

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 BRENDA WILLHOFT, GARY WILLHOFT,
5 TOM McCARTHY and ALICE L. SANDERS,
6 *Petitioners,*
7

8 vs.
9

10 CITY OF GOLD BEACH,
11 *Respondent,*
12

13 and
14

15 TURTLE ROCK, LLC,
16 *Intervenor-Respondent.*
17

18 LUBA Nos. 2001-088 and 2001-089
19

20 FINAL OPINION
21 AND ORDER
22

23 Appeal from City of Gold Beach.
24

25 Corinne C. Sherton, Salem, filed the petition for review and argued on behalf of
26 petitioners. With her on the brief was Johnson and Sherton.
27

28 No appearance by City of Gold Beach.
29

30 E. Michael Connors, Portland, filed the response brief and argued on behalf of
31 intervenor-respondent. With him on the brief was Davis Wright Tremaine.
32

33 HOLSTUN, Board Member; BRIGGS, Board Chair; BASSHAM, Board Member,
34 participated in the decision.
35

36 AFFIRMED

12/03/2001
37

38 You are entitled to judicial review of this Order. Judicial review is governed by the
39 provisions of ORS 197.850.
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NATURE OF THE DECISION

Petitioners appeal a floodplain permit (LUBA No. 2001-088) and a conditional use permit (LUBA No. 2001-089) to allow expansion of an existing Recreational Vehicle (RV) park.

MOTION TO INTERVENE

Turtle Rock, LLC (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

REPLY BRIEF

Petitioners move for permission to file a reply brief to respond to arguments in intervenor’s brief that petitioners waived their right to raise certain issues. Intervenor objects only to appendix 1-2 to the reply brief, which is a table that compares statewide planning goal language with language from the comprehensive plan. The table is composed entirely of documents that are subject to official notice, and we believe the table is responsive to intervenor’s waiver argument. We therefore allow the reply brief in its entirety.

FACTS

On two prior occasions we have considered petitioners’ challenges to city decisions concerning the disputed RV park expansion that is at issue in this appeal. *Willhoft v. City of Gold Beach*, 38 Or LUBA 375 (2000) (*Willhoft I*); *Willhoft v. City of Gold Beach*, 39 Or LUBA 353 (2001) (*Willhoft II*).¹ The history and factual context of the underlying dispute is set out in some detail in those opinions and will not be repeated in similar detail here.

The subject property includes 24.3 acres. The property is zoned Commercial (4-C). The western portion of the property that lies outside the Hunter Creek estuary but inside the

¹Our citations to the “Record” in this opinion are to the record that the city compiled on remand following *Willhoft II*. That record includes the record in *Willhoft II*, which in turn is composed of two separate records. We cite to the separate incorporated records from *Willhoft II* as Record (2000-090) and Record (2000-091) to distinguish them from the record compiled on remand. Many documents appear in all three records.

1 100-year floodplain is subject to both the Shoreland Overlay (SO) zone and the city’s Flood
2 Damage Prevention Ordinance (FDPO).

3 Some aspects of the proposed RV park expansion are permitted in the 4-C zone and
4 some are permitted conditionally. The conditional use permit that is challenged in this
5 appeal authorizes “expansion of an existing 50-space RV park for 59 additional RV/tent
6 spaces and additional structures * * *.” Record 168. The floodplain permit authorizes fill
7 that was previously placed in the SO-zoned part of the property and finds that such fill is
8 consistent with the FDPO.² The floodplain permit also authorizes additional fill in the SO-
9 zoned part of the property that will be necessary to construct the approved expansion and
10 concludes that the additional fill is consistent with the FDPO.³ We set forth additional facts
11 where necessary in addressing petitioners’ assignments of error below.

12 **FIRST AND FIFTH ASSIGNMENTS OF ERROR**

13 In their first and fifth assignments of error, petitioners allege the city erred by
14 improperly locating the 100-year floodplain on the subject property. In their first assignment
15 of error, petitioners further argue that the city erred by failing to identify the location,
16 quantity and nature of the fill that is approved by the floodplain permit

17 The FDPO applies to “all areas of special flood hazard within the jurisdiction of the
18 City of Gold Beach.” FDPO 3.1. Although the terminology varies somewhat, as defined in
19 the FDPO, the special flood hazard area is the 100-year floodplain. The 100-year floodplain
20 also defines the location of the Coastal Shoreland and, in turn, the SO zone. Gold Beach
21 Comprehensive Plan (GBCP) 77. Therefore, the 100-year floodplain area of the subject

²The city describes its action as a “conditional use permit to authorize a floodplain development permit.” Record 208. We refer to the permit that approves existing and proposed fill in the 100-year floodplain as the “floodplain permit.”

