

APPLICANT'S EVIDENTIARY REBUTTAL
BANDON BIOTA, LLC GOLF COURSE APPLICATION
HBCU-22-001
CONTINUATION (SECOND SEVEN DAYS)

CHARLIE WATERMAN QUESTIONS

I am a lifetime resident of the area who has traveled Highway 101 from Bandon south past the Two-Mile Creek areas for the past 60 years. I have observed flooding in both the main Two-Mile Creek and south Two-Mile Creek above and below the highway.

Due to the flooding, it will affect the New River Dunes Golf Course access from Boak Lane. The flooding will impede traffic at the two-mile creek Bridge off from Boak lane and low-lands road area.

APPLICANT'S RESPONSE: It is true that Two-Mile Creek does flood periodically during heavy rain events. It is also true that the Two-Mile Creek bridge lying south of Boak Lane (applicant's private road) has been submerged during hightide, storm surge events. In the past, access across the bridge has been disrupted on an average of once and occasionally twice a year, however, over the past three years, the creek elevation has not exceeded the top of the bridge.

This does not mean that major storm events will not occur in the future, during which access across the bridge could be affected. The applicant, for the sake of health and safety, will close the golf course during heavy storm events, if the creek elevation exceeds or could potentially exceed the elevation of the bridge. A major ocean surge and upstream flooding are usually accompanied by major storm events that are not ideal conditions for an enjoyable round of golf, so temporarily closing the course for safety purposes will not affect the success of the golf course.

Note: It is the intent of the applicant to construct steel side rails along each side of the bridge and roadway approach zones for safety purposes. This can be accomplished without impacting the creek or adjacent wetlands.

If the traffic is routed to the Hoffer Lane, Odot will need to address that increase in traffic volume onto Highway 101. Can the road width and surface from the golf course to highway 101 accommodate the increased traffic.

APPLICANT'S RESPONSE: Golf course traffic on Hoffer Lane will be limited to golf course work force accessing the agronomy/maintenance facility. It is anticipated that there will be approximately twenty maintenance/management employees utilizing the access daily, which equates to approximately forty trips per day. Over a two-hour peak period, that equated to one trip every three minutes.

ODOT stated that they have concerns regarding the site visibility to the north at the intersection of Hoffer Lane and Highway 101 (see ODOT comments below). The applicant owns the

property adjacent to and south of Hoffer Lane. There is an existing driveway 900 feet south of Hoffer Lane that serves several of the applicant's residences currently utilized for staff housing.

The applicant met with ODOT at that location prior to submittal of this application. ODOT agreed that the intersection of the residential driveway and HWY 101 provides a much better site distance in both directions. If ODOT determines that the location south of Hoffer Lane is better suited for employee access, the applicant can and will utilize that access point.

Note: The applicant owns the property (60-foot pan handle) over which Hoffer Lane is constructed. If Hoffer Lane is utilized for access, that applicant can improve the road to any standard deemed necessary by the Coos County Roadmaster.

OREGON DEPARTMENT OF TRANSPORTATION COMMENTS:

ODOT has the following comments regarding the above referenced conditional-use permit application:

- I. This land use action will trigger Change of Use (COU) criteria for Hoffer Ln
- II. A new approach application will be required if Hoffer Ln is included in the New River Dunes Golf Course Development. ODOT is concerned about the site distance to the north of Hoffer Ln. During the new approach application process, we can discuss options for mitigation.

APPLICANT'S RESPONSE: As stated above, there is a clear option for the mitigation of site distance concerns associated with Hoffer Lane. The applicant can utilize the applicant's existing access point 900 feet south of Hoffer Lane. This issue will be resolved with the Oregon Department of Transportation.

COMMENTS BY MARIE B. RICHIE

Dear Planning Commission members,

I am writing to you today to append my testimony of 1 December with additional information about the groundwater supply that the Golf Course is proposing to use and related issues of ecological significance to the local Agricultural community who have been all but left out of this discussion that is literally life or death to them. I am writing, in part, on their behalf, whether it "counts" according to your legal team or not. Common sense would suggest that these people's opinions should matter the most. Nonetheless, I present to you the points we have discussed as being relevant to the land-use decisions at hand.

APPLICANT'S RESPONSE: The Planning Department indicated that proper notice was sent, pursuant to law, to the required surrounding property owners. It is therefore a false statement that the local agricultural community has been left out of the discussion.

