

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

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MARTHA LYNN GRAY, and LEONARD)
PALMER,)
)
Petitioners,)
)
and)
)
JOHN W. KENDALL, WILLIAM J. FURNISH,)
MICHAEL PARKER, WILLIAM BERG,)
ROL MERSEREAU, LEYS H. McCARTER,)
CITY OF GEARHART, ANN K. TAYLOR,)
JANE R. KENDALL, PETER J. KENDALL,)
DEMOCRATIC CENTRAL COMMITTEE OF)
CLATSOP COUNTY, JOHN. W. REYNOLDS,) LUBA
Nos. 90-167)
PHYLLIS C. REYNOLDS, and ALFRED M.) and 90-
168)
WIEDEMANN,)
)
Intervenors-Petitioner,)
)
vs.)
)
CLATSOP COUNTY,)
)
Respondent,)
)
and)
)
NORTHWEST GENERAL, INC., and)
RICHARD SCHROEDER,)
)
Intervenors-Respondent.)

FINAL OPINION
AND ORDER

Appeal from Clatsop County.

Susan D. Marmaduke, Portland, filed a petition for review on behalf of petitioners. With her on the brief was Olson & Marmaduke. Martha Lynn Gray, Seaside, and Leonard Palmer, Port Ludlow, Washington, argued on their own behalves.

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Intervenor-petitioner Alfred M. Wiedemann, Rochester,
Washington, filed a petition for review on his own behalf.

William R. Canessa, Seaside, represented intervenor-
petitioner City of Gearhart.

1 Robert S. Simon, Lake Oswego, represented intervenor-
2 petitioner Democratic Central Committee of Clatsop County.

3
4 Intervenors-petitioner John W. Kendall, William J.
5 Furnish, Michael Parker, William Berg, Rol Mersereau, Leys
6 H. McCarter, Ann K. Taylor, Jane R. Kendall, Peter J.
7 Kendall, John W. Reynolds, and Phyllis C. Reynolds
8 represented themselves.

9
10 No appearance by respondent.

11
12 Steven L. Pfeiffer, Portland, filed the response brief
13 on behalf of intervenors-respondent. With him on the brief
14 was Stoel, Rives, Boley, Jones & Grey. Michael R. Campbell,
15 Portland, argued on behalf of intervenors-respondent.

16
17 SHERTON, Referee; HOLSTUN, Chief Referee; KELLINGTON,
18 Referee, participated in the decision.

19
20 REMANDED 11/04/91

21
22 You are entitled to judicial review of this Order.
23 Judicial review is governed by the provisions of ORS
24 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a Clatsop County ordinance amending
4 the acknowledged Clatsop County Comprehensive Plan Map (plan
5 map) and Resource Inventory Map (plan inventory map) and the
6 Clatsop County Zone Map (zone map).

7 **MOTIONS TO INTERVENE**

8 John W. Kendall, William J. Furnish, Michael Parker,
9 William Berg, Rol Mersereau, Leys H. McCarter, Ann K.
10 Taylor, Jane R. Kendall, Peter J. Kendall, John W. Reynolds,
11 Phyllis C. Reynolds, City of Gearhart, Democratic Central
12 Committee of Clatsop County and Alfred M. Wiedemann filed
13 motions to intervene on the side of petitioners in this
14 appeal. Northwest General, Inc. and Richard Schroeder filed
15 motions to intervene on behalf of respondent. There is no
16 opposition to the motions, and they are granted.

17 **MOTION TO STRIKE**

18 Intervenors-respondent (respondents) move to strike
19 intervenor-petitioner (intervenor) Wiedemann's petition for
20 review. Respondents renew the arguments made in their
21 September 9, 1991 motion to dismiss intervenor Wiedemann's
22 petition for review. We reject those arguments, for the
23 reasons stated in our September 11, 1991 Order on Motions to
24 Amend Petition for Review and File Response Brief in Excess
25 of Fifty-Page Limit.

26 Respondent's motion to strike is denied.

1 **STANDING OF PETITIONER PALMER**

2 Respondents challenge the standing of petitioner
3 Palmer. Respondents contend petitioner Palmer was retained
4 by the county as a consultant to provide technical
5 assistance in reviewing the subject application and,
6 therefore, was akin to a county staff member. According to
7 respondents, in order for petitioner Palmer to have standing
8 to appeal the county's decision, he must have "appeared
9 before" the county. ORS 197.830(2)(b). Respondents argue
10 this Board has previously determined that acting as a member
11 of a local decision making body does not satisfy the
12 statutory requirement to have "appeared before" the local
13 government. Cecil v. City of Jacksonville, ___ Or LUBA ___
14 (LUBA No. 90-013, August 27, 1990, slip op 3-4, aff'd 104
15 Or App 526 (1990). Similarly, respondents argue, acting as
16 a local government staff member does not satisfy this
17 statutory standing requirement.

18 Petitioner Palmer argues that he submitted oral and
19 written testimony in the county proceedings. Petitioner
20 Palmer also argues that our decision in Cecil is not
21 controlling because (1) he was not a member of a local
22 decision making body in the county proceedings; and
23 (2) appeals of postacknowledgment plan and land use
24 regulation amendments are subject to a different statutory
25 standing requirement.

26 ORS 197.830(2) provides in relevant part:

1 "Except as provided in ORS 197.620(1) and (2), a
2 person may petition [LUBA] for review of a land
3 use decision if the person:

4 "* * * * *

5 "(b) Appeared before the local government * * *
6 orally or in writing." (Emphasis added.)

7 ORS 197.620(1) provides:

8 "Notwithstanding the requirements of
9 ORS 197.830(2), persons who participated either
10 orally or in writing in the local government
11 proceedings leading to adoption of an amendment to
12 an acknowledged comprehensive plan or land use
13 regulation may appeal the decision to [LUBA]."
14 (Emphasis added.)

