

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

Received From: David Caulombe

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Email: decaulombe@peak.org

Phone: 541-908-3741

Address: 37741 Gouge Pl

City, State, Zip: Cornelius OR 97330

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IDENTIFIER: T06S3

Hearing Testimony Notes

INTRODUCTION:

Discretionary review is a review built in with latitude to consider circumstances of the proposal against public policy, environmental health, public safety and other government goals.

BCC 53.210 provides in relevant part that: “The decision to issue a conditional use permit is discretionary.”

Contrary to the testimony from the Government Official in Newport, your decision is not based on clear and objective criteria.

Rather, the criteria are **subjective in nature**. The *squishiness* of the criteria (yes that is a legal term of art-I say in jest) is intentional. The County’s Code does not impose varying subjective terms for differing conditional use applications. A vanilla residential CUP is reviewed under the same text as a CUP seeking to increase its footprint with millions of tons of organic and inorganic waste—some of which is toxic to humans and animals.

The **level of risk** resulting in *serious interference* and *undue burdens* and adverse impacts to adjacent property, character of the area and the level of undue burden on public improvements, facilities, utilities, or services available to the area **requires a more stringent level of scrutiny**.

Stated differently, the greater the adverse impacts the greater the level of scrutiny and thus the greater the applicant’s burden.

The Applicant’s burden is one of **production**—a clear and complete demonstration of compliance with the criteria, as well as the burden to **persuade** this body of compliance.

Shifting the burden to staff, the planning commission, the public or opponents is clear legal error. Do not be misled.

Given the testimony of the serious interference to Robert Kipper’s property and

use, other adverse impacts discovered and submitted by the opponents into this hearing record, amply demonstrate that the Applicant has not met its burden, and you must deny the application. A point Staff noted in its report to the Commission: the Record is full of substantial evidence to support a denial.

The Criteria:

BCC 53.215. The decision to approve a conditional use permit shall be based on findings that:

(1)The proposed use does not seriously interfere with uses on adjacent property, with the character of the area, or with the purpose of the zone;

The Applicant provided some definitions regarding your interpretive role in these proceedings. Context is key. The most immediate context is provided by BCC 53.210 expressly stating your decision and review is discretionary.

Discretionary means:

The latitude of decision within which a court or judge decides questions arising in a particular case not expressly controlled by fixed rules of law according to the circumstances and according to the judgment of the court or judge; Webster's Third International Dictionary.

What does the text say, in context and intended purpose as disclosed by legislative history. Deference is given to the County when its interpretation of local code language is plausible. Understanding plain language includes common definitions and legal terms of art. Those include:

Adjacent: Lying near or close to; sometimes contiguous; neighboring. Adjacent implies that the two objects are not widely separated, though they may not actually touch, *** (case law cite omitted) while adjoining imports that they are so joined or united to each other that no third object intervenes. *Black's Law Dictionary*, pg 62.

Adjoining: means touching or contiguous, as distinguished from lying near to or adjacent. To be in contact with; to abut upon. Internal citations omitted. *Black's Law Dictionary*, pg 62.

Adjacent: *** 1a: Not distant or far off (the city square and the ~ streets)..nearby but not touching (the Islands and the ~mainland coast) ***. *Webster's Third New International Dictionary Unabridged*, (1961, 2002) pg 26.

In its presentation, the Applicant's representative substituted the term *adjoining* in for *adjacent*. That violates the statutory principle of construction that a judge/decision maker is "not to insert what has been omitted, or to omit what has been inserted[.]"

Of course the Applicant desires that the scope of review be limited so that evidence of serious interference to property use, character of the area and undue burdens *any* public improvements, facilities, utilities, or services available to the area.

Stated differently, the Applicant desires to shield the proper review of its interference by limiting the area of review. The examples Webster's definition gives-a city square and streets and Islands association with the mainland demonstrate a scope much larger than the area the Applicant prefers.

I found it ironic that the Applicant's attorney went to such effort to explain to you the meaning of relevant, then his client immediately resorted to lobbying efforts totally unrelated to an applicable criterion.

Regrading irrelevant testimony, I found it amusing that public officials outside of the County's territorial limits would testify that you should approve the expansion--no doubt to the delight of their constituents' pocketbook and their own avoidance of housing a toxic waste site within their territory.

Chair Wyse questions to staff and the Applicant concerning the narrow scope of consideration for interference to property use, character of the area and undue burdens *highlights* the lack of evidence a small impact consideration area introduces.

