



Oregon

John A. Kitzhaber, M.D., Governor

Department of Land Conservation and Development

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January 8, 2015

TO: Land Conservation and Development Commission

FROM: Jim Rue, Director
Patty Snow, Ocean and Coastal Services Division Manager
Laren Woolley, Coastal Shores Specialist

SUBJECT: **Agenda Item 12, January 22-23, 2015, LCDC Meeting**

**REVIEW OF A DIRECTOR'S DECISION TO APPEAL (INTERVENE) TO THE
LAND USE BOARD OF APPEALS**

TILLAMOOK COUNTY

AGENDA ITEM SUMMARY

The Department of Land Conservation and Development (DLCD and/or department) director has approved the department to intervene and support Tillamook County in its legislative amendments to address significant coastal erosion within the Neskowin rural community. The department finds that the adopted amendments to the local program not only comply with applicable statewide planning goals, but are potentially transferable to other communities along the Oregon coast.

If you have questions regarding this case, please contact Laren Woolley, Coastal Shores Specialist, at 541-514-0091 or by email at laren.woolley@state.or.us.

A. Type of Action

The director requests that the Land Conservation and Development Commission (LCDC and/or commission) authorize the department to proceed with intervening in the appeal of the Tillamook County decision to the Land Use Board of Appeals (LUBA). The department filed a Motion to Intervene with LUBA on December 16, 2014. It was necessary for the department to file the notice because the 21-day filing period expired prior to the commission's next scheduled meeting January 22-23, 2015.

II. CASE SUMMARY

A. Background

This case involves an effort by Tillamook County to support the unincorporated community of Neskowin in addressing significant coastal hazard issues. This planning effort was conducted over the course of a 5-year period, from the fall of 2009 to the present. From the beginning, the department was asked by the county and the Neskowin community to participate as a partner in these efforts. The county, as a result of a request by Neskowin citizens, created the Neskowin Coastal Hazard Committee (NCHC). The committee consisted of a core group of Neskowin citizens, supported by the county and agency partners, including Oregon Parks and Recreation Department and DLCD. The committee was chaired by County Commissioner Mark Labhart.

Following are some key concepts developed and supported by the NCHC:

- Significant coastal erosion has occurred in Neskowin for the past several decades
- There is scientific evidence of an increasing probability of more severe coastal erosion hazards into the future
- The Neskowin coastal hazards adaptation planning effort and products will guide community decisions as probabilities increase and erosion events occur
- Planning now to adapt to these hazards and the changing beach environment is prudent and provides a level of confidence for property owners and beach recreation users facing an uncertain future
- Land use policy and ordinance changes will work to safeguard people and property and also protect the coastal resources as defined by Statewide Planning Goals 7 and 18
- Land use ordinance changes should focus on helping the community to become more resilient to erosion hazards

Community members, as part of the Neskowin Coastal Hazards Committee (NCHC), implemented an extensive and effective education and outreach effort to the Neskowin community and beyond to insure that the community was informed throughout the process. The effort included numerous well-attended public meetings, community wide mailings and emails, ongoing information distributed on the community website, informal community member discussions, and more. Upon completion of the NCHC's work, the Neskowin Citizen Advisory Committee, as part of initial steps toward county adoption, held additional meetings with the community and at the conclusion of that process recommended adoption of the amendments to the county.

As a result of this effort, the land use amendments adopted by Tillamook County are comprehensive and include a coastal erosion adaptation plan for Neskowin and the following associated plan and code amendments:

- Amendments to the Goal 18 element of the comprehensive plan including text and policies which support this effort to increase resilience to coastal erosion

- Amendments to the Neskowin Community Plan text (a new coastal hazards section) and maps (the coastal hazard overlay zone maps)
- Amendments to the development code to create the Neskowin Coastal Hazards Overlay Zone
- Amendments to the development code to create storm water runoff and erosion control provisions for Neskowin.

The department provided resources to assist in the development of these amendments as follows:

- A \$20,000 grant to assist in developing a draft Neskowin coastal hazards adaptation plan.
- A \$12,000 grant to assist in developing an engineering report regarding hard and soft erosion control solutions to protect the village and maintain the beach. The Neskowin community provided the remainder of the overall cost of the project which was \$36,000.
- DLCD staff provided extensive support throughout, including assistance in the development of the draft amendments to implement the adaptation plan.

