

Tillamook County



DEPARTMENT OF COMMUNITY DEVELOPMENT
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Land of Cheese, Trees and Ocean Breeze

MEMO

Date: August 9, 2021
To: Tillamook County Board of Commissioners
From: Sarah Absher, CFM, Director
Subject: Continuation of #851-21-000086-PLNG-01 & #851-21-000086-PLNG: Goal 18 Exception Request and Development Permit Request for Construction of a Beachfront Protective Structure

Attached are comments received prior to the conclusion of the 5:00pm August 6, 2021, written comment period. The public comment period for this request has closed and the hearing will reopen with Applicants' final comments on August 16, 2021, at 2:00pm.

Please be advised that the August 16, 2021, meeting is in virtual and teleconference format only.

If you have any questions regarding the information received, please do not hesitate to contact me at 503-842-3408x3317, email: sabsher@co.tillamook.or.us or email Allison Hinderer, Office Specialist 2, at ahindere@co.tillamook.or.us.

Sincerely,
Sarah Absher, CFM, Director



Oregon

Kate Brown, Governor

Department of Land Conservation and Development

Oregon Coastal Management Program

810 SW Alder Street, Suite B

Newport, OR 97365

www.oregon.gov/LCD



August 6, 2021

Mary Faith Bell, Chair
Tillamook County
Board of County Commissioners
201 Laurel Avenue
Tillamook, OR 97141

Re: 851-21-000086-PLNG-01: Goal Exception Request
851-21-000086-PLNG: Floodplain Development Permit Request

Dear Chair Bell and Tillamook County Commissioners,

Thank you for the opportunity to provide written testimony for the goal exception request, #851-21-000086-PLNG-01, and for the floodplain development permit request, #851-21-000086-PLNG. These applicants ultimately seek to place a beachfront protective structure along the westerly lots of the Pine Beach Subdivision and 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, which we hereby incorporate.

This testimony will focus on clarifying the appropriate decision-making process the County must follow in the consideration of the goal exception request. Because state law prohibits an exception for a use allowed by a statewide planning goal, the County must first make a factual determination whether each of the properties is currently eligible for a beachfront protective structure (BPS) under Goal 18. For any properties that are ineligible under Goal 18 as a matter of fact, the County may then consider the exception request under the appropriate law.

Threshold Factual Determination – Development Status

The request of the applicants is to protect their oceanfront properties from erosion and flooding by constructing a beachfront protective structure (BPS). In deciding whether to approve this request, the County must first determine whether it considers the above referenced properties (15 tax lots) developed under the definition of “development” provided in Goal 18, Implementation Requirement (IR) 5:

Permits for beachfront protective structures shall be issued only where development existed on January 1, 1977. Local comprehensive plans shall identify areas where development existed on January 1, 1977. For the purposes of this requirement and Implementation Requirement 7 ‘development’ means houses, commercial and industrial buildings, and

vacant subdivision lots which are physically improved through construction of streets and provision of utilities to the lot and includes areas where an exception to (2) above has been approved.

Thus, if development existed on a property on January 1, 1977, IR5 authorizes the County to issue the requested Floodplain Development Permit if all the applicable criteria have been met. Tillamook County must make the threshold factual determination of eligibility for BPS very clear for each of the tax lots in this matter and develop findings supported by substantial evidence for that determination.

An “exception” is an amendment to the comprehensive plan that does “not comply with some or all goal regulations applicable to the subject property.” ORS 197.732(1)(b)(B). State law only authorizes a county to take a goal exception in two circumstances: (1) for uses not allowed by the goal, or (2) to allow a use authorized by a statewide planning goal that cannot comply with the approval standards for that type of use. Thus, for Goal 18, IR 5, if an area was developed on January 1, 1977, then a county need not, and cannot lawfully, take an exception to permit BPS. It simply isn’t necessary. Previous case law has affirmed that a goal exception cannot be taken for a use that the goal allows. *DLCD v. Yamhill County*, 183 Or App 556, 53 P3d 462 (2002).

Thus, the initial determination before the County is one of fact: whether the applications are for properties that were or were not developed on January 1, 1977.

Threshold Factual Determination – Existing Exception to Goal 18

The second determination the County must make on these requests is also a factual determination: whether the properties in question have an existing Goal 18, IR 2 exception. In addition to authorizing permits for BPS where development existed on January 1, 1977, Goal 18, IR 5 authorizes BPS in areas where a county has an exception to Goal 18, IR2. The applicants request approval of several different types of goal exceptions (discussed further below) and additionally for the County to make “alternative findings.” The County cannot make alternative findings because it would obviate the need for a Goal 18, IR5 exception. The applicants either need a goal exception or they do not. As stated above, the County cannot take an exception for a use the goal allows.

The applicants express in their July 21, 2021 application materials that “[t]he Applicants ask you to approve the proposed BPS, in the alternative only, on the basis that the Applicants already have goal exceptions that allow residential development on the dune that is now subject to wave overtopping and undercutting. As such, as a practical matter the Applicants already have an exception to Goal 18, Implementation Measure 2 that prohibits residential development on such a dune.” It does not suffice to determine that a goal exception exists here as a “practical matter.” A goal exception is an affirmative act that is incorporated into a comprehensive plan. Tillamook County has identified and adopted specific exception areas for Goal 18, IR 2 in the County’s Comprehensive Plan (Part 6 of the Beaches and Dunes Element). The lands in the application are not part of an existing goal exception under Goal 18 and are not reflected in the Tillamook County Comprehensive Plan.

If the County determines that the properties subject to these application requests were not developed as of January 1, 1977, then they need a goal exception to move forward with the construction of a BPS. An exception to Goal 18, IR 5 is the path under Oregon land use to protect otherwise ineligible properties with a BPS. If the County determines that some, or all, of the properties subject to these application requests were developed as of January 1, 1977, then those properties do not need a goal exception to move forward with a request for BPS; only a floodplain development permit would be necessary if that is determined to be the case.

Threshold Legal Determination – Applicable Exception Process

If the County finds that a goal exception is needed for these properties, then the third determination is one of law: what exception process is applicable in this case and what are the relevant criteria for making a goal exception decision. The applicants are requesting a goal exception for both Goal 18, IR 2, and IR 5. They also wish the County to approve their exception request through four different types of exceptions: a specific reasons exception, a general reasons exception, an irrevocably committed exception, and a built exception.

The request before the County is whether to allow the construction of a BPS for these 15 tax lots. Therefore, the applicants do not need an exception to Goal 18, IR 2 (which is about, among other provisions, the prohibition of houses on certain dune forms subject to ocean flooding). They only need an exception to Goal 18, IR 5, for the protection of existing property with a BPS. The only appropriate pathway for a goal exception in this case is a general reasons exception for Goal 18, IR 5.

Part II of Statewide Planning Goal 2 provides a process a local government can follow when taking an “exception” to one of the land use goals, when unique circumstances justify that the state policy should not apply. The rules governing exceptions are provided in OAR chapter 660, division 4. There are several goals and goal provisions to which a specific pathway is outlined, **but for those where no other specific pathway exists or fits, a general “reasons” exception applies.**

The department agrees with the Tillamook County Planning Commission that a general “reasons” exception to Goal 18, IR 5 is necessary for the lots that are not eligible for BPS and that the proper administrative rule provisions are those of OAR 660-004-0022(1) and OAR 660-004-0020. The applicants do not qualify for, nor need, an exception to Goal 18, IR 2, which also means they do not qualify for, nor need, a specific exception under OAR 660-004-0022(11), which is about development that is otherwise prohibited on foredunes.

The homes that exist in the application area were built in conformance with the other provisions of Goal 18, specifically Goal 18, IR 2. The houses were **not** built in an active foredune or in a dune area subject to ocean flooding at the time of development, which means they did not need an exception to Goal 18, IR2. The other goal exceptions (to Goals 3, 4, 11, and 14) that allow for the Barview/Twin Rocks/Watseco community to be residentially developed do not mean the properties have exceptions to any other goals. While the homes in this area now experience ocean flooding, they do not need a retroactive exception to continue to exist where they are located.