Consistent with the Chair's inquiry, LUBA held where a code provision that provides that where a proposal will have significant impacts on an area, the proponent of the proposal may be required to submit more detailed and reliable evidence that the proposal will comply with applicable approval criteria than would otherwise be required in order for the county to approve an application with fewer impacts is consistent with *Fasano v. Washington Co. Comm.*, 264 Or 574,

586, 507 Page 2 of 8 P2d 23 (1973), regarding the burden of proof in a quasi-judicial proceeding. *Tidewater Contractors v. Curry County*, 65 Or LUBA 424 (2012).

(2)The proposed use does not impose *any* undue burden on any public improvements, facilities, utilities, or services available to the area; and

Coffin Butte Road provides a access to Soap Creek valley, Tampico, OSU agricultural and forest land properties. Driving, biking, walking or jogging through a channel of putrefied rotting waste, airborne particulates and pathogens, as well as a steady stream of trucks and other heavy equipment is an undue burden on the use of the public service the road offers.

Conditions of Approval.

BCC 53.220 - Conditions of Approval.

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. On-site and off-site conditions may be imposed. An applicant may be required to post a bond or other guarantee pursuant to BCC 99.905 to 99.925 to ensure compliance with a condition of approval. Conditions may address, but are not limited to: ***

A condition of approval is not a substitute for meeting a criterion.

Here, the Applicant views a “mitigation to negate *a negative impact* as support for *not seriously interfering* with a use on adjacent property. BCC 53.220 provides neither textual nor logical support for the Applicant’s perverse misuse of the Code.

Stated differently, the Applicant is attempting to satisfy its requirement to meet the criterion’s obligation “not to seriously interfere with uses on adjacent property” by reducing a “negative impact” of its proposed expansion.

Mitigating *serious interference* is not the standard of proof required by the Code. Demonstration that the proposed expansion **does not seriously interfere with uses of adjacent property** is the Applicant’s burden to establish. A hypothetical or hopeful negation of a negative impact does not meet the Applicant’s burden.

In order for the local government to postpone a determination of compliance with an applicable criterion to a future proceeding, the local government must first determine, based on evidence in the record, that “compliance with the approval criterion is possible.” The evidentiary showing that is required in order for the local government to determine that future compliance is “possible” is not the same evidentiary showing that will be required when a local government makes the required ultimate finding that an approval criterion is satisfied or will be satisfied with measures that are “likely and reasonably certain to succeed.” *Gould v. Deschutes County*, 227 Or App 601, 612, 206 P3d 1106 (2009). *Northgreen Property LLC v. City of Eugene*, 65 Or LUBA 83 (2012).

Accordingly, the Applicant’s history of lack of compliance with current operations and its lack of responsiveness to current conditions of approval is **very relevant** to whether it is “**likely and reasonably certain**” that it will succeed with and comply with any proposed conditions of approval.

The county may not defer a determination of compliance with applicable approval criteria to a future proceeding that does not allow for public participation merely because the deferred criteria require no interpretation or judgment. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

If the County assumes it will make a determination of compliance with approval criteria following the various monitoring and reporting requirements, the County must allow the public to participate.

Where a local code provision requires applicants for destination resorts to demonstrate that “[a]ny negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource,” where a proposed resort’s consumptive use of groundwater is anticipated to impact the quantity and quality of water in an offsite stream, and where the applicant’s final master plan includes a mitigation plan requiring the applicant to replace the water consumed by the resort with a quantity and quality of water that will maintain fish habitat in the stream, the local government may not impose a condition of approval allowing the applicant to demonstrate that the source of the mitigation water provides the requisite quantity and quality of water at a later date without review or input by interested persons. *Gould v. Deschutes County*, 79 Or LUBA 561 (2019).

END OF TESTIMONY

PROCEDURAL OBJECTION

I would like to state a procedural objection.

My neighbors have been challenging the proposed expansion of this landfill for many years. I am new to the neighborhood and this issue. Accordingly, I have read some of the materials in the Record and as reported in the various local forums. I came yesterday to educate my myself and learn from the oral testimony to gain information about the proposal and reasons for opposition.

I heard comments from those testifying that they believed they could not provide certain types of testimony. I am not sure where they were misled, but it could have been the admonishment from staff or the applicant concerning what they believed was relevant testimony.

The Chair read a statement likely consistent (I say likely because I was not able to hear the statement very well) the ORS Chapter 197.797(5)(b) which states that testimony, arguments and evidence must be directed toward the criteria described in paragraph (a) of this subsection or other criteria in the plan or land use regulation **which the person believes to apply to the decision**[.]

I believe that the robust public hearing process was limited as some testimony was not provided based on a real or perceived restriction on the ability to provide argument or evidence with the **person herself believed** applies to this decision.

I'm making this objection at the first opportunity and with time for the County to remedy this error.

David Coulombe
37741 Govier Pl
Corvallis, Or 97330