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March 16, 2023

Via Email

Tillamook County Board of Commissioners
c/o Tillamook Community Development
1501-B Third St.
Tillamook, OR 97141

Re: Oregon Coast Alliance Remand Testimony regarding conditional use permit request for 19-site campground in Tierra Del Mar, #851-21-000416-PLNG.

Dear Chair Skaar and Members of the Board,

On behalf of Oregon Coast Alliance (ORCA), please accept this testimony on the above-entitled application. Due to several shortcomings, outlined below, I respectfully request that the Board of Commissioners deny the application.

Attached is ORCA's petition for review on remand from LUBA. ORCA incorporates its arguments from the petition for review.

Under TCLUO 10.020(6)(f)(iii), the applicant has not satisfied the criteria for a "minor modification." The applicant alleges that the changes are minor but those changes are, apparently, enough to demonstrate that criteria are allegedly satisfied. Moreover, the introduction of a geologic report and wetlands report are significant enough to qualify as more than "minor modifications" under state law. Contrary to the findings, the new evidence and changes require significant alteration in the approval criteria and development standards. In addition, the revised plan includes three fire hydrants and a sprinkler system. This will affect the amount of water necessary for the use. The proposed changes also include propane-fueled fire pits and staff-controlled wood fire pits. These additions are only as good as the applicant's staff and their attention. Indeed, the new application is silent on whether there will be 24/7 staff on

site, which appears to be necessary if the staff-controlled propane and wood fire pits will be maintained.¹

Apart from TCLUO 10.020(6)(f)(iii), the changes in the application require that a new application be submitted, or that the remand not be limited because the new evidence raises new issues that affect other criteria.

The property is located in a High Landslide area. Section 4.130 requires a “Geologic Hazard report prior to approval of planned developments, coast resorts, subdivisions, and partitions....” Under the geologic hazard requirements, the proposed findings allege that that the vegetation will be the minimum necessary but the findings fail to allege exactly how much vegetation removal will occur. To provide the public with enough information to ascertain satisfaction of the criterion, as well as other related criteria², the public needs to know how much vegetation removal will occur.

Under TCLUO 6.040(3), an application for a conditional use must demonstrate that: “[t]he parcel is suitable for the proposed use considering its size, shape, location, topography, existence of improvements, and natural features.” Here, the use is not suitability based upon the geologic hazards and wetlands. The proposed use is not suitable given the natural features, including the presence of wetlands, Aquatic Resources of Special Concerns, and geologic hazards. The neighboring property has a wetland identified as “mature, forested wetland, and therefore, part or all of this wetland may meet the state’s criterion for Aquatic Resources of Special Concern³, which can affect the eligibility protocols for compensatory mitigation if a DSL Permit is required. Given that the onsite wetland is a continuation of the neighboring property, it is likely that the subject property also contains Aquatic Resources of Special Concern, and that

¹ Previously, ORCA requested clarification on whether applicant was going to use an onsite host as a condition of approval:

“Next, it is imperative that the applicant retain some onsite host or security to address issues that will inevitably arise. This assurance must be included as a condition of approval. Without someone to check with and have supervision over the campsite, there is little to no chance that the conditions imposed if the application is approved and rules for the campsite will be enforced to the detriment of the neighboring property owners’ livability.”

² For example, the geologic hazard report may implicate other criteria – such as suitability – that were not at issue previously because there was no report until now.

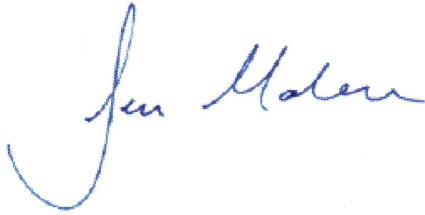
³ OAR 141-85-510(3) defines “**Aquatic Resources of Special Concern**” to mean the: “waters of this state that provide functions, values and habitats that are limited in quantity because they are naturally rare or have been disproportionately lost due to prior impacts. These include alkali wetlands and lakes, bogs, cold water habitat, fens, hot springs, interdunal wetlands, kelp beds, mature forested wetlands, native eelgrass beds, off-channel habitats (alcoves and side channels), ultramafic soil wetlands, vernal pools, wet prairies, wooded tidal wetlands, and others as determined by the Department.”

issue must be resolved before the conditional use criteria can be applied. The staff report noted that there are mapped wetlands and river features, including forested shrub wetlands, and DSL has already stated that the proposal will impact wetlands, thus requiring a state permit.

ORCA requests an open record period of 14 days to respond to new testimony and evidence submitted. The applicant has submitted new evidence on remand – and ORCA alleges that the new evidence is more than a minor modification – and therefore the County must grant opponents an opportunity to respond to the applicants’ new evidence, as well as new argument and evidence that is submitted at the hearing.

In conclusion, ORCA respectfully requests that the application on remand be denied.

Sincerely,

A handwritten signature in blue ink that reads "Sean T. Malone". The signature is written in a cursive style with a large, sweeping initial "S".

