APPEAL OF A LAND USE DECISION

SUBMIT TO COOS COUNTY PLANNING DEPT. AT 60 SECOND STREET OR MAIL TO: COOS COUNTY PLANNING 250 N. BAXTER, COQUILLE OR 97423. EMAIL PLANNING@CO.COOS.OR.US PHONE: 541-396-7770

Planning Director Appeal Fee $250.00 / Hearings Body or Officer Appeal Fee $2688.00

Date Received: 8/27/24 *Fee Received* 2688.00 *FILE # AP-* 24-004 Reciept# 248192

If the correct fee is not with the appeal it will not be processed. Application shall be filled out electronically.

List the names and signatures of each petitioner and a statement of the interest of each petitioner to determine party status. Multiple parties shall join in filing a single petition for review, but each petitioner shall designate a single Contact Representative for all contact with the Planning Department. All communications regarding the petition, including correspondence, shall be with the Contact Representative. This can be attached to this form marked as Attachment "A".

Appellant: Oregon Coast Alliance

Mailing address: P.O. Box 857, Astoria, OR 97103

Phone: (503) 391-0210 Email: cameron@oregoncoastalliance.org

Signature: cameron lafollette

Appellant's Representative: Sean Malone

Mailing address: PO Box 1499, Eugene, OR 97440

Phone: 303-859-0403 Email: seanmalone8@hotmail.com

Signature:

The name of the applicant: Ocean River LLC

County application file number being appealed: HBCU-24-001

☐ Planning Director's Decision (Fee $250) ■ Hearings Body or Hearings Officer Decision (Fee $2560)

The appellant must explain how they have achieved party status pursuant to the applicable sections of 5.8.150 or 5.8.160:

Appellant submitted several written testimonies for the hearing before the Planning Commission and the subsequent Open Record period.

The appeal deadline, as stated in the Director's Decision: August 29, 2024

The nature of the decision and the specific grounds for appeal, citing specific criteria from the Coos County Zoning and Land Development Ordinance, Comprehensive Plan, Statute or Rule. (This can be attached to this form marked as Attachment "B".)

The nature of the decision is as follows: the County approved a conditional use permit to establish an 18-hole regulation golf course with accessory uses in the EFU zone, and the facilities include a clubhouse/restaurant, agronomy, center/maintenance facility, a turn-stand with restrooms and vendor space, at least two stand-alone restrooms, a caddy shack, a driving range, a practice course, and necessary parking and drop-off areas. Appellant will include the remainder of the requirements in an attachment as Exhibit B.

The appellant must explain in detail, on the appeal form or attached to the appeal form, how the application did not meet the criteria in the case of an approval or why the criteria should or should not apply; or, in the case of a denial the appellant shall explain why the application did meet the criteria or why certain criteria did not apply to the application. (This can be attached to this form marked as Attachment "C".)

The appellant has included Attachment C setting forth how the application did not meet the criteria in this case.

Sean T. Malone

Attorney at Law

PO Box 1499

Eugene, OR 97440

Tel. (303) 859-0403

seanmalone8@hotmail.com

August 27, 2024

Via Hand Delivery

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

Re: Oregon Coast Alliance Appeal of HBCU-24-001 (Ocean River LLC)

Dear Planning Staff,

On behalf of Oregon Coast Alliance, please accept this appeal of the planning commission's decision in HBCU-24-001. Attached hereto is the appeal form. The appellant is the Oregon Coast Alliance, PO Box 857, Astoria, OR 97103, 503-391-02010, cameron@oregoncoastalliance.org. The appellant's representative is Sean Malone, Attorney at Law, PO Box 97440, 303-859-0403, seanmalone8@hotmail.com. The name of the applicant is Ocean River LLC and the application file number is HBCU-24-001. Appellant is providing the filing fee through a check in the amount of $2,688.00, enclosed herein. The date the notice of decision was mailed was August 14, 2024, making the final date for appeal August 29, 2024. Below are the remaining requirements that could not adequately fit on the appeal form.

Attachment A:

Sean T. Malone, attorney for Oregon Coast Alliance, is the contact representative.

Attachment B:

The nature of the decision is as follows: the County approved a conditional use permit to establish an 18-hole regulation golf course with accessory uses in the EFU zone, and the facilities include a clubhouse/restaurant, agronomy, center/maintenance facility, a turn-stand with restrooms and vendor space, at least two stand-alone restrooms, a caddy shack, a driving range, a practice course, and necessary parking and drop-off areas.

The specific grounds for appeal are set forth below, where appellant explains in detail how the application did not meet the criteria in this case.

Attachment C:

The specific grounds for appeal and detailed explanation of how the application did not meet the criteria in this case:

The issues preserved for appeal include those raised in ORCA's testimony before the planning commission dated July 11, 2024, July 18, 2024, and July 25, 2024, incorporated by reference and attached hereto, as well as the following:

- <u>The application has not demonstrated that the subject lots and parcels were lawfully created</u>

The application and findings did 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 and the findings have 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.

The applicant apparently believes that property line adjustments create land in the sense that a property line adjustment creates a lawfully established unit of land. For example, the applicant alleges that "[t]he area in yellow was created by Property line Adjustment Deed 2003-6462 following approval of the adjustment by Coos County. The applicant is mistaken. Property line adjustments simply adjust boundaries. The resulting property is not newly created, and is not a new parcel. *See Meyer v. Jackson County*, __ Or LUBA __ (LUBA No. 2014-005, April 24, 2014). Properties are newly created via a partition or subdivision. Properties are unlawful if they have not been created in conformance with all applicable land use laws. The applicant references D-23-002/ACU-23-037 but that application is not in the record. Therefore, there is no substantial evidence

to support the applicant's allegations as to whether the lots and parcels are lawfully established.

Geologic Assessment Review

The application must be subject to a condition of approval that requires that the applicant submit and receive approval for a geologic assessment review. However, the findings did not impose this condition of approval. In *Rhyne* and its progeny, the process for the geologic assessment review must allow for the same review process with the same procedural and substantive rights that were provided in this application. Because the applicant does not have the details needed for the location of structures, it cannot feasibly carry out the geologic assessment review. The findings allege:

> "The concern about the geologic assessment is not applicable at this stage, as the assessment is specifically tied to structural development. The use impacts under discussion pertain to the entire project, not just the structures. A geologic assessment can be applied for through a subsequent permit, which means that this issue does not undermine the current application and is not a valid argument against the proposal."

The findings fail to properly condition the approval by essentially deferring findings to another stage of the approval process without ensuring the same procedural and substantive rights, as is required through a condition of approval under *Rhyne*.

The applicant alleges that it does not have the details needed for the location of structures to carry out the geologic assessment review.[1] The findings did not respond to this issue. If the applicant does not know the location of the structures, then the applicant cannot reasonably demonstrate compliance with all of the approval criteria, including the impacts related to the farm impacts test under ORS 215.296. If the applicant does not

---

[1] The applicant alleges:

- "The structures, proposed in conjunction with the golf course have not been architecturally designed and, while the location of structures is generally known, the exact location of each structure is subject to change as development of the course proceeds."
- "Because the majority of the structures associated with the golf course have not been designed, and the exact location is unknown, it will be necessaryto address ordinance requirements for liquefaction at a later date. Because the standards of Section 4.11.115 will be addressed under a quasi-judicial land process with notice, it is not required that the standards be addressed at this time."

know the location of the buildings, then it cannot know the full extent of the impacts from the proposed use. The restaurant and clubhouse will have impacts due to the number of visitors and golfers, the amount of garbage produced, traffic, trespass, attraction of corvids, and so forth. The applicant cannot readily define the baseline for the farm impacts analysis if the applicant is not aware of where the buildings will be placed, as is conceded by the applicant. The findings did not respond to this issue.

> The golf course is located on high value farmland and the applicant has not satisfied the requirements contained in the land use tables, administrative rules, and local code.

The applicant is proposing a non-farm use on farmland (more specifically, high value farmland, which alone is fatal to the application). The legislature has identified a legislative policy in favor of retaining agricultural lands,[2] or, as the Supreme Court has opined: "the legislature has declared that preservation of agricultural land, particularly in large blocks, is an important statewide policy and that limitations on urban expansion into, and alternative uses of, agricultural and forest lands are necessary and a matter of statewide concern." *Stop the Dump Coalition v. Yamhill County*, 364 Or 432, 442 (2019).

---

[2] ORS 215.243 provides:

> "(1) Open land used for agricultural use is an efficient means of conserving natural resources that constitute an important physical, social, aesthetic and economic asset to all of the people of this state, whether living in rural, urban or metropolitan areas of the state.
>
> (2) The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources and the preservation of such land in large blocks is necessary in maintaining the agricultural economy of the state and for the assurance of adequate, healthful and nutritious food for the people of this state and nation.
>
> (3) Expansion of urban development into rural areas is a matter of public concern because of the unnecessary increases in costs of community services, conflicts between farm and urban activities and the loss of open space and natural beauty around urban centers occurring as the result of such expansion.
>
> (4) Exclusive farm use zoning as provided by law, substantially limits alternatives to the use of rural land and, with the importance of rural lands to the public, justifies incentives and privileges offered to encourage owners of rural lands to hold such lands in exclusive farm use zones."

