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

SAVE OREGON'S CAPE KIWANDA ORGANIZATION,
CAROLYN GERMANE and JOHN L. TENNY,
Petitioners,

vs.

TILLAMOOK COUNTY,
Respondent,

and

NESTUCCA RIDGE DEVELOPMENT, INC.,
Intervenor-Respondent.

LUBA No. 2001-021

FINAL OPINION
AND ORDER

Appeal from Tillamook County.

Christine M. Cook, Portland, filed the petition for review and argued on behalf of petitioners.

No appearance by Tillamook County.

Jeannette M. Launer, Pacific City, and Michael C. Robinson, Portland, filed the response brief. With them on the brief was Stoel Rives, LLP. Jeannette M. Launer argued on behalf of intervenor-respondent.

BRIGGS, Board Chair, and BASSHAM, Board Member, participated in the decision.

AFFIRMED

06/08/2001

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

NATURE OF THE DECISION

Petitioners challenge a county decision to approve a conditional use permit for a commercial development on a coastal foredune.

MOTION TO INTERVENE

Nestucca Ridge Development, Inc. (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

The subject property is comprised of two tax lots, tax lot 1500 and tax lot 1501. The property forms a roughly crescent-shaped parcel fronting the Pacific Ocean. The property is located approximately one mile north of the unincorporated community of Pacific City, immediately north of a county parking lot and the Pacific City dory fleet boat launch. Tax lot 1501 curves to the west and north of tax lot 1500, and faces the Pacific Ocean. Tax lot 1501 contains approximately 1.9 acres. To the north of tax lot 1501 is Cape Kiwanda State Park. Tax lot 1500 borders the county parking lot and contains approximately 2.3 acres. Cape Kiwanda Drive (a portion of the Three Capes Scenic Loop) borders tax lot 1500 to the east.

The subject property contains four major topographic features. The first feature is riprap that parallels the shore and straddles much of the subject property's western boundary line. The riprap was constructed around 1970, pursuant to a Beach Development on Ocean Shores permit. Record 340-341. The second feature is a gently sloping area from the beach up to a topographic bench. The third feature, the bench, is located in the center of the subject property, and is the major focus of the proposed development on the property.¹ The fourth feature is a steep slope that forms the eastern boundary of tax lot 1501 and the northern boundary of tax lot 1500.

¹Apparently, the benched area was constructed by excavation prior to 1967. Record 1386.

1 The subject property is zoned commercial (C-1). In 1996, the county approved a
2 conditional use permit for a hotel facility to be developed in two phases on tax lot 1500 and
3 on another tax lot located to the east of the subject property, across Cape Kiwanda Drive.
4 Phase I has been developed on the eastern tax lot. In 2000, intervenor applied to modify its
5 conditional use permit to allow it to reconfigure the Phase II site plan and to develop hotel
6 facilities on tax lot 1501 as an additional phase.

7 The development required three decisions by the county: (1) approval of the modified
8 conditional use permit for the hotel; (2) a determination of the development's oceanfront
9 setback line (OSL); and (3) a review and approval of a geologic hazard report. The county
10 planning commission approved the modification, determined that the ocean setback should
11 be 60 feet from the Oregon Coordinate Line (OCL), and approved the geologic hazard
12 report.² Petitioners, among others, appealed the planning commission's decision to the board
13 of county commissioners. The board of county commissioners denied the appeal and
14 affirmed the planning commission's decision, with some minor revisions. This appeal
15 followed.

16 **FIRST ASSIGNMENT OF ERROR**

17 **A. Introduction**

18 A key issue under this assignment of error is the proper classification of the sand
19 formation underlying the subject property. One major difficulty in this appeal is that the
20 parties and the decision use a number of imprecisely defined and overlapping terms. Those
21 terms have their source in Statewide Planning Goal 18 (Beaches and Dunes), in the
22 definitions for the statewide planning goals, and in county comprehensive plan and code
23 provisions implementing Goal 18. Goal 18, Implementation Requirements 1 and 2 (IR 1 and
24 2) provide:

²The OCL is the boundary line between public and private ownership on Oregon beaches. In this case, the OCL forms the western boundary of the subject property.

1 “(1) Local governments * * * shall base decisions on plans, ordinances and
2 land use actions in beach and dune areas, other than older stabilized
3 dunes, on specific findings that shall include at least:

4 “(a) The type of use proposed and the adverse effects it might have
5 on the site and adjacent areas;

6 “(b) Temporary and permanent stabilization programs and the
7 planned maintenance of new and existing vegetation;

8 “(c) Methods for protecting the surrounding area from any adverse
9 effects of the development; and

10 “(d) Hazards to life, public and private property, and the natural
11 environment which may be caused by the proposed use.

