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Via Email to Sarah Absher: sabsher@co.tillamook.or.us

Tillamook County Planning Commission
c/o Sara Absher, Senior Planner
Tillamook County
Department of Community Development
1510 – B Third St
Tillamook, OR 97141
(503) 842-3408

Re: Oregon Coast Alliance comments on CUP application for a recreational campground, marina, cycling/equestrian staging area, gardens and research stations (aka the Bayocean Park Resort)

Dear Ms. Absher and members of the Planning Commission,

Please accept these comments on the proposed Conditional Use Permit¹ (CUP) application for the Bay Ocean Resort, which includes 25 luxury camping units suitable for a family of six², equestrian and cycling staging areas, edible and floral gardens to feed visitors, a marina, dock, floating gardens, a wildlife preserve, a research facility and area

¹ Conditional use is defined in article II as “A use of land that generally conforms to the type and nature of the uses permitted by right in a zone, but because of potential adverse off-site impacts, requires the review and discretionary approval of the Director or Commission according to the provisions of Article VI of this Ordinance.” As outlined below, a fundamental shortcoming of the proposed development is that it does not “generally conform[] to the type and nature of the uses permitted by right in [the] zone.”

² The applicant has not provided the square footage for these luxury camping units. Furthermore, from the pictures presented of the proposed “glamping” tents, it appears as though they will be situated upon pilings, but the application is not forthcoming about the actual design and structure of the luxury tents. “Glamping” entails significant amenities, and it does not appear that the application accounts for these amenities.

(including 3 additional tents or camping units,), personal watercraft (which may include motorboats and water scooters), various kiosks, a rain garden, allegedly “habitat-friendly” fencing, use of a generator, and caretaker’s residence, amongst other components. The application also proposes to hold weddings, as if the resort is also proposed as an events center, but the applicant provides no information related to weddings other than to say that they could be held at the proposed development.

The bulk of the proposal appears to be a presentation prepared by students at the University of Oregon. While the proposal aspires to achieve environmentally-friendly intentions, the proposal is not grounded in an adequate factual or legal basis, falling far short of what is required of such an ambitious resort in an environmentally-sensitive area, designated significant wildlife habitat and the presence of listed species. The subject property is within the Recreation Management (RM) (3.040), the Estuary Natural (EN) zone (3.102), the Beach and Dune Overlay (BD) zone (3.085), and the Shoreland Overlay (SH) zone (3.090). The applicant, however, apparently did not account for overlay zones, and, therefore, failed to present evidence or argument purporting to satisfy zones other than the RM zone.

I. Background

A. Historical Bayocean Resort

In the early 19th century, Bayocean Spit hosted a resort of significant size, referred to as Bayocean Park. *See* Exhibit 1. The resort, however, was consumed by the ocean as a result of erosion and flooding, and in 1952 the Spit breached, making Bayocean Spit an island. *See* Exhibit 2. Bayocean Spit was eventually repaired by the U.S. Army Corps of Engineers, who constructed a breakwater and, eventually, the South Bar Jetty, along with the so-called Dike Road that runs on top of the breakwater and is used by the Corps for breakwater and jetty maintenance. The Spit repair work was completed in 1956, though the jetty was not completed until several decades later. The Bayocean resort town became known as “the town that fell into the sea.” *Id.* Despite this history of past folly, the applicant proposes to develop a significant chunk of land on Bayocean Spit. No less suitable location is imaginable.

B. Fish and Wildlife

The subject property is designated as significant wildlife habitat in the comprehensive plan. Tillamook Bay, including the portions owned by the applicant, contains Chinook and Coho Salmon, cutthroat trout, rockfish, perch, greenling, lingcod, cabezon, sturgeon, and sole. The applicant’s upland property contains many bird species,

including the Federally-threatened snowy plovers. *See* Exhibit 3 (noting Snowy Plover sightings, 17 semipalmated plovers, 40 western sandpipers and 45 least sandpipers). Tillamook Bay supports almost 25% of the northern- and central-coast wintering waterfowl population in Oregon, with winter counts of approximately 7,500 waterfowl of 34 species. *See* Portland Audubon Society, <http://audubonportland.org/local-birding/iba/iba-map/tillamook>.

II. Failure to satisfy burden of proof

The burden of proof falls on the applicant to demonstrate that all relevant criteria are satisfied. In the absence of substantial evidence to satisfy all applicable approval criteria, the County should deny the CUP application for failure to submit sufficient evidence to demonstrate approval. *See Fasano v. Washington Co. Comm.*, 264 Or 574, 586, 507 P2d 23 (1973) (Because the action of the commission in this instance is an exercise of judicial authority, the burden of proof should be placed, as is usually in judicial proceedings, upon the one seeking change"); *Wilson v. Washington County*, 63 Or LUBA 314 (2011) (an applicant bears the burden of proof to demonstrate that an application complies with applicable approval standards, and a local government is not required to approve a noncomplying development proposal, even if the conditions of approval might be imposed that would render the proposal consistent with the applicable approval criteria).

ORCA notes that the same applicant sought in 2009 to acquire a permit for development on this same property by a different route: he built a fenced enclosure and placed several goats in it, and then considered applying to Tillamook County for a single family residence "caretaker's dwelling" as a farm structure. Tillamook County notified Mr. Bernards that, "A single family residence would not be allowed in this particular location as a conditional use, as it would not be consistent with the Comprehensive Plan goals and policies that address Bayocean Spit properties." *See* Exhibit 4. Thus, this applicant has a history of seeking to develop by any possible means the property he acquired on the Spit. However, neither that attempt nor the current one meet the requirements necessary under State law, County ordinance and perpetual easements.

