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**Via email - Tatiana.Burgess@malheurco.org**

Malheur County Planning Commission  
c/o Tatiana Burgess, Interim Planning Director

Re: County File No. 2023-12-010 – Lee/Head Aggregate Mining Land Use Application  
Our File No.: HAS019.0001

Dear Commissioners:

Mike and Mandi Hastings, neighbors to the site of the referenced application, asked me to assist them in reviewing it. Along with other neighbors, they plan to submit evidence at your hearing this evening. As I am unable to attend that session, this letter seeks mostly to frame your evaluation of that evidence within the parameters set forth in Oregon law.

Your counsel will advise that the applicant asks you to make a “quasi-judicial decision.” As staff notes (p. 2), the applicant thus bears the burden to demonstrate that his requested use complies with all relevant State and County law. I would emphasize that the law places no burden on:

1. County staff to find evidence relating to the approval criteria; or
2. Neighbors to demonstrate that any criterion is not met.

Staff clearly put a lot of work into the written report it prepared for the Commission, which we appreciate. Our comments seek mostly to expand on that report. In short, the application warrants denial for two overarching reasons. First, even taken at face value, the evidence presented is insufficient to demonstrate that either:

1. The quality and quantity of aggregate onsite necessary to deem it significant; or
2. The applicant can mitigate the “ESEE consequences” that would result from mining on the site.

Second, even if we assume, for purposes of argument, that the applicant’s evidence sufficed on either account, the Commission will hear contrary evidence that undermines (no pun intended) any credibility or persuasiveness that the application does provide.

### **Evidence of Quality and Quantity of Aggregate Onsite**

Staff notes (p. 2) that OAR 660-023-0180(3) requires the applicant to:

- provide “adequate information regarding the quantity, quality, and location of the [aggregate] resource;” which



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- information must come from a “representative set of samples of aggregate material in the deposit on the site.”

The application simply provides none of this.

No evidence that the applicant undertook testing “throughout the subject property.” The Land Use Board of Appeals has described this evidentiary burden as follows: “To be representative, a reasonable person must conclude that the local government’s findings as to the quantity and quality of the resource throughout the subject property are supported by substantial evidence,” *Sanders v. Yamhill County*, 34 Or LUBA 69, 96-99 (1998).

LUBA has drilled down (again no pun) on the term “throughout the subject property.” The Board specifically upheld a county’s finding that “two on-site borings were not sufficient to establish that a 117-acre mining site qualifies as a significant aggregate resource site.” *Westside Rock v. Clackamas County*, 56 Or LUBA 601, 619 (2008). The Commission can similarly find that the test holes purportedly dug on the site fail to represent the quality and quantity of aggregate throughout the site.

No evidence that the applicant’s test results are credible. Evaluating whether evidence demonstrates a particular point requires the Commission to judge the credibility of the person who tenders it. See *Velasquez v. Jackson County*, 80 Or LUBA 1, 6–9 (2019). In evaluating the quality and quantity of aggregate on the applicant’s site, it is entirely reasonable, indeed likely necessary, for the Commission to depend on expertise. See *Protect Grand Island Farms v. Yamhill County*, 64 Or LUBA 179, 184-86 (2011) (finding collect “a representative set of samples,” a county does not err in accepting and relying on samples collected using methods that a reasonable professional geologist would employ to determine the quantity of aggregate present on the site).

Such expertise exists and is recognized in the field of geology. DOGAMI’s website (<https://www.oregon.gov/osbge/Resources/Pages/ConsumerGuide.aspx>, accessed Jan. 24, 2024) notes as follows:

Individuals may say they are geologists, however, persons wishing to engage in the public practice of geology in the State or Oregon must be registered (i.e. licensed) by the Oregon State Board of Geologist Examiners (OSBGE). This online resource guide explains how Oregon designates geologists who are registered to practice geology in the state.

We find nothing in the record that suggests the evidence applicant’s evidence is supported by any such expertise. Indeed, I understand that you will receive testimony to the effect that the individuals cited are not experts in the field of geology or any related science.

### **Evidence that the Applicant can Mitigate ESEE Consequences on Neighbors**

As described in the staff report, OAR 660-023-0180(7) obligates the applicant to provide evidence that he would mitigate any effects the proposed surface mining activity would pose to uses on its neighbors’ properties.



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No evidence the applicant evaluated existing uses on its neighbors' properties. The staff report does yeoman's work analyzing the ESEE consequences of the proposed mining operation. In order for the County to even undertake that analysis, however, the applicant must first:

1. identify the impact area of its proposed mining activity;
2. evaluate the nature and extent of uses taking place on properties within that area;
3. evaluate impacts that its mining activity would have on those properties; and
4. identify actions necessary to mitigate such impacts.

*Molalla River Reserve Inc. v. Clackamas County*, 42 Or LUBA 251, 254-55 (2002). Having failed to meet this *prima facie* evidentiary burden, in and of itself, warrants denial of the application.

To conclude, a quasi-judicial land use application typically requires the Commission to weigh the credibility and persuasiveness of evidence presented regarding the relevant criteria. In this case, the Commission is simply presented with no credible evidence that the application can comply with a number of those criteria. As such, the applicant presents the Commission no real choice but to deny the application.

As a practical matter, neighbors note the fact that the same application failed just two years ago and DOGAMI continues to have an open violation order on the property. As such, the applicant's current, bare-bones proposal just further wastes the County's time and money. We appreciate the opportunity to comment and would happily take your comments and/or questions.

Sincerely,

Ty K. Wyman

TKW:mcd

Cc : Stephanie Williams, County Counsel  
Brian Sheets, Applicant's Counsel  
Mike & Mandi Hastings