

**LU-24-027 IN-PERSON TESTIMONY  
SUBMITTAL COVER SHEET**

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BOC ID: BOC3

IDENTIFIER: T0708

Open Record Submission  
(LU-24-027)

Date: October 29, 2025

Commission Members:

At the close of the public testimony portion of the hearing on this matter, the Chair of the Commission indicated that the Record was to be held open for six days.<sup>1</sup> This written statement provides evidence, argument and testimony, although rushed, is submitted consistent with state law which authorizes the same.

**Conditions of Approval.**

The Staff Report recognizes the Applicant's proposal fails to meet the burden of proof with applicable criteria. The Staff, however, recommends the use of multiple conditions of approval to overcome the Applicant's failure to meet its burden of production and persuasion. In light of the outpouring of public testimony demonstrating how this application fails to meet the criteria as well as a small measure of common sense, Staff's measured recommendation is unpersuasive.

Notwithstanding the use of conditions of approval, the Applicant fails to meet its burden of proof. Accordingly, the Commission should simply deny the application.

More critically from a procedural perspective, no condition of approval is a possible suitor able to demonstrate the Applicant has not seriously interfered with the character of the area. As the analysis below demonstrates, no possible suitor even exists under the Code.

A. BCC 53.215 Criteria

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

B. BCC 53.220 Conditions of Approval

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<sup>1</sup> ORS 197.797(6)(a) & (c) mandate the Record be held open for seven days.

“The County may impose conditions of approval to mitigate negative impacts to adjacent property, to meet the public service demand created by the development activity, or to otherwise ensure compliance with the purpose and provisions of this code.”

### *C. Scope of authority*

The Applicant and Staff rely on conditions of approval to satisfy the Applicant’s burden of proof required to meet each and every applicable criterion. That reliance is misplaced. The scope of the plain language of BCC 53.220 does not authorize use of conditions of approval to “mitigate negative impacts” to “the character of the area” as expressed in the second phrase in subsection (1) of BCC 53.215.<sup>2</sup> The plain language expressly authorizes the use of conditions of approval to negate negative impacts<sup>3</sup> to adjacent property and to meet public service demand created by the development and ensure compliance with the purpose of this code section, but it does not authorize a condition of approval to mitigate any destruction, loss or alteration or other serious interference to the “character of the area.”

Stated differently, the parallelism between the criteria in BCC 53.215 and the authorization for when conditions of approval are limited by the text in BCC 53.220. Expressly omitted from authorization is the authority to apply a condition of approval to the second phrase in subsection (1). That is, no authority is expressed in the first sentence in BCC 53.220 authorizing the Commission to impose any conditions of approval to mitigate serious interference with the character of the area.<sup>4</sup> Any attempt to fill this void violates cardinal rules<sup>5</sup> of construction specifically adopted by law and recognized by LUBA and the Courts. The Applicant and Staff conflate analysis of the *character* of the area with *uses* on

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<sup>2</sup>As noted in my earlier written testimony, conditions of approval are not a substitute for meeting the Applicant’s burden of proof.

<sup>3</sup> The County and Applicant seem to view negative impacts and serious interference as interchangeable terms. They are not.

<sup>4</sup> Nor could one plausibly interpret the last phrase “ensure compliance with the purpose and provisions of this code” to provide authority. The plain language is addressed to ensure compliance, not criterial satisfaction.

<sup>5</sup> Neither a judge nor a Commissioner may insert into legislation what the law has omitted nor omit what the law inserts.

adjacent property. Textually, the Code separates the two and requires the Applicant to produce substantial evidence showing how each of these distinct portions of BCC 53.215 are met. The Staff Report indicates that both the Applicant and Staff correctly interpret “character of the area” to indicate a geographic area larger in size than the term “adjacent” provides in the first phrase of the subsection (1) of BCC 53.215. However, both staff and Applicant miss the code’s distinction when considering the Applicant’s failure to meet the burden of production, proof and persuasion by proposing conditions to substitute for demonstrating no serious interference results from the proposed expansion which affect the *character* of the area.

In addition to a greater geographic scope than adjacent use, consideration of character of the area demonstrates the protection of significant long lasting qualities such as the area’s pastoral presence, recreational advantages, its essence and observable<sup>6</sup> traits. Once demolished and replaced with a mountain of garbage and toxic waste, the essence of the site is destroyed. No condition of approval can mitigate that destruction. Within the proposed expansion area, I have personally observed herds of elk, deer, and other wildlife. Last year’s snow event provided a stark backdrop for viewing an elk herd of approximately 30 in number in the proposed development site.

Moreover, Ken Eklund testified to the social, historic and cultural influence of the area. That influence captures what the observable landscape sometimes fails to effectively demonstrate. Those traits merge with the observable to reflect the recognized character of the area.

Significant and multi-year blasting<sup>7</sup> will discourage wildlife use of the area and change its character. Replacing elk and deer browse vegetation with rotting waste and a toxic slurry is a serious interference for which no condition of approval can remedy.

The Commission should give this land use case the serious attention it deserves and find the Applicant has not carried its burden of proof and deny it.

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<sup>6</sup> The “appearance: outward and visible quality or trait[.]” is one of the express definitions for character. *Webster’s Third International Dictionary, Unabridged*, pg.376.

<sup>7</sup> Blasting is considered an ultra hazardous activity with potential for damage far exceeding the scope of adjacent properties. Continuous yearly blasting will create barriers to wildlife use of the area.

David Coulombe