the above-entitled application. ORCA aims to protect the Oregon coast by working with coastal residents for sustainable communities; protection and restoration of coastal and marine natural resources; providing education and advocacy on land use development; and adaptation to climate change. ORCA requests that the application be denied given the flaws identified below.

The applicant requests a conditional use permit to allow a regulation 18-hole golf course with accessory uses in the EFU zone. The accessory uses include a clubhouse/restaurant, an agronomy center/maintenance facility, a turn-stand, at least two stand-alone restrooms, a caddy shack, a driving range, a practice course, and the necessary parking/drop-off areas. The proposed golf course is directly adjacent to Recreation (Rec) zoned land to the west (Bandon State Park) and privately owned EFU land to the north, south, and east. The state ownership to the west contests of vacant open space land.

I. The application has not demonstrated that the subject lots and parcels were lawfully created

The application has not demonstrated that the subject lots and parcels were lawfully created. Under CCZO 4.6.210, "[t]he size of the parcel will not prohibit development as long as it was lawfully created or otherwise." The applicant has not demonstrated that the parcels are lawfully established. The applicant must submit deed histories, property description cards, or other information establishing that the lots are lawfully established. If any of the lots/parcels were unlawfully divided after land use laws were in place, which commonly occurs, then the resulting lots/parcels are not legal lots or lawfully established units of land.

II. Geologic Assessment Review

The applicant alleges that it does not have the details needed for the location of structures to carry out the geologic assessment review. As noted below, the condition of approval must provide for the same substantive and procedural rights that have been provided here. Moreover, if the applicant does not know the location of the structures, then the applicant cannot reasonably demonstrate compliance with all of the approval criteria. For example, the applicant cannot reasonably determine whether the impacts

III. The golf course is located on high value farmland

The golf course is prohibited because the golf course is located on high value farmland.[1] Under ORS 195.300(10), high-value farmland includes high-value farmland as described in ORS 215.710 that is land in an exclusive farm use zone or a mixed farm and forest zone, except that the dates specified in ORS 215.710 (2), (4) and (6) are December 6, 2007." ORS 215.710(2) provides as follows::

> "In addition to that land described in subsection (1) of this section, for purposes of ORS 215.705, high-value farmland, if outside the Willamette Valley, includes tracts growing specified perennials as demonstrated by the most recent aerial photography of the Agricultural Stabilization and Conservation Service of the United States Department of Agriculture taken prior to November 4, 1993. For

[1] Golf courses are not permitted on high-value farmland, except for limited circumstances that do not apply here. *See e.g.*, OAR 660-033-0130(18)(c).

purposes of this subsection, "specified perennials" means perennials grown for market or research purposes including, but not limited to, nursery stock, berries, fruits, nuts, Christmas trees or vineyards but not including seed crops, hay, pasture or alfalfa."

See also OAR 660-033-0020(8)(b); ORS 215.710(2). The property containing the golf course is in common ownership, which means that the property containing the golf course is a "tract." *See* OAR 660-033-0020(14) (definition of "tract"). The staff report acknowledges that there are two points that appear to be permitted, have a certificate, or a decree for the use of water for irrigation issued by the Water Resources Department in the project area. Given that some portion of that land contains high-value farmland, the entire tract is considered "high-value farmland." The staff report fails to appreciate the import of the defined term "tract," alleging that the aforementioned two points are not within the footprint of the course. That contention is inconsistent with state law and its definition of high value farmland and tract.

IV. Impacts to Surrounding Farmland

The applicant has not submitted a sufficient farm impacts analysis. State law requires that the proposal not force a significant change in accepted or forest practices on surrounding lands devoted to farm or forest uses and a significant increase in the cost of an accepted farm or forest practices on surrounding land devoted to farm and forest use:

> *(5) APPROVAL CRITERIA Approval requires review by the governing body or its designate under ORS 215.296. Uses may be approved only where such uses:*
>
> > *(a) Will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; and*
> >
> > *(b) Will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.*"

