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ARCHIVES DIVISION

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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 660
LAND CONSERVATION AND DEVELOPMENT DEPARTMENT

FILED

06/14/2022 4:44 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Amending Goal 2 exception rules to justify narrow exception under Goal 18.

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 09/22/2022 8:45 AM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

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Filed By:
Casaria Taylor
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HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 09/22/2022

TIME: 8:30 AM

OFFICER: LCDC

ADDRESS: Department of Land Conservation and Development
635 Capitol St. NE
Basement Hearing Room
Salem, OR 97301

DATE: 08/23/2022

TIME: 4:00 PM

OFFICER: Meg Reed

ADDRESS: Newport Public Library
35 NW Nye St.
McEntee Meeting Room
Newport, OR 97365

NEED FOR THE RULE(S)

Under Goal 18, only certain types of development that existed on January 1, 1977 are eligible to apply for shoreline armoring permits. Roads (such as Highway 101) are not eligible for shoreline armoring. Some sections of state Highway 101 and other city and county roads are oceanfront and vulnerable to the hazard of coastal erosion. In some cases, use of shoreline armoring for road protection may be warranted through an exception to Goal 18. The proposed new language to the land use goal exception process is targeted for these public roadways, creating the opportunity to protect them through shoreline armoring.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

Statewide Land Use Planning Goal 18: Beaches and Dunes: <https://www.oregon.gov/lcd/OP/Documents/goal18.pdf>

Statewide Land Use Planning Goal 2: Land Use Planning: <https://www.oregon.gov/lcd/OP/Documents/goal2.pdf>

Final Report from the Goal 18: Pre-1977 Development Focus Group:

https://www.oregon.gov/lcd/OCMP/Documents/G18FocusGroup_FinalReport_2019.pdf

Guidebook on Erosion Control Practices of the Oregon Coast:

https://www.oregon.gov/lcd/Publications/guidebook_erosion_control_practices.pdf

Oregon Administrative Rules, Chapter 660, Division 4:

<https://secure.sos.state.or.us/oard/displayDivisionRules.action?selectedDivision=3054>

STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

The rule adds a new reasons exception to the local goal exception process specific to public, ocean-fronting roads to allow these routes to continue to exist in the same location using shoreline armoring. If utilized, this exception might reduce the number of road closures and detours needed in some locations due to erosion hazards. This could help support connectivity of the transportation network on the coast, therefore supporting the populations that rely on those transportation networks. As such, we expect the proposed rule to support opportunities to maintain transportation connectivity of essential coastal routes with a minimal but equal effect on the fair, just and unbiased treatment of people of different races.

FISCAL AND ECONOMIC IMPACT:

The rule does not change any existing processes. Those local governments involved with a goal exception will incur the use of staff resources and personnel.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) State agencies, units of local government, and members of the public likely to be economically affected by the rule will be those that participate in a local government goal exception process. That process includes the following steps and those groups potentially impacted at each step:

-Applicant applies for a goal exception through the relevant local government – public body (applicant), local planning department;

-Application is reviewed, the public has opportunities to comment, a decision is made on the application – local planning department, local planning commission, DLCD, members of the public, adjacent property owners, relevant state or federal agencies, local elected officials;

-If the goal exception is approved, the applicant will then need to apply for a permit for a beachfront protective structure with relevant state and federal agencies and/or local governments, utilizing existing processes and procedures.

These processes already exist. One new addition to the process from existing procedures is the requirement of a

feasibility assessment by the public body (applicant) to evaluate alternatives to a beachfront protective structure that would not require an exception and that shows there are no reasonable alternatives to the proposed activity or project modifications that would better protect public rights, reduce or eliminate the detrimental effects on the ocean shore, or avoid long-term costs to the public. The cost of performing this assessment will be borne by the applicant. However, it will likely be a required assessment in securing any needed permits for the construction of a beachfront protective structure so will be able to serve dual purposes. Because the proposed exception is limited to public bodies, applicants will only be federal, tribal, state, city, or county government or a special district.

(2) (a) The department has not identified any small business of any type subject to the rules. (b) Small businesses will not be expected to perform additional record keeping or administrative activities outside of the requirements of current administrative rules. (c) The department has not identified costs to small businesses associated with this rule regarding professional services, equipment supplies, labor, or increased compliance administration.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

A Rulemaking Advisory Committee was utilized for this rulemaking, which was comprised of nine individuals representing various interests of Oregon's coastal communities. This included a retired small business owner and a tourism association representative. These individuals, as well as the other RAC members, were able to highlight the needs and interests of the small business community in this rulemaking effort.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

HOUSING IMPACT STATEMENT:

Description of proposed change: (Please attach any draft or permanent rule or ordinance) Addition of a specific reasons exception for Goal 18 to OAR 660-004-0022, reasons necessary to justify an exception under Goal 2, Part II(c).