Here, the applicant has failed to carry his burden on numerous fronts. The application appears to wrap itself in environmentally-friendly language while minimizing or ignoring the limitations of and impacts from the development. The proposed development raises more questions than it resolves, and, as set forth throughout these comments, the various components of the development fail to contain basic information necessary to even consider approval of the application. For example, the application fails

to provide sufficient evidence to carry the applicant's burden of proof in at least the following respects, and many others to be discussed below:

- The Spit is identified, at Comprehensive Plan Goal 17, p. 31, as significant wildlife habitat that contains listed species under the Endangered Species Act, but the application provides no information related to the effect of the proposed development on listed species or other species for that matter. *See* Portland Audubon Society, <http://audubonportland.org/local-birding/iba/iba-map/tillamook>.
- One of the most problematic proposals for the eco-resort is as a venue for weddings³, but the applicant provides no information about the numerous issues related to holding a wedding, let alone a wedding in an area designated significant wildlife habitat.
- The proposal fails to provide any information related to erosion even though erosion is the reason Bayocean Park became the “the town that fell into the sea.” Episodic erosion on the spit results in dramatic changes over a short period of time. Episodic erosion is unpredictable because of a number of variables, including wind, water temperature, weather, condition of the jetties at the mouth of Tillamook Bay, and tide.
- The applicant has not submitted any information related to whether significantly increasing traffic may result in increased bird, wildlife, and listed species' disturbance and mortality.
- The applicant failed to present any testimony related to the adverse effects from campers. Campers often bring dogs, and dogs can have adverse effects on snowy plover nests, and, therefore, leash requirements must be in place. The applicant has failed to address this issue.
- The application proposes to fence various areas, but the application fails to provide any information about the adverse effects from fencing on wildlife. ORCA is opposed to any fencing in county-designated significant wildlife habit.

³ A wedding is more consistent with an events center, which is not a permitted conditional use in the underlying or overlay zones. Weddings generally entail hundreds of people, catering, large amounts of food, amplified noise, alcohol, and so forth, all of which are inconsistent with designated significant wildlife habitat that includes listed species.

- The applicant has not submitted any information about the effects of lighting on the listed species, variety of birds, and other wildlife found within the county-designated significant wildlife habitat.
- The applicant has not submitted any information related to wildlife/equestrian conflicts, or any information about the pasturing, care of, and waste management needs of equines. Current equestrian use of the Spit is managed by Tillamook County, occurs in carefully designated areas, and is on a small scale.
- The proposed development purports to rely on wind energy, but fails to reconcile the well-known impacts to bird species from operation of windmills. *See* Exhibit 5 (“the Service estimates annual mortality at 440,000 birds” from the wind industry).
- Campsites, weddings and other such events will attract scavengers and corvids that can also predate on various birds species, including the listed snowy plover. The applicant has not even acknowledged that predators would be attracted to the Spit, and fail to provide any information related to garbage management. If cars are permitted at the campsites, then that will increase the degree to which corvids and scavengers will be present.
- The applicant has not submitted any information about transportation restrictions, which requires consideration of only road on the Spit, the Dike Road: the necessity for upgrading the road to County road standards if it is to be used by public vehicles; the fact that any proposed public use of Dike Road by the campground or by guests contravenes Tillamook County Ordinance 42 and Army Corps of Engineers perpetual easements; and the landowner’s requirements under the Corps perpetual easement that applies to his property, which may jeopardize the campground proposal substantially or entirely.
- The applicant has not submitted any substantive information at all on infrastructure: how sanitation will be provided, given that Tillamook County denied the Site Evaluation application; how water will be provided, as the nearest water provider does not include Bayocean Spit in its territory and the proposed rainwater harvesting is problematic; how graywater and other wastewater will be dealt with.
- Several aspects of the proposal are not in fact conditional uses at all under sec. 6.040, and cannot be reviewed under those criteria. The applicant has not discussed how he would permit those aspects of the application, which include but are not limited to the proposed building for a “research

facility;” one or more rainwater storage tanks; the dock/marina and walkway, which are not conditional uses in the EN zone; parking for the resort; permanent storage at the site.

III. Conditional Use Permit (CUP) Criteria

A. LUO 6.020 - The application must be referred to the Commission

LUO 6.020(2) requires “[t]he application shall be referred to the Commission if the director determines that the proposed use would have significant impacts that extend beyond the abutting properties.” As explained throughout these comments, the proposed development will have significant adverse effects beyond the abutting properties, and, therefore, the application must be referred to the Commission, as indeed it has been.

B. LUO 6.030 - The proposed development is not consistent with the standards in which it is located

Under LUO section 6.030(1), a conditional use “shall be subject to the standards of the zone in which it is located.” The subject property is within the Recreation Management (RM) (3.040), the Estuary Natural (EN) zone (3.102), the Beach and Dune Overlay (BD) zone (3.085), and the Shoreland Overlay (SH) zone (3.090). The application apparently misunderstands the applicable zoning because the application materials state that only the RM zone is applicable.

The purpose of the Estuary Natural (EN) Zone is to provide for preservation and protection of significant fish and wildlife habitats and other areas which make an essential contribution to estuarine productivity or fulfill scientific, research, or educational needs. The applicant has not demonstrated that the proposed uses are consistent with any conditional uses for the EN zone.

