

February 22, 2024

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:

We continue to assist Mike and Mandi Hastings, neighbors to the site of the referenced application. County staff was nice enough to forward Mike and Mandi the Feb. 14 letter submitted by applicant's counsel to the Commission.

Arriving nearly six months after the original permit application, this 36-page submittal highlights the applicant's inability to demonstrate that aggregate in this location exists in sufficient quality and quantity.

1. The applicant fails to understand it possesses the burden to present evidence that demonstrate compliance with all applicable criteria.

Counsel asserts (p. 28) that "the critical issue is whether the findings can be rebutted with opposing information . . ." Wrong. The critical issue is whether the applicant has proven that it can meet the listed criteria. See Zoning Ord. Sec. 6-11-5, *Burden of Proof* ("The burden of proof is upon the one seeking change").

2. The applicant fails to understand the weight of that burden.

Counsel goes on to assert that "[s]ubstantial evidence is in the record to find that quantity and quality exceed the thresholds required." This misreads the relevant question. "Substantial evidence" constitutes a legal test that LUBA must deploy when it review a city or county land use decision. ORS 197.828(2)(a). To the Commission, the applicant must demonstrate by a preponderance of the evidence compliance with each criterion. See, e.g., *City of Roseburg v. Douglas County*, (LUBA No. 2023-048) (2023).

3. The applicant fails to understand that bearing such weight requires credible evidence.

As pointed out in my Jan. 25 letter:

- a. in weighing the evidence, the Commission must evaluate the credibility of each witness. See *Velasquez v. Jackson County*, 80 Or LUBA 1, 6–9 (2019); and



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- b. registration with DOGAMI constitutes the most direct evidence that a person possesses expertise in evaluating the quantity and quality of aggregate located in a prospective Goal 5 significant resource area.

Nothing in counsel's letter rebuts the fact that, in making its decision, the Commission must evaluate the credibility of each witness. Indeed, in failing to prove the expertise of the applicant's witnesses, counsel acknowledges that he relies on nothing more than lay testimony in asking this Commission to consign forever this area of the County to mining. Instead, counsel asserts that it is difficult to bring such expertise to bear. This assertion fails for two reasons:

- i. similar applications for nearby sites have been supported by such expertise; and
- ii. that the applicant has been unable to find such expertise does not absolve the applicant of its burden – indeed, it likely indicates that experts refused to support this application.

Beyond the above-described deficiencies in the evidence of quantity and quality, as noted in my Jan. 25 letter, the applicant's evidence regarding ESEE effects of the proposed aggregate designation is woefully insufficient. Please see the enclosed letter from land use planner Peter Finley Fry.

For the Commission's convenience, I attach a list of each criterion as to which the applicant must demonstrate compliance by a preponderance of the evidence. The applicant has failed to provide credible evidence demonstrating such compliance, and the Commission would be well within its authority to deny the application.

We appreciate the opportunity to comment.

Sincerely,

Ty K. Wyman

TKW:mcd

Encl

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