15 The challenged decision amends an acknowledged
16 comprehensive plan and land use regulations. We agree with
17 petitioner Palmer that his standing in this appeal
18 proceeding is governed by ORS 197.620(1). Petitioner Palmer
19 submitted oral and written testimony in the proceedings
20 below. Therefore, petitioner Palmer "participated * * * in
21 the local government proceedings," as required by ORS
22 197.620(1). We also agree with petitioner Palmer that his
23 participation as a consultant in the proceedings below was
24 not participation as a member of a local decision making
25 body and, consequently, we need not determine whether
26 participation as a local decision maker satisfies the
27 standing requirement of ORS 197.620(1).

28 The challenge to petitioner Palmer's standing is
29 denied.

1 **FACTS**

2 The subject property is north of the City of Gearhart's
3 urban growth boundary (UGB). It is adjoined on the west by
4 the Pacific Ocean and beaches, on the north by the Surf
5 Pines residential development, on the east by U.S. Highway
6 101, on the southeast by the Beechwood residential
7 development, and on the south by the Oregon State Park
8 Department's Del Rey Wayside. South of the Del Rey Wayside,
9 within the Gearhart UGB, is the Highlands residential
10 development.

11 The subject property is identified by the county as
12 "approximately 230 acres" in "several parcels in different
13 ownerships." Record 9. However, only approximately the
14 western third of this 230 acre area would be directly
15 affected by the approved plan and zone map amendments. The
16 subject property "is undeveloped and consists primarily of a
17 series of former beach ridges running parallel to the
18 [ocean] shore in a wide, depositional plain." Id.
19 Elevation of the subject property ranges from sea level to
20 80 feet.

21 The underlying zoning district on the subject property
22 is predominantly Residential-Agricultural, 5-acre (RA-5).
23 However, an approximately 200 to 400 foot wide strip of land
24 on the western edge of the subject property,¹ which would

¹Maps in the record indicate that the "1967 Oregon Ocean Shore Zone Line" forms the western boundary of the subject property.

1 not be directly affected by the plan and zone map changes
2 approved by the challenged decision, is zoned Open Space,
3 Parks and Recreation (OPR).²

4 In 1979, the county adopted the Beaches and Dunes
5 Element of its plan. Ordinance 78-25. In 1980, the county
6 adopted a 1978 report by petitioner Palmer, entitled
7 "Stability of Coastal Dunes, Clatsop County, Oregon" (Palmer
8 Report), as part of its plan. Ordinance 78-25. A series of
9 plan Resource Inventory Maps was also adopted by these
10 ordinances. These inventory maps include an "active dune
11 line" running north-south on the subject property, and on
12 the Surf Pines and Del Rey Wayside properties directly to
13 the north and south, approximately 800 feet from their
14 western boundaries (hereafter "1978 active dune line").³
15 According to the Palmer Report, land west of the active dune
16 line is comprised of active dunes, and land east of the
17 active dune line is comprised of conditionally stable dunes.
18 Record 293-95. On the subject property, land west of the

²It would appear from the table of "Comprehensive Plan Map and Land and Water Development and Use Map" designations at Clatsop County Land and Water Development and Use Ordinance (DUO) 3.010 that lands zoned RA-5 and OPR have Rural Lands and Conservation Other Resources plan map designations, respectively.

³In addition, the plan map adopted by these ordinances includes a "construction setback line" which coincides with the 1978 active dune line on these properties (hereafter "1978 construction setback line"). At some point, however, the county adopted an exception to Statewide Planning Goal 18 (Beaches and Dunes) for the Shore Pines property to the north. This exception apparently added to the plan map a "Surf Pines Building Line" located approximately 300 feet west of the 1978 construction setback line on the Surf Pines property. Record Exhibit 7 ("Existing Zoning Map").

1 1978 active dune line is subject to the Active Dune Overlay
2 (ADO) and Shorelands Overlay (SO) zoning districts, whereas
3 land east of the 1978 active dune line is subject to the
4 Beaches and Dunes Overlay (BDO) district.⁴

5 On May 10, 1990, intervenor Northwest General, Inc.
6 (applicant) submitted an application to amend (1) sheets 134
7 and 137 of the plan inventory map to move the active dune
8 line on the subject property and properties to the north and
9 south approximately 700 feet west and to add a "1990 Wave
10 Affect [sic] Line" and "Future Wave Affect [sic] Line" for
11 those properties; (2) the plan map to move the construction
12 setback line on the subject property approximately 300 feet
13 west; and (3) the zone map to move the boundary between the
14 ADO and BDO districts, and the eastern boundary of the SO
15 district, on the subject property approximately 700 feet
16 west, to coincide with the revised active dune line. The
17 application does not include a specific development proposal
18 for the subject property, but states that it is "preparatory
19 to a future [plan amendment and zone change] to apply the
20 DRO [Destination Resort Overlay] to the site." (Emphasis in
21 original.) Record 191. The application further states:

22 "A future destination resort on the site will
23 include an 18-hole golf course, hotel
24 accommodations, restaurants, recreational support

⁴In addition, the beach area west of the subject property is subject to the Sensitive Bird Habitat Overlay (SBHO) district and the Flood Hazard Overlay (FHO) district.

1 facilities, commercial facilities, and
2 individually-owned residences. Structures will be
3 located to the east of the construction setback
4 line. A portion of the golf course will be
5 located between the construction setback line and
6 the active dune line, within the conditionally
7 stable dune area. * * * " Id.