The purpose of the Beach and Dune Overlay Zone (BD) is to regulate development and other activities in a manner that conserves, protects and, where appropriate, restores the natural resources, benefits, and values of coastal beach and dune areas, and reduces the hazard to human life and property from natural events or human-induced actions associated with these areas. The BD zone establishes guidelines and criteria for the assessment of hazards resulting from beach and dune processes and development activities in beach and dune areas. The applicant has not demonstrated that the proposed uses are consistent with any conditional uses for the BD zone.

The purpose of the Shoreland Overlay (SH) Zone is to (a) provide for development, restoration, conservation of protection of coastal shorelands in a manner which is compatible with the resources and benefits of coastal shorelands and adjacent coastal water bodies; and (b) protect identified priority dredged material disposal and mitigation sites from uses which would prevent their ultimate use of dredged material disposal or mitigation. Bayocean Spit is classified as an area needed for water-dependent and water-related uses, exceptional aesthetic resource, and significant wildlife habitat. The applicant has not demonstrated that the proposed uses are consistent with any conditional uses for the SH zone.

The Recreation Management (RM) zone is intended to accommodate the type of recreational developments that preserve an area's natural values; it is not intended for intensive recreational developments that do not retain substantial open space on the property. The applicant has not demonstrated that the proposed uses are consistent with any conditional uses for the RM zone.

C. LUO 3.120

If the applicant is going to construct a dock for the research center⁴, then the applicant must demonstrate compliance this “regulated activity.” See LUO 3.120(2)(d) (pilings). The applicant has not demonstrated compliance with LUO 3.120(3) (procedure for reviewing regulated activities), LUO 3.120(5) (impact assessments), LUO 3.120(7) (significant degradations or reduction s of estuarine natural values). As with many other aspects of this application, the applicant has simply failed to address, let alone satisfy, all applicable approval criteria.

D. LUO 3.140

The application proposes aquaculture facilities, including water gardens, but the application fails to address the LUO's estuary development standards. See 3.140(1)(a) (“evidence shall be provided by the applicant and findings made by the county that aquaculture facilities do not prevent access to navigation channels, and that obstruction of access to publicly-owned lands and recreation use areas is minimized”); 3.140(1)(b) (aquaculture facilities should be designed to minimize their visual impact (view obstruction). Whenever feasible, submerged structures are preferred over floating structures”); 3.140(3) (standards for “siting, design, construction, maintenance or

⁴ The applicant proposes to include building a walkway out nearly 1000 ft. in order to be able to site the dock in the Estuary Conservation zone. The applicant has not provided any information about the effects of the proposed walkway on the reedy/marsh habitat.

expansion of new docks and moorages in estuary zones, water-dependent development shoreland zones or other areas within the shoreland overlay zone); 3.140(3)(b)(1) and (2) (“when new construction or expansion of docks and moorages is proposed, evidence shall be provided” that the “size of the facility is the minimum necessary to accommodate the number and size of boats using the facility” and that “alternatives such as dryland storage, launching ramps, or mooring buoys are impracticable”); 3.140(3)(d)-(1); 3.140(5) (dredging in estuarine waters, intertidal areas, and tidal wetlands); 3.140(7) (fill in estuarine waters, intertidal areas and tidal wetlands); 3.140(9) (industrial and commercial uses in estuarine waters, intertidal areas and tidal wetlands); 3.140(10) (land transportation facilities); 3.140(12) (mitigation); 3.140 (14) (piling installation); 3.140(16) (shallow draft port facilities and marinas). The applicant has simply failed to present *any* evidence to satisfy the applicable sections of LUO 3.140.

E. LUO 4.020

The limited information in the application indicates that several signs or similar kiosks are proposed, but the applicant fails to set forth any information to demonstrate that relevant standards under LUO 4.020 (signs) have been satisfied.

F. LUO 4.030

LUO 4.030 provides standards for off-street parking and off-street loading requirements. The purpose of requirements for off-street parking and loading is to relieve traffic congestion; to ensure customer convenience and safety; to provide safe access to parked vehicles; and to help ensure safe and timely response of emergency vehicles. The applicant has not demonstrated that the proposed development would be consistent with off-street parking and off-street loading requirements. This is an especially acute problem as Tillamook County Ordinance 42, which regulates the Dike Road, does not allow extensive use of vehicles, nor building of any parking or off-loading facilities.

G. LUO 4.060

The applicant has not demonstrated that the proposed development would be consistent with recreational campground standards contained at LUO 4.060. The purpose of the recreational campground standards is to insure that each new or enlarged recreational campground provides necessary facilities, adequate lot area, set-back, and other needed requirements for the public safety, health and general welfare. The applicant has not submitted preliminary plans to the Tillamook planning department meeting state requirements. Each campsite must be within 20 feet of a road, and the road must meet county standards, which the Dike Road (the only one on Bayocean Spit) does

not. Furthermore, the campground must be at least the minimum size required by the zone, which is 40 acres. Because the majority of the applicant's 53 acres is submerged⁵ or submersible, the application cannot be approved. The layout of the campsite does not appear to meet the space, layout or direct access to interior road right-of-way requirements, but without adequate detail and sufficient materials, it is impossible to determine whether the applicant is in compliance with the LUO. As noted elsewhere, the Dike Road does not meet the county's standards.

H. LUO 4.070

The applicant has not demonstrated that the proposed development would be consistent with requirements for development requirements for geologic hazard areas. The applicant submitted an alleged geologic hazard report, but the report is several years old and not related to the current proposal. Therefore, the applicant must submit a geologic hazards analysis for *this* project, and satisfy the requirements contained in LUO 4.070.

I. LUO 4.080

The applicant has not submitted any information or evidence demonstrated that the proposed development would be consistent with the requirements for protection of water quality and streambank stabilization, contained in LUO 4.080.

