Appendix

Compilation of all written public comments received by
the Goal 18: Pre-1977 Development Focus Group by September 30, 2019.

Disclaimer: DLCD makes no representation regarding the completeness or accuracy of the information posted in the public comments that follow, or that the information therein will be error-free.

Comments from Frank Sherkow (2891 Hwy 101 North, Yachats)

I'm glad that we are talking about **PRE**-1977 development today.

First, let me thank Senator Roblan and Representative Gomberg for supporting this effort.

Between 1939 and 1952, based on aerial photos, a house was built north of Yachats on my lot. It was one of the first houses built in the entire area.

- They had electricity . . . and I have electricity
- They had water . . . and I have water
- They had a driveway off of 101 . . . and I have a driveway off of 101
- They had a septic system and drain field . . . and I have a septic system and USE THE SAME DRAIN FIELD, because that's where you can pass a Perc test

Tax records show that that house was used until the mid-60s. Did they have a fire, flood, or some other calamity; we don't know. But, the lot was developed and utilities supplied.

The outline of the house was visible on air photos through the late 70s. The septic system remained after the house fell into disrepair.

But, the lot was classified as INELIGIBLE for shore protection. I believe that this was done IN ERROR, and have asked the County to correct it. No response so far.

All of my neighbors to the north have rip-rap. On the lot adjacent to the north, is a lot that **NEVER had a structure built and never**

had functional utilities. They do have a PIPE in the ground that COULD be part of a septic system. But, it never was operational.

So, my lot has a 70-year history of residential development and CAN'T get shore protection and my neighbor NEVER had a structure or utilities, and had RIP-RAP after the mid-90s.

When asked about this apparent inconsistency, the State Parks officials said that this was probably done ***"WHEN THE GUIDELINES WERE LOOSER."***

This is NOT TRUE! My neighbor threatened litigation and got a permit. **And**, 3 years ago, the State Parks officials **upgraded** his shore protection from ½ BANK to FULL-BANK rip-rap, WITHOUT MY NEIGHBOR REQUESTING IT.

When asked about that, both the State and County said that they would look into it and get back to me. They never did.

THESE ARE THE FACTS and THEY ARE UNDISPUTED.

Now for advice received . . .

- A trusted State consultant told me that as the erosion gets close to my house, the State might require me to MOVE MY HOUSE. So, I should subdivide my lot so the house sits on a small area and SELL everything east of that.
- Two State Parks official said that I should use the concept of "BOOTSTRAPPING" to justify a rip-rap permit. This concept was only used once and, they admitted, that it had a small probability of success.

- When I tried this out on the County Planning Director, he that the use of this concept was up to the Department of Land Conservation & Development and he would defer to them and State Parks.
- When asked about the presence of the house on my lot, they asked whether it was OCCUPYABLE on Jan. 1, 1977. **That's not what the regulations say!**
- They asked about the location of the old house vs. the new house. **That's not what the regulations say!**

We have 3 agencies involved, with the County deferring to the State, and the State deferring to environmental groups and special interests. In order to get a permit, **they ALL have to agree simultaneously**. **They EACH HAVE VETO POWER**. So, round and round we go, and nothing happens. I've had talks with them on and off for 17 years.

This is a cautionary tale for 2 reasons. First, there is no consistency of how this process is handled. No one ever told me that, "You have a good point; let's see what we can do."

Second, the people and organizations responsible for this process don't believe in shore protection. I had a long talk with State Parks officials. They said they don't want to protect lighthouses, historic sites, communities, or Highway 101 . . . not even State parks.

How do I get fair treatment?

Whatever change you make, it has to be more than changing words!

Sherkow Property (yellow highlight) – North of Yachats (between US 101 and ocean)

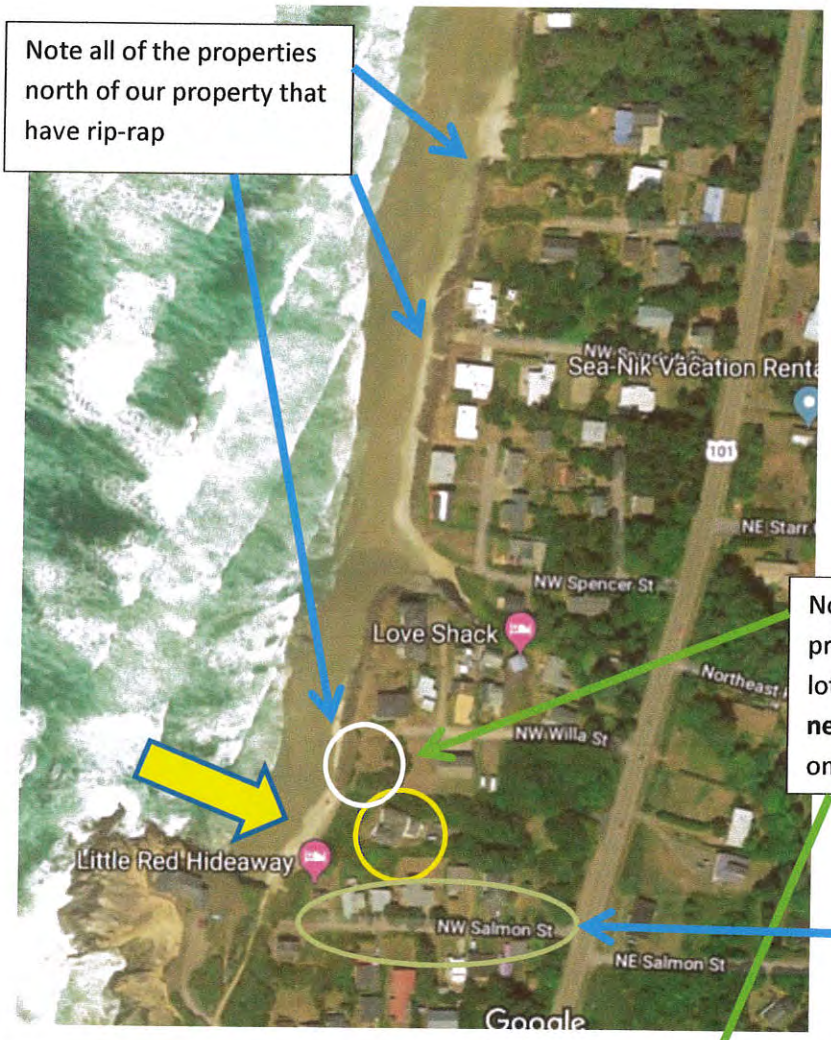


Photo taken from the Trailhead for 804 Trail, looking north

Suggestions from Frank Sherkow (fsherkow@earthlink.net or 541-547-3143):

1. Allow **in-fill shore protection**. Includes a provision that says if there is 200-500 feet of shore protection on either or both sides (public and/or private) of a subject property, then the State will grant an in-fill shore protection permit equal to the adjacent protection or adequate for the situation. This would not only protect the subject property, but also the neighboring properties (which are supposed to already be protected). This in-fill approach would have minimal impact on the localized aesthetic or environmental condition.

2. Instruct State and local agencies to **review areas where shore protection exists or might exists to strive for continuity and compatibility of shore protection**. Involve affected local property owners and public agencies. Plan with property owners on how to **handle "missing links" and vulnerable areas**. Be proactive and positive.

3. The State and local agencies have, knowingly or unknowingly, created a situation whereby it is difficult to get an affirmative answer or engage in a positive working relationship concerning this issue. Some officials have apparently "created" criteria beyond those listed in the rules. Some permits are granted and others denied or discouraged based on an uneven administration of the process.
    a. Create rules that state that the **State SHALL provide a shore protection (i.e., rip-rap) permit** when an application is submitted if requirements are met.
    b. The State shall **engage positively with property-owners** and State agencies in order to satisfy shore protection requirements and permit issues, in a timely manner.
    c. If those requirements and conditions cannot be met, the **State shall issue a letter clearly stating the reasons for any denial, and allow the property-owners and/or State agencies an opportunity to adequately address these conditions**.
    d. The State shall create an **Ombudsman position** to deal with applications and situations that get bogged down in the process. This position will have **real authority** to resolve these situations.

4. Add a shore protection criteria that would **allow protection for one or more properties or infrastructure elements behind or adjacent to the coast as a reason for providing a shore protection permit to properties/agencies on the coast**. *("A stitch in time saves nine.")*

5. The State shall encourage local agencies, property-owners, and if appropriate affected State agencies (e.g., ODOT) to **work together in a cooperative process to establish shore protection** that prevents further detrimental erosion (i.e., proactive protection). This might include methods of how adjacent/abutting shore protection strategies can work together to maximize shore protection.

01/16/19

Existing Section 5 Language States:

*"Permits for beachfront protective structures shall be issued only where development existed on January 1, 1977. **Local comprehensive plans shall identify areas where development existed on January 1, 1977**. For the purposes of this requirement and Implementation Requirement 7 'development' means houses, commercial and industrial buildings, and vacant subdivision lots which are physically improved through construction of streets and provision of utilities to the lot and includes areas where an exception to (2) above has been approved.*

The criteria for review of all shore and beachfront protective structures shall provide that:

(a) visual impacts are minimized;
(b) necessary access to the beach is maintained;
(c) negative impacts on adjacent property are minimized; and
(d) long-term or recurring costs to the public are avoided."

By putting both sentences (from the rule) together, the direct quote would be, ***"Local comprehensive plans shall identify areas where houses, commercial and industrial buildings, and vacant subdivision lots existed on January 1, 1977."***

Operative Language:

1. **Local** = local governments (State cannot generate multiple "local comprehensive plans")
2. **Comprehensive Plans** = one set of standards, criteria and guidelines per local jurisdiction; usually encompasses larger geographical areas
3. **Areas** = neighborhoods, communities, and/or large groupings of adjoining lots

Conclusions:

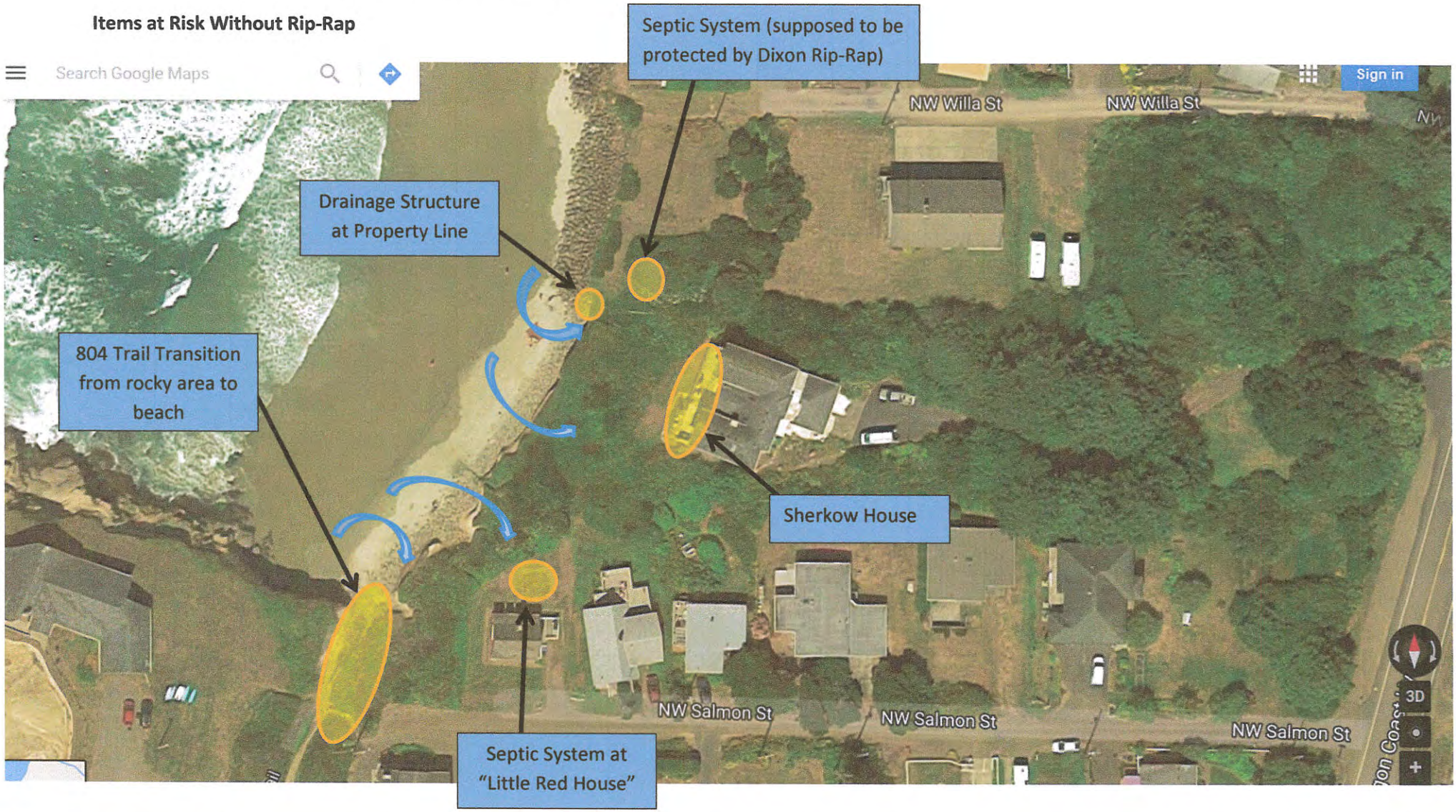
1. The State is acting as if the 2nd sentence (underlined) in the rule does not exist.
2. The rule language talks about **"AREAS"** and not **"LOTS"**.
3. It **does not say that each and every lot** in an **AREA** shall have a house, commercial structure or be subdivided using the "statutory subdivision method."
4. State agencies have NO POWER to make lot-by-lot Goal 18 eligibility rulings.
5. **Only Local Jurisdictions have the power to identify AREAS for Goal 18 eligibility, based on a "local comprehensive plan."**
6. The rule does not say that the State shall determine 1977-development patterns by doing a lot-by-lot inventory.
7. By granting Goal 18 eligibility by **AREAS**, it immediately solves most of the in-fill issues of Shore Protection.

Summary: I call on all local jurisdictions on the coast to immediately produce and adopt the Local Comprehensive Plans called for in the rule.

Frank Sherkow – March 5, 2019

Sherkow Property – 2891 Hwy 101, North, Yachats, OR

Items at Risk Without Rip-Rap



We assert that five items are at risk without suitable shore proportion. First is the drainage structure at the Sherkow/Dixon property line. This is right at the bank. Second is the Dixon septic system which is supposedly the reason for their rip-rap permit. Third is the septic system at the "Little Red House" at the end of Salmon Street. Fourth is our (Sherkow) house. Fifth is the beach access from the 804 Trail, which is consistently eroding. In our opinion, it's time to think about a comprehensive, pro-active solution.

Better Approach

Goal 18 Focus Group

June 19, 2019

GREEN - SOFTER TECHNIQUES

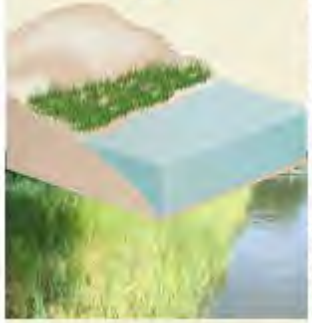
Small Waves | Small Fetch | Gentle Slope | Sheltered Coast

US Army Corps of Engineers

https://coast.noaa.gov/data/digitalcoast/pdf/living-shoreline.pdf

LIVING SHORELINE

VEGETATION ONLY



Roots hold soil in place to reduce erosion. Provides a buffer to upland areas and breaks small waves.

Suitable For

Low wave energy environments.

Material Options

- Native plants*

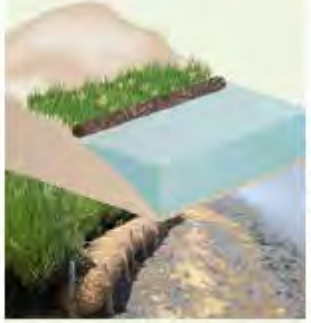
Benefits

- Dissipates wave energy
- Slows inland water transfer
- Increases natural storm water infiltration
- Provides habitat and ecosystem services
- Minimal impact to natural community and ecosystem processes
- Maintains aquatic/terrestrial interface and connectivity
- Flood water storage

Disadvantages

- No storm surge reduction ability
- No high water protection
- Appropriate in limited situations
- Uncertainty of successful vegetation growth and competition with invasive

EDGING



Structure to hold the toe of existing or vegetated slope in place. Protects against shoreline erosion.

Suitable For

Most areas except high wave energy environments.

Vegetation* Base with Material Options

(low wave only, temporary)
- "Snow" fencing
- Erosion control blankets
- Geotextile tubes
- Living reef (oyster/mussel)
- Rock gabion baskets

Benefits

- Dissipates wave energy
- Slows inland water transfer
- Provides habitat and ecosystem services
- Increases natural storm water infiltration
- Toe protection helps prevent wetland edge loss

Disadvantages

- No high water protection
- Uncertainty of successful vegetation growth and competition with invasive

SILLS

Parallel to existing or vegetated shoreline, reduces wave energy and prevents erosion. A gapped approach would allow habitat connectivity, greater tidal exchange, and better waterfront access.

Suitable For

Most areas except high wave energy environments.

Vegetation* Base with Material Options

- Stone
- Sand breakwaters
- Living reef (oyster/mussel)
- Rock gabion baskets

Benefits

- Provides habitat and ecosystem services
- Dissipates wave energy
- Slows inland water transfer
- Provides habitat and ecosystem services
- Increases natural storm water infiltration
- Toe protection helps prevent wetland edge loss

Disadvantages

- Require more land area
- No high water protection
- Uncertainty of successful vegetation growth and competition with invasive

BEACH NOURISHMENT ONLY

Large volume of sand added from outside source to an eroding beach. Widens the beach and moves the shoreline seaward.

Suitable For

Low-lying oceanfront areas with existing sources of sand and sediment.

Material Options

- Sand

Benefits

- Expands usable beach area
- Lower environmental impact than hard structures
- Flexible strategy
- Redesigned with relative ease
- Provides habitat and ecosystem services

Disadvantages

- Requires continual sand resources for renourishment
- No high water protection
- Appropriate in limited situations
- Possible impacts to regional sediment transport

BEACH NOURISHMENT & VEGETATION ON DUNE

Helps anchor sand and provide a buffer to protect inland area from waves, flooding and erosion.

Suitable For

Low-lying oceanfront areas with existing sources of sand and sediment.

Material Options

Sand with vegetation
Can also strengthen dunes with:
- Geotextile tubes
- Rocky core

Benefits

- Expands usable beach area
- Lower environmental impact
- Flexible strategy
- Redesigned with relative ease
- Vegetation strengthens dunes and increases their resilience to storm events
- Provides habitat and ecosystem services

Disadvantages

- Requires continual sand resources for renourishment
- No high water protection
- Appropriate in limited situations
- Possible impacts to regional sediment transport

GRAY - HARDER TECHNIQUES

Large Waves | Large Fetch | Steep Slope | Open Coast

US Army Corps of Engineers

COASTAL STRUCTURE

BREAKWATER

Offshore structures intended to break waves, reducing the force of wave action and encourages sediment accretion. Can be floating or fixed to the ocean floor, attached to shore or not, and continuous or segmented. A gapped approach would allow habitat connectivity, greater tidal exchange, and better waterfront access.

Suitable For

Most areas except high wave energy environments often in conjunction with marinas.

Material Options

- Grout-filled fabric bags
- Armorstone
- Pre-cast concrete blocks
- Living reef (oyster/mussel) if low wave environment
- Wood
- Rock[1]

Benefits

- Reduces wave force and height
- Stabilizes wetland
- Can function like reef
- Economical in shallow areas
- Limited storm surge flood level reduction

Disadvantages

- Expensive in deep water
- Can reduce water circulation (minimized if floating breakwater is applied)
- Can create navigational hazard
- Require more land area
- Uncertainty of successful vegetation growth and competition with invasive
- No high water protection
- Can reduce water circulation
- Can create navigation hazard

GROIN

Perpendicular, projecting from shoreline. Intercept water flow and sand moving parallel to the shoreline to prevent beach erosion and break waves. Retain sand placed on beach.

Suitable For

Coordination with beach nourishment.

Material Options

- Concrete/stone rubble[1]
- Timber
- Metal sheet piles

Benefits

- Protection from wave forces
- Methods and materials are adaptable
- Can be combined with beach nourishment projects to extend their life

Disadvantages

- Erosion of adjacent sites
- Can be detrimental to shoreline ecosystem (e.g. replaces native substrate with rock and reduces natural habitat availability)
- No high water protection

REVETMENT

Lays over the slope of a shoreline. Protects slope from erosion and waves.