8 On August 17, 1990, after public hearings, the county
9 planning commission adopted a resolution recommending denial
10 of the proposed plan and zone map amendments. On
11 October 17, 1990, the board of commissioners held a public
12 hearing to consider the proposed amendments, based on the
13 record established before the planning commission. On
14 December 5, 1990, the board of commissioners adopted the
15 challenged ordinance. The ordinance adopts a modified
16 version of the plan and zone map amendments proposed by the
17 applicant, amending (1) the plan inventory map to move the
18 active dune line on the subject property approximately 300
19 feet west; (2) the plan map to move the construction setback
20 line on the subject property approximately 300 feet west;⁵
21 and (3) the zone map to relocate the boundary between the
22 ADO and BDO overlay districts, and the eastern boundary of
23 the SO district, on the subject property approximately 300
24 feet west, to the location of the new active dune line.⁶

⁵Thus, under the approved amendments, the active dune line and construction setback line on the subject property continue to coincide, but are moved approximately 300 feet west of the 1978 active dune/construction setback line.

⁶The ordinance also amends sheets 134 and 137 of the plan inventory map to delineate a "1990 Wave Affect [sic] Line" and "Future Wave Affect [sic]

1 **FIRST ASSIGNMENT OF ERROR (GRAY/PALMER)**

2 "The Board [of Commissioners] held the wrong kind
3 of hearing before it announced its decision moving
4 the active dune line."

5 The challenged decision states, with regard to the
6 proposed amendments to the plan inventory map:

7 "[Under DUO 5.710(1)(b),⁷] legislative action is
8 appropriate in this instance because the proposed
9 revision to the Resource Inventory Map extends
10 well beyond the subject property and directly
11 affects approximately 20 individual parcels. In
12 addition, the action involves an assessment of
13 resource boundaries rather than consideration of a
14 development proposal. * * *" Record 13.

15 Additionally, the challenged decision states it
16 "legislatively adopts a revised Resource Inventory Map for
17 map sheets 134 and 137 that delineates a revised active dune
18 line on the subject property * * *." (Emphasis added.)
19 Record 33.

20 Petitioners contend the record shows only 9 to 12, not
21 20, property ownerships would be affected by the proposed

Line" for the subject property and adjoining property to the north and south, as proposed by the applicant. However, these amendments are not at issue in this appeal.

⁷Subsection (1) of DUO 5.710 (Legislative Action Under This Ordinance) provides:

"The following are legislative actions under this Ordinance.

"a. An amendment to this Ordinance.

"b. A district or zone change action the County Commission has designated as legislative after finding the matter at issue involves such a substantial number of property owners or such broad public policy changes that administrative processing would be inappropriate."

1 amendment to the active dune line on the plan inventory map.
2 However, according to petitioners, even if the county were
3 correct that 20 ownerships would be affected by the proposed
4 amendment, the "substantial number of property owners"
5 requirement of DUO 7.510(1)(b) for designating the proposed
6 amendment legislative is not satisfied. Petitioners further
7 argue that the challenged amendment of the plan inventory
8 map has all the indicia of a quasi-judicial decision See
9 Benton County v. Friends of Benton County, 295 Or 79, 88,
10 653 P2d 1249 (1982); Strawberry Hill 4-Wheelers v. Benton
11 County, 287 Or 591, 601 P2d 769 (1979). According to
12 petitioners, the amendment was requested by one entity,
13 intervenor Northwest General, Inc., and its application had
14 to result in a decision, involving the application of
15 specific standards to particular facts.

16 Petitioners contend the county's error in designating
17 its amendment of the active dune line on the plan inventory
18 map as "legislative" is an error of law, rather than
19 procedure. However, petitioners argue in the alternative
20 that if it is an error of procedure, petitioners'
21 substantial rights were prejudiced because the county relied
22 on its characterization of the plan inventory map amendment
23 as legislative as an excuse for avoiding application of the
24 statewide planning goals.

25 Respondents argue that DUO 5.710(1) governs only
26 amendments to the text of the DUO or the zone map and,

1 therefore, is not relevant to amendment of the plan
2 inventory map. Respondents nevertheless contend the county
3 correctly identified the proposed amendments to the plan
4 inventory map as legislative in nature. Respondents argue,
5 however, that here the county's characterization of the
6 amendment as legislative was inconsequential, because the
7 county proceedings on the proposed amendment provided the
8 equivalent of a quasi-judicial process. Respondents point
9 out the county followed the same procedures with regard to
10 the proposed "legislative" plan inventory map amendment as
11 it did for the admittedly quasi-judicial proposed amendments
12 to the plan and zone maps.

13 Respondents further argue petitioners have not
14 demonstrated they were denied any procedural safeguard
15 because of the county's characterization of the proposed
16 plan inventory map amendment as legislative and, therefore,
17 have not shown their substantial rights were prejudiced.
18 According to respondents, the county's decision as to what
19 substantive standards applied to the proposed plan inventory
20 map amendment was governed by the nature of the proposed
21 amendment, not whether it was legislative or quasi-judicial.

22 We agree with intervenor that DUO 5.710 is not
23 applicable to plan amendments. Therefore, whether the
24 county's findings demonstrate compliance with DUO
25 5.710(1)(b) is irrelevant to whether the county correctly
26 determined that the proposed plan inventory map amendment

1 was legislative in nature.

2 However, in this case, we need not determine whether
3 the county erred in characterizing the proposed plan
4 inventory map amendment as legislative. We agree with
5 intervenor that such an error would be procedural in nature
6 and, therefore, warrant reversal or remand only if
7 petitioners demonstrate that their substantial rights were
8 prejudiced. ORS 197.835(7)(a)(B). Petitioners do not
9 contend the county proceedings failed to provide any of the
10 procedural safeguards required in a quasi-judicial
11 proceeding. Further, intervenor is correct that the
12 applicability of the statewide planning goals depends on the
13 substantive nature of the proposed plan inventory map
14 amendment, not on whether it is characterized as legislative
15 or quasi-judicial.⁸ See League of Women Voters v. Klamath
16 County, 16 Or LUBA 909, 913-14 (1988); see also 1000 Friends
17 of Oregon v. Washington County, 17 Or LUBA 671, 683-84
18 (1989). We address petitioners' arguments that the county
19 failed to demonstrate compliance with various statewide

⁸Arguably, there could be instances where the county's duty to adopt findings in support of its decision to amend the active dune line on the plan inventory map might differ, depending on whether the decision is characterized as legislative or quasi-judicial. See Lima v. Jackson County, 56 Or App 619, 625, 643 P2d 355 (1982); Gruber v. Lincoln County, 2 Or LUBA 180, 186-87 (1981). However, in view of the fact that the challenged ordinance includes several plan and land use regulation amendments which are undisputably quasi-judicial, and the nature of the challenges made by petitioners under their assignments of error, addressed infra, whether the amendment to the active dune line is quasi-judicial or legislative would not affect our resolution of this appeal.