- 1) The water in the semi-deep marine layer aquifer is NOT recharged by seasonal rains - the water is much older and more widespread than the developers are willing to admit to. This is evidenced by the pH of said water, which remains a constant ph 6.8 throughout the season, and I have documented proof of this as well as witnesses. Water in the upper

table ranges from ph 5.4 to ph 5.8, with seasonal variation: a demonstrable fact. They are NOT the same. This resource is NOT renewable and is the only backup water that local farmers have. The proposed pumping rate WILL most certainly drain that water supply in a few short years and, I have more recent (than 2005) hydrological evidence to support that.

APPLICANT'S RESPONSE: Evidence was submitted during the first seven-day continuation period, showing that the State of Oregon operates under the principle of "prior appropriation." This means that senior water rights holders are entitled to available water subject to the uses allowed under their permit or water right.

"If" permits for water use are issued to the applicant by the Oregon Water Resources Department (OWRD), the applicant will hold a junior water right to all existing water rights in the area. This simply means that, the golf course "cannot" impact the water rights of adjacent agricultural uses with senior rights.

With all respect intended, contrary to the opponent's assertion, all water sources are recharged by seasonal rain.

I submit to the council that Bandon Biota has cherry-picked old evidence because the current evidence doesn't support their ask. Nor, is it reasonable to assume that they'd only irrigate for 100 days in the future. There were over 200 functionally dry days here in 2020 and 2021.

APPLICANT'S RESPONSE: The number of days the applicant irrigates is a very non-specific measurement of the amount of water utilized. Regardless of how often the applicant irrigates, the amount of water the applicant is entitled to is regulated by the Oregon Water Resources Department (OWRD). Water usage will be regulated based upon the amount allowed per second, as well as the total amount allowed annually. It will be required that the applicant's water usage be monitored (water meters) and that reports be filed periodically with the OWRD.

Local growers who use surface and surface-layer groundwater have no other options to continue growing without drilling into the deeper layer. If the surface water fails, that is their only hope to stay alive. We have been within 10 feet of those wells failing the last two years on the Leff property. I have evidence of this, too.

APPLICANT'S RESPONSE: The applicant has not pumped a drop of water at the golf course property and cannot be held responsible for the Leff water issues. Just because there is an existing water shortage on particular property, a conclusion cannot be made that water usage at another location is going to further diminish their supply.

- 2) The area is populated by snowy plovers, among other endangered species. I have video evidence of this and at least 48 witnesses who can testify to this fact, in the form of my horticultural students who I routinely take on video field trips to the Southern boundary of the proposed course.

APPLICANT'S RESPONSE: Based on information provided by the U.S. and Oregon Department of Fish and Wildlife, Coos County has adopted relevant Goal 5 resources in their Comprehensive Plan. The land upon which the golf course will be situated is not identified as containing Goal 5 resources. Land use decisions cannot be based upon unidentified or adopted Goal 5 resources.

- 3) The lawyer for the golf course blatantly lied to the board in testimony that only gorse was removed. I have a wealth of video evidence documenting this, too.

APPLICANT'S RESPONSE: This is not pertinent to the relevant criteria. However, if substantial amounts of gorse (invasive species) had not been removed from the applicant's property, it would have been impossible for the opponent to trespass and take videos.

- 4) I have walked the property in question many times over the years, often with witnesses, and have documented several endangered and rare species of plants in that area including terrestrial orchids that grow nowhere else in the world. There is video evidence of this, too.

APPLICANT'S RESPONSE: Again, the land upon which the golf course will be constructed is not identified as containing Goal 5 resources.

- 5) I have since spoken to the neighbouring farms and have found that they are ALL in opposition to the water usage proposed by the golf course. They were NOT alerted to the proposed hearings until I virtually knocked on their doors and told them. This is a MASSIVE GAP in relevant testimony.

APPLICANT'S RESPONSE: It is not known what property owners the opponent contacted, and it is therefore difficult to determine whether those property owners were entitled to notice. The Planning Department indicated that proper notice was sent to the required surrounding property owners.

- 6) It was understood by said farmers that they would have until 22 December to make their concerns known. I only found out today at 11am that I only had one hour to consolidate my thoughts and send them. I have called as many as I can, but they're all out working today, as is common. I would encourage the board to please reach out to these people who would be the MOST impacted by this decision.

APPLICANT'S RESPONSE: Again, appropriate notice was sent and the directions for the continuation were addressed at the hearing and posted online.