Thus, despite that a golf course is an allowed use on non-high-value farmland, the application occurs amidst this legislative policy.

The golf course is prohibited because the golf course is located on high value farmland.[3] 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 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 findings fail 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.

The applicant concedes that the definition for high-value farmland applies at ORS 215.710(2), wherein the applicant alleges that: *Aerial photographs confirm that on December 6, 2007* [195. 3 *00(10)(a)], the subject tract upon which the golf course is proposed, does contain lands growing specified perennials. This criterion is satisfied.*" If all 342 acres are in common ownership, then ORS 215.710(2)'s provision for a "tract" means that the entirety of the ownership is high-value farmland. At the hearing, the

---

[3] 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).

applicant has indicated the opposite. The applicant took contrary positions on this issue before the planning commission. The findings do not rely on underlying evidence supporting the applicant's allegations made at the hearing. The applicant must submit the property line adjustments that allegedly preclude the entire tract from being high-value farmland. The findings fail to address this issue.

Next, under ORS 195.300(10)(c)(A), the property is high-value farmland. ORS 195.300(10)(c)(A) provides that high-value farmland means "Land that is in an exclusive farm use zone or a mixed farm and forest zone and that on June 28, 2007, is .... Within the place of use for a permit, certificate or decree for the use of water for irrigation issued by the Water Resources Department." Appellant attached the Permit to Appropriate the Public Waters (G-13208) and Certificate of Water Right for cranberry operations on 28.0 acres. The applicant alleges that "segment of the property upon which the golf course is proposed did not contain a water permit, certificate, or decree for the use of water." It is not clear whether this is part of the applicant's contiguous ownership, in which case the golf course, indeed, contains high-value farmland, or whether it has been severed from the property entirely. The findings do not clarify this issue. Appellant submits that it appears as though it is part of the golf course but not in active play, but the findings do not substantiate the applicant's allegations with sufficient evidence to obtain an approval. In any event, the golf course is in contiguous ownership with the remainder of the 342 acres now owned by Ocean River LLC.

All 342 acres are zoned Exclusive Farm Use except along Twomile Creek, and it is highly likely that those lands are subject to a "place of use" of a water right/certificate for irrigation as required under ORS 195.300. The findings do not show which existing water rights as of June 28, 2007 apply to all or part of the 342 acres, whether part of the actual golf course or reserved for "open space" or other use. As noted before the planning commission, it would be very odd if 342 acres of EFU land, or even just the 165 acres of EFU land slated for the golf course, were not in the place of use for one, or more likely several, pre- June 2007 water rights for irrigation. The HVF definition under ORS 195.300 applies to contiguous ownership, so even the two locations identified by the findings that are a place of use for a water right for irrigation, and which appear to be outside the golf course proper, make the entire 342 acres subject to HVF rules prohibiting golf courses.

Moreover, the decision alleges that:

"The next criteria to consider for high-value farmland is to look at the water rights. The map below was used to determine 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. However, they are not in the footprint of the golf course."

The findings are not clear on this point. The findings do not demonstrate "what is the footprint of the golf course." Is this the 342 acres or the lesser acreage that is the "golf course" proper? Moreover, the findings refer to a map that has numerous red dots and alleges that it highlights "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." The map does not identify where these specific points are. The findings do not contain substantial evidence to support the allegations and the findings are inadequate as they have not responded to appellant's claims.

The findings also allege that:

"The property has been carefully evaluated and isolated to ensure that it does not meet the criteria for classification as high-value farmland. The opponent appears to be relying on outdated tax lot data to make this argument. Staff has addressed this by confirming that the land in question does not constitute a tract of high-value farmland, and therefore, the issue has been resolved."

The findings do not demonstrate which tax lots contain the place of use for a permit, certificate or decree for the use of water for irrigation issued by the Water Resources Department. There is no way of confirming the allegations of the applicant and the findings. The findings misconstrue the standard, are inadequate, and lack substantial evidence.

<u>The golf course exceeds the acreage limitation, is inconsistent with the rules for the definition of a golf course, and inconsistent with the legislative policy for preservation of farmland.</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.

The applicant's entire ownership appears to be roughly 342 acres, spanning for approximately 2 miles, but the golf course itself is 165 acres. All the 342 acres is farmland, but the applicant is not utilizing all of that land for the golf course.[4] The applicant cannot have it both ways, alleging on one hand that all of the acreage is for the golf course, but that there is acreage that is not "utilized for golf." The definition of "golf course" notes that it is an "area of land with highly maintained natural turn laid out *for the game of golf* with a series of nine or more holes, each including a tee, a fairway, a putting green, and often one or more natural or artificial hazards." Nothing in that definition allows the applicant to take out of farm production the 165 acres that is not even devoted to the game of golf. As noted above, there is a legislative policy to preserve farmland and the applicant here is using just as much land as is devoted to the golf course to no particular use at all. The applicant is using unnecessary farmland that is not devoted to the game of golf, which violates the rule (*e.g.*, OAR 660-033-0130(20)) and is contrary to the legislative policy.

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.

The application does not comply with the Beaches and Dunes requirements in CCZO 4.11.129 and failed to include a condition of approval to defer findings.

[4] This raises the issue that the applicant alleges at times that the non-golf use acreage is part of the golf course and other times not part of the golf course, depending on when it is convenient. For example, the applicant alleges that "134-acres of open space land that contain natural dune formations, partially covered with native vegetation, approximately 20 acres of wetlands, and approximately 23 acres of identified flood areas." The applicant then alleges that "[w]hile not utilized for golf, the open space, wetland and flood areas provide for appropriate setting for a Scottish Links Golf Course[.]"

Neither the applicant nor the findings address 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 findings failed to 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.

The applicant has not satisfied the criteria for the golf course and design capacity, pursuant to OAR 660-033-0130.

The applicant acknowledges that the ownership includes two residential dwellings located within the boundaries of the proposed golf course. The applicant alleges that both dwellings are currently being utilized as month-to-month residential rentals. The applicant alleges that they will continue to be rented. Golfers will want to stay at these dwellings on the golf course, and the applicant needs to establish the design capacity for these dwellings because they are "in connection with the use." OAR 660-033-0130(2). The applicant has failed to do so and the findings do not respond to this issue. Regardless, accessory uses cannot include "housing." 660-033-0130(20)(d)(A) ("Accessory uses to a golf course do not include: Sporting facilities unrelated to golfing such as tennis courts, swimming pools, and weight rooms; wholesale or retail operations oriented to the non-golfing public; or housing"). The application, therefore, cannot be approved with the housing on the golf course property. Even if that were not the case, the applicant would be required to disclose the design capacity dwellings that will be rented out to golfers. Moreover, the applicant is incorrect to allege that a new design capacity of 100 people applies every ½ mile. The ½ mile limitation applies unless it is a tract as of a particular date, which does not permit the applicant to expand upon the 100-person design capacity.

The findings not only misconstrue OAR 660-033-0130(2) and OAR 660-033-0130(20)(d)(A) but they fail to respond to the appellants' arguments.

The applicant has not satisfied the farm impacts test, pursuant to state law (ORS 215.296) and local code (CCZO 4.6.120(5)(a) and (b))

The applicant has not satisfied the farm impacts test, pursuant to state law (ORS 215.296) and local code (CCZO 4.6.120(5)(a) and (b)). 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. State law is implemented by the following code provision:

(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."

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 and findings allege 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 and County cannot obviate an analysis of impacts to surrounding farm uses. 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 and the findings have not accounted 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.

In *Stop the Dump Coalition v. Yamhill County*, 364 Or 432, 442 (2019), the Oregon Supreme Court clarified the farm impacts rule. There, the Court noted that "the farm impacts test [applies] on a farm-by-farm and farm practice-by-farm practice basis and intended to use the ordinary meaning of 'significant' and significantly' in ORS 215.296(1)[.]" "'[S]ignificant' indicates that the change has, or is likely to have, an important influence or effect on the farm or forest practices 'on surrounding lands.'" In essence, the concern in the legislation that resulted in ORS 215.296(1) is the "changes in practices and increases in costs." "The legislature was concerned about the supply of agricultural land, but we conclude that the legislature intended the farm impacts test to focus on forced changes in farming and forest practices and the costs of those practices[.]" As it relates to that the test, the Oregon Supreme Court concluded that:

> "To summarize, when the parties dispute whether a nonfarm use will force a significant change to a particu-lar accepted farm practice or significantly increase the cost of that practice, the farm impacts test in ORS 215.296(1) requires an applicant to prove that the proposed nonfarm use (1) will not force a significant change in the accepted farm practice and (2) will not significantly increase the cost of that practice. A "significant" change or increase in cost is one that will have an important influence or effect on the farm. For each relevant accepted farm practice, if the applicant cannot prove both of those elements without conditions of approval, the local government must consider whether, with conditions of approval, the applicant will meet the farm impacts test."

The Court was not done, however, because it also addressed the "cumulative impacts" under the farm impacts test, which requires such a cumulative analysis and possibly that the cumulative impacts test request also considering more than the aggregate of multiple less-than-significant impacts on each farm.

