

LAND USE
BOARD OF APPEALS

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

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OREGON SHORES CONSERVATION)
COALITION,)
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Petitioner,)
)
vs.)
)
LINCOLN CITY,)
)
Respondent.)

LUBA No. 85-057
FINAL OPINION
AND ORDER

Appeal from Lincoln City.

Richard P. Benner, Portland, filed the petition for review and argued on behalf of petitioner.

Frederick J. Ronnau, Lincoln City, filed a response brief and argued on behalf of Respondent City.

BAGG, Referee; KRESSEL, Chief Referee; DuBay, Referee; participated in the decision.

REMANDED 04/14/86

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner appeals Lincoln City Ordinance No. 85-09. The
4 ordinance changes the city's procedures and standards
5 regulating beachfront protective structures.

6 FACTS

7 Prior to this amendment, development in hazard areas and
8 beach and dunes areas was subject to particular development
9 standards. The amendment on review excepts rip-rap beachfront
10 protective structures and natural means of beach protection
11 from city ordinance standards. The new ordinance provides that
12 the city shall rely on the State of Oregon, Division of State
13 Lands and the Department of Transportation, State Parks
14 Division, to control the development of beachfront protective
15 structures.

16 The city did, however, retain some involvement with
17 beachfront protective structures. The ordinance prohibits the
18 state's issuance of permits for protective structures

19 "until the city has had an opportunity to determine
20 that such protection complies with Lincoln City's
Comprehensive Plan and Zoning Requirements."

21 Further, Section 3(3)(g) of the new ordinance provides
22 standards which must be applied "before authorizing the state
23 to proceed with the issuance of a permit."¹

24 ASSIGNMENT OF ERROR NO. 1

25 "Respondent Violated Goal 2 by Failing to Explain How
26 Ordinance No. 85-09 Complies with the Statewide
Planning Goals."

1 Petitioner says that the new ordinance changes the
2 respondent's policies and criteria for approving beachfront
3 protective structures. Petitioner complains that approval of
4 such structures is subject to Statewide Planning Goal 17
5 (Coastal Shorelands) and 18 (Beaches and Dunes), and there is
6 no indication in findings or in the whole of the city's record
7 that respondent applied Goals 17 and 18 to this ordinance
8 amendment.² Petitioner asks that we remand the ordinance for
9 the development of adequate findings.

10 Later in this opinion we hold that adoption of this
11 ordinance does involve application of the coastal shorelands
12 and beaches and dunes goals. We further hold the record does
13 not reveal findings showing compliance with Goals 17 and 18.
14 We therefore sustain this assignment of error.

15 ASSIGNMENT OF ERROR NO. 2

16 "Ordinance No. 85-09 Violates ORS 227.180(1)(a) by
17 Imposing Standing Limits More Strict Than Those in the
18 City Planning Statute."

18 The new ordinance includes a process to appeal decisions on
19 beachfront protective devices. The process leads to a review
20 before the county council. The ordinance limits standing to
21 appeal, however, to

22 "the developer, interested parties within 500 feet of
23 the proposed project and agencies which might be
24 affected by the use."

24 Petitioner argues that ORS 227.180(1)(a) provides that any
25 party who is "aggrieved" may appeal. Whether or not such
26 person lives within 500 feet of a new structure is unimportant,

1 according to petitioner. Because the ordinance restricts
2 standing in a way not consistent with the statute, the
3 ordinance must fail, according to petitioner.

4 Respondent argues that this ordinance provision was part of
5 the acknowledged original ordinance. The city also says that
6 persons outside the 500 foot limit can appeal through the state
7 agency permit process and therefore suffer no harm under this
8 restriction.

9 We are not persuaded by either defense. "Aggrieved"
10 persons are entitled to appeal actions under ORS
11 227.180(1)(a). Since it is possible an aggrieved person might
12 live outside the 500 foot limit, the ordinance restricts the
13 right of appeal in a way inconsistent with ORS 227.180(1)(a).
14 See, the discussion of "aggrieved" and "adverse affect" in
15 Benton Co. v. Friends of Benton Co., 294 Or 79, 653 P2d 1249
16 (1982).

17 We conclude, therefore, the city was without authority to
18 limit standing to those within 500 feet of the proposed use.
19 Overton v. Benton County, 61 Or App 667, 658 P2d 574 (1983).