- 7) Planned farm lands were taken out of commission by the purchase of these properties over the years when the landowners had personal troubles and needed money. They were then let to grow back in gorse. Bandon Biota has been a IRRESPONSIBLE, BAD LANDOWNER of these parcels, presumably for the purpose of making them appear as if they are NOT high value farmland. They *were* and could be again. The fire hazard around the Leff and Krannick properties that has been allowed to happen is also real and documented.

APPLICANT'S RESPONSE: These claims are categorically false and are irrelevant to the applicable criteria.

- 8) Golf is not a growing sport, despite what its enthusiasts might tell you. A casual look at the state of the sport in North America is that it has been in decline for many years and is not, as a general rule, attracting new or young players. Bandon, like many South Coast towns, has a long history of throwing itself after anyone who flashes cash. What will happen when people no longer play golf like they used to? Will they start plugging houses onto their properties? What is this place going to look like in 50 years? I don't need to tell you that's what planning is all about.

APPLICANT'S RESPONSE: These comments are irrelevant to the applicable criteria.

- 9) The existing golf course in the area (Bandon Crossing) has NOT been a good neighbour to the farmers in the area. They have taken no measures to stop the traffic ACCIDENTS AND FATALITIES that continue to occur on their doorstep. They refuse to do anything about the salmon spawning creek that their operations have already dried up, despite multiple complaints to DEQ. They refuse to compensate David Leff for his road that is now flooded every time it rains more than an inch because of their negligence with the water supply. David is supposed to be able to cut them off, too, and has yet to have ANYONE do anything about his concerns. With one bad and unresponsive neighbour with a wall of lawyers to deal with, NOBODY who actually farms here wants another one.

APPLICANT'S RESPONSE: These comments are irrelevant to the applicable criteria.

- 11) On the off-chance the course is ever shut down due to water issues, all those people would lose their jobs. If it doesn't go in, no one has to worry.

APPLICANT'S RESPONSE: These comments are irrelevant to the applicable criteria.

- 12) Perhaps most importantly, were the golf course to tap into ONLY surface-water wells and agreed to be shut down when they went dry, that would be acceptable to the local growers. At no time should they be allowed to tap into the deeper layer (below 45 ft). This could be accomplished by planting native grasses and using a non-irrigation approach, as has been successfully done in other Western States. There is actually NO REASON for them to water non-native grasses non-stop until everything is destroyed for everyone else. There is a way to make this work, but NOT with the current water plan. PLEASE, PLEASE, PLEASE deny this application as is. To approve it, as is, would be the death of us all here. This is not hyperbole: water is life.

APPLICANT'S RESPONSE: These comments are irrelevant to the applicable criteria.

OREGON COAST ALLIANCE (ORCA) COMMENTS

On behalf of Oregon Coast Alliance (ORCA), please accept this open record testimony for the above-entitled application.

ORCA COMMENTS: 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.”

In response to this criterion, the applicant concedes that: “Aerial photographs confirm that on December 6, 2007 [195.300(10)(a)], the segment of the applicant’s ownership upon which the golf course is proposed, does contain lands growing specified perennials.” Applicant’s Exhibit A, Page 3. Indeed, the 93.56-acre parcel identified as map no. 29S15W251000 is plainly in farm use according to aerial photos in the staff report. The applicant, therefore, concedes that the subject property contains high-value farmland. Because the subject properties are in common ownership, the entirety of the subject property is considered high-value farmland. 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). The application must, therefore, be denied. If the applicant wishes to pursue a golf course on this property, he must apply for an Exception. Absent an approved Exception, no golf course is permitted on any portion of the applicant’s property, due to it being high-value farmland.

APPLICANT’S RESPONSE: As stated by the ORCA, ORS 195.300(10) includes high-value farmland as described in ORS 215.710. 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. ORS 215.705 addressed “Dwellings in farm or forest zone.”

The applicant is not applying for a dwelling in the forest zone and therefore “tracts growing specific perennials” does not apply. The applicants land upon which the golf course is proposed is not high value farmland.

ORCA COMMENTS: 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 a 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.

For the analysis of the Farm Impacts Test, pursuant to ORS 215.296, the applicant contends that the development and maintenance of a golf course involves similar or the same practices as what is involved in a farm use, and, therefore, there would be no impacts. ORCA strenuously disagrees. The applicant has not provided a discussion of the post-development land uses and the impacts that they may have on area farm uses. The applicant's contention that agronomic practices of the golf course management are compatible with farm use is simply conclusionary. The applicant offers no support for this bare allegation. Farm use is defined to include an intent to make a profit in money (i.e., commercial agriculture). A golf course has no intent to make a profit in money by 3 conducting agricultural operations.