Suitable For

Sites with pre-existing hardened shoreline structures.

Material Options

- Stone rubble[1]
- Concrete blocks
- Cast concrete slabs
- Sand/concrete filled bags
- Rock-filled gabion basket

Benefits

- Mitigates wave action
- Little maintenance
- Indefinite lifespan
- Minimizes adjacent site impact

Disadvantages

- No major flood protection
- Require more land area
- Loss of intertidal habitat
- Erosion of adjacent unreinforced sites
- Require more land area
- No high water protection
- Prevents upland from being a sediment source to the system

BULKHEAD

Parallel to the shoreline, vertical retaining wall. Intended to hold soil in place and allow for a stable shoreline.

Suitable For

High energy settings and sites with pre-existing hardened shoreline structures. Accommodates working water fronts (eg: docking for ships and ferries).

Material Options

- Steel sheet piles
- Timber
- Concrete
- Composite carbon fibers
- Gabions

Benefits

- Moderates wave action
- Manages tide level fluctuation
- Long lifespan
- Simple repair

Disadvantages

- No major flood protection
- Erosion of seaward seabed
- Erosion of adjacent unreinforced sites
- Loss of intertidal habitat
- May be damaged from overtopping oceanfront storm waves
- Prevents upland from being a sediment source to the system
- Induces wave reflection

SEAWALL

Parallel to shoreline, vertical or sloped wall. Soil on one side of wall is the same elevation as water on the other. Absorbs and limits impacts of large waves and directs flow away from land.

Suitable For

Areas highly vulnerable to storm surge and wave forces.

Material Options

- Stone
- Rock
- Concrete
- Steel/vinyl sheets
- Steel sheet piles

Benefits

- Prevents storm surge flooding
- Resists strong wave forces
- Shoreline stabilization behind structure
- Low maintenance costs
- Less space intensive horizontally than other techniques (e.g. vegetation only)

Disadvantages

- Erosion of seaward seabed
- Disrupt sediment transport leading to beach erosion
- Higher up-front costs
- Visually obstructive
- Loss of intertidal zone
- Prevents upland from being a sediment source to the system
- May be damaged from overtopping oceanfront storm waves

[1] Rock/stone needs to be appropriately sized for site specific wave energy.

If You Were Dealing with a Communicable Disease

- **You wouldn't run away and hide *(and let nature take its course)***
- You'd learn the cause
- Treat those that have the disease
- Produce a vaccination
- Establish prevention steps
- Educate the public and health-givers

Instead of Retreating . . .

- How about **working with nature** **to build up beaches**?
  - Better for property-owners
  - Better for beach users
  - Better for the environment

If nature cannot take its course with natural renourishment, coasts can erode.

- **What's the Oregon coast worth to Oregonians, local tax-base, and employment??**
- **Protect** State Parks, historic sites, critical infrastructure, etc.
- **Prevent having to rebuild or replicate** parks, homes, and infrastructure, etc.
- ***Retreating coastline due to erosion serves no one!***

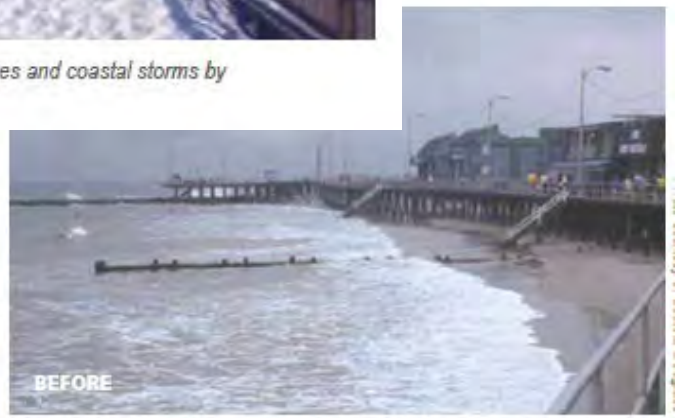
What Are the Right Options?

- Different options for different sites
- Assess the highest probability of performance at each location
- Assess the cost and benefits (included avoided or facility replacement costs)
- Determine cost sharing arrangements
- Gain public input

Beach nourishment, which adds sand to the coastal system, protects people and property from the effects of hurricanes and coastal storms by widening a beach and advancing the shoreline seaward. This project was constructed at Panama City Beach, Fla.

BEACH NOURISHMENT PROJECTS ARE ENGINEERED

http://asbpa.org/wpv2/wp-content/uploads/2017/08/HowBeachNourishmentWorksPrimerASBPA.pdf



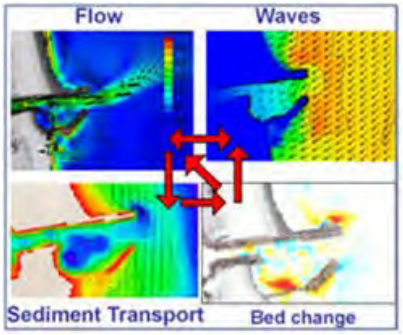
Dunes included in a beach nourishment project act as a protective barrier, preventing flooding and storm damage caused by storm surge, wave runup, and overtopping. This project was constructed at Ocean City, N.J.

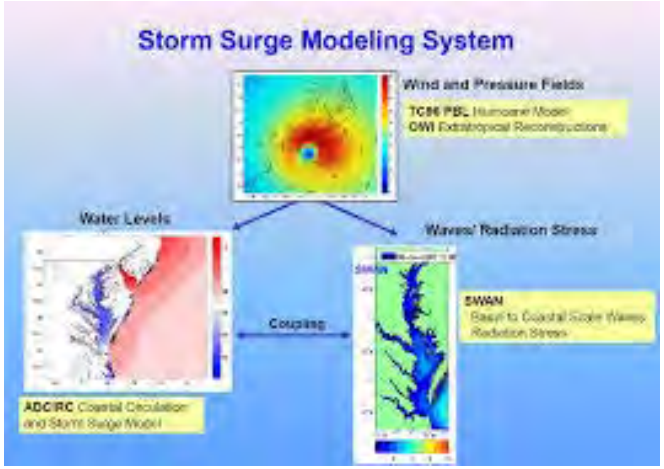
Where Are the Experts?

- **Hatfield Marine Science Center** – 4 miles away
- **OSU – Wave Lab** – 50 miles away
- **USACE – Portland** – 150 miles away
- NOAA and Others
- Shore Protection Research

Age of Computers

- Computer **Coastal Erosion Simulation Model**
  - Test physical scenarios
  - Test policy options
  - Test options for beach improvements
  - Test tax-base and economic impacts, and facility replacement costs





- **What does the shoreline look like in 20 years *UNDER CUURENT POLICIES*?**
  - How many homes, roads, parks and other elements will be gone? Where?
  - Lose of beaches and tax-base?

Shore Protection Cases

- This review was undertaken to **address various longstanding cases and the rip-rap approval process** – promised to State Legislators
- Review the individual, longstanding cases – ***why are they stalled or denied?***
- How many can be advanced within the current rules with **minimal changes in interpretations**?
- How many can be advanced with **minor rule changes**?
- How many can be advanced with **"legally established lot"** interpretation?
- How many can be advanced with **boot-strapping**?
- How many can be advanced with recognition of **protection for adjoining lots**?

June 5, 2019

Attention: Goal 18 Focus Group

While attending the last two meetings of the Goal 18 Focus Group, several people asked us why we were there—after all, we obtained our revetment! Our answer is simply this. While we are extremely relieved to have protection after a two-and-a-half-year battle of watching 40 ft. of our property wash away while being prevented from doing anything, we are still angry about all the sleepless nights worrying whether the house would survive the next storm, and we are extremely sympathetic to those who continue to fight the battle for the right to protect their property. In the end, we did not get approved for armament as a result of "common sense"; we got approved only because our property loss was severely impacting our neighbor's (green zone) property. If that neighbor had decided not to apply for armor or couldn't afford to obtain armor, we would still be without protection and possibly without a house.

The intended or unintended consequences of Goal 18 has been to create a "Have" and "Have Not" system for homeowners on the Oregon coast. The tragic fact about being among the "Have Nots" is that they face the inability to protect, and in some cases save, properties from destruction, rendering the property valueless. Imagine a neighborhood of homes in the path of a wildfire. The interpretation from Goal 18 would be that those homes that are part of a subdivision would be allowed to have firefighting crews assist them while those that were not part of the subdivision would not qualify for that same protection and, to make matters worse, would be prevented from fighting the fires themselves.

Getting back to the issue of common sense. Does it make sense that one or two properties are denied basic protection when multiple neighbors to the south have armor installed and multiple neighbors to the north are on the list of approved properties for armor? What exactly is gained by denying those one or two properties? Does it make sense to allow homes that received building permits in good faith and homes that pay taxes to fall into the ocean?

In the last meeting it was stated that an amendment to Goal 18 would be very difficult if not impossible to obtain in Salem. The discussion then went to Goal Exceptions since that process is "already in place." During our battle, we were told numerous times that obtaining an "exception" would be highly unlikely based on the history of those seeking them in the past, and the process could take two or more years to complete. In our situation, we didn't have two more years to wade through this process—erosion was happening too fast. In addition, no one at any time could explain what an approved "exception" might look like.

These are the facts on our property—if none of these were suitable for an "exception" to Goal 18, what would?

- Our lot has been a legal lot since the 1940s.
- A road and all utilities have been available to our lot since the 1950s.

- On our street, homes were built on every ocean front lot north of us prior to 1977. Why didn't our lot have a home as well? One possible reason is that the State Parks purchased the lot along with five others to the south in 1966 with the intention of creating a public Wayside with parking and restroom facilities. This prevented the lots from being developed privately. However, the State Parks abandoned their plan—considering it "excess property" and in 1980, they sold the lots at auction, which is how we purchased it. Was there any mention of our lot being a "red zone" lot? Of course not.
- We built our home with a 50 ft. setback from the ocean (10 more feet than what was required at the time). The street side setback prevented us from any additional setback.
- In 1983 after a strong storm, we applied for a permit to install revetment on three properties—a partial one on our property and full revetments on the two properties to the south. When we went to the County to ask what was required for the permit process, we were told that the State, not the County, provided the permits and to contact one of the local contractors who would go through the process of obtaining our permit. We did that, and we were granted revetment rights by the State. Over the years we were also approved to repair the revetment. Again—no mention of "red zone."
- The first time we heard anything about red and green zones was when we tried to secure a permit to extend our "approved" revetment across our property in 2016. We were denied.
- Since the map of "Have" and "Have Nots" was not completed until 2002, how would any ocean-front homeowner or potential buyer know what might be facing them prior to that date?

During last month's meeting it was noted that the entire area from Fishing Rock to Salishan has been battered with strong storms and property loss. The fact that there is already a significant amount of armor along this part of the coast, why could you not consider this entire area as an "exception" to Goal 18? It would save individual property owners time, money, and stress from seeing others who have approval for protection while they fight an endless battle. It would also assist the County and State personnel who must face these distraught homeowners daily.

One last note. It doesn't take a university study to determine that the ability to protect property correlates directly with market value. Prior to our revetment approval, our property was worth no more than the furnishings inside. If we had ever needed to sell, no one in their right mind would purchase a home threatened by the ocean with no protection rights whatsoever.

We appreciate your time in reading our comments.

Mark and Lynn Seaman
Lincoln Beach

Problems of Shoreline Armoring and Eligibility in the Central Oregon Coast
May 22, 2019
Steve Neville, Coastal Property Owner

The stated purpose of this focus group is **"to review the equity and consistency of the application of Statewide Planning Goal 18: Beaches and Dunes, Implementation Requirement #5."**

It is the purpose of this presentation to demonstrate that:

- The Goal 18 has **not** been applied consistently and does **not** recognize the problems of climate change now affecting the coast.
- The central Oregon coast is highly developed with only few isolated lots that are not eligible for armoring.
- The patchwork of permitting has created a "sawtooth" pattern of a few isolated properties at increasing risk for erosion.
- The concept of a meandering vegetation line was rejected in the original deliberations of the Beach Bill.
- Application of the vegetation line puts at risk buildings and vital infrastructure that were built with approval by local permitting authorities.
- A number of properties in the central coast area that not eligible for armoring are at risk for erosion and demonstrate the need for a more flexible approach to armoring.

In 1967 the Oregon Beach Bill was enacted as HB 1601. It established a 16' foot contour line to create a public **"recreational easement"**. West of this contour line the state opened up a 363-mile-long corridor for public use. It was simple and contained little other detail.

The next legislature in 1969 enacted HB 1045 that acknowledged the shortcomings of the original bill and created a defined line known as the **"Beach Zone Line" (BZL)**. This was a clearly defined and surveyed line that established that all land west of the **"Beach Zone Line" (BZL)** was under the authority of the state as the public **"recreational easement".** Land lying east of this line was private property and not under state authority. Thus, both public and private property rights were protected as intended by both legislatures.

There was no language in either HB 1601 or HB 1045 that defined or restricted the installation of **Beach Protective Structures (BPS) or armoring**. If armoring was to be placed it required a permit **only if** the **BZL** or any land westward was touched. This establishment of the **Beach Zone Line** guaranteed two outcomes:

- It insured the public would always have unencumbered access.
- It insured private property rights eastward were protected.

It should be noted that no state permits were required for land not touching or exceeding the BZL. About the year 2000, the BZL was replaced by a meandering vegetation line to define the public easement.

In 1969 47% of all land in recreational easement was privately owned.

Important point: The original Beach Bill was not an enemy of private property owners. It only created a recreational easement across private lands seaward of a surveyed, defined line. It did not deal with the issue of **Beach Protective Structures (BPS) or armoring**.

Important point: From 1967 until June 6, 1977 there was no Goal 18. The establishment of Goal 18 as administrative policy created the concept of an eligibility for installing **BPS (Beachfront Protective Structure)** or armoring. Subsequent maps showed properties designated as GREEN (Eligible for Protection), RED (Not eligible for Protection), and LIGHT GREEN (Eligible due to Exception).

The implementation Goal 18 created a date certain of 1/1/1977 that development had to exist for armoring installation. The specifics of eligibility are defined in Requirement 5.

- There were no prior qualifying dates or establishment of lists for developed or undeveloped properties.
- There was no recognition of properties that were zoned for development and approved by land use decisions for development but did not have qualifying improvements.

The subsequent implementation polices of Goal 18 imposed greater restrictions on private property owners. These restrictions were not a part of the original Beach Bill, but were the administrative interpretations evolving from it. Subsequent actions discontinued the use of the **Beach Zone Line** using the less clearly defined and meandering concept of **"vegetation line."**

This idea of a **"vegetation line."** was considered by both 1967 and 1969 legislatures and rejected as unacceptable due to its inconsistency with Oregon State Constitution requirements of a property line being "definite and certain."

It should be noted that private ownership of lands westward of the original established **BZL (Beach Zone Line)** and the **vegetation line** still exist today.

Exceptions to Goal 18

It is said that there have been no Exceptions to Goal 18. In fact, there are two local examples of ***de facto*** "exceptions".

Salishan

The first is Salishan which is classified on the Oregon Coastal Atlas maps as **"Eligible due to Exception".**

In January 1977 Lincoln County stopped permitting undeveloped lots in Salishan due to the 1/1/1977 cutoff date for development. Newspaper accounts report that Salishan planned to take legal action. However, on 4/12/1978 Lincoln County Board of Commissioners ordered the Lincoln County Planning Department to grant building permits for Salishan. Goal 18 Eligibility shows **all** of Salishan to be light green in color indicating an exception to Goal 18. A review of

State Beachfront Protective Structure permit records indicates 70 of the Salishan lots have **no** armoring permit records.

Despite this, there is general agreement that *no* exception to Goal 18 has ever been approved.

Re: Red (ineligible) property permitted to install BPS

The second local example of ***de facto*** exception to Goal 18 is the permitting of armoring of 21 properties that are designated as ineligible on the Oregon Coastal Atlas maps in the 5.3-mile area extending from Fishing Rock to the mouth of Siletz Bay.

While we understand the mission of this Focus Group is not to make decisions regarding specific issues of the application of Goal 18, we do believe that this is the appropriate forum to discuss the inadequacies of the current application of Goal 18.

On January 16, 2019, this Goal 18 Focus Group presented data showing that as of the end of 2014 the central coast is highly developed and uniquely involved with beachfront armoring:

- Only 22.5 miles (5 per cent) of Oregon coastline is armored
- 92 per cent of the armoring is in Clatsop, Tillamook and Lincoln county
- More than half of the armoring is in Lincoln County

The current status of eligibility for armoring is summarized graphically on the Ocean Shores Viewer (http://coastalatlas.net/). We have created GIS web maps (http://arcg.is/1C9KKu) based on this data base and county records to show graphically the current status of eligibility and installation of beachfront protective structures in 5.3-mile area from Fishing Rock to Siletz Bay.

The first map shows the extent of armoring of 349 lots from Fishing Rock to the Siletz Bay:

		Total lots	# Lots w/BPS	Lots w/o BPS	%Lots w/BPS
Dark Green	Eligible for Protection	185	151	34	81%
Light Green	Eligible due to Exception	130	128	2	99%
Red	Not Eligible for Protection	34	21	13	62%
Fishing Rock to Salishan Spit		**349**	**300**	**49**	**86%**

This area of the central Oregon Coast is highly developed as demonstrated by the vast majority of lots (86 per cent) that are armored.

The second map shows the current status of extensive armoring in this portion of the coast. Note that the purple line does not accurately represent actual permitted and installed armoring.
The third map shows the lots where armoring was permitted on ineligible properties. These structures were installed in the last 20 years.

In the 5.3 mile stretch of beach from Fishing Rock to Siletz Bay, there are 21 lots classified as **ineligible** for armoring that have been permitted to install armoring through an ***ad hoc*** and ***inconsistent*** decision-making process. These include:

- 3 private lots purchased in 1981 as State surplus property
- 11 lots in Bella Beach
- 5 lots on Neptune Avenue
- 1 lot on Lincoln Avenue
- 1 lot is an extension of Willow Avenue

In the area outside of Salishan, there are only 34 lots that are **ineligible** for armoring RED

- 21 have been riprapped
- 13 non-qualifying lots are without beach revetment:
    - 2 are State Park land
    - 2 are commercial development-WorldMark
    - 1 is undeveloped no access property-part of Coronado Shores plat
    - 1 is common element (beach access for Coronado Shores)
    - 1 is common element (beach access for SeaRidge)
    - 2 individual residences w/permitted "column" revetment structure on private property
    - 4 individual residences

Conclusions

1. Climate change and sea level rise are causing unprecedented erosion in many areas of the Oregon coast with negative impact on public and private property.

2. The Lincoln Beach/Gleneden Beach region of the coast is historically highly developed with a high degree of armoring of 86 per cent of lots.

3. Since 1977, Goal 18 has been applied inconsistently as evidenced by the installation of beach protective structures in 21 ineligible properties.

4. Of the 349 lots in the Lincoln Beach/Gleneden Beach area, there are only 13 (4 %) lots outside of Salishan that are not eligible for protection.

5. Properties which were zoned and approved for development should be permitted to install armoring when the buildings and/or infrastructure are at potential risk rather than wait for an emergency.

6. Goal 18 should be applied to recognize:
    - the reality of climate change
    - the unique characteristics of development in the central Oregon coast
    - the extensive armoring of this portion of the coast that currently exists
    - the consequences of inequities and inconsistencies in the permitting process

Permit Status 1

vflaw.maps.arcgis.com

SeaRidge Homeowners Association: Revetment along the Oregon Coast

SeaRidge Homeowners Association: Revetment along the Oregon Coast

Understanding the inconsistencies of shoreline armoring and permitting for the tax parcels in the Lincoln Beach area in Lincoln County, Oregon.