12 “(2) Local governments * * * shall prohibit residential developments and
13 commercial and industrial buildings on beaches, active foredunes
14 [and] on other foredunes which are conditionally stable and that are
15 subject to ocean undercutting or wave overtopping * * *.”

16 Tillamook County Land Use Ordinance (LUO) 3.085 implements IR 1 and 2 by
17 imposing a Beach and Dune Overlay (BDO) zone. The BDO zone permits:

18 “Residential, commercial and industrial development * * * only in areas
19 classified as stabilized foredune or conditionally stable foredune not subject to
20 ocean undercutting or wave overtopping, or in areas when an exception has
21 been taken to the prohibitions contained in Goal 18 [IR 2].” LUO
22 3.085(4)(A)(1)(a).

23 Thus, the proposed development is allowed on the subject property only if it is in an
24 area “classified as stabilized foredune or conditionally stable foredune not subject to ocean
25 undercutting or wave overtopping.” *Id.* The county’s key finding in this case is that the “site
26 [is composed of] younger stabilized dunes, not subject to wave undercutting or overtopping.”
27 Record 35. Petitioners challenge that finding on two grounds, arguing that (1) the county
28 erred in classifying the entire subject property as “younger stabilized dunes”; and (2) the
29 county erred in determining that the subject property is not subject to ocean undercutting and
30 wave overtopping. Before turning to those arguments, we first attempt to reduce some
31 terminological confusion.

1 First, the parties agree that the sand formation underlying the subject property is a
2 foredune.³ The relevant definitions in the goals definitions appear to make some distinction
3 between dunes and foredunes, although there are also umbrella terms that cover both types.⁴
4 No party argues that any distinction between dunes and foredunes plays a legally significant
5 role in this case. We follow the parties, the decision, and much of the evidence in the record
6 in according no significance to that distinction.

7 Second, the goals definitions classify both dunes and foredunes according to whether
8 and the extent to which they are stabilized with respect to accretion and erosion, particularly
9 wind erosion. The degree of stability turns generally on the extent to which soils and

³The goals definitions define “dune” as a “hill or ridge of sand built up by the wind along sandy coasts,” but do not define “foredune.” As far as we can tell, a “foredune” is a type of dune that is located at the landward margin of a beach.

⁴The goals definitions include the following relevant definitions:

“**DUNE, CONDITIONALLY STABLE.** A dune presently in a stable condition, but vulnerable to becoming active due to fragile vegetative cover.”

“**DUNE, OLDER STABILIZED.** A dune that is stable from wind erosion, and that has significant soil development and that may include diverse forest cover. They include older foredunes.”

“**DUNE, RECENTLY STABILIZED.** A dune with sufficient vegetation to be stabilized from wind erosion, but with little, if any, development of soil or cohesion of the sand under the vegetation. Recently stabilized dunes include conditionally stable foredunes, conditionally stable dunes, dune complexes, and younger stabilized dunes.”

“**DUNES, YOUNGER STABILIZED.** A wind-stable dune with weakly developed soils and vegetation.”

“**FOREDUNE, ACTIVE.** An unstable barrier ridge of sand paralleling the beach and subject to wind erosion, water erosion, and growth from new sand deposits. Active foredunes may include areas with beach grass, and occur in sand spits and at river mouths as well as elsewhere.”

“**FOREDUNE, CONDITIONALLY STABLE.** An active foredune that has ceased growing in height and that has become conditionally stable with regard to wind erosion.”

“**FOREDUNE, OLDER.** A conditionally stable foredune that has become wind stabilized by diverse vegetation and soil development.” *Oregon’s Statewide Planning Goals*, Definitions 40.

1 vegetation have been established on the dune or foredune. The goals definitions appear to
2 recognize three degrees or types of stabilized dune or foredune, in order of increasing
3 stability: conditionally stable, younger stabilized and older stabilized. However, the
4 Tillamook County Comprehensive Plan (TCCP) adopts a slightly different reference scheme
5 based on U.S.D.A. Natural Resources Conservation Service (NRCS) definitions. The TCCP
6 provides a table where the goals definitions are paired with their NRCS synonyms. In
7 relevant part, the TCCP uses the terms “recently stabilized foredune” to refer to a
8 conditionally stable foredune, and “open dune sand conditionally stable” for a conditionally
9 stable dune. The TCCP and the goals definitions have the same reference with respect to
10 younger and older stabilized dunes. One potentially confusing difference between the two
11 schemes of reference is that under the goals definitions “recently stabilized dune” is an
12 umbrella term covering conditionally stable dunes, conditionally stable foredunes, and
13 younger stabilized dunes. Under the TCCP, there are no such umbrella terms, and the phrase
14 “recently stabilized” is applied only to conditionally stable foredunes. With that clarification,
15 we turn to the parties’ arguments.