Here, there are multiple significant impacts that must be analyzed – farm-to-farm, farm practice-by-farm practice, and in the cumulative – in order to carry the applicant's burden of proof. At this point, however, the applicant has not engaged any such analysis except to allege that the impacts from a golf course are the same, or at least similar, as from a cranberry bog and other surrounding farm uses. The findings continue this error, and did not respond to appellants' comments below. That allegation, however, clearly misconstrues the analysis required by the Oregon Supreme Court.

The applicant, below, and the findings repeatedly allege that the impacts between bogs and golf courses are the same or similar and that there will be dunes that separate some of the farm uses from the golf course. It is not enough to simply allege[5] – across the board – that the effects and chemicals used in a golf course are the same as in cranberry bogs[6]. The applicant is offered no evidence to support such a statement, and that statement requires some expertise. The applicant and findings have established no expert opinion that the effects of a cranberry bog are the same as golf course. One is intended to draw as many golfers as possible, and the other is not intended to draw any visitors, except those working on the bogs. Even then, the applicant does not allege that they are the same but just similar – though that contention is without record support.

Some impacts that may occur include trespass from errant golfers or golfers following errant drives, litter, attraction of corvids[7] from trash, impacts from the application of herbicides, pesticides, insecticides and so forth. Golf courses use a variety of chemical applications, including pre-emergent herbicides, fungicides, insecticides, growth regulators, plant stimulants, and so forth.[8] As noted in the footnote, there is a host

---

[5] The applicant alleges that:

> "It is however the applicant's contention, for the purpose of showing compatibility, that the activities associated with maintaining a golf course are very similar, and often the same, as those types of activities performed ill conjunction with existing farm uses in the area."

The applicant also refers to "fertilizers and chemicals" but does not expand. The chemicals used on golf courses can include concerning chemicals such as chlorpyrifos, which can affect the nervous system in high doses.

[6] Regardless, there are other surrounding farm uses, including blueberry production and pasture on the Leff ownerships. The findings do not respond to this allegation.

[7] The issue is apparently so common that some golf courses spray for crows. The applicant has not demonstrated what it expects to use to deter crows or corvids.

[8] Fungicides are biocidal chemical compounds or biological organisms used to kill or inhibit fungi or fungal spores. Phosphite salts can be used as a biodegradable fungicide to protect golf course turfgrass against Pythium root rot and other pathogens of the order Oomycetes. It is primarily used on greens and fairways as a preventative treatment. Plant growth regulators or inhibitors are used to suppress seedheads and leaf growth due to rising mowing costs and danger posed to operators and other personnel. Plant growth regulators are now standard practice for golf course superintendents to enhance overall turf quality, promote a smooth and uniform playing surface, and improve stress tolerance in higher maintenance areas. Post-Emergent Herbicides tackle both perennial and annual broadleaf weeds, and some even control grassy weeds (weeds that resemble grass). Post emergent herbicides can also be used to treat specific problem areas. These include selective, aquatic, and non-selective. Selective herbicides control specific weed species,

of chemicals that are applied to typical golf courses, but the applicant has not been straightforward as to what chemicals will be used. At the hearing, the applicant said "we spray lawns" but what is the applicant spraying? Not all of these chemicals are made equally and some can have deleterious effects on farmers and their crops. Moreover, the applicant and the findings do not demonstrate – with any evidence – that the farm uses and golf course uses utilize the same chemicals.

It should be expected that controlling weeds on 300+ acres would require significant application of chemicals. Neither the applicant nor the findings contest that chemicals will be applied. The applicant and the findings do not disclose or respond to testimony about how much of any of these chemicals are expected or what is routine for golf courses of this size. The application and findings do not indicate how it will address invasive species, noxious weeds, pest management (*i.e.*, the applicant has not demonstrated which chemicals it expects to use). The public cannot begin to understand the impacts until the applicant discloses the types of herbicides and insecticides it is using. Again, the findings do not respond to these issues, and the public cannot begin to formulate adequate testimony without the underlying information.

The applicant and findings also conclude that "the golf course will be physically and visually shielded from the adjacent agricultural use, and vice versa." It is not clear how the applicant and findings believe visual impacts from the golf course would affect the farm uses. Regardless, the applicant and the findings fail to identify the impacts that are likely to occur. The applicant and findings allege that there are dunes of a particular height that buffer some surrounding property, but there is no evidence in the record in the form of topographical maps or photographs (other than aerial photographs that offer little evidentiary weight) to demonstrate the height of any of the surrounding dunes. The findings do not respond to the testimony from appellants and others on this issue. The applicant and findings also allege that "the golf course fairways are generally surrounded

---

while leaving golf course turfgrass relatively unharmed. Some of these act by interfering with the growth of the weed and are often synthetic mimics of natural plant hormones. Aquatic herbicides are chemicals specifically formulated for use in water to kill or control aquatic plants. A non-selective herbicide kills all plants it comes in contact with. From grubs, nematodes, mole crickets, mites, ants, mosquitoes and more - superintendents constantly battle for control of soil and turf inhabiting pests on golf courses. Insecticides can include, but are not limited to, the following: Control Solutions, Nufarm, Syngenta, BASF, Bayer, FMC Corporation, DOW, Valent and other leading manufactures. They include ovicides and larvicides used against insect eggs and larvae, respectively. The applicant has been silent on which types of chemicals it will use and the effects of them. The findings do not respond to this testimony below.

by elevated dune formations that separate the course from adjacent properties and naturally direct runoff internally." The surrounding dunes – which have not been substantiated by any evidence in the record – are not somehow hermetically sealing the runoff and wastewater on the golf course. Even if it were "generally surrounded by elevated dune formations," a significant concern is the impacts to groundwater and to adjacent bogs (regardless of whether there may be an intervening dune of some unsubstantiated size). The findings do not address this issue. The applicant must prepare a hydrologic assessment to determine what the impact from runoff of water and pesticides, fungicides, herbicides, and insecticides. The findings do not address these issues or address whether a hydrologic assessment is required. At the hearing, the applicant alleged that it has test wells and monitoring wells and it is using that to determine how it will impact adjacent and surrounding properties. This is a concession that the applicant does not know the impacts, though there will be impacts. This is exactly the type of analysis that must occur for the farm impacts test, but the applicant is not presenting that information here and now. The findings do not respond to this issue. Simply put, the applicant and findings cannot reasonably understand the impacts as it relates to the farm impacts test without this type of analysis, as well as some type of independent review. The application is, therefore, half-baked because the applicant cannot carry its burden of proof as it relates to water usage and how that will affect neighboring and surrounding cranberry bogs. Again, the findings do not respond to this issue. The farm impacts test must be deferred under *Rhyne* and its progeny, as outlined in below, until a later time when the applicant has presented all reasonably relevant information related to farm impacts and increased costs to farmers. Again, however, the findings do not respond to these issues.

The impacts related to water are not simply resolved by the Oregon Water Resources Department. A typical 150-acre golf course uses 200 million gallons of water a year (without considering the restaurant, clubhouse, and other uses), and it is likely that use of wells or groundwater[9] will result in impacts to adjacent and surrounding bogs. The applicant has not demonstrated how much water is necessary for this golf course, how

[9] The applicant alleges that "It is anticipated that the water source for irrigation and domestic use will be from deepwater wells and potentially reservoirs or ponds." ORCA submits that the applicant has not demonstrated that drawdown will not occur by using "deepwater wells," ponds and other means. Indeed, this is simply more evidence that the applicant has failed to complete any kind of relevant analysis.

many golfers (apart from the traffic analysis[10]), and patrons to the restaurant are expected. The impacts to adjacent bogs and farm uses cannot be evaluated until there is a hydrologic study and geologic hazard assessment that addresses these issues. The applicant and findings ignore the likelihood that the chemicals (insecticide, fungicide, herbicide, pesticides, etc., none of which are specifically identified) used on the golf course will enter the bogs through the groundwater and porous, sandy soil.

Below, appellant included comments from Waterwatch of Oregon for the Bandon Biota Water Transfers. As noted in those comments, the water rights are not likely to be granted:

> "The water rights involved in these transfer applications may be subject to forfeiture. There is no water use data posted on WRIS for any year for certificates 86449 and 86448. Also, certificates 86449 and 86448 specifically require water use reporting for water used for temperature control, but there is no temperature control water use available on WRIS for either certificate for any year. In determining if a right is subject to transfer, OWRD is required to assess whether the water right was forfeited within the time limit set by ORS 540.610, which covers a five-year time period that ended no more than 15 years before the potential issuance of a notice of cancellation. ORS 540.610(2)(f). The "clock" for OWRD's forfeiture assessment required for review of this transfer, therefore, is not just the previous five-year period but includes this full look-back period. Additionally, OWRD must initiate cancellation proceedings "[w]henever it appears to the satisfaction of the Water Resources Commission upon the commission's own determination... that a perfected and developed water right has been forfeited." ORS 540.631. 3. T-14438 would result in enlargement. These changes would result in enlargement. Enlargement is an expansion of a water right that can occur when the user uses a greater rate or duty per acre than is currently allowed, increases the acreage irrigated under a right, fails to keep the original place of use from receiving water from the same source, or diverts more water at the new point of appropriation or diversion than is legally available at the original point of appropriation or diversion. OAR 690-380-0100(2). The Department shall not approve a transfer application that results in enlargement. OAR 690-380-5000(1)(c). These transfers would result in enlargement because irrigation of golf courses, which typically use thirsty turf grass, is a much more consumptive use

[10] For example, what is the average number of golfers from other nearby golf courses or a similarly situated golf course? The applicant must determine what the farm impacts from a significant number of golfers.

than irrigation and temperature control for cranberry operations, especially since cranberry bogs are typically lined and they recycle water."