1 planning goals infra.

2 The first assignment of error (Gray/Palmer) is denied.

3 **THIRD ASSIGNMENT OF ERROR (GRAY/PALMER)**

4 "The decision moving the 'active dune' line
5 violates Goal 18 and the plan's Beaches and Dunes
6 element. The Board [of Commissioners] failed to
7 apply the correct standard and the findings are
8 legally inadequate. There is no substantial
9 evidence in the whole record to support a finding
10 that the dunes are not subject to accretion or
11 deflation over a 100 year period."

12 **FIRST ASSIGNMENT OF ERROR (WIEDEMANN)**

13 "The decision moving the 'Active Dune' line
14 violates Goal 18 and the Plan's [Beaches and
15 Dunes] policies. The Board [of Commissioners]
16 failed to apply the correct standard and the
17 findings are not adequate. Moreover, there is no
18 substantial evidence in the whole record to
19 support a finding that the dunes are not active."

20 There is no dispute that the portion of the subject
21 property east of the 1978 active dune line is composed of
22 conditionally stable dunes. The challenged plan inventory
23 map amendment moving the active dune line 300 feet to the
24 west on the subject property has the effect of reclassifying
25 that 300-foot wide strip (hereafter affected area) as
26 conditionally stable dunes, rather than active dunes.
27 Petitioners Gray and Palmer and intervenor-petitioner
28 Wiedemann (petitioners) contend this reclassification
29 violates Statewide Planning Goal (goal) 18 and the Beaches &
30 Dunes Element of the county's comprehensive plan.

31 **A. Goal 18 (Beaches and Dunes)**

32 The Statewide Planning Goals (goals) define active dune

1 as:

2 "A dune that migrates, grows and diminishes from
3 the effect of wind and supply of sand. Active
4 dunes include all open sand dunes, active hummocks
5 and active foredunes."⁹

6 The goals define conditionally stable dune as:

7 "A dune presently in a stable condition, but
8 vulnerable to becoming active due to fragile
9 vegetative cover." (Emphasis added.)

10 Goal 18 requires local plans to include inventory
11 information necessary to identifying and designating beach
12 and dune uses and policies. The implementation requirements
13 imposed by Goal 18 differ for different types of beach and
14 dune areas.

15 We understand petitioners to argue that the county
16 misinterpreted Goal 18 to allow identification of active
17 dunes and conditionally stable dunes based on their present
18 condition alone, without consideration of whether such
19 conditionally stable dunes are likely to become active dunes
20 during the next 100 years. Petitioners also contend the
21 record does not contain substantial evidence to support the
22 county's determination of compliance with Goal 18.

23 We agree with respondents that the definitions of dune
24 types in the statewide planning goals refer to the present

⁹Open sand dune is a "collective term for active, unvegetated dune landforms." Active hummocks are "[p]artially vegetated (usually with beach grass), circular, and elevated mounds of sand which are actively growing in size." An active foredune is an "unstable barrier ridge of sand paralleling the beach and subject to wind erosion, and growth from new sand deposits [and] may include areas with beach grass * * *."

1 condition of the dunes. There is nothing in Goal 18 which
2 imposes a requirement that in order to identify a dune which
3 is presently in a stable condition as conditionally stable,
4 a local government must find that the dune is unlikely to
5 become active in the next 100 years. Further, with regard
6 to petitioners' evidentiary challenge, petitioners do not
7 contend the record lacks evidence that the dunes in the
8 affected area are presently in a stable condition,¹⁰ only
9 that the record lacks evidence they will remain in a stable
10 condition for the next 100 years. The latter is not
11 required by Goal 18.

12 This subassignment of error is denied.

13 **B. Plan Beaches & Dunes Element**

14 **1. Interpretation**

15 The plan Beaches & Dunes Element incorporates a section
16 on dune classification from the Palmer Report. Both the
17 plan and the report state that "active dunes" include (1)
18 the statewide planning goal definitions of active dune and
19 open sand dune, (2) areas of unvegetated open sand, and (3)
20 areas of known accretion or deflation changes, even where
21 vegetation is present. The plan and report conclude their
22 discussion of "active dunes" with the following:

¹⁰Petitioners do contend that Exhibit 6 to respondents' application shows there has been "as much as seven feet of deposition from 1967 to 1990 in the area [respondents] characterize as 'conditionally stable.'" Petition for Review 33. However, examination of Exhibit 6 shows the area experiencing deposition from 1967 to 1990 is west of the affected area.

1 "Activity within the time context of development
2 life-expectancy is assumed (arbitrarily about 100
3 - years). Activity of dunes within 'recent'
4 (Holocene) geologic time alone, would include much
5 of what is now 'stabilized.'

6 " '* * * there has been little permanent
7 stabilization of the sand dunes along
8 the ocean shore in the past four to
9 seven thousand years,' (Wiedemann, 1974,
10 p. 17).

11 "Active dunes have been defined here in the
12 context of about one hundred years projection from
13 past conditions. Sequential photographs, maps,
14 soils and landforms have been evaluated in
15 defining active areas." (Emphasis added.)
16 Record 264, 293-94.

