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

OREGON SHORES CONSERVATION COALITION
and LANDWATCH LANE COUNTY,
Petitioners,

vs.

LANE COUNTY,
Respondent,

and

CITY OF FLORENCE
and GEORGE E. BYNON,
Intervenors-Respondent.

LUBA No. 2006-048

FINAL OPINION
AND ORDER

Appeal from Lane County.

James D. Brown, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Cascade Resources Advocacy Group.

Stephen L. Vorhes, Assistant County Counsel, Eugene, filed a joint response brief and argued on behalf of respondent.

Emily N. Jerome, Eugene, filed a joint response brief and represented intervenor-respondent City of Florence.

George E. Bynon, Florence, filed a joint response brief and argued on his own behalf.

BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

REMANDED

09/08/2006

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

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NATURE OF THE DECISION

Petitioners appeal a county decision that amends the county Coastal Resources Management Plan.

MOTION TO INTERVENE

The City of Florence (city) and George E. Bynon move to intervene on the side of respondent.¹ There is no opposition to the motions and they are granted.

FACTS

The Coastal Resources Management Plan (CRMP) is a “special purpose” plan jointly adopted by the county and city that in relevant part implements Statewide Planning Goal 16 (Estuarine Resources). Goal 16 generally provides for three types of estuarine management units: natural, conservation and development. For the Suislaw River estuary, the CRMP identifies a 95-acre area known as the “C” estuarine management unit along one bank of the river approximately one mile from the river mouth, and assigns it a “natural” estuarine designation.² As discussed below, the natural estuarine designation prohibits application of riprap to armor river banks except in limited circumstances. The challenged decision amends the CRMP to identify a 10 acre area of the “C” management unit as Sub-Area C-1 and redesignates that sub-area from Natural to Conservation. The intent of that amendment is to allow erosion control measures to be taken that may be inconsistent with the restrictions on placing riprap that apply in natural management units.

Sub-Area C-1 lies at the base of a bluff that has been steadily eroding since the 1930s, in part due to failure of a nearby jetty originally built in the 1890s that is no longer

¹ The county and intervenors-respondent filed a joint response brief. For brevity, we refer to those parties as “respondents.”

² The entire Suislaw estuary is designated as a shallow-draft development estuary. OAR 660-017-0015(3). The estuary includes a mix of natural, conservation, and development management units.

1 maintained. The bluff is within the City of Florence limits. In 1991, the city approved the
2 Shelter Cove residential subdivision on top of the bluff, between the estuary and
3 Rhododendron Drive. A number of homes were subsequently built within the subdivision.
4 In 1994, at the request of the Shelter Cove Homeowners Association, the city adopted map
5 and text amendments to the CRMP and the city comprehensive plan to redesignate Sub-Area
6 C-1 from natural to conservation. In May 2005, the City of Florence and the Shelter Cove
7 Homeowners Association applied to the county to co-adopt the CRMP amendments. The
8 county board of commissioners voted to approve the requested amendments. This appeal
9 followed.

10 **FIRST ASSIGNMENT OF ERROR**

11 Lane Code (LC) 16.400(6)(h)(iii)(aa) requires that amendments to the CRMP comply
12 with the applicable statewide planning goals. Goal 16 is:

13 "To recognize and protect the unique environmental, economic, and social
14 values of each estuary and associated wetlands; and

15 "To protect, maintain, where appropriate develop, and where appropriate
16 restore the long-term environmental, economic, and social values, diversity
17 and benefits of Oregon's estuaries."