Again, the findings do not respond to this issue, except to say that:

> "the Oregon Water Resources Department is responsible for conducting a negative impact analysis during the water right transfer process. The County can accept this analysis as sufficient proof that there will be no adverse impacts from the proposed use. The opponent has not provided sufficient evidence to demonstrate any specific adverse impacts on a property-by-property basis, making it difficult for the applicant or the planning commission to address these objections. Broad statements without detailed evidence may preclude an appeal on this issue to the Land Use Board of Appeals. The use is permitted under ORS 215.283, and siting the golf course will not alter the farmland designation or remove the land from the agricultural inventory."

WRD has not engaged in an impact analysis yet and, therefore, the County cannot accept this analysis as sufficient proof that there will be no adverse impacts from the proposed use – because there has been no such analysis. The applicant is again deferring findings without any condition of approval to ensure the public has the same procedural and substantive rights as it does here whenever the actual findings will be made in the future. This violates *Rhyne* and its progeny. The findings fail to respond to questions about what chemicals (fungicides, herbicides, *etc.*) will be used on the golf course.

The applicant and the public cannot adequately gauge the farm impacts test under ORS 215.296 if the applicant does not know the location of the buildings. The findings do not disagree, yet come to a contrary conclusion. The restaurant and clubhouse will have impacts from the number of visitors (which has not been disclosed), the amount of garbage produced, traffic, trespass, attraction of corvids, and so forth. The applicant has not provided any estimate of the number of golfers expected for the proposed golf course, apart from a traffic estimate. The number of golfers is relevant to these impacts on adjacent farm uses. The applicant and findings cannot readily define the baseline for the farm impacts analysis. There is simply no reason to think that the applicant can satisfy this criterion without knowing where the variety of structures will be placed on the property. The findings do not respond to these issues raised by appellant and others.

The applicant also alleges that it is "anticipated that on-site sanitary waste will be addressed through an onsite sanitary septic system and drain field." The applicant and findings, however, do not disclose the potential effects, likely because the applicant does

not even know if it will use a septic system and drain field. This is yet another issue that is half-baked. Nitrogen pollution from septic systems and drain fields is common. Again, the findings do not address these issues, and, therefore, the findings are inadequate. The findings also fail to establish a sufficient evidentiary basis.

According to testimony at the hearing, the applicant misidentified the Twin Creek farm operation. The testimony also noted that Bandon Biota has not adequately managed their properties to reduce wildfire concerns. The testimony also noted that the applicant has not provided any studies associated with water drawdown or otherwise. The findings do not respond to these issues.

Of particular concern is the Kranick Cranberry Farm, given that is directly adjacent and centrally located on the eastside of the proposed golf course. The applicant acknowledges that the ridge of the intervening dune (again, no topographical map has been submitted to verify these allegations) is, at times, only 10 feet tall. The potential impacts identified above are particularly acute as it relates to the Kranick Cranberry Farm. As with all other farms, the applicant copies-and-pastes the same statement that the golf course and bogs utilize the same "irrigation, fertilizing, mowing." This is clearly disingenuous, because the applicant has not even conceded in the farm impacts test for the closest farm that there will be chemicals applied. Moreover, there is no evidence to demonstrate that the chemicals used are the same across the bogs and the golf course. Again, the findings do not respond to this issue, and the findings are inadequate and not based on substantial evidence.

Finally, neither the applicant nor the findings included a cumulative impacts analysis. A cumulative impacts analysis is required, as noted by the Oregon Supreme Court, but the applicant has neither engaged in such an analysis or conceded that such an analysis is applicable. This because the applicant has disclaimed any and all impacts because they are allegedly the same as those of a cranberry bog, which is a wholly unsupported allegation.

Appellant incorporates the following issues raised by ODFW:

"In accordance with the department's mission and Fish and Wildlife Habitat Mitigation Policy (OAR 635- 415), staff submit the following preliminary comments and recommendations in relation to this proposal. Please include these comments for the record.

• It is unclear if surveys have been conducted to assess what wildlife species may be present on the property. Given the type of habitat, location, and scale of the

project, the department recommends wildlife surveys be conducted to identify more specific recommendations for avoidance, minimization, and mitigation measures. It is recommended the applicant hire a biologist to conduct surveys. The department would be willing to provide technical guidance on methods and timing.

• The siting location immediately abuts, and shares similar habitat characteristics with, designated critical habitat for the federally listed coastal distinct population segment of pacific marten (Martes caurina, federal status: Threatened). Selection criteria3 used by the United States Fish and Wildlife Service (USFWS) to determine critical habitat suggest that there is a high likelihood of use by this species in the Bandon Dunes Natural Area. There are also known use areas immediately adjacent to the project area for other listed species. As such, the department suggests the county and/or applicant reach out to USFWS for guidance on minimizing impacts and to inquire on the potential need for an Incidental Take permit.

• Twomile creek is listed by the Oregon Department of State Lands (DSL) as Essential Salmon Habitat for Fall chinook, winter steelhead, and coho. If there are any new stream crossings (e.g. bridges, culvert installations, etc) associated with this project compliance with Oregon's fish passage laws (ORS 509.585 – ORS 509.910) is required.

o All new and replaced stream crossings need to meet or exceed state of Oregon Fish Passage guidelines as defined under OAR 635-412. OAR 635-412-0035 (3) specifies that: "Requirements for fish passage at road-stream crossing structures such as bridges and culverts are:

(a) Stream Simulation Option (preferred design alternative) where:

(A) Open-bottomed and closed-bottom road-stream crossing structures shall have beds under or within the structure that:

(i) Are equal to or greater than the active channel width multiplied by 1.2 plus 2 feet, as measured at sufficient locations outside the influence of any artificial or unique channel constrictions or tributaries both upstream and downstream of the site. o If there is any planned in-stream work (such as culvert replacement or bridge installation) associated with this project, it is advised that the applicant

adheres to the Oregon Guidelines for Timing of In-Water Work for the associated stream. The instream work period for Twomile Creek is July 15th -September 30th . Exemptions to this time must be approved by ODFW.

• Per the County Comprehensive Plan, a 50 foot or greater riparian buffer is the recommended standard to protect stream habitats. Given the significant low stream flows and increased water temperatures that many watersheds in southwest Oregon have been experiencing, it is of great importance to Oregon's fish populations that protection of riparian buffers are maintained and supported. The department would be interested in reviewing any plans for work within a riparian area and can provide guidance on habitat improvements and minimization of detrimental impacts within riparian buffers.

o The department is retaining this comment from the original 2022 comments for posterity. The department recognizes that the applicant addresses on pages 25-26 (10 a-i) ordinances pertaining to riparian vegetation and the minimum riparian vegetation setback. The applicant states that "All riparian vegetation shall be protected in conjunction with the development of the golf course.", "Any development proposed near a wetland or other waterway will maintain a minimum 50-foot setback.", and the other provisions do not apply to construction plans or will comply with local, state, and federal regulations. If this application is approved, and construction plans change in the future so as there may be riparian impacts due to structural development, the department would recommend mitigation actions in alignment with the department's Mitigation Policy. •

• The department recommends additional details on management plans for water use and methods to reduce impacts to water quality. The new application does not add any new clarification to water use needs, only that they would be applying to utilize groundwater and wells. The section on drainage seems to rely primarily on existing wetlands to support water quality protection. There is no detail supporting the capacity of existing wetlands to handle the change in management activities that may alter the amount of run-off contaminants and nutrient influx from fertilizers, chemicals, increased vehicle use on non-porous surfaces that currently do not exist on the site. The department recommends planting of additional vegetation surrounding the wetland habitats to create a better filtration buffer and a substantive stormwater management plant to prevent contamination of nearby waterways and wetlands. Moreover, the applicant has not identified what

chemicals, fertilizers, and so forth it will be using as is related to the farm impacts test.

• There is conflicting information in the application narrative to the maps. In the narrative the applicant states that no part of the course will be going through wetlands (page 1), however the maps of the course design seem to indicate that the course does potentially go through the wetlands associated with holes 2, 3, and 12.