J. LUO 4.110

The applicant has not demonstrated that proposed development would protect archaeological sites. *See* LUO 4.110(1) ("No permit shall be issued until either the State Historic Preservation Office determines that the proposed activity will not adversely affect the archaeological site, or the State Historic Preservation Office has developed a program for the preservation or excavation of the site").

Archeological sites are protected under Oregon law by three statutes: ORS 358.905-962, which protects archeological sites and objects; ORS 390.235, which prohibits destroying, altering, disturbing, damaging or excavating an archeological site without a state-issued permit; and ORS 97.740-760, which protects Native American grave goods, sites and other protected objects.

⁵ The applicant has not even disclosed how much of his property is submerged, but aerial photos indicate that roughly 23 acres is upland.

Development of the property will likely affect archaeological sites because when Bayocean Spit was reconstructed, evidence of an Indian Village was encountered. *See* Exhibit 6. It is also documented historically in *Tillamook Indians of the Oregon Coast* by John Sauter and Bruce Johnson that at least one Native village site was located at the base of Bayocean Spit, and another over a mile north, as well as temporary encampments; and there is a known likelihood of at least four Native archeological sites in the vicinity. The Spit was also probably used as a Native burial site. *See* Exhibit 7, Exhibit 8. Given this documented history of Native use and high likelihood of Native artifacts on the property, the applicant is strongly recommended to consult with the State Historic Preservation Office (SHPO), and hire an archeologist to survey the area for Native use. To date he has done neither. In addition, it may be necessary for both the Siletz and the Grand Ronde to be brought into the process as archeological research gets underway on the applicant's property. Depending on the finds, archeological surveys may significantly curtail, or perhaps eliminate, the possibility of a recreational campground on the applicant's property. *See* Exhibit 9.

K. LUO 6.040

1. LUO 6.040(1) - The use is not listed as a conditional use in the underlying zone or in an applicable overlying zone

LUO 6.040(1) requires that a conditional use in the underlying zone, or in an applicable overlying zone meet the specific criteria applying to that zone. The primary issue for the applicant is that so many uses are proposed. For example, the application includes a luxury campground, research facility, permanent water tank/cistern, rain water collection system, parking lot, marina, renewable energy facilities. These uses are not permitted within the Estuary Natural zone, *see* LUO 3.102(3), within the Beach and Dune Overlay zone (BD), *see* 3.085(4)(B), within the Shoreland Overlay zone (SH), *see* LUO 3.090(4)(b),(c), and (5), and within the Recreation Management zone (RM), *see* 3.040.

2. LUO 6.040(2) - The use is not consistent with the applicable goals and policies of the comprehensive plan

LUO 6.040(2) requires that “[t]he use is consistent with the applicable goals and policies of the Comprehensive Plan.” As explained below, the proposed development is inconsistent with the applicable goals and policies of the comprehensive plan. *See infra*.

3. LUO 6.040(3) - The parcel is not suitable for the proposed use considering its size, shape, location, topography, existence of improvements and natural features

As noted above, a recreational campground must satisfy the underlying zone's minimum lot requirement, but that has not been satisfied here because the applicant only has approximately 23 acres of uplands. Furthermore, the proposal does not even appear to use all the upland the applicant *does* own for the campground, as he proposes clustering the tents and other necessary structures into a small area, making its lack of compliance with this requirement even greater. As noted in other sections, the parcel is not suitable for the proposed use considering its limited size, designation as significant wildlife habitat, designation as an exceptional aesthetic resource, and occurrence of listed species. The influx of people, lighting, traffic, scavengers, and other adverse impacts from the proposed development are not suitable for Bayocean Spit.

4. LUO 6.040(4) - The proposed use will alter the character of the surrounding area in a manner which substantially limits, impairs or prevents the use of surrounding properties for the permitted uses in the underlying zone

LUO 6.040(4) requires that “[t]he proposed use will not alter the character of the surrounding area in a manner which substantially limits, impairs or prevents the use of surrounding properties for the permitted uses listed in the underlying zone.” Significantly increasing traffic and parking on the Dike Road will limit existing uses of the Spit. Currently, there is not enough parking to accommodate the uses, and increasing daily trips to the subject property will substantially limit, impair, and prevent uses for the surrounding properties. The influx of guests, visitors, employees, and so forth will interfere with the enjoyment of the spit as a recreation area for bird-watching, sightseeing, horseback riding, jogging, photography and many other similar uses. Currently, the Spit is used for these kinds of passive recreation without the possibility of significant traffic, and no influx of campers and guests.

5. LUO 6.040(6) - The proposed use is timely, considering the adequacy of public facilities and services existing or planned for the area affected by the use

LUO 6.040(6) requires that “[t]he proposed use is timely, considering the adequacy of public facilities and services existing or planned for the area affected by the use.” The proposed use is not timely because there are no public facilities available on the property, yet the applicant proposes significant use of property that would significantly increase visitors to the Spit.

The applicant's alleged reliance on renewable energy fails to demonstrate that such renewable energy would be sufficient to accommodate all energy, waste management, and other needs of the resort, including its guests, employees, and visitors. Special events, such as weddings, proposed for the resort would significantly tax the proposed renewable resources. The applicant has not addressed how garbage would be handled at the resort. The applicant has not demonstrated that recycling and capturing rain water could satisfy the proposed uses and needs at the resort. Summer months (June, July, and August) are arid, averaging less than 5 inches of rain per month. Without some evidence that recycling and capturing water is sufficient to meet the needs of the resort, the application cannot be approved. Reusing and capturing rain water would require cisterns, and the application fails to acknowledge or site such cisterns, or show how they could be allowed under the current zoning and Comprehensive Plan provisions. The application fails to demonstrate how the water would be treated for consumption.