18 Goal 16 requires that coastal comprehensive plans classify portions of estuaries into
19 three types of management units: natural, conservation and development. For each
20 management unit, Goal 16 sets out (1) a list of permitted uses and (2) conditionally allowed
21 uses subject to specified requirements. For natural units, Goal 16 lists as a permitted use
22 "riprap for protection of uses existing as of October 7, 1977," and a number of other uses that
23 are allowed "[w]here consistent with the resource capabilities of the area and the purposes of
24 this management unit[.]" For conservation units, the list of permitted uses includes all the
25 permitted and conditionally allowed uses in the natural units, with one exception not relevant
26 here. In addition, Goal 16 provides a list of uses conditionally allowed in conservation units
27 that are not allowed in natural units. The Goal 16 conservation unit description does not

1 specifically refer to riprap. A similar approach is employed for development units. In
2 development units Goal 16 allows all the permitted or conditionally allowed uses in the
3 natural and conservation units, as well as a number of additional uses not allowed in either
4 the natural or conservation units. The Goal 16 development unit description also does not
5 specifically refer to riprap.

6 OAR 660-017-0025 implements Goal 16 and provides in relevant part:

7 “(1)(a) Natural estuaries shall be managed to preserve the natural resources
8 and the dynamic natural processes. Those uses which would change,
9 alter, or destroy the natural resources and natural processes are not
10 permitted. Natural estuaries shall only be used for undeveloped, low
11 intensity, water-dependent recreation; and navigation aids such as
12 beacons and buoys; protection of habitat, nutrient, fish, wildlife, and
13 aesthetic resources; passive restoration measures, and where consistent
14 with the resource capabilities of the area and the purposes of
15 maintaining natural estuaries, aquaculture; communication facilities;
16 placement of low water bridges and active restoration measures.
17 Existing man-made features may be retained, maintained, and
18 protected where they occur in a natural estuary. Activities and uses,
19 such as waste discharge and structural changes, are prohibited. *Riprap*
20 *is not an allowable use, except that it may be allowed to a very limited*
21 *extent where necessary for erosion control to protect:*

22 “(A) *Uses existing as of October 7, 1977;*

23 “(B) Unique natural resource and historical and archeological
24 values, or;

25 “(C) Public facilities; and where consistent with the natural
26 management unit description in Goal #16 (and as deemed
27 appropriate by the permitting agency).

28 “* * * * *

29 “(2) Conservation estuaries shall be managed for long-term uses of
30 renewable resources that do not require major alterations of the
31 estuary. Permissible uses in conservation management units shall be
32 those allowed in section (1) of this rule; active restoration measures;
33 aquaculture; and communication facilities. *Where consistent with*
34 *resource capabilities of the management unit and the purposes of*
35 *maintaining conservation management units, high-intensity water-*
36 *dependent recreation; maintenance dredging of existing facilities;*
37 *minor navigational improvements; mining and mineral extraction;*

1 water dependent uses requiring occupation of water surface area by
2 means other than fill; bridge crossings; and *riprap shall also be*
3 *appropriate. * * ** (Emphases added.)

4 Thus, unlike the Goal 16 conservation unit description, OAR 660-017-0025(2)
5 specifically refers to “riprap,” and appears to allow riprap without the limitations imposed by
6 the Goal 16 natural unit description and OAR 660-017-0025(1)(a), subject only to findings
7 that the riprap is “consistent with resource capabilities of the management unit and the
8 purposes of maintaining conservation management units.” Consistent with OAR 660-017-
9 0025(2), the CRMP allows within conservation units “erosion control structures” subject
10 only to findings that such structures are consistent with resource capabilities and the purpose
11 of the conservation unit.

12 Petitioners argue that, properly understood, Goal 16 allows riprap in conservation
13 units but only subject to all the limitations imposed under the natural management unit. That
14 is, in petitioners’ view, when the Goal 16 conservation unit description lists as allowed uses
15 the uses listed in the natural unit description, that listing “carries forward” the restrictions
16 imposed under the natural management unit, including the provisions that allow riprap only
17 where necessary to protect uses existing on October 7, 1977, etc. According to petitioners,
18 because the express purpose of the challenged CRMP amendments is to allow for erosion
19 control measures to protect development that does not qualify for erosion control protection
20 under the natural management unit, the challenged amendments are therefore inconsistent
21 with Goal 16. Petitioners further argue that OAR 660-17-0025(2) is not intended to allow
22 uses more intensive than those listed for each management unit under Goal 16. To the
23 contrary, petitioners note that OAR 660-017-0025(1) states that “[n]o development or
24 alteration shall be more intensive than that specified in [Goal 16] as permissible uses for
25 comparable management units[.]” Thus, to the extent OAR 660-017-0025(2) purports to
26 allow riprap in conservation units without the natural management unit restrictions,
27 petitioners argue that the rule is inconsistent with the Goal.