Even assuming that the golf course could be placed on the subject property, the applicant's showing under ORS 215.296 is clearly inadequate. Under ORS 215.296(1), a non-farm use on EFU land must not force a significant change in accepted farm practices or significantly increase the cost of those farm practices on surrounding agricultural lands. Case law demonstrates that the review under ORS 215.296 must be applied on a farm-by-farm basis and farm-practice-by-farm-practice basis. The test is not a conversion (i.e., supply of land) or profitability test. If a farmer must change accepted farming practices, even if there is no increased costs or reduced profitability, the nonfarm

use cannot satisfy ORS 215.296. ORS 215.296(2) allows counties to impose conditions of approval. Those conditions of approval must be measured by how the condition prevents the loss of agricultural land and not on how the condition might preserve the overall profitability of a farm use. The conditions must also measure the ability of the farmer to engage in an accepted farming practice. Moreover, the applicant must address the cumulative impacts of the individual impacts. As noted in the staff report, the lands to the north, south, and east are all zoned EFU. The EFU land directly adjacent to the golf course tract contains two active cranberry operations. There are also two cranberry operations further east and northeast of the proposed course. There are also blueberry operation to the east, and pastureland that is owned by the applicant under Bandon Biota, LLC.

The applicant alleges that a golf course would not bring about any greater impact to the surrounding farm uses than other farm uses would. This is obviously incorrect because the golf course is designed to draw in untold numbers of people to golf, work, and dine on the subject property far more than maintaining the existing farm-oriented land use pattern would. Increased human presence will result in increased attraction of scavengers as a result of human activity and waste, increase in traffic, increase in trespass, and so forth.

Golf courses consume significant amounts of water. The applicant is in the process of filing for a new groundwater right, storage, irrigation, pond maintenance, and a surface water right for diversion of water during the storage season. The applicant disclaims any impacts to surrounding farm operations because of Oregon's priority date ("first in time, first in right") system for water rights. The applicant cannot obviate an analysis of impacts to surrounding farm uses. ORCA has submitted comments on the water rights applications (T-14438, T-14439, T-14440, *see* attached comments). ORCA notes that these water rights transfers cannot be approved for the reasons set forth in the attached comments, and ORCA incorporates those comments as testimony for the golf course application.

Prior reports have identified that there is limited publicly available groundwater within the project area and the Bandon area, likely due to seawater intrusion. The applicant must account for the impact to surrounding cranberry bogs because of drawdown. Moreover, the surface-level distance is not determinative of whether there are impacts. The applicant must submit a hydrology report to ensure that there will be no significant impacts to surrounding farm uses, groundwater, wells, and so forth.

V. <u>The golf course exceeds the acreage limitation</u>

Under a 660-033-0130(20)(a), "[a] regulation 18 hole golf course is generally characterized by a site of about 120 to 150 acres of land, has a playable distance of 5,000 to 7,200 yards, and a par of 64 to 73 strokes." While there is no strict upper limit in terms of acreage, the 120 to 150-acre provision cannot be stretched to the proposed size in excess of that requirement. There is flexibility in the rule, but the rule is also capable of being broken. The applicant does not have a blank check to create a golf course of whatever acreage it would like, and the entire golf tract is more than 340 acres. It is not clear that the rule was intended to allow such a significant area – all of which is high value farmland – to be devoted to non-golf course uses in support of a golf course. ORCA believes that doubling the upper limit exceeds what is allowed under the 120 to 150-acre limitation.

VI. Use by the non-golfing public must be prohibited

Under OAR 660-033-0130(20)(d)(A), "[a]n accessory use or activity does not serve the needs of the non-golfing public." That rule goes on to articulate what cannot be included as accessory uses. The County must, therefore, impose a condition of approval that prohibits uses for the non-golfing public, including sporting facilities unrelated to golfing, including but not limited to tennis courts, swimming pools, and weight rooms; wholesale or retail operations oriented to the non-golfing public; or housing. No banquets, public gatherings, or public entertainment. The restaurant cannot be used by the general public, as was previously maintained by the applicant.