• On page 30 of the application, the applicant addresses Section 4.1.131 of the Coos County comprehensive plan (Significant Wildlife Habitat) by stating "no portion of the course is within an identified Significant Wildlife Area". This section of the chapter specifically addresses: "Sensitive Big-game Range", Salmonid Spawning and Rearing Areas, and Bird Habitat Sites.

o The property is within Year-round Peripheral Big Game Habitat. Per the mitigation policy, this habitat is Category 3: essential and not limited habitat or important and limited habitat. The Mitigation Policy goal for mitigation is "no net loss of habitat quantity or quality" with a strategy of "in-kind, in-proximity mitigation". The county comprehensive plan addresses impacts to big game habitat in relation to dwelling density and there are no dwellings proposed in this application. However, the department highlights the concerns with wildlife conflict below which could be reduced by maintaining and supporting quality habitat on adjacent/in-proximity lands and planning ahead by integrating management practices and designs to reduce the potential for wildlife conflict before they occur. The department offers the applicant the technical advice expertise of our local staff.

o There is a plan identified raptor site less than 2 miles of the property and likely others that we do not know about. In order to ensure protection of any nest sites, and in line with the Forest Practices Act (629-665-0020); When a landowner, timber owner or operator proposes an operation near a resource site that requires special protection, the State Forester shall inspect the resource site with the landowner or landowner's representative, the operator and when available, the appropriate representative of the Department of Fish and Wildlife." This notification should apply to any nesting sites within one-half mile of the property. At that time a site inspection will be completed by our agency to determine to risk associated with construction activities. The US Fish and Wildlife Service oversees the

protection of eagles and migratory birds outside of forestry actions, through the Migratory Bird and Habitat Program. Both eagles and their nests are protected. They provide guidance on when a take permit may be needed: https://www.fws.gov/story/do-i-need-eagle-take-permit.

o As previously mentioned, Two-mile creek is designated by DSL as Essential Salmon Habitat

• There are additional indirect effects associated with the placement of a golf course at this location, including:

o The proposed area is adjacent to productive western snowy plover (*Charadrius nivosus nivosus*, state and federal status: Threatened) habitat and a habitat restoration area for the species. Increased public traffic during the sensitive nesting season may potentially decrease nesting success. Relatedly, garbage generated in areas of human activity has been shown to contribute to increased attraction of natural predators of plovers such as crows, ravens, and other natural prey species for the non-native red fox. Red fox will also be attracted to the area with the creation of a series of open meadow environments interspersed with taller grass cover (like a Scottish Links course).

o There is typically little tolerance for waterfowl and big game on golf courses, and actions to exclude or haze these species can cause detrimental impacts to these species and surrounding properties. Migrating birds are expending large amounts of biological resources on their journey and may be attracted to ideal conditions artificially created by the golf course and adjacent cranberry bogs. Additionally, the management practices of the greens typically create attractive, nutrient rich forage that attracts big game species. The soil disturbance on the green can cause significant damage depending on the big game species. Surrounding agriculture properties may experience additional wildlife conflict, as these practices can also create attractive conditions.

o Additionally, the increased human presence in combination with highly desirable forage often leads to habituation of game species, which ultimately can create unsafe conditions for both humans and the habituated animal.

o While some songbirds and raptors may still be able to utilize the heavily fragmented open space through the course, other wildlife species like some small mammals, waterfowl, and big game may be excluded (via active hazing, other human use exclusion, or lethal removal) due to the aforementioned conflicting uses. The department acknowledges that the habitat will be improved by the removal of the non-native vegetation and enhancement of native vegetation, but that value is tempered if wildlife are unwelcome to utilize it either spatially or temporally. Impacts from this loss for some species could be improved through mitigation in alignment with the mitigation policy for the respective habitat types on the property and their condition. The department recommends the applicant engage in discussions with the department on a course of action for appropriate mitigation.

• Based on the department's cursory review of the application, it appears that a water right will be required. However, the applicant should be aware that the department will be required, as part of the Oregon Water Resources Department (OWRD) process, to review new proposed uses of water (including groundwater which has a potential substantial interference with surface water) that may result in detrimental impacts to sensitive, threatened, or endangered fish. If the department's assessment reveals flow within the impacted reach are or are assumed to be entirely or partially below those essential to support the biological needs of fish, wildlife, or habitats and/or the proposed use will otherwise impact habitat recommendations to OWRD may reflect that assessment indicating that the proposed use may diminish physical habitat and alter the flow regime to which fish and wildlife are naturally adapted. These changes would be considered to negatively affect fish/wildlife distribution, productivity, and abundance. In these instances, where further reduction in flow or alteration of habitat from a proposed water use would impair or be detrimental to fish, wildlife, and/or their habitat mitigation may be required. The department recommends that the applicant contacts OWRD for more information on the water right permitting process.

o The department has reviewed an OWRD application for a water right and diversion transfer request for properties owned by the applicant near this property and made recommendations in alignment with the form, but no new water right applications.

The only response to ODFW in the findings is as follows:

"The Oregon Department of Fish and Wildlife (ODFW) has been notified and requested to provide comments regarding bird habitat concerns, particularly in relation to the Goal 5 inventoried Bird Site. Any compliance with ODFW's comments will be required, but this obligation applies specifically to inventoried bird habitats as identified in the Comprehensive Plan."

The findings fail to address the issues raised by ODFW, and, therefore the findings are inadequate. The findings fail to comply with the standards identified above, and, therefore, the findings misconstrue applicable law identified above. The findings are also not based on substantial evidence, as indicated above.

ORCA agrees with and incorporates the Marie Ritchie letter. First, it appears from the testimony that the applicant has not controlled the gorse on their holdings in the area. This casts doubt on the applicant's allegations about controlling gorse on the subject property. The applicant's primary motive is remuneration, not keeping the community safe from wildfire. Indeed, the property listed on the application as owned by Bandon Biota contains significant gorse, which is documented in the Ritchie letter and in testimony before the Planning Commission. This creates a wildfire risk that has not been addressed by the applicant and it is of the applicant's own making.

The Ritchie letter is also rightfully concerned about water availability. The water required for the course will be extraordinary. Again, if the applicant has not secured water for the proposed use with the accompanying studies, then the applicant cannot know the true effects of the application. The applicant is not giving the Planning Commission the full picture of the effects of the project, including drawdown to other wells and nearby cranberry bogs. The applicant has put the cart before the horse by proposing to disclose the impacts after the applicant secures an approval when there is no further public process. There needs to be an additional process that provides the public with the same substantive and procedural rights that have been provided here as it relates to any approval criteria that pertain to the effects of significant water usage or reduced water availability. The applicant also conceded that their test wells in the mid-level aquifer on the proposed course did not contain sufficient water. That is evidence that the applicant cannot satisfy its tremendous water needs for the proposed golf course.

The findings allege, in response to Ritchie's allegations, that:

"the proposed water usage will drain the entire basin and impact local wells and water bodies, but she does not provide scientific data or studies to support these assertions. Without detailed hydrological studies or aquifer tests, it is difficult to

accurately predict the impact on water resources. Ms. Richie references the lack of comprehensive studies on the mid-level aquifer and outdated data from the 1980s. However, she does not provide any recent studies or alternative data to substantiate her claims. The applicant may have conducted more recent assessments that should be considered.

The arguments made by Ms. Richie are based on generalizations about water usage and agricultural impacts. She assumes that the proposed development will have the same negative effects as past projects without considering potential mitigation measures or differences in project design.

Ms. Richie asserts that high-value farmland cannot be converted into a golf course, but she does not reference specific legal precedents or regulations to support this claim. This is a use listed under ORS 215.283 for uses that may be permitted in the farm use zones.

Ms. Richie fails to acknowledge any potential mitigation measures that the applicant might implement to reduce water usage, protect local aquifers, or address agricultural concerns. This omission weakens her argument, as it assumes a worst-case scenario without considering possible solutions.

Ms. Richie's concerns about the economic impact on local farms are speculative and not backed by economic analysis or studies. The proposed development may also bring economic benefits to the area, which she does not address.

In conclusion, while Ms. Richie raises valid concerns about water usage, her arguments lack the necessary evidence and detailed analysis to substantiate her claims. A more balanced assessment would require reviewing the applicant's studies, mitigation plans, and compliance

with local regulations before drawing conclusions about the potential impact of the proposed development."

It is the applicant's burden of proof, not Ritchie's, to ensure that all criteria are satisfied. The findings are not even certain what will be implemented by the applicant when the findings allege that the applicant "might implement to reduce water usage, protect local aquifers, or address agricultural concerns." An approval should have certainty, and the findings, here, do not support that certainty.

The applicant and the findings do not substantiate the allegations about severing the high-value farmland from the golf course and breaking up the tract. The applicant has

also submitted contradictory allegations about whether the application satisfies the definition of high-value farmland. The applicant must support its allegations with evidence from the record, and take a consistent position on whether it has satisfied the applicable criteria. The findings failed to accomplish this basic requirement.

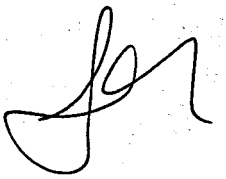
Condition of approval 1 is inadequate because it does not defer findings appropriately as provided by the *Rhyne* decision and its case law. The applicant has not ensured that the same procedural and substantive rights will be provided there, as were provided here.

Conditions of approval 3-5 are unconstitutionally vague and do not satisfy the Court of Appeals' reasoning in *Sisters Forest Planning Committee v. Deschutes County*, 198 OR App 311, 108 P3d 1175 (2005). The conditions are not identifying what is actually required of them, and a reasonable person would not be able to identify what is required by these vague conditions. There are numerous measures and recommendations identified by ODOT, DSL, and ODFW, but the findings do not identify what is actually required of the applicant beyond a single-sentence generalization. There is no assurance that required issues raised by these agencies will be appropriately conditioned when the conditions wholly lack specificity.