Description of the need for, and objectives of the rule: Under Goal 18, only certain types of development that existed on January 1, 1977 are eligible to apply for shoreline armoring permits. Roads (such as Highway 101) are not eligible for shoreline armoring. Some sections of state Highway 101 and other city and county roads are oceanfront and vulnerable to the hazard of coastal erosion. In some cases, use of shoreline armoring for road protection may be warranted through an exception to Goal 18. The proposed new language to the land use goal exception process is targeted for these public roadways, creating the opportunity to protect them through shoreline armoring.

List of rules adopted or amended: OAR 660-004-0022

Materials and labor costs increase or savings: The department does not estimate that the proposed rules will result in any cost increase or savings for materials or labor.

Estimated administrative construction or other costs increase or savings: The department does not estimate cost increases or savings related to administrative, construction, or other from the proposed rule.

Land costs increase or savings: The department does not estimate that the proposed rules will result in any land cost increase or savings.

Other costs increase or savings: The department estimates that the proposed rule may result in the avoidance of a cost increase for materials or labor by minimizing the need for coastal road closures or delays from the impacts of coastal erosion.

*Typical-Single story 3 bedrooms, 1 ½ bathrooms, attached garage (calculated separately) on land with good soil conditions with no unusual geological hazards.

AMEND: 660-004-0022

RULE SUMMARY: Addition of a specific reasons exception for Goal 18 to OAR 660-004-0022, reasons necessary to justify an exception under Goal 2, Part II (c). Under Goal 18, only certain types of development that existed on January 1, 1977 are eligible to apply for shoreline armoring permits. Roads are not eligible for shoreline armoring. Some sections of state Highway 101 and other city and county roads are oceanfront and vulnerable to the hazard of coastal erosion. In some cases, use of shoreline armoring for road protection may be warranted through an exception to Goal 18. The proposed new language to the land use goal exception process is targeted for these public roadways, creating the opportunity to protect them through shoreline armoring.

CHANGES TO RULE:

660-004-0022

Reasons Necessary to Justify an Exception Under Goal 2, Part II(c) ¶¶

An exception under Goal 2, Part II(c) may be taken for any use not allowed by the applicable goal(s) or for a use authorized by a statewide planning goal that cannot comply with the approval standards for that type of use. The types of reasons that may or may not be used to justify certain types of uses not allowed on resource lands are set forth in the following sections of this rule. Reasons that may allow an exception to Goal 11 to provide sewer service to rural lands are described in OAR 660-011-0060. Reasons that may allow transportation facilities and improvements that do not meet the requirements of OAR 660-012-0065 are provided in OAR 660-012-0070. Reasons that rural lands are irrevocably committed to urban levels of development are provided in OAR 660-014-0030. Reasons that may justify the establishment of new urban development on undeveloped rural land are provided in OAR 660-014-0040. Reasons that may justify the establishment of temporary natural disaster related housing on undeveloped rural lands are provided in OAR 660-014-0090.¶¶

(1) For uses not specifically provided for in this division, or in OAR 660-011-0060, 660-012-0070, 660-014-0030 or 660-014-0040, the reasons shall justify why the state policy embodied in the applicable goals should not apply. Such reasons include but are not limited to the following: There is a demonstrated need for the proposed use or activity, based on one or more of the requirements of Goals 3 to 19; and either:¶¶

(a) A resource upon which the proposed use or activity is dependent can be reasonably obtained only at the proposed exception site and the use or activity requires a location near the resource. An exception based on this paragraph must include an analysis of the market area to be served by the proposed use or activity. That analysis must demonstrate that the proposed exception site is the only one within that market area at which the resource depended upon can reasonably be obtained; or¶¶

(b) The proposed use or activity has special features or qualities that necessitate its location on or near the proposed exception site.¶¶

(2) Rural Residential Development: For rural residential development the reasons cannot be based on market demand for housing except as provided for in this section of this rule, assumed continuation of past urban and rural population distributions, or housing types and cost characteristics. A county must show why, based on the economic analysis in the plan, there are reasons for the type and density of housing planned that require this particular location on resource lands. A jurisdiction could justify an exception to allow residential development on resource land outside an urban growth boundary by determining that the rural location of the proposed residential development is necessary to satisfy the market demand for housing generated by existing or planned rural industrial, commercial, or other economic activity in the area.¶¶