The question at hand is not whether these properties need an exception to exist where they are, but whether they can install a beachfront protective structure to protect the existing development. For each ineligible property, the applicants require an exception to the date-based limitation on the placement of BPS for Goal 18.

Further, the application does not warrant either a “built” exception or a “committed” exception. There is no argument that the houses in the application and the surrounding area are lawful and committed to residential development. The application is not about the existing houses, rather it is for permission to place an accessory structure, a BPS, in an area that otherwise does not allow it under Goal 18, IR5. There is no BPS at the proposed location yet, so it is not “built.” Likewise, there is only one BPS in the immediate area (the Shorewood RV Resort) which the applicants argue has not impacted the properties. Therefore, other BPS in the adjacent area have not “committed” this beach and dunes resource area to a non-resource use necessitating BPS here as well.

A specific reasons exception under OAR 660-004-0022(11), a built exception under OAR 660-004-0025, and a committed exception under OAR 660-004-0028, are not applicable in this case because the applicants do not need permission for the existing lawfully developed houses. Since there is not a specific section in OAR 660-004-0022 pertaining to reasons for an exception to allow BPS for an ineligible development, a general “reasons” exception is the appropriate pathway for the applicants. OAR 660-004-0022(1).

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 mentioned above, for this matter, the provisions of OAR 660-004-0022 specify the 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)).

Applicants argue that the County is obligated under Goal 7 to protect these properties from ocean flooding and erosion, and therefore needs to grant an approval. Goal 7 obligates jurisdictions to plan for natural hazards by adopting inventories, policies and implementing measures in their comprehensive plans to reduce risk to people and property from natural hazards. The goal does not obligate the County to protect life and property indefinitely once development has occurred, but to consider natural hazards in the course of planning. The County is not compelled by the Goal 7 requirements to grant the exception, nor would the County be out of compliance with Goal 7 in the absence of the exception.

The applicants argue that because the County has planned for urban levels of residential development to occur in the Barview/Twin Rocks/Watseco community that they are obligated to grant the exception for a BPS to protect the homes and infrastructure in this community. Under this argument, Goal 18, IR 5 would never have an application. To render Goal 18, IR 5 to have no effect at all is contrary to the general rules of construing law. ORS 174.010. The purpose of Goal 18, IR 5 is to protect beach and dune areas by only allowing pre-1977 development the option to utilize a beachfront protective structure for purposes of mitigating coastal erosion. It puts all other development ‘on notice’ that such measures are not available to them and should incorporate other non-structural options for mitigating coastal hazards.

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

If the provisions of OAR 660-004-0022(1) are found to be 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.*

It is imperative that the County focus on these standards when evaluating the exception application for the lots deemed ineligible within the Barview/Twin Rocks/Watseco Unincorporated Community

Boundary. As already stated, the other exception pathways the applicants present are not applicable in this case and those arguments cannot be the basis for an exception decision. In addition, “the exceptions process is not to be used to indicate that a jurisdiction disagrees with a goal.” OAR 660-004-0000(2). Therefore, not agreeing with the policy does not authorize the County to use that disagreement as a basis for a valid goal exception decision.

Conclusion

To summarize, DLCD recommends that the County make a clear determination on: 1) the eligibility status of each of the 15 tax lots under the application; 2) whether a new exception is needed, and 3) what exception pathway and criteria are appropriate to base a decision on. As previously stated, a goal exception cannot be taken for a use already allowed by the goal. Additionally, it is the department’s position that the pathway of review for this application is a general “reasons” exception as provided in OAR 660-004-0020 and OAR 660-004-0022(1). Only the criteria for this pathway should be evaluated for a goal exception decision.

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 Shores Specialist, at (541) 514-0091 or meg.reed@state.or.us.

Sincerely,



Patty Snow, Coastal Program Manager
Oregon Coastal Management Program
Department of Land Conservation and Development

cc: Meg Reed, Oregon Department of Land Conservation and Development
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August 6, 2021

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

RE: 851-21-000086-PLNG & 851-21-000086-PLNG-01; Applicants' First Open
Record Submittal

Dear Chair Bell and Members of the Board:

As you know, this firm represents the Applicants who are 22 owners of beachfront properties in the Pine Beach and George Shand Tracts subdivisions. Please include this letter in the record of the above matter. The Applicants are aware that their request is complex and their submittals lengthy, but such has been necessary to thoroughly address each of the numerous state and local standards at issue and to respond to claims made by opponents and questions raised by the Board. We continue to appreciate the Board's time and consideration of this matter and hope that this letter provides additional clarity and helps the Board to conclude that the Applicants' request should be approved. Should you decide that approval is warranted, the Applicants request that you direct staff to work with the Applicants to write the findings supporting approval. The Applicants are ready and willing to draft findings for staff and your review and revision or to assist in any other way you feel is appropriate.

I. Introduction

This letter responds to questions that were raised by the Board during the July 28, 2021 hearing on this matter, responds to comments submitted the morning of that hearing by DLCD, Oregon Coast Alliance (ORCA) and Oregon Shores Conservation Coalition (Oregon Shores), and adjusts and clarifies the Applicants' position in order to respond to DLCD's changed position. No new evidence is submitted, per the Board's directive.

As you know, on the morning of the July 28, 2021 hearing, the Applicants were given DLCD's letter to this Board in which the agency dramatically changed its position, determining now that the subject properties in the George Shand Tracts subdivision were "developed" on January 1, 1977 and so are eligible for a beachfront protective structure (BPS) without the need to take an exception to Goal 18.

In light of DLCD's new position, which we understand is now supported by County staff, the Applicants adjust and clarify their request in Section III of this letter. Section IV responds to questions raised by the Board at the July 28, 2021 hearing. Section V responds to specific claims raised by opponents in testimony received at the July 28, 2021 hearing. The Applicants respectfully requests that the Board follow the Planning Commission recommendation and approve the Applicants' request to protect their homes.

II. Goal 18

Goal 18 is not the rigid, cruel law that opponents claim. And it does not demand that the County ignore the plight of its urban unincorporated Twin Rocks-Barview-Watseco community, any more than it requires the City of Tillamook or other urban area to be ignored in the face of disaster. Rather, its basic requirements are:

“To conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of coastal beach and dune areas; and

“To reduce the hazard to human life and property from natural or man-induced actions associated with these areas.”

Tillamook County has taken numerous goal exceptions (Goals 3, 4 and 17 at least) and applied urban unincorporated community laws to establish the Twin Rocks-Barview-Watseco community exactly where it is, as a place where dense, urban level coastal residential development is appropriate. In turn, DLCD has acknowledged the Twin Rocks-Barview-Watseco community in which the Subject Properties exist, complies with Goal 18. That means the Subject Properties' residential development is “appropriate development” under Goal 18 and has been deemed to comply with Goal 18 under goal exceptions and other laws. No one seriously disputes any of the foregoing.¹

Goal 18 allows properties to have a “Beachfront Protective Structure” (BPS) or “rip rap” in two situations.² One situation is if the property was "developed" on January 1, 1977 (Goal 18

¹ Some more strident opponents chose to ignore Goal 18's recognition of “appropriate development” and its requirement to “reduce hazards to life and property.” Ignoring Goal 18's express terms does not erase that they exist.