³We refer to the conditional use permit that authorized expansion of the RV park as the “conditional use permit.” The parties sometimes refer to the conditional use permit as the “expansion permit” or the “expansion order.”

1 property is the area where both the SO and the FDPO apply.

2 The record clearly establishes that there is at least some fill remaining in the 100-year
3 floodplain area depicted on the relevant Flood Insurance Rate Map (FIRM map), which
4 establishes the location of the 100-year floodplain for purposes of the FDPO.⁴ FDPO 3.2.
5 Intervenor placed that fill on the property in 1999, without the benefit of specific approval
6 from the city. At least some of that fill has been removed from the 100-year floodplain,
7 although the parties dispute how much fill has been removed, how much remains and where
8 the remaining fill is located. The floodplain permit that is challenged in this appeal approves
9 that existing fill as well as additional fill that will be needed to construct the approved
10 expansion.⁵ Petitioners' main dispute under the first and fifth assignments of error is that in
11 approving fill in the floodplain and the RV park expansion, the city incorrectly determined
12 that the boundary of the 100-year floodplain on the subject property is located much closer to
13 the Hunter Creek estuary than it actually is. Petitioners also argue that the city erred by
14 failing to identify how much existing fill it was approving in the disputed floodplain permit,
15 precisely where that fill is located and the nature of that fill.

16 We find it unnecessary to address the parties' lengthy arguments concerning whether
17 the city actually took an identifiable position concerning the precise location of the 100-year
18 floodplain on the subject property.⁶ We also find it unnecessary to address the parties'

⁴We noted in *Willhoft II* that “[t]here is no dispute that at least some of the fill that was placed on the subject property * * * was placed in and remains in the shoreland area that is subject to the city SO zone.” 39 Or LUBA at 357 n 4.

⁵As petitioners correctly note, more recent maps show that current elevations on the subject property are higher than the elevations shown on the FIRM maps, which established the 100-year floodplain elevation on the western end of the subject property at 12.1 feet and showed most of that area in the 100-year floodplain. Record Oversized Exhibits 1, 8. From the record, the fill that intervenor placed in the floodplain is the only apparent explanation for the higher current elevations on the property.

⁶In *Willhoft II*, 39 Or LUBA at 360, we determined that the plot plan that was attached to the first floodplain permit decision was not adopted for the purpose of establishing the boundary of the estuary. Record (2000-091) 11. We also do not believe that the current floodplain permit decision, which reaffirms the prior floodplain permit, thereby adopts the 100-year floodplain boundary shown on the referenced plot plan. Similarly, we do not believe the conditional use permit decision adopts the “100-year floodplane [sic]

1 lengthy arguments concerning where that 100-year floodplain is located. In *Willhoft II*, we
2 concluded that all the fill that had been placed in the Hunter Creek estuary has been
3 removed.⁷ It necessarily follows that any fill that remains on the property that adjoins the
4 Hunter Creek estuary, or that will be placed on that property, is either in the floodplain (in
5 which case a floodplain permit is required) or it is outside the floodplain (in which case a
6 floodplain permit presumably is not required). In its floodplain permit decision, the city
7 purported to approve any remaining fill and to approve the additional fill that will be
8 required to complete the RV park expansion that is approved by the conditional use permit.
9 That floodplain permit approval was required, because the fill is already located in the
10 floodplain that adjoins the estuary or will be placed in the floodplain that adjoins the estuary.
11 To the extent any of the approved fill is located on lands at higher elevations, outside the
12 floodplain, there is no legal error in including it in the floodplain permit.

13 The theory that forms the foundation of petitioners’ first and fifth assignments of
14 error, and is essential to make resolution of the parties’ various arguments under those
15 assignments of error necessary, is petitioners’ contention that the city may not approve the
16 remaining or proposed fill without *first* determining (1) the boundaries of the 100-year
17 floodplain, (2) the locations of the existing and proposed fill in that 100-year floodplain, (3)
18 how much fill already exists or will be placed in each of these locations, and (4) the nature of
19 all the existing and proposed fill. Petition for Review 13 (“it was impossible to determine
20 compliance with the FDPO, as well as the SO zone and Plan shorelands policies, without
21 knowing the location, nature and volume of fill that is being approved”).

22 In the abstract, petitioners’ position is plausible, depending on the criteria that must

boundary” shown on the plot plan that is attached to the conditional use permit at Record 149 as expressing its view of where the 100-year floodplain is located on the subject property.

⁷As petitioners correctly note, we found the evidence on that question to be contradictory and less than overwhelming. Petition for Review 4-5 n 4. Nevertheless, that was our conclusion in *Willhoft II*, and because our decision was not appealed this appeal presents no issue concerning fill in the estuary.