Sean T. Malone
Attorney for Oregon Coast Alliance

Cc:
Client

1 and groundwater impacts,” “Water availability & drinking water,” and
2 “Emergency response and infrastructure limited for a timely use.” R 80, 192. The
3 Board of Commissioners continued the hearing to May 11, 2022, which was
4 continue to June 1, 2022. *Id.* Public testimony was overwhelmingly against the
5 proposed conditional use request. *See* R 104-151, 162-178. At the June 1, 2022
6 hearing, the Board heard additional oral public testimony and oral argument from
7 the appellant, applicant, and final comments from the planning director and staff.
8 *Id.* The Board then deliberated and voted 3-0 to uphold the Planning
9 Commission’s decision and deny the appeal, subject to Conditions of Approval as
10 amended and included as Exhibit A. The final order dated June 22, 2022 (R 50-51
11 (Appx 1-2)), incorporated the conditions in Exhibit A (R 52 (Appx 3)) and findings
12 in Exhibit B (R 53- 65 (Appx 4-16)).

13 III. JURISDICTION

14 LUBA has jurisdiction under ORS 197.015(10)(a)(A) and ORS 197.825(1).

15 IV. ARGUMENT

16 A. FIRST ASSIGNMENT OF ERROR – The County misconstrued
17 applicable law and made inadequate findings in deferring compliance
18 with TCLUO 4.130, Development Requirements for Geologic Hazard
19 Areas to a later time where there is no opportunity for public comment
20 and appeal.

21

22 1. Preservation of assignment of error

23

1 Below, Petitioner cites to the relevant portions of the record where
2 opponents raised the issue of geologic hazards, the applicant's allegations about
3 the same, and the findings that defer compliance with the TCLUO 4.130. In
4 summary, those portions of the record where this issue was raised includes R 217,
5 227, 177, 314, 341, 344.

6 2. Standard of review

7 A local government's interpretation of state law and local law that
8 implements state law is not entitled to the deferential standard of review under
9 *Siporen v. City of Medford*, 349 Or 247, 266 (2010). A local government's
10 interpretation of issues not pertaining to state law is afforded *Siporen* deference
11 only if the interpretation is from the governmental entity that promulgated the
12 standards at issue. Where the matter is not one of state law and the approval
13 authority was not the same that promulgated the provisions at issue, then LUBA
14 reviews such interpretations under ORS 197.835(9)(a)(D) to determine whether the
15 County "[i]mproperly construed applicable law." *Waverly Landing Condo.*
16 *Owners' Assoc. v. City of Portland*, 61 Or LUBA 448 (2010). If there is no
17 interpretation or the interpretation is inadequate for review, ORS 197.829(2)
18 provides that LUBA may interpret the local provision in the first instance. Where
19 there is no reviewable express or implied interpretation, LUBA has nothing to
20 defer to. *Heitsch v. City of Salem*, 65 Or LUBA 187 (2012).

1 Under ORS 197.829(1), LUBA shall “affirm a local government’s
2 interpretation of its comprehensive plan and land use regulations, unless the board
3 determines that the local government’s interpretation:

- 4 “(a) Is inconsistent with the express language of the comprehensive plan or
5 land use regulation;
- 6 (b) Is inconsistent with the purpose for the comprehensive plan or land
7 use regulation;
- 8 (c) Is inconsistent with the underlying policy that provides the basis for
9 the comprehensive plan or land use regulation; or
- 10 (d) Is contrary to a state statute, land use goal or rule that the
11 comprehensive plan provision or land use regulation implements.”

12
13 *See also PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143, 1146
14 (1993), *modified by State v. Gaines*, 346 Or 160, 171-172, 206 P3d 1042 (2009).

15 “[U]nder ORS 197.829(1), LUBA is required to defer to a local
16 government’s interpretation of its land use regulations unless the interpretation is
17 inconsistent with the express text of the regulation, the purpose of the regulation,
18 the underlying policy implemented by the regulation, or a state law that the
19 regulation carries out.” *Kaplowitz v. Lane County*, 285 Or App 764, 775, 398 P3d
20 478 (2017). As explained in *Siporen*:

21 “To the extent that the interpretation is directed at a single term or statement,
22 that means determining whether the interpretation plausibly accounts for the
23 text and context of the term or statement. But, to the extent that the
24 interpretation is directed at multiple statements that may be in conflict, the
25 inconsistency determination is a function of two inquiries: (1) whether the
26 interpretation in fact is an interpretation, *i.e.*, a considered determination of
27 what was intended that plausibly harmonizes the conflicting provisions or
28 identifies which ones are to be given full effect; and (2) the extent to which
29 the interpretation comports with the ‘express language’ of the relevant

1 provisions (including, necessarily, those provisions that, according to the
2 interpretation at issue, are to be given full effect).”

3
4 *Siporen*, 349 Or at 262, 243 P3d 776.

5 A local government’s findings are necessary to the degree they are essential
6 to the challenged decision. Findings must “(1) identify the relevant approval
7 standards, (2) set out the facts which are believed and relied upon, and (3) explain
8 how those facts lead to the decision on compliance with the approval standards.”

9 *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). Additionally, findings
10 must address and respond to specific issues relevant to compliance with applicable
11 approval standards that were raised in the proceedings below. *Norvell v. Portland*
12 *Metropolitan Area Local Government Boundary Com.*, 43 Or App 849, 853
13 (1979).