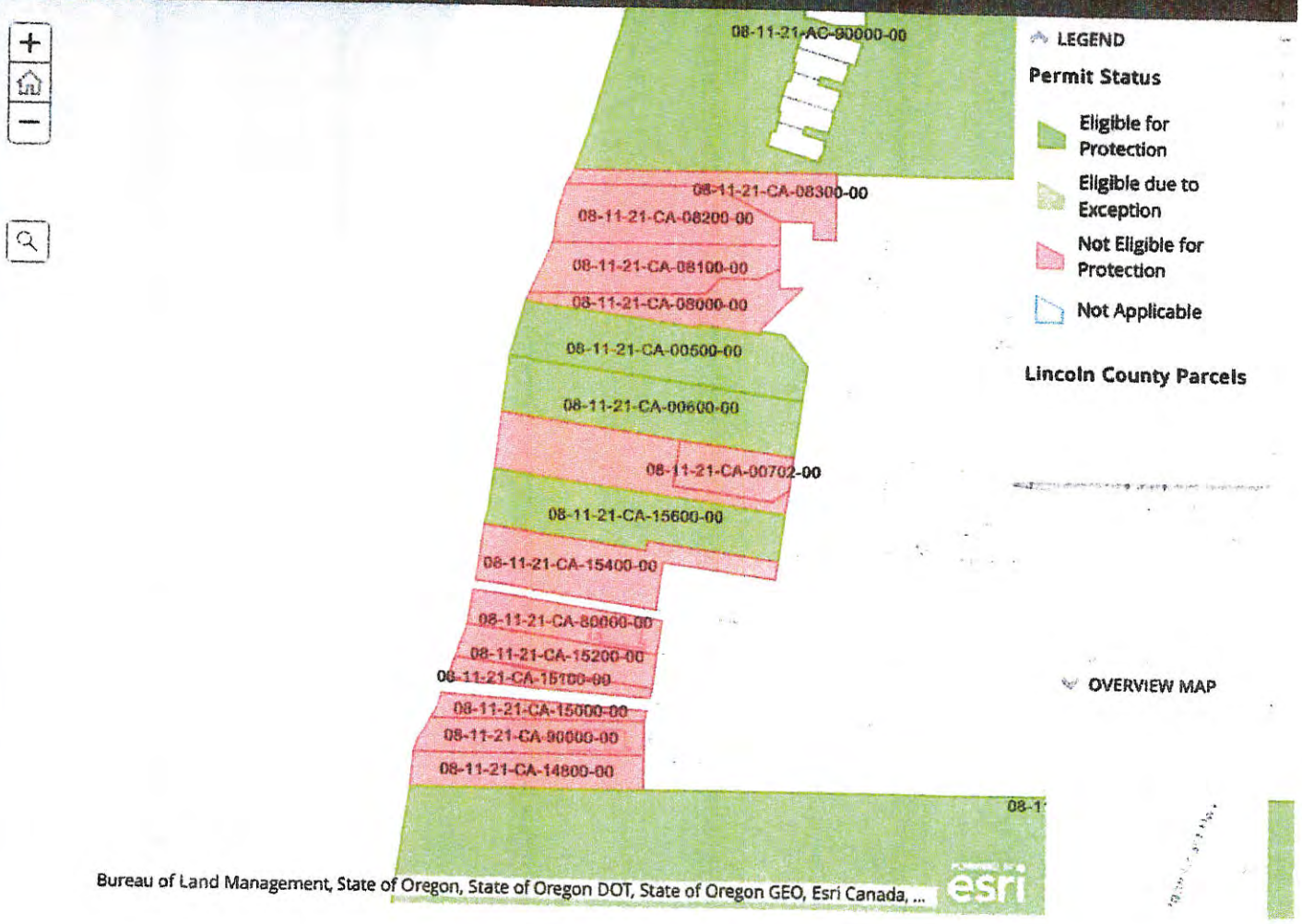
An Oregon Shoreline Story Map

ermit Status | iprap Status | Ineligible Properties with Installed Riprap

Erosion and riprap beneath residences

The Oregon coastline from Fishing Rock to the Siletz Bay is 5.3 miles in length and consists of 349 tax parcels. 315 parcels are eligible for revetment and most have been riprapped. Of the 34 parcels that are ineligible, 21 have been allowed to have riprap. Of the remaining 13 parcels, only 7 are developed. This highly developed area of the central coast is armored inconsistently leaving a small number of properties vulnerable to erosion.

The Oregon Department of Land Conservation and Development's (DLCD) Goal 18 limits the placement of beachfront protective structures to those areas where development existed prior to 1977. A Goal 18 exception is needed to install new shoreline armoring.



Rip Rap Status 2

vflaw.maps.arcgis.com

SeaRidge Homeowners Association: Revetment along the Oregon Coast

SeaRidge Homeowners Association: Revetment along the Oregon Coast

Understanding the inconsistencies of shoreline armoring and permitting for the tax parcels in the Lincoln Beach area in Lincoln County, Oregon.

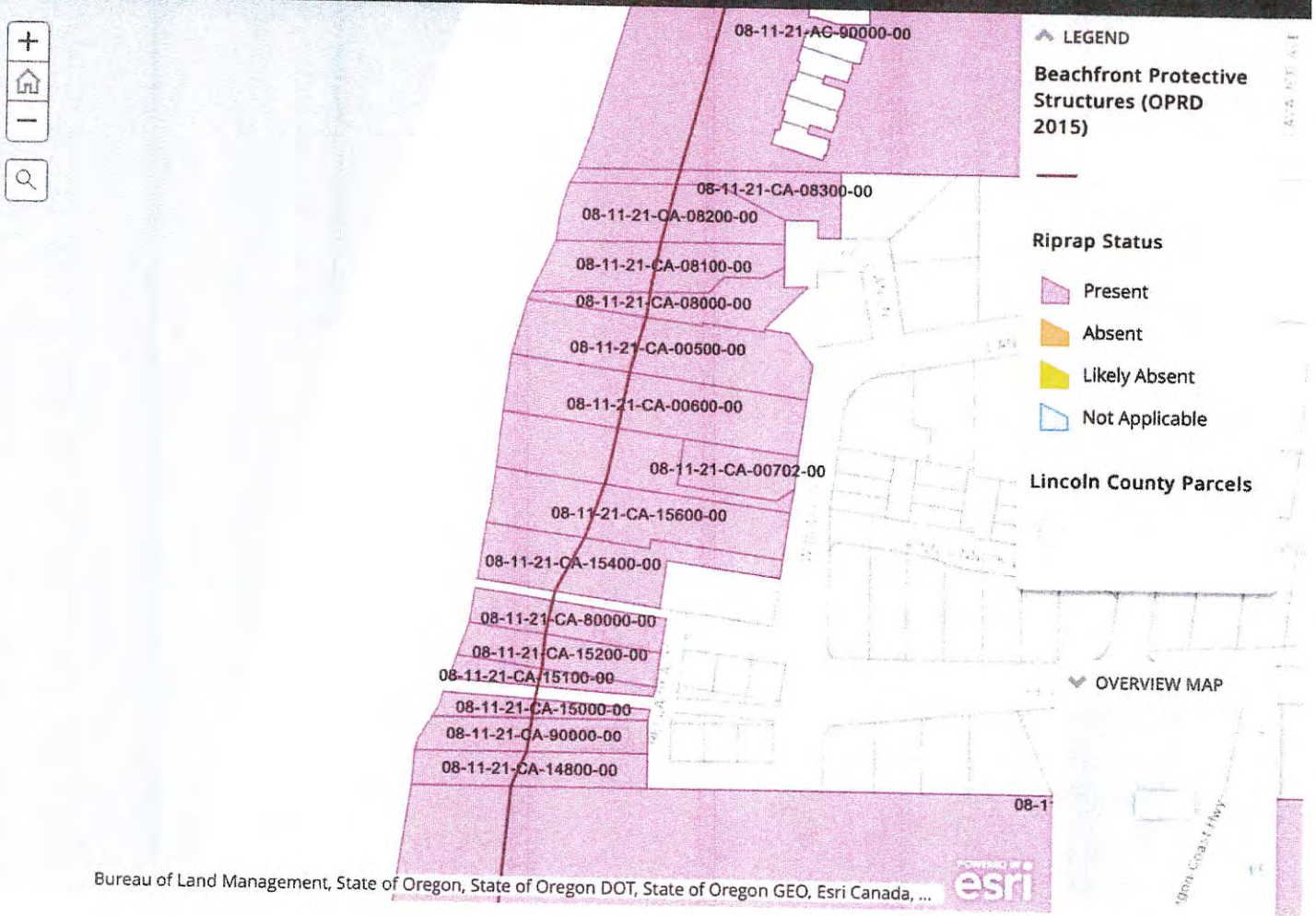
An Oregon Shoreline Story Map.

Permit Status | Riprap Status | Ineligible Properties with Installed Riprap

Berm restoration below residences. (Fall, 2018.)

The status of shoreline protection is varied for the 349 Lincoln Beach parcels. SeaRidge has worked cooperatively with Oregon Parks and Recreation Department to employ "soft measures" to protect against erosion by pushing native sand and importing sand. Despite these efforts at considerable cost, our parcel and other unprotected parcels are being impacted by increasing erosion due to wave action and flooding. The current policy of eligibility for beachfront protective structures is now over 50 years old. The current maps do not accurately reflect the status of permitted revetments.

Beach protective structures include visible rock riprap and a concrete seawall. All unprotected parcels are being impacted by increasingly severe erosion caused by wave action, flooding and current and projected sea level rise.



Ineligible Properties w/ Rip Rap 3

vflaw.maps.arcgis.com

SeaRidge Homeowners Association: Revetment along the Oregon Coast

SeaRidge Hon SeaRidge Homeowners Association: Revetment along the Oregon Coast Revetment along the Oregon Coast

An Oregon Shoreline Story Map.

Understanding the inconsistencies of shoreline armoring and permitting for the tax parcels in the Lincoln Beach area in Lincoln County, Oregon.

Permit Status | Riprap Status | eligible Properties with Installed Riprap

Severe erosion of sand berm beneath residences caused by recent storm surge. (Winter, 2018.)

Since 1984, SeaRidge has worked cooperatively with the Oregon State Departments responsible for implementing Goal 18. In recent years there has been unprecedented beach erosion that has been attributed to climate change and sea level rise along the Oregon coast. SeaRidge has utilized so-called "soft methods" that involved pushing native sand with permission of the beach managers. In the last several years, the berm has been rebuilt with imported sand that has been severely eroded with winter high tides and storm surge. Since 1984 SeaRidge has spent over $600,000 to protect the berm while working cooperatively with beach managers. This photo compared to prior photo shows the extent of berm erosion after winter storms in early December, 2018 (see comparison to prior photo in the fall of 2018).

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July 23, 2019

Via Electronic Mail
Goal 18 Focus Group
Moss Room, Agate Beach Best Western,
Newport, OR

RE: Goal 18 Equity and Consistency

Dear Members of the Focus Group:

Please include this letter in the record of the work of this Focus Group. As you know, the purpose of this group is to determine whether Goal 18 is equitable in the face of climate change.[1] A primary driver of the legislative call for this committee and DLCD's accession to that call, was to determine whether Goal 18 should change and, if so, how. If the answer to this question is not a product of this committee, then it does not respond to its charge.

This firm represents numerous Oregon ocean front property owners with serious concerns about Goal 18, and who strongly believe that the current Goal 18 rule driven solely by whether property was "developed" on January 1, 1977, lacks any rational policy basis and should be removed. The decision to allow or deny a request for oceanfront armoring should be driven by standards – already largely in place in OAR 736-020-003 through 0032. No home should be required to fall into the ocean merely because it is situated on property that was not "developed" on January 1, 1977. If there is a Goal 14 or other non-Goal 18 exception that supported a property's development – as is the case for much of Oregon's northern coast including its numerous unincorporated communities served by public water and sewer -- then that private development investment and related public infrastructure should be protected when ocean levels rise or wave action changes. It is simply irrational to say "no" merely because the property was legitimately developed with all required land use permits, after January 1, 1977.

Further, as you must understand, many unincorporated communities as well as homes within incorporated cities, are served with public water and sewer. A public policy that foresees

[1] In DLCD's report to the legislature "2017-19 Biennial Report", p 46 DLCD explained:
"Goal 18: Pre-1977 Development Focus Group: The department will initiate and lead a Policy Focus Group of relevant stakeholders to review the policies contained in and related to Statewide Planning Goal 18: Beaches and Dunes. With the increase of erosion and flooding potential on the Oregon coast due to climate change, private and public investments along the oceanfront are increasingly at risk of damage or ruin. It has been demonstrated in certain instances that the policies encompassed by Goal 18, specifically those relating to the allowance of shoreline armoring (e.g. riprap, seawalls), may not be flexible or comprehensive enough to deal with the realities of a changing climate. A policy focus group has been convened by the department to analyze the current policy framework in order to proactively address identified issues and discuss potential recommendations."

ocean encroachment breaking apart this infrastructure with untold environmental consequences simply because it was lawfully installed after January 1, 1977, is foolish. Developed property along the Oregon coast includes subdivisions and condominiums, as well as ocean facing private open space and infrastructure. At the time when such was lawfully platted and developed, that land was often hundreds of feet from the ocean, but has since been swallowed up due to the change of ocean currents caused by jetties and the like, as well as climate change. Oregon should be looking ahead to protect those public and private investments, not backward. A thoughtful public policy would allow the state to protect legitimate private property rights, as well as legitimate public rights to recreate on the beach, applying a standards approach.

Accordingly, this letter and those of many others, asks you to recommend the removal of the Goal 18 prohibition on shoreline armoring for property not "developed" on January 1, 1977 and to replace it with shoreline armoring standards along the lines of those already in place in OAR 736-0020-000 et seq. Once the eligibility question is removed, existing law capably ensures the protection of both public and private interests. The January 1, 1977 cut off is otherwise simply well-known to be an arbitrary selection existing for no apparent reason other than protecting the oceanfront homes of powerful people in office at the time the restriction was adopted. As the PowerPoint prepared by the economist on your panel several months ago illustrates, Goal 18's irrational prohibition results in about 1,600 north coast properties being eligible for shoreline armoring and some 1,600 north coast homes being ineligible, with no apparent policy justification. No thoughtful public policy would demand the application of different rules to one set of 1,600 wholly lawful homes than is applied to another set of 1,600 wholly lawful homes, simply because of the date of "development." Oregon is certainly capable of equally protecting the public interest and the rights of owners of property that was developed on January 1, 1977, as it is in protecting the public interest and property rights of landowners whose property was lawfully developed later. A rational and equitable public policy applies performance standards equally to all lawful development that requires shoreline armoring.

There is another good reason to change Goal 18's backward looking prohibition on shoreline armoring. That is for Oregon to save its "Beach Bill" rights that sprung into being in 1967 and which the Oregon Supreme Court approved a few years later, on very narrow and now legally suspect grounds. If Oregon persists in greedily claiming the right to "own" and demand harm to deeded private property that was legitimately developed upon upland areas when sea level rise puts ocean waves perilously close, eventually property owners will challenge the shaky doctrine of "custom" upon which the entire Oregon program depends. In other words, being greedy on the Goal 18 question, risks Oregon's entire shoreline protection program. To explain.

In *Thornton v. Hay*, 254 Or 584 (1969), the Oregon Supreme Court upheld the "Beach Bill" on the narrow grounds that the public has an interest in the nature of a recreational easement, on the dry sand beaches to a surveyed "vegetation line," under the ancient doctrine of "custom". The doctrine of "custom" is essentially a recognition of an interest something like a prescriptive easement, which accrues from the public's continuous use of otherwise private property for recreation over a period of many years to the extent that it became a "custom" for the public to have such rights to recreate. The doctrine of "custom" is on shakier legal ground than prescriptive easements, because "custom" covers a broader area and employs presumptions

– presumptions which are largely no longer valid under current federal unconstitutional takings law. And, regardless, there can be no "customary" public right to recreate on privately owned and deeded land that was (or is) under a deck, or a dog run, or a private fence or a home, that for time immemorial was privately used to the exclusion of the public. In fact, more recently, the Oregon Supreme Court essentially so held. *McDonald v. Halverson*, 308 Or 340 (1989) (finding that Little Whale Cove was privately used and excluded the public for many years among other things, and so not subject to the doctrine of "custom").

Demonstrating the seriousness of the issue, a property owner in 1994 argued Oregon's Beach Bill program worked an unconstitutional taking of his private property. He got the attention of the United States Supreme Court, which is no easy task. The United States Supreme Court only denied accepting his case to look at whether the Oregon program amounted to an unconstitutional taking of his property, because the record of the public's "custom" on Mr. Steven's private property had not been developed. However, two justices of the United States Supreme Court (Justices Scalia with O'Connor joining), wrote an opinion on the Court's denial of certiorari, that seriously questioned the validity of the Oregon Supreme Court's *Thornton* "custom" analysis against the law of unconstitutional takings, with the Justices suggesting the doctrine of "custom" that supports Oregon's Beach Bill program is an unconstitutional "land grab". It was reasonably clear to knowledgeable observers that had the plaintiff in that case (Mr. Stevens) developed his record, the U.S. Supreme Court likely would have taken review and that at least two justices were prepared to reverse Oregon's program. *Stevens v. City of Cannon Beach*, 114 S. Ct 1332, 1335 (1994) (*cert denied*) (Scalia dissenting). Since that time, the Court has a gained a firm majority willing to give voice to protecting private property rights and has written several significant cases underscoring the same under which the Beach Bill would now be tested.

Moreover, despite the Oregon statute and rule that claims public rights to control what happens west of the 1967 surveyed "Statutory Vegetation Line," and also what happens west of the "line of established vegetation," Oregon courts have declined to extend the doctrine f "custom" to lands lying landward of the statutory vegetation line. *State v. Bauman*, 16 Or App 275, 517 P2d 1202 (1974). In other words, even under Oregon law, claims of public rights to land east of the SVL, is suspect. Regardless, OPRD applies these rules under the backward looking Goal 18 January 1, 1977 date restriction together with the doctrine of "custom," to say that the "line of established vegetation" no matter how far it may retreat, gives the agency the right to demand a permit for shoreline armoring and to deny such permit even east of the SVL. The agency takes this position even though such private property was held and used to the exclusion of the public before wave action scoured away the vegetation. With all due respect, not even the doctrine of custom stretches that far.

Think about it. Due to climate change and other man made influences on ocean levels and wave action, great amounts of private property legitimately developed under Oregon's land use planning program, to include land in unincorporated communities and incorporated cities and the public infrastructure that supports it, is in grave peril of destruction over the coming years. If Oregon's only justification for allowing such significant and catastrophic public and private harms is "the property was not 'developed' on January 1, 1977", then Oregon begs for a lawsuit

or many lawsuits that carry significant risk of gutting or substantially gutting the Beach Bill program. Lest there be some who think Oregon state judges would be inclined to look the other way, a recent United States Supreme Court decision made clear that such lawsuits can be brought in federal court. *Knick v. Township of Scott,* 588 U.S. ___ (2019). Regardless, to assume any court – state or federal - will support refusals to allow owners to protect their property in light of current known principles that apply to "unconstitutional takings", appears even more irrational than the backward looking requirement of Goal 18.

Please understand that in truth it is somewhere between risky to legally impossible to claim that the public has any "custom" (which requires a long history of public use) over property that until very recently had every right to and did exclude the public. It is a wiser course for Oregon to establish performance standards to approve or deny ocean armoring, rather than relying upon a reviewing court to agree that there is something magic about January 1, 1977 and that deeded private land under say, someone's deck is now really situated on the public's dry sand beach, the public's rights to which were established by "custom" and so the property is ineligible to be protected.

Accordingly, this Focus Group should recommend removal of the Goal 18 prohibition on shore land armoring for property developed after January 1, 1977 and replace it with a performance standard approach that recognizes legitimate public and private rights and makes it possible for shoreline armoring to be thoughtfully installed on all Oregon property that needs it. Thank you for your consideration.

Very truly yours,

Wendie L. Kellington

WLK:wlk
CC: Clients

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August 27, 2019

Via E-Mail

P16125-001

Goal 18: Pre-1977 Development Focus Group
Oregon Department of Land Conservation & Development
Jasper Room, Agate Beach Best Western
Newport, Oregon 97365 Memorandum

Re: ***Executive Summary – Reworking Goal 18, Requirement 5 to Avoid Constitutional Mines***
Meeting No. 6

Dear Focus Group,

Over the past five meetings, we have heard from stakeholders of all types—property owners, environmental groups, land use experts, engineers, and many more. Each group, and each individual, has directly or otherwise set forth their own preferred concept of an ideal outcome regarding the future of shoreline armoring on the Oregon Coast. However, the received testimony and resulting discussions have also revealed the procedural, substantive, and moral deficiencies of the constraints imposed by Goal 18, Requirement 5. Those issues amount to colorable constitutional challenges to the application of Requirement 5, the success of which could have wide ranging collateral consequences. The coffers of local governments and the Oregon Beach Bill could both suffer significantly in the expected litigation. Regardless of an individual's regard for shoreline armoring, all should be able to agree that the risks of maintaining Requirement 5 in its current form far exceed the resulting benefits, if any. This letter relies, in part, on many of the public comments submitted to this Focus Group; the ideas touched on here are discussed in much more detail in the attached memorandum.