1 be satisfied to approve the existing or proposed fill. The difficulty with petitioners’ theory in
2 this case is that petitioners have not demonstrated that the relevant criteria make precise
3 knowledge of the location, amount and nature of the fill a prerequisite to applying those
4 criteria. It may be that one or more of the criteria that must be applied under the SO zone or
5 the FDPO simply cannot be applied to approve fill without knowing the precise location,
6 amount and nature of fill that is being approved. However, petitioners make no attempt to
7 show that such is the case here. It is not obvious to us that the Gold Beach Zoning Ordinance
8 (GBZO) 2.940 riparian setback requirement, the GBZO 2.950 limit on erosion and flood
9 control measures or any of the GBCP Estuarine Shorelands policies, which petitioners argue
10 in the second, third, sixth, seventh and eighth assignments of error were violated, necessarily
11 require precise delineation of the location of the 100-year floodplain in all cases, or the
12 location, amount and nature of fill, before they can be applied to approve additional and
13 existing fill. For that reason, petitioners’ arguments under the first and fifth assignments of
14 error provide no basis for reversal or remand.

15 The first and fifth assignments of error are denied.

16 **THIRD AND SEVENTH ASSIGNMENTS OF ERROR**

17 Petitioners’ third assignment of error challenges the city’s approval of a riparian
18 setback proposal in the floodplain permit. Petitioners’ seventh assignment of error
19 challenges the city’s approval of the riparian setback proposal in the conditional use permit.

20 Within the SO zone, GBZO 2.940 requires a 50-foot setback “from the streambank of
21 all perennial streams to protect riparian vegetation * * *.”⁸ Both the floodplain permit and
22 the conditional use permit impose a 50-foot riparian setback to comply with GBZO 2.940

⁸GBZO 2.940 provides as follows:

“Riparian Vegetation Protection. Except as necessary for water-dependent uses, all developmental and mineral extraction activities shall be set back 50 feet from the streambank of all perennial streams to protect riparian vegetation as identified in the comprehensive plan or by specific site investigation as part of the permit application process.”

1 and require implementation and maintenance of a riparian vegetation plan. Record (2000-
2 091) 8; Record 174. The conditional use permit decision explains:

3 “The City Council concludes that the CUP request complies with GBZO
4 2.940 and therefore adequately protect[s] the riparian areas on the property.
5 The Applicant’s riparian vegetation mitigation plan includes a 50-foot riparian
6 buffer area from the top of the bank of Hunter Creek. The City Council
7 concludes that the top of the bank is based upon the two-year flood elevation
8 level because it is not possible to accurately determine the top of the bank
9 based on the existing physical features of Hunter Creek. *See*
10 OAR 660-023-0090(1)(g); OAR 141-085-0010(2). The Applicant submitted
11 substantial evidence to establish the two-year flood level elevation. The
12 applicant surveyed and marked the top of the bank based on this evidence and
13 staked the 50-foot riparian buffer area. The City Staff and the Oregon
14 Department of Fish and Wildlife (ODFW) reviewed and approved the
15 Applicant’s riparian vegetation mitigation plan.” Record 170-71.⁹

16 The GBZO does not define the term “streambank,” as it is used in GBZO 2.940. We
17 understand the city to have looked to the Goal 5 (Open Spaces, Scenic and Historic Areas,
18 and Natural Resources) administrative rule’s “safe harbor” provisions for riparian corridors
19 for guidance on the meaning of that term. Under OAR 660-023-0090(5)(b), such a safe
20 harbor is achieved by imposing a 50-foot riparian setback from the “top of bank” “[a]long
21 * * * fish-bearing streams with average annual stream flow less than 1,000 cfs[.]”
22 OAR 660-023-0090(1)(g) provides that “[t]op of bank’ shall have the same meaning as
23 ‘bankfull stage’ defined in OAR 141-085-0010(2).” OAR 141-085-0010(2) provides as
24 follows:

25 “‘Bankfull Stage’ means the stage or elevation at which water overflows the
26 natural banks of streams or other waters of this state and begins to inundate
27 the upland. In the absence of physical evidence, the two-year recurrence
28 interval flood elevation may be used to approximate the bankfull stage.”

29 Petitioners first contend the city erred in adopting the above interpretation of the term
30 “streambank” and that it should have used a dictionary definition of “bank” in granting the
31 floodplain permit and conditional use permit instead.

⁹The floodplain permit decision includes similar findings. Record 210.