1 Respondents argue generally that the challenged decision does not approve
2 application of riprap or any other erosion control measure; it simply adopts a plan
3 designation that will allow the landowners to seek future permits for an “erosion control
4 structure” free of the restrictions imposed under the natural management unit. According to
5 respondents, “[t]he analysis of any specific activity or development for compliance with Goal
6 16 must await an application requesting that review.” Response Brief 10. Respondents also
7 disagree with petitioners that the Goal 16 conservation unit description imposes the same
8 limitations on riprap and other erosion control structures that are imposed under the natural
9 unit description. Respondents contend that neither OAR 660-017-0025(2) nor the CRMP is
10 inconsistent with the Goal in allowing riprap in conservation units subject only to a finding
11 that such structures are consistent with resource capabilities and the purpose of the unit. In
12 any case, respondents argue, even if the CRMP is inconsistent with the goal in this respect,
13 the CRMP is acknowledged to comply with the goal and the rule, and nothing in the
14 challenged decision allows petitioners to challenge whether unamended CRMP provisions
15 listing uses allowed in the conservation unit comply with the goal.

16 It is not clear to us that a future permit for an erosion control structure would be
17 directly subject to review for compliance with Goal 16. Respondents do not cite any code or
18 CRMP provisions requiring that permits to construct erosion control structures comply with
19 the statewide planning goals. However, we agree with respondents that petitioners cannot in
20 the course of appealing a decision that redesignates estuarine waters to a conservation unit
21 challenge the fact that the CRMP allows riprap or erosion control structures in conservation
22 units without making such structures subject to the same limitations that govern in natural
23 units. Reduced to essentials, petitioners’ argument is that the existing CRMP provisions
24 governing riprap in conservation units are inconsistent with Goal 16. However, those CRMP
25 provisions are acknowledged to comply with Goal 16, and petitioners do not explain how

1 they can challenge those acknowledged CRMP provisions in the context of a decision that
2 simply switches one acknowledged Goal 16 unit designation for another.³

3 The first assignment of error is denied.

4 **SECOND ASSIGNMENT OF ERROR**

5 Goal 16 requires that coastal comprehensive plans:

6 “Consider and describe in the plan the potential cumulative impacts of the
7 alterations and development activities envisioned. Such a description may be
8 general but shall be based on the best available information and projections.”⁴

³ Although we need not and do not resolve petitioners’ arguments regarding the correct interpretation of OAR 660-017-0025(2), we tend to agree with respondents that the CRMP is consistent with OAR 660-017-0025(2) with respect to what standards apply to a proposal for riprap or erosion control structures in a conservation unit. The third sentence of OAR 660-017-0025(2) expressly allows riprap in conservation units subject only to the requirement for findings that the riprap is consistent with resource capabilities and the purpose of the management unit. Petitioners argue that those requirements are in addition to those imposed by OAR 660-017-0025(1)(a) with respect to natural units. However, OAR 660-017-0025(2) separately refers to the “permissible uses” listed in OAR 660-017-0025(1) and the conditional uses, including “riprap” that is allowed where “consistent with the resource capabilities of the management unit and the purposes of maintaining conservation management units[.]” There is no suggestion in OAR 660-017-0025(2) that any limitations that apply to the “permissible uses” listed in OAR 660-017-0025(1)(a) also apply to conditional uses separately listed in OAR 660-017-0025(2). Moreover, petitioners’ reading has the effect of making it more difficult to gain approval for riprap in conservation units than it would be for natural units. Under the Goal 16 natural unit description and OAR 660-017-0025(1)(a), riprap that complies with the stated limitations is not subject to any requirement for findings regarding consistency with resource capabilities, etc. Riprap under the Goal 16 conservation unit description and OAR 660-017-0025(2) *is* subject to those findings requirements. Under petitioners’ view, riprap in conservation units is subject to both sets of standards. Because the conservation unit generally allows more intensive development than the natural unit, it seems anomalous to impose more rigorous standards on riprap in conservation units than in natural units.