I. The collective experience with Goal 18, Requirement 5 over the previous 30 years has revealed it as unworkable in substance and overly suspectable to inconsistent application in practice. Its deficiencies caused substantial hardships for oceanfront landowners and raise serious doubts about its constitutionality and continuing viability.

In theory, Requirement 5 should have rendered ministerial the permitting process for shoreline armoring. It identified a date of demarcation (January 1, 1977) and specific eligibility criteria ("'[D]evelopment'" means houses, commercial and industrial buildings, and vacant subdivision lots which are physically improved through construction of streets and provision of utilities to the lot[.]"). Moreover, in compelling local governments to identify areas in their comprehensive plans where development existed prior to January 1, 1977, the administration of Requirement 5 was intended to be transparent and predicable. Yet, Requirement 5, as it has been actually applied over the previous 30 years, *realized none of these promised benefits*. The resulting process has instead been opaque, unpredictable, and inconsistent. While these flaws might manifest as the formative base for a tragedy to a landowner in desperate need of shoreline armoring, they are symptoms of the broader constitutional infirmity of Goal 18, Requirement 5.

II. A local government's denial of a permit for the construction of shoreline armoring pursuant to Goal 18, Requirement 5 is generally vulnerable to claimed violations of the landowner's rights

guaranteed by the (A) Procedural and Substantive Due Process clause; (B) Equal Protection clause; and (C) Takings clause of the US Constitution.

A. *Procedural and Substantive Due Process*. The inconsistent and nebulous application of the "development" standard across Oregon's political subdivisions is arbitrary and capricious is in derogation of the guarantees of substantive and procedural due process enshrined in the state and federal constitutions.

B. *Equal Protection*. That the availability of a shoreline armoring permit, in practice, is a function of the creation of arbitrary classes of landowners (such as those with pre- and post-January 1, 1977 development; the de facto recognition of Requirement 5 exemptions without any basis in its language; and the once-common tacit acceptance by state and local authorities of unpermitted shoreline armoring) in violation of the equal protection provisions of the state and federal constitutions.

C. *Takings Clause*. The gradual, but escalating, appropriation of property from a decreasing proportion of oceanfront landowners (by, for example, the 1967, 1969, and 1999 statutory eastward expansions of the Beach Bill's recreation easement and the January 1, 1977 inflection point created by Requirement 5, which has had the cumulative effect of burdening fewer and fewer landowners with the very real possibility that they could lose their homes due to otherwise preventable erosion) that will ultimately result in a total loss of their properties due to government-mandated inaction constitutes a regulatory taking that will inevitably mature into a pre se taking for which compensation is due under the Fifth Amendment of the US Constitution.

III. As a result of a recent Supreme Court decision, local governments should expect to see increases in the number of takings lawsuits, such as those challenging a permit denial pursuant to Requirement 5, and the legal costs to defend them. Further, the Oregon Beach Bill could be collateral damage as a result of those lawsuits because requirement 5 and the Beach Bill share the same, increasingly vulnerable legal foundation.

Due a recent, monumental shift in the law governing takings claims brought about by *Knick v. Township of Scott*, Goal 18, Requirement 5's unconstitutional defects present a much more serious problem for both local governments and the legal underpinnings of Oregon's Beach Bill. Following the denial of a permit for shoreline armoring, the US District Court for the District of Oregon will be open to adjudicate any constitutional challenges to that denial (i.e. takings, due process, and equal protection). The District of Oregon is, both procedurally and substantively, a much less favorable forum for local governments than the prior pathway, to LUBA. Even where a landowner challenging a permit denial through litigation loses on each claim (so long as those claims are not frivolous), the local government will still incur substantial, unrecoverable legal fees and losses to productivity. Any such litigation will see landowners, in order to effectively protect their own rights, essentially challenge the legal foundation of Oregon's Beach Bill. A declaration that the Beach Bill is unconstitutional would, needless to say, effect a change of enormous magnitude. Few, if any, want that outcome, but it remains as a risk as long as Requirement 5 continues to create and incubate landowners who are desperate to prevent the erosive destruction but ineligible for shoreline armoring.

Very truly yours,

VIAL FOTHERINGHAM LLP

David M. Phillips

BEFORE THE OREGON DEPARTMENT OF

LAND CONSERVATION & DEVELOPMENT

In re: GOAL 18: PRE-1977 DEVELOPMENT FOCUS GROUP	Meeting Date: August 27, 2019 *Goal 18: Pre-1977 Development Focus Group Meeting No. 6* **UPDATED MEMORANDUM**[1]

This Commission was assembled "to review the equity and consistency of the application of Statewide Planning Goal 18: Beaches and Dunes, Implementation Requirement #5." Other esteemed members of this Commission have spoken at length about the inconsistent, opaque application of Goal 18, Requirement No. 5 by local governments up and down the Oregon Coast. While I wholeheartedly endorse those comments, this memorandum is meant to focus on the ancillary constitutional issues presented by the substance and application of Requirement No. 5 and likely collateral consequences. The effective moratorium on the approval of beachfront protective structures, coupled with previous inconsistencies in the goal's application, have

[1] This memorandum updates and expands upon the legal analysis that was submitted during the Focus Group's fifth meeting.

rendered local governments' permit denials constitutionally suspect. As a result, local governments can expect to see a flood of suits brought in the United States District Court for the District of Oregon to remediate those constitutional violations. To stem the tide of threatened litigation, Goal 18, Requirement No. 5 must be amended to ensure that the costs of Oregon's Beach Bill are not disproportionately levied on a subset of oceanfront landowners consistent with the requirements of the United States Constitution. A failure to do so could have significant collateral consequences such as unwinding or otherwise mitigating the appropriation of private property underlying Oregon's Beach Bill.

MEMORANDUM

I. *Knick v. Township of Scott* Effectively Forces Local Governments to Defend Their Land Use Decisions in Federal Court

In its most recent term, the United States Supreme Court, in *Knick v. Twp. of Scott, Pennsylvania*, __ U.S. __, 139 S. Ct. 2162 (2019), effected a dramatic shift in the relevant legal landscape by overruling *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).[2] In short, *Knick* reopened the doors of federal courts for all manner of land use-related lawsuits. To demonstrate the magnitude of this shift, particularly as it will impact local governments in Oregon, requires a brief discussion of the land use review scheme to which local governments have become accustomed.

A final land use decision by a local government—such as a request for a permit to construct of shoreline armoring—is generally appealed to the Land Use Board of Appeals ("LUBA").[3] From there, a decision from LUBA may be appealed to the Oregon Court of

[2] *See Knick*, 139 S. Ct. at 2179.

[3] *See* ORS § 197.825(1) (Subject to several exceptions not relevant here, "the Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision of a

Appeals[4] and then to the Oregon Supreme Court in the normal manner. An individual or entity has standing to appeal a final land use decision upon a de minimis showing: The putative appellant must have (1) filed a timely notice of appeal, and (2) "appeared before the local government, special district or state agency orally or in writing."[5] Notably, there is no requirement that the appealing party have a "personal stake" in the matter on appeal.[6] This permissive standing scheme has resulted in local governments relying on special interest groups both to appeal permissive land use decisions (i.e. those that allow some result inconsistent with a group's purpose or values) and to defend, on appeal, decisions adverse to the original applicant.[7] Practically, this saves local governments the legal fees that would otherwise be incurred to defend its own decisions on appeal.

Under the pre-*Knick* scheme, parties who sought to recover, via 42 U.S.C. § 1983, for a violation of the Takings Clause of the Fifth Amendment were required to exhaust both administrative and state court remedies before their claims were ripe for adjudication in federal court.[8] In Oregon, this typically meant going through LUBA, the Oregon Court of Appeals, and

local government[.]"); ORS § 197.015(10)(a)(A)(i) (defining "[l]and use to decision" to include "[a] final determination made by a local government . . . that concerns the . . . application of[]" statewide goals).

[4] ORS § 197.850(3)(a).

[5] *See* ORS § 197.830(2); *see also* OAR 661-010-0050(1) (applying the same standard to intervenors).

[6] *See Kellas v. Dep't of Corr.*, 341 Or. 471, 480–81 (2006) (refusing to imply additional standing requirements beyond those in the operative statute).

[7] Even where third-party does not intervene to defend a land use decision before LUBA, a local government's failure to appeal is not prejudicial to the underlying decision. *Cf., e.g.*, *South Oregon Pipeline Info. Project v. Coos County*, 56 Or LUBA 802, 803 (2008) (allowing a local government to limit its participation to filing the record); *Hearne v. Baker County*, 35 Or LUBA 768, 771 n.2 ("There are a variety of reasons why local governments may elect not to appear at LUBA as litigants to defend their land use decisions[.]"). In other words, a land use decision will not be reversed merely because it is undefended before LUBA.

[8] *See Williamson*, 473 U.S. at 195–96.

the Oregon Supreme Court for a determination of whether a taking occurred and then an inverse condemnation suit in the relevant Oregon Circuit Court for determination of the appropriate amount of compensation.[9] But once parties had a final decision from an Oregon court, those claims had already been decided, vitiating their right to bring suit in federal district court.[10] The practical consequence of this rule was that takings claims were adjudicated almost solely in state courts.[11] Generally, federal courts provide a neutral forum that is decidedly less friendly to local governments than the state courts to which they have grown accustom. Post-*Knick*, Oregon property owners will be able to avail themselves of § 1983 takings claims in U.S. District Court as an alternative to the previously mandated LUBA-pathway. A federal forum is favorable to property owners and detrimental to local governments for six reasons.

First. Because of the stringent requirements of Article III standing, local governments will not be able to rely on third-parties to protect their decisions. Under Article III, a litigant must have "a personal stake in the outcome of the controversy[.]"[12] "Standing to defend . . . in the place of an original defendant, no less than standing to sue, demands that the litigant possess

[9] *See generally Nelson v. City of Lake Oswego*, 126 Or. App. 416, 418–19 (1994).

[10] *See San Remo Hotel, L.P. v. City & Cty. of San Francisco*, 545 U.S. 323, 341–43 (2005) (applying "ordinary preclusion rules" to takings claims litigated in state court).

[11] *See id.* at 346–47 ("[A]s a practical matter, a significant number of plaintiffs will necessarily litigate their federal takings claims in state courts. . . . [M]ost of the cases in our takings jurisprudence . . . came to us on writs of certiorari from state courts of last resort.").

[12] *Baker v. Carr*, 369 U.S. 186, 204 (1962); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (noting, as a matter of prudential rather than Article III standing, "the general prohibition on a litigant's raising another person's legal rights") (quotations omitted).

'a direct stake in the outcome.'"[13] The third-parties that have traditionally been willing to defend local governments' land use decisions cannot meet this standard.[14]

Second. As a corollary to the first reason, local governments will need to defend these federal claims themselves. In an appeal to LUBA, a local government is treated as both a decision-maker of first instance (comparable to a trial court) and an interested party. As a result, the local government may decline to appear before LUBA, resting solely on the strength of the underlying land use decision, without prejudicing its rights. That is not so in federal court. A local government must appear and defend a federal lawsuit or risk entry of a default judgment.[15]

Third. In defending a suit brought pursuant to 42 U.S.C. § 1983, local governments face a heightened prospect of being saddled with land owners' attorney fees. "In any action or proceeding to enforce a provision of [42 U.S.C. § 1983], the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee."[16] Although the statutory language seems party-neutral, it has not been applied as such. A plaintiff is entitled to a fee award "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff," such as by entry of a favorable judgment.[17] Yet, a prevailing defendant may only recover attorney fees when the

[13] *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (requiring a defendant meet the requirements of Article III standing) (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986)).

[14] *See, e.g.*, *Diamond*, 476 U.S. at 62 ("[Standing to litigate cannot] be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973))).

[15] *See, e.g.*, *Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d 1261, 1267 (9th Cir. 1992) (permitting entry of a default judgment on where "the well-pleaded factual allegations [of the complaint, taken] as true," establish a legally sufficient claim).

[16] 42 U.S.C. § 1988(b).

[17] *See Farrar v. Hobby*, 506 US 103, 111–112 (1992); *see also Beach v. Smith*, 743 F2d 1303, 1306 (9th Cir 1984) ("[E]ven in the absence of a favorable judgment, a litigant may be a prevailing party

plaintiff's claim is "frivolous, vexatious, or brought to harass or embarrass the defendant."[18] While LUBA's authorization to award attorney fees is similarly limited, it applies equally to all parties.[19]

Fourth. Local governments will face significantly higher discovery burdens when defending suits in federal court than they would under the pre-*Knick* scheme. This issue, in particular, is compounded by the prohibition on "claim splitting," which "requires parties to bring all available claims in one action[.]"[20] Land owners are, thus, unlikely to limit their complaint to a takings claim; as will be discussed below, local governments can expect to face a variety of state and federal constitutional claims and common law claims. Generally, in an appeal to LUBA and higher courts, a local government's only discovery-like obligation is to produce the record of its decision.[21] LUBA may only consider extra-record evidence or allow discovery when it concerns "disputed factual allegations" but this is rare.[22] Conversely, discovery in federal court is, famously, expansive.[23]

for purposes of an attorney fee award if his action was a 'catalyst' which motivated the defendant to provide the relief originally sought through litigation.").

[18] *Benigni v. Hemet*, 879 F2d 473, 480 (9th Cir 1988).

[19] *See* ORS § 197.830(15)(b) (mandating a fee award "to the prevailing party against any other party who the board finds presented a position without probable cause to believe the position was well-founded in law or on factually supported information"); *Fechtig v. City of Albany*, 150 Or App 10, 24 (1997) (requiring, to award fees, a determination that "every argument in the entire presentation [that a non-prevailing party] makes to LUBA [be] lacking in probable cause (i.e. merit)").

[20] *Adaptix, Inc. v. Amazon.com, Inc.*, No. 5:14-CV-01379-PSG, 2015 WL 4999944, at *5 (N.D. Cal. Aug. 21, 2015), *opinion clarified*, 2016 WL 948960 (N.D. Cal. Mar. 14, 2016); *Clements v. Airport Auth. of Washoe Cty.*, 69 F.3d 321, 328 (9th Cir. 1995) (same).

[21] *See* ORS § 197.835(2)(a) (limiting LUBA, with some limited exceptions, to the record made before the local government).

[22] OAR 661-010-0045(1); *Jones v. Lane County*, 27 Or LUBA 654, 655 (1994) ("Where the dispute between parties concerns only the legal conclusions or consequences to be drawn from the facts in the record," discovery and extra-record evidence are not warranted.).

[23] *See* FRCP 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]").

Fifth. Local governments will be unlikely to receive the same deference in federal court as is accorded by LUBA. By statute, "LUBA and [Oregon's appellate] courts must affirm a local government's interpretation of its own ordinance unless [such an interpretation] is inconsistent with the express language of the ordinance . . . or with the apparent purpose or policy of the ordinance."[24] It is not clear that local governments would receive any deference in federal court.[25]

Sixth. The takings case law in federal court is underdeveloped, and there are reasons to believe that the Ninth Circuit, as currently constituted, will be more friendly to such claims. As a consequence of *Williamson County*, federal takings jurisprudence is underdeveloped. Because state court decisions on matters of federal law are not binding on federal courts, the District of Oregon and Ninth Circuit are, effectively, writing on a blank slate. President Trump's appointments to the Supreme Court resulted in the demise of *Williamson*, and it is reasonable to believe that his recent appointments to the Ninth Circuit will have a similar effect.[26] Whether the

[24] *Save Oregon's Cape Kiwanda Org. v. Tillamook Cty.*, 177 Or. App. 347, 352 (2001); *see also Siporen v. City of Medford*, 349 Or. 247, 258 (2010) ("[W]hen a governing body is responsible for enacting an ordinance, it may be assumed to have a better understanding than LUBA or the courts of its intended meaning.").

[25] *Cf. Kay v. City of Rancho Palos Verdes*, 504 F.3d 803, 814 (9th Cir. 2007) (suggesting that Congress may, as they did under the Telecommunications Act, impose a "deferential standard of review to appeals from local zoning and permitting agency decisions" in federal court); *City of Portland v. Homeaway.com, Inc.*, 191 F. Supp. 3d 1157, 1166 n.3 (D. Or. 2016) (describing "[t]he deference Oregon courts afford to a local government's construction of an ordinance is a matter of pragmatism" and declining to accord such deference to a city charter); *but see Charter Commc'ns, Inc. v. Cty. of Santa Cruz*, 304 F.3d 927, 933 (9th Cir. 2002) ("[T]he County's denial of consent[, which is a legislative action,] should be upheld as long as there is substantial evidence for any one sufficient reason for denial.").

[26] *See, e.g.*, Ben Feuer, *Thanks to Trump, the liberal 9th Circuit is no longer liberal*, Wash. Post, Feb. 28, 2019, *available at* https://www.washingtonpost.com/outlook/2019/02/28/thanks-trump-liberal-ninth-circuit-is-no-longer-liberal/?utm_term=.7b0c766806f2 (describing the likely results of the 16-12 split between active circuit judges and 9-9 split of senior circuit judges appointed by Democrats and Republicans, respectively).

federal courts follow, for example, *Stevens v. City of Cannon Beach*, 317 Or. 131 (1993), which *inter alia* rejected facial and as-applied takings challenges to Goal 18, is not assured.[27]

In overruling *Williamson County*, the Supreme Court curtailed the myriad benefits previously enjoyed by local governments, who held a favored position in appeals to LUBA and Oregon's appellate courts. Even if local governments find success defending some or all of the potential constitutional claims, which are discussed in detail *infra*, their litigation costs to achieve those results will be orders of magnitude higher than before. Indeed, as long as land owners can bring nonfrivolous claims—a low hurdle—local governments will be saddled with the time and legal expenses necessary to litigate the coming flood of federal lawsuits to completion.[28] And some land owners will ultimately prevail, upsetting local governments' carefully laid land use plans and subjecting them to cover the land owners' attorney fees as well. While amending Goal 18, Requirement No. 5 cannot undue tectonic shift resulting from *Knick v. Township of Scott*, doing so can significantly minimize the number and strength of land owners' potential claims.

II. Potential Constitutional and Common Law Challenges to Local Governments' Land Use Decisions Denying Permits for Beachfront Protective Structures

A. A vested right, arising under Oregon common law, to complete a non-conforming use

The first viable claim for land owners denied a permit to erect shorefront protection structures is one arising from Oregon common law—the land owner has a "vested right" to a

[27] *See Stevens*, 317 Or. at 146–48.

[28] *See* FRCP 11 (requiring, to avoid sanctions, that a party's "claims . . . [be] warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law[.]"); *Benigni*, 879 F.2d at 480 (allowing a government that prevails on a § 1983 claim to recover attorney fees only where that claim is "frivolous, vexatious, or brought to harass or embarrass").

non-conforming use. Although this claim is a creature of state law, a federal court may hear that claim in concert with federal claims pursuant to the court's supplemental jurisdiction.[29]

In assessing whether a land owner has a vested right to continue a nonconforming use, the primary factor in making such a determination—and the factor that has generated the most appellate decisions—is the expenditure ratio: "the ratio between the costs that the landowner incurred to construct the planned development [at the time the use became non-conforming] and the estimated cost of constructing the whole planned development."[30] First articulated by the Oregon Supreme Court in 1973, the remaining factors are:

> [(1)] the good faith of the landowner, [(2)] whether or not he had notice of any proposed zoning or amendatory zoning before starting his improvements, [(3)] the type of expenditures, i.e., whether the expenditures have any relation to the completed project or could apply to various other uses of the land, [(4)] the kind of project, the location and ultimate cost. Also, [(5)] the acts of the landowner should rise beyond mere contemplated use or preparation, such as leveling of land, boring test holes, or preliminary negotiations with contractors or architects.[31]

Although the most recent cases discussing vested rights do so in the context of Measure 49, the courts have made clear that their discussion of vested rights derives—by the statutory mandate at Section 5(3) of Measure 49—from "broadly applicable legal precedents describing a property owner's rights when land use laws are enacted that make a partially finished project unlawful."[32] So there can be no question that the concepts discussed in these

[29] 28 U.S.C. § 1367(a).

[30] *Oregon Shores Conservation Coal. v. Bd. of Commissioners of Clatsop Cty.*, 297 Or. App. 269, 280 (2019) (citing *Friends of Yamhill Cty., Inc. v. Bd. of Comm'rs of Yamhill Cty.*, 351 Or. 219, 246 (2011)).

[31] *Clackamas Cty. v. Holmes*, 265 Or. 193, 198–99 (1973) (citations omitted).

