



Oregon

Tina Kotek, Governor

Department of Land Conservation and Development

Oregon Coastal Management Program

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March 6, 2023

Erin Skaar, Chair
Tillamook County
Board of County Commissioners
201 Laurel Avenue
Tillamook, OR 97141



Re: Remand Hearing for LUBA Appeal
851-21-000086-PLNG-01: Goal Exception Request
851-21-000086-PLNG: Floodplain Development Permit Request

Dear Chair Skaar and Tillamook County Commissioners,

Thank you for the opportunity to provide written testimony for the remand from the State of Oregon Land Use Board of Appeals (LUBA) Nos. 2021-101 and 2021-104 regarding the goal exception request, #851-21-000086-PLNG-01, and for the floodplain development permit request, #851-21-000086-PLNG. These applications were for the approval of an exception to Goal 18, Implementation Requirement 5 to place a beachfront protective structure along the westerly lots of the Pine Beach Subdivision and the five oceanfront lots to the north located within the Barview/Twin Rocks/Watseco Unincorporated Community Boundary. Please enter this letter into the record of the hearing on the subject requests.

The Oregon Department of Land Conservation and Development (DLCD) previously submitted written comments for inclusion within the record for this matter before the Planning Commission on May 19, 2021, and June 10, 2021, and before the Board of County Commissioners on July 27, 2021, and August 6, 2021, and participated as an Intervenor-Petitioner in the appeals of the land use decision to LUBA.

This testimony will focus on the steps and issues LUBA outlined in its remand to Tillamook County.

Vacant Lots

The subject properties include 15 oceanfront lots, 11 of which are developed with houses and four of which are vacant. LUBA found that the county's evaluation was inadequate in regard to the vacant lots and why a reasons exception is appropriate to allow a beachfront protective structure (BPS) on properties that have not been developed with residential uses.

“The county failed to evaluate the relationship between the unique circumstances it identified, the vacant parcels and any related infrastructure, and the proposed BPS. The findings fail to adequately explain why the conservation goal of IR 5 cannot be met on the vacant lots and/or why the conservation goal (no BPS) should yield to development of

the BPS, as proposed, on the vacant lots.” *Oregon Coast Alliance v. Tillamook County*, ___ Or LUBA ___, slip op at 38.

Absent substantial evidence that the vacant lots were developed, additional analysis is required to support an exception for the four vacant lots.

OAR 660-004-0022 Reasons Necessary to Justify an Exception Under Goal 2, Part II(c)

Under ORS 197.732(3)(b), the Land Conservation and Development Commission (LCDC) is authorized to adopt rules establishing “[u]nder what circumstances particular reasons may or may not be used to justify an exception” under the “reasons exception” standards of Part II of Goal 2 and ORS 197.732(2). LCDC has adopted OAR 660-004-0022. As confirmed by LUBA, the provisions of OAR 660-004-0022 specify the reasons exception pathway for the applicants for the ineligible properties. Specifically, OAR 660-004-0022(1) provides:

(1) For uses not specifically provided for in this division, or in OAR 660-011-0060, 660-012-0070, 660-014-0030 or 660-014-0040, the reasons shall justify why the state policy embodied in the applicable goals should not apply. Such reasons include but are not limited to the following:

(a) There is a demonstrated need for the proposed use or activity, based on one or more of the requirements of Goals 3 to 19; and either

(A) A resource upon which the proposed use or activity is dependent can be reasonably obtained only at the proposed exception site and the use or activity requires a location near the resource. An exception based on this paragraph must include an analysis of the market area to be served by the proposed use or activity. That analysis must demonstrate that the proposed exception site is the only one within that market area at which the resource depended upon can reasonably be obtained; or

(B) The proposed use or activity has special features or qualities that necessitate its location on or near the proposed exception site. [emphasis added]

An application that does not satisfy these provisions fails and may not be approved. As provided in OAR 660-004-0022(1), reasons shall justify why the state policy embodied in Goal 18 should not apply in this case. While a county can demonstrate this need based on one or more of the requirements of Goals 3 to 19, they do not have to utilize that approach. *See DLCD v. Yamhill County*, 31 Or LUBA 488, 496-497 (1996) (holding that “include but are not limited to” means the reasons in OAR 660-004-0022(1)(a) are not exclusive, but that a local government should clearly indicate in the findings that it is not relying on subsection (1)(a)).

LUBA affirmed in this case that the statewide planning goals and comprehensive plan provisions relied upon by the county did not support a finding of “demonstrated need” for a reasons exception. *Oregon Coast Alliance v. Tillamook County*, ___ Or LUBA ___, slip op at 46.

OAR 660-004-0020 Goal 2, Part II(c), Exception Requirements

If the county finds on remand that the provisions of OAR 660-004-0022(1) are satisfied, the review may then turn to the provisions of OAR 660-004-0020. In addition to the above, there are

four tests to be addressed when taking an exception, which are set forth in Statewide Planning Goal 2, Part II and more specifically in OAR 660-004-0020(2)(a) – (d). Those criteria are:

- 1) *Reasons that justify why the state policy embodied in the applicable goal should not apply;*
- 2) *Areas which do not require a new exception cannot reasonably accommodate the use;*
- 3) *The long-term environmental, economic, social and energy consequences resulting from the use of the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and*
- 4) *The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.*

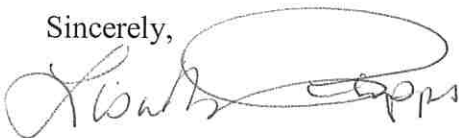
The county should focus on these standards when re-evaluating the exception application for the ineligible lots within the Barview/Twin Rocks/Watseco Unincorporated Community Boundary. The county must address the role of the vacant lots in the overall analysis of the beachfront protective structure under OAR 660-004-0020(2).

Floodplain Development Permit

While the county can evaluate a floodplain development permit with the goal exception application, it is not required. The applicants put forth a specific design for a beachfront protective structure for both developed and vacant lots. DLCD recommends that the county re-evaluate the goal exception analysis to Goal 18, Implementation Requirement 5 separately from the floodplain development permit. An approved exception is required for the floodplain development permit and the exception decision has been remanded in order to justify whether an exception should be granted for vacant properties.

Thank you for this opportunity to comment. Please enter this letter into the record of these proceedings. If you have any questions, please contact Meg Reed, Coastal Policy Specialist, at (541) 514-0091 or meg.reed@dlcd.oregon.gov.

Sincerely,



Lisa Phipps, Coastal Program Manager
Oregon Coastal Management Program
Department of Land Conservation and Development

cc: Meg Reed, Oregon Department of Land Conservation and Development
Rhiannon Bezore, Oregon Department of Land Conservation and Development
Steven Shipsey, Oregon Department of Justice
Kevin Herkamp, Oregon Parks and Recreation Department