

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,<sup>1</sup> which would

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<sup>1</sup>Maps 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).<sup>2</sup>

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").<sup>3</sup>  
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

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<sup>2</sup>It 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.

<sup>3</sup>In 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.<sup>4</sup>

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

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<sup>4</sup>In 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;<sup>5</sup>  
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.<sup>6</sup>

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<sup>5</sup>Thus, 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.

<sup>6</sup>The 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),<sup>7</sup>] 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

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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.

<sup>7</sup>Subsection (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.<sup>8</sup> 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

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<sup>8</sup>Arguably, 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."<sup>9</sup>

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

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<sup>9</sup>Open 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,<sup>10</sup> 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:

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<sup>10</sup>Petitioners 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.<sup>11</sup> 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

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<sup>11</sup>Petitioners 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.<sup>12</sup> 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

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<sup>12</sup>Respondents 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.<sup>13</sup>

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

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<sup>13</sup>We 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).<sup>14</sup>

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

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<sup>14</sup>Petitioners 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<sup>[15]</sup> 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 "\* \* \* \* \*

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<sup>15</sup>The 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.<sup>16</sup>

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

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<sup>16</sup>Respondents 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.<sup>17</sup> 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.

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<sup>17</sup>We 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.