1 We find it unnecessary to resolve intervenor’s contention that GBZO 2.940 was
2 adopted to implement Goal 5. Because the GBZO does not define the term “streambank,”
3 the city was well within its discretion under ORS 197.829(1) and *Clark v. Jackson County*,
4 313 Or 508, 836 P2d 710 (1992) in interpreting that term in the same way “top of bank” is
5 defined in OAR 660-023-0090(1)(g). The city did not err in interpreting GBZO 2.940 as it
6 did.

7 Petitioners next argue that the city erred in using “the two-year recurrence interval
8 flood elevation” “to approximate the bankfull stage.” Petitioners argue use of the two-year
9 flood elevation is error, because there is evidence in the record from which the bankfull stage
10 can be approximated.

11 There are a number of pieces of evidence that, viewed in isolation, would appear to
12 show the “approximate” location of the bankfull stage or top of the bank. However, there is
13 simply no way to tell if that is the case for all areas of the subject property or whether the
14 bank locations shown on the pictures in the record remain unaltered in those locations today.
15 If there is one thing that is clear in this proceeding, it is that the parties disagree about
16 whether the fill that was placed in the floodplain has actually been removed. It also appears
17 to be clear that efforts to remove that fill have, in at least some areas of the property, altered
18 the previously existing banks. Record 885. On this record there is simply no way we can
19 question the city council’s determination that the requisite physical evidence of the location
20 of the streambank is presently not available. We conclude that the city did not err in utilizing
21 the two-year flood elevation, for purposes of establishing the riparian setback that is required
22 by GBZO 2.940.

23 The third and seventh assignments of error are denied.

24 **SECOND AND SIXTH ASSIGNMENTS OF ERROR**

25 Under their second assignment of error petitioners argue that the floodplain permit
26 decision does not adequately respond to their arguments below that the proposal violates

1 certain GBCP policies. Under their sixth assignment of error, petitioners present similar
2 arguments concerning the conditional use permit decision.

3 The relevant GBCP policies appear under the heading “Goal 16 - ESTUARINE
4 RESOURCES.” Record 1098. Under that heading, 13 policies are listed for “estuaries,” and
5 17 policies are listed for “estuarine shorelands.” Record 1098-1103. During the proceedings
6 below, petitioners argued that the proposal violates the following plan policies for estuarine
7 shorelands (hereafter GBCP Estuarine Shorelands Policies or Policies):

8 “2. Gold Beach will minimize man-induced sedimentation in the estuaries.

9 “* * * * *

10 “4. Gold Beach will reduce the adverse effects upon water quality and fish
11 and wildlife habitat resulting from the use and enjoyment of the
12 county’s estuary shorelands.

13 “5. Gold Beach will ensure compatibility with the characteristics of
14 adjacent coastal waters.

15 “6. Gold Beach will consider the relationships between estuarine
16 shorelands and:

17 “a) resource of coastal waters;

18 “b) associated geologic and hydrologic hazards.

19 “Such considerations will be included in:

20 “a) comprehensive plan changes and revisions,

21 “b) implementing actions, and

22 “c) permit reviews.

23 “* * * * *

24 “11. Gold Beach will maintain riparian vegetation especially important to:

25 “a) water quality;

26 “b) fish and wildlife habitat;

27 “c) recreational use; and

1 “d) aesthetic resources[.]” Record 1100-01.

2 The city adopted the following findings in its conditional use permit decision to
3 address petitioners’ arguments concerning the above-quoted plan policies:

4 “The City Council also concludes that the CUP request complies with the SO
5 Comprehensive Plan policies. The Opponents assert that the CUP request
6 does not comply with [GBCP Estuarine Shorelands Polices 2, 4, 5, 6 and 11].
7 These are Goal 16 Estuary policies, not Goal 17 Shoreland policies.
8 Regardless, the CUP request complies with these policies. The applicant’s
9 approved riparian vegetation mitigation plan will protect the fish and wildlife
10 in the area in compliance with Policies 4, 5, & 11. The applicant also
11 submitted substantial documentation verifying that there will not be adverse
12 impact to the fish and wildlife resources in the area. There is no evidence that
13 the expansion of the existing RV park will result in sedimentation in the
14 estuary as indicated in Policy 2. The City Council finds that the expansion of
15 the existing RV park is compatible with the adjacent coastal waters under
16 Policy 5 and takes into account the relationships set forth in Policy 6.”
17 Record 171.

18 **A. Waiver**

19 We first consider intervenor’s arguments that petitioners waived the issues that are
20 presented under the second and sixth assignments of error. Intervenor argues the issues were
21 waived in two ways. First, intervenor argues these issues were waived because they were not
22 raised in *Willhoft II*. Second, intervenor argues the issues were waived because they were
23 not raised with sufficient specificity in the proceedings before the city following *Willhoft II*.