[32] *Corey v. Dep't of Land Conservation & Dev.*, 344 Or. 457, 466 (2008); *see also Friends of Yamhill*, 351 Or. at 235 ("[T]he voters who approved Measure 49 intended to adopt Oregon common law as the standard for identifying a vested right.").

cases and the test they articulate apply whenever a land use law "make[s] a partially finished project unlawful."[33]

In particular, under Oregon common law, unlike in many other states, the lack of a previously issued building permit has never been fatal to the finding of a vested right:

> According to one treatise, "[t]he majority rule requires issuance of a building permit by the municipality, plus substantial construction and/or substantial expenditures before rights vest." Patricia E. Salkin, 4 American Law of Zoning § 32:332–5 (5th ed 2008). In those jurisdictions, the absence of a building permit is ordinarily fatal to a vested rights claim. Id. In Oregon, by contrast, the absence of a building permit does not necessarily preclude finding a vested right to complete development. *See Holmes*, 265 Or. at 201, 508 P.2d 190 (reasoning that the absence of a building permit did not preclude finding a vested right where the landowner had incurred substantial costs to improve the land for his proposed development but had not incurred construction costs).[34]

Indeed, it was not even a factor listed by the Court in *Holmes*.[35]

In derogation of land owners' vested rights, Goal 18, Requirement No. 5 bans local governments from issuing "[p]ermits for beachfront protective structures [unless] . . . development existed on January 1, 1977."[36] "Development" is defined as "mean[ing] houses, commercial and industrial buildings, and vacant subdivision lots which are physically improved through construction of streets and provision of utilities to the lot and includes areas where an exception to [Requirement No. 2] has been approved."[37] In addition, any permit for beachfront protective structures must ensure that:

(a) visual impacts are minimized;

[33] *Corey*, 344 Or. at 466.

[34] *Friends of Yamhill*, 351 Or. at 235 n.12.

[35] *See Holmes*, 265 Or. at 198–99 (setting out factors to consider in determining if there exists a vested right).

[36] OAR 660-015-0010(3), *text available at* https://www.oregon.gov/lcd/OP/Documents/goal18.pdf. [hereinafter, "*Goal 18, Req. No. 5*"].

[37] *Id.*

(b) necessary access to the beach is maintained;
(c) negative impacts on adjacent property are minimized; and
(d) long-term or recurring costs to the public are avoided.[38]

Thus, January 1, 1977, purports to serve as an inflection point—was there "development" before that date? As ably communicated by others on this Focus Group, in practice, it did no such thing.

In theory, Requirement No. 5 should have rendered ministerial the permitting process for shoreline armoring. It identified a date of demarcation (January 1, 1977) and specific eligibility criteria ("'[D]evelopment'" means houses, commercial and industrial buildings, and vacant subdivision lots which are physically improved through construction of streets and provision of utilities to the lot[.]"). Moreover, in compelling local governments to identify areas in their comprehensive plans where development existed prior to January 1, 1977, the administration of Requirement No. 5 was intended to be transparent and predicable. Yet, Requirement No. 5, as it has been actually applied over the previous 30 years, *realized none of these promised benefits*.

Goal 18, Requirement No. 5 is infirm on its face, or as it is presently structured, it serves no practical purpose. An Oregon land owner obtains a "vested right" to continue a non-conforming use under Oregon common law[39] where, following the land owner's good faith expenditure of sufficient funds on the development, a zoning ordinance renders unlawful the intended use.[40] The similarities between vested rights and the pre-1977 exception to Requirement

[38] *Id.*

[39] A vested right is not merely a common law, state-specific creation; it is also an essential component of the protections provided by the Takings and Due Process clauses. *See* Or. Op. Att'y Gen. OP-6424 (1992) ("The term 'vested rights' often arises in the context of due process cases dealing with whether particular regulations or ordinances create a property right that is protected under the Fifth and Fourteenth Amendments of the United States Constitution."); John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights As Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 Wash. U. J. Urb. & Contemp. L. 27, 31 (1996) (citing *Board of Regents v. Roth*, 408 U.S. 564, 577–78 (1972)) (noting a similar analysis applies to courts determining whether a land owner has a "protectible property interest" in a challenge to retroactive land use restrictions).

[40] *See generally Holmes*, 265 Or. at 197–99.

No. 5 are readily apparent, but the requirements imposed by Goal 18 are much more stringent. First, the critical date for Requirement No. 5 is January 1, 1977, but under the vested rights analysis, the critical date is the effective date of the land use restriction.[41] That date is June 6, 1977.[42] Second, Goal 18, Requirement No. 5 implements a standard for applicant-land owners in excess of that required for a vested right. In contrast to the flexible, multi-factor approach pioneered in *Holmes*, Goal 18, Requirement No. 5 requires, as of January 1, 1977, the existence of a building or a subdivision complete with roads and utilities. The applicant must also show that the proposed protective structures satisfy four concerns favoring the public's rights.[43]

Unless modified or abrogated by the legislature, Oregon's courts are "bound by applicable rules of common law[.]"[44] But courts will not recognize such a change by the legislature to the common law, unless "it [is] evident that that the legislature intended 'to negate [that rule], either expressly or by necessary implication.'"[45] Indeed, where, as here, the legislature provides for a new remedy, the pre-existing common law remedy is retained absent an "intention to negate."[46] While it is unclear whether an administrative rule can abrogate a common law remedy, at the very least, the agency would be required to demonstrate a similar

[41] *Compare* Goal 18, Req. No. 5 ("where development existed on January 1, 1977"), *with Friends of Yamhill Cty., Inc. v. Bd. of Comm'rs of Yamhill Cty.*, 351 Or. 219, 241 (2011) ("[T]he effective date of the zoning change [i]s the [critical] temporal point for measuring the existence of a vested right[.]").

[42] Or. DLCD, Statewide Goal Adoption Dates at 4 (March 12, 2010), *available at* https://www.oregon.gov/lcd/OP/Documents/goal_adoption_amendment_dates.pdf.

[43] *See Goal 18, Req. No. 5*, *supra* n.35.

[44] *State v. Black*, 193 Or. 295, 301 (1951).

[45] *Espinoza v. Evergreen Helicopters, Inc.*, 359 Or. 63, 89 (2016) (quoting *Holien v. Sears, Roebuck & Co.*, 298 Or. 76, 96–97 (1984)) (second alteration in original).

[46] *Brown v. Transcon Lines*, 284 Or. 597, 610 (1978).

quantum of intent.[47] Accordingly, unless Goal 18, Requirement No. 5 is amended in such a manner that it provides protections in excess of a land owner's vested rights, it serves no practical purpose. Accordingly, the new language for Requirement No. 5 proposed below addresses this concern.

B. Takings Claims

The United States Constitution, under the Takings Clause of the Fifth Amendment, prohibits federal, state, and local governments from "taking" property without just compensation. This guarantee—and the door to federal court opened by *Knick v. Township of Scott*—will drive much of the litigation brought by land owners who are denied permits for beachfront protective structures under the auspices of Goal 18, Requirement No. 5. Because "as applied" takings claims are highly fact specific, local governments will be unable to resolve quickly the initial suits or to use future, favorable precedents to eventually do so.

Generally, takings claims arising from land use regulations can be divided into two categories, both of which can be brought against local governments. Per se takings occur when a regulation "deprives land of all economically beneficial use, . . . [unless the government] shows that the proscribed use interests were not part of [the land owner's] title to begin with"[48] or when a regulation mandates a "physical occupation of property," even if it is a "minor" intrusion.[49] Where a regulation causes only a partial diminution in property value, a court looks at three factors in an "essentially ad hoc, factual inquir[y]": (1) "[t]he economic impact of the

[47] *See Gunty v. Dep't of Employment Servs.*, 524 A.2d 1192, 1197 (D.C. 1987) ("Unless a statute *or administrative regulations* fairly express an intention to modify the common law, including traditional principles of administrative law, they should not be interpreted to do so." (emphasis added)).

[48] *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

[49] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982).

regulation"; (2) the regulation's "interfere[nce] with [the property-owner's reasonable] investment-backed expectations"; and (3) "the character of the governmental action."[50] In either case, a government will only be liable for takings where the harm is no more than the incidental result of government action.[51] Thus, a landowner must demonstrate a "substantial cause-and-effect relationship, excluding the probability that other forces alone produced the injury."[52]

While many landowners who have been denied a permit for placing shoreline protection cannot yet establish a complete deprivation of the economic use of their property, such a result is only a matter of time.[53] Unless homeowners are able to effectively prevent erosion, their homes will eventually be lost to the sea. Moreover, as landowners' property, which is more accurately described as a right to exclude, is converted to dry sand, to which there is no right to exclude, all economic value is lost. Particularly where, as a consequence of the inconsistency in application of Goal 18, Requirement No. 5 some neighbors have protective structures and others do not, local governments are likely to find courts unsympathetic to any attempted defense claiming less than a complete dispossession.[54]

Homeowners will not, however, be limited to bringing claims once their homes have been destroyed by erosion and local governments' failures to act. Instead, they can assert a claim

[50] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

[51] *See Christy v. Hodel*, 857 F.2d 1324, 1335 (9th Cir. 1988).

[52] *Akins v. State*, 71 Cal. Rptr. 2d 314, 340 (Ct. App. 1998).

[53] *See, e.g.*, Courtney B. Johnson & Steven R. Schell, *Adapting to Climate Change on the Oregon Coast: Lines in the Sand and Rolling Easements*, 28 J. Envtl. L. & Litig. 447, 481–82 (2013) (relating the projected impact of climate change on the Oregon coast, including an estimated global sea level rise of one meter).

[54] *See, e.g.*, *Lucas v*, 505 U.S. at 1031 (suggesting, in evaluating the magnitude of a deprivation, "[t]he fact that a particular use has long been engaged in by similarly situated owners [as] ordinarily import[ing] a lack of any common-law prohibition, . . . [and] the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant").

for a partial regulatory taking pursuant to *Penn Central*. While an argument might be made that homeowners should have had no expectation of a right to shoreline protection, that argument fails as to homeowners with a pre-1977 vested right. Indeed, the government's own actions in enacting Goal 18, Requirement No. 5 confirms that expectation interest.[55] Given the inconsistent application of Requirement No. 5 in the permitting processes, it would be difficult for local governments to argue that Goal 18, Requirement No. 5 was merely a "public program adjusting the benefits and burdens of economic life to promote the common good."[56] A small subset of oceanfront landowners are being asked to shoulder the loss of their houses and any reasonable prospect of realizing economic value from their land for the "common good"—this is by no means a situation where all similarly situated property owners give up a small portion of their property rights in furtherance of some larger social aim. Because this is not a situation where the risks of permit denial (and resulting erosion) were known or expected when landowners initial purchased their land, local governments' liability for takings claims cannot be easily brushed aside.

A landowner's challenge to a permit denial as a partial regulatory taking under *Penn. Central* raises a second issue that could have significant, far reaching consequences for Oregon's Beach Bill. In 1967 when the Beach Bill was first enacted, it effected a wholesale transfer of private property—"the land lying between the line of mean high tide and the visible line of vegetation"—to the State for the public's use.[57] Such an appropriation of privately held land

[55] *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1010–11 (1984) (holding that a taking resulted when the government acted in contravention of mandatory statutory requirements upon which the plaintiff was entitled to rely).

[56] *Penn Central*, 438 U.S. at 124.

[57] *See State ex rel. Thornton v. Hay*, 254 Or. 584, 586 (1969).

without compensation was immediately challenged, making its way to the Oregon Supreme Court. There, the Court extended itself both temporally and conceptually to resurrect—at least in the United States— "the English doctrine of custom."[58] In upholding the original iteration of the Beach Bill, the Court applied, in the first instance, a highly fact-specific doctrine.[59] Commentators criticized the Court's mutation of the doctrine and its application[60]; nevertheless, *Thorton* has persisted.

In relying on the doctrine of custom, the Court rendered a single decision that appropriated nearly the entire dry-sand area of the state.[61] That decision has continued to provide the protection against takings claims that would otherwise result from the expansion of the Beach Bill's ambit and other beach-related land use regulations.[62] *Thornton* is the Atlas of Oregon's beach-related land use regulations, shouldering what is now more than 50 years of statutes, regulations, caselaw, and Oregon's steady appropriation of once privately-owned oceanfront land. As progenitor, if *Thornton* falls, so does its progeny. A successful challenge to Requirement No. 5 through invalidation of the doctrine of custom cannot be done in a way that spares, for example, the Beach Bill.

[58] *Id*. at 595.

[59] *See, e.g.*, David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum. L. Rev. 1375, 1408 (1996) (comparing other courts' limitation of custom on "a case-by-case, fact-intensive basis" to "Oregon, [which] has fully realized a general application of custom, applying the doctrine to an entire class of property in the state").

[60] *See id*. at 1422 and n.260 ("Much ink has been spilled about how the Oregon Supreme Court subtly refined and altered some of Blackstone's elements of custom.").

[61] *See, e.g.*, *McDonald v. Halvorson*, 308 Or. 340, 359 (1989) ("By relying instead on the somewhat broader doctrine of custom, the court reasonably anticipated that much litigation could be avoided.").

[62] *See, e.g.*, *Stevens v. City of Cannon Beach*, 317 Or. 131, 143 (1993) ("In the years following the *Thornton* case, the Oregon Beach Bill was revised, and the comprehensive land use laws leading to the eventual implementation of LCDC Goal 18 at state and local levels were enacted. Those laws recognized and accommodated the common law doctrine of customary use of Oregon's beaches.").

All of this is academic, however, unless there is a reasonable chance that *Thornton* will be overruled. Several factors suggest that is not such a remote possibility. First, as discussed above, *Thornton* has, and continues to be, widely criticized by legal academics.[63] Second, Justice Scalia, joined by Justice O'Conner, raised serious questions about the case itself and, more generally, the ad hoc recognition of previously unknown common law doctrines that serve to limit the bundle of property rights enjoyed by citizens of a state.[64] Justice Scalia, writing for a four-judge plurality, decried a similar judicial pronouncement as a "judicial taking."[65] Granted, neither Justice Scalia nor Justice O'Conner remain on the Court, but as *Knick* demonstrates, there are at least five votes in favor of generally expanding private property rights. Moreover, federal courts would be more likely than Oregon courts to cabin *Thornton*'s statewide-scope.

Leaving Requirement No. 5 unchanged and preserving *Thornton* and the Beach Bill are effectively mutually exclusive. As erosive forces inch towards landowners' homes, they will understandably use the means available to them to try and prevent that loss. But because Goal 18 and the Beach Bill both depend on *Thornton*, there is a real risk of ending Oregon's beach-related land use scheme. As such, it is imperative that Goal 18, Requirement No. 5 be amended to provide an increased recognition of the interests of all oceanfront landowners; something that is not inconsistent with continued public beach access and environmental preservation.

[63] *See, e.g.*, James L. Huffman, *Why Liberating the Public Trust Is Bad for the Public*, 45 ENVTL. L. 337, 372–74 (2015) (criticizing *Thornton* for subordinating private property rights to "an ever-expanding doctrine of public rights").

[64] *See Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1334–36 (1994) (Scalia, J. dissenting from denial of cert.) ("To say that this case raises a serious Fifth Amendment takings issue is an understatement. . . . [T]he landgrab (if there is one) may run the entire length of the Oregon coast.").

[65] *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010) ("But the particular state actor is irrelevant. If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.").

C. Procedural Due Process Claims

The Fourteenth Amendment to the United States Constitution prohibits states from depriving individuals of their property without due process of law. To establish a procedural due process violation, plaintiffs must prove they had "(1) a protectible liberty or property interest"; (2) a government deprivation of that interest; "and ([3]) a denial of adequate procedural protections."[66] Generally, where a local government issues a land use decision, such as a permit, as a judicial rather than legislative matter, an applicant has a sufficient protectable property interest.[67] The denial of a permit is a deprivation of the applicant's property interest in that permit. Accordingly, any claims brought by landowners against local governments for denials of shoreline protection permits will turn largely on whether the landowners received adequate process. In litigation, this is generally a fact specific inquiry not suitable for determination on a motion to dismiss.[68]

Generally, local governments should expect to see claims for procedural due process violations resulting from two broad categories of conduct: (1) the inexplicably inconsistent application of Goal 18, Requirement No. 5 to different beachfront land owners with similar or even identical circumstances necessitating shoreline protection, and (2) subsequent denials of shoreline protection permits despite previously granting landowners a permit to build on

[66] *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998).

[67] *See, e.g.*, *Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005) (distinguishing statutes mandating the issuance of a permit where certain criteria are met, which create a sufficient property interest, and those that vest discretion in the decisionmaker, which do not).

[68] *See Grabhorn, Inc. v. Metro. Serv. Dist.*, 624 F. Supp. 2d 1280, 1289 (D. Or. 2009) ("A determination on whether [the plaintiff] received all the process it was due cannot be made until discovery uncovers what actually happened.").

oceanfront lots. Individual landowners may also possess claims arising from factual circumstances unique to them.

A local government's land use action may be invalidated where is it "so arbitrary or irrational that it runs afoul of the Due Process Clause."[69] An inconsistent application of legal standards—such as the temporal and geographic disparity in local governments' application of Goal 18, Requirement No. 5—without a sufficient justification runs afoul of the right to procedural due process.[70]

Similarly, when a government upsets the expectations of an individual, who reasonably relied on a government's prior act, the result is a violation of procedural due process. Although the doctrine has been also described as equitable estoppel or vested rights, a government's required recognition of those doctrines is a component of due process.[71] In granting permits for land owners to build on oceanfront lots prior to the effective date of Goal 18, Requirement No. 5, local governments, perhaps inadvertently, granted those land owners an expectation that they would be able to place shoreline protection when it became necessary.[72]

[69] *Shanks v. Dressel*, 540 F.3d 1082, 1087 (9th Cir. 2008) (quoting *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542 (2005)).

[70] *See Amdurer v. Vill. of New Hempstead Zoning Bd. of Appeals*, 146 A.D.3d 878, 879 (N.Y. App. Div. 2017) ("A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious." (quotation omitted)), *accord David Hill Dev., LLC v. City of Forest Grove*, No. 3:08-CV-266-AC, 2012 WL 5381555, at *27 (D. Or. Oct. 30, 2012) (upholding a jury verdict finding a procedural due process violation where the evidence, in part, demonstrated the defendant "inconsistent[ly] and arbitrar[ily] appli[ed] its own [land use] rules").

[71] *Cf. Wiggins v. Barrett & Assocs., Inc.*, 295 Or. 679, 701 (1983) (suggesting that a complete denial of an estoppel defense may violate due process); *cf. also State v. Rogers*, 313 Or. 356, 375 (1992) ("There is also an issue preclusion component of the federal Double Jeopardy Clause.").

[72] *See, e.g.*, *Holman v. City of Warrenton*, 242 F. Supp. 2d 791 (D. Or. 2002) (finding a denial of procedural due process where a city refused to issue a construction permit after previously issuing a condition permit for the same construction).

D. Equal Protection Claims

Finally, land owners denied a permit to construction shoreline protection would likely be able to bring a claim for a violation of the Equal Protection Clause of the Fourteenth Amendment. Because the landowners are not a member of a protected class, this is termed a "class of one" claim. In this type of claim, the local government must demonstrate the validity of its classification (i.e. the denial of a permit for a particular landowner) by establishing its decision "bears a rational relationship to a legitimate state interest."[73] Where a decision is "malicious, irrational or plainly arbitrary," no rational basis exists.[74] Because this form of an equal protection claim largely mirrors the theories and evidence a landowner would use to prove a violation of due process, a discussion of those will not be repeated here.

The Beach Bill, and its subsequent amendments, also created distinct classes of landowners, whose property rights are, in part, dependent on a temporal component. First, the current version of Requirement No. 5 distinguishes between those who "developed" their property prior to January 1, 1977, and those who did not. Only the former group has the opportunity to preserve their property through the construction of shoreline armoring. While rational basis is not an exacting standard, there must be some legislative reason for the selection of January 1, 1977.[75] Moreover, a bare desire for the preservation of limited resources—in this

[73] *David Hill Development v. City of Forest Grove*, 688 F.Supp.2d 1193, 1216 (citing *Patel v. Penman*, 103 F.3d 868, 875 (9th Cir. 1996)).

[74] *Id*.

[75] *Cf., e.g.*, *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1377 (9th Cir. 1993) (affirming the disparate treatment of two subclasses the date-based distinction "was based on events that began to unfold on [the critical date]").

case, unarmored beach—cannot be the sole basis justifying the disparate classifications.[76] It is also curious that the cutoff date is five months before Goal 18's effective date.

