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Via Email

Tillamook County Board of Commissioners
c/o Sarah Absher, Director
Tillamook County Department of Community Development
1510-B Third Street
Tillamook, OR 97141
sabsher@co.tillamook.or.us, ltone@co.tillamook.or.us

Re: Oregon Coast Alliance testimony for remand of #851-21-000086, a request for an exception to Goal 18 and flood development permit

Dear Chair Skaar and Members of the Board,

On behalf of Oregon Coast Alliance, please accept this testimony on remand from LUBA in LUBA No. 2021-101/104. The applicant has failed to cure the problems identified by LUBA and the County Board should deny the application.

The County is currently in violation of the Tillamook County Land Use Ordinance (TCLUO). Instead of waiting to see whether LUBA would remand the decision, the applicant moved forward with installing the revetment. Because the decision was remanded, the applicants currently stand in violation of the TCLUO, yet the County Board of Commissioners allows this illegality to continue unabated.

The issues on remand include the following:

1. LUBA agreed with opponents that the County misconstrued adopted findings unsupported by substantial evidence that the George Shand Tract properties were developed on January 1, 1977. LUBA determined that "Goal 18, IR 5, protects development 14 that existed on January 1, 1977. 9 The county misconstrued IR 5 in finding that it 15 can be met if utilities could have been accessed but had not actually been 16 provided to the lot."

2. LUBA agreed with Petitioners in several respects under the "catch-all" exception to Goal 18, IR 5 for those properties that were not developed on January 1, 1977:

- We agree with petitioners that zoning that allows the development of a residence on property and the risk of property loss are not unique circumstances sufficient to justify an exception to Goal 18, IR 5. IR 5 includes a provision such that people who acquired property that was not developed on January 1, 1977, were on notice that the goal did not allow BPS. The county found that the development on the subject properties is in a location that "Goal 18 expressly states is* * * safe and 'appropriate' for residential development." Record 35. We IO agree with petitioners that Goal 18 does not identify specific locations as safe and appropriate for development such that the use is thereafter entitled to protection. Standing alone, the risk to development in an area developed with residential uses in compliance with then-applicable law does not justify an exception and must be considered in connection with the unique erosion patterns identified by the county. First, however, we address the county's conclusions concerning the potential for future hardening and its implications for whether the IR 5 conservation goal is unachievable in this location.

- We agree with petitioners that the county erred in concluding that the impact on the coast was acceptable based on potential additional hardening. The county concluded that, although many of the properties that are eligible for BPS without an exception have not yet installed BPS, an exception is appropriate. The county relied, in part, on DLCD's position in a 2021 Goal 18, IR 5, exception case in Lincoln County, where the county concluded that the ESEE impacts of additional hardening would not be significant due to the amount of existing and potential BPS.

- We agree with petitioners that the county's conclusion that additional armoring is inevitable is speculative and not a basis for an exception. IR 5 provides that all BPS are to be reviewed to minimize visual impacts, maintain necessary access to the beach, minimize negative impacts on adjacent property, and avoid long-term or recurring costs to the public. The findings do not provide a basis to assume that, because properties may be eligible to apply for BPS, those BPS will be sought and approved.

- We do, however, agree with petitioners that the county's evaluation is inadequate with respect to the vacant lots in both areas. The county did not explain the role of the vacant lots and the relative location of any infrastructure in its analysis. Furthermore, OCA argues in its seventh

assignment of error that the county did not adopt findings relating its rationale to the four vacant lots. OCA argues:

> "The findings do not explain how 'appropriate development,' under 2 Goal 18, includes vacant lots that have not been developed. Merely because some public infrastructure is available does not mean that those vacant lots have been developed to any degree that warrants a goal exception. * * * The findings repeat that 'the proposed 6 exception is necessary for the protection of the structures and associated infrastructure,' but that analysis does not apply to the vacant lots." OCA's Petition for Review 32-33.

OCA observes that the vacant lots do not contain the people and property that the county states the exception serves to protect. We agree with OCA that the county failed to address why a reasons exception is appropriate to allow 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 18 lots.