(3) Rural Industrial Development: For the siting of industrial development on resource land outside an urban growth boundary, appropriate reasons and facts may include, but are not limited to, the following:¶¶

(a) The use is significantly dependent upon a unique resource located on agricultural or forest land. Examples of such resources and resource sites include geothermal wells, mineral or aggregate deposits, water reservoirs, natural features, or river or ocean ports;¶¶

(b) The use cannot be located inside an urban growth boundary due to impacts that are hazardous or incompatible in densely populated areas; or¶¶

(c) The use would have a significant comparative advantage due to its location (e.g., near existing industrial activity, an energy facility, or products available from other rural activities), which would benefit the county

economy and cause only minimal loss of productive resource lands. Reasons for such a decision should include a discussion of the lost resource productivity and values in relation to the county's gain from the industrial use, and the specific transportation and resource advantages that support the decision.¶

(4) Expansion of Unincorporated Communities: For the expansion of an Unincorporated Community defined under OAR 660-022-0010(10) the requirements of subsections (a) through (c) of this section apply:¶

(a) Appropriate reasons and facts may include findings that there is a demonstrated need for additional land in the community to accommodate a specific rural use based on Goals 3-19 and a demonstration that either:¶

(A) The use requires a location near a resource located on rural land; or¶

(B) The use has special features necessitating its location in an expanded area of an existing unincorporated community, including:¶

(i) For industrial use, it would have a significant comparative advantage due to its location such as, for example, that it must be near a rural energy facility, or near products available from other activities only in the surrounding area, or that it is reliant on an existing work force in an existing unincorporated community;¶

(ii) For residential use, the additional land is necessary to satisfy the need for additional housing in the community generated by existing industrial, commercial, or other economic activity in the surrounding area. The plan must include an economic analysis showing why the type and density of planned housing cannot be accommodated in an existing exception area or urban growth boundary, and is most appropriate at the particular proposed location. The reasons cannot be based on market demand for housing, nor on a projected continuation of past rural population distributions.¶

(b) The findings of need must be coordinated and consistent with the comprehensive plan for other exception areas, unincorporated communities, and urban growth boundaries in the area. For purposes of this subsection, "area" includes those communities, exception areas, and urban growth boundaries that may be affected by an expansion of a community boundary, taking into account market, economic, and other relevant factors.¶

(c) Expansion of the unincorporated community boundary requires a demonstrated ability to serve both the expanded area and any remaining infill development potential in the community, at the time of development, with the level of facilities determined to be appropriate for the existing unincorporated community.¶

(5) Expansion of Urban Unincorporated Communities: In addition to the requirements of section (4) of this rule, the expansion of an urban unincorporated community defined under OAR 660-022-0010(9) shall comply with OAR 660-022-0040.¶

(6) Willamette Greenway: Within an urban area designated on the approved Willamette Greenway Boundary maps, the siting of uses that are neither water-dependent nor water-related within the setback line required by section C.3.k of Goal 15 may be approved where reasons demonstrate the following:¶

(a) The use will not have a significant adverse effect on the greenway values of the site under consideration or on adjacent land or water areas;¶

(b) The use will not significantly reduce the sites available for water-dependent or water-related uses within the jurisdiction;¶

(c) The use will provide a significant public benefit; and¶

(d) The use is consistent with the legislative findings and policy in ORS 390.314 and the Willamette Greenway Plan approved by the commission under ORS 390.322.¶

(7) Goal 16 - Water-Dependent Development: To allow water-dependent industrial, commercial, or recreational uses that require an exception in development and conservation estuaries, an economic analysis must show that there is a reasonable probability that the proposed use will locate in the planning area during the planning period, considering the following:¶

(a) Goal 9 or, for recreational uses, the Goal 8 Recreation Planning provisions;¶

(b) The generally predicted level of market demand for the proposed use;¶

(c) The siting and operational requirements of the proposed use including land needs, and as applicable, moorage, water frontage, draft, or similar requirements;¶

(d) Whether the site and surrounding area are able to provide for the siting and operational requirements of the proposed use; and¶

(e) The economic analysis must be based on the Goal 9 element of the County Comprehensive Plan and must consider and respond to all economic needs information available or supplied to the jurisdiction. The scope of this analysis will depend on the type of use proposed, the regional extent of the market and the ability of other areas to provide for the proposed use.¶

(8) Goal 16 - Other Alterations or Uses: An exception to the requirement limiting dredge and fill or other reductions or degradations of natural values to water-dependent uses or to the natural and conservation management unit requirements limiting alterations and uses is justified, where consistent with ORS chapter 196, in any of the circumstances specified in subsections (a) through (e) of this section:¶