16 **B. Classification of the Subject Property**

17 Petitioners first argue that the county erred in determining that the entire subject
18 property is properly classified as “younger stabilized dune.” Petitioners contend that the
19 evidence in the record establishes that, at best, only part of the subject property is classifiable
20 as “younger stabilized dune.” According to petitioners, the bench area is more properly
21 classified as “open dune sand conditionally stable,” while the portion of the property on the
22 lower slope above the riprap is an active dune or “open dune sand.” Petitioners argue that the
23 county failed to demarcate clearly where these different classifications exist on the subject
24 property, with the result that the county has no basis to conclude that development prohibited
25 by LUO 3.085, *i.e.*, on active or “open dune sand,” would not occur.

1 Intervenor responds that the county did not find, as petitioners allege, that the entire
2 property is classified as “younger stabilized dune.” Instead, intervenor points out, the county
3 found that the “site” is classified as “younger stabilized dunes.” Record 35. Intervenor
4 contends that the county’s determination is limited to the site where development is
5 proposed, that is, on the bench area 60 feet landward of the OCL. According to intervenor,
6 substantial evidence in the record supports the county’s determination that the “site” is
7 properly classified either as younger or conditionally stable dune on which development is
8 permitted under LUO 3.085. Intervenor cites to the following testimony from intervenor’s
9 expert, Dr. John Marra:

10 “[Marra]: To summarize it briefly, as you start to come up off the beach
11 you’ve got open sand with no vegetation, little bit of driftwood, you come up
12 over the bank and you’ve got primarily European Beach Grass with a little bit
13 of other, minor, secondary species, and then relatively quickly you get into a
14 full-fledged, let’s see, I’ve got American Dune Grass and Sea Rocket were on
15 the other piece but up above that is, you get onto *the benched area* where
16 there’s European Beach Grass, American Dune Grass, secondary species,
17 Sitka Spruce, Scotch Broom, Evergreen, Huckleberry, Fir, beach species
18 Shorepine, Tree Lupine, Coast Strawberry. So if you look, O.K., so primarily
19 were talking about vegetation cover that makes the determination of what the
20 dune type is. *And if we look at these definitions, it’s the sand in the recently*
21 *stabilized dune classification.* O.K., it’s a sand dune presently in a wind-stable
22 condition but vegetated by fragile plantings. It’s somewhere between there
23 and a definition, a little bit better definition of the younger stabilized dune is a
24 youthful wind-stabilized dune as weakly developed sandy soils of little or no
25 development of cemented nodules. Vegetation on this land coordinates native
26 grass, European Beach Grass, shrubs such as Scotch Broom, Tree Lupine,
27 Shorepine, and Red Alder characterize it. *So, based on what’s on there, it’s*
28 *primarily younger stabilized dune.*

29 “[Commissioner]: And then, that meets the criteria allowed?

30 “[Marra:] *And that kicks it over to a younger stabilized dune.* It falls into this
31 general category.

32 “[Commissioner:] So [to answer] my question[;]

33 “[Marra]: I would call it this one, *I would call it open dune sand conditionally*
34 *stable based on the definition there.*” Petition for Review App 50 (emphasis
35 added).

1 Intervenor is correct that the county limited its determination to the “site” rather than
2 the entire subject property. To the extent petitioners suggest that either LUO 3.085 or Goal
3 18 requires the county to evaluate the character of the entire subject property, or the entire
4 foredune underlying the subject property and others, we reject the suggestion. LUO 3.085
5 requires that the county allow development “only in areas” classified as stabilized or
6 conditionally stable. The “area” the county considered was the benched area on the subject
7 property on which development is proposed. Petitioners have not demonstrated that either
8 LUO 3.085 or Goal 18 requires a more expansive evaluation. As the evidence in this case
9 illustrates, dune formations can encompass a wide geographic area and have multiple
10 characteristics. Petitioners’ view of the pertinent scope of consideration would require that
11 the county prohibit development on even older stabilized areas of a foredune, merely because
12 another area of the foredune is in an active condition, or subject to ocean undercutting or
13 wave overtopping. While that view of Goal 18 is not implausible, we see nothing in Goal 18
14 that supports, much less compels, that interpretation.