- We agree with petitioners that Goal 7 does not require the installation of hazard mitigation measures after development has occurred. DLCD' s Petition for Review 35-36. Similarly, the comprehensive plan does not require the county to allow BPS where development has occurred. The county's interpretation of its comprehensive plan as authorizing BPS under the unique circumstances here is not a finding that a comprehensive plan provision implementing the goals requires BPS.

- The goals and comprehensive plan provisions relied upon by the county do not support a finding of "demonstrated need" for a reasons exception.

- For the vacant lots, as we explained above, the county's reasons for adopting the exception are deficient and require additional analysis and evidence. Given that additional analysis of whether reasons support the exception for the vacant lots is required, we will not address the assignments of error as they relate to the vacant lots.

- Under OAR 660-004-0020(2)(d), LUBA determined that “[w]e are unable to ascertain how much of a role the vacant lots play in the county's analysis, and, because the county will have to address the vacant lots on remand with better

findings and more evidence, it would be premature to address these assignments of error as they relate to the developed properties.

- DLCD's fifth assignment of error is that the county's findings approving the FDP are inadequate. OCA's fifth assignment of error is that the county misconstrued the law and adopted findings not supported by substantial evidence 6 when it concluded that certain flood hazard area criteria were met. OCA also restates its prior assignment of error that "the findings and ESEE analysis do not respond to the well-known and publicly-available information about the impacts of BPS o[n] shoreline structures, including passive erosion." OCA's Petition for Review 27. This element of the assignment of error is derivative of the prior assignment of error, and we do not address it again. We do not reach the assignments of error challenging the adequacy of the FDP findings and supporting evidence because they are premature. The county approved a unitary BPS design protecting both developed and vacant lots. We have concluded that the county has identified a sufficient reason for an exception for the developed lots under the catch all provision, but has not done so for the vacant lots. We have also concluded that because the vacant lots were included in the county's ESEE and alternatives analysis, it is premature for us to address 6 the assignments of error challenging the county's related findings. Similarly, it is premature for us to consider the FDP assignment of error. First, the FDP requires 8 an approved exception and we are remanding the decision approving the exception. Second, the BPS design may change as a result of the county's decision as to whether reasons justify an exception on the vacant properties and the county's ESEE and alternatives analysis.

ORCA includes and incorporates the petitions for review from all opponents because the briefing is relevant for many of the issues, including the ESEE analysis arguments and floodplain development permit.

The applicant alleges that "[t]here is simply no reason not to approve the revetment – it harms no one, helps many and meets all relevant standards." The basic problem is that what the applicant seeks is contrary to Goal 18, and that is why the applicant is seeking an exception. If everyone did as the applicants here, then Goal 18 would lose all meaning. The County should aim to retain the integrity of the statewide planning goals, not assist the applicant in poking holes in them.

The applicant alleges that a new dwelling has been constructed since the matter was last before the County Board. This is egregious, because the applicants are constructing houses almost fifty years after the cutoff date in Goal 18 for development that allows revetments or BPS. If dwellings that are built today require revetments, then there is simply no end to the cycle

of development and need for revetments. In these circumstances, Goal 18 has lost all meaning, integrity, and enforcement.

The findings for the reasons exception were found to be inadequate in several respects, as well as a complete failure to justify an exception for the vacant lots. The applicant cannot demonstrate a need for revetment to protect the vacant lots because the vacant lots are not developed, and the alleged harm to the non-vacant lots is not present on the vacant lots. In other words, there is no "appropriate development" that needs to be protected on the vacant lots[1]. Therefore, the County cannot grant an exception to the vacant lots because those lots are not subject to the harm articulated for the non-vacant lots. The applicant purports to protect the vacant lots because it is necessary to protect the other lots. The standard, however, requires an exception apply to "specific properties." OAR 660-004-0020(2)(a) ("'Reasons justify why the state policy embodied in the applicable goals should not apply.' The exception set forth the facts and assumptions used as the basis for determining that a state policy embodied in a goal should not apply to *specific* properties or situations, ….") (emphasis added). The applicant cannot use the vacant lots as a means in and of themselves to protect other properties subject to the exception, but that is exactly what the applicant purports to do.