14 3. Argument

15 The subject property is located in areas of geologic hazards. The findings
16 concede that the property has highly variable slopes, as well as mapped wetlands
17 and riverine features:

18 “The subject property has highly variable slopes and terrain with it generally
19 sloping upward to the east (Exhibits A and E). Development is proposed to
20 be primarily located on the slopes, east of an existing private roadway
21 through the subject property (Exhibit A). Mapped wetlands and riverine
22 features are present on the subject property on the western boundary,
23 including Freshwater Forested/Shrub wetlands (Exhibit A).”
24

1 R 61 (Appx 12); *id.* (“The tract lies within an area of potential landslide
2 susceptibility as identified by DOGAMI map lays (exhibit A). Members of the
3 public submitted testimony requesting that the geologic hazard zone criteria be
4 addressed at this stage to allow for public scrutiny and review:

5 “Geological Hazard Zone - the applicant states that an existing geological
6 study has been done but did not provide for public review. The property
7 appears to be in an area of high landslide susceptibility. Section
8 4.130(3)(4)(5) of Tillamook County Land Use Ordinance requires a
9 ‘*Geologic Hazard report prior to approval of planned developments, coast*
10 *resorts, subdivisions and partitions* ‘ This report was not provided
11 which is required to be prepared and stamped by both an Oregon Registered
12 Geologist and an Oregon Registered Engineer. The report would provide
13 important information to make an informed decision such as:
14 recommendations on location of structures and roads, management of
15 stormwater run-off, and potential hazards to life, public and private property
16 and the natural environment which may be caused by the proposed us. It
17 would also give methods for protecting the surrounding area from adverse
18 effects of the development.”

19
20 R 217. Again, the public asked for the Geologic Hazard Zone criteria to be
21 addressed at this time because the property falls within a high landslide area that
22 overlaps with proposed development:

23 “The property is located in a High Landslide area. Section 4.130 requires a
24 Geologic Hazard report prior to approval of planned developments, coast
25 resorts, subdivisions, and partitions....’ As the development proposal is
26 located within an area of geological hazards, excess traffic and congestion, a
27 geologic report would provide recommendations on location of structures
28 and roads; recommendations for management of stormwater runoff; hazards
29 to life, public and private property, and the natural environment, which may
30 be caused by the proposed use; and methods for protecting the surrounding
31 area from any adverse effects of the development.”

32

1 R 177.¹ Even the appeal statement included the geologic hazards issue:

2 “Conditional Use Review Criteria (3)² The parcel is suitable for the
3 proposed use considering its ... natural features.

4

- 5 • There are mapped wetlands and riverine features including forested
6 shrub wetlands present on the subject property, but the applicant has
7 not provided a wetland delineation, which is crucial to decision-
8 making.
- 9 • *The tract lies within an area of potential landslide susceptibility as*
10 *identified by DOGAMI map layer, but the applicant has not provided*
11 *a Geologic Hazard report for assessment of compliance.*
- 12 • The applicant has provided no information on the surface and
13 groundwater systems that will be used for drinking water.”

14

15 R 314, 341, 344 (emphasis added). Simply put, the Geologic Hazard Zone criteria

16 cannot be deferred to a later stage when the public has no opportunity to

17 participate, comment, appeal, and otherwise have the geologic hazard zone criteria

¹ There is no shortage of the public raising the issue of geologic hazard compliance:

“It appears the property is within a High Landsliding Area (see map below). Section 4.130(3)(4)(5) requires a ‘*Geologic Hazard report* prior to approval of planned developments, coast resorts, subdivision and partitions’ This report was not provided which is required to be prepared and stamped by both an Oregon Registered Geologist and an Oregon Registered Engineer. This report would provide the necessary information for the Planning Commission to make a decision such as:

- Recommendations on location of structures and roads
- Management of stormwater run off
- Hazards to life, public and private property, and the natural environment which may be caused by the proposed use
- Methods for protecting the surrounding area from any adverse effects of the development.”

R 417; R 418 (landslide hazard map).

² As noted in the Second Assignment of Error, the geologic hazard issue dovetails with the issues raised about the application of the third conditional use criterion.

1 appealed to a higher review authority. The County is obligated to condition the
2 approval on satisfaction of that criteria at a later time, when the same rights and
3 processes are provided to the public.

4 The allegations and findings are not entirely clear as to what geologic
5 investigation has occurred in the past, but it appears clear that the applicant has not
6 commissioned a geologic report to satisfy the requirements of TCLUO 4.130. On
7 one hand, the applicant alleges that some work has been done: “An extensive
8 geological study has been done to the site by the previous owner utilizing the roads
9 planned for the campground, and the study confirmed that the site is suitable for
10 development,” R 93, 202; R 434, 453 (applicant’s bare allegation: “An extensive
11 geological study has already been done on the site by the previous owner utilizing
12 the roads planned for the campground in addition to others covering the entire 18
13 Acres. The study found the site suitable to the development.”), but then also
14 alleges that work remains to be done: “[g]eotechnical investigation has been
15 contracted with Apex Industries and Earth Engineering is currently in process.” R
16 93, 202; R 453 (“Additional Geological work will be completed as needed for the
17 site based on engineering and permit requirements.”); R 434 (“Additional
18 geological study work will be contracted to ensure we meet all Oregon State and
19 Tillamook County requirements as well as to ensure we develop the site properly
20 with regards to structures such as the support cabin and infrastructure. As already

1 stated a Civil Engineering team will be engineering the site.”). The applicant
2 refers to a “geotechnical contract” at R 203, which appears to be an incomplete bid
3 or proposal for geotechnical engineering services from Earth Engineers Inc. That
4 same page includes a proposal for “site exploration plan.” *Id.* Some of the test pits
5 and boring locations are located on or near sites proposed for use in the campsite.
6 *Id.* At most, it appears that the applicant intends to perform some geologic review
7 at a later time, which unlawfully defers findings and fails to determine the
8 applicability of criteria prior to approval.