Current use of the Spit occupies the majority of the limited parking available at the single County-maintained parking lot on Dike Road. There is a lack of existing public facilities, and the applicant has simply failed to provide any substantive information to resolve the issue of parking than to suggest that visitors be bused to the spit. See discussion *infra* of Tillamook County Ordinance 42 regulating private vehicular use on Bayocean Spit. However, grasping the depth of the problem with public facilities on the Spit necessitates some background discussion.

The Dike Road is a complicated structure with a complex history whose use is highly regulated. It is not, nor has it ever been, available for unrestricted public vehicle use. The proposed use is not timely because, as noted below, Dike Road is subject to a perpetual easement for the Corps and any alterations require prior approval from the Corps. More problematic for purposes of LUO 6.040(6) is that the Corps cannot grant permanent road access to private property owners.

As appears from existing documents, the roadbed is owned largely or wholly by Tillamook County in fee, but the road was constructed by the US Army Corps of Engineers on top of the dike built by the Corps to repair the 1952 breach of the Spit. Road use was and is regulated by the perpetual easements requested by the Corps and granted by landowners in the 1950s, all of which, using similar language, grant the Corps "the perpetual right, power, privilege and easement to construct, reconstruct, maintain, repair, operate and/or patrol a breakwater, closure structure, sand dike and/or sand fill, and all appurtenances thereto in, upon, over and across the lands..." See Exhibit 10.

Furthermore, the Ports of Bay City and Tillamook Bay both signed resolutions to "a. provide without cost to the United States all lands, easements and rights-of-way necessary for the construction of the project; b. Reconstruct or make necessary changes in

roads as necessary..." as well as make a 15% cash contribution to the Bayocean Spit repair project. *See* Exhibit 11.

The Corps has consistently over the years, whenever the question arose, made it clear to Tillamook County that Corps use of the Dike Road for maintenance and repair of the Bayocean projects is primary. On March 6, 1958, in a Letter of Consent to the County, the Corps laid out the details. The County cannot grant any right or title to the roadway to another party, though they can surface and maintain it. Significantly, "the Government has unrestricted use of these roads for any purposes deemed necessary. Any alterations, changes or additions to the dike or to the sand fill should [sic] have the prior approval of this office. It may be necessary at a later date to formalize your use of the roads, and if so, this office will take the necessary action and will so advise you."

In September 2008 this question came up again, as a private landowner on the Spit requested of the County a permanent road easement over Dike Road.

The Corps replied that, "the nature of the Corps' easement ownership makes it impossible for the Corps to grant any permanent right or title to the roadway." Furthermore, the County in 1967 granted to the Corps all necessary lands, easements and rights-of-way required for the second part of the Bayocean project: South Bar Jetty project and the roadway, which provides the only access to the Jetty. *See* Exhibit 12. Thus, the Corps concluded, the County cannot grant permanent road access rights to private landowner interests in the Dike Road, but may regulate road use, as long as keeping the Corps use primary, as required by assurances of local cooperation and the easements. *See* Exhibit 13.

Last, some or all of the applicant's property, which is bisected by the Dike Road, is included in one of above-described easements to the Corps of Engineers. This was granted by the former owners, H.T. Botts and Margaret Botts, in 1956, and contains the usual language requested by the Corps for Bayocean project easements quoted above. *See* Exhibit 14. The applicant has provided no map showing how much of his property is affected by this perpetual easement, nor any discussion whatsoever of its effects on the proposed recreation campground development. The Corps of Engineers stated in a recent email that "any work done in the area covered by this easement would have to be coordinated with the Corps of Engineers and would require a Consent to Easement document from this office." *See* Exhibit 15. As such, the road, as a public facility, poses significant problems for allowing significantly increased traffic to the spit, and the road is simply not available to accommodate the needs of the proposed resort.

IV Comprehensive Plan Goals and Policies

A. Hazards – Goal 7

Goal 7 of the Statewide Planning Goals states:

To protect life and property from natural disasters and hazards, developments subject to damage or that could result in loss of life shall not be planned nor located in known areas of natural disasters and hazards without appropriate safeguards. Plans shall be based on an inventory of known areas of natural disaster and hazard.

Comprehensive Plan, 7-1. Tillamook County's acknowledged comprehensive plan implements this goal through various policies. The applicant submitted an alleged geologic report, but it does not relate to the present application. Instead, it was prepared in 2009 for the proposed goat farm, garden, and caretaker's residence. It does not account for a campground or the number of visitors contemplated by the application. The applicant has not provided *any* data on flooding, episodic erosion, historic erosion on the Spit that led to the 1952 breach *and* the current erosion since the Spit was repaired, earthquake history, sea level rise, wash-over⁶, liquefaction, or tsunamis. Tsunamis are not just a risk on the Oregon coast but an inevitability. There is clear causation between tectonic activity along the Pacific Ring of Fire's subduction zones and tsunamis, yet the applicant has not provided any information related to emergency procedures in case of such an event. In addition, the Spit sits on top of wet loamy sandy muddy lagoon silt that has migrated over the years, and it presents the very real possibility of being stuck in quicksand-like material. This presents a hazard for those using personal watercraft. Emergency services do not cover the Spit.