VII. Beaches and Dunes

The applicant has not addressed the structural impacts that may need to be completed. The applicant alleges that a subsequent conditional use application can address the structural development component. If the applicant would like to postpone satisfaction of the structural development component standard, then the applicant would be required to satisfy that standard at a later time, with a process that provides the same rights of participation and opportunity for appeal as is provided here. A decision to approve an application must demonstrate that compliance with all discretionary approval criteria is "feasible." *Meyer v. City of Portland*, 7 Or LUBA 184 (1983), *aff'd,* 67 Or App 274 (1984). Conditions of approval can be used by a local government to ensure compliance will be achieved. "[F]easibility means that 'substantial evidence supports findings that solutions to certain problems … are possible, likely and reasonably certain

to succeed.'" *Meyer v. Portland*, 67 Or App 274, 280 n. 6, 678 P2d 741, *rev. den.* 297 Or 82 (1984).

In *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447 (1992), LUBA noted that:

> "Assuming a local government finds compliance, or feasibility of compliance, with all approval criteria during a first stage (where statutory notice and public hearing requirements are observed), it is entirely appropriate to impose conditions of approval to assure those criteria are met and defer responsibility for assuring compliance with those conditions to planning and engineering staff as part of a second stage."

23 Or LUBA at 447; *see, Stockwell v. Benton County*, 38 Or LUBA 621 (2000) (deferred findings of compliance must observe statutory notice and hearing requirements). While "[t]hese principles are relatively simple and straightforward in the abstract, [they] prove more complex in the context of specific permit approval requests." *Rhyne*, 23 or LUBA at 447. Local governments may "impose conditions if necessary' to ensure that those feasible solutions are later developed and implemented. That is an option that is available to the local government when the evidentiary record supports such findings, …." *Gillette v. Lane County*, __ Or LUBA __, (LUBA No. 2006-001, June 5, 2006) (slip op at 6).

However, if compliance with approval criteria is unclear or uncertain, then the request must be denied, postponed, or made more certain by a condition of approval requiring a further public hearing regarding discretionary approval:

> "Where the evidence presented during the first stage approval proceedings raises questions concerning whether a particular approval criterion is satisfied, a local government essentially has three options potentially available. First, it may find that although the evidence is conflicting, the evidence nevertheless is sufficient to support a finding that the standard is satisfied or that feasible solutions to identified problems exist, and impose conditions if necessary. Second, if the local government determines there is insufficient evidence to determine the feasibility of compliance with the standard, it could on that basis deny the application. Third, if the local government determines that there is insufficient evidence to determine the feasibility of compliance with the standard, instead of finding the standard is not met, it may defer a determination concerning compliance with the standard to the second stage. In selecting this third option, the local government is not finding all applicable approval standards are complied with, or that it is feasible to do so, as part of the first stage approval (as it does under the first option described above). Therefore, the local government must assure that the second stage approval process to which the decision making is deferred provides the statutorily

> required notice and hearing, even though the local code may not require such notice and hearing for second stage decisions in other circumstances."

Rhyne, 23 Or LUBA 447-48; *Gould v. Deschutes County*, 216 Or App 150, 161-163, 171 P3d 1017 (2007) (conclusion that it was feasible to prepare a wildlife mitigation plan was not sufficient to conclude that the plan would actually result in adequate mitigation).

The local government may not delegate or defer demonstration of compliance with a discretionary review standard to an administrative or ministerial decision-maker. *See Hodge Oregon Properties, LLC v. Lincoln County*, 194 Or App 50, 55, 93 P3d 93 (2004) (conditions were actually approval criteria that had to be satisfied before approval of the development application). In *Hodge Oregon Properties*, 194 Or App 50, the Court of Appeals affirmed LUBA's remand and expanded on its and LUBA's understanding of "discretionary conditions of approval," stating that:

> "approval is not permissible unless the conditions have been satisfied. By treating the conditions as siting or performance standards that would be subject to review by county staff, LUBA noted that, the county effectively ignore the possibility that the applicant actually might not be able to comply with them and precluded other interested persons from establishing precisely that fact through the hearings process that is required concerning conditions of approval."