9 Instead of requiring the applicant to address the Geologic Hazard Zone
10 criteria before the County, the County deferred the requirement to a later stage, one
11 where there is no opportunity for public comment, a hearing, an opportunity to
12 appeal, and so forth. In other words, if the County would like to defer findings as
13 to satisfaction of the Geologic Hazard Zone criteria, then the County has to provide
14 for the same public process that is occurring here.

15 For example, the County imposed condition 3, as follows:

16 “*At the time of applying for Zoning and Building Permit approval,*
17 *Applicant will be required to submit the following:*

- 18
- 19 • Authorization Notice approval for on-site sewage
20 disposal permits from the Department of Community
21 Development or Oregon DEQ.
 - 22
 - 23 • A letter from Tierra Del Mar Water Company confirming
24 water service to the proposed facility.
 - 25

- 1 • A letter from the Nestucca Rural Fire Protection District
2 confirming fire protection service to the proposed
3 facilities.
- 4
- 5 • A letter from the Tillamook County Public Works
6 Department approving the road approach and internal
7 roadway design.
- 8
- 9 • *Demonstration of compliance with the standards*
10 *contained in TCLUO 4.130(2) including.”*
- 11

12 R 52, 64 (Appx 15) (emphasis added). The County also imposed Condition 4,
13 which provides as follows:

14 “If buildings within or near the area identified as inactive landslide
15 topography are to be sited on slopes greater than 29%, a Geologic Hazard
16 Report will be required as described in TCLUO 4.130. If such a report is
17 required, a Geologic Hazard Report shall be submitted in conjunctions with
18 application for Zoning and Building Permit approval for review and
19 acceptance.”

20
21 R 52, 64 (Appx 15). Apart from deferring findings for TCLUO 4.130, this
22 condition is also problematic because it is not clear what it means to be “*near* the
23 area identified as inactive landslide topography.” *Id.* Because the County has not
24 conditioned subsequent satisfaction of TCLUO 4.130 on the same type of process
25 that led to the challenged decision, the County erred.

26 The findings concede that there are “highly variable slopes” and that
27 “[d]evelopment is proposed to be primarily located on the slopes.” R 54 (Appx 5).
28 Importantly, the findings concede that that “[b]uildings are proposed to be sites
29 within or near the Geologic Hazard Area,” R 59 (Appx 10), but condition of

1 approval 4 states that “[i]f buildings within or near the area identified as inactive
2 landslide topography are to be sited on slopes greater than 29%, a Geologic Hazard
3 Report will be required as described in TCLUO 4.130,” R 52 (Appx 3). Because
4 the findings simply side-step application of TCLUO 4.130((3), the findings are
5 inadequate. The findings also misconstrue applicable law because the findings
6 unlawfully defer findings. Apart from those obvious problems under TCLUO
7 4.130, this condition is also problematic because it is not clear what it means to be
8 “near the area identified as inactive landslide topography.” *Id.*³ Because the
9 County has not conditioned subsequent satisfaction of TCLUO 4.130 on the same
10 type of process that led to the challenged decision, the County erred.

11 The findings for the geologic hazards zone and development within geologic
12 hazard areas concedes that the subject property and development falls within the
13 areas of potential landslide susceptibility but defers compliance with TCLUO
14 4.130(1)-(3).

15 *SECTION 4.130: DEVELOPMENT REQUIREMENTS FOR GEOLOGIC*
16 *HAZARD AREAS*

17
18 (1) *The following are GEOLOGIC HAZARD AREAS to which the*
19 *standards of this Section apply:*

20 ...

21 (b) *Inactive landslides, landslide topography and mass*
22 *movement topography identified in DOGMI bulletins 74*
23 *and 79 where slopes are greater than 19 percent;*

³ Regardless, the findings admit that “[b]uildings are proposed to be sited within or near the Geologic Hazard Area.”

1
2 **Findings:** The subject properties lie within an area of potential landslide
3 susceptibility as identified by DOGAMI map layers (Exhibit A). Staff finds
4 that the subject property is partially located within a Geologic Hazard Area
5 and that development within that area is subject to the standards of TCLUO
6 4.130(2).

- 7
8 (2) *All development within GEOLOGIC HAZARD areas shall*
9 *comply with the following standards:*
10 (a) *Vegetation removal shall be the minimum necessary to*
11 *accommodate the use.*
12 (b) *Temporary measures shall be taken to control runoff and*
13 *erosion of soils during construction. Such measures*
14 *include temporary stabilization (mulching or sodding)*
15 *sediment basins or other performance equivalent*
16 *structures required by the Planning Department.*
17 (c) *Exposed areas shall be planted in permanent cover as*
18 *soon as possible after construction.*
19 (d) *Storm water shall be directed into drainages with*
20 *adequate capacity so as not to flood adjacent or*
21 *downstream properties. Finished grades should*
22 *preferably be designed to direct water flows along*
23 *natural drainage courses.*
24 (e) *Additional requirements contained in a Geologic report*
25 *required by this Section shall be followed.*
26

27 **Findings:** At the time of applying for Zoning and Building Permit approval,
28 Applicant will be required to submit evidence demonstrating compliance
29 with TCLUO 4.130(2). Staff recommends that these standards be met
30 through compliance with Conditions of Approval.