The department supported the Neskowin Coastal Hazards Adaptation Plan and associated amendments throughout the development and adoption process. The department believes that these products represent an excellent approach or template to implement the requirements of Goal 7 and Goal 18, and that they have considerable value in providing guidance to other coastal communities in addressing coastal hazards issues. With these things in mind the department believes that support of Tillamook County in this case is warranted and needed.

III. APPEAL FACTORS AND ANALYSIS

To proceed with an appeal, the commission must base its decision on one or more of the following factors from OAR 660-001-0230(3):

- (a) Whether the case will require interpretation of a statewide planning statute, goal or rule;
- (b) Whether a ruling in the case will serve to clarify state planning law;
- (c) Whether the case has important enforcement value;
- (d) Whether the case concerns a significant natural, cultural or economic resource;
- (e) Whether the case advances the objectives of the agency's Strategic Plan;
- (f) Whether there is a better way to accomplish the objective of the appeal, such as dispute resolution, enforcement proceedings or technical assistance.

For the reasons stated below, the department finds that the facts of this case lead to a conclusion that consideration of factors (b), (d), and (e) support a decision to intervene in an appeal of Tillamook County's legislative decision to LUBA, and that consideration of factor (f) does not present a viable alternative to the appeal.

The specific challenges to the county's legislative land use decision will not be known until the filing of the petition for review, which is currently scheduled to be filed on or before February 2, 2015.

(a) Whether the case will require interpretation of a statewide planning statute, goal or rule

The department does not anticipate that this case will involve the interpretation of a statewide planning statute, goal or rule; however this may change when we receive the Petition for Review.

(b) Whether a ruling in the case will serve to clarify state planning law

A ruling in favor of Tillamook County in this case will provide significant guidance to coastal jurisdictions for implementing Statewide Planning Goals 7 and 18.

(c) Whether the case has important enforcement value

While the case does not appear to have important enforcement value it is likely to significantly influence the willingness of coastal jurisdictions to address these coastal erosion issues in the future.

(d) Whether the case concerns a significant natural, cultural or economic resource

The Neskowin Coastal Hazards Adaptation Plan takes a holistic approach to managing coastal hazards, striving to protect the natural resources of the ocean shore area, while increasing the resilience of the cultural and economic resources of the built environment. The department believes that supporting the county's decision in this case will further the long term protection of these important resources. Although the amendments may not directly concern a significant natural resource it does address a significant natural hazard - coastal erosion. Coastal erosion is impacting coastal communities now and is expected to increase substantially over time. Coastal communities need to be equipped with the tools necessary to address this hazard. The Tillamook County (Neskowin) amendments provide a substantial beginning in the development of tools necessary to address this hazard.

(e) Whether the case advances the objectives of the agency's strategic plan

This case clearly advances the objectives of the DLCD's strategic plan. The plan indicates that "Community resilience, enabling communities to reduce exposure to natural hazards and respond to climate change, is part of the department's core work and is highlighted in this plan as a leadership and strategic priority." Additionally the strategic plan identifies that the department core work should "...help communities plan for and address threats to public safety, damage to built and natural environments, and interruption of economic well-being from flooding and other hazard events, particularly in coastal areas." New strategies include increasing "... public safety by avoiding areas subject to natural hazards", and providing assistance "...for local government resilience planning to address hazards that have not been well addressed in the past (*e.g.*, landslides), look beyond hazard mitigation to other elements of resilience (*e.g.*, recovery planning), and address climate change adaptation."

The coastal erosion adaptation planning work done by Tillamook County in this case, which can be utilized elsewhere on the Oregon coast, is precisely what is envisioned by the department's strategic plan.

(f) Whether there is a better way to accomplish the objective of the appeal, such as dispute resolution, enforcement proceedings or technical assistance

In this case, the department is seeking authorization to intervene in support of Tillamook County's legislative decision. The objective of this action is to assist the county in defending this decision, which the department views as important in establishing a potentially transferrable approach to managing coastal hazards. We believe that intervening on behalf of the county is the most effective way to accomplish this objective.