24 Under *Beck v. City of Tillamook*, 313 Or 148, 155-56, 831 P2d 678 (1992), petitioners
25 in the current appeal of the floodplain permit may have lost or waived their right to raise
26 issues in this appeal if they failed to raise those issues in *Willhoft II* or if those issues were
27 resolved adversely to petitioners in *Willhoft II*. We have explained this “law of the case”
28 waiver principle as follows:

29 “Based on the court’s holding in *Beck*, * * * we conclude the permissible
30 scope of local proceedings following a LUBA remand of a local government’s
31 decision, is framed by LUBA’s resolution of the assignments of error in the
32 first appeal. Resolved issues, which may not be considered in the local
33 government proceedings on remand, include (1) issues presented in the first
34 appeal and rejected by LUBA; and (2) issues which could have been, but were

1 not, raised in the first appeal. Unresolved issues, which may be considered in
2 a local government proceeding on remand, include (1) issues presented in the
3 first appeal that LUBA either sustains or does not consider, and (2) issues that
4 could not have been raised in the first appeal. Thereafter, in a subsequent
5 appeal to LUBA of a local decision on remand, a petitioner may raise issues
6 concerning the local government’s determinations regarding such unresolved
7 issues.” *Louisiana Pacific v. Umatilla County*, 28 Or LUBA 32, 35 (1994)
8 (footnote omitted).

9 As petitioners correctly note, “law of the case” waiver could not apply to petitioners’
10 challenge of the conditional use permit, because this is the first time that permit has been
11 appealed to LUBA.¹⁰ We need address only one of the reasons petitioners argue for why
12 “law of the case” waiver does not apply to the floodplain permit decision that is challenged
13 in this appeal. As petitioners correctly argue, they raised issues concerning the proposal’s
14 compliance with comprehensive plan policies for estuarine shorelands in *Willhoft II*. LUBA
15 did not consider those arguments in *Willhoft II*, because the city could not locate the relevant
16 city plan policies or city SO zone provisions and, for that reason, had not applied them. The
17 issues petitioners raise here are, therefore, “unresolved issues” and were not waived under
18 *Beck*.

19 **B. Statutory Waiver**

20 Under ORS 197.763(1) and 197.835(3), petitioners waived, and therefore may not
21 assert in this appeal, any issues that could have been raised during the local proceedings
22 following our remand in *Willhoft II*, but were not raised. Statutory waiver potentially could
23 apply to arguments directed at either the floodplain permit decision or the conditional use
24 permit decision. There is no dispute that petitioners raised issues concerning compliance
25 with the cited plan policies.¹¹ We agree with petitioners that they are not required to identify

¹⁰We do not understand intervenor to argue that “law of the case” waiver applies to petitioners’ arguments under the sixth assignment of error that are directed at the conditional use permit.

¹¹The conditional use permit decision expressly acknowledges that the plan policies were raised. Record 171.

1 their legal theory for why those plan policies apply to preserve their right to contest the city’s
2 adverse rulings on petitioners’ arguments concerning those policies. *DLCD v. Curry County*,
3 33 Or LUBA 728, 733 (1997).

4 **C. Nonapplicability of the Cited Plan Policies**

5 **1. The Cited Policies are Goal 16 (Estuarine Resources) Policies**

6 The challenged conditional use permit decision findings take the position that the
7 cited plan Policies were adopted to implement Goal 16 and are codified under the heading
8 “Goal 16 - ESTUARINE RESOURCES” in the comprehensive plan. Record 171; 1098.
9 From that position, the findings quoted above take the position that the GBCP Estuarine
10 Resources Policies are not applicable to shorelands as defined under Goal 17 (Coastal
11 Shorelands), including the subject property.

12 The difficulty with the city’s position is that the cited Policies clearly are measures
13 that were adopted by the city to implement the Goal 17 requirement to protect coastal
14 shorelands. *See* Reply Brief App 1-2 (demonstrating parallel language in the policies and
15 Goal 17 text). The statewide planning goals define coastal shorelands as including lands that
16 are immediately adjacent to estuaries, such as the subject property.¹² Further, Goal 17
17 requires that local government comprehensive plans, at a minimum, include as coastal
18 shorelands “lands * * * within 50 feet of an estuary or coastal lake.” Much of the subject
19 property is a “coastal shoreland,” as the statewide planning goals define that term, even
20 though the GBCP refers to the Hunter Creek estuary shoreland as an estuarine shoreland.¹³

¹²The statewide planning goals define “Coastal Shoreland” as including “[t]hose areas immediately adjacent to the ocean, all estuaries and associated wetlands, and all coastal lakes.”