Moreover, additional questionable classifications exist: (1) the disparate levels of completed development necessary to secure pre-January 1, 1977 shoreline armoring rights between residences and subdivisions; and (2) the 1999 amendments to the Beach Bill that instituted a moving vegetation line, which rendered some landowners at least partially west of the new vegetation line and thus categorically ineligible for shoreline armoring. Practically, these seemingly arbitrary classifications caused real harm to landowners caught on the wrong side of a critical date or the vegetation line. Indeed, this illustrates the need to thoughtfully rework Goal 18, Requirement No. 5 to not only bring it in line with the requirements of the US Constitution but to also ensure it has a coherent purpose and method.

CONCLUSION

As a result of the Supreme Court's recent decision in *Knick v. Township of Scott*, it is now more urgent than ever that the constitutional—and practical—infirmities of Goal 18, Requirement No. 5 be corrected. Local governments will likely face a deluge of takings suits in federal court, forcing them to stretch already limited budgets to accommodate the necessary costs of representation. The impact of *Knick*, at least as to takings and related constitutional claims arising from a denial of a construction permit for shoreline protection, will be minimized by reworking Goal 18, Requirement No. 5 to ensure it is consistent with the United States Constitution, which means it must give due regard for the property rights of oceanfront

[76] *See Plyler v. Doe*, 457 U.S. 202, 227 (1982) ("[A] concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources.").

landowners and be written such that local governments can apply it consistently to each applicant.

Dated this 27th day of August, 2019. VIAL FOTHERINGHAM LLP

/s/David Phillips
David Phillips, OSB #072620
17355 SW Boones Ferry Road, Suite A
Lake Oswego, OR 97035
T: (503) 684-4111
F: (503) 598-7758
E: David.Phillips@vf-law.com
Focus Group Member

August 24, 2019

To: Meg Reed
Coastal Shores Specialist
Department Land Conservation Development (DLCD)

Subject: DLCD Goal 18 Focus Group – Public Input

Background:

We are the owner of an oceanfront home located off Pacific Street in the Lincoln Beach area of Lincoln County. Along with our neighbor, we have been communicating with the County & State over the years regarding the feasibility to install a Beachfront Protective Structure since 1991. Based on this communication, we have understood we were in an area eligible for beachfront protection until the Goal 18 Eligibility Inventory Map was created a few years ago.

We recognize Beachfront Protection Structures are not permanent and will not stop erosion nor rising sea levels, but they are the only solution to provide protection for beachfront property for our property at this time.

Situation:

On the Goal 18 Eligibility Inventory Map, we are part of a group of four homeowners in an area identified as Not Eligible for Beachfront Protective Structure as the DLCD interprets Goal 18 Item 5. Per our understanding, the Inventory Map created by just checking to see how if a property was classified as a recorded subdivision on January 1, 1977 without anyone looking into how the land was being used nor intended use at that time or prior to that date.

We have evidence a recorded development in our area existed on January 1, 1977. There is a pre-1977 subdivision plat recorded with the County, our lots were platted and recorded with the County on January 1, 1977 and there was a road and utilities in our neighborhood on January 1, 1977.

The pre-1977 subdivision expired in late 1976 and the current subdivision was recorded in early 1977. Due to the anomaly of being in between the end and beginning of recorded subdivisions on January 1, 1977, our area was not classified as a subdivision and thus Eligible for Protection on the Goal 18 Eligibility Inventory Map.

Our homes are sandwiched in between areas eligible for Beachfront Protective Structures. The property to the north has rip-rap installed and the deflection of the waves from this structure has facilitated erosion to our property. Some of the properties to the south are starting to install rip-rap to protect their property.

The Goal 18 Eligibility Inventory Map has not been approved by any local authorities yet is still used as the basis for determining areas eligible for Beachfront Protective Structures. There is no appeal process for challenging the classification assigned by the DLCD on map nor any common

sense applied to the interpretation of this Goal as it applies to the protection of private property.

There are ineligible lots sandwiched in between areas that are approved for shoreline protection and have shoreline protection installed. In long established residential areas, the ineligible lots are islands or gaps in long stretch of area eligible for shoreline protection of which we are one. There are properties with rip-rap in areas not approved for shoreline protection.

Proposal:

From our perspective, it appears Local and State Government Departments seem to avoid proceeding with common sense decisions due to potential lawsuits by outside groups and the entire process seems paralyzed from the threat of legal action. And why a map that no Local or State Department recognizes as valid is being use as the tentpole for deciding on shoreline protection approval is beyond comprehension.

We're not trying to overturn the objectives of Goal 18 but only see that it is implemented in a fair and consistent manner that makes sense to protect private and public property. Having a mixture of eligible and ineligible for shoreline protection will ultimately increase erosion for all properties, especially in areas like our where the number of eligible lots comprise the majority of properties.

We recognize the time and effort to revise Goal 18 that affects a small segment of the population is a challenge and that there are larger overarching policies that will need to be addressed in the long run.

However, there is a need to address amending Goal 18 to allow infill residential areas that were intended for residential use on January 1, 1977 to be eligible for shoreline protection NOW.

At a minimum, we also strongly recommend either implementing a process for revising the Goal 18 Eligible Inventory Map be implemented immediately or eliminate the Goal 18 Eligible Inventory Map.

Attachment:

Letter Dated August 4, 2017 to DLCD, Subject Shoreline Protection Status for Properties in Lincoln Beach & Supporting Information.

Thank you for your time and allowing us to provide input to this process.

Ed & Joan Tanabe
4825 Lincoln Avenue
Depoe Bay, OR 97341
e) ottercoast@earthlink.net

Lincoln Beach: Goal 18 Inventory Map

Lincoln Beach: Shoreline Protected Areas

Ocean Shores Viewer https://www.coastalatlas.net/oceanshores/

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cliff@bartolduslaw.com

August 4, 2017

Meg Reed
Coastal Shore Specialist
Oregon Department of Land Conservation
and Development
810 SW Alder St., Ste. B
Newport, OR 97365

RE: Shoreline Protection Status for Properties in Lincoln Beach

Dear Ms. Reed:

As I indicated when I met with you briefly in your office, I represent four property owners who own property in the Lincoln Beach area of Lincoln County. Specifically, my clients are Richard and Sally Grant who own tax lot 15000 on Lincoln County Assessor's Map 8-11-21-CD, Ed and Joan Tanabe who own tax lot 15100, Shari Kain who owns tax lot 14900 and Terry and Jan DeSylvia who own tax lot 14800. The ownership of the lots from north to south is Tanabe, Grant, Kain and DeSylvia. The Grant, Kain and DeSylvia lots are each approximately 65 feet in width while the Tanabe lot is slightly narrower in width. There is what is listed as a 5 foot strip of public access between the Tanabe and Grant lots. However, that 5 foot strip terminates on the bluff above the beach and there is no access from that strip to the beach.

According to a preliminary map that has been prepared by your department, these four properties are not entitled to shoreline protection. However, the property immediately north of the Tanabe property and the property immediately south of the DeSylvia property are subject to protection. The property subject to protection extends for a significant way, both to the north and to the south. I am enclosing a portion of your map that shows the property and the areas protected to the north and to the south.

This letter comes to request that the DLCD revise its map to show that these four properties are entitled to shoreline protection. Lincoln County has already made a determination that these properties are entitled to shoreline protection and the State should respect the determination of the County since the County is the primary agency that determines compatibility and eligibility for shoreline protection.

The Oregon State Parks and Recreation Department has already accepted the determination of the Lincoln County Planning Department that the project on these properties complies with LCDC goals. Pursuant to a letter dated February 5, 1991 from David G. Talbot, State Parks Director, and Earl Johnson, Assistant Director of Division of State Lands, to Kathy Everett and Partners, the State determined that there had been compliance with LCDC Goal 6. Under the heading of the letter "General Concerns Evaluated", #6 read as follows:

> "6. Compliance with LCDC Goals – The project has been determined to be in compliance with Lincoln County's comprehensive plan, however the county's plan prefers non-structural stabilization techniques."

While the letter indicates a preference for non-structural solutions, that is simply stating a preference. The primary purpose for citing this quote from the letter is to show that the State did indicate that the property qualifies for shoreline stabilization.

Another letter dated October 17, 1991 from Oregon State Parks and Recreation Department was signed by David Talbot and sent to Kathy Everett, Richard Grant and Ed Tanabe. Again, in that letter, it states:

> "Public Laws – The application has been reviewed by the Lincoln County planner and found to be consistent with the County plan and zoning ordinance."

The Grants did not purchase their property until after the February letter was written. They were relying on that letter in purchasing their property because it was represented to them by the agencies with jurisdiction over granting shoreline protection permits that the property qualified for such protection. The October letter confirmed the February letter by indicating that shoreline protection was consistent with the County plan.

The properties owned by my clients were all included in a plat of Cummings Addition which was recorded in 1948 with the Lincoln County Clerk. Although that plat was later vacated to make way for a new plat of Pacific Panorama, prior to 1977 the property composing Cummings Addition had been partitioned. I am enclosing a copy of a 1976 Assessor's map that shows streets and lots.

There was a road that existed on the property prior to 1977. It was created in 1953 and is the primary road serving Pacific Panorama. Utilities were also available to the property prior to 1977. A letter is included from the Kernville-Gleneden-Lincoln Beach Water District that clearly shows that the water district provided services for the lots prior to 1977. The waterline is located just feet from my clients' properties.

Likewise, the Gleneden Sanitary District completed a sewer line adjoining my clients' properties prior to 1977. The sewer project was complete in June of 1976 and was in operation. In short, the DeSylvia, Kane, Grant and Tanabe properties also had the availability of sewer service and water service prior to 1977.

Electrical service was also available to each of the properties. Central Lincoln PUD has confirmed that in 1972 electrical facilities were available to serve the properties.

Copies of all letters referenced in this letter are enclosed.

I am enclosing a map that shows the location of the sewer line and water line in relationship to the properties.

The total shore frontage of the four properties is approximately 255 feet. The property to the north entitled to shoreline protection extends approximately 800 feet. The property entitled to shoreline protection on the south extends approximately 1,200 feet.

From a very practical and common sense standpoint, not allowing shoreline protection on these four properties is the equivalent of not sealing the proverbial crack in the dike. Once water starts running through a crack, it causes the crack to widen. By failing to allow these properties to rip rap, properties to the north and the south are placed in jeopardy because if these properties are not allowed shoreline protection, water will attack the properties entitled to protection from the side.

While the most northerly and southerly properties of the four, the Tanabe and DeSylvia properties may be entitled to rip rap to protect adjoining properties, pursuant to the policy of "bootstrapping" which is commonly used, then the scenario becomes even more oppressive and burdensome when you have only two houses out of thousands of feet of shoreline that are not entitled to protection. Given the small area between two lengthy stretches of rip-rap "bootstrapping" should apply to all four lots.

The purpose of this letter is to request that the four lots owned by my clients be redesignated on your preliminary maps to show that they are eligible for shoreline protection.

If you have any questions, please let me know. I would be pleased to discuss this matter at greater length with you. I have also discussed this matter with Onno Husing and I'm sure he would be glad to participate in our discussions.

Very truly yours,

Dennis L. Bartoldus

DENNIS L. BARTOLDUS

DLB/ms
Enclosures
cc: Clients
Onno Husing, Lincoln County Planning
Jay Sennewald, Oregon Park & Recreation Department

Oregon

PARKS AND RECREATION DEPARTMENT

October 17, 1991

Kathy Everette
PO Box 605
Gleneden Beach OR 97388

Ed Tanabe
20810 60th Street E
Summer WA 98390

Richard Grout
1420 NW Gilmore Blvd.
Isaquah WA 98027-5327

RE: BA-343-91, SP 3235 Beach Sand Alteration, Gleneden Beach, Lincoln County

Your request to alter the ocean shore at Gleneden Beach by pushing beach sand up against the beach front bank has been evaluated by the State Parks and Recreation Department and the Division of State Lands. The proposed project is located at Township 8S Range 11W, Section 21. The review included posting of the site with a public notice, a staff inspection, an evaluation of the project against the Parks Department's Beach Improvement Standards, and consideration of comments received from circulation of the application by the Division of State Lands.

PROJECT DESCRIPTION

The proposed project consists of bulldozing 1500 cubic yards of beach sand from adjacent beaches to create an artificial sand berm against the face of the marine terrace. Beach grass is proposed to be planted on the berm following the building of the dune.

GENERAL CONCERNS EVALUATED

1. Project Need - These properties were the subject of a request for a rip rap rock revetment in 1990. The permit was denied on the grounds that ocean-caused erosion is minimal, and that inadequate upland drainage is the main erosion threat to the property. Conditions have not changed since the original evaluation. There is still no apparent threat from the ocean, and thus, there is no need to bulldoze beach sand up against the beach front property.

2. Protection of Public Rights - Public ownership and use easement rights seaward of the beach zone line

525 Trade Street SE
Salem, OR 97310
(503) 378-6305
FAX (503) 378-6447

will be adequately protected.

3. Public Laws - The application has been reviewed by the Lincoln County planner and found to be consistent with the County plan and zoning ordinance. It is not known what federal regulations may affect the proposed project.

4. Public Costs - The removal of sand from adjacent beaches may exacerbate upland erosion. This beach has coarse sand grain particles, which according to OSU oceanographers, is highly susceptible to water storm wave erosion. If a large quantity of sand is skimmed off this beach, what buffer that the beach sand provides between the ocean and the marine terrace may be eliminated. In that event, ocean wave action would be allowed to invade the marine terrace uninterrupted - possibly causing extensive beach front erosion.

5. The sand alteration is not subject to provisions of the Land Conservation and Development regarding beach front protective structures seaward of the beach zone line after January 1, 1977.

SCENIC CONCERNS EVALUATED

1. Natural Features - There would be same visual degradation of the beach scenery.

2. Shoreline Vegetation - No vegetation would be affected.

3. View Obstruction - There would be no obstruction of views.

4. Compatibility with Surroundings - The project would blend in with surrounding scenery.

RECREATION USE CONCERNS EVALUATED

1. Recreation Use - The sand alteration could have an affect on recreation use of the beach if it leads to accelerated beach sand erosion and subsequent possible irrecoverable loss of sand on the beach.

2. Recreation Access - The project would not obstruct or block recreation access along the beach.

SAFETY CONCERNS EVALUATED

1. Structural Safety - The sand berm created by bulldozing up the sand would not be a safety hazard to the public.

2. Obstructional Hazards - The project would not be an obstruction to persons going onto or along the ocean shore area.

3. Neighboring Properties - The project would not affect neighboring properties.

4. Property Protection - The sand berm would increase protection to upland property, although unnecessarily.

CONCLUSION

Based on evaluation of the proposal against the Beach Improvement Standards and consideration of comments received from agencies and the public, your application for a permit to bulldoze beach sand is denied. Should your beach frontage how signs of active erosion which threatens the stability of the property or upland dwellings, we would be willing to reconsider this permit denial.

Very truly yours,

David G. Talbot, Director
Oregon State Parks & Recreation Dept.

PDB:dlg
Everett.ltr

cc: Earle Johnson, Supervisor
Waterway Permits
Division of State Lands

Lincoln County Planning Dept.

Region 2 State Parks

Beverly Beach Dist. Park Headquarters

Lynn Gray

NEIL GOLDSCHMIDT
GOVERNOR

PARKS AND RECREATION DEPARTMENT

525 TRADE STREET SE, SALEM, OREGON 97310 PHONE (503) 378-6305 FAX (503) 378-6447

February 5, 1991

Kathy Everette & Partners
P.O. Box 605
Gleneden Beach, OR 97388

RE: BA-335-90, SP 3150, Riprap Revetment:
Gleneden Beach, Lincoln County, Oregon

Your request to construct a riprap revetment on the ocean shore has been evaluated by the State Parks and Recreation Department and the Division of State Lands. The proposed project is locate at Township 8S, Range 11W, Section 21. The review included posting of the site with a public notice, a staff inspection, an evaluation of the project against the Park Department's Beach Improvement Standards, and consideration of comments received from the circulation of the application by the Division of State Lands.

PROJECT DESCRIPTION

The proposed project consists of installing a revetment on the ocean beachfront using 900 cubic yards of mechanically placed riprap rock. A toe trench 8' deep would be dug and the revetment laid at a slope of 1½:1 and extending to a height of 16' above the present beach level. The revetment would be 29' long beginning approximately 50' south of zone line point Li-7-138. The proposed structure would extend 27' west of the edge of the bluff, 17' beyond the Beach Zone Line.

GENERAL CONCERNS EVALUATED

1. Project Need - The bluff setback on the property above the beach was recently determined by the county to be 33'. A house was built in accordance with the county's laws regulating setbacks. The geologists report indicates there has been minimal erosion to the bluff in the past few years. His report indicates that any erosion occurring is coming from a storm drain outfall.

   While the geologist recommended a greater setback than that required by the county, the property owner chose to construct the dwelling closer to the beach according to the county setback.

2. Public Rights - The project would occupy approximately 500 square feet of beach west of the Beach Zone Line.

3. Public Laws - The proposed project is covered by a regional permit issued by the U. S. Army Corp of Engineers. Lincoln County has determined the project to be consistent with their Comprehensive Plan.

4. Project Modifications - No alternatives were considered.

5. Public Costs - The proposed project would take up valuable dry sand black space irrecoverably.

6. Compliance with LCDC Goals - The project has been determined to be in compliance with Lincoln County's comprehensive plan, however the county's plan prefers non-structural stabilization techniques.

SCENIC CONCERNS EVALUATED

1. Natural Features - The proposed project would take up approximately 800 square feet of sandy beach, 500' of which would be west of the Beach Zone Line. The project would degrade nearly 30' of natural and undisturbed marine terrace.

2. Shoreline Vegetation - The proposed project would not eliminate any vegetation if constructed from the beach.

3. View Obstruction - The project will not obstruct views from adjoining properties.

4. Compatibility with Surroundings - The proposed project would be compatible with the view to the north. Several revetments exist beginning 60' north of the Everett lot. Revetments to the south however do not occur for 1600' and thus the proposed revetment would not blend in well with views to the south.

RECREATION USE CONCERNS EVALUATED

1. Recreation Use - The project would occupy approximately 500 square feet of beach within the Ocean Shores Recreation Area.

2. Recreation Access - The project would not remove a public access route to the beach.

SAFETY CONCERNS EVALUATED

1. Structural Safety - The proposed project will not present any unusual safety hazards.

2. Obstructional Hazards - The project will not be an obstruction to beach access from the upland.

3. Neighboring Properties - The engineering geologists report does not address the effect of revetments on adjoining properties. Current research regarding the effects of revetments on adjoining properties indicates that it is uncertain how revetment projects impact neighboring properties.

4. Property Protection - The project would add some measure of protection to the Everette property.

OTHER RESOURCE CONCERNS EVALUATED

No comments were received indicating the project would cause a negative impact on fish and wildlife habitats, estuarine values, navigation interests, significant historic and archaeological sites, significant natural areas, or air and water quality.

PUBLIC COMMENTS

Comments were received objecting to the issuance of a permit on the grounds that prior to building the applicant was aware of a geologist report recommending a greater setback, yet the building was constructed shoreward of the geologist recommendation. An objection was also made that erosion is not critical on the site and therefore there is insufficient justification to build a revetment which would impact public rights.

STAFF FINDINGS/INSPECTION

1. Wave erosion is minimal. The engineering geologist supports this conclusion. Storm drainage is causing a small localized amount of erosion.

2. No building structure is threatened at this time.

CONCLUSION

Based on evaluation of the above standards, a staff inspection of the site, and consideration of public comments, the State Parks and Recreation Department and Division of State Lands denies your application for a riprap revetment at this time.

In order to maintain the stability of your beachfront bank we encourage you to remedy the storm drain impact on the site. Should significant ocean wave erosion cut into your beachfront property in the future, we would be willing to reconsider this permit application request.

Very truly yours,

David G. Talbot
State Parks Director

Earle Johnson
Assistant Director
Division of State Lands

DGT:EJ:lr
PARTNERS.LTR

cc: Region 2 Parks Office
South Beach District
Lincoln County Planning Dept.

KERNVILLE-GLENEDEN BEACH
LINCOLN BEACH WATER DISTRICT

Post Office Box 96
Gleneden Beach, OR 97388
Telephone (541) 764-2475 Fax (541) 764-2459

April 4, 2006

Mr. Matt Spangler
Lincoln County Department of Planning & Development
Public Service Building
210 SW 2nd St. Room A
Newport, OR 97365

Dear Matt,

The Kernville-Gleneden Beach-Lincoln Beach Water District provided water service for the lots described below prior to 1977.