We also need not and do not address petitioners’ further argument that OAR 660-017-0025(2) is inconsistent with Goal 16. Again, however, we tend to agree with respondents that there is no inconsistency. While Goal 16 is admittedly less than clear regarding what standards apply to riprap in conservation (and development) units, the Land Conservation and Development Commission (LCDC) promulgated both the goal and the rule, and presumably understands what uses are allowed by the goal. As OAR 660-017-0025(1) indicates, LCDC clearly believed that the uses allowed under the rule are not more intensive than those allowed under the goal.

⁴ Goal 16 lists the following requirements for coastal comprehensive plans:

“Based upon inventories, the limits imposed by the overall Oregon Estuary Classification, and needs identified in the planning process, comprehensive plans for coastal areas shall:

“1. Identify each estuarine area:

“2. Describe and maintain the diversity of important and unique environmental, economic and social features within the estuary;

1 The challenged decision states that “[t]he proposed change is to allow for
2 examination of the site for erosion control that could reduce loss of the bank * * *” Record
3 21. The county’s findings characterize riprap and other structural solutions as being
4 preferable to and more effective than nonstructural solutions. Record 20. Petitioners argue
5 that the county failed to consider the “potential cumulative impacts of the alterations and
6 development activities envisioned” by the challenged plan amendment. Petitioners cite to
7 testimony from the National Marine Fisheries Service (NMFS) that the cumulative impacts
8 of armoring Sub-Area C-1 combined with existing erosion control structures along the river
9 could be harmful to habitat. Record 266-67. According to petitioners, NMFS recommended
10 that the county develop a comprehensive strategy to address current and future erosion
11 issues.

12 Respondents cite to evidence suggesting that the net impact of installing an erosion
13 control structure in Sub-Area C-1 would be ecologically beneficial, but respondents do not
14 cite to any findings, much less comprehensive plan language, indicating that the county
15 considered the “potential cumulative impacts of the alterations and development activities
16 envisioned” by the plan amendment. Respondents do not argue that the Goal 16
17 “Comprehensive Plan Requirements” are inapplicable to the challenged plan amendments.
18 However, we understand respondents to argue that it is unclear at this point whether any
19 erosion control structure or other solutions will be applied for and approved, and that the

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- “3. Classify the estuary into management units; and
 - “4. Establish policies and use priorities for each management unit using the standards and procedures set forth below.
 - “5. Consider and describe in the plan the potential cumulative impacts of the alterations and development activities envisioned. Such a description may be general but shall be based on the best available information and projections.”

1 exact nature of any such structure or solution is unknown.⁵ While that may be true, Goal 16
2 goes on to specify that the cumulative impacts analysis “may be general but shall be based on
3 the best available information and projections.” Apparently there is a considerable body of
4 evidence in the record discussing potential erosion control solutions and likely consequences.
5 Respondents offer no reason why the county cannot rely on that evidence and other
6 necessary evidence to conduct a “general” cumulative impacts analysis. It may be that the
7 cumulative impacts of likely measures taken to reduce erosion in Sub-Area C-1 may be
8 negligible; nonetheless, Goal 16 requires that they be considered and the results of that
9 consideration included in the comprehensive plan, in this case the CRMP.