Erosion was and is an active and ongoing process on the Spit. *See* Exhibit 16. A number of factors coincide to accelerate erosion, including precipitation, lack of vegetation, gentle and steep slopes, and fine sediment. On Bayocean Spit the interplay of waves, currents and the two jetties at the mouth of Tillamook Bay make an even more complex situation. It was the construction of a single jetty in 1916 and its extension in 1933 which caused the erosion acceleration that culminated in the Spit's 1952 breach. But even now, with a stabilizing second jetty in place, the Spit still erodes and its longterm stability is questionable. Fundamentally, it is a fragile landform, unstable and constantly changing as a result of currents, manmade structures and tides. The comprehensive plan is particularly concerned with erosion, including, but not limited to, the undercutting of structures of all sizes, increased sediment load, degradation of water quality, and the interruption of linear developments such as highways. Comp plan 7-19. To prevent or remediate the impacts of erosion the Plan requires the inclusion of measures such as the stabilization of shorelines with vegetation and/or riprap and the maintenance of riparian buffer strips. *Id.*

⁶ Wash-overs have breached the Spit temporarily in several areas in the past.

B. Population and Economy - Goal 9

Tillamook Bay is currently supporting 50-acres of Hayes Oyster beds adjacent to tax lot 1400. Hayes Oysters owned a part of the bay that required construction for the Pitcher Point Dike Road, and granted to the Corps the right to construct the road so long as no commercial use was ever permitted. 80% of the oysters in Oregon are from Tillamook oysters, including Hayes Oysters and other commercial growers such as Pacific Seafood, and the proposed development would greatly affect the Tillamook County commercial oyster economy. Boat traffic may harm the oyster beds, and because there are no clear channels to the Spit, dredging would be required for the dock and marina. Dredging would implicate a host of other requirements under the LUO, as well as disturbing commercial oyster beds by sedimentation and water quality degradation.

C. Public Facilities – Goal 11

1. Wastewater

The Comprehensive Plan opposes the extension of sewer services outside of urban or community growth boundaries absent a significant health and/or water quality problem and rehabilitation of septic systems is infeasible or unusual circumstances exist.⁷ The County will expand or create water systems only if such systems are limited to the development needs permitted by the Comprehensive Plan (11-51). Extension of sewer service to the Recreation Management zone is, therefore, inconsistent with the Comprehensive Plan’s goals and policies. *Id.*

There is little information apart from statements that the development will utilize composting toilets, and the applicant has not demonstrated, in any discernible manner, that four composting toilets would be sufficient for the amount of people expected to use the property. Furthermore, the applicant has not demonstrated how the compost from these toilets would be used on the property. As noted above, the applicant has failed to provide sufficient information related to wastewater to satisfy applicable criteria. The applicant sought approval for a wastewater treatment system. *See* Exhibit 17. The application, however, was denied based on the criterion that the “site is not on an

⁷ The Comprehensive Plan Goal 11 acknowledges the vulnerability of dunes for septic systems:

“Dune aquifers are especially prone to pollution from septic systems. Pollution can occur even if present DEQ rules are followed since those rules do not address contamination of dune aquifers... Those areas of particular concern include all deflation plains and their fringes”

Comprehensive Plan, 11-48.

unstable landform that might adversely affect operation of the system.” *Id.* (“It is the opinion of this agent, that the Bayocean spit is an unstable landform and the areas of review for this application are not appropriate for an onsite wastewater treatment system.”); OAR, Chapter 340, Divisions 071, 073.

2. Water Supply

The county is expected to relieve pressure on water systems by not approving developments in areas where water systems cannot serve them along with existing lots. Comprehensive Plan, 11-54. The proposed resort is outside the boundary of the Oceanside Water District that serves the nearest community of Cape Meares, and there is no alternative water supplier. The Comprehensive Plan highlights the danger of approving development where there will be a difficulty in providing water service.

Here, the applicant proposes to capture rainwater, but state law places restrictions on rainwater capture. First, state law only allows roof surfaces for harvesting rainwater. *See Exhibit 18.* Determining the amount of rainwater the roof can be expected to collect depends on the roof footprint, or capture area. To supply the resort with rain water for cooking, showers, drinking, horses, and so forth, as proposed by the applicant, it is estimated that the resort will require storing about 150,000 gallons of water. Collecting adequate water will require permanent collection facilities and permanent storage tanks, none of which are permitted conditionally and none of which are accounted for by the applicant. Finally, disregarding the dry summer months, even with a high average rainfall, rainfall harvesting systems can only effectively capture about 75 percent of rainwater because of evaporation, leaks, etc. *See Exhibit 18.* Because the structures are tents, it is unclear how rain water would be captured because the applicant has not set forth any substantiating evidence with the application as it relates to rainwater capture.

3. Fire Protection and Emergency Response

Comprehensive Plan Goal 11 indicates Cape Meares has no guaranteed fire protection in Tillamook County:

Map 4 shows that almost all populated areas of the County receive some form of fire protection. The only community without any guaranteed fire protection is Cape Meares although the Tillamook Rural Fire Protection District will respond to a call *if possible*.

Comprehensive Plan, 11-24. The Spit is not included in the Tillamook Fire District. Spit Fire Protection is the jurisdiction of the Department of Forestry, whose nearest equipment

is many miles away. The likelihood of camp fires increases the risk of accidental fire in the sensitive dune area. There is limited water availability of firefighting, especially in high-risk late summer when the proposed rainwater collection tank will be nearly empty.