See also Township 13 Homeowners Association, Inc. v. City of Waldport, __ Or LUBA __ (LUBA Nos. 2006-171/172, Jan. 18, 2007) (Slip op *7-8) ("Under *Rhyne*, it was impermissible for the city to completely defer the analysis required by [the local code] to a later stage of the approval process where no notice or opportunity for comment is provided"). The County must include a condition of approval that would require, in essence, a round 2 for this application, which would include all of the procedural and substantive protections that have been provided here.

VIII. Request to Leave the Record Open

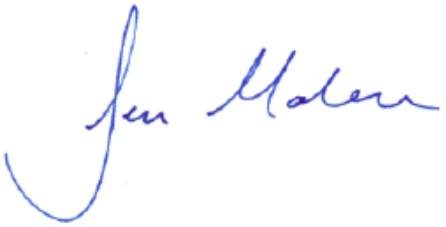
Given the repeatedly failure to present sufficient information to satisfy the approval criteria, it is likely that the hearing will be continued. However, in the event it is not continued, ORCA respectfully requests that the record be left open for a minimum of 14 days.

IX. Conclusion

Like staff, ORCA believes the applicant has not satisfied numerous criteria necessary for approval of the application. The applicant has presented the County with a

half-baked application, and it is not a serious attempt to gain approval. Accordingly, the Planning Commission should deny the application.

Sincerely,



Sean T. Malone
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Cc:
Client

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Eugene, OR 97440 seanmalone8@hotmail.com

May 23, 2024

Via Email

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Transfer Section
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Lisa.J.Jaramillo@water.oregon.gov
Dante.J.Luongo@water.oregon.gov
(503) 986-0900

Re: ORCA comments on applications T-14438, T-14439, T-14440

Dear Ms. Jaramillo,

On behalf of Oregon Coast Alliance (ORCA), please accept these comments for Transfers T-14438, T-14439, and T-14440. These comments are for all three applications, except where otherwise specified. ORCA is concerned about enlargement that will result from the transfers and the reduced water availability in the area.

As it relates to all three applications, water right transfer decisions are actions that must be coordinated with local land use governments to protect important local water resources. OAR 690-005-0025(3); OAR 690-005-0035. The transfer applicant, Bandon Biota LLC, withdrew its application for a golf course with the Coos County Planning Department on February 1, 2023. Attached is Coos County's notice of Bandon Biota's application withdrawal. The approval by the Planning Commission is no longer valid, as a result of the withdrawal. To the extent that a new application for a golf course has been submitted, it has not been noticed for public review or hearings, nor has it been deemed complete. At this point, the applicant has no existing approval from Coos County for the proposed golf course.

OAR 690-005-0035(4)(a) requires that "land use information be submitted with applications or requests, or as otherwise specified prior to taking action on the water use

approval. The information shall be sufficient to assess compatibility as specified on forms contained in the department's Land Use Planning Procedures Guide[.]" The necessary information was not, apparently, provided by the applicant. OAR 690-005-0035(4)(c), in turn, requires that an applicant submit land use information prior to use of water and associated construction:

> "If local land use approvals are pending, place conditions on a permit or other approval to preclude use of water and any associated construction until the applicant obtains all required local land use approvals; or, withhold issuance of the water use permit or approval until the applicant obtains all required local land use approvals."

Because the land use application has neither been noticed nor deemed complete, the agency has no approval that the agency can rely upon. The previous application experienced significant opposition, and it is likely the new application will experience similar opposition, which could create a protracted process. The County should remedy the blatantly false Land Use Compatibility Statement that states that the applicant has received an approval when that application has been withdrawn.

Furthermore, as it relates to all three applications, they fail to include Exhibit 3 water use plan that as of early 2023 included year-round pumping of 600cfs without reclamation for reuse.[1] No specific information about the site wells within the proposed golf course were provided, including their depth and the hydrology of the area, amongst others. This is important because most shallow wells have been going dry during recent summers.

For T-14438, ORCA submits that it would result in enlargement because a golf course is a more consumptive use than irrigation and temperature control for cranberry production. Not only are cranberry operations typically lined and the water is recycled but it also occurs in a small area (17.4 acres), much smaller than the proposed irrigation area (26.4 acres), which will result in enlargement.