10 The second assignment of error is sustained.

11 **THIRD ASSIGNMENT OF ERROR**

12 The county may initiate amendments to the CRMP or applicants may request an
13 amendment. When applicants request an amendment, LC 16.400(9) provides:

14 “Requests must set forth compelling reasons as to why the amendment should
15 be considered at this time, rather than in conjunction with a periodic Plan
16 update.”

17 Petitioners argue that the applicant, the residential subdivision homeowners’
18 association, failed to provide “compelling reasons” to consider the CRMP amendment.
19 According to petitioners, because the county failed to adopt findings stating that the
20 applicant had set out compelling reasons it was error for the county to even consider the
21 proposed amendment.

22 Respondents argue that LC 16.400(9) is not an approval criterion or a provision that
23 requires a specific finding of compliance. According to respondents, LC 16.400(9) is
24 designed to assist the planning commission in determining whether an applicant-initiated

⁵ Respondents also emphasize that any particular erosion control structure applied for will be subject to permit requirements under various federal, state and local regulations. However, respondents do not indicate that such standards require evaluation of the “potential cumulative impacts of the alterations and development activities envisioned” by this plan amendment.

1 plan amendment should be considered as an individual matter, or whether the county should
2 wait and consider the proposed amendment as part of periodic review. Respondents argue
3 that the planning commission clearly felt that immediate action was required, given the stated
4 need to protect the existing subdivision from erosion.

5 We tend to agree with respondents that LC 16.400(9) is not an applicable approval
6 criterion or a provision that requires a particular finding. It is, at best, an application
7 requirement intended to assist the county in deciding how to proceed on the application. The
8 county clearly made a choice to proceed immediately rather than wait for periodic review,
9 based on the information provided in the application. Petitioners do not dispute that
10 evidence that the bluff below the residential subdivision is eroding and could lead to the
11 subdivision falling into the river is a “compelling reason” for purposes of LC 16.400(9). The
12 county’s failure to make findings regarding LC 16.400(9) is harmless error, if it is error at
13 all.

14 The third assignment of error is denied.

15 **FOURTH ASSIGNMENT OF ERROR**

16 Petitioners argue that several findings are not supported by substantial evidence.⁶

17 **A. LC 16.400(6)(h)**

18 Under LC 16.400(6)(h)(iii)(bb), in order to approve a comprehensive plan
19 amendment, the county must find that the amendment is one of the following:

⁶ As a review body, we are authorized to reverse or remand the challenged decision if it is “not supported by substantial evidence in the whole record.” ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff’d* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must consider and weigh all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker’s conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

1 “(i-i) necessary to correct an identified error in the application of the Plan;
2 or

3 “(ii-ii) necessary to fulfill an identified public or community need for the
4 intended result of the * * * amendment; or

5 “* * * *”

6 The county found that both subsections were satisfied:

7 “The proposed amendments are necessary to correct an error in the
8 application of the Plan Designation that has changed over time. There is an
9 identified community need to slow, and eliminate if possible, the erosion of
10 the riverbank to protect property. Corrective actions may also improve the
11 quality of the degraded habitat.” Record 17.

12 The county interpreted “identified error” to mean not only that the CRMP was
13 erroneous when first implemented, but also to encompass changed circumstances where the
14 CRMP is no longer accurate. Under *Church v. Grant County*, 187 Or App 518, 524, 69 P3d
15 759 (2003) and ORS 197.829(1), we may overturn a local government’s interpretation of its
16 own ordinances only if that interpretation is inconsistent with the express language, purpose,
17 or policy of the ordinance.⁷ The county’s interpretation is not inconsistent with the express
18 language, purpose, or policy of the ordinance. There is also substantial evidence to support
19 the county’s decision that circumstances have changed since the CRMP was implemented.