Though the Spit once had some utilities, those were either washed away or destroyed by ocean waves, flooding, erosion, and the 1952 breach. Currently, the property contains no infrastructure or facilities. As noted in a recent article, there are significant issues surrounding access and the lack of utilities. *See* Exhibit 19. All energy would need to be harnessed onsite, which would entail significant development of windmills, solar panels, cisterns, and so forth, none of which have been accounted for in the application.

D. Transportation – Goal 12

Bayocean Spit contains only one access road, which would require enormous upgrading to bring it into compliance with the County’s road standards. After the Spit breached in 1952 from a combination of ocean flooding and erosion, the Army Corps of Engineers (Corps) built the Dike Road on top of the breakwater which they constructed to stabilize the Spit after the 1952 breach. See historical discussion *infra* concerning the Dike Road. The road was constructed in 1956, and the lifespan was 50 years, a lifespan that has now expired. The County is responsible for road maintenance, but little maintenance has been performed. Upgrading the road to county standards would require significant investment.

The proposed development would allow cars at campsites, but doing so entails additional transportation-related impacts that have not been disclosed by the applicant. The applicant has not demonstrated how many trips per day result from the proposed development or the impact from some unknown number of trips per day. Even without this information, it is apparent that the proposed development would exceed capacity and ability to shoulder a substantial influx of visitors and guests. The applicant proposes to shuttle guests onto the Spit, and have the guests park their cars at local businesses. The applicant, however, has not provided any agreements with local businesses that would allow for such an arrangement, or any kind of plan showing how arrangements would work in practice.

In Ordinance No. 42, the Board of Commissioners found that “to the extent that the sand spit has been conditionally stabilized, but continues to be a fragile ecosystem” and “whereas the Bayocean Peninsula is now prime habitat for birds and other wildlife; and is used extensively by the public for birding, hiking and other forms of passive

recreation,” Ordinance No. 42 proposes to implement a system of permitting of property owner vehicles into the privately owned portions of Bayocean Spit. This allows “only one permit and key shall be issued for each Bayocean property regardless of the number of ownership interests in each such property”. This enables owners to access their land, but also severely limits traffic to protect wildlife and enable passive recreation. Ordinance 42 proposes to preserve wildlife habitat and enjoyment of passive recreation and allows only one vehicle permit beyond the parking lot gate per property. In addition, cars may not park for more than 72 consecutive hours at the parking lot. Parking is not permitted along Dike Road. Parking in Cape Meares is also not available. Thus, Ordinance 42 prohibits the applicant’s various transportation schemes: private vehicles may not use Dike Road beyond the very limited use granted to Spit landowners by the Ordinance; there is no extended parking at the one parking lot; and Dike Road itself is not available for public vehicular use outside these very limited exceptions.

E. Energy Conservation – Goal 13

The applicant proposes to use a variety of renewable energies, but there is no substantive evidence demonstrating that such renewable energy would be sufficient to accommodate the needs of the guests, visitors, and caretaker, which include lighting, video monitors, internet, and other amenities typically found at a “luxury” campground. Furthermore, the applicant fails to account for the harmful effects of some forms of renewable energy (e.g., wind turbines) to the wildlife. The application is also fundamentally flawed because it does not show where any renewable energies would even be sited. For example, solar energy would require platforms or other structures to hold up the panels because it is unlikely the tents could hold the panels, and the application fails to demonstrate the siting of any solar panels.

F. Estuarine Resources – Goal 16

The application proposes to ferry people to the Spit, but this would require construction of a dock and marina on the Spit, as well as dredging, as noted above. As also noted above, the applicant has not addressed any relevant criteria to construct a dock or marina. This is doubly so for the revised proposal that describes a long walkway through the EN zone in order to construct the dock in the Estuary Conservation zone. Furthermore, any such dock would require an individual permit from the Department of State Lands and a permit from the Army Corps of Engineers. The developer has not applied for either. In addition, a DSL permit would require the County be able to sign a Land Use Compatibility Statement (LUCS) certifying the proposed development is in compliance with all County Comprehensive Plan and ordinance requirements. Clearly

this development does not meet any of those County requirements, and thus other necessary permits could never be granted.

G. Coastal Shorelands – Goal 17

The Comprehensive Plan requires that significant shoreland resources be protected consistent with their designation for the protection of natural values of significant shoreland resources:

Shoreland development shall be sited and designed to be consistent with the protection for the natural values of identified major marshes, significant wildlife habitat, coastal headlands, and exceptional aesthetic resources within the shorelands planning boundary identified in the Tillamook County Comprehensive Plan.

Comprehensive Plan, Goal 17 Coastal Shorelands Complete, pg 80. Bayocean Spit is designated wildlife habitat, containing listed species and a host of wildlife, as noted above.

The applicant has failed to set forth any impacts from significantly increasing the human component on the spit, including increased traffic, increased lighting, increased likelihood of attracting scavengers and corvids. These activities all pose serious threats to the Western Snowy Plover habitat. Low nest success has been linked specifically to human disturbance and was a large factor leading to the birds' threatened status. 58 Fed. Reg. 12865 (March 5, 1993) (listing of Pacific Coast Population of the Western Snowy Plover). Nesting habitat is unstable due to natural forces such as high winds, storms, and wave actions. *Id.* Furthermore, the applicant has not accounted for impacts from wind turbines, which are well-known to adversely impact birds, and the siting of solar panels.

There is nothing to demonstrate that the siting or the design of the proposed resort has taken into account the impacts to wildlife on the Spit. The applicant failed to present any information on the impacts to listed species or other wildlife. The additional stress to the Western Snowy Plover population on Bayocean Spit that the proposed development will cause is inconsistent with the above Comprehensive Plan policy. Despite the development proposal's characterization of the resort as an "Eco-Resort," the increased human presence and activities will greatly impact the listed species, birds, and other wildlife. Approving the development would directly facilitate negative impacts to Western Snowy Plover habitat, other bird species, and wildlife in designated significant wildlife habitat.