¹³The GBCP includes the following description of the Hunter Creek estuary and its associated shoreland boundary:

“The Hunter Creek estuary is classified as a ‘natural’ estuary for its entire length and area. The ‘estuary’ boundary’ is defined as mean higher high tide elevation and the line of non-aquatic vegetation where such vegetation is present. The ‘estuary shorelands boundary’ is defined as the 100 year floodplain boundary.” GBCP 77.

1 We do not know why the city chose to place some of its policies that clearly were adopted to
2 implement Goal 17 under the Goal 16 section of the comprehensive plan and chose to place
3 other Goal 17 policies under plan heading “Goal 17 and 18 - COASTAL SHORELAND
4 AND BEACHES AND DUNES GOALS,” which combines policies to implement Goal 17
5 and Goal 18 (Beaches and Dunes). Record 1103-04. Because the cited Policies were clearly
6 adopted to implement Goal 17, the city’s interpretation of those Policies is not entitled to
7 deference under ORS 197.829(1). *Friends of Neabeack Hill v. City of Philomath*, 139 Or
8 App 39, 45-46, 911 P2d 350 (1996). The city’s choice to codify the cited shoreland plan
9 policies with estuarine policies does not, in and of itself, provide a sufficient reason to
10 conclude that they are inapplicable to the subject property, which clearly is a “coastal
11 shoreland” within the meaning of Goal 17.

12 **2. The GBCP Policies are Aspirational and are not Mandatory**
13 **Approval Criteria**

14 Although the challenged decision does not take the position that the Policies are
15 aspirational or that they do not apply to individual permit decisions, intervenor argues in its
16 brief that such is the case and that LUBA should interpret the Policies in that manner under
17 ORS 197.829(2).¹⁴

18 We decline to do so. The overlapping treatment that is accorded the planning
19 requirements of Goals 16 and 17 in the GBCP can lead to confusion. We also note that
20 GBCP Estuarine Shorelands Policy 6 expressly provides that it is to be “considered” in
21 “permit reviews.” While that language does not necessarily mean the policy is mandatory, it
22 somewhat undercuts intervenor’s argument. If the city embraces the interpretation that
23 intervenor offers in its brief, we believe the city must first adopt that interpretation and
24 explain how such an interpretation is consistent with the language of the Policies themselves,

¹⁴ORS 197.829(2) allows LUBA to interpret local government land use legislation in the first instance, where the local government fails to do so.

1 viewed in context with the other provisions of the GBCP and GBZO that implement Goals
2 16 and 17. Such an interpretive exercise will be sufficiently problematic, that we will not
3 attempt it where the city has not done so.

4 **D. Policies 4, 5 and 11**

5 These Policies are set out in the text above and will not be repeated here. The
6 conditional use permit decision findings, quoted above in the text, take the position that the
7 riparian vegetation mitigation plan that will be implemented in the riparian setback area is
8 sufficient to demonstrate compliance with these Policies.¹⁵ Petitioners expressly do “not
9 challenge the contents of the [r]iparian [v]egetation [m]itigation plan.” Petition for Review
10 23. However, petitioners contend that the city incorrectly identified the location of the
11 streambank and, therefore, the vegetation mitigation plan is inadequate because it is applied
12 in the wrong area.

13 We have rejected petitioners’ third and seventh assignments of error and conclude
14 that the city did not incorrectly identify the location of the streambank. It follows that the
15 city did not misidentify the required riparian setback area. Because that is the only challenge
16 petitioners make to the vegetation mitigation plan, we reject petitioners’ contention that the
17 city’s findings in support of the conditional use permit concerning GBCP Estuarine
18 Shorelands Policies 4, 5 and 11 are inadequate.¹⁶

¹⁵The previously quoted findings are as follows:

“* * * The applicant’s approved riparian vegetation mitigation plan will protect the fish and wildlife in the area in compliance with Policies 4, 5, & 11. The applicant also submitted substantial documentation verifying that there will not be adverse impact to the fish and wildlife resources in the area.” Record 171.

¹⁶Although the city’s findings in support of the floodplain permit concerning the GBCP Estuarine Shorelands Policies do not specifically acknowledge petitioners’ arguments concerning GBCP Estuarine Shorelands Policies 4, 5 and 11, they do cite and rely on the riparian vegetation mitigation plan in approving the floodplain permit. Record 210. We therefore reject petitioners’ second assignment of error, which challenges the floodplain permit under GBCP Estuarine Shorelands Policies 4, 5 and 11, for the same reason we reject petitioners’ sixth assignment of error, which challenges the conditional use permit.