17 According to petitioners, the plan Beaches & Dunes
18 Element defines "active dunes" as dunes which will be
19 subject to accretion or deflation changes over the next 100
20 years. Petitioners contend the county erroneously
21 interpreted the dune classification provisions of the plan
22 Beaches & Dunes Element to allow classification of the dunes
23 in the affected area as conditionally stable merely because
24 they have vegetation under present conditions.

25 Respondents contend that while the Beaches & Dunes
26 Element and Palmer Report suggest or recommend use of a 100
27 year projection in identifying active and conditionally
28 stable dunes, the plan does not require that a 100 year
29 analysis be performed in all instances. According to
30 respondents, there are no plan policies addressing this
31 issue.

32 At one point, the county's findings state that "based

1 on present conditions, [the affected area] is conditionally
2 stable." Record 18. However, the findings go on to state
3 that "the chief point of disagreement [between the parties
4 below] was not the present status of the dunes but the
5 likely future stability of [the affected area.]" Id. The
6 findings further state:

7 "* * * Although these considerations of future
8 [dune] stability are largely, and perhaps more
9 appropriately addressed by the county's provision
10 for a construction setback line, the Board [of
11 Commissioners] will address them in the context of
12 this proceeding to identify the active dune line
13 because the county's Beaches and Dunes Element and
14 the Palmer [Report] permit such considerations and
15 because the parties have addressed them.

16 "The Beaches and Dunes Element and the Palmer
17 [Report] suggest that it is appropriate to use a
18 development life expectancy of 100 years in order
19 to evaluate the future stability of coastal hazard
20 areas. The Board adopts this period for purposes
21 of this proceeding because it represents a
22 reasonable life expectancy and, based on the
23 evidence presented, represents the reasonable
24 limit of predictive ability." (Emphasis added.)
25 Record 19.

26 The above quoted findings, and particularly the
27 emphasized portion, indicate the county adopted, at least
28 for the purposes of this plan inventory map amendment, the
29 interpretation of the Beaches & Dunes Element and Palmer
30 Report advocated by petitioners. Thus, the county based its
31 approval of the challenged amendment to the active dune line
32 on a determination that the affected area will remain in a
33 stable condition for 100 years, and did not misinterpret the
34 Beaches & Dunes Element and Palmer Report in the manner

1 petitioners contend.

2 This subassignment of error is denied.

3 **2. Evidentiary Support**

4 Petitioners contend there is not substantial evidence
5 in the record to support a determination that the dunes in
6 the affected area are reasonably likely to remain in a
7 stable condition for the next 100 years.

8 We have reviewed the evidence in the record cited by
9 the parties concerning whether the dunes in the affected
10 area are likely to remain stable for the next 100 years.
11 There is a considerable amount of conflicting expert
12 testimony and other evidence in the record.¹¹ There is
13 general agreement that there is vegetative cover in the
14 affected area which presently has a stabilizing effect.
15 There is disagreement as to how likely it is that such

¹¹Petitioners challenge the qualifications of only one of respondents' expert witnesses, Wilbur Ternyik, who with a co-author prepared a vegetation analysis of the subject property. Petitioners contend the Palmer Report, which has been adopted as part of the county plan establishes necessary qualifications for persons preparing site analyses of beach and dune terrain, and argue that Ternyik does not have the necessary qualifications.

The section of the Palmer Report referred to by petitioners states that "[i]n the absence of established criteria, the following checklist is presented to suggest the capabilities by which a specialist might demonstrate qualifications as a technical specialist to prepare site specific reports." (Emphasis added.) Record 310. In view of the emphasized portions of the quote, we agree with intervenor that the plan establishes no absolute qualifications for authors of site specific analyses. We note that the statement of Ternyik's qualifications (Record 360) indicates he qualifies as an expert on beach and dune vegetation (although not on coastal erosional and geological processes). See Record 221. Therefore, we believe the county was entitled to give weight to Ternyik's testimony within this area of expertise.

1 vegetative cover will provide long-term stability and how
2 susceptible it is to damage due to fire, construction or
3 other human activities. Record 184-85; Application,
4 Appendix I.

5 There is further general agreement that this stretch of
6 the coast has been accreting sand for perhaps 3500 years,
7 with the most rapid accretion occurring in the past 100
8 years, due to construction of the Columbia River jetty.
9 There is also agreement that the rate of accretion is
10 progressively slowing, and will end sometime in the next 30
11 to 50 years. However, there is disagreement as to what will
12 happen after accretion ceases. Some experts think the beach
13 in this stretch of the coast will remain stable, while
14 others think that a process of erosion will begin that could
15 result in destabilizing the dunes in the affected area.
16 There is also disagreement between experts as to the
17 likelihood and effects of earthquakes, subsidence, tsunamis
18 and worldwide rises in sea level. Record 139-47, 150-53,
19 171-75, 184-85, 220-28, 389-393; Supp. Record 74-75, 77-78,
20 89-92; Application, Appendices II through V.

21 However, petitioners specifically argue, under this and
22 the following assignment of error, that respondents' expert
23 witnesses were unable to testify that the shoreline would
24 not begin to erode after 50 years had elapsed. Petitioners
25 contend that when questioned on this point, one of
26 respondents' geology experts (Kienle) deferred to the other

1 (Everts). Petitioners transcribe oral testimony of Everts,
2 who stated he was only asked by respondents to address what
3 would happen over the next 50 years and that after 50 years
4 "your guess may be as good as mine." Petition for Review
5 43-44. Petitioners argue that several experts testified
6 that more data is needed. Record 152, 391; Supp. Record 90.
7 According to petitioners, where respondents' "own experts
8 state that their data is insufficient to permit them to
9 predict whether the [affected area] will remain stable over
10 the period mandated by the plan, there is no substantial
11 evidence to support such a finding by the [county]."
12 Petition for Review 44.