The potential issue of soil erosion in the developed area of Lots 100, 201 and 204 Map 8-11-21- CD dated August 31, 1976, has been brought to my attention by Mr. Richard Grant a homeowner on Lincoln Avenue.

It is a concern of the Kernville-Gleneden Beach-Lincoln Beach Water District that every cooperative effort be explored to maintain the existing soil structure by improved road drainage; that should protect the existing infrastructure in that area.

The Kernville-Gleneden Beach-Lincoln Beach Water District looks forward to the decision by the Lincoln County Department of Planning & Development that would contribute to the future stability of these District facilities.

Sincerely,

Mark Snyder, Superintendent
Kernville-Gleneden Beach-Lincoln Beach Water District

Cc: Kernville-Gleneden Beach-Lincoln Beach Water District
District Board of Commissioners
Cc: Mr. Richard Grant

GLENEDEN SANITARY DISTRICT
Post Office Box 96
Gleneden Beach, Oregon 97388
Telephone 764-2475

April 4, 2006

Mr. Matt Spangler
Lincoln County Department of Planning & Development
Public Service Building
210 SW 2nd St. Room A
Newport, OR 97365

Dear Matt,

The Gleneden Sanitary District provided sanitary service for the lots described below prior to 1977. Patrons were allowed to connect to the system in 1976.

The potential issue of soil erosion in the developed area of Lots 100, 201 and 204 Map 8-11-21- CD dated August 31, 1976, has been brought to my attention by Mr. Richard Grant a homeowner on Lincoln Avenue.

It is a concern of the Gleneden Sanitary District that every cooperative effort be explored to maintain the existing soil structure by improved road drainage; that should protect the existing infrastructure in that area.

The Gleneden Sanitary District looks forward to the decision by the Lincoln County Department of Planning & Development that would contribute to the future stability of these District facilities.

Sincerely,

Mark

Mark Snyder, Contract Superintendent
Gleneden Sanitary District

Cc: Gleneden Sanitary District Board of Directors
Cc: Mr. Richard Grant

CENTRAL LINCOLN
YOUR PUBLICLY-OWNED ELECTRIC UTILITY

2129 North Coast Highway • P.O. Box 1126 • Newport, OR 97365-0090 • 541-265-3211 • *FAX: 541-265-5208*

Matt Spangler
Lincoln County Planner
Public Services Building
210 SW 2nd St. Room A
Newport, OR 97365

04-05-06

Dear Matt,

I have reviewed our records and find that in 1972 Central Lincoln PUD had electrical facilities available to serve Tax lots 100, 201 and 204, Map 8-11-21-CD. Providing service to each of these lots on an individual basis would have been considered usual and customary construction at this time and well within the scope of standard practices. These lots are all within our service area and power would have been provided as each customer requested.

If you have any further questions please contact me at 574-2049.

Sincerely,

Troy S. Delle
Senior Engineering Tech.

BOOK 159 PAGE 281

DEED

KNOW ALL MEN BY THESE PRESENTS That we, ART CUMMINGS and ILA M. CUMMINGS, husband and wife, for One and no/100 ($1.00) Dollar and other good and valuable consideration to us in hand paid, do hereby give, grant and dedicate to the Public for road purposes the following described real property situated in Lincoln County, Oregon, to-wit:

Beginning at the Northeast corner of the Plat of Sea Breeze, said point also being 381.47 feet West and North 21° 19' 30" East 1059.53 feet from a 2 inch iron pipe set for the 1/4 Section corner between Sections 21 and 28 in T. 8 S. R. 11 W. W.M.; thence North 21° 19' 30" East 155.64 feet to the true point of beginning, which said point is on the West boundary of Oregon Coast Highway; thence West 1013.20 feet; thence South 145 feet; thence West 50.77 feet; thence North 331.40 feet; thence East 50.47 feet; thence South 145 feet; thence East 1028.81 feet; thence South 21° 19' 30" West 42.93 feet to the point of beginning.

TO HAVE AND TO HOLD unto the Public for the uses and purposes hereinabove set out forever.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 21st day of July, 1953.

Art Cummings (SEAL)

Ila M. Cummings (SEAL)

STATE OF OREGON, ;
; ss
County of Lincoln. ;

BE IT REMEMBERED That on this 21st day of July, 1953, before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named Art Cummings and Ila M. Cummings, husband and wife, known to me to be the identical individuals described in and who executed the within instrument and acknowledged to me that they executed the same freely and voluntarily.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal the day and year last above written.

McCLUSKEY NOTARY PUBLIC STATE OF OREGON

Notary Public for Oregon
My Commission Expires:
July 24, 1955

B13440 DEED PHOTOSTAT

ART CUMMINGS and
ILA M. CUMMINGS
To
THE PUBLIC

STATE OF OREGON }
COUNTY OF LINCOLN } SS.

I hereby certify that the within instrument was received for record on the 22nd day of July, 1953 at 2:00 o'clock P.M. and recorded in Book 159 on page 281 of Deed Records of said County.

Witness my hand and seal of County affixed.

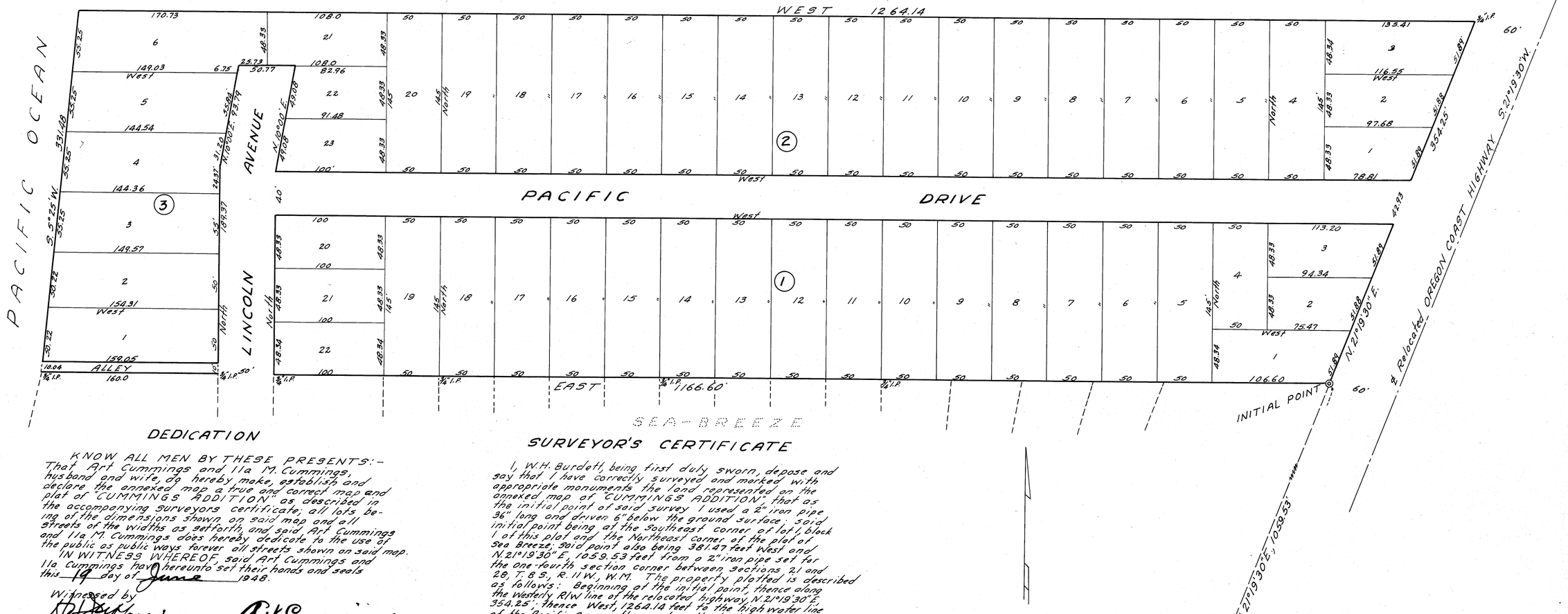
[illegible]
County Clerk
By [illegible]
Deputy

C. R. McCluskey
Toledo, Oregon

8-50

CUMMINGS ADDITION

LINCOLN COUNTY, OREGON.
SECTION 21, T. 8 S., R. 11 W., W.M.



DEDICATION

KNOW ALL MEN BY THESE PRESENTS:- That Art Cummings and Ila M. Cummings, husband and wife, do hereby make, establish and declare the annexed map a true and correct map and plat of "CUMMINGS ADDITION" as described in the accompanying surveyors certificate; all lots being of the dimensions shown on said map and all streets of the widths as set forth, and said Art Cummings and Ila M. Cummings does hereby dedicate to the use of the public as public ways forever all streets shown on said map.

IN WITNESS WHEREOF, said Art Cummings and Ila Cummings have hereunto set their hands and seals this 19 day of June 1948.

Witnessed by
R. D. Jeffries
R. A. Miller

Art Cummings
Ila M Cummings

ACKNOWLEDGEMENT

STATE OF OREGON
COUNTY OF MULTNOMAH } S.S.

Be it remembered, that on this 19 day of June 1948, before me, the undersigned notary public in and for said state and county, personally appeared Art Cummings and Ila M. Cummings, personally known by me to be the identical persons described in and who executed the foregoing instrument and acknowledged to me that they executed the said instrument as their free and voluntary act and deed for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year last above written.

Adaline A. Jeffries
Notary Public for Oregon
My commission expires Oct 17, 1950

SURVEYOR'S CERTIFICATE

I, W.H. Burdett, being first duly sworn, depose and say that I have correctly surveyed and marked with appropriate monuments the land represented on the annexed map of "CUMMINGS ADDITION" that as the initial point of said survey I used a 2" iron pipe 36" long and driven 6" below the ground surface; said initial point being at the southeast corner of lot 1, block 1 of this plat and the Northeast corner of the plat of Sea Breeze, said point also being 381.47 feet West and N. 21°19'30" E. 1059.53 feet from a 2" iron pipe set for the one-fourth section corner between sections 21 and 28, T. 8 S., R. 11 W., W.M. The property platted is described as follows: Beginning at the initial point, thence along the Westerly R/W line of the relocated highway, N. 21°19'30" E. 354.25'; thence West, 1264.14 feet to the high water line of the Pacific Ocean; thence along the high water line S. 5°25' W., 331.48' to the North line of the plat of Sea Breeze; thence along the North line of the plat of Sea Breeze East, 1166.60 feet to the point of beginning.

REGISTERED OREGON LAND SURVEYOR
W. H. Burdett
NOV. 19, 1934
W. H. BURDETT
45

W.H. Burdett

Subscribed and sworn to before me this 12th day of June 1948.

Millard C. Robinson
Notary Public for Oregon
My commission expires June 1, 1952

FILED
JUL 6 - 1948
R. E. Collins
County Clerk
By Tilla Gildersleeve
Deputy

APPROVED July 6, 1948.

F. E. Kirby
County Judge

R. E. Collins
County Clerk

E. H. Collins
County Commissioner

W. F. Osburn
County Assessor

County Commissioner

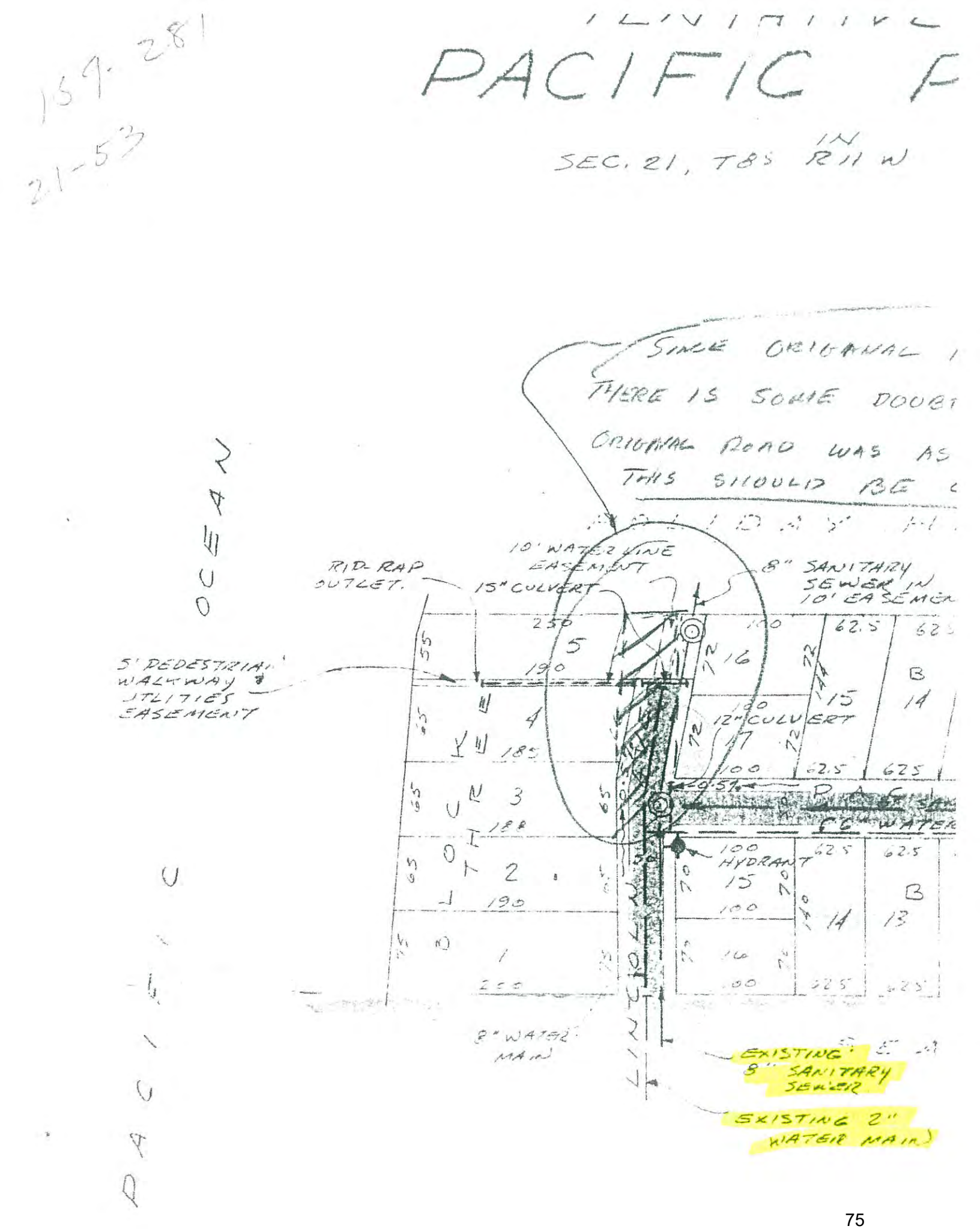
D. B. Ambler
County Surveyor

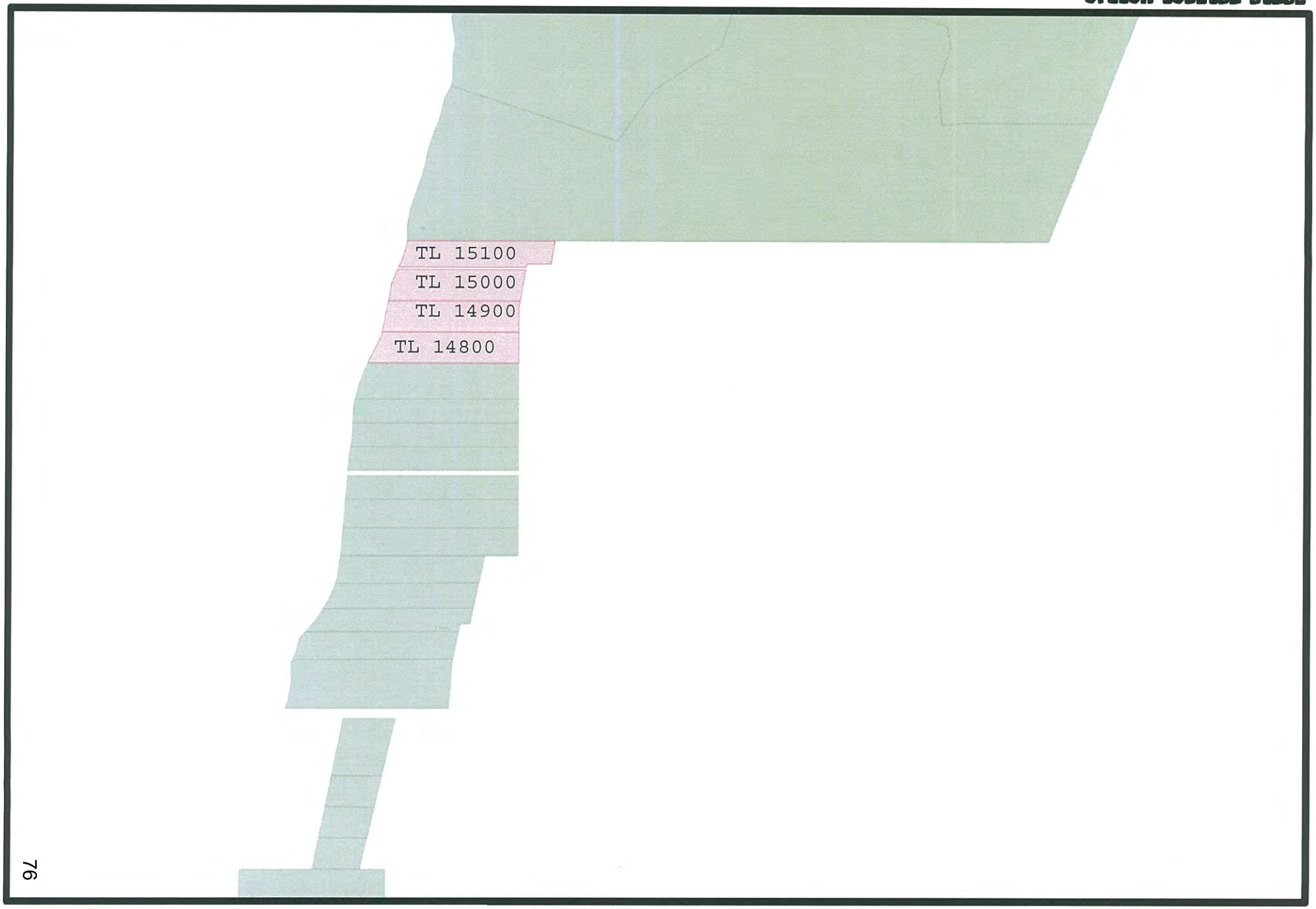
All taxes have been paid to June 30, 1948

Timothy P. Welp
County Sheriff.
by Eleanor Dick, Deputy

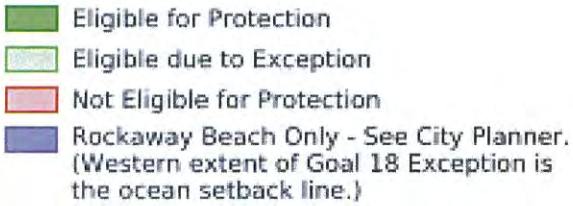
DRAWING NUMBER
CUMMINGS ADDITION
PLAN HOLD CORPORATION • IRVINE, CALIFORNIA
REORDER BY NUMBER 075AR

DRAWING NUMBER
8-50
PLAN HOLD CORPORATION • IRVINE, CALIFORNIA
REORDER BY NUMBER 075AR


PACIFIC
SEC. 21, T8S R11W
SINCE ORIGINAL
THERE IS SOME DOUBT
ORIGINAL ROAD WAS AS
THIS SHOULD BE
OCEAN
10' WATERLINE EASEMENT
RIP-RAP OUTLET.
15" CULVERT
8" SANITARY SEWER IN 10' EASEMEN
5' PEDESTRIAN WALKWAY & UTILITIES EASEMENT
12" CULVERT
100 HYDRANT
8" WATER MAIN
EXISTING 8" SANITARY SEWER
EXISTING 2" WATER MAIN



Legends


Eligible for Protection
Eligible due to Exception
Not Eligible for Protection
Rockaway Beach Only - See City Planner.
(Western extent of Goal 18 Exception is
the ocean setback line.)