APPLICANT'S RESPONSE: ORCA is raising the same issues regarding impacts to adjacent farm and forest use as they did in their first submittal to the Planning Commission. Those issues were addressed in the applicant's submittal for the first seven-day continuation period.

ORCA COMMENTS: Golf course maintenance involves significant water use, which can have a drawdown effect on surrounding agricultural water use, and golf courses typically use pesticides that can adversely affect surrounding farm uses. ODFW noted that the area is suffering from significantly low stream flows and increased water temperatures. The applicant's allegation that it has no conclusion regarding future well development impacts is inadequate in light of the likelihood of impacts to surrounding wells and farm practices. The applicant proposes testing over time but the impacts need to be addressed now, not later. As such, it is likely that some undetermined amount of water proposed for use will exacerbate the issue. Alteration of the landform in the development of the golf course can impact drainage and runoff, air flow, and so forth, which can adversely affect adjacent farm uses.

APPLICANT'S RESPONSE: Again, ORCA is raising the same issues addressed in the applicant's response during the first seven days of the continuation period. ORCA pounds on the water issue knowing that the submitted hydrology report stated that there is not sufficient information available to reach a conclusion regarding potential impacts.

The appropriate method for avoiding water related impacts to adjacent or nearby uses, is to rely on methods used by Oregon Water Resources Department, the agency responsible for assuring that there will be no impacts to adjacent uses. Strategically placed monitoring wells is a time-tested method for protecting the "senior water rights" of agricultural uses in the area.

ORCA COMMENTS: As noted in the staff report, EFU parcels are located to the north, south, and east. Staff identified nine separate cranberry farms in the nearby area and two nearby ranches with livestock and hay production actively occurring. The staff report identified numerous lands that contained farm uses that were apparently overlooked by the applicant. The applicant must supplement its analysis and provide a serious attempt at complying with ORS 215.296.

APPLICANT'S RESPONSE: Again, ORCA is raising the same issues addressed in the applicant's response during the first seven days of the continuation period. The applicant therein addressed each farm use individually.

ORCA COMMENTS: The generalized plan for the golf course is already obviously flawed because it will not satisfy OAR 660-033-0130(20)(d)(B), which requires that "[a]n accessory use that provides commercial services (e.g., pro shop, etc.) shall be located in the clubhouse rather than in a separate building." The plan for the golf course plainly shows the "pro shop/offices & storage" in a separate building than the "restaurant." As with many criteria, the applicant has not provided a serious attempt at complying with the criteria.

APPLICANT'S RESPONSE: The applicant has removed a structure and changed the caption on the "conceptual" Golf Course Routing Masterplan. The plan now shows one structure that is labeled "Clubhouse/Pro-Shop. Those changes better conform with the clubhouse design utilized to address the design capacity standard.

There is also an architectural rendering that was submitted with the applicant's application addendum. That design was conceptual and only intended to demonstrate how the entrance to the golf course could potentially be designed.

The applicant does not agree with ORCA's conclusion that "food service" can only occur in conjunction with the clubhouse/pro-shop. See OAR 660.033.0130(20)(d)(C) in part below:

(C) Accessory uses may include one or more food and beverage service facilities in addition to food and beverage service facilities located in a clubhouse.

However, it is not necessary to debate the issue at this time. The applicant will be filing a second application to address geotechnical issues for all structures when the architectural design and specific location for each structure is known. At that time, individual uses, as well as their design capacity, can be addressed in more detail.

With that said, committing to a single structure, (clubhouse/pro-shop) eliminates this issue raised by ORCA, and allows approval of this application with conditions.

ORCA COMMENTS: As noted in prior testimony, the applicant has not demonstrated compliance with the relevant design capacity criterion. Because the applicant has not complied with the design capacity requirements in any meaningful way, the applicant must seek approval for an exception "pursuant to ORS 197.732 and OAR chapter 660,

division 4[.]” OAR 660-033-0130(2)(a). However, because the applicant concedes that the subject tract is high-value farmland and does not satisfy OAR 660-033-0130(18)(c), a golf course is prohibited. Without submitting the required information, the applicant alleges that “the decision as to whether proposed structures meet the 100-person design capacity threshold can be made based upon the submitted clubhouse/restaurant design, its seating capacity and institutional knowledge of the needs necessary to serve the patrons of a single golf course.” The applicant is mistaken, and the applicant’s position is contrary to established case law.