H. Beach and Dune – Goal 18

Bayocean Spit is designated significant wildlife habitat, and the proposed development includes fencing that could inhibit wildlife movement, as well as beach access. The property owner left, until just a few weeks ago, considerable fencing on the property from a 2009 attempt to gain a permit for a caretaker's dwelling for an "agricultural" operation of pasturing goats. This fencing was only recently moved and now the applicant proposes to re-fence portions of the property. ORCA does not support fencing any portion of the Spit because of impacts to wildlife and to existing uses of the Spit for passive recreation.

V. Endangered Species Act

The applicant has entirely failed to account for impacts to listed species or demonstrate how the proposed actions would not result in take of a listed species. Compliance with the ESA is not just a matter of federal law, it is also required under the Tillamook LUO. *See* LUO, Article XI, Section 11.010 ("No application made under the provisions of this Ordinance shall be approved unless compliance can be shown with all applicable local, State and Federal laws."). Impact to species will result from fencing, noise from generators, influx of visitors and automobiles, wind turbines, attracting scavengers and corvids, and so forth, as explained throughout this documents. The applicant, however, has not acknowledged even the possibility of impacts to listed species.

A number of courts have now held that the "take" prohibition extends not only to acts of parties that directly kill or harm a listed species or its habitat, "but also bans those acts of a third party that bring about" the taking, which can include acts by a governmental party who is authorizing the conduct at issue. *See e.g., Strahan v. Cox*, 127 F.3d 155, 163 (1st Cir. 1997) *cert. den.* 525 US 830 (1998) (Mass. officials liable under ESA for licensing commercial fisherman who used methods that harmed listed whales).⁸ Even causing an "imminent threat" of harm to a listed species constitutes a

⁸ *See also Palila v. Hawaii Dept of Land & Nat. Res.*, 639 F.2d 495, 497-98 (9th Cir. 1981)(holding state's practice of allowing feral goats and sheep in palila's habitat constituted a taking); *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1301 (8th Cir. 1989)(holding EPA caused illegal take by registering certain pesticides for specific uses that would likely harm listed species); *Sierra Club v. Yeutter*, 926 F.2d 429, 438-39 (5th Cir. 1991)(holding USFS caused illegal take of listed woodpeckers by approving timber management plan that allowed timber companies to clear cut certain lands); *US v. Town of Plymouth*, 6 F.Supp 2d 81, 90-91(D.Mass 1998)(holding town liable for take of piping

“take” under the ESA.⁹ In other words, Tillamook County would very likely be liable under the ESA for approving the proposed development, given the obvious effects to snowy plovers. The applicant’s failure to demonstrate compliance with the ESA precludes issuance of any permit, and, in the event a permit was issued, the County would be subject to liability for doing so.

VI. Public Road Improvement Ordinance – Ordinance No. 55

The public road improvement ordinance requires that County roads be held to certain standards. It is not clear that the applicant’s proposal for a permeable road would satisfy these standards. *See* section III, (A) (“When Permit is Required” – road improvement permit is required for all construction in public right of ways” requires among other things a concept plan that covers utilities, drainage plans, signatures of abutting property owners and extent of disturbance to the land; a public hearing; the average daily traffic estimate; and material specifications, including aggregate base). In the absence of satisfying the County’s road standards, the application may not be approved.

VII. Conclusion

For the foregoing reasons, the application is significantly flawed, and, therefore, ORCA requests that the Planning Commission deny the application. It does not appear that the defects can be remedied, and therefore the application cannot be approved.

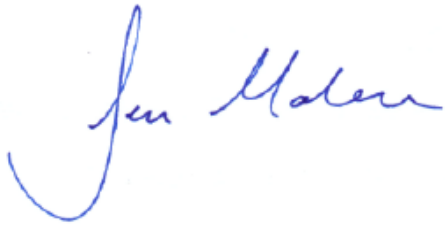
ORCA requests the Planning Commission leave the record open for two weeks after the November 13th hearing in order for ORCA to respond to the testimony the

plovers caused by off road vehicle use that town allowed on its local beach); *Loggerhead Turtle v. County Council of Volusia*, 148 F.3d 1231, 1249 (11th Cir. 1998) *cert den.* 526 US 1081 (1999)(County Council held liable for take created by inadequately protective lighting ordinances); *Pacific Rivers Council v. Oregon Forest Indus. Council*, No. 02-243-BR, 2002 U.S. Dist. LEXIS 28121, 2002 WL 32356431 at *11 (D. Or Dec. 23, 2002) (finding that state forester's authorization of logging operations that are likely to result in a take is itself a cause of a take); *Seattle Audubon Soc'y v. Sutherland*, 2007 U.S. Dist. LEXIS 39044 (W.D. Wash. May 30, 2007)(holding that WA DNR officials implementing the state Forest Practices Act could potentially be liable for take of spotted owls); and *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073, 1079 (D. Minn. 2008)(holding the Minn. DNR violated ESA take prohibition by authorizing lynx trapping).

⁹ *See, Forest Conservation Council v. Rosboro Lumber*, 50 F.3d 781, 784-85 (9th Cir. 1995).

applicant and others will be submitting to the County. As this is a complex and multi-layered application, the extra time is necessary in order for ORCA to research and present additional testimony as needed.

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 ORCA

Cc:
Client

Enclosures