The applicant alleges not that the revetment needs to be protecting those specific properties from the alleged harm but that the revetment on the vacant properties needs to be installed to protect other properties. That is inconsistent with the plain language, context, and purpose/policy of the administrative rule and Goal 2. The applicant has not demonstrated that it cannot utilize the "end protection measures." The applicant alleges that "there is simply not enough room on the developed properties to do so and still provide them with the protections they require."

In a report from West Consultants, the applicant alleges that there is only five feet available to place the construction, but there appears to be roughly five feet in the picture provided with end protection measures. Other than a bare allegation that there is not enough room, there is no expertise or objective information provided by West Consultants to support that conclusion. Even if there is not sufficient room for the end protection measures in the photograph provided, that does not mean that there are not alternative means or protection measures that could be used. If the applicant is alleging that it is not just a physical problem, but rather a legal problem related to setbacks, then the applicant has not demonstrated that a variance is not possible. West Consultants also allege – without any support in the record – that the vacant lot owners are unwilling to allow protection measures to be placed on the vacant lots or sell the vacant lots.

[1] Merely because some public infrastructure is available does not mean that those vacant lots have been developed to any degree that warrants a goal exception. The mere fact that public infrastructure that does not actually serve a property could be at risk is an insufficient reason for an exception.

The applicant also attempts to explain that the vacant lots protect "public infrastructure," which, again, fails to focus the inquiry on the "specific property." The standard expressly requires that "specific properties," not generalized grievances. Moreover, the applicant has not demonstrated that any impacts to this public infrastructure have occurred as a result of past flooding. The applicant is simply basing its allegations on speculation.

As noted above, the petitions for review are included in the record, and ORCA relies on the ESEE arguments therein because the applicant is "largely rely[ing] upon the findings that the Board already adopted. In addition, it is important to note that the simple fact that revetment is on the applicant's property does not mean that the revetment will not have impacts to the dry sand beach where the public recreates. In fact, that is the concern with revetment: that it will have impacts elsewhere. Indeed, the applicant's remand letter includes quotes from studies, as well as site-specific reports, that concede the potential for impacts, though the applicant attempts to cast those as positive or neutral effects.

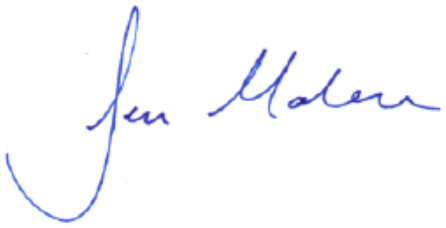
TCLUO 3.510(10)(h) "[p]rohibit man-made alteration of sand dunes, including vegetation removal, which would increase potential flood damage." The photos included at Figure 4 of the West Consultants report (Exhibit 6, Page 8 of 21) demonstrates, unequivocally that vegetation was removed during the construction process. As noted in ORCA's petition for review, there is no argument that removal of vegetation is not occurring, and the record contains numerous reports and studies about the well-known and publicly-available information about the adverse impacts from armoring the shoreline, including but not limited to passive erosion. Moreover, the findings and applicants' reports concede that impacts would occur prior to the re-establishment of the vegetation that the applicants would remove or how long it would take for vegetation to re-establish.

Finally, the plain language of the code provision requires that there be no "potential" increase in flood damage. Again, the record explains that flood damage will continue to occur, which clearly falls within the "potential" language. The applicant alleges because the applicant is currently in violation of the land use ordinance – and the County Board allows that violation to continue – that the issue is moot. Not so. As long as there is "potential" for increased flood damage, the provision will be violated because there is no disagreement about whether vegetation was removed. The applicant's letter includes reports and quotes that clearly show the "potential" contemplated is very real.

Because the applicant has submitted new evidence, ORCA respectfully requests an opportunity to respond to that new evidence – as well as other new evidence that may be submitted into the record on the day of the hearing. ORCA requests 14 days to submit responsive testimony. ORCA notes that the County has roughly two months to issue a decision.

For the above reasons, ORCA respectfully requests that the Board of Commissioners deny the application on remand because, as indicated by opponents, the applicant has not satisfied the remand instructions required by LUBA. LUBA found the findings deficient as to several statewide planning goals, but the applicant's remand letter does not address those issues *at all*. As such, based upon the applicant's remand materials, the application must be denied.

Sincerely,



Sean T. Malone
Attorney for Oregon Coast Alliance

Cc:
Client