- 31
32 (3) *A GEOLOGIC HAZARD report is required prior to approval of planned*
33 *developments, coast resorts, subdivisions and partitions governed by the*
34 *Land Division Ordinance, building permits, mobile home permits, sand*
35 *mining, occurring in areas identified in (1) with the following exception:*
36 (a) *For building or mobile home or manufactured home permits in*
37 *areas identified in (1)(b), reports are needed for lots 20,000 square*
38 *feet or larger only where the proposed structure is to be situated on*
39 *slopes greater than 29 percent or if (1)(f) applies.*
40

1 **Findings:** Buildings are proposed to be sited within or near the Geologic
2 Hazard Area. Buildings situated on slopes greater than 29 percent will
3 require Geologic Hazard Report review as described in TCLUO 4.130. If
4 such a report is required, a Geologic Hazard approval will be required prior
5 to applying for Zoning and Building permits. Staff recommends that this
6 requirement be met through compliance with Conditions of Approval.
7

8 R 58-59 (Appx 9-10). Again, these findings led to the conditions outlined above,
9 but the problem with the conditions is that they defer findings of compliance with
10 TCLUO 4.130 until a time in which the public has no opportunity to comment or
11 appeal. Not only that but the conditions themselves (and the criteria) are far from
12 requiring a simple check-the-box exercise. Instead, the criteria above and the
13 conditions themselves are subjective and policy-laden determinations that must be
14 addressed through the land use process that affords opportunity for comment and
15 appeal.

16 Conditions of approval are not findings, and a simple “promise or statement
17 regarding the proposed development is not an adequate substitute for a condition of
18 approval that is necessary to ensure compliance with applicable approval criteria,
19 even if that promise or statement occurs in the application.” See *Culligan v.*
20 *Washington County*, 57 Or LUBA 395, 401 (2008) (“we believe that an applicant’s
21 promise or statement regarding the proposed development is not an adequate
22 substitute for a condition of approval that is necessary to ensure compliance with
23 applicable approval criteria, even if that promise or statement occurs in the

1 application narrative.”). Conditions of approval cannot substitute for, or be used to
2 avoid, demonstrating compliance with approval criteria.

3 A decision to approve an application must demonstrate that compliance with
4 all discretionary approval criteria is “feasible.” *Meyer v. City of Portland*, 7 Or
5 LUBA 184 (1983), *aff’d*, 67 Or App 274 (1984). Conditions of approval can be
6 used by a local government to ensure compliance will be achieved. “[F]easibility
7 means that ‘substantial evidence supports findings that solutions to certain
8 problems ... are possible, likely and reasonably certain to succeed.’” *Meyer v.*
9 *Portland*, 67 Or App 274, 280 n. 6, 678 P2d 741, *rev. den.* 297 Or 82 (1984).

10 Here, there is no finding of feasibility with regard to the

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

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

19
20 23 Or LUBA at 447; *see, Stockwell v. Benton County*, 38 Or LUBA 621 (2000)

21 (deferred findings of compliance must observe statutory notice and hearing
22 requirements); *Holbrook v. Rockaway Beach*, __ Or LUBA __ (LUBA No. 2008-
23 064, Jan 15, 2009) (Slip op *6) . While “[t]hese principles are relatively simple and
24 straightforward in the abstract, [they] prove more complex in the context of

1 specific permit approval requests.” *Rhyne*, 23 Or LUBA at 447. LUBA has further
2 noted that local governments may “impose conditions if necessary’ to ensure that
3 those feasible solutions are later developed and implemented. That is an option that
4 is available to the local government when the evidentiary record supports such
5 findings,” *Gillette v. Lane County*, __ Or LUBA __, (LUBA No. 2006-001,
6 June 5, 2006) (slip op at 6).

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

11 “Where the evidence presented during the first stage approval proceedings
12 raises questions concerning whether a particular approval criterion is
13 satisfied, a local government essentially has three options potentially
14 available. First, it may find that although the evidence is conflicting, the
15 evidence nevertheless is sufficient to support a finding that the standard is
16 satisfied or that feasible solutions to identified problems exist, and impose
17 conditions if necessary. Second, if the local government determines there is
18 insufficient evidence to determine the feasibility of compliance with the
19 standard, it could on that basis deny the application. Third, if the local
20 government determines that there is insufficient evidence to determine the
21 feasibility of compliance with the standard, instead of finding the standard is
22 not met, it may defer a determination concerning compliance with the
23 standard to the second stage. In selecting this third option, the local
24 government is not finding all applicable approval standards are complied
25 with, or that it is feasible to do so, as part of the first stage approval (as it
26 does under the first option described above). Therefore, the local
27 government must assure that the second stage approval process to which the
28 decision making is deferred provides the statutorily required notice and
29 hearing, even though the local code may not require such notice and hearing
30 for second stage decisions in other circumstances.”

1
2 *Rhyne*, 23 Or LUBA 447-48; *Gould v. Deschutes County*, 216 Or App 150, 161-
3 163, 171 P3d 1017 (2007) (conclusion that it was feasible to prepare a wildlife
4 mitigation plan was not sufficient to conclude that the plan would actually result in
5 adequate mitigation); *Neighbors for Livability v. City of Beaverton*, 178 Or App
6 185, 35 P3d 1122 (2001).

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

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

22
23 *See also Township 13 Homeowners Association, Inc. v. City of Waldport*, ___ Or
24 LUBA ___ (LUBA Nos. 2006-171/172, Jan. 18, 2007) (Slip op *7-8) (“Under
25 *Rhyne*, it was impermissible for the city to completely defer the analysis required

1 by [the local code] to a later stage of the approval process where no notice or
2 opportunity for comment is provided”).