(a) Dredging to obtain fill for maintenance of an existing functioning dike where an analysis of alternatives demonstrates that other sources of fill material, including adjacent upland soils or stockpiling of material from

- approved dredging projects, cannot reasonably be utilized for the proposed project or that land access by necessary construction machinery is not feasible;¶
- (b) Dredging to maintain adequate depth to permit continuation of the present level of navigation in the area to be dredged;¶
- (c) Fill or other alteration for a new navigational structure where both the structure and the alteration are shown to be necessary for the continued functioning of an existing federally authorized navigation project such as a jetty or a channel;¶
- (d) An exception to allow minor fill, dredging, or other minor alteration of a natural management unit for a boat ramp or to allow piling and shoreline stabilization for a public fishing pier;¶
- (e) Dredge or fill or other alteration for expansion of an existing public non-water-dependent use or a nonsubstantial fill for a private non-water-dependent use (as provided for in ORS 196.825) where:¶
- (A) A Countywide Economic Analysis based on Goal 9 demonstrates that additional land is required to accommodate the proposed use;¶
- (B) An analysis of the operational characteristics of the existing use and proposed expansion demonstrates that the entire operation or the proposed expansion cannot be reasonably relocated; and¶
- (C) The size and design of the proposed use and the extent of the proposed activity are the minimum amount necessary to provide for the use.¶
- (f) In each of the situations set forth in subsections (a) to (e) of this section, the exception must demonstrate that the proposed use and alteration (including, where applicable, disposal of dredged materials) will be carried out in a manner that minimizes adverse impacts upon the affected aquatic and shoreland areas and habitats.¶
- (9) Goal 17 - Incompatible Uses in Coastal Shoreland Areas: Exceptions are required to allow certain uses in Coastal Shoreland areas consistent with subsections (a) through (e) of this section, where applicable:¶
- (a) For purposes of this section, "Coastal Shoreland Areas" include:¶
- (A) Major marshes, significant wildlife habitat, coastal headlands, exceptional aesthetic resources and historic and archaeological sites;¶
- (B) Shorelands in urban and urbanizable areas, in rural areas built upon or irrevocably committed to non-resource use and shorelands in unincorporated communities pursuant to OAR chapter 660, division 22 (Unincorporated Communities) that are suitable for water-dependent uses;¶
- (C) Designated dredged material disposal sites; and¶
- (D) Designated mitigation sites.¶
- (b) To allow a use that is incompatible with Goal 17 requirements for coastal shoreland areas listed in subsection (9)(a) of this rule, the exception must demonstrate:¶
- (A) A need, based on Goal 9, for additional land to accommodate the proposed use;¶
- (B) Why the proposed use or activity needs to be located on the protected site, considering the unique characteristics of the use or the site that require use of the protected site; and¶
- (C) That the project cannot be reduced in size or redesigned to be consistent with protection of the site and, where applicable, consistent with protection of natural values.¶
- (c) Exceptions to convert a dredged material disposal site or mitigation site to another use must also either not reduce the inventory of designated and protected sites in the affected area below the level identified in the estuary plan or be replaced through designation and protection of a site with comparable capacity in the same area.¶
- (d) Uses that would convert a portion of a major marsh, coastal headland, significant wildlife habitat, exceptional aesthetic resource, or historic or archaeological site must use as little of the site as possible and be designed and located and, where appropriate, buffered to protect natural values of the remainder of the site.¶
- (e) Exceptions to designate and protect, for water-dependent uses, an amount of shorelands less than that amount required by Goal 17 Coastal Shoreland Uses Requirement 2 must demonstrate that:¶
- (A) Based on the Recreation Planning requirements of Goal 8 and the requirements of Goal 9, there is no need during the next 20-year period for the amount of water-dependent shorelands required by Goal 17 Coastal Shoreland Uses Requirement 2 for all cities and the county in the estuary. The Goal 8 and Goal 9 analyses must be conducted for the entire estuary and its shorelands, and must consider the water-dependent use needs of all local government jurisdictions along the estuary, including the port authority, if any, and be consistent with the Goal 8 Recreation Planning elements and Goal 9 elements of the comprehensive plans of those jurisdictions; and¶
- (B) There is a demonstrated need for additional land to accommodate the proposed use(s), based on one or more of the requirements of Goals 3 to 18.¶
- (10) Goal 18 - Fore-dune Breaching: A fore-dune may be breached when the exception demonstrates that an existing dwelling located on the fore-dune is experiencing sand inundation and the sand grading or removal:¶
- (a) Does not remove any sand below the grade of the dwelling;¶
- (b) Is limited to the immediate area in which the dwelling is located;¶
- (c) Retains all graded or removed sand within the dune system by placing it on the beach in front of the dwelling;

and¶

(d) Is consistent with the requirements of Goal 18 "Beaches and Dunes" Implementation Requirement 1.¶