For T-14438, ORCA submits that the certificates 86449 (primary) and 86448 (secondary) are not eligible for transfer because they were not used according to the terms of the certificate. The applicant has not established the requisite use for the full

[1] Unlike a golf course, cranberries use reclamation and use less water per acre. The majority of the proposed water rights to be transferred are those assigned to both irrigation and temperature control of cranberries. The irrigation of cranberries is collected and reused before being lost to evaporation. Golf courses, on the other hand, use fertilization and irrigation that is not reclaimed. Moreover, majority winter-applied water to mitigate freeze events (and summer-applied for temperature control) is not equivalent to summer-applied irrigation to turf grass.

time from 2014 through 2019. No water use is posted on WRIS for either certificate for any year. The terms of the certificate appear to have been violated because both certificates require annual reporting for temperature control but none is available.

For T-14438, the application must be denied because the source is from an unlawful reservoir. ORS 537.130(2) restricts anyone from storing "any waters" without a permit. WRD cannot allow an unlawful reservoir to continue and the transfer must be denied because it relies on an unpermitted reservoir.

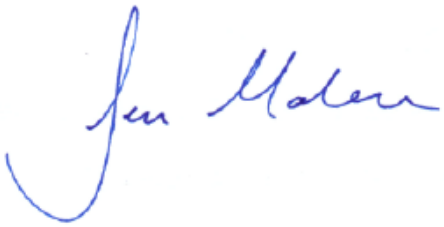
For T-14439, ORCA submits that the transfer will reduce stream flows and Instream Water Right Certificate 76268 on Twomile Creek. T-14439 proposes to change the place of use and add a point of diversion for Certificate 73636. The current place of use is 53 acres of land directly north and adjacent to Twomile Creek. The current points of diversion are four portable pumps located within Twomile Creek and adjacent to the irrigated land. Certificate 73636, however, has been leased instream intermittently since 2001 under IL-107, with the current lease agreement in place from 2021 to 2025. The proposed place of use is the new golf course which is not adjacent to Twomile Creek but spread out over six quadrants south of the creek. The proposed new point of diversion is at a fixed location in Twomile Creek in a different quadrant and further down the river from the portable pumps. This proposed transfer would therefore cause significant changes to the flows within Twomile Creek and any return flows it received when the land under the certificate was being irrigated. This is important because Twomile Creek within this reach is protected by an instream water right. ISWR Certificate 76268 exists to provide required stream flow for anadromous fish migration, spawning, egg incubation, fry emergence, and juvenile rearing, and flows are protected throughout the reach. Additionally, Twomile Creek is listed by the Oregon Department of State Lands as Essential Habitat for Fall chinook, winter steelhead, and coho. It appears likely that the proposed transfer would injure the instream water right's flows and purpose.

For T-14439, ORCA submits that the transfer will cause injury to other water rights, including certificates 26397, 90113, and 90096. These water rights' source of water from Twomile Creek will not receive return flows from irrigation of the original land under Certificate 73636 if the place of use is changed to a large golf course. Furthermore, the proposed additional point of diversion would be located further downstream from the diversion points for Certificate 26397, 90113, and 90096, where as the points of diversion are located upstream. New pumping by a senior water right at this location may case injury to junior water rights.

For T-14440, ORCA submits that the transfer will also result in enlargement. T-14440 proposes changes to certificates 89934 which allows beneficial use for irrigation, temperature control, and flood harvesting of 13.8 acres of cranberry bogs. The proposed transfer changes the place of use for the irrigation portion. The proposed transfer also changes the character of use for the temperature control portion to irrigation and changes

its place of use. These changes will result in enlargement issues because irrigation of golf courses, which typically use thirsty turf grass, is a much more consumptive use than irrigation and temperature control for cranberry operations, especially since cranberry bogs are typically lined and they recycle water. The current cranberry operations also occur on a compact area of land; the irrigation and temperature control occur on the same 13.8 acres. The proposed irrigation will spread out over 20.9 acres across four quadrants. This change from an overlap of use and size of the place of use will result in enlargement of the water right.

Sincerely,



Sean T. Malone
Attorney for Oregon Coast Alliance

Cc:
Client