² The relevant parts of Goal 18 are:

“2. Local governments and state and federal agencies shall prohibit residential developments * * * on beaches, active foredunes, on other foredunes which are conditionally stable and that are subject to ocean undercutting or wave overtopping, * * *”

“5. Permits for beachfront protective structures shall be issued only where development existed on January 1, 1977. Local comprehensive plans shall identify areas where development existed on January 1, 1977. For the purposes of this requirement and Implementation Requirement 7 ‘development’ means houses, commercial and industrial buildings, and vacant subdivision lots which are physically improved through construction of streets and provision of utilities to the lot

Implementation Measure 5). The other situation where BPS or rip rap is allowed, is if property has an existing or a new exception that allows residential development on a dune that is subject to wave overtopping or undercutting (we call this for simplicity an “eroding dune”). This second situation that allows BPS/rip rap is under Goal 18, Implementation Measures 2 and 5. The policy underpinnings of this second basis for allowing BPS/rip rap are embedded in Goal 18 itself. Places where the County has allowed intense urban residential development and the establishment of an intricate system of urban infrastructure under Goal exceptions, must be allowed to be protected. This serves the part of Goal 18 that requires that hazards to people and property be reduced. BPS/rip rap reduces a serious, significant hazard.

However, there are organized and well-funded opponents who seriously take the position that Goal 18 exists only to serve their recreational and aesthetic desires; so property and lives must be sacrificed in service of those desires and that coastal land owners essentially “have it coming”. They wish to mold Goal 18 to serve only this view. Goal 18 is vulnerable to being shaped because there are almost no cases to guide how it is to be interpreted and applied.

Accordingly, it makes sense then, that if the Applicants qualify for BPS/rip rap on both of Goal 18’s written bases, that the Applicants should rely upon both bases (as they have) to maximize the likelihood that their lives and property will be protected before it is too late.

The opponents mostly focus on the Applicants’ positions that they already have exceptions that allow residential development that is now on an eroding dune, which means that they are entitled to BPS/rip rap under Goal 18, Implementation Measures 2 and 5. Relatedly, opponents focus on the Applicants’ alternative position that if they are not entitled to BPS/rip rap under their existing exceptions, then they are entitled to **new** exceptions to allow BPS/rip rap on the dune, now that it has started to erode.

Rather, the opponents say that under Goal 18 Implementation Measure 2, that there is no way that the Applicants can get a new exception to the prohibition on residential development on the eroding dune *and* their existing exceptions are not good enough. They say that in order to have an existing exception that allows residential development on a dune that is eroding, the dune has to be eroding when the exception is taken. That is why they say that the existing exceptions are not good enough. But inconsistently they *also* say that you can’t take a new exception when the dune starts to erode either, because the residential use for which the exception is being taken is already allowed by Goal 18 (under the existing goal exceptions and the planning program that builds on them). In other words, they acknowledge that the Subject

and **includes areas where an exception to (2) above has been approved**. The criteria for review of all shore and beachfront protective structures shall provide that:

- “(a) visual impacts are minimized;
- “(b) necessary access to the beach is maintained;
- “(c) negative impacts on adjacent property are minimized; and
- “(d) long-term or recurring costs to the public are avoided.”

Properties have existing exceptions that allow them to be where they are and that the dune is now eroding. They just state what seems to be a tautology: The existing exception now allows residential development on an eroding dune, but because of that, no new exception can be taken to protect that residential development and, because the dune was not eroding when the existing exceptions were taken, they aren't good enough.

Opponents have a different position about the Applicants' requested exceptions to Goal 18, Implementation Measure 5. Until a few minutes before the Board's hearing on July 28, all opponents asserted that if the standards are met, the Applicants can only, at most, have a "catch all" "reasons exception" to Goal 18, Implementation Measure 5. They just disagreed that the standards are met. The reason that they try to pin the Applicants to that type of exception (the "catch all" reasons exception), is because it is the hardest one to get and to defend at LUBA. It is this type of exception that LUBA has said has to show unique or "exceptional" circumstances. Other types of exceptions are much more straightforward and need not show that unique circumstances drive the need for the exception.

Then, to make a complicated case more so, just before the July 28 hearing, DLCDC changed its position and said they now agree that the George Shand Tracts were "developed" on the magic date and so are eligible for BPS/rip rap. Having said that, they then say that is why the County cannot take a Goal 18 Implementation Measure 5 exception to the magic date for the George Shand Tracts: because they are already eligible.³ However, the rest of the opponents continue to say the George Shand Tracts are ineligible under any basis asserting the Subject Properties were not "developed" on the magic date and fail to meet any goal exception standard and the existing exceptions are not good enough.

None of this is fleshed out in any LUBA or appellate case, and so it is unwise for the Applicants to rely upon a single basis for approval. Hence, the critical importance of alternative bases for approval.

III. Revised Summary of the Applicants' Request

The Applicants seek approval of BPS to protect their properties (Subject Properties) from certain destruction by dangerous coastal erosion and ocean flooding. Opponents are determined to insist that more than \$10 million dollars of property value, \$75,000 a year in annual tax revenue, 22 Tillamook County families' biggest investment and potentially their lives, wash away into the ocean in the face of a serious threat. We hope you will not let that happen and will approve this request.

³ You can't take an exception to a goal for a use that is already allowed by the applicable goal. They say the use of BPS/rip rap is already allowed on the George Shand Tracts.

The Applicants' George Shand Tracts Position

Based upon DLCD (and staff's) changed positions that the George Shand Tracts were "developed" on January 1, 1977, the George Shand Tracts' owners' request for BPS should be approved as follows:

1. They are eligible for BPS under Goal 18, Implementation Measure 5, because they were "developed" on January 1, 1977 under the old (pre-1984) and current (post-1984) definitions of that term.

However, alternative findings should also be adopted approving the BPS for the George Shand Tracts because other opponents continue to claim otherwise and the Applicants do not know how an appellate authority will view "developed".

Therefore, ***IN THE ALTERNATIVE ONLY:***

2. The existing exceptions allow residential development on a dune that is eroding and so the Subject Properties are entitled to BPS/Rip Rap under Goal 18 Implementation Measure 2 through the command of Implementation Measure 5.

The Board should observe the undisputed point that Goal 18 says residential development properties are eligible for BPS if they have a goal exception that allows residential development on a dune that is eroding. The Board should further observe that the George Shand Tracts have "built and committed" goal exceptions that allow residential development where it is, which is now on a dune that is eroding. The Board should therefore conclude that the George Shand Tracts are also eligible for the BPS because their existing built and committed exception allows residential development on an eroding dune (what Goal 18, Implementation Measure 2 prohibits) This is not an "implied" exception. This is an actual exception, that actually and indisputably exists; that actually and indisputably allows what Goal 18, Implementation Measure 2 prohibits – residential development on a dune that is now eroding. Therefore, it seems evident, the existing exceptions are exceptions to the prohibition on residential development on eroding dunes, in Goal 18, Implementation Measure 2. The Board should observe the position of DLCD and other opponents (viz.) that the Subject Properties are allowed to be on the eroding dune they are on, under a County approved/DLCD acknowledged land use planning program including goal exceptions. The Board should then decide that position demonstrates that the George Shand Tracts have acknowledged exceptions allowing residential development on an eroding dune, making them eligible for BPS.

IN THE ALTERNATIVE ONLY TO THE ABOVE:

3. If the existing exceptions are not good enough to be exceptions to Goal 18, Implementation Measure 2, then the George Shand Tracts are eligible for **Goal 18, Implementation Measure 2** exceptions, of several different types:

- Built and Committed Exceptions: the lots with residences/garages are committed to residential development and built with residential development on a dune that has started to erode.
- Committed Exceptions: the vacant lots within the same subdivision, are surrounded by residential development and residential infrastructure (water, sewer, gas, electricity, telephone, roads) is stubbed to serve them, they are committed to residential development on a dune that has started to erode.
- Goal 18-specific reasons exception: Allowing residential development to exist on a dune that is eroding.