20 This assignment of error is sustained.

21 ASSIGNMENT OF ERROR NO. 3

22 "Ordinance No. 85-09 Violates Goal 17 by Failing to
23 Give Preference to Nonstructural Solutions to Beach
Erosion."

24 Goal 17 establishes a policy favoring nonstructural
25 solutions to beach erosion problems. The new ordinance,
26 according to petitioner, excludes rip-rap from application of

1 criteria which would otherwise insure compliance with the
2 goal. Therefore, an applicant proposing to stabilize a
3 beachfront with rip-rap is excused from the obligation to
4 demonstrate that nonstructural solutions are unsuitable.
5 Petitioner says this scheme violates the goal. Petitioner adds
6 that under the old ordinance, an applicant would be required to
7 show (following the goal) that nonstructural solutions were not
8 feasible.

9 Respondent argues the ordinance on appeal simply defers to
10 the state permit process. In other words, the city has merely
11 recognized state agency authority to issue permits for erosion
12 control measures. The state is obliged to apply the goals in
13 its permit process, according to the city.

14 Respondent is correct that state agencies have authority to
15 issue permits for fill and removal and for rip-rap within the
16 geographical area described in ORS 390.605.³ However, state
17 jurisdiction over all rip-rap permits does not mean the city
18 may give up its land use planning authority. Arguably, the
19 city is still empowered to zone beachfront areas to prohibit
20 all development. There is nothing in state law suggesting that
21 exclusive jurisdiction to issue permits for rip-rap precludes
22 the exercise of zoning authority by a local jurisdiction. See
23 1000 Friends of Oregon v. LCDC, 75 Or App 199, ___ P2d ___
24 (1985) for a discussion of the relationship between local land
25 use planning responsibilities and their applicability to state
26 agency regulatory processes.

1 Under the city's scheme, it is unclear which agency has
2 authority for land use planning actions concerning beachfront
3 protective devices. This uncertainty translates into a
4 question as to which agency, if any, has responsibility for
5 insuring compliance with statewide planning goals. Thus, it is
6 conceivable that the city will claim the state is responsible
7 for insuring compliance with all statewide planning goal
8 standards, while it is equally possible that the state may
9 point back to the city claiming it is the city's responsibility
10 to insure that the goals are satisfied by the exercise of the
11 city's land use planning activities. ORS 197.175.

12 There is an additional reason why the ordinance in its
13 present form cannot be sustained. Even if we assume the city
14 simply recognized its legal obligation to defer to the state on
15 permits for protective devices, the state's jurisdiction is
16 geographically limited. The city's ordinance affects lands
17 outside state jurisdiction. Goal 17, by its terms, controls
18 activities west of the Oregon Coast Highway as described in ORS
19 366.235 and all lands

20 "within an area defined by a line measured
21 horizontally:

22 "(a) 1000 feet from the shoreline of estuaries; and

23 "(b) 500 feet from the shoreline of coastal lakes."

24 The amended ordinance does not limit its application to
25 lands over which the state has jurisdiction. Also, there is no
26 map accompanying the record which would help define ordinance

1 coverage. Section 1 of Ordinance 85-09 applies to "hazardous
2 areas" and section 2 applies to beaches and dune areas. There
3 is nothing, however, to show that these areas are within state
4 jurisdiction and therefore beyond the city's ability (or need)
5 to control. In short, we find the ordinance subject to
6 compliance with Goal 17.

7 Because we find that Goal 17 applies to this ordinance, we
8 find the city erred in eliminating from the ordinance all
9 standards insuring compliance with Goal 17.

10 This assignment of error is sustained.

11 ASSIGNMENT OF ERROR NO. 4

12 "Ordinance 85-09 Violates Goal 18 by Failing to Apply
13 [sic] Implementation Requirement to Applications for
14 Beachfront Protective Structures."

15 Petitioner argues Goal 18 Implementation Requirement No. 5
16 requires that permits for beachfront protective devices be
17 issued only where development existed on January 1, 1977.

18 Because this ordinance does not limit rip-rap or other
19 protective measures to properties developed before that date,
20 the ordinance violates Goal 18, according to petitioner.

21 Respondent makes the same argument it made in Assignment of
22 Error No. 3. Respondent claims the ordinance simply defers to
23 state jurisdiction, and it is the state's worry as to whether
24 or not a particular development existed on or before January 1,
25 1977.