V. DEPARTMENT RECOMMENDATION AND DRAFT MOTION

The department recommends that the commission support the director's recommendation and proceed with intervening in the appeal of the Tillamook County Neskowin Coastal Erosion Adaptation Plan and associated comprehensive plan and code amendments.

Proposed Motion: I move that the commission authorize the department to intervene in the appeal of the subject Tillamook County legislative decision to the Land Use Board of Appeals based on the information included in the staff report and its demonstration that OAR 660-001-0230(3) (b), (d) and (e) apply.

Alternative motion: I move the commission not authorize the department to intervene in the appeal of the subject legislative decision from Tillamook County for the following reason(s):

_____.

VI. ATTACHMENTS

- A. DLCDC Motion to Intervene

VII. BACKGROUND REFERENCES

- A. Tillamook County Notice of Decision
[Link to Notice of Decision.pdf](#)
- B. Attachment C, Neskowin Coastal Erosion Adaptation Plan (includes comprehensive plan and code amendments)
[Link to Attachment C.pdf](#)

ELLEN F. ROSENBLUM
Attorney General



FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

December 11, 2014

VIA HAND-DELIVERY

12/11/14 AM 10:29 LUBA

Kelly Burgess
Land Use Board of Appeals
775 Summer Street NE, Suite 330
Salem, OR 97301-1283

Re: *Seabreeze Associates Limited Partnership and Frederick Quirin v. Tillamook County*
LUBA No.: 2014-106
DOJ File No.: 660005-GN0373-14

Dear Kelly:

Enclosed please find a \$100 filing fee per State Warrant Number 123800118, the original and one copy of the Department of Land Conservation and Development's MOTION TO INTERVENE, and a Certificate of Filing/Service in the above-referenced matter.

Sincerely,

Steven E. Shipsey
Assistant Attorney General
Natural Resources Section

Enclosures

SES:jrs/#608465

c: Laren Woolley, DLC
Damien R. Hall, Ball Janik LLP
William K. Sargent, Tillamook County Counsel

1 II.

2 The facts establishing movant's right to intervene include the following: Intervenor
3 appeared in the proceeding before Tillamook County that resulted in the land use decision
4 that is the subject of the appeal. See Exhibit A. This motion to intervene is timely filed
5 within 21 days of November 26, 2014, the date on which the Board received petitioners'
6 notice of intent to appeal.

7 DATED this 11th day of December 2014.

8 Respectfully submitted,

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10 ELLEN ROSENBLUM
11 Attorney General
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15 Steven E. Shipsey, OSB No. 944350
16 Assistant Attorney General
17 Of Attorneys for Oregon Department of
18 Land Conservation and Development,
19 State of Oregon, Intervenor
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Oregon

John Kitzhaber., Governor

Dept. of Land Conservation and Development Oregon Coastal Management Program

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Newport, OR 97365
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September 29, 2014

Sarah Absher, Senior Planner
Tillamook County
Department of Community Development
1510 3rd St. Suite B
Tillamook, OR 97141

RE: Review of the Proposed Neskowin Comprehensive Plan and Land Use Code Amendments

Dear Ms. Absher,

We want to thank the Board of Commissioners for the opportunity to comment on the proposed amendments to the Neskowin Comprehensive Plan and Land Use Code. We understand that the county has received comments regarding the regulatory role of local government in promoting and protecting public health, safety, and welfare, and the taking of private property rights. We hope the following information will be helpful as the Board considers these amendments.

We have reviewed the proposed Neskowin land use amendments and provide the following observations:

- The proposed Neskowin land use amendments include a coastal erosion overlay zone which is based upon credible Oregon Department of Geology and Mineral Industries (DOGAMI) coastal erosion zone maps and analysis. These maps and analysis are sound, clearly demonstrate significant hazards to development in these areas, and are appropriate to be used to address coastal hazards. Statewide Planning Goal 7 requires that "Local governments shall adopt comprehensive plans (inventories, policies and implementing measures) to reduce risk to people and property from natural hazards." These hazards include coastal erosion. In addition, Statewide Planning Goal 18 requires the reduction of hazards to human life and property from natural actions within coastal beach and dune areas.
- The bulk of the amendments are provisions that regulate how development occurs within the hazard overlay zone, not whether development can occur (*e.g.*, better geologic report standards, safest site requirement, runoff and drainage requirements, and readily movable construction requirements). The only new requirements that potentially limit additional development of property located within the hazard overlay zone include a density limitation (*i.e.*, additional dwellings, if allowed in the underlying zone are only allowed on portions of a parcel/lot outside the hazard overlay zone), and a land division limitation

(i.e., additional parcels/lots must have a development site outside the hazard overlay zone). Existing legal parcels/lots within the hazard overlay zone are allowed a dwelling (and associated uses). These potential limitations only relate to possible additional development and land divisions.