3 Here, because the County deferred findings under TCLUO 4.130(1)-(3) to a
4 stage where there is no opportunity for comment and appeal, the County
5 committed legal error. The County was required to condition the approval of the
6 application on a further process that contained the same participation and appeal
7 rights as provided here. The County also made inadequate findings in not
8 responding to public comment about the applicability of TCLUO 4.130(1)-(3).

9 E. SECOND ASSIGNMENT OF ERROR – The findings under TCLUO
10 6.040(3) and the issue of “suitability” are inadequate because the
11 findings do not respond to the public comments related to geologic
12 hazards, topography, and wetlands, all of which should apply to a
13 decision under TCLUO 6.040(3).

14
15 1. Preservation of assignment of error

16
17 Petitioner incorporates the preservation section and references to the record
18 in the first assignment of error because the issue of geologic hazards goes directly
19 to the suitability of the subject property for the proposed use. *See* R 217, 227, 177,
20 314, 341, 344.

21 2. Standard of review

22 A local government’s findings are necessary to the degree they are essential
23 to the challenged decision. Findings must “(1) identify the relevant approval
24 standards, (2) set out the facts which are believed and relied upon, and (3) explain

1 how those facts lead to the decision on compliance with the approval standards.”
2 *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). Additionally, findings
3 must address and respond to specific issues relevant to compliance with applicable
4 approval standards that were raised in the proceedings below. *Norvell v. Portland*
5 *Metropolitan Area Local Government Boundary Com.*, 43 Or App 849, 853
6 (1979)..

7 3. Argument

8 TCLUO 6.040(3) requires that:

9 “[a]ny CONDITIONAL USE authorized according to this Article shall be
10 subject the following criteria:

11 * * *

12
13
14 (3) The parcel is suitable for the proposed use considering its size,
15 shape, location, topography, existence of improvements and
16 natural features.”

17
18 R 60 (Appx 11). The findings for this criterion are set out in a number of bullet
19 points, and the only one addressing the issue of geologic hazard is set forth above,
20 as well as here:

21 “• The subject property has highly variable slopes and terrain with it
22 generally sloping upward to the east (Exhibits A and E). Development
23 is proposed to be primarily located on the slopes, east of an existing
24 private roadway through the subject property (Exhibit A). Mapped
25 wetlands and riverine features are present on the subject property on
26 the western boundary, including Freshwater Forested/Shrub wetlands
27 (Exhibit A).
28

1 • The tract lies within an area of potential landslide susceptibility as
2 identified by DOGAMI map layers (Exhibit A). The subject property
3 is not located in a Special Flood Hazard Area (Exhibit A).”
4

5 R 61 (Appx 12). The same is true with regard to the existence of wetlands, the
6 findings simply acknowledge that DSL stated that wetlands would be impacted⁴,
7 but failed to say whether these impacts make the subject property suitable for the
8 proposed use. Not only is the issue of whether wetlands will be adversely affected
9 an issue that affects the “suitability” of the subject property but that judgment call
10 is also the essence of the County’s obligation under the land use process – whether
11 the property is suitable in light of the project’s impacts to wetlands. The County
12 here punted and made no determination. Therefore, the findings are inadequate, as
13 it relates to both the geologic hazards issue but also the wetlands issue.

14 Public comment raised the issue of TCLUO 6.040(3) and whether the
15 topography, geologic hazards, presence of wetlands made the subject property
16 suitable for the proposed use:

17 **“Conditional Use Review Criteria (3) - not met**

18 The application provided by Oregon Treehouse Partners was incomplete. In
19 critical areas, it lacked the specificity necessary for the Planning
20 Commission’s determination that the application met this conditional use

⁴ The findings state:

“The Applicants site plan and National Wetlands Inventory Map would indicate that the proposed campsites and roadway may be adjacent to mapped wetland features (Exhibit A & B). as stated above, DSL provided comment that proposed activities will impact state wetlands and require state fill/removal permits (Exhibit C).”

R 61 (Appx 12).

1 criteria factor. The Planning Commission failed to adequately consider the
2 suitability of the site given its topography and the potential impact to, among
3 other critical factors, mapped wetlands and Aquatic Resources of Special
4 Concerns, surface and groundwater systems as well as potential landslide
5 susceptibility. The Planning Commission failed to require wetland
6 delineation, despite acknowledging that the property has mapped wetlands
7 including forested shrub wetlands and riverine features. The Planning
8 Commission failed to even require that the applicant provide a detailed
9 map with the actual specific location of the proposed campground structures,
10 campsites, parking areas and amenities in relation to the multiple maps
11 provided.

12
13 The applicant has the burden of proof yet failed to provide evidence that
14 their development proposal meets the critical conditional use requirement
15 related to suitability of the parcel considering its natural features. The tract
16 lies within an area of potential landslide susceptibility as identified by
17 DOGAMI map layer yet the applicant did not provide a Geologic Hazard
18 report proving its suitability. The applicant has provided no information on
19 the surface and groundwater systems that will be needed for drinking water
20 in the campground. The applicant failed to address concerns raised by
21 Oregon Department of Fish and Wildlife staff regarding potential impacts on
22 wetlands, fish passage determination, big game movements and potential
23 conflicts with nesting birds.”