1 Finally, petitioners argue the applicant did not submit evidence in support of its
2 finding that the proposal will not result in “adverse impact to the fish and wildlife resources
3 in the area.” *See* n 15. To the extent this allegation is sufficient to assert an evidentiary
4 challenge to the city’s finding that the riparian vegetation mitigation plan is adequate to
5 comply with GBCP Estuarine Shorelands Policies 4, 5 and 11, intervenor argues the city was
6 entitled to rely on the planning staff report to the city council in this matter. Record 611.
7 That staff report advised the city council that the riparian vegetation plan had been reviewed
8 by the Oregon Department of Fish and Wildlife and “determined to be adequate protection
9 for this area.” *Id.* Intervenor argues, and we agree, that the staff report constitutes
10 substantial evidence.

11 **E. GBCP Estuarine Shorelands Policy 2**

12 GBCP Estuarine Shorelands Policy 2 provides, in its entirety, that the city “will
13 minimize man-induced sedimentation in the estuaries.” The city’s brief finding addressing
14 this criterion under the conditional use permit is as follows:

15 “* * * There is no evidence that the expansion of the existing RV park will
16 result in sedimentation in the estuary as indicated in Policy 2.” Record 171.¹⁷

17 Continuing with the brevity in GBCP Estuarine Shorelands Policy 2 and the brevity accorded
18 that policy in the conditional use permit decision, petitioners simply argue:

19 “[The city’s] findings do not explain how man-induced sedimentation into the
20 estuary will be minimized (ES Policy 2)[.]” Petition for Review 17.

21 In the usual case, the city’s finding might warrant remand, because it does not offer
22 much in the way of explanation and might be read to shift the burden of proof from the
23 applicant (to prove there will be no sedimentation or that any sedimentation will be
24 minimized) to those who oppose the application (to prove there will be sedimentation that

¹⁷In this opinion, we assume the city’s GBCP Estuarine Shorelands Policy 2 findings concerning the proposed RV park expansion in the conditional use permit also express the city’s view concerning the fill that is required to support that expansion, which is the subject of the floodplain permit.

1 will not or cannot be minimized). Although it is a close question, we do not do so here. The
2 above-quoted finding can be read to take the position that the proposal will not result in any
3 sedimentation. While there may be no evidence to support such a position, petitioners
4 neither identify any evidence that would dispute that position nor dispute the position itself.

5 For the above reasons, we reject petitioners' arguments under the second and sixth
6 assignments of error concerning GBCP Estuarine Shorelands Policy 2.

7 **F. GBCP Estuarine Shorelands Policy 6**

8 GBCP Estuarine Shorelands Policy 6 provides as follows:

9 "6. Gold Beach will consider the relationships between estuarine
10 shorelands and:

11 "a) resource of coastal waters;

12 "b) associated geologic and hydrologic hazards.

13 "Such considerations will be included in:

14 "a) comprehensive plan changes and revisions,

15 "b) implementing actions, and

16 "c) permit reviews." Record 1100-01.

17 In the conditional use permit findings quoted earlier in the text, the city simply states
18 "[t]he City Council finds that the expansion of the existing RV park is compatible with the
19 adjacent coastal waters under Policy 5 and takes into account the relationships set forth in
20 Policy 6." Record 171.¹⁸ While this finding is brief and somewhat ambiguous, we
21 understand the city to again be relying on the riparian vegetation mitigation plan to ensure
22 that the proposal and the nearby coastal waters resource are compatible.

¹⁸In this opinion, we assume the city's GBCP Estuarine Shorelands Policy 6 findings concerning the proposed RV park expansion in the conditional use permit also express the city's view concerning the fill that is required to support that expansion, which is approved in the related floodplain permit.

1 We frankly have some difficulty determining exactly what GBCP Estuarine
2 Shorelands Policy 6 requires in the context of these permit decisions. Moreover, its apparent
3 requirement that the city “consider the relationships between estuarine shorelands” and
4 coastal waters and hazards does not clearly impose a substantive obligation beyond the
5 requirement for “consideration.” Even if we assume there is some substantive obligation, its
6 nature is ambiguous. Given the ambiguity in GBCP Estuarine Shorelands Policy 6, the city’s
7 apparent view that the riparian vegetation mitigation plan will ensure compatibility with
8 coastal waters, and petitioners’ failure to do more than fault the city’s finding for being too
9 conclusory, we conclude that the finding is adequate.

10 For the above reasons, we reject petitioners’ arguments under the second and sixth
11 assignments of error concerning GBCP Estuarine Shorelands Policy 6.

12 **G. Failure to Correctly Identify the Estuarine Shorelands**

13 Under the sixth assignment of error, petitioners appear to argue that the city’s failure
14 to accurately identify the boundaries of the estuarine shorelands on the subject property
15 necessarily means the city cannot demonstrate compliance with the GBCP Estuarine
16 Shorelands Policies discussed under the second and sixth assignments of error. Petitioners
17 do not develop that argument under the second and sixth assignments of error and we have
18 already rejected petitioners’ broader argument to that effect in our discussion of the first and
19 fifth assignments of error.