26 For the reason discussed under Assignment of Error No. 3,
we do not agree that assuring goal compliance is clearly a

1 state responsibility. Also, as with Goal 17, lands subject to
2 Goal 18 exist outside state permit jurisdiction. Coastal areas
3 subject to Goal 18:

4 "include beaches, active dune forms, recently
5 stablized dune forms, older stablized dune forms, and
inter dune forms."

6 The definitions of various dune forms in the goal are
7 functional definitions. The dunes need not exist in specific
8 areas to be subject to the goal. It seems, therefore, that
9 dune forms can exist inside and outside of the areas subject to
10 state jurisdiction as defined in ORS 390.605 and 390.650.

11 We conclude that the ordinance excuses city responsibility
12 for compliance with Goal 18 for areas over which the city has
13 jurisdiction - those areas not subject to the state permit
14 process.

15 It follows that the city is obliged to control beachfront
16 protective devices within its jurisdiction subject to Goal 18.
17 Because the goal requires that permits only be issued for
18 developments which were in existence on July 1, 1977, the
19 city's elimination of this requirement from its ordinance for
20 areas under its control violates the goal.

21 This assignment of error is sustained.

22 ASSIGNMENT OF ERROR NO. 5

23 "Ordinance No. 85-09 Violates Goal 18 by Failing to
24 Apply Implementation Requirement 1 to Applications to
Riprap on the Beachfront."

25 Goal 18 Implementation Requirement 1 requires

26 "1. Local governments and state and federal agencies

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

5 "a. The type of use proposed and the adverse
6 effects it might have on the site and
7 adjacent areas;

8 "b. Temporary and permanent stabilization
9 programs and the planned maintenance of new
10 and existing vegetation;

11 "c. Methods for protecting the surrounding area
12 from any adverse effects of the development;
13 and

14 "d. Hazards to life, public and private property
15 and the natural environment which may be
16 caused by the proposed use."

17 The ordinance is defective, according to petitioner,
18 because it excludes rip-rap construction from these standards.

19 We agree for the same reason discussed under Assignment of
20 Errors 3 and 4, supra.

21 Ordinance 85-09 is remanded for further proceedings not
22 inconsistent with this opinion.

23 Remanded.
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FOOTNOTES

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4 The standards require the city to address the following:

- 5 "1. The rate of erosion occurring at the site;
- 6 "2. The extent that other beachfront protective
7 structures are available in the area;
- 8 "3. The extent of existing development which has
9 occurred in the area;
- 10 "4. The existence of known or identified geological
11 hazards;
- 12 "5. The extent vegetation will be removed as a result
13 of the proposed action;
- 14 "6. Whether the structure meets minimum design
15 criteria as determined by the U.S. Army Corps of
16 Engineers;
- 17 "7. Whether access will be limited by the proposed
18 action;
- 19 "8. Whether the scenic attraction of the shoreland
20 area is protected;
- 21 "9. Whether non-structural means of protection were
22 considered prior to employing rip-rap; and
- 23 "10. Whether performance guarantees are given.

24 "The City shall also as a part of the impact
25 evaluation, complete with the appropriate State
26 agency, a site review of each shoreland proposal. Not
withstanding other reviews deemed necessary by the
City Manager, an impact evaluation shall also be used
to review projects where seawalls, bulkheads, groins
are proposed, however, no review as provided in
previous sections of such projects shall be completed
until a report prepared by a registered engineer or
geologist is submitted."

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26 The city's comprehensive plan and implementing ordinances

1 are acknowledged by the Land Conservation and Development
2 Commission as in compliance with statewide land use planning
3 goals. This amendment is subject to review for goal compliance
4 under ORS 197.610-647.

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5 ORS 390.650 requires a person desiring to make an
6 improvement on property subject to ORS 390.640 must apply to
7 the State Parks and Recreational Division of the Department of
8 Transportation for a permit. ORS 390.640 requires permits for
9 any improvements along ocean shores. An ocean shore is defined
10 in ORS 390.605 as the land line between extreme low tides of
11 the Pacific Ocean and the land line of vegetation is
12 established and described by ORS 390.770. If the city's
13 ordinance controls anything beyond this area, it violates Goal
14 17 and 18 because it excuses application of the substantive
15 provisions of the goal for rip-rap construction in areas
16 subject to goal protection.
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