24
25 R 227-228. The above commenter also included a host of information about the
26 existence of wetlands on neighboring property and that apparently continues into
27 the subject property. *See* R 230-290 (neighboring property wetland
28 documentation); R 230-250 (DSL Joint Permit Application); R 251-278 (DSL
29 Credit Request Form); R 279-284 (Oregon Rapid Wetland Assessment Protocol
30 Report); R 285-290 (DSL letter dated July 19, 2021). Because the County did not
31 respond to these issues under TCLUO 6.040(3) (the suitability standard), the
32 County’s decision must be remanded to determine whether the topography,

1 geologic hazards, and presence of wetlands makes the subject property suitable for
2 the proposed use.

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Response Page

Department of State Lands (DSL) WN#*

WN2023-0122

Responsible Jurisdiction

Staff Contact

Lynn Tone

Jurisdiction Type

County

Municipality

Tillamook

Local case file #

851-21-000416-PLNG

County

Tillamook

Activity Location

Township

04S

Range

10W

Section

06

QQ section

Tax Lot(s)

600

Street Address

Sand Lake Rd N of Pacific City

Address Line 2

City

Pacific City

State / Province / Region

Postal / Zip Code

Country

Tillamook

Latitude

45.251151

Longitude

-123.959411

Wetland/Waterway/Other Water Features

There are/may be wetlands, waterways or other water features on the property that are subject to the State Removal-Fill Law based upon a review of wetland maps, the county soil survey and other available information.

The National Wetlands Inventory shows wetland, waterway or other water features on the property

Your Activity

It appears that the proposed project **may** impact wetlands and **may** require a State permit.

Applicable Oregon Removal-Fill Permit Requirement(s)

- A state permit is required for 50 cubic yards or more of fill removal or other ground alteration in wetlands, below ordinary high water of waterways, within other waters of the state, or below highest measured tide.

Closing Information



Additional Comments

This site has a concurred delineation (WD2022-0477). This delineation identified jurisdictional wetlands and waters onsite. The delineation also identified areas of mature Sitka spruce forest, an Aquatic Resource of Special Concern. A permit and associated mitigation will be required for removal and/or fill activities within the delineated features that are 50 cubic yards or greater. Additional protections may apply for the Sitka spruce dominated areas.

Please contact Aquatic Resource Coordinator Dan Cary for questions on permitting.

This is a preliminary jurisdictional determination and is advisory only.

This report is for the State Removal-Fill law only. City or County permits may be required for the proposed activity.

- A Federal permit may be required by The Army Corps of Engineers: (503)808-4373

Contact Information

- For information on permitting, use of a state-owned water, wetland determination or delineation report requirements please contact the respective DSL Aquatic Resource, Proprietary or Jurisdiction Coordinator for the site county. The current list is found at: <http://www.oregon.gov/dsl/ww/pages/wwstaff.aspx>
- The current Removal-Fill permit and/or Wetland Delineation report fee schedule is found at: <https://www.oregon.gov/dsl/WW/Documents/Removal-FillFees.pdf>

Response Date

3/14/2023

Response by:

Chris Stevenson

Response Phone:

503-986-5246

Melissa Jenck

From: Lynn Tone
Sent: Thursday, March 16, 2023 9:14 AM
To: Melissa Jenck
Subject: FW: EXTERNAL: Additional written testimony

-----Original Message-----

From: Lynnae Ruttledge <lynae.brown1@gmail.com>
Sent: Thursday, March 16, 2023 12:05 AM
To: Lynn Tone <ltone@co.tillamook.or.us>
Subject: EXTERNAL: Additional written testimony

[NOTICE: This message originated outside of Tillamook County -- DO NOT CLICK on links or open attachments unless you are sure the content is safe.]

Hello Lynn - I trust this email finds you doing well.

The Board packet material that has now been posted provides critical new information. I respectfully ask that my additional written testimony (below) be submitted for the Remand Hearing March 16 at 5 p.m.

With respect to Conditional Use Criteria #3, the applicant has not demonstrated that the proposed project is suitable for the proposed use considering ... (the project site's) natural features. For example, the revised site plan clearly shows a bathhouse in very close proximity to identified wetlands; it will be critical to have a determination by the Department of State Lands that this is advisable.

Earlier narrative submitted by the applicant indicated that 6 trees would be removed but there is no identification in the revised site plan to the nature or location of those specific trees. The identified trees may be within the the wetlands that are designated as Aquatic Resources of Special Concern. This may preclude development and a permit application with the Department of State Lands should be initiated without delay.

The revised site plan now includes three fire hydrants and a sprinkler system. It should be noted that this is a significant departure for Tierra Del Mar - we have NO fire hydrants. It is unclear what the water source will be for the fire hydrants but there is an acknowledgement that the fire hydrants will result in increased water consumption.

It seems clear that the Fire Chief has concerns about the real potential risk of a fire hazard, impacting not only the campground but the neighboring properties and the community at large of Tierra Del Mar. This is a significant red flag that needs to be addressed - will there be evacuation procedures in place? will there be fire extinguishers strategically placed? how will the newly identified use of propane fueled fire pits and staff-controlled wood fire pits be safely managed? what staffing levels will be maintained to address the public safety concerns raised by the community regarding campground management? will there be emergency telephone service available to staff, campers and community members?

With respect to Conditional Use Criteria #6, the applicant has not demonstrated that the proposed project is timely, considering the adequacy of public facilities and services.