20 The second and sixth assignments of error are denied.

21 **FOURTH ASSIGNMENT OF ERROR**

22 Under this assignment of error, petitioners argue that if the floodplain permit is
23 reversed or remanded, then the conditional use permit must also be reversed or remanded,
24 because the conditional use permit depends on the floodplain permit. Because we do not
25 reverse or remand the floodplain permit, the fourth assignment of error is denied.

1 **EIGHTH ASSIGNMENT OF ERROR**

2 The SO zone limits structural solutions to erosion and flooding problems in coastal
3 shorelands. GBZO 2.950 parallels Goal 17, Implementation Requirement 5 and provides as
4 follows:

5 “Nonstructural solutions to problems of erosion and flooding shall be
6 preferred to structural solutions. Where shown to be necessary and allowed,
7 water and erosion control structures such as jetties, bulkheads, seawalls, and
8 similar protective structures and fill shall be designed to minimize adverse
9 impacts on water currents, erosion, and accretion patterns.

10 “Further, where listed as a permitted activity within this zone, riprap shall
11 only be allowed upon findings that:

12 “(1) Land use management practices and nonstructural solutions are
13 inadequate; and

14 “(2) Adverse impacts on water currents, erosion, and accretion patterns are
15 minimized.”

16 Intervenor’s original request to expand the RV park included proposed bank
17 protection, which had been approved by the Oregon Division of State Lands (DSL) in
18 1994.¹⁹ No proposal for bank structural protection was included in the application that led to
19 the conditional use permit decision that is challenged in this appeal. No such structural
20 solutions to erosion or flooding are approved by the challenged decision.

21 In rejecting petitioners’ argument that it must address GBZO 2.950 in the present
22 application, the city explained:

23 “The City Council concludes that GBZO 2.950 is not applicable. The
24 Applicants are not proposing erosion or flooding solutions as part of the CUP,

¹⁹According to petitioners, the shoreline protective structures authorized by that 1994 DSL permit were never constructed and the DSL permit has now expired. Petition for Review 24 n 17. According to petitioners, intervenor resubmitted the application that led to the 1994 DSL permit. Petitioners argue that the resubmitted application is pending and intervenor has refused to withdraw it or resubmit an application to DSL that reflects the somewhat different RV park expansion that has now been approved by the city.

Intervenor responds that it was reluctant to withdraw its pending DSL permit application because the city might have determined that structural erosion and flooding solutions were needed to approve the requested expansion and it “did not want to start the DSL process all over again.” Intervenor-respondent’s brief 43.

1 nor is there any evidence that such solutions are required. Although the
2 Opponents note that there is a pending application with [DSL], the City
3 Council believes that this DSL application is a matter for DSL to consider.”
4 Record 171.

5 Petitioners contend that intervenor’s refusal to withdraw its pending DSL permit
6 application shows that the approved expansion will make structural solutions to future
7 erosion and flooding problems necessary. Moreover, petitioners argue that by proceeding
8 with the RV park expansion first, and deferring its efforts to seek DSL approval, intervenor
9 is effectively precluding the nonstructural solutions favored by GBZO 2.950, such as
10 setbacks, by the order in which it seeks permits.

11 On its face, GBZO 2.950 only applies where flood or erosion control measures are
12 proposed, which is not the case here. We leave open the possibility that the city would be
13 required to confront GBZO 2.950 more directly in this case, even though the applicant is not
14 proposing any flood or erosion control measures, if there was substantial evidence that the
15 approved RV park expansion would make such structural measures likely or inevitable.
16 However, petitioners here simply rely on intervenor’s failure to withdraw its prior DSL
17 permit application and statements that intervenor made in 1999 that it then “hoped to protect
18 [its] property from further erosion damage by installing riprap along [its] entire northern
19 property boundary * * *.” Record 329.²⁰ While there may be reasons for petitioners to
20 *suspect* that intervenor *might* seek approval for flood and erosion control measures in the
21 future, we do not agree that the record supports a conclusion that the approved expansion
22 makes such measures likely or inevitable. We do not agree with petitioners that GBZO 2.950
23 requires that intervenor demonstrate what kinds of erosion and flood control measures may
24 be necessary to protect the approved expansion in the future or that the city erred by failing
25 to require that intervenor make such a demonstration.

²⁰Petitioners also cite Record (2000-090) 297 in support of their contention that intervenor has expressed a desire to riprap the northern border of its property. That page of the record does not support their contention.

- 1 The eighth assignment of error is denied.
- 2 The city's decisions are affirmed.