Condition of approval 6 is legally insufficient because there is no information to suggest that monitoring will result in mitigation prior to having a negative impact on the other water right. The condition assumes that monitoring will occur (despite not demonstrating how that monitoring will occur) and it also assumes that there will be no negative impact when there is no information or evidence on which to base that conclusion. Again, the County cannot know the conclusions of how water drawdown will affect nearby farms if the analysis has not yet occurred. Moreover, the variety of chemicals that will be used has not been disclosed and the findings do not demonstrate how monitoring will account for those impacts to water quality.

Condition 9 cannot be satisfied because of the above deficiencies. For example, if the findings do not appropriately identify the conditions related to ODOT, DSL, and ODFW, then the applicant cannot adequately satisfy all conditions. Again, because conditions 3-5 are vague, the conditions will not carry out their intended purpose.

Sincerely,



Sean T. Malone
Attorney for Oregon Coast Alliance

Cc:
Client

Sean T. Malone

Attorney at Law

PO Box 1499

Eugene, OR 97440

Tel. (303) 859-0403

seanmalone8@hotmail.com

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

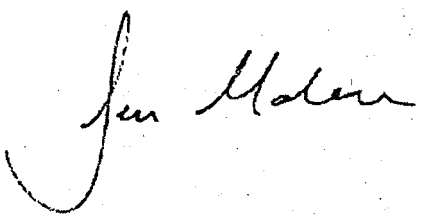
Given the repeatedly failure to present sufficient information to satisfy the approval criteria, it is likely that the hearing will be continued. However, in the event it is not continued, ORCA respectfully requests that the record be left open for a minimum of 14 days.

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
Attorney for Oregon Coast Alliance

Cc:
Client

Sean T. Malone

Attorney at Law

PO Box 1499 Tel. (303) 859-0403

Eugene, OR 97440 seanmalone8@hotmail.com

July 18, 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 open record 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 that the application fails to satisfy all applicable criteria.

The applicant is proposing a non-farm use on farmland (more specifically, high value farmland, which alone is fatal to the application). The legislature has identified a legislative policy in favor of retaining agricultural lands,[1] or, as the Supreme Court has

[1] ORS 215.243 provides:

"(1) Open land used for agricultural use is an efficient means of conserving natural resources that constitute an important physical, social, aesthetic and economic asset to all of the people of this state, whether living in rural, urban or metropolitan areas of the state.

opined: "the legislature has declared that preservation of agri-cultural land, particularly in large blocks, is an important statewide policy and that limitations on urban expansion into, and alternative uses of, agricultural and forest lands are necessary and a matter of statewide concern." *Stop the Dump Coalition v. Yamhill County*, 364 Or 432, 442 (2019). Thus, despite that a golf course is an allowed use on non-high-value farmland, the application occurs amidst the aforementioned legislative policy.

I. The applicant has not satisfied the criteria for the golf course and design capacity

The applicant acknowledges that the ownership includes two residential dwellings located within the boundaries of the proposed golf course. The applicant alleges that both dwellings are currently being utilized as month-to-month residential rentals. The applicant alleges that they will continue to be rented. Clearly, golfers will want to stay at these dwellings on the golf course, and the applicant needs to establish the design capacity for these dwellings because they are "in connection with the use." OAR 660-033-0130(2). However, accessory uses cannot include "housing." 660-033-0130(20)(d)(A) ("Accessory uses to a golf course do not include: Sporting facilities unrelated to golfing such as tennis courts, swimming pools, and weight rooms; wholesale or retail operations oriented to the non-golfing public; or housing"). The application, therefore, cannot be approved with the housing on the golf course property. Even if that were not the case, the applicant would be required to disclose the design capacity

---

(2) The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources and the preservation of such land in large blocks is necessary in maintaining the agricultural economy of the state and for the assurance of adequate, healthful and nutritious food for the people of this state and nation.

(3) Expansion of urban development into rural areas is a matter of public concern because of the unnecessary increases in costs of community services, conflicts between farm and urban activities and the loss of open space and natural beauty around urban centers occurring as the result of such expansion.

(4) Exclusive farm use zoning as provided by law, substantially limits alternatives to the use of rural land and, with the importance of rural lands to the public, justifies incentives and privileges offered to encourage owners of rural lands to hold such lands in exclusive farm use zones."

dwellings that will be rented out to golfers. Moreover, the applicant is incorrect to allege that a new design capacity of 100 people applies every ½ mile. The ½ mile limitation applies unless it is a tract as of a particular date, which does not permit the applicant to expand upon the 100-person design capacity.

II. The applicant has not satisfied the farm impacts test

In *Stop the Dump Coalition v. Yamhill County*, 364 Or 432, 442 (2019), the Oregon Supreme Court clarified the farm impacts rule. There, the Court noted that "the farm impacts test [applies] on a farm-by-farm and farm practice-by-farm practice basis and intended to use the ordinary meaning of 'significant' and significantly' in ORS 215.296(1)[.]" "'[S]ignificant' indicates that the change has, or is likely to have, an important influence or effect on the farm or forest practices 'on surrounding lands.'" In essence, the concern in the legislation that resulted in ORS 215.296(1) is the "changes in practices and increases in costs." "The legislature was concerned about the supply of agricultural land, but we conclude that the legislature intended the farm impacts test to focus on forced changes in farming and forest practices and the costs of those practices[.]" As it relates to that the test, the Oregon Supreme Court concluded that:

> "To summarize, when the parties dispute whether a nonfarm use will force a significant change to a particu-lar accepted farm practice or significantly increase the cost of that practice, the farm impacts test in ORS 215.296(1) requires an applicant to prove that the proposed nonfarm use (1) will not force a significant change in the accepted farm practice and (2) will not significantly increase the cost of that practice. A "significant" change or increase in cost is one that will have an important influence or effect on the farm. For each relevant accepted farm practice, if the applicant cannot prove both of those elements without conditions of approval, the local government must consider whether, with conditions of approval, the applicant will meet the farm impacts test."

The Court was not done, however, because it also addressed the "cumulative impacts" under the farm impacts test, which requires such a cumulative analysis and possibly that the cumulative impacts test request also considering more than the aggregate of multiple-less-than-significant impacts on each farm.

Here, there are multiple significant impacts that must be analyzed – farm-to-farm, farm practice-by-farm practice, and in the cumulative – in order to carry the applicant's burden of proof. At this point, however, the applicant has not engaged any such analysis except to allege that the impacts from a golf course are the same, or at least similar, as

from a cranberry bog and other surrounding farm uses. That allegation, however, clearly misconstrues the analysis required by the Oregon Supreme Court.

As noted, the applicant repeatedly alleges that the impacts between bogs and golf courses are the same or similar and that there will be dunes that separate some of the farm uses from the golf course. It is not enough to simply allege[2] – across the board – that the effects and chemicals used in a golf course are the same as in cranberry bogs[3]. The applicant is offered no evidence to support such a statement. Even then, the applicant does not allege that they are the same but just similar – though that contention is without record support.

Some impacts that may occur include trespass from errant golfers or golfers following errant drives, litter, attraction of corvids[4] from trash, impacts from the application of herbicides, pesticides, insecticides and so forth. Golf courses use a variety of chemical applications, including pre-emergent herbicides, fungicides, insecticides, growth regulators, plant stimulants, and so forth.[5] As noted in the footnote, there is a host

---

[2] The applicant alleges that:

> "It is however the applicant's contention, for the purpose of showing compatibility, that the activities associated with maintaining a golf course are very similar, and often the same, as those types of activities performed ill conjunction with existing farm uses in the area."

The applicant also refers to "fertilizers and chemicals" but does not expand. The chemicals used on golf courses can include concerning chemicals such as chlorpyrifos, wich can affect the nervous system in high doses.

[3] Regardless, there are other surrounding farm uses, including blueberry production and pasture on the Leff ownerships.

[4] The issue is apparently so common that some golf courses spray for crows. The applicant has not demonstrated what it expects to use to deter crows or corvids.

[5] Fungicides are biocidal chemical compounds or biological organisms used to kill or inhibit fungi or fungal spores. Phosphite salts can be used as a biodegradable fungicide to protect golf course turfgrass against Pythium root rot and other pathogens of the order Oomycetes. It is primarily used on greens and fairways as a preventative treatment. Plant growth regulators or inhibitors are used to suppress seedheads and leaf growth due to rising mowing costs and danger posed to operators and other personnel. Plant growth regulators are now standard practice for golf course superintendents to enhance overall turf quality, promote a smooth and uniform playing surface, and improve stress tolerance in higher maintenance areas. Post-Emergent Herbicides tackle both perennial and annual broadleaf weeds, and some even control grassy weeds (weeds that resemble grass). Post emergent herbicides can also be used to treat specific problem areas. These include selective, aquatic, and non-selective. Selective herbicides control specific weed species, while leaving golf course turfgrass relatively unharmed. Some of these act by interfering

of chemicals that are applied to typical golf courses, but the applicant has not been straightforward as to what chemicals will be used. At the hearing, the applicant says "we spray lawns" but what is the applicant spraying? Not all of these chemicals are made equally and some can have deleterious affects on farmers and their crops. Moreover, the applicant has not shown – with any evidence – that the farm uses and golf course uses utilize the same chemicals.