The Board should respond to opponent claims that the Board cannot protect the Subject Properties because the County has not updated its Comprehensive Plan dune maps to recognize that the dune is eroding. Thus, the Board should acknowledge that its Comprehensive Plan Goal 18 element specifically inventories its dunes with reference to adopted maps showing the location of eroding dunes. The Board should also acknowledge that its same Goal 18 element expressly states that where more detailed information is needed that “the County will consult the USDA [SCS] Survey for coastal Tillamook County and will perform field inspections using criteria described in ‘A System of Classifying and Identifying Oregon’s Beaches and Dunes’ in the ‘Beaches and Dunes Handbook for the Oregon Coast.’” Accordingly, the County should find that more specific information is needed here, and that the Applicants have provided the specific field inspection and applied the referenced classification system to establish that the dune at issue is now of a type (in Goal 18’s language) that is conditionally stable and subject to wave overtopping and undercutting. The Board should adopt that more specific information for the dune at issue here.

4. The Board should also find (again in the alternative only to the finding that the George Shand Tracts were “developed” on the magic date and so are eligible and do not need an exception to have BPS/rip rap) that if the Subject Properties were not “developed” on January 1, 1977, then they are entitled to a Goal 18, Implementation Measure 5 exception to the magic date requirement because they are eligible for a “catch all” reasons exception.

The County should find all of the following justify the “catch all” reasons exception to Goal 18, Implementation Measure 5 for the George Shand Tracts:

To meet the “catch all” requirement that “[t]here is a demonstrated need for the proposed use or activity, based on one or more of the requirements of Goals 3 to 19”, the Board should find all of the following:

- An acknowledged urban unincorporated community is in severe risk of a natural hazard that will harm persons and property. They need the proposed BPS/rip rap to reduce their risk of harm.

- Goal 7 requires the following: “Local governments shall adopt comprehensive plans (inventories, policies and implementing measures) to reduce risk to people and property from natural hazards.”
- An exception to Goal 18, Implementation Measure 5 is a plan amendment that here is for the sole purpose of protecting persons and property from a devastating hazard that threatens them.
- If the County does not approve the requested exception, the County cannot comply with its Goal 7 obligation to amend its plan to protect persons and property from natural and man-made hazards.
- Goal 18 requires the County “[t]o reduce the hazard to human life and property from natural or man-induced actions associated with these areas.”
- If the County does not approve the requested exception to Goal 18, Implementation Measure 5, then the County cannot comply with its Goal 18 obligations to protect acknowledged Goal 18 “appropriate development” from natural and man-made hazards.
- To meet the LUBA created requirement to show “unique” or “exceptional” circumstances, the Board should find that the following unique and exceptional circumstances exist:
 - Man-made changes to the Rockaway subregion of the Rockaway Littoral cell of installing two jetties in unusually close proximity to one another, have irrevocably altered ocean and beach processes in the Rockaway subregion. No other known jetties on the Oregon Coast have been constructed in such close proximity to one another, causing the unusual ocean sickness seen in this subregion. These man-made changes have resulted in an unusual ocean and beach interaction such that the ocean prograded sand for more than 70-years, and then when two El Niño events hit in 1997 and 1998, the sick ocean ecosystem reacted like a cancer and changed from metastasizing sand to pulling sand away and redistributing it elsewhere. This will happen in no other part of the Oregon Coast because no where else has the jetties too close together acting as a funnel, as here. Evidence of this unusually diseased ocean and beach process is that the extreme erosion we have seen since the El Niño events is occurring predominately in the Rockaway subregion and it is the **only** subregion where there is **no** prograding occurring any longer whatsoever.
 - Without counting the jetties or the George Shand Tracts, 90% of the properties in the Rockaway subregion are already rip rapped or eligible for rip rap according to DLCDC's own “Atlas.” Thus, when necessary, the already sick ocean/beach interface will be hardened. There is no “natural” beach/ocean process that can be saved on this beach/ocean by refusing to allow the requested BPS/rip rap requested here, in this unique Rockaway subregion. At some point in the not too distant future 90% of the properties will have rip rap, because they are eligible under Goal 18, according to DLCDC’s own “Atlas.”

- The Subject Properties were approved for residential development at a time when the ocean had been prograding for more than 70-years. None of the expert reports that evaluated the residential development proposals foretold of the change in the ocean/beach interface that happened. The Subject Properties are part of a vibrant urban unincorporated community that is acknowledged to provide the County with dense urban residential opportunities, based upon the idea that they are safe.
- The County has taken Goal 18 exceptions for all other of the County's limited urban unincorporated communities in extreme danger as here. The County has never intentionally sacrificed the coastal area of an acknowledged urban unincorporated community to natural disaster. Rather, per Goal 7 and 18, and the basic role of government in the first place, it is the established policy of the County to protect its limited designated acknowledged urban unincorporated communities. This does not open a "floodgate". The County and indeed the state has few acknowledged unincorporated communities. They are not the norm. But when extreme hazards come calling, as here, they must be protected.
- The Property owners did everything right. They bought and developed their properties in good faith on the strength of the County's urban acknowledged planning program that encourages residential development on the Subject Properties. They should not be punished because a natural disaster has befallen them, any more than Portland should be forbidden to shore up buildings to protect lives and property from the Cascadia subduction earthquake or fire fighters should refuse to respond to wildfire that threatens urban unincorporated communities or incorporated ones like Phoenix Oregon.

The Applicants' Position Regarding the Pine Beach Subject Properties

The Applicants' position regarding the Pine Beach properties is similar to the above EXCEPT, they withdraw their position that Pine Beach was "developed" on the magic date. That issue is a needless distraction and is one that your staff does not support. Having withdrawn that the Pine Beach properties were "developed" on the magic date, Pine Beach is eligible for a Goal 18, Implementation Measure 5 exception to the 1977 date requirement, without that being an alternative position.

Therefore, the Pine Beach owners' request for BPS should be approved as follows:

1. The Board should find that the Pine Beach properties were not "developed" on January 1, 1977, and so they are entitled to a Goal 18, Implementation Measure 5 exception to the date requirement, because they are eligible for a "catch all" reasons exception.

This was the decision that the Planning Commission recommended you approve. The bases for the requested catch all exception to Goal 18, Implementation Measure 5 are the same as the one discussed above for the George Shand Tracts' alternative "catch all" reasons exception to Goal 18, Implementation Measure 5. For the George Shand Tracts, the catch all reasons

exception is in the alternative because DLCD and staff believe than the George Shand Tracts are already eligible for BPS/rip rap under Goal 18, Implementation Measure 5 finding they were “developed” on the magic date.

The County should find all of the same reasons that justify the “catch all” reasons exception to Goal 18, Implementation Measure 5 for the George Shand Tracts described above, apply equally to the Pine Beach properties.

IN THE ALTERNATIVE ONLY:

2. The Board should find that the existing exceptions allow residential development on a dune that is eroding and so the Subject Pine Beach Properties are entitled to BPS/Rip Rap under Goal 18 Implementation Measures 2 and 5.

The Board should observe the undisputed point that Goal 18 says residential development properties are eligible for BPS if they have a goal exception that allows residential development on a dune that is eroding. The Board should further observe that the Pine Beach properties have a “built and committed” goal exception that allows residential development where it is, which is now on a dune that is eroding. The Board should further observe that the Pine Beach properties have “built and committed” goal exceptions that allow residential development where it is, which is now on a dune that is eroding. The Board should therefore conclude that the Pine Beach properties are also eligible for the BPS because their existing built and committed exception allows residential development on an eroding dune (what Goal 18, Implementation Measure 2 prohibits). The Board should expressly find that this is not an “implied” exception. This is an actual exception, that actually and indisputably exists, that actually and indisputably allows what Goal 18, Implementation Measure 2 prohibits. Therefore, the Board should find that it seems evident they are an exception to the prohibition in Goal 18, Implementation Measure 2. The Board should observe the position of DLCD and other opponents (viz.) that the Subject Properties are allowed to be on the eroding dune they are on, under a County approved/DLCD acknowledged land use planning program including goal exceptions. The Board should decide that position demonstrates that the Pine Beach properties have acknowledged exceptions that allow residential development on an eroding dune making them eligible for BPS.