15 We also agree with intervenor that substantial evidence supports the county’s key
16 disputed finding.⁵ Fairly read, the above-quoted testimony establishes that the benched area
17 on which development is proposed is either (1) younger stabilized dune or (2) conditionally
18 stable (*i.e.*, “recently stabilized” or “open dune sand conditionally stable”), or both. Nothing
19 in that testimony, or other evidence cited by petitioners, indicates that the benched area on
20 which development is proposed can be classified as an active foredune or “open dune sand.”

⁵As 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); *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 Although the county’s decision does not demarcate the portions of the benched area that are
2 classified as “younger stabilized dune” from those classified as “conditionally stable,”
3 petitioners have not demonstrated that failure to do so could result in development on
4 portions of the subject property on which development is prohibited, *i.e.*, on portions
5 classifiable as active foredune or “open dune sand.” Development in areas classified as either
6 “younger stabilized dune” or “conditionally stable” is permitted, provided that the area is not
7 subject to ocean undercutting or wave overtopping. We turn to petitioners’ challenges to the
8 county’s findings regarding ocean undercutting and wave overtopping.

9 **C. Ocean Undercutting or Wave Overtopping**

10 Petitioners contend that the county’s finding that the site is not subject to ocean
11 undercutting or wave overtopping is not supported by substantial evidence.⁶ The lynchpin of
12 the evidence supporting the county’s finding on this point is the presence of the riprap along
13 the western boundary of the property. Intervenor’s experts testified that the riprap will
14 effectively fix the position of the shoreline, and the potential landward extent of ocean
15 undercutting will be minimal, assuming that the riprap is repaired if it is damaged during
16 storm events. Petitioners argue that that testimony is inconsistent with other evidence in the
17 record, including earlier studies conducted by the same experts. Further, petitioners argue
18 that intervenor’s evidence assumes, without justification, that if the riprap is damaged during
19 storm events it would be repaired in a manner or within a time frame that would prevent any
20 undercutting and retreat of the dune.

21 We agree with intervenor that substantial evidence supports the county’s findings on
22 this point. The choice between conflicting evidence is up to the county, as long as a
23 reasonable person could reach the decision the county does, considering the evidence in the

⁶Although the parties do not cite any pertinent definitions to us, we understand “wave overtopping” to mean wave action that hits the top of a dune and pulls sand and vegetation from the dune, and “ocean undercutting” to mean wave action that hits the bottom of a dune, undermining the stability of the dune by eroding its base.

1 record as a whole. *Angel v. City of Portland*, 22 Or LUBA 649, 659, *aff'd* 113 Or App 169,
2 831 P2d 77 (1992); *Wissusik v. Yamhill County*, 20 Or LUBA 246, 260 (1990). Based on the
3 evidence in the record as a whole, a reasonable person could conclude that the riprap is
4 adequate to ensure compliance with LUO 3.085. Further, petitioners cite no basis to question
5 the assumption that intervenor can and will make timely repairs to the riprap if it is damaged,
6 and we see no evidentiary defect in that regard.

7 The first assignment of error is denied.

8 **SECOND ASSIGNMENT OF ERROR**

9 Under the LUO, the location of oceanfront structures is set by the OSL. The process
10 for establishing the OSL is set out at LUO 3.085(4)(A), which generally is keyed to the
11 location of existing buildings within 300 feet of a proposed development.⁷ In the present

⁷LUO 3.085(4)(A)(1)(c) provides, in relevant part:

“Oceanfront structures shall be located in a manner which aligns development parallel to the Oregon Coordinate Line [(OCL)] as much as possible, consistent with the purpose of this zone.

“(1) The * * * OSL determines how close to the ocean any structure other than an approved structure for oceanfront protection or stabilization or for beach access may be located, subject to any additional setback necessary to meet site-specific hazard concerns.

“The OSL is landward of the crest of the active foredune and is approximately parallel to the [OCL]. In all cases, the OSL is measured from the most oceanward point of a structure which is higher than three feet from existing grade.

“The exact location of the OSL depends on the location of oceanfront buildings near the proposed structure and upon the location and orientation of the [OCL]. For purposes of determining the OSL, ‘Building’ shall be limited to a permanent residential, commercial or industrial structure attached to a fixed foundation, and located within 500 feet of the [OCL].