One should expect that controlling weeds on 300+ acres would require significant application of chemicals. The applicant has not disclosed how much of any of these chemicals are expected or what is routine for golf courses of this size. The application has not indicated how it will address invasive species, noxious weeds, pest management (i.e., the applicant has not demonstrated which chemicals it expects to use). The public cannot begin to understand the impacts until the applicant discloses the types of herbicides and insecticides.

The applicant also concludes that "the golf course will be physically and visually shielded from the adjacent agricultural use, and vice versa." It is not clear how the applicant believes visual impacts from the golf course would affect the farm uses. Regardless, the applicant completely fails to identify the impacts that are likely to occur. The applicant alleges that there are dunes of a particular height that buffers some surrounding property, but there is no evidence in the record in the form of topographical maps or photographs (other than aerial photographs) to demonstrate the height of any of the surrounding dunes. The applicant also alleges that "the golf course fairways are generally surrounded by elevated dune formations that separate the course from adjacent properties and naturally direct runoff internally." The surrounding dunes – which have not been substantiated by any evidence in the record – are not somehow hermetically sealing the runoff and wastewater on the golf course. Even if it were "generally surrounded by elevated dune formations," a significant concern is the impacts to groundwater and to adjacent bogs (regardless of whether there may be an intervening

---

with the growth of the weed and are often synthetic mimics of natural plant hormones. Aquatic herbicides are chemicals specifically formulated for use in water to kill or control aquatic plants. A non-selective herbicide kills all plants it comes in contact with. From grubs, nematodes, mole crickets, mites, ants, mosquitoes and more - superintendents constantly battle for control of soil and turf inhabiting pests on golf courses. Insecticides can include, but are not limited to, the following: Control Solutions, Nufarm, Syngenta, BASF, Bayer, FMC Corporation, DOW, Valent and other leading manufactures. They include ovicides and larvicides used against insect eggs and larvae, respectively. The applicant has been silent on which types of chemicals it will use and the effects of them.

dune of some unsubstantiated size). The applicant must prepare a hydrologic assessment to determine what the impact from runoff of water and pesticides, fungicides, herbicides, and insecticides. Ironically, at the hearing, the applicant alleged that it has test wells and monitoring wells and it is using that to determine how it will impact adjacent and surrounding properties. Again, this is exactly the type of analysis that must occur for the farm impacts test, but the applicant is not presenting that information here and now. Simply put, the applicant cannot reasonably understand the impacts as it relates to the farm impacts test without this type of analysis, as well as some type of independent review. The application is, therefore, half-baked because the applicant cannot carry its burden of proof as it relates to water usage and how that will affect neighboring and surrounding cranberry bogs. The farm impacts test must be deferred under *Rhyne* and its progeny, as outlined in other testimony, until a later time when the applicant has presented all reasonably relevant information related to farm impacts and increased costs to farmers.

The impacts related to water are not simply resolved by the Oregon Water Resources Department. A typical 150-acre golf course uses 200 million gallons of water a year (without considering the restaurant, clubhouse, and other uses), and it is likely that use of wells or groundwater[6] will result in impacts to adjacent and surrounding bogs. The applicant has not demonstrated how much water is necessary for this golf course, how many golfers (apart from the traffic analysis[7]), and patrons to the restaurant are expected. ORCA submits that the impacts to adjacent bogs and farm uses cannot be evaluated until there is a hydrologic study and geologic hazard assessment that addresses these issues. Indeed, the applicant appears to wholly ignore the likelihood that the chemicals (insecticide, fungicide, herbicide, pesticides, etc., none of which are specifically identified) used on the golf course will enter the bogs through the groundwater and porous, sandy soil.

---

[6] The applicant alleges that "It is anticipated that the water source for irrigation and domestic use will be from deepwater wells and potentially reservoirs or ponds." ORCA submits that the applicant has not demonstrated that drawdown will not occur by using "deepwater wells," ponds and other means. Indeed, this is simply more evidence that the applicant has failed to complete any kind of relevant analysis.

[7] For example, what is the average number of golfers from other nearby golf courses or a similarly situated golf course? The applicant must determine what the farm impacts from a significant number of golfers.

ORCA also attaches the comments from Waterwatch of Oregon for the Bandon Biota Water Transfers. As noted in those comments, the water rights are not likely to be granted:

> "The water rights involved in these transfer applications may be subject to forfeiture. There is no water use data posted on WRIS for any year for certificates 86449 and 86448. Also, certificates 86449 and 86448 specifically require water use reporting for water used for temperature control, but there is no temperature control water use available on WRIS for either certificate for any year. In determining if a right is subject to transfer, OWRD is required to assess whether the water right was forfeited within the time limit set by ORS 540.610, which covers a five-year time period that ended no more than 15 years before the potential issuance of a notice of cancellation. ORS 540.610(2)(f). The "clock" for OWRD's forfeiture assessment required for review of this transfer, therefore, is not just the previous five-year period but includes this full look-back period. Additionally, OWRD must initiate cancellation proceedings "[w]henever it appears to the satisfaction of the Water Resources Commission upon the commission's own determination... that a perfected and developed water right has been forfeited." ORS 540.631. 3. T-14438 would result in enlargement. These changes would result in enlargement. Enlargement is an expansion of a water right that can occur when the user uses a greater rate or duty per acre than is currently allowed, increases the acreage irrigated under a right, fails to keep the original place of use from receiving water from the same source, or diverts more water at the new point of appropriation or diversion than is legally available at the original point of appropriation or diversion. OAR 690-380-0100(2). The Department shall not approve a transfer application that results in enlargement. OAR 690-380-5000(1)(c). These transfers would result in enlargement 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."

ORCA incorporates the entirety of the attached comments from Waterwatch, which demonstrate that the applicant is unlikely to obtain water rights sufficient to support a large golf course.

As noted below, the applicant cannot adequately gauge the farm impacts test under ORS 215.296 if the applicant does not know the location of the buildings. The restaurant and clubhouse will have impacts from the number of visitors, the amount of garbage produced, traffic, trespass, attraction of corvids, and so forth. The applicant has not

provided any estimate of the number of golfers expected for the proposed golf course, apart from a traffic estimate. The number of golfers is relevant to these impacts on adjacent farm uses. The applicant cannot readily define the baseline for the farm impacts analysis. There is simply no reason to think that the applicant can satisfy this criterion without knowing where the variety of structures will be placed on the property.

The applicant also alleges that it is "anticipated that on-site sanitary waste will be addressed through an onsite sanitary septic system and drain field." The applicant, however, does not disclose the potential effects, likely because the applicant does not even know if it will use a septic system and drain field. This is yet another issue that is half-baked. Nitrogen pollution from septic systems and drain fields is common.

According to testimony at the hearing, the applicant misidentified the Twin Creek farm operation. The testimony also noted that Bandon Biota has not adequately managed their properties to reduce wildfire concerns. The testimony also noted that the applicant has not provided any studies associated with water drawdown or otherwise.

Of particular concern is the Kranick Cranberry Farm, given that is directly adjacent and centrally located on the eastside of the proposed golf course. The applicant acknowledges that the ridge of the intervening dune (again, no topographical map has been submitted to verify these allegations) is, at times, only 10 feet tall. The potential impacts identified above are particularly acute as it relates to the Kranick Cranberry Farm. As with all other farms, the applicant copies-and-pastes the same statement that the golf course and bogs utilize the same "irrigation, fertilizing, mowing." This is clearly disingenuous, because the applicant has not even conceded in the farm impacts test for the closest farm that there will be chemicals applied. Moreover, there is no evidence to demonstrate that the chemicals used are the same across the bogs and the golf course.

Finally, the applicant has failed to engage in a cumulative impacts analysis. A cumulative impacts analysis is required, as noted by the Oregon Supreme Court, but the applicant has neither engaged in such an analysis or conceded that such an analysis is applicable. This because the applicant has disclaimed any and all impacts because they are allegedly the same as those of a cranberry bog, which is a wholly unsupported allegation.

III. <u>The proposal is inconsistent with the administrative rules for the definition of a golf course and the legislative policy for preservation of farmland</u>

The applicant's entire ownership appears to be roughly 342 acres, spanning for approximately 2 miles, but the golf course itself is 165 acres. All the 342 acres is

farmland, but the applicant is not utilizing all of that land for the golf course.[8] As noted in the footnote, the applicant cannot have it both ways, alleging on one hand that all of the acreage is for the golf course, but that there is acreage that is not "utilized for golf." The definition of "golf course" notes that it is an "area of land with highly maintained natural turn laid out *for the game of golf* with a series of nine or more holes, each including a tee, a fairway, a putting green, and often one or more natural or artificial hazards." Nothing in that definition allows the applicant to take out of farm production the 165 acres that is not even devoted to the game of golf. As noted above, there is a legislative policy to preserve farmland and the applicant here is using just as much land as is devoted to the golf course to no particular use at all. The applicant is using unnecessary farmland that is not devoted to the game of golf, which violates the rule (e.g., OAR 660-033-0130(20)) and is contrary to the legislative policy.