3. If the existing exceptions are not good enough, *then in the alternative*, the Board should find that the Pine Beach properties are eligible for **Goal 18, Implementation Measure 2** exceptions, of several different types:
 - Built and Committed Exceptions: the lots *with residences/garages* are **committed** to residential development and **built** with residential development on a dune that has started to erode.
 - Committed Exceptions: the *vacant lots* within the same subdivision, are surrounded by residential development and residential infrastructure (water, sewer, gas, electricity, telephone, roads) is stubbed to serve them, they are committed to residential development on a dune that has started to erode.

- Goal 18-specific reasons exception: Allowing residential development to exist on a dune that is eroding.

Just like for the George Shand properties, the Board should respond to opponent claims that the Board cannot protect the Subject Properties because the County has not updated its Comprehensive Plan dune maps to recognize that the dune is eroding. Thus, the Board should acknowledge that its Comprehensive Plan Goal 18 element specifically inventories its dunes with reference to adopted maps showing the location of eroding dunes. The Board should also acknowledge that its same Goal 18 element expressly states that where more detailed information is needed that “the County will consult the USDA [SCS] Survey for coastal Tillamook County and will perform field inspections using criteria described in ‘A System of Classifying and Identifying Oregon’s Beaches and Dunes’ in the ‘Beaches and Dunes Handbook for the Oregon Coast.’” Accordingly, the County should find that more specific information is needed here, and that the Applicants have provided the specific field inspection and applied the referenced classification system to establish that the dune at issue is now conditionally stable and subject to wave overtopping and undercutting. The Board should adopt that more specific information for the dune at issue here.

For the Board’s convenience, the chart below summarizes the Applicants’ requests for each of the Subject Properties:

Lots	Applicants’ Position (Board Should Find)	Alternative Findings ONLY
Lots 114-116, 118 and 120-123 Pine Beach Replat Unit 1 (developed with houses)	1. Not “developed” on January 1, 1977; eligible for “catch all” reasons exception to Goal 18, IM 5	2. Existing “built and committed” exceptions allow residential development on an eroding dune notwithstanding the prohibition in Goal 18, IM 2 that residential development not be allowed on an eroding dune. 3. Eligible for new Goal 18, IM 2 ⁴ exceptions: <ul style="list-style-type: none"> • Built with residences on an eroding dune;

⁴ If the existing exceptions are not good enough to allow residential development on an eroding dune, then the County may decide exceptions to Goal 18, IM 2 are appropriate regardless of Goal 18, IM 5 eligibility or new exceptions being granted. This is because Goal 18, IM 2 exceptions are a helpful planning tool to not only ensure the Subject Properties are eligible for BPS, but also to allow residential development to continue as planned under the existing County planning program for Twin Rocks-Barview-Watseco now that it is plain that the dune is eroding. Doing so will avoid claims in the County’s next periodic review or major plan amendment that the changed dune means that residential development may not continue. Granting Goal 18, IM 2 exceptions in this proceeding for all of the Subject Properties – even the George Shand lots – if the existing exceptions are not good enough, avoids the possibility of such claims.

Lots	Applicants' Position (Board Should Find)	Alternative Findings ONLY
		<ul style="list-style-type: none"> • Committed to residential development on an eroding dune; and • Goal 18-specific reasons to include eligibility for BPS through other exceptions.
<p>Lots 117 and 119 Pine Beach Replat Unit 1 (vacant, but public infrastructure stubbed to each lot)</p>	<p>1. Not “developed” on January 1, 1977; eligible for “catch all” reasons exception to Goal 18, IM 5</p>	<p>2. Existing “built and committed” exceptions to allow residential development on an eroding dune notwithstanding the prohibition in Goal 18, IM 2 that residential development not be allowed on an eroding dune.</p> <p>3. Eligible for new Goal 18, IM 2 exceptions:</p> <ul style="list-style-type: none"> • Committed to residential development on an eroding dune; and • Goal 18-specific reasons to include eligibility for BPS through other exceptions.
<p>Tax lots 3000, 3100 and 3104 George Shand Tracts (developed with houses)</p>	<p>1. “Developed” on January 1, 1977; eligible for BPS under Goal 18, IM 5</p>	<p>2. Existing “built and committed” exceptions allow residential development on an eroding dune notwithstanding the prohibition in Goal 18, IM 2 that residential development not be allowed on an eroding dune.</p> <p>3. Eligible for new Goal 18, IM 2 exceptions:</p> <ul style="list-style-type: none"> • Built with residences on an eroding dune; • Committed to residential development on an eroding dune; and • Goal 18-specific reasons to include eligibility for BPS through other exceptions.

Lots	Applicants' Position (Board Should Find)	Alternative Findings ONLY
		4. Eligible for "catch all" reasons exception to Goal 18, IM 5
Tax lots 3203 and 3204 George Shand Tracts (vacant, but public infrastructure stubbed to each lot)	1. "Developed" on January 1, 1977; eligible for BPS under Goal 18, IM 5	2. Existing "built and committed" exceptions to allow residential development on an eroding dune notwithstanding the prohibition in Goal 18, IM 2 that residential development not be allowed on an eroding dune. 3. Eligible for new Goal 18, IM 2 exceptions: <ul style="list-style-type: none"> • Committed to residential development on an eroding dune; and • Goal 18-specific reasons to include eligibility for BPS through other exceptions. 4. Eligible for "catch all" reasons exception to Goal 18, IM 5

Also for the Board's convenience, the relevant standards for each type of exception are provided below:

- "Catch All" Reasons Exception: OAR 660-004-0022(1)
- Built Exception: OAR 660-004-0025
- Committed Exception: OAR 660-004-0028
- Goal 18-Specific (Foredune Development) Reasons Exception: OAR 660-004-0022(11)

IV. Response to Question Raised by the Board at the July 28, 2021 Hearing Regarding the Unique Effects of Combination of Usually Close Together Jetties and El Niño/La Niña Events

The Subject Property is located within the Rockaway subregion of the Rockaway littoral cell. The Rockaway subregion is uniquely defined by two engineered structures – two jetty systems on either end of the subregion in relative close proximity, which is not seen in any other littoral subregion on the Oregon Coast. As discussed in West Consultants' July 21, 2021, technical memorandum, several documents in the record clearly state that these jetty structures have had a pronounced influence on the shorelines near jetties along the Oregon coast (DOGAMI Open File Report O-08-15 (2008) (Exhibit 1 to Applicants' July 27, 2021 Submittal,

p. 19-21); DOGAMI, Special Paper 47 (2015) (Exhibit 2 to Applicants' July 27, 2021 Submittal, p. 45-50; DOGAMI Open File Report O-20-04 (2020) (Exhibit 3 to Applicants' July 27, 2021 Submittal, p. 18-20)). The undisputed evidence in the record shows that the installation of these jetties in unusually close proximity to one another have caused irreparable damage to the ocean and beach processes in the Rockaway subregional of the Rockaway littoral cell.

For the first 70+-years, that irreparable damage caused the beach in front of the Subject Properties to grow by 1,000 feet after the construction of the north Barview Jetty in 1914. See West Consultants' May 27, 2021 technical memorandum and DOGAMI reports in the record. It is well-documented that this jetty also caused pronounced erosion on the Bayocean Spit.