13 Respondents argue that Kienle and Everts testified that
14 their projections for a relatively stable shoreline would
15 extend to 100 years or more in the future. However, these
16 experts' original reports (Application, Appendices II and
17 III) clearly address a 50 year time frame, and the
18 additional documents cited by respondents do not support
19 their contention.¹² Record 142-46, 150-53. Respondents
20 also argue that in view of the statement in the Palmer
21 Report that present data suggests a potential coastal
22 erosion rate averaging three feet per year (Record 284), the

¹²Respondents also cite the oral testimony of Kienle and Everts at the June 21 and 28, 1990 planning commission hearings. However, respondents do not transcribe the testimony in question or otherwise identify it. We will not search at random through the several hours of taped testimony from these hearings.

1 county could reasonably conclude that even if erosion did
2 begin sometime after 30 to 50 years, it would take much
3 longer than 100 years to reach the relocated active dune
4 line. Record 20.

5 Substantial evidence is evidence a reasonable person
6 would rely upon in reaching a decision. Where the local
7 record contains conflicting believable evidence, the choice
8 of which evidence to believe belongs with the local
9 government decision maker. City of Portland v. Bureau of
10 Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Eckis
11 v. Linn County, ___ Or LUBA ___ (LUBA No. 90-132,
12 September 11, 1991), slip op 10, 23; Douglas v. Multnomah
13 County, 18 Or LUBA 607, 617 (1990).

14 In this case, there is conflicting believable expert
15 testimony with regard to whether the subject stretch of
16 coastline will remain stable or will begin to erode when
17 accretion stops sometime in the next 30 to 50 years.
18 However, we agree with petitioners that there is no evidence
19 in the record that the coastline at the subject site will
20 not erode during the next 50 to 100 years. Further,
21 although there is evidence that if such erosion occurs, the
22 ocean will not actually reach the affected area in the next
23 100 years, there is no evidence with regard to the effect
24 such erosion would have on the stability of the dunes in the
25 affected area. Therefore, a reasonable person could not
26 conclude that the dunes in the affected area are reasonably

1 likely to remain conditionally stable for the next 100
2 years.

3 This subassignment of error is sustained.

4 The third assignment of error (Gray/Palmer) and first
5 assignment of error (Wiedemann) are sustained, in part.

6 **FOURTH ASSIGNMENT OF ERROR (GRAY/PALMER)**

7 "The decision moving the construction setback
8 [line] violates Goal 18 and the plan's Beaches and
9 Dunes element. The Board [of Commissioners]
10 failed to address the correct standard and the
11 findings are legally inadequate. There is no
12 substantial evidence in the whole record to
13 support a finding that the ocean will not encroach
14 on the [affected] area over a 100 year period."

15 **SECOND ASSIGNMENT OF ERROR (WIEDEMANN)**

16 "The decision moving the construction setback line
17 violates Goal 18 and the Plan's [Beaches and
18 Dunes] element. The Board [of Commissioners]
19 failed to address the correct standards and its
20 findings are legally inadequate. Furthermore,
21 there is no substantial evidence to support a
22 finding that the ocean will not encroach on the
23 [affected] area over a 100 year period."

24 The area affected by the challenged amendment of the
25 construction setback line on the plan map is the same as
26 that affected by the challenged relocation of the active
27 dune line on the plan inventory map.

28 **A. Goal 18 Implementation Requirements and Plan**
29 **Beaches and Dunes Policies**

30 **1. Implementation Requirement 2/Policy 2**

31 Goal 18 Implementation Requirement 2 and plan Beaches &
32 Dunes Policy 2 are virtually identically worded. They
33 prohibit residential, commercial or industrial buildings in

1 areas designated as active dunes. Petitioners contend the
2 relocation of the construction setback line violates these
3 provisions.

4 Based on our decision under the preceding assignments
5 of error, the county's decision to relocate the active dune
6 line on the subject property will be remanded. Accordingly,
7 the affected area retains its active dune classification.
8 We therefore agree with petitioners that it is inconsistent
9 with Goal 18 Implementation Requirement 2 and plan Beaches &
10 Dunes Policy 2 to relocate the construction setback line so
11 that construction of buildings is potentially allowable in
12 the subject area.

13 This subassignment of error is sustained.

14 **2. Implementation Requirement 1/Policy 1**

15 Goal 18 Implementation Requirement 1 and plan Beaches &
16 Dunes Policy 1 are also virtually identically worded. They
17 provide, in relevant part:

18 "Local governments * * * shall base decisions on
19 plans, ordinances and land use actions in beach
20 and dune areas, other than older stabilized dunes,
21 on specific findings that shall include at least:

22 "a. The type of use proposed and the adverse
23 effects it might have on the site and
24 adjacent areas;

25 "b. Temporary and permanent stabilization
26 programs and the planned maintenance of new
27 and existing vegetation;

28 "c. Methods for protecting the surrounding area
29 from any adverse effects of the development;
30 and

1 "d. Hazards to life, public and private property,
2 and the natural environment which may be
3 caused by the proposed use." (Emphasis
4 added.)

5 Petitioners argue the county failed to adopt specific
6 findings addressing the factors listed above, as required by
7 the above quoted provision.

8 The above quoted goal implementation requirement and
9 plan policy specifically applies to "decisions on plans,"
10 and requires the adoption of specific findings. The
11 challenged amendment of the construction setback line is a
12 plan map amendment. Therefore, the county improperly failed
13 to adopt findings addressing this provision when adopting a
14 plan amendment.¹³

15 This subassignment of error is sustained.

16 **B. Plan Construction Setback Line Requirements**

17 Plan Beaches & Dunes Policy 16 provides:

18 "Adequate setbacks for structures must be provided
19 for by considering the rate of erosion together
20 with the anticipated life of any structures."
21 Record 277.

22 The Palmer Report contains the following recommendation:

23 "Setback for structures * * * should be based upon

¹³We recognize that three of the four listed factors refer to the "proposed use" or "development." We also realize there was no specific development proposal before the county when it adopted the challenged plan amendment. However, the net effect of the challenged amendment would be to allow certain types of development in the affected area which would not otherwise have been allowed. Consequently, the county must adopt findings addressing the general consequences of its plan amendment with regard to development of the affected area.