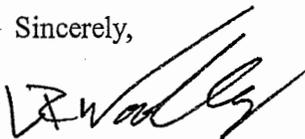
We observe the following related to the proposed Neskowin land use amendments:

- The purpose of these amendments is to guide safer development in areas of significant coastal hazards and to reasonably limit additional development where possible in these hazardous areas.
- The proposed amendments provide that each existing parcel/lot within the hazard overlay zone is authorized to develop a dwelling if it could be authorized in the existing underlying zone. As a result, property within the hazard overlay zone retains economic value.
- The proposed amendments provide that proposed new parcels/lots need to include a building site outside of the hazard overlay zone. We believe that this limitation on additional development in known hazard areas is reasonable in meeting the requirements of Statewide Planning Goals 7 and 18.
- While these provisions may serve to limit the intensification of development in certain hazard areas, they do not preclude all development.

In addition, we have assessed the possible applicability of Oregon Measure 49 (ORS 195.300-195.336) to these proposed Neskowin land use amendments. These regulations fall within the statute's definition of "Protection of public health and safety" and therefore would not be subject to a compensable claim as provided in ORS 195.305(3)(b). "Protection of public health and safety" is defined in ORS 195.300(21) as "...a law, rule, ordinance, order, policy, permit or other governmental authorization that restricts a use of property in order to reduce the risk or consequence of fire, earthquake, landslide, flood, storm, pollution, disease, crime or other natural or human disaster or threat to persons or property including, but not limited to, building and fire codes, health and sanitation regulations, solid or hazardous waste regulations and pollution control regulations." Therefore, we believe that the proposed Neskowin land use amendments would not be subject to legitimate Measure 49 claims.

Once again, we appreciate the opportunity to comment on these proposed amendments. We believe they are pro-active in addressing significant and increasing coastal hazards consistent with Statewide Planning Goals 7 and 18, and appear to be supported by the majority of Neskowin residents based on an extensive public outreach effort that spans multiple years. Please do not hesitate to contact me if you have any questions.

Sincerely,

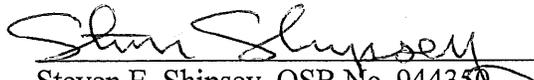


Laren Woolley
Coastal Shores Specialist
Department of Land Conservation and Development

1 CERTIFICATE OF FILING/SERVICE

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3 I certify that on December 11, 2014, I filed the original of this MOTION TO
4 INTERVENE, together with one copy, with the Land Use Board of Appeals, 775 Summer
5 Street NE, Suite 330, Salem, Oregon 97301-1283, by hand-delivery.

6 DATED this 11th day of December, 2014.

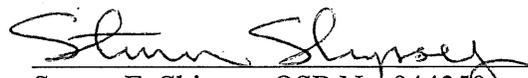
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9 Steven E. Shipsey, OSB No. 944350
10 Assistant Attorney General
11 of Attorneys for Oregon Department of
12 Land Conservation and Development,
13 State of Oregon, Intervenor
14

15
16 I further certify that on December 11, 2014, I served a true and correct copy of
17 this MOTION TO INTERVENE by first-class mail on the following persons:

18 William K. Sargent
19 Counsel for Respondent
20 1510 B Third Street
21 Tillamook, OR 97141
22

23 Damien R. Hall
24 Counsel for Petitioners
25 Ball Janik LLP
26 101 SW Main Street #1100
27 Portland, OR 97204

28
29 DATED this 11th day of December, 2014.

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31 
32 Steven E. Shipsey, OSB No. 944350
33 Assistant Attorney General
34 of Attorneys for Oregon Department of
35 Land Conservation and Development,
36 State of Oregon, Intervenor
37