Two El Niño events reacted badly with the two jetty structures because of their close location to one another, causing the already malfunctioning ocean system to stop its aggressive prograding, and instead begin unprecedented erosion, focused upon the properties in the Rockaway subregion, specifically upon the Subject Properties in the south end of the subregion. (DOGAMI Open File Report O-08-15 (Exhibit 1 to Applicants' July 27, 2021 Submittal, p. 21). As explained in DOGAMI Open File Report O-08-15 (2008) in the record, "because of the proximity of the storm systems to the south, the arrival of waves on the Oregon coast tend to occur at strongly oblique angles relative to the shore, contributing to greater erosion at the south ends of the littoral cells (*i.e.*, north of the headlands and jetties)." *Id.*

There can be no dispute that the Barview Jetty interferes with sediment transport to the north which is the area in which the Subject Properties are located. There can be no dispute that because both the Barview and Nehalem jetties cabin the Rockaway subregion, they interfere with natural storm processes and contribute to the ocean's unusual behavior. There can be no dispute that the two jetties are in unusually close proximity to one another; if there are others placed similarly in Oregon there are not many; the Applicants' expert stated he was aware of no others. There can be no dispute that the combination of these two jetties irrevocably damaged the natural ocean/beach functions and replaced them with a sick dysfunctional system that, when combined with the two El Niño events of the late 1990s, caused significant and unusual erosion of the beaches in the Rockaway subregion.

In response, the County can expect that the 90% of properties in the Rockaway subregion that are eligible for BPS/rip rap according to DLCD's "Atlas" will install BPS/rip rap to protect themselves. The evidence demonstrates that the natural beach function is already lost at the location of the Subject Properties.

V. Responses to Specific Claims Raised in July 28, 2021 Testimony

This section responds to the specific claims raised in DLCD's, ORCA's and Oregon Shores' letters submitted at the July 28, 2021 hearing.

1. Were the oceanfront lots of the George Shand Tracts subdivision, including the vacant lots, "developed" on January 1, 1977, and so would be entitled to BPS without the need to take a Goal 18 exception?

In a surprising turn, DLCD now agrees with County staff that the oceanfront lots of the George Shand Tracts subdivision, including the two vacant lots, were “developed” on January 1, 1977 and so are entitled to BPS without the need to take a Goal 18, IM 5 exception:

“After much research, County planning staff have determined that the five lots that are part of the George Shand Tracts subdivision, Tax Lots 3000, 3100, 3104, 3203 and 3204 of Section 7DA in Township 1 North, Range 10 West of the Willamette Meridian, Tillamook County, Oregon, do meet the definition of development under Goal 18, IR 5, and thus do not need an exception to the goal for placement of a BPS.” DLCD Letter, dated July 27, 2021.

Conversely, ORCA and Oregon Shores maintain that the subject lots in the George Shand Tracts subdivision were not “developed” on January 1, 1977.

As County staff has correctly determined, and as DLCD has now agreed, the oceanfront lots of the George Shand Tracts subdivision, including the two vacant lots, were “developed” on January 1, 1977 under both the current definition of “development” in Goal 18 and the pre-1984 definition. The evidence in the record demonstrates that the lots were created, platted and recorded in 1950. Ocean Boulevard had been constructed to serve all of the lots by January 1, 1977. There was “provision of utilities” to each lot – water was provided via the predecessor to the Watseco-Barview Water District, and in fact, one lot just north of the Subject Properties (tax lot 2900) was connected to it, with sewer provided by individual septic systems. There is ample evidence in the record to support a finding that the subject oceanfront lots in the George Shand Tracts subdivision were “developed” on January 1, 1977, and so are entitled to BPS as of right.

2. Subject lots in the Pine Beach subdivision were not “developed” on January 1, 1977.

As explained above, the Applicants have withdrawn their request for a finding that the subject oceanfront lots in the Pine Beach subdivision were “developed” on January 1, 1977. Instead, the Applicants request that the Board adopt one or more of the exceptions described above which would make the subject oceanfront lots in the Pine Beach subdivision eligible for the requested BPS. They are eligible for exceptions, because they were not “developed” on the magic date.

3. Built and committed exceptions to allow the requested BPS are inapplicable to this application.

Some opponents claim that the only pathway to approval of this request is to grant an exception to Goal 18, Implementation Measure 5 under the “catch all” reasons exception criteria at OAR 660-004-0022(1). Those claims are mistaken. It is true that the requested Goal 18, Implementation Measure 5 “catch all” reasons exception is proper, appropriate and should be approved. But there is no reason that the County cannot also find that the Subject Properties are “committed” to residential development on an eroding dune and eligible for a Goal 18, Implementation Measure 2 exception. There is no reason that the County cannot find that at

least the Subject Properties with houses on them are “built” with houses on an eroding dune and so are eligible for a “built” exception to Goal 18, Implementation Measure 2. There is no reason that the County cannot take a Goal 18-specific reasons exception to allow houses on an eroding dune under a Goal 18, Implementation Measure 2 exception, that will then among other things, make those houses eligible for BPS/rip rap to protect them.

4. Uses allowed by the applicable goal cannot justify an exception.

Opponents assert the truism that uses allowed by the applicable goal cannot form the basis for an exception to that goal. Applicants are very aware of this truism and that is the reason why the Applicants make alternative requests. That truism does not prohibit the Applicants’ request. It goes the other way: the opponents’ point illustrates the merits of the Applicants’ position that their existing exceptions are good enough to justify the requested BPS/rip rap.

The requested exceptions to Goal 18, Implementation Measure 2 are exceptions to allow residential development on an eroding dune. Goal 18, Implementation Measure 2 prohibits residential development on an eroding dune. If Goal 18 already allows that use on the Subject Properties as opponents claim, then it does so under existing exceptions blended into an acknowledged planning program, which is the point the Applicants make above that they already have goal exceptions that allow residential development on an eroding dune. However, if the Applicants’ existing exceptions are interpreted as not allowing residential development on an eroding dune, then the Applicants are entitled to take an exception to Goal 18, IM 2 to allow residential development on an eroding dune.

The Goal 18, Implementation Measure 5 “catch all” reasons exception for the George Shand Tracts is requested in the alternative only to the position of staff and DLCDC that they are eligible for BPS/rip rap because they were developed on the magic date. The Pine Beach Goal 18, Implementation Measure 5 “catch all” reasons exception is requested because the properties are otherwise ineligible under the magic date criteria of Goal 18, Implementation Measure 5.

It is only if the Subject Properties are ineligible for BPS/rip rap under Goal 18, that they seek an exception to allow it.

5. The Applicants may not rely on existing exceptions to form the basis for an exception to Goal 18, IM 2

The statement proves too much. What OAR 660-004-0010(3) actually says, is:

“An exception to one goal or goal requirement *does not ensure compliance with any other applicable goals or goal requirements for the proposed uses at the exception site*. Therefore, an exception to exclude certain lands from the requirements of one or more statewide goals or goal requirements does not exempt a local government from the requirements of any other goal(s) for which an exception was not taken.”

This means that the existing exceptions to Goals 3, 4 and 17 are not exceptions to Goal 18. But they are exceptions that allow residential development on a dune that has started eroding. Goal 18 says no more and no less than BPS/rip rap is allowed to protect properties that have a goal exception that allows residential development on an eroding dune. That is what the existing goal exceptions covering the Subject Property do. If they do not, then a new Goal 18 exception is required and the Applicants recognize that and request new Goal 18 exceptions in the alternative to their position that their existing exceptions are good enough.

Moreover, the Applicants are not asking the County to rely on the Subject Properties' existing exceptions to form the basis for the requested exception to Goal 18, IM 2 and 5. Rather, it is the fact that Subject Properties are in an acknowledged urban unincorporated community, with an acknowledged medium density residential zone and planning program that has allowed the Subject Properties to be built/developed with uses that require BPS that is not allowed by Goal 18, IM 2 and 5. It is the existing and acknowledged urban planning program that commits the Subject Properties to urban residential development on the foredune that has become subject to ocean undercutting and wave overtopping.

6. Goal 7 does not obligate the County to protect life and property indefinitely once development has occurred, but only to consider natural hazards in the course of planning.

This is DLCD's argument and the agency knows better or should. Goal 7 requires the following:

“A. NATURAL HAZARD PLANNING

“1. Local governments shall adopt comprehensive plans (inventories, policies and implementing measures) to reduce risk to people and property from natural hazards.”