(11) Goal 18 - Foredune Development: An exception may be taken to the foredune use prohibition in Goal 18 "Beaches and Dunes", Implementation Requirement. Reasons that justify why this state policy embodied in Goal 18 should not apply shall demonstrate that:¶

(a) The use will be adequately protected from any geologic hazards, wind erosion, undercutting ocean flooding and storm waves, or the use is of minimal value;¶

(b) The use is designed to minimize adverse environmental effects; and¶

(c) The exceptions requirements of OAR 660-004-0020 are met.¶

(12) Goal 18 - Beachfront Protective Structures: An exception may be taken to the requirements of Goal 18, implementation requirement 5 to permit beachfront protective structures for the primary purpose of protecting and stabilizing ocean-fronting public roads and highways that were developed on January 1, 1977. As used in this section, "public roads and highways" mean roadways that are owned, operated, maintained, or any combination thereof by federal, tribal, state, county, or city government or a special district as defined in ORS 197.015(19). Roads that dead end at the ocean shore as defined in ORS 390.605(2) or otherwise generally run perpendicular to the ocean shore are not eligible for this exception. Uses such as parking lots, waysides, and campgrounds are not roads and are not eligible for this exception. Only a public body that owns, operates, or maintains the public roadway may apply for an exception under this section. Reasons that justify why the requirements of Goal 18, implementation requirement 5 should not apply shall include the following:¶

(a) Justification that the beachfront protective structure will provide a significant public benefit by protecting and stabilizing the ocean-fronting public road or highway;¶

(b) Feasibility Assessment: Evaluation of alternatives to a beachfront protective structure that would not require an exception and that shows there are no reasonable alternatives to the proposed activity or project modifications that would better protect public rights, reduce or eliminate the detrimental effects on the ocean shore, or avoid long-term costs to the public. This feasibility assessment shall describe why alternatives are not achievable, or if tried, why they were not successful. Relevant factors may include topographic limitations, environmental constraints, limits of area for relocation, or cost. If, and only if, the feasibility assessment does not identify a viable option that would not require an exception, then the assessment shall also include a description and justification of the preferred erosion mitigation technique that does require an exception. This feasibility assessment shall evaluate, at a minimum, the following alternatives:¶

(A) Hazard avoidance options, including removing, moving, or relocating the road or highway;¶

(B) Non-structural stabilization methods (e.g., foredune enhancement, beach nourishment, vegetation plantings, cobble berms);¶

(C) Site modifications for the control of erosion such as vegetation management, drainage controls, slope regrading, and structure reinforcements; and¶

(D) Bio-engineered structures (e.g., clay burritos and vegetated terraces).¶

(c) Evaluation of how the proposed beachfront protective structure will:¶

(A) Minimize visual impacts;¶

(B) Maintain access to and along the ocean shore, including access to the Oregon Coast Trail;¶

(C) Minimize negative impacts on adjacent property;¶

(D) Minimize adverse impacts on water currents, erosion, and accretion patterns;¶

(E) Account for local sea rise and climate change for the design life of the structure; and¶

(F) Avoid and mitigate long-term and recurring costs to the public. As used in this subsection, "mitigate" means the reduction of adverse effects of a proposed beachfront protective structure on beach habitats and beach access by considering, in the following order:¶

(i) Avoiding the effect altogether by not taking a certain action or parts of an action;¶

(ii) Minimizing the effect by limiting the degree or magnitude of the action and its implementation;¶

(iii) Rectifying the effect by repairing, rehabilitating, or restoring the affected ocean shore area;¶

(iv) Reducing or eliminating the effect over time by preservation and maintenance operations during the life of the action by monitoring and taking appropriate corrective measures;¶

(v) Compensating for the effect by creating, restoring, enhancing, or preserving beach habitat and access to and along the ocean shore within the same general vicinity of the proposed beachfront protective structure.

Compensation should consider the Oregon Parks and Recreation Department's Ocean Shore Management Strategy;¶

(d) Assessment of how the exception requirements of OAR 660-004-0020 are met.

Statutory/Other Authority: ORS 197.040

Statutes/Other Implemented: ORS 195.012, ORS 197.040, ORS 197.712, ORS 197.717, ORS 197.732