The applicant is also mistaken about the type of condition of approval that can be used to determine compliance with the design capacity requirement. The applicant alleges that “a condition of approval shall be imposed that requires verification from a professional structural designer that the final design for all structures maintains a design capacity of 100-persons or less.” That is not sufficient. The condition of approval must provide for a new process, the same as which has been provided here, including notice, opportunity for comment, and opportunity for appeal. The reason for this is that opponents can disagree about the evidence submitted in support of the design capacity requirement and opponents should be able to submit their own evidence in support. Absent that, the applicant and the County will violate the holding in *Rhyne v. Multnomah County* and its progeny. The County cannot leave determination of this criterion to a process that does not include the public.

ORCA disagrees with the applicant’s allegation that there can be more than one group of structures, each with its own 100-person design capacity. That is expressly contrary to the administrative rule’s requirements. The rule requires a strict 100-person design capacity overall.

APPLICANT’S RESPONSE: ORCA is raising the same issues addressed in the applicant’s response during the first seven days of the continuation period. The applicant has committed to using the Bandon Trails Clubhouse design and has submitted a revised design capacity analysis by Scott Edwards Architecture. While ORCA disagrees that the evidentiary threshold of evidence has been achieved, the Land Use Board of Appeals has put this issue to rest by accepting the same level of evidence provided herein.

ORCA COMMENTS: The applicant’s hydrogeology report concludes that the applicant is unlikely to achieve their desired pumping rate of 400 gpm with one well. The report suggests that three or likely more wells producing lower pump rates would be necessary. The report also indicates that drawdown is expected from pumping. The applicant must account for the impact to surrounding cranberry bogs as a result of this drawdown, as well as Bandon State Natural Area. The report also acknowledges that impacts to groundwater quality are expected from seawater intrusion. In fact, the report acknowledges that there is limited publicly available groundwater quality within the project area and the Bandon area. The report is also far from complete, conceding numerous data gaps, including information on aquifer properties, groundwater quality,

hydraulic connection, and so forth. The report's recommendations for future action indicate that much more work is necessary for this project.

APPLICANT'S RESPONSE: ORCA is raising the same issues addressed in the applicant's response during the first seven days of the continuation period.

However, it should be said that ORCA is picking and choosing comments from the Hydrology report that benefit their argument, without considering the entire report. ORCA does not address the report where it suggests that "the deeper bearing water zone may act as a confined or semi-confined aquifer due to the relatively thick (20 to 40 feet) clay layer that separates it from the overlying dune sand aquifer and shallow zone aquifer (marine terrace)," from which most uses in the area draw their water. As stated in the application, the deep-water zone (120 to 130 feet) is where the applicant intends to derive their water source.

By cherry picking segments, ORCA leaves out the full statement regarding salt-water intrusion. The report states, "the deeper MTAS (deep zone) is bounded to the east by low permeability bedrock," suggesting that most water pumped at wells completed in the deeper zone may come from the west; saltwater intrusion may be more likely as a result. This statement suggests that wells drawing from the deeper zone will be less likely to affect uses to the east, where farm uses exist.

The report concludes that the only way to determine impacts to farm uses, present and future, is through regular, long-term testing from monitoring wells located between the proposed use and surrounding farm uses. Again, the State of Oregon relies on the water resources department as the agency charged with protecting existing water rights.

ORCA COMMENTS: As for the County's geotechnical requirements, the September 15, 2022, Stuntzer Engineering letter alleges that the "geotechnical issues can be resolved through conditions of approval and future conditional use applications with notice, when necessary information becomes available." The geotechnical requirements may affect 5 other criteria, and, therefore, any criteria that are affected by the geotechnical analysis will have to be deferred in addition to the geotechnical criteria. Deferring these issues requires that the very same process as provided here will have to be provided, along with notice, opportunity for comment, and opportunity for appeal. The applicant cannot evade the applicable criteria by deferring their application.

The completeness letter alleges that "Cascadia Geoservices has visited the site and has determined that structures can be established in the general locations proposed on the master plan," but those locations are inconstant with the administrative rules, as noted above. The applicant appears to concede that the layout of structures and the course will not be known until a later time. The applicant is putting the cart before the horse, and fails to present a means by which to determine whether the criteria can be satisfied. For all the reasons above, the planning commission must deny this application for a golf course; it is in many ways incomplete, failing to satisfactorily address and meet the requirements of both case law and state legal requirements.

APPLICANT'S RESPONSE: The applicant has no issue with ORCA's proposal that geotechnical analysis for Beaches and Dunes and geologic hazards be reviewed at a later date so long as it is done through a new conditional use process that provides notice and allows public participation.