The proposal is very much taking place under the framework of the County's planning program and is for the County to amend its Comprehensive Plan to protect people and property from risks presented by natural hazards. In this regard, Goal 7 defines “natural hazards” to include coastal flooding and erosion. Nothing in Goal 7 remotely says that the County is excused from the obligation to protect people or property from natural hazards once it adopts its plan for the first time. It is questionable whether DLCD's position in this regard, is made in good faith.⁵

The Board should understand what DLCD is doing here. The agency is saying (1) the only kind of goal exception the Applicants can even apply for is a “catch all” reasons exception to Goal 18, Implementation Measure 5's magic date, and (2) then they are saying that the Applicants cannot satisfy the “catch all” reasons exception standard that requires a

⁵ This is not the first time DLCD has advanced a frivolous position to oppose the Applicants' effort to protect their lives and property. Until the final moments before the July 28, 2021 hearing, DLCD claimed that the George Shand Tracts subdivision was not a subdivision because it was named a “tract”. DLCD has of course now abandoned that silly position.

“demonstrated need” for the proposed use based upon requirements of Goal 7 (and any other goals with “requirements” in them), (3) because they want to make new law to say that Goal 7 applies only when the County first adopts its plan. Goal 7 says no such thing.

LUBA interpreted the “catch all” exception’s “demonstrated need” standard to require that the County (1) identify one or more obligations under Goals 3 to 19 [or under its comprehensive plan implementing Goals 3-19], (2) explain why the county is at risk of failing to meet those obligations if it does not approve the requested exception, and (3) explain why the proposed exception to the requirements of one goal will help the county maintain compliance with its other goal obligations. *Oregon Shores Conservation Coalition v. Coos County*, __ Or LUBA __, *31 (LUBA No. 2020-002, May 4, 2021); *Confederated Tribes of Coos v. City of Coos Bay*, __ Or LUBA __, *25 (LUBA No. 2020-012, May 4, 2021).

If the County approves the requested “catch all” reasons exception, it will achieve all three of LUBA’s requirements. (1) Goal 7 requires the County to adopt comprehensive plan provisions, to include policies and implementing measures for beach and dune areas to reduce the hazard to human life and property; (2) denying the requested exception, is refusing to adopt a comprehensive plan amendment necessary to protect people and property from a natural hazard; and (3) refusing to approve the proposal will put the County at risk of failing to meet its planning obligations under Goal 7. The requested exception will help the County maintain compliance with its obligation under Goals 7 and 18 to adopt comprehensive plan provisions to reduce the risk of danger to human life and property from coastal hazards.

What is plain in fact, is that the proposal meets the “demonstrated need” standard under a proper reading of Goal 7.

7. The BPS may fail over time.

This speculative claim is not a basis upon which to deny the proposal. The only evidence in the record is that the proposed BPS will significantly reduce the risk of ocean flooding and erosion to human lives and property. The Applicants understand that nothing is perfect and if an extraordinary storm occurs or a tsunami hits, the proposed BPS will not fully protect them. But there can be no dispute on the record that the proposed BPS/rip rap will quite definitely be effective to reduce the risk to human life and property. Nothing more can be asked of a BPS or is being asked of the proposed BPS.

8. By approving additional BPS, the County is committing to a preference for private development protection over protection of the beach and dune resource.

There is no “preference” of anything here. There is applying the law as it is written, nothing more and nothing less. By approving the proposed BPS, the County is doing its job to protect all people, under law including Goal 18 which exists per its express terms to protect coastal lives and property. Opponents’ preference that lives and property be lost so they might have a bit more beach to play on, finds no support in any law and is so extreme a position that it should be strongly rebuked. The County is applying the law as it is written to allow private

property to be protected with a BPS that is not on the public beach (like all other proposals), and that cannot even be seen, to protect their lives and property just like 90% of the other properties are entitled to in the Rockaway littoral cell.

9. The Applicants' expert's calculations of impacts to north-south access along the beach do not take into account sea level rise.

West Consultants in its Third Supplemental Technical Memorandum, dated July 21, 2021, provides a thoughtful and thorough response to the concern over north-south beach access. That memo provides detailed calculations showing how the BPS will have no meaningful impact on persons walking along the beach or any other existing access. In this regard it is important to understand that all applicable standards concerning beach access impose an obligation to protect *existing* public access; they do not require evaluating and protecting public access that does not now exist or that may or may not exist in the future. If sea level rise overwhelms the Subject Properties, there will be no public access or anything else at the Subject Properties. The Applicants' expert reports establish that existing beach accesses are protected under the proposal.

10. Oregon Shores claims that the proposal does not meet various criteria under the County's land use ordinance (TCLUO) and comprehensive plan (TCCP). Each claim requiring a response is addressed below.

- a. TCLUO Section 3.510: Flood Hazard Overlay (FH) Zone:
 - i. Purpose

Oregon Shores erroneously claims that the purpose of the FH zone is not met because the proposal overlooks the negative impacts that BPS will have on the shoreline, adjacent properties and on the public's safety and access. These claims are so off base, that the only explanation is that the commenters have not read the application materials and expert reports and analyses, which thoroughly explain how this proposed BPS in this specific location will not cause the negative impacts that some commenters speculate would happen. Oregon Shores relies upon generalized statements of how BPS can cause erosion on adjacent properties or narrowing of the beach, which ignores that the specific proposal at this specific location is designed to have minimal impacts on coastal processes under the well-established scientific "Weggel" model of BPS types. They ignore the Applicants' expert engineer's site-specific reports and analyses which demonstrate that the proposed BPS will not increase wave runup, cause flanking or otherwise accelerate erosion on or otherwise impact, neighboring properties. They ignore the expert's reports and analyses which demonstrate that the BPS will not have an effect on the shoreline or on the public's safety and access.

The proposal is entirely consistent with the stated purpose of the FH zone. (a) The proposed beachfront protective structure will help protect human life and health by mitigating the effects of flooding that may threaten existing residential structures and their occupants. (b) The costs of construction and maintenance of the revetment and environmental restoration will be borne by the property owners, (c) thus minimizing the expenditure of public money for the cost of the structure or potential rescue efforts. Also, consistent with the stated purposes, (e) the

BPS will protect and certainly minimize damage to the existing public facilities and utilities – sewer, water, gas, electricity, telephone and roads – that serve the subject properties. (f) Protection of the subject properties will help to retain their value and thus maintain a stable tax base. (h) As discussed throughout these proceedings, at the time the subdivisions were proposed and houses approved, there was no reason to believe that the pattern of shoreline change would reverse or that erosion would threaten these properties. The property owners (Applicants) are assuming responsibility by requesting an exception to build a BPS in their own backyards, under procedures authorized by state law and the County’s code.

ii. Specific standards for Coastal High Hazard Areas

The first thing to keep in mind is that the places where the houses are approved to be, is not in a high hazard area. The BPS will be in the “Coastal High Hazard” area, but the houses are not. Oregon Shores claims that because the proposal to install a BPS involves disturbance of the dune and removal of vegetation in order to install the BPS, it is inconsistent with TCLUO 3.510(10)(h). Oregon Shores’ reading of TCLUO 3.510(10)(h) is mistaken. The standard prohibits “man-made alteration of sand dunes, including vegetation removal, which would increase potential flood damage.” This standard does not categorically prohibit the alteration of dunes or vegetation removal that does not increase flood potential, as here. The County standard by its express terms, only prohibits activities that increase potential flood damage. The proposed BPS will decrease potential flood damage – that is its sole purpose. Moreover, the disturbance of the dune, including vegetation removal, will be temporary. The BPS will be recovered in excavated sand and replanted with native vegetation, restoring the dune to its natural state. The BPS will be monitored annually and recovered with sand and replanted when necessary.

iii. Development permit review criteria

Oregon Shores’ claim that TCLUO 3.510(14)(b)(5) that “no feasible alternative upland locations exist on the property” has not been adequately analyzed, is another demonstration that they have failed to read the Applicants’ materials. The BPS is proposed to be placed at the most landward point possible on the Subject Properties given the location of the existing residential structures that the BPS is intended to protect. The construction drawings in the record show that there are mere feet between the proposed BPS and several of the residences. Moreover, DLCDD’s determination in the Lincoln County matter, included with Applicants’ June 10, 2021 Second Open Record Submittal, properly recognized and accepted the argument of the Applicants’ there that beachfront protective structures must be located to prevent the hazard, and that on the ocean shore, this means between the structure and the shoreline to be protected. Oregon Shores’ suggestion that this criterion requires non-structural alternatives to be considered is not supported by the plain text of the standard, which requires only feasible alternative upland *locations* to be considered. Regardless, the Applicants have provided an analysis of alternative methods and their expert has concluded that none of those alternative methods are feasible or adequate to achieve the necessary protection from risk.