20 The county found in the alternative that preventing erosion of the banks below the
21 bluff was necessary to fulfill an identified public or community need. Petitioners argue that

⁷ ORS 197.829(1) provides, in relevant part:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]”

1 because, as the county repeatedly emphasizes, the decision does not itself approve any riprap,
2 the decision does not “fulfill” an identified community need. Although the decision itself
3 does not approve riprap or other erosion control measures, it lays the groundwork for
4 installation of such measures, which the county believed to be “necessary to fulfill an
5 identified public or community need.” We agree with respondents that the county’s findings
6 demonstrate that both (i-i) and (ii-ii) are met, either of which is sufficient to satisfy LC
7 16.400(6)(h).

8 **B. Protection of Clam Beds**

9 One of the county’s reasons for finding that the natural designation no longer is
10 appropriate for Sub-Area C-1 is because clam beds in that area are no longer productive.

11 “Evidence presented, both at the hearing and in the record of the city
12 approval, shows that the CRMP designation of ‘Natural’ for [MU] C-1 was
13 largely based on the need to protect the existence of Pittock clam beds. As the
14 ‘inner’ jetty failed, allowing the riverbank to collapse, the resulting sand
15 covered the clam beds to the point they are no longer productive. The loss of
16 this habitat no longer warrants the ‘Natural’ designation of this part of the
17 [MU] and accommodates the change to ‘Conservation’.” Record 15.

18 Petitioners dispute the finding that CRMP “Natural” designation for the Sub-Area C-
19 1 portion of management unit C was “largely based” on the need to protect clam beds.
20 According to petitioners, the designation included other reasons based on other
21 characteristics, and the description notes that the clam beds are located “predominantly
22 outside of the jetty,” not in the Sub-Area C-1 area.

23 Petitioners are correct that the management unit C designation lists six rationales for
24 the natural designation for that unit, only one of which refers to the clam beds. Presumably,
25 not all of those rationales apply to the Sub-Area C-1 portion of management unit C, and
26 petitioners do not identify what other rationales might apply to that portion. The basic
27 rationale for designating Sub-Area C-1 conservation is that whatever clam beds existed in
28 that portion have been smothered by eroding sand. While there is conflicting evidence on the
29 remaining habitat value of Sub-Area C-1, a reasonable person could conclude, as the county

1 did, that the reduction in habitat value in Sub-Area C-1 warrants redesignation of that area to
2 conservation.

3 **C. Effects on Adjacent Areas**

4 The county’s decision adds language to the CRMP stating that more productive
5 estuary areas would be buffered by the “moderate” designation of Sub-Area C-1, as an
6 apparent justification for redesignating that area from a natural to a conservation unit:

7 “The sensitivity of the more productive adjacent estuary is buffered by the
8 moderate designation of this estuary management unit.” Record 12.

9 Petitioners argue that this statement is an apparent attempt to address concerns raised below
10 regarding the cumulative impact of installing erosion control structures in Sub-Area C-1,
11 including testimony that such structures would likely push the erosion problem to another
12 location on the river. According to petitioners, there is no evidence supporting the above
13 statement that designating Sub-Area C-1 conservation will “buffer” more productive areas of
14 the estuary, and all the evidence is to the contrary.

15 The decision itself does not cite any evidence in support of the above text, or explain
16 how the conservation designation “buffers” more productive parts of the estuary.
17 Respondents do not specifically respond to this sub-assignment of error or cite to evidence
18 supporting that statement. While it is not clear what role the above-quoted text plays in the
19 county’s justification, it appears that it may relate in part to the issue of cumulative impacts
20 that must be considered under Goal 16, discussed under the second assignment of error.
21 Accordingly, remand is warranted under this sub-assignment of error to identify evidence
22 supporting the above-quoted text, and/or adopt findings explaining what role that text plays
23 in justifying the redesignation and the role, if any, the text plays in the county’s cumulative
24 impacts analysis.

25 This sub-assignment of error is sustained

26 The fourth assignment of error is sustained in part and denied in part.

1 The county's decision is remanded.