“(a) If there are legally constructed buildings within 300 feet of the exterior boundary of the subject property to both the north and the south, the OSL is a line drawn between the most oceanward point of any legally constructed portion of the nearest building to the north and the nearest building to the south.

1 case, there are no buildings located within 300 feet to the north or south of tax lot 1501. The
2 two nearest structures are located between 400 and 500 feet south of the subject property. If
3 the county had based the OSL on these buildings, as provided for by LUO
4 3.085(4)(A)(1)(c)(1)(c), the minimum setback line would be 105 feet. Instead, as allowed by
5 LUO 3.085(4)(A)(1)(c)(2), the county established the setback line at 60 feet from the OCL.
6 Petitioners contend that in finding that the 105-foot standard setback line is “unreasonable
7 and inequitable,” the county misconstrued LUO 3.085(4)(A)(1)(c) because intervenor
8 purchased the subject property in 1995, well after the OSL ordinance was adopted.

9 Petitioners also contend that the finding that 60 feet is an appropriate distance
10 violates LUO 3.085(4)(A)(1)(c)(3) because the evidence in the record establishes that the
11 subject property is subject to dune retreat resulting from wave attack during severe storms,

“(b) If there are legally constructed buildings within 300 feet to the north only or to the south only, the OSL is the average setback from the [OCL] of all such buildings.

“(c) If there are no legally constructed buildings within 300 feet to either the north or south on oceanfront lots, the OSL is the average oceanfront setback from the [OCL] of the nearest two * * * existing buildings.

“(2) In cases where the above method of OSL determination requires development to be set back further from the Beach Zone line than is required by geologic hazards or protection of the ocean view of existing development on oceanfront property, the Planning Director may determine the setback distance which will apply. The intent of this provision is to limit this application of the Director’s discretion to those rare and unusual circumstances where the above method of determining the OSL produces an unreasonable and inequitable result. In such instances, a public meeting for purposes of discussing the proposed setback shall be held and recorded. Notice shall be given to surrounding property owners and persons requesting notice pursuant to [LUO 10.040].

“* * * * *

“(3) Notwithstanding the above provisions, the Planning Director shall require a greater setback from the ocean where there is evidence of significant coastal, environmental, or geologic hazards as determined by a Dune Hazard Report * * * or other information available to the Department. In making this determination, the Hazard Report and the Director shall take into account evidence of recent, active beach erosion and whether the proposed development has been designed to adequately minimize and mitigate for any adverse environmental effects to the fullest extent required by law.”

1 and that the 60-foot setback is insufficient to ensure that structures will not be undermined or
2 destroyed as a result.

3 Intervenor responds that the county interpreted its ordinance to allow a modification
4 of the setback line in these circumstances, where the calculated setback of 105 feet would cut
5 into the steep slope of the eastern dune, resulting in unnecessary slope disturbance and a
6 greater likelihood of disturbance to neighboring properties at the top of the slope. Further,
7 intervenor cites to findings where the county found that the 105-foot setback was contrary to
8 intervenor's investment-back expectation, which was to develop commercially-zoned
9 property for commercial purposes. Finally, intervenor argues that the county found that,
10 whatever hazard from wave action may exist on the property, a 60-foot setback is a sufficient
11 buffer, as the riprap on the property will prevent major wave action from affecting the
12 property. Intervenor argues that these conclusions form a reasonable interpretation of what is
13 needed to satisfy LUO 3.085(4)(A)(1)(c), that interpretation is not clearly wrong and,
14 therefore, we must defer to it.

15 This Board is required to defer to a local governing body's interpretation of its own
16 enactment, unless that interpretation is contrary to the express words, purpose or policy of
17 the local enactment or to a state statute, statewide planning goal or administrative rule that
18 the local enactment implements. ORS 197.829(1); *Gage v. City of Portland*, 319 Or 308,
19 316-17, 877 P2d 1187 (1994); *Clark v. Jackson County*, 313 Or 508, 514-15, 836 P2d 710
20 (1992). This means we must defer to a local government's interpretation of its own
21 enactments, unless that interpretation is "clearly wrong." *Reeves v. Yamhill County*, 132
22 Or App 263, 269, 888 P2d 79 (1995); *Goose Hollow Foothills League v. City of Portland*,
23 117 Or App 211, 217, 843 P2d 992 (1992).