1 the life expectancy of the structure multiplied by
2 expected rates of coastal change. Present data
3 suggests a potential coastal erosion rate
4 averaging one meter per year (3 feet/yr.) and a
5 housing duration of about 100 years, therefore a
6 minimum 300 foot setback from the shoreline is
7 suggested to accommodate beach fluctuation for
8 residential land use areas." Record 284.

9 The Palmer Report also establishes seven factors to be
10 considered in establishing a construction setback line.
11 These factors include "[e]rosion trends and rates as shown
12 by historical and sedimentary evidence." Record 315.

13 The challenged decision adopts findings addressing each
14 of the seven factors. The findings addressing the erosion
15 factor state:

16 "* * * In the future, the beach will continue to
17 receive sand from offshore sources and the
18 shoreface at the north end of Clatsop beach, until
19 it reaches a new dynamic equilibrium in
20 approximately 2010. * * * The Palmer [Report]
21 suggests a potential coastal erosion rate of up to
22 an average of three feet per year. Even assuming
23 the absence of shoreline equilibrium, it would
24 take at least 250 years of continuous shoreline
25 erosion at the rate of three feet per year for the
26 shoreline to erode from its position in 1990 to
27 the proposed construction setback line. With 100
28 years as the reasonable anticipated life of any
29 development, the proposed construction setback
30 line provides an adequate buffer between future
31 development and the shoreline." Record 26-27.

32 We understand petitioners to contend the above quoted
33 findings are not supported by substantial evidence, for the
34 same reasons stated under the previous assignments of error.

35 The evidence in the record on this issue is the same
36 evidence concerning accretion, erosion, subsidence,

1 earthquakes and tsunamis cited previously. However, in this
2 instance we agree with respondents that the evidence in the
3 record would allow a reasonable person to conclude that even
4 if erosion does begin some time in the next 100 years, after
5 accretion halts, the shoreline will not erode all the way to
6 the adopted construction setback line during the next 100
7 years.

8 This subassignment of error is denied.

9 The fourth assignment of error (Gray/Palmer) and second
10 assignment of error (Wiedemann) are sustained, in part.

11 **SECOND ASSIGNMENT OF ERROR (GRAY/PALMER)**

12 "* * * The decisions violate [Statewide Planning]
13 Goals 5, 11, 17, 18 [and] OAR 660-16 * * *. The
14 findings do not address relevant standards. They
15 are legally inadequate to demonstrate compliance
16 with the statewide goals * * *."

17 Petitioners contend the challenged decisions are all
18 amendments to an acknowledged comprehensive plan or land use
19 regulations. Petitioners argue all such amendments must
20 comply with the statewide planning goals. ORS
21 197.125(2)(a); 1000 Friends of Oregon v. Jackson County, 79
22 Or App 93, 718 P2d 753 (1986); Ludwick v. Yamhill County, 72
23 Or App 224, 696 P2d 536, rev den 299 Or 443 (1985); see also
24 League of Women Voters v. Metro Service Dist., 99 Or App
25 333, 781 P2d 1256 (1989), rev den 310 Or 70 (1990).
26 According to petitioners, the county erroneously failed to
27 demonstrate the adopted amendments comply with the statewide
28 planning goals, specifically Goal 5 (Open Spaces, Scenic and

1 Historic Areas, and Natural Resources) and its implementing
2 rules, OAR chapter 660, Division 16, Goal 11 (Public
3 Facilities and Services) and Goal 17 (Coastal Shorelands).¹⁴

4 With regard to Goal 5, petitioners contend there is
5 evidence in the record that the challenged decision affects
6 Goal 5 resources, including sensitive wildlife habitat and
7 groundwater. Petitioners argue that removing from the
8 affected area the protections afforded by Goal 18 to active
9 dune areas will have secondary effects on the county's
10 compliance with Goal 5. With regard to Goal 11, petitioners
11 argue there is evidence in the record from the local soil
12 and water conservation district and others concerning sewage
13 disposal and water quality problems in the area. Finally,
14 with regard to Goal 17, petitioners contend the county
15 should have addressed the factors in Goal 17 for identifying
16 shorelands, rather than assuming that if the affected area
17 is not active dunes it is not shorelands.

18 Respondents contend the county properly determined that
19 revision of a Goal 18 plan inventory map and corresponding
20 changes in beaches and dunes overlay zoning districts
21 involves only the application of Goal 18, and a slight
22 overlap with Goal 17. Respondents contend that even if
23 Goal 5 resources are located in the subject area, the

¹⁴Petitioners also allege county failure to demonstrate compliance with Goal 18. However, petitioners' arguments concerning compliance with Goal 18 are addressed under the preceding assignments of error.

1 challenged amendments would not alter the protection
2 afforded such resources under the Goal 5 planning process.
3 Respondents also argue that Goal 11 is obviously irrelevant
4 to the mapping of an active dune area. Respondents finally
5 argue that Goal 17 is applicable here only because it
6 identifies as coastal shorelands "areas of geologic
7 instability [which are] related to or will impact a coastal
8 water body."

9 Amendments to acknowledged comprehensive plans and land
10 use regulations are reviewable for compliance with the
11 statewide planning goals. 1000 Friends of Oregon v. Jackson
12 County, supra, 79 Or App at 97; Ludwick v. Yamhill County,
13 supra, 72 Or App at 231. The Court of Appeals has stated:

14 " * * * An amendment to one [plan] provision can
15 effect the way in which another provision operates
16 or affect the land uses upon which it operates,
17 and the new or changed operation of the unamended
18 provision may be inconsistent with the goals.
19 Those 'secondary effects' are goal compliance
20 problems, and they are as much the product of the
21 plan amendment as are any goal violations that the
22 amendment introduces into the provision which it
23 changes directly. * * *" (Emphasis in original.)
24 1000 Friends of Oregon v. Jackson County, supra,
25 79 Or App at 98.