- b. TCLUO Section 3.530: Beach and Dune Overlay (BD) Zone:
 - i. Non-structural solutions

Oregon Shores claims that the Applicants have not meaningfully addressed TCLUO 3.530(4)(A)(2) requiring a showing that “non-structural alternatives cannot provide adequate protection”. Again, it appears that they did not read the Applicants’ materials. The Applicants have provided an analysis of alternative methods (West Consultants Supplemental Memorandum, dated May 27, 2021 in the record) and their expert has concluded that none of those alternative methods can provide adequate protection from the looming risk for the Subject Properties.

- ii. Public access

Oregon Shores claims that the application does not meet TCLUO 3.530(4)(A)(6)’s requirement that existing public access is preserved. The evidence in the record shows that there are two private beach accesses in the exception area. The proposed structure will improve the northern beach access with a gravel path and ramp that goes over the rock revetment and allows improved access to the beach and the proposal does not do anything with let alone interfere with the southern beach access.

The proposal also does not interfere with access along the beach either. The proposal has been carefully designed to be only on private property that no member of the public has access to now. Further, as explained above, West Consultants in its Third Supplemental Technical Memorandum, dated July 21, 2021, provides a thoughtful and thorough response to the concern over north-south beach access. That memo provides detailed calculations demonstrating that the proposed BPS will have no meaningful impact on persons walking along the beach. The proposed BPS has no impact on access along or to the beach.

- c. TCLUO Article 10 – Administrative Provisions

Oregon Shores claims that the application is not in compliance with TCLUO Article 10 asserting that it fails to show compliance with a reasons exception under ORS 197.732. The application is being processed in compliance with the exceptions process outlined in ORS 197.732 and has addressed every applicable standard under ORS 197.732 and OAR 660-004 implementing the statute. The proposal is compliant with TCLUO Article 10.

- d. TCLUO 9.030(3) Text Amendment Criteria:
 - i. Consistency with Statewide Planning Goals and Comprehensive Plan
 - 1. State Goal 5 and TCCP Goal 5

Oregon Shores claims that the application fails to consider potential impacts to nearby inventoried Goal 5 resources Hidden Lake, Smith Lake and Camp Magruder. First, it bears repeating that there are no inventoried Goal 5 resources on the Subject Properties as explained in the Applicants’ June 10, 2021 submittal. Second, Camp Magruder is not an inventoried Goal 5 resource. Although Camp Magruder is mentioned in the County’s description of Smith Lake, a

Goal 5 resource, it is not inventoried as a Goal 5 resource. Regardless, there will be no discernable impact to Camp Magruder from the proposed BPS. The evidence in the record is also that the proposed BPS will not harm adjacent properties – it will not increase wave runup, cause flanking or otherwise accelerate erosion on neighboring properties. As for Hidden Lake and Smith Lake, those resources are hundreds of feet east and south of the Subject Properties and will not be impacted whatsoever by the proposed BPS. If the evidence in the record is that the proposed BPS will not harm adjacent properties, it will certainly do no harm to resources that are hundreds of feet away and separated from the Subject Properties by an entire subdivision and a road. The proposal is consistent with Goal 5.

2. TCCP Goal 7 Section 1.1(b)(4)

Oregon Shores claims the proposed BPS will create natural hazards. Here again, they are mistaken. The application materials and expert reports address the possible creation of new natural hazards by the proposed BPS, such as the potential impacts to surrounding properties, and conclude that the proposal will not create any new hazards. The Applicants' expert engineer's site-specific reports and analyses conclude that the proposed BPS will not increase wave runup, cause flanking or otherwise accelerate erosion on neighboring properties, and will not cause any hazards that might interfere with access along the beach. The proposal is consistent with this implementation guideline.

ii. Consistency w/Comprehensive Plan Policies

1. TCCP Goal 7, Policy 2.4(a)

Oregon Shores claims the proposed BPS fails to meet this policy, without much embellishment to understand their objection. This policy provides a list of prevention or remedial actions that shall be taken to address the hazard of erosion. That list includes the stabilization of eroding shorelines with riprap. This policy contains no requirement to analyze how proposed riprap will impact the stability of the surrounding area over time, the implications that riprap will have on public safety or how a proposal may result in the proliferation of even more riprap as Oregon Shores claims. Rather, this policy supports the Applicants' proposal in that it provides for the stabilization of eroding shorelines with riprap as a prevention or remedial measure that *shall* be taken to prevent eroding shorelines. The proposal is consistent with this policy.

2. TCCP Goal 7, Policy 2.5(d)

Oregon Shores suggests that this policy which concerns permanent structures in stream channels subject to flash flooding, and not ocean flooding, applies to this proposal. This application does not propose a structure in a stream channel. This policy is inapplicable to the proposal.

3. TCCP Goal 16, Policy 7.5(2)

Oregon Shores erroneously asserts that the Applicant failed to address alternative methods of shoreline stabilization listed in this policy. Again, Oregon Shores apparently did not read the Applicants' submittals. The Applicants have provided an analysis of alternative methods to structural shoreline stabilization (West Consultants Supplemental Memorandum, dated May 27, 2021) and their expert has concluded that none of those alternative methods can provide the necessary protection for the Subject Properties. The proposal is consistent with this policy.

4. TCCP Goal 16, Policy 7.5(5)-(6)

As Oregon Shores correctly points out, these policies apply only to Estuary Natural/Conservation zones and are inapplicable to this proposal.

5. TCCP Goal 17, Policies 4.2 and 4.3

The Subject Properties have received an exception to Statewide Planning Goal 17. The Goal 17 exception applies to the entire Twin Rocks-Barview-Watseco community which extends to the ocean. Goal 17 does not apply to development of the Subject Properties and uses on the property cannot be found to violate Goal 17, as a matter of law.

6. TCCP Goal 18, Policy 2.4a and 4.4e

These policies require that decisions on land use actions in beach and dune areas be based on certain specific findings. Despite this policy requiring *decisions* to be based on the listed specific findings, each of the required findings are thoroughly addressed throughout the Applicants' materials.

iii. TCLUO 9.040 – TPR Compliance

The proposed BPS will not generate any continuing traffic related to its use. The only traffic that will be generated will be temporary traffic required for construction of the structure, which will be similar (but will occur over a shorter period of time) to that of constructing the residential structures in the subdivision. Such traffic levels will not "significantly affect" any existing or planned transportation facility. The proposal is consistent with the transportation planning rule.

VI Conclusion

The Application narrative and the supporting evidence in the record demonstrate that under any approach, the County can and should approve the proposed BPS. The Applicants have carefully analyzed and addressed each of the relevant approval standards, and have responded to all objections, and have providing evidence that supports approval. It is respectfully submitted that the proposal meets all relevant standards for approval of the requested BPS. The Applicants request that you adopt the recommendation of the Planning Commission and approve the requested PBS.

Thank you for your consideration.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Wendie L. Kellington".

Wendie L. Kellington

WLK:wlk
CC: Clients