24 Here, the county interpreted its code provisions to allow for development within a
25 modified setback when it is established that (1) the greater setback will cause greater impacts
26 on upland development; (2) the development will satisfy reasonable investment-backed

1 expectations for the property as zoned; and (3) the development will not be located within an
2 area susceptible to geologic hazards. We agree with intervenor that the county's
3 interpretation of its code provision is not clearly wrong and, therefore, we must defer to it.
4 We also agree with intervenor that there is substantial evidence in the record to support the
5 county's finding that 3.085(4)(A)(1)(c) is satisfied.

6 The second assignment of error is denied.

7 **THIRD ASSIGNMENT OF ERROR**

8 LUO 4.070(6)(a) requires that geologic hazard assessments comply with certain
9 informational standards. In particular, LUO 4.070(6)(a)(3) requires that the hazard
10 assessment include a discussion of the "orientation of bedding planes in relation to the dip of
11 the surface slope."

12 Petitioners argue that intervenor's Geologic Hazard Assessment does not include
13 information regarding the orientation of bedding planes, and therefore the assessment is
14 deficient, and cannot form a basis for determining that development on the subject property
15 is appropriate.

16 Intervenor argues, and we agree, that LUO 4.070(6) is an informational requirement.
17 LUO 3.085(4)(A)(1)(b) and 3.085(5)(B)(3)(c) permit the county to deny or restrict
18 development in areas where hazardous conditions will be created or exacerbated. The
19 county's decision may be based on the contents of the geologic hazard assessment "and any
20 other information." LUO 3.085(4)(A)(1)(b). Petitioners have not demonstrated how a failure
21 to include evidence regarding bedding planes in the Geologic Hazard Assessment renders the
22 county's findings regarding compliance with LUO 3.085(4)(A)(1)(b) and 3.085(5)(B)(3)(c)
23 deficient. *Wissusik v. Yamhill County*, 27 Or LUBA 94, 98-99 (1994); *Murphy Citizens*
24 *Advisory Comm. v. Josephine County*, 25 Or LUBA 312, 325 (1993). In any event,
25 petitioners' assignment of error is factually incorrect. Intervenor points to an illustration in
26 the Geologic Hazard Assessment that depicts the bedding plane, and testimony that shows

1 that the existence of bedding planes, if any, will not affect development of the subject
2 property. Record 1266, 1268; Petition for Review App 73. Therefore, this assignment of
3 error provides no basis for reversal or remand.

4 The third assignment of error is denied.

5 **FOURTH ASSIGNMENT OF ERROR**

6 Approval of the proposed development requires the county to find compliance with
7 LUO 6.040, which provides in relevant part:

8 “Any CONDITIONAL USE authorized according to [LUO 6.040] shall be
9 subject to the following criteria * * *:

10 “* * * * *

11 “(3) The parcel is suitable for the proposed use considering its size, shape,
12 location, topography, existence of improvements and natural features.

13 “(4) The proposed use will not alter the character of the surrounding area in
14 a manner which substantially limits, impairs or prevents the use of
15 surrounding properties for the permitted uses listed in the underlying
16 zone.

17 “* * * * *

18 “(6) The proposed use is timely, considering the adequacy of public
19 facilities and services existing or planned for the area affected by the
20 use.”

21 Petitioners argue that the development, as proposed, cannot satisfy LUO 6.040(3), (4)
22 and (6), because the record is replete with letters and testimony from longtime residents and
23 visitors expressing opposition to (1) commercial development affecting the current views
24 along the beach; (2) additional demand for parking at the adjacent county parking lot; (3)
25 potential complaints from guests regarding noise generated by the dory fleet as it uses the
26 boat ramp and beach during early morning hours; and (4) the potential effect new
27 development would have on the stability of the dunes.

28 The county adopted detailed findings that discuss the testimony summarized in the
29 petition for review, but conclude, based on other evidence and its conditions of approval that,

1 as conditioned, the parcel is suitable for the proposed development. The county also found
2 that the proposed development will not alter the character of the surrounding area, nor will it
3 limit, impair or prevent the use of the surrounding area. The findings further conclude that
4 the development is timely, considering the adequacy of public facilities.⁸ Record 47-51.
5 Petitioners have not demonstrated that the county misconstrued its code provisions, or why
6 the evidence it relied upon is insufficient to satisfy LUO 6.040(3), (4) and (6).

7 The fourth assignment of error is denied.

8 The county's decision is affirmed.

⁸The conditions of approval include: (1) completion of a detailed site investigation; (2) minimal site excavation and plant removal; (3) building height limitations; (4) limitations on parking during and after construction; (5) construction of pedestrian walkways to the dory ramp and beach; and (6) a requirement that guests be notified of potential noise from boaters during the early morning hours.