IV. The golf course is located on high value farmland

The applicant concedes that the definition for high-value farmland applies at ORS 215.710(2), wherein the applicant alleges that: *Aerial photographs confirm that on December 6, 2007* [195. 3 *00(10)(a)], the subject tract upon which the golf course is proposed, does contain lands growing specified perennials. This criterion is satisfied.*" If all 342 acres are in common ownership, then ORS 215.710(2)'s provision for a "tract" means that the entirety of the ownership is high-value farmland. At the hearing, the applicant has indicated the opposite. Again, the applicant is taking contrary positions on this issue. As of now, there is no underlying evidence supporting the applicant's allegations made at the hearing. The applicant must submit the property line adjustments that allegedly preclude the entire tract from being high-value farmland.

Next, under ORS 195.300(10)(c)(A), the property is high-value farmland. ORS 195.300(10)(c)(A) provides that high-value farmland means "Land that is in an exclusive farm use zone or a mixed farm and forest zone and that on June 28, 2007, is .... Within the place of use for a permit, certificate or decree for the use of water for irrigation issued by the Water Resources Department." ORCA attaches hereto the Permit to Appropriate the Public Waters (G-13208) and Certificate of Water Right for cranberry operations on

[8] This raises the issue that the applicant alleges at times that the non-golf use acreage is part of the golf course and other times not part of the golf course, depending on when it is convenient. For example, the applicant alleges that "134-acres of open space land that contain natural dune formations, partially covered with native vegetation, approximately 20 acres of wetlands, and approximately 23 acres of identified flood areas." The applicant then alleges that "[w]hile not utilized for golf, the open space, wetland and flood areas provide for appropriate setting for a Scottish Links Golf Course[.]"

28.0 acres. The applicant alleges that "segment of the property upon which the golf course is proposed did not contain a water permit, certificate, or decree for the use of water." It is not clear whether this is part of the applicant's contiguous ownership, in which case the golf course, indeed, contains high-value farmland, or whether it has been severed from the property entirely. It appears as though it is part of the golf course but not in active play, but the applicant, again, has not substantiated its allegations with sufficient evidence to obtain an approval. In any event, the golf course is in contiguous ownership with the remainder of the 342 acres now owned by Ocean River LLC.

In addition, all the 342 acres is zoned Exclusive Farm Use except along Twomile Creek, and it is highly likely that those lands are subject to a "place of use" of a water right/certificate for irrigation as required under ORS 195.300. The applicant has not shown which existing water rights as of June 28, 2007 apply to all or part of the 342 acres, whether part of the actual golf course or reserved for "open space" or other use. It would be very odd if 342 acres of EFU land, or even just the 165 acres of EFU land slated for the golf course, were not in the place of use for one, or more likely several, pre-June 2007 water rights for irrigation. The HVF definition under ORS 195.300 applies to contiguous ownership, so even the two locations identified by the staff report that are a place of use for a water right for irrigation, and which appear to be outside the golf course proper, make the entire 342 acres subject to HVF rules prohibiting golf courses. *See* the discussion below concerning lawful creation of parcels by means of PLAs.

V. Geologic Assessment Review

First, this application must be subject to a condition of approval that requires that the applicant submit and receive approval for a geologic assessment review. As noted in prior testimony that explained the holdings in *Rhyne* and its progeny, the process for the geologic assessment review must allow for the same review process with the same procedural and substantive rights that were provided in this application.

Second, the applicant alleges that it does not have the details needed for the location of structures to carry out the geologic assessment review.[9] ORCA submits that

[9] The applicant alleges:

- "The structures, proposed in conjunction with the golf course have not been architecturally designed and, while the location of structures is generally known, the exact location of each structure is subject to change as development of the course proceeds."
- "Because the majority of the structures associated with the golf course have not been designed, and the exact location is unknown, it will be necessary

the applicant cannot adequately gauge the farm impacts test under ORS 215.296 if the applicant does not know the location of the buildings. The restaurant and clubhouse will have impacts due to the number of visitors and golfers, the amount of garbage produced, traffic, trespass, attraction of corvids, and so forth. The applicant cannot readily define the baseline for the farm impacts analysis if the applicant is not aware of where the buildings will be placed, as is conceded by the applicant.

VI. The applicant has not demonstrated that the subject property is lawfully established.

The applicant apparently believes that property line adjustments create land in the sense that a property line adjustment creates a lawfully established unit of land. For example, the applicant alleges that "[t]he area in yellow was created by Property line Adjustment Deed 2003-6462 following approval of the adjustment by Coos County. The applicant is mistaken. Property line adjustments simply adjust boundaries. The resulting property is not newly created, and is not a new parcel. *See Meyer v. Jackson County*, __ Or LUBA __ (LUBA No. 2014-005, April 24, 2014). Properties are newly created via a partition or subdivision. Properties are unlawful if they have not been created in conformance with all applicable land use laws. The applicant references D-23-002/ACU-23-037 but that application is not in the record. Therefore, there is no substantial evidence to support the applicant's allegations as to whether the lots and parcels are lawfully established.

VII. Procedural Objection

At the hearing, staff stated that for the "rebuttal" (or responsive period), no new evidence is allowed. That statement requires clarification because the parties *can* submit new evidence that is responsive to evidence submitted in the open record period. If ORCA is prohibited from submitting responsive argument and evidence, ORCA's substantial rights will be prejudiced.

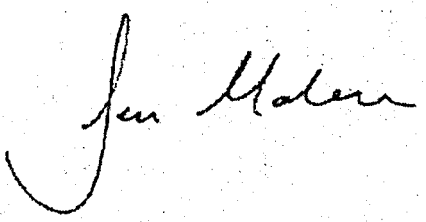
VIII. Conclusion

Consistent with the foregoing, ORCA respectfully requests that the application be denied. The Planning Commission should deny the application.

---

to address ordinance requirements for liquefaction at a later date. Because the standards of Section 4.11.115 will be addressed under a quasi-judicial land process with notice, it is not required that the standards be addressed at this time."

Sincerely,



Sean T. Malone
Attorney for Oregon Coast Alliance

Cc:
Client

Sean T. Malone

Attorney at Law

PO Box 1499 Tel. (303) 859-0403

Eugene, OR 97440 seanmalone8@hotmail.com

July 25, 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 responsive 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 rebuttal 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 that the application fails to satisfy all applicable criteria.

ORCA agrees with and incorporates the Marie Ritchie letter. First, it appears from the testimony that the applicant has not controlled the gorse on their holdings in the area. This casts doubt on the applicant's allegations about controlling gorse on the subject property. The applicant's primary motive is remuneration, not keeping the community safe from wildfire. Indeed, the property listed on the application as owned by Bandon Biota contains significant gorse, which is documented in the Ritchie letter and in testimony before the Planning Commission. This creates a wildfire risk that has not been addressed by the applicant and it is of the applicant's own making.

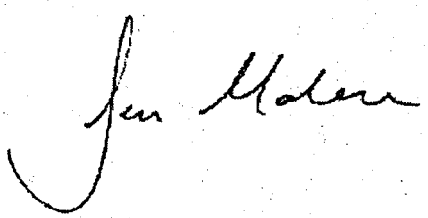
The Ritchie letter is also rightfully concerned about water availability. The water required for the course will be extraordinary. Again, if the applicant has not secured water for the proposed use with the accompanying studies, then the applicant cannot know the true effects of the application. The applicant is not giving the Planning Commission the full picture of the effects of the project, including drawdown to other wells and nearby cranberry bogs. The applicant has put the cart before the horse by proposing to disclose the impacts after the applicant secures an approval when there is no further public process. There needs to be an additional process that provides the public with the same substantive and procedural rights that have been provided here as it relates to any approval criteria that pertain to the effects of significant water usage or reduced water availability. The applicant also conceded that their test wells in the mid-level aquifer on the proposed course did not contain sufficient water. That is evidence that the applicant cannot satisfy its tremendous water needs for the proposed golf course.

Several commenters note that the application will convert farmland. More specifically, the application will remove high-value farmland. As noted in other prior testimony, the applicant has not substantiated its allegations about severing the high-value farmland from the golf course and breaking up the tract. The applicant has also submitted contradictory allegations about whether the application satisfies the definition of high-value farmland. The applicant must support its allegations with evidence from the record, and take a consistent position on whether it has satisfied the applicable criteria.

The applicant's consultant (and "vested partner") unsurprisingly alleges that all criteria have been satisfied, but that is plainly not the case. The applicant has not disclosed the effects from the significant water demand; the applicant does not even know the location of the buildings it proposes to construct; and the applicant has not presented a geologic review assessment, which itself will reveal further impacts associated with the development. Again, it becomes impossible to identify the impacts of the golf course because the applicant has held so much back at this stage. Perk Development is "proud of the success that the Keiser's and the Bandon Dunes Golf Resort Family have brought to this area," but, as noted by those that are not "vested" in the project, the applicant has not maintained the gorse on the surrounding property. If the applicant and Perk Development sincerely cared about the community, then they would maintain their properties and not present a fire hazard to the community. The Perk Development letter is entirely lacking in substance and appears only to be a puffery.

Consistent with the foregoing, as well as prior testimony, ORCA respectfully requests that the application be denied because the applicant has failed to support its application with valid legal theories and substantial evidence.

Sincerely,



Sean T. Malone
Attorney for Oregon Coast Alliance

Cc:
Client