26 Here, the adopted amendments to the active dune line
27 and construction setback line have the effect of allowing
28 development of structures to occur in an area where they
29 were heretofore prohibited. It is clear that such a change
30 could have secondary effects on Goal 5 or coastal shoreland
31 resources in the surrounding area, or on sewer and water

1 problems in the area. We, therefore, agree with petitioners
2 that the county improperly failed to demonstrate that the
3 adopted plan and land use regulation amendments comply with
4 Goals 5, 11 and 17.

5 The second assignment of error (Gray/Palmer) is
6 sustained.

7 **FIFTH ASSIGNMENT OF ERROR (GRAY/PALMER)**

8 "The decision amending the [zone map] to relocate
9 the [ADO, BDO and SO] district boundaries violates
10 [DUO] 5.412 because there is no substantial
11 evidence to support a finding that a demand exists
12 for the development of the uses listed in the
13 proposed zone at the proposed location, the change
14 does not comply with the Plan, and the Board [of
15 Commissioners] failed to address relevant evidence
16 that the revision would be detrimental to the
17 general interests of the community."

18 DUO 5.412 (Zone Change Criteria) provides:

19 "The governing body shall approve a
20 non-legislative^[15] zone designation change if it
21 finds compliance with * * * the following
22 additional criteria.

23 "(1) The amendment shall be consistent with the
24 Comprehensive Plan.

25 * * * * *

26 "(3) A demand exists for the development and uses
27 listed in the proposed zone at the proposed
28 location.

29 * * * * *

¹⁵The challenged decision recognizes that the adopted overlay district boundary changes are non-legislative in nature, and the parties do not dispute the county's characterization. Record 28, 32.

1 "(4) The revision will not be detrimental to the
2 general interests of the community."

3 With regard to (1), petitioners argue the zoning
4 district amendments are not consistent with the plan, for
5 the reasons stated supra with regard to the plan inventory
6 map amendment relocating the active dune line and the plan
7 map amendment relocating the construction setback line.
8 With regard to (3), petitioners contend there is no evidence
9 in the record of a demand for a destination resort in the
10 subject area. With regard to (4), petitioners argue the
11 county failed to address issues raised below concerning
12 impacts of the zoning changes on the community interest
13 (e.g., impacts on the Del Rey Beach Wayside and recreational
14 use of the ocean beaches adjacent to the subject property).

15 Respondents argue the county correctly concluded
16 DUO 5.412 does not apply to the relocation of overlay
17 district boundaries, because the relocation of the active
18 dune line automatically triggers corresponding overlay
19 district boundary relocations.¹⁶

20 In other words, respondents contend that DUO 5.412 is
21 inapplicable because under other provisions of the plan and
22 DUO establishing the nature and purpose of the ADO, BDO and
23 SO overlay districts, the application of these districts is
24 controlled by plan resource inventory maps identifying the

¹⁶Respondents also contend DUO 5.412(3) and (4) would be inapplicable in any case, as no specific development proposal is before the county.

1 location and physical characteristics of various types of
2 beaches and dunes and coastal shorelands resources.
3 Therefore, according to respondents, irrespective of the
4 requirements of DUO 5.412, it would be inconsistent with the
5 amended plan inventory map and plan map not to adopt the
6 challenged overlay district boundary amendments.

7 Our resolution of other assignments of error requires
8 that we remand the plan inventory map and plan map
9 amendments which respondents contend justify the challenged
10 overlay district boundary amendments and, therefore, we must
11 remand the overlay district amendments as well. However, we
12 agree with respondents' interpretation of DUO 5.412 as not
13 applying to overlay district boundary amendments which are
14 controlled by plan inventory maps identifying the location
15 and physical characteristics of certain types of resource
16 areas.

17 The fifth assignment of error (Gray/Palmer) is denied.

18 **SIXTH ASSIGNMENT OF ERROR (GRAY/PALMER)**

19 "The [challenged] decision was affected by a
20 legally impermissible criterion, namely, 'equity'
21 with adjacent property owners who were
22 beneficiaries of an exception granted in
23 recognition of pre-existing housing west of the
24 active dune line."

25 Petitioners argue that the Surf Pines development to
26 the north of the subject property was granted an exception
27 to Goal 18 because of pre-existing houses located west of
28 the 1978 active dune line. Petitioners contend comments

1 made by individual commissioners at the October 17, 1990
2 hearing indicated they believed that "equity" with Surf
3 Pines was an adequate justification for relocating the
4 active dune line on the subject property.

5 This Board has held on numerous occasions that the land
6 use decision reviewed in an appeal before LUBA is the final
7 written decision, not what individual parties, staff or
8 members of the decision making body may have stated during
9 the course of the proceedings below. Gruber v. Lincoln
10 County, 16 Or LUBA 456, 460 (1988); Bruck v. Clackamas
11 County, 15 Or LUBA 540, 542 (1987); Oatfield Ridge Residents
12 Rights v. Clackamas Co., 14 Or LUBA 766, 768-69 (1986);
13 Citadel Corporation v. Tillamook County, 9 Or LUBA 61, 67
14 (1983).

15 Here, the allegedly improper basis for amending the
16 active dune line is not included in the final, written
17 decision appealed to this Board.¹⁷ Petitioners' argument,
18 therefore, provides no basis for reversal or remand of the
19 county's decision.

20 The sixth assignment of error (Gray/Palmer) is denied.

21 The county's decision is remanded.

¹⁷We note the decision does discuss continuity with the existing building line for Surf Pines to the north and the construction setback line for The Highlands to the south, in the findings addressing the "existing upland development" factor for establishment of a construction setback line. Record 27, 315. However, petitioners do not argue that the location of these other lines on property to the north and south is irrelevant to the location of a construction setback line on the subject property.