1. The applicant remains silent on 24/7 staff on site. That is an unresolved issue and cause for on-going community concern.
2. It is unclear how/if camper shuttles to the beach (as proposed earlier by the applicant) will be provided.

3. It is unclear how/if delivery trucks and other vehicles will be accommodated with no designated parking at the relocated administrative/camper support facility.
4. There is no mention of how the campgrounds lighting will be modulated to be the least intrusive and least impactful to neighbors and wildlife. It's important to remember that Tierra Del Mar Community Association members voluntarily fund the lights on Sand Lake Road; that support could cease at any point.

The applicant has not responded to other issues of concern to the community.

1. Initially, the water source for the administrative/camper support facility was to be a well. The 4 RV sites were to be served by the TDM water company. Now that the location of the support facility has shifted to the cluster area with the 4 RV sites, has the TDM Water Company committed to meeting that expanded use?
2. Is the planned design of the new stand-alone viewing platform up at the top of the campground area going to be ADA accessible and child-safe?
3. Will the applicant commit in writing to a strict 'no fireworks' policy with a plan for how it will communicate and enforce the policy? This is a public safety issue as well as a community livability issue.

I look forward to hearing the discussion and deliberations by the Board of County Commissioners in this matter.

Kind regards,
Lynnae Ruttledge
5885 Austin Ave.
Tierra Del Mar
(360) 915-2008

Sent from my iPad



March 14, 2023

Tillamook County Board of Commissioners

The Tierra Del Mar Community Association appreciates the opportunity to submit comments related to LUBA Remand of Conditional Use Permit Application #851-21-000107-PLNG. Based on feedback from our community, we respectfully request the following questions and considerations be included in your deliberations at the March 16, 2023, public hearing. Submitted to you are previous inquiries and new concerns regarding the recently revised site plan changes for the campground project.

Traffic:

- Given the existing narrow and steep terrain of the gravel road on Floyd Avenue and the expected increase and frequency of vehicles entering and leaving the campground property, how will the anticipated road congestion be addressed considering the new reduced road width recommendations?

Maximum Occupancy:

- Based on proposed site square footage, what is the maximum occupancy of each site and/or overall campground for individuals, tents, and vehicles?
- Will campers be permitted to park an additional non-RV motorized vehicle at their designated camp site?
- Applicant stated previously they were not planning on accommodating personal RVs and trailers, how will this be enforced if applicant's plans change?

Fire Safety:

- Considering the current steep terrain of the access roads to the campsite, can the applicant or Fire Chief speak to the new recommended road width reductions (where possible from 26ft. to 16ft.) in terms of fire safety and emergency evacuation?
- Multiple propane-fueled fire pits and staff-controlled wood fire pits have been added to the new project plans. The addition of these fire pits is a major shift in the potential fire risk. **(Please note fire hydrant comments in the Water Supply question below).*

Emergency Preparedness and Evacuation:

- Tierra Del Mar is located in a Tsunami Hazard Overlay Zone and our community has worked diligently to secure funding for evacuation signage and emergency shelters. The applicant's remand submittal *Community Impacts Improvement* statement states that the community requested a 12'x14' emergency supply shed which is now illustrated in the revised site plans. Clarification is requested concerning how the emergency shelter supplies inventory will be purchased and managed.

Water Supply:

- Can the applicant provide an update concerning the current status of their Oregon Water Resources Department application for adequate well water supply for their project?
- Initial water source for the campground support facility was to be a well, now that the location of this structure has shifted, has any confirmation been secured from the TDM Water Company that they are in agreement with the increased need for water supply? Applicant's revised plan includes three fire hydrants and a sprinkler system both of which require additional water.
- *There are NO fire hydrants serving the entire residential Tierra Del Mar community.

Campground Security:

- What update to the proposed onsite camp host/staff 24-hours per day year-round can be provided and does the applicant plan to use the Tillamook County Sheriff's Office for assistance with any onsite conflicts and disturbances?

In conclusion, the Tierra Del Mar Community Association appreciates your consideration and requests the following conditions of approval should you approve this project.

- a. No fireworks policy: fireworks are a fire safety concern for the entire area including the Tierra Del Mar community as a whole.
- b. No recreational vehicles (RVs), personal or other be permitted.
- c. Written confirmation from applicant they will work with the property owners and residents of Floyd Ave. to resolve any campground-related traffic, parking, and safety/emergency preparedness issues.

Sincerely,

TIERRA DEL MAR COMMUNITY ASSOCIATION BOARD OF DIRECTORS

Melissa Jenck

From: Lynn Tone
Sent: Thursday, March 16, 2023 11:26 AM
To: Melissa Jenck
Subject: FW: EXTERNAL: Oregon Treehouse Partners Condition Use Permit Application

From: Richard Friz <rfriz@live.com>
Sent: Thursday, March 16, 2023 11:22 AM
To: Lynn Tone <ltone@co.tillamook.or.us>
Subject: EXTERNAL: Oregon Treehouse Partners Condition Use Permit Application

[NOTICE: This message originated outside of Tillamook County -- DO NOT CLICK on links or open attachments unless you are sure the content is safe.]

Dear Ms. Tone,

Regarding this application for a recreational campground in Tierra Del Mar, we would like to submit this comment:

We are property owners in Tierra Del Mar and have read and documents and plans for this development are in favor of it. It would bring needed revenue to the County and give visitors an opportunity to enjoy Tillamook County and the Tillamook County coastal beauty. Thank you. Rich and Carol Friz