Goal 18: Pre-1977 Development Focus Group
Oregon Department of Land Conservation & Development
Attn: Meg Reed
Coastal Shores Specialist
meg.reed@state.or.us

September 3, 2019

Dear Focus Group,

The stated purpose of this focus group was **"to review the equity and consistency of the application of Statewide Planning Goal 18: Beaches and Dunes, Implementation Requirement #5."**

During the five sessions held to discuss **"equity and consistency"** there was ample evidence presented that while Goal 18 is well-meaning and widely embraced, its conception and application are deeply flawed. In our presentation of May 22 we presented narrative and graphic evidence that:

1. The Goal 18 has **not** been applied consistently and does **not** recognize the problems of climate change and increasing storm severity now affecting the coast.
2. The central Oregon coast is highly developed with **only** few isolated lots that are not eligible for armoring. This has not been pristine undeveloped land for decades predating Goal 18.
3. The patchwork of permits for beachfront armoring has created a "sawtooth" pattern of a few isolated properties at increasing risk for erosion.
4. The concept of a **meandering vegetation line** was rejected in the original deliberations of the Beach Bill in 1967 and 1969 and could be considered a regulatory of Taking of private property.
5. Use of the vegetation line puts at risk **buildings and vital infrastructure** that were built with approval by local permitting authorities.
6. A small number of properties in the central coast area that not eligible for armoring are at risk for erosion and demonstrate the need for a more flexible approach to armoring.
7. The criteria for eligibility for beachfront armoring are inconsistent and ignore properties that were zoned for development and approved by land use decisions for development **but** did not have arbitrary qualifying improvements

In 1967 the Oregon Beach Bill was enacted as HB 1601. It established a 16' foot **contour** line to create a public **"recreational easement**". The state opened up a 363-mile-long corridor west of this contour line for public use. It was simple and contained little other detail.

The next legislature in 1969 enacted HB 1045 that acknowledged the shortcomings of the original bill and created a defined line known as the **"Beach Zone Line" (BZL)**. This was a clearly defined and surveyed line that established the public **"recreational easement"** west of the **"Beach Zone Line" (BZL).**

The polices of Goal 18 imposed great restrictions on private property owners. These restrictions were not a part of the original Beach Bill, but were the administrative interpretations evolving from it. Subsequent actions discontinued the use of the **Beach Zone Line** using the less clearly defined and meandering concept of **"vegetation line."** This idea of a **"vegetation line."** was considered by both 1967 and 1969 legislatures and **rejected** as unacceptable due to its inconsistency with Oregon State Constitution requirements of a property line being "**definite and certain**." As a consequence despite the original intent of the 1967 and 1969 legislatures, there is gradual appropriation of property of oceanfront landowners.

Exceptions to Goal 18

It is said that there have been no Exceptions to Goal 18. In fact, there are two local examples of ***de facto*** "exceptions".

Salishan

The first is Salishan which is classified on the Oregon Coastal Atlas maps as **"Eligible due to Exception".**

In January 1977 Lincoln County stopped permitting undeveloped lots in Salishan due to the 1/1/1977 cutoff date for development under Goal 18. Newspaper accounts report that Salishan planned to take legal action. However, on 4/12/1978 Lincoln County Board of Commissioners ordered the Lincoln County Planning Department to grant building permits for Salishan. Goal 18 Eligibility shows **all** of Salishan to be light green in color indicating an exception to Goal 18. A review of **State Beachfront Protective Structure permit records** indicates 70 of the Salishan lots have **no** armoring permit records.

Despite this, there is general agreement that *no* exception to Goal 18 has ever been approved.

Re: Red (ineligible) property permitted to install BPS

The second local example of ***de facto*** exception to Goal 18 is the permitting of armoring of 21 properties that are designated as ineligible on the Oregon Coastal Atlas maps in the 5.3-mile area extending from Fishing Rock to the mouth of Siletz Bay.

While we understand the mission of this Focus Group is not to make decisions regarding specific issues of the application of Goal 18, we do believe that this is the appropriate forum to discuss the inadequacies of the current application of Goal 18 and the **urgent** need for revision.

In the January meeting of this Focus Group data was presented showing that as of January 1, 2015 the central coast is **highly developed** and **uniquely involved** with beachfront armoring:

- Only 22.5 miles (5 per cent) of the entire Oregon coastline is armored
- 92 per cent of the armoring is in Clatsop, Tillamook and Lincoln county
- More than half of the armoring is in Lincoln County

The current status of eligibility for armoring is summarized graphically on the Ocean Shores Viewer (http://coastalatlas.net/). We have created interactive GIS web maps (http://arcg.is/1C9KKu) based on the Ocean Shores Viewer and county records to show graphically the current status of eligibility and installation of beachfront protective structures in 5.3-mile area from Fishing Rock to Siletz Bay.

I direct your attention to the table which summarizes the state of armoring in this section.

		Total lots	# Lots w/BPS	Lots w/o BPS	%Lots w/BPS
Dark Green	Eligible for Protection	185	151	34	81%
Light Green	Eligible due to Exception	130	128	2	99%
Red	Not Eligible for Protection	34	21	13	62%
Fishing Rock to Salishan Spit		**349**	**300**	**49**	**86%**

BPS: Beachfront protective structure

The following summarizes the lack of **"equity and consistency"** of the application of Goal 18:

- **34 lots are originally deemed Not Eligible for Protection**
- **21 lots have been allowed to install armoring**
- **13 non-qualifying lots are without beach revetment:**
    - 2 are State Park land
    - 2 are commercial development-WorldMark
    - 1 is undeveloped no access property-part of Coronado Shores plat
    - 1 is common element (beach access for Coronado Shores)
    - 1 is common element (beach access for SeaRidge)
    - 2 individual residences w/permitted "column" revetment structure on private property
    - 4 individual residences

Conclusions

1. Climate change and sea level rise are causing unprecedented erosion in many areas of the Oregon coast with negative impact on public and private property.

2. The Lincoln Beach/Gleneden Beach region of the coast is highly developed with a high degree of armoring of 86 per cent of lots and an additional 10 per cent that are eligible but not yet armored.

3. Since 1977, Goal 18 has been applied **inconsistently** as evidenced by the installation of beach protective structures in 21 ineligible properties.

4. Of the 349 lots in the Lincoln Beach/Gleneden Beach area, there are only 13 (4 %) lots outside of Salishan remain ineligible and unarmored.

5. Properties which were zoned and approved for development should be permitted to install armoring when the buildings and/or infrastructure are at potential risk rather than wait for an emergency.

6. Goal 18 should be applied to recognize:
    - the reality of climate change
    - the unique characteristics of development in the central Oregon coast
    - the extensive armoring of this portion of the coast that currently exists
    - the consequences of inequities and inconsistencies in the permitting process

With regards,

Steve Neville
Svn123@icloud.com
(541) 740-6481

September 5, 2019

Ms. Meg Reed, Coastal Specialist
Oregon Department of Land Conservation and Development
810 SW Alder Street, Suite B
Newport, Oregon 97365

Dear Ms. Reed,

Thank you for facilitating the Goal 18 Work Group. It was a critically important undertaking and I appreciate the DLCD initiating this work.

I am writing to encourage the DLCD and OPRD that now is the time to seriously look at and be willing to make some changes to Goal 18 especially as it relates to the properties in the Lincoln Beach and Gleneden Beach areas of the Oregon coast. There are numerous inconsistencies in the application and approval of beachfront armament in this stretch of the Oregon coast. There are numerous "red" properties that are supposedly ineligible for rip rap but have been allowed by either the State or County to install it to protect their property.

My wife and I are owners of a home at SeaRidge. There are 80 homes at SeaRidge and we have a smaller frontage on the beach, per owner, than probably any property on the Oregon coast. We have worked with OPRD and DLCD for years using "soft" methods to protect our property. We have spent hundreds of thousands of dollars and yet we remain vulnerable. We feel as though SeaRidge has been singled out among all properties in Lincoln County with disparate treatment. We strongly support the spirit of the Beach Bill to make the beaches in Oregon accessible to all Oregonians, however the application of and changes to the bill over the years have created inconsistencies resulting in two classes of owners on the Oregon coast.

Thanks again for your work and for allowing this letter to be a part of the public testimony.

Gordon Crisman
4175 NW Highway 101, Unit A-1
Depoe Bay, Oregon 97341

September 18, 2019

Dear Ms. Reed,

My wife and I are owners at SeaRidge in Lincoln County. In the thirty years that our family has occupied this residence we have witnessed significant and dramatic erosion directly in front of our unit. In an attempt to resolve our problem, we have participated in most of the meetings of the DLCD. We are concerned that there are many inconsistencies in the applications of beachfront armament and we hope this is a matter that will be addressed by the focus group.

In addition, at SeaRidge there is a sewage pumping station located very near to the beach. Each winter the erosion gets closer to that station. In the event that pumping station is breeched, there will be sewage on the beach which is abhorrent to everyone - Oregon Parks Department, Lincoln County, the sewage district, and the residents in the area. Many residents of SeaRidge will not be able to occupy their homes. Senator Roblan, Ono Husing, Jay Sennewald, and Doug Gless have all visited our property and are aware of what could occur in the future.

We all have a stake here, and hope the Focus Group will help with a positive plan and suggestions for providing protection for our beaches. Thank you for your anticipated consideration and efforts.

Regards,
Joseph and Marsha BeLusko
SeaRidge residents

Public Comments for the Goal 18 Focus Group Process

by Franklin E. Sherkow, P.E.

2891 Highway 101 North, Yachats, OR 97498

1. Goal 18 was developed to provide an understandable and straightforward policy to create eligibility and permits for shore protection. Unfortunately, it's been turned into a process to prevent permits from being issues. Three different agencies (DLCD, State Parks, and City/County) must all simultaneously agree on eligibility and permit issuance. Two of those agencies (DLCD and State Parks) actually do not believe in shore protection for public infrastructure or private property, and are quite open about it. They actually work together in private, without any written documentation available to the public or land owners, to prevent new permits.

   They also consistently change their interpretations of terms and definitions in the Rule, without formalizing any such actions or making any such records available to the public, in violation of the Oregon's Administrative Rulemaking Procedures and Oregon's Public Records Law (ORS 192.410 – 192.505). This causes a continuing lack of understanding of the Rule meaning and applicability by all parties, such that almost all applicants must hire an attorney to file suit in order to get any permit actions.

   Now, the **State has misinterpreted the Rule to mean that the residential or commercial had to be present and "occupyable" on January 1, 1977**. So, if you had a house on the coast for 20 years and it burnt down on Christmas eve (December 24, 1976), but was rebuilt the next spring (April 1977), it would somehow lose its shore protection eligibility. No reasonable person believes that is the case.

   The discussions at the Goal 18 Focus Groups (Jan. – Aug. 2019) would actually make gaining a shore protection permit more costly, time-consuming, and complicated, which appears to be their goal.

2. The Rule was clearly written to provide a meaningful role for local government. It was also clear that the authors meant that any pre-1977 development would qualify if it was in an **AREA** of development defined by local governments.

   Did you know that the word "local" (meaning "local government") is mentioned 8 times in the Goal 18 Rules? The phrase "local government" is mentioned 6 times. The following can be found in the existing Goal 18 Rules (bottom of page 3 and top of page 4):

A. INVENTORIES

Local government should begin the beach and dune inventory with a review of Beaches and Dunes of the Oregon Coast, USDA Soil Conservation Service and OCCDC, March 1975, and determine what additional information is necessary to identify and describe:

1. The geologic nature and stability of the beach and dune landforms;

2. Patterns of erosion, accretion, and migration;

3. Storm and ocean flood hazards;

4. Existing and projected use, development and economic activity on the beach and dune landforms; and

5. Areas of significant biological importance.

There is **NO mention in the Rule of any State Inventory of Lots** (in order to establish shore protection eligibility). DLCD has falsely and unlawfully taken this responsibility of the pre-1977 development away from local governments. Therefore, **it unlawfully establishes shore protection eligibility based on an unlawfully created documents (which has no reference or standing in the Rule). The State has been doing this for decades**.

The State has chosen to willfully misinterpret the Goal 18 Rules, and local governmental units have acquiesced to this situation, sometimes using the excuse to limited local budgets for not fulfilling their obligation to produce "local comprehensive plans" for Goal 18. The existing Rule clearly says that **"Local comprehensive plans shall identify areas where development existed on January 1, 1977."**

a. **Local** = local governments (State cannot generate multiple "local comprehensive plans")
b. **Comprehensive Plans** = one set of standards, criteria and guidelines per local jurisdiction; usually encompasses larger geographical areas
c. **Areas** = neighborhoods, communities, and/or large groupings of adjoining lots
d. The State is acting as if the 2nd sentence in the existing Rule language does not exist.
e. The Rule language talks about "**AREAS**" and not "**LOTS**"
f. It **does not say that each and every lot** in an **AREA** shall have a house, commercial structure or be subdivided using the "statutory subdivision method"
g. State agencies have NO POWER to make lot-by-lot Goal 18 eligibility rulings
h. **Only Local Jurisdictions have the power to identify AREAS for Goal 18 eligibility, based on a "local comprehensive plan**"
i. The rule does not say that the State shall determine 1977-development patterns by doing a lot-by-lot inventory
j. By granting Goal 18 eligibility by **AREAS**, it immediately solves most of the in-fill issues of Shore Protection for property owners. It also allows the County/cities to protect other assets like roads, US 101, bridges, historic sites, communities, etc.

So, a **State Inventory of Lots** on Jan. 1, 1977 **DOES NOT EQUAL Local Comprehensive Plans which identify Areas where development existed**

3. The Rule should allow **in-fill shore protection**. Includes a provision that says if there is 200-500 feet of shore protection on either or both sides (public and/or private) of a subject property, then the State will grant an in-fill shore protection permit equal to the adjacent protection or adequate for the situation. This would not only protect the subject property, but also the neighboring properties (which are supposed to already be protected). This in-fill approach would have minimal impact on the localized aesthetic or environmental condition. The State limited discussion (at the Focus Group meetings) about this subject to highly impractical options. It actually asked for Public Comments on the subject before it revealed it policy option, making it impossible to provide targeted comments.

4. The State and local agencies should be instructed to **review areas where shore protection exists or might exist to strive for continuity and compatibility of shore protection**. Involve affected local property owners and public agencies. Plan with property owners on how to **handle "missing links" and vulnerable areas**. Be proactive and positive.

5. The State and local agencies have, knowingly or unknowingly, created a situation whereby it is difficult to get an affirmative answer or engage in a positive working relationship concerning this issue. Some officials have apparently "created" criteria beyond those listed in the rules. Some permits are granted and others denied or discouraged based on an uneven and inconsistent administration of the process. Example after example was presented to the Goal 18 Focus Group by local land owners, but no discussion was allowed by DLCD staff or action was ever taken. Many of these cases were not even used as examples or case studies for the purpose of determining how to improve the process. The following should happen:
    a. Create rules that state that the **State SHALL provide a shore protection (i.e., rip-rap) permit** when an application is submitted, if eligibility requirements are met.
    b. The State shall **engage positively with property-owners** and State agencies in order to satisfy shore protection requirements and permit issues, in a timely manner.
    c. If those requirements and conditions cannot be met, the **State shall issue a letter clearly stating the reasons for any denial, and allow the property-owners and/or State agencies an opportunity to adequately address these conditions**.
    d. The State shall create an **Ombudsman position** to deal with applications and situations that get bogged down in the process. This position will have **real authority** to resolve these situations.

6. The State should add a shore protection criteria that would **allow protection for one or more properties or infrastructure elements behind or adjacent to the coast as a reason for**

providing a shore protection permit to properties/agencies <u>on</u> the coast. *("A stitch in time saves nine.")*

7. The State should encourage local agencies, property-owners, and if appropriate affected State agencies (e.g., ODOT) to **work together in a cooperative process to establish shore protection** that prevents further detrimental erosion (i.e., proactive protection). This might include methods of how adjacent/abutting shore protection strategies can work together to maximize shore protection.

8. The State has chosen to use a "beach protection" strategy of **<u>retreating</u>** as nature continues to erode the shoreline. Important infrastructure should always be <u>exempt for the Goal 18 Rule (e.g., US 101)</u>. The authors never contemplated this policy of retreating, and the State's strategy was never codified in any legislative action or rulemaking process.
    a. How about **working with nature to <u>build up beaches</u>**? (e.g., Beach Nourishment Program and placement of strategic sea barriers)
        i. Better for property-owners
        ii. Better for beach users
        iii. Better for the environment
    b. What's the Oregon coast worth to Oregonians, local tax-base, and employment??
    c. Protect State Parks, historic sites, critical infrastructure, etc.
    d. Prevent having to rebuild or replicate parks, homes, and infrastructure, etc.
    e. Retreating coastline due to erosion serves no one!
    f. Different options work best for different sites
        i. Assess the highest probability of performance at each location
        ii. Assess the cost and benefits (including avoided or facility replacement costs)
        iii. Determine cost sharing arrangements
        iv. Gain public input

9. Where Are the Experts? The State has chosen to ignore the national and regional experts who could help to solve this problem. Why? Some of these experts work close by *(as measured from Newport, the site of the Focus Group meetings)*.
    a. Hatfield Marine Science Center – 4 miles away
    b. OSU – Wave Lab – 50 miles away
    c. USACE – Portland – 150 miles away
    d. NOAA and Others
    e. Shore Protection Research from other states and countries

10. We live in the "Age of Computers." Why isn't the State working with OSU and others to develop **Computer Coastal Erosion Simulation Model? Isn't our shore and beaches worth the investment?**
    a. Test physical scenarios
    b. Test policy options
    c. Test options for beach improvements
    d. Test tax-base and economic impacts, and facility replacement costs

    The <u>burden is on the State</u> to show that their policy choice is correct and viable.
    - What does the shoreline look like in 20 years UNDER CURRENT POLICIES?
    - How many homes, roads, parks and other elements will be gone? Where?
    - Loss of beaches and tax-base?

11. Shore Protection Cases - The review and meetings held by the Goal 18 Focus Group were undertaken to address various longstanding cases and the rip-rap approval process – **it was promised to State Legislators**. But, the Focus Group members and State personnel refused to discuss any of these long-standing cases, even though the land owners representing these cases were present at the Focus Group meetings and made repeated requests for such action during the limited public comment sessions. **Why won't the State do any of the following in cooperation with local governments?**
    a. Review the individual, longstanding cases – why are they stalled or denied?
    b. How many can be advanced within the current rules with minimal changes in interpretations?
    c. How many can be advanced with minor rule changes?
    d. How many can be advanced with "legally established lot" interpretation?
    e. How many can be advanced with "boot-strapping"?
    f. How many can be advanced with recognition of protection for adjoining lots?

12. Lastly, the existence of the Rule is prima fascia evidence that the State of Oregon wanted to allow shore protection under certain conditions. However, DLCD and State Parks Department **don't believe in shore protection**. Their representatives have repeatedly said as much at the Focus Group meetings and other forums. The State Park's representative said that he was told by "management" not to actively participate in the Focus Group meeting discussions, even though they had a seat on the committee and are responsible for issuing rip-rap permits. Having <u>public agencies hold internal policies that work directly in opposition to the very purpose of the Rule</u> they are responsible for administering, is a fraud on the public and affected land owners.

KELLINGTON LAW GROUP, PC

Wendie L. Kellington
P.O. Box 159
Lake Oswego Or
97034

Phone (503) 636-0069
Mobile (503) 804-0535
Facsimile (503) 636-0102
Email: wk@klgpc.com

September 30, 2019

Via Electronic Mail
DLCD Goal 18 Focus Group
dlcd.goal18@state.or.us

RE: *Goal 18 Equity and Consistency*

Dear DLCD:

Please include this letter in the record of the "Goal 18 Focus Group". As you know, the purpose of this "focus Group" group was to determine whether Goal 18 is equitable in the face of climate change.[1] Goal 18's inequitable policy choice unless changed, demands that one family be allowed to protect their ocean front investment and another family next door, cannot. Rather, the latter must watch their home fall into the ocean, for no reason other than the winning property was "developed" on January 1, 1977 and, the losing property a day or so later. This irrational policy choice becomes unimaginably cruel in the face of climate change.

I only heard about the "Focus Group" anecdotally right before it ended. This is a very odd thing since I am a seasoned land use lawyer who is very much in the middle of all things Oregon land use and run in circles that are similarly 'in the know'. I attended the first "Focus Group" meeting that was scheduled after I heard about it – which was the second to last meeting. At once I knew my participation was pointless. There was not one "ineligible-for-oceanfront-armoring" property owner on the "Focus Group". But there were **two members** of the interest group "**Surf Riders" on the committee** (one in person and one apparently in San Francisco patched in by telephone). Further, there were quite a few people openly sympathetic to that organization's point of view. This "Surf Rider" stacked deck is not disclosed in the Draft "Final Report," but I observed this with my own eyes.

My disappointment deepened when focus group members bluntly stated their view that oceanfront property owners who lost their property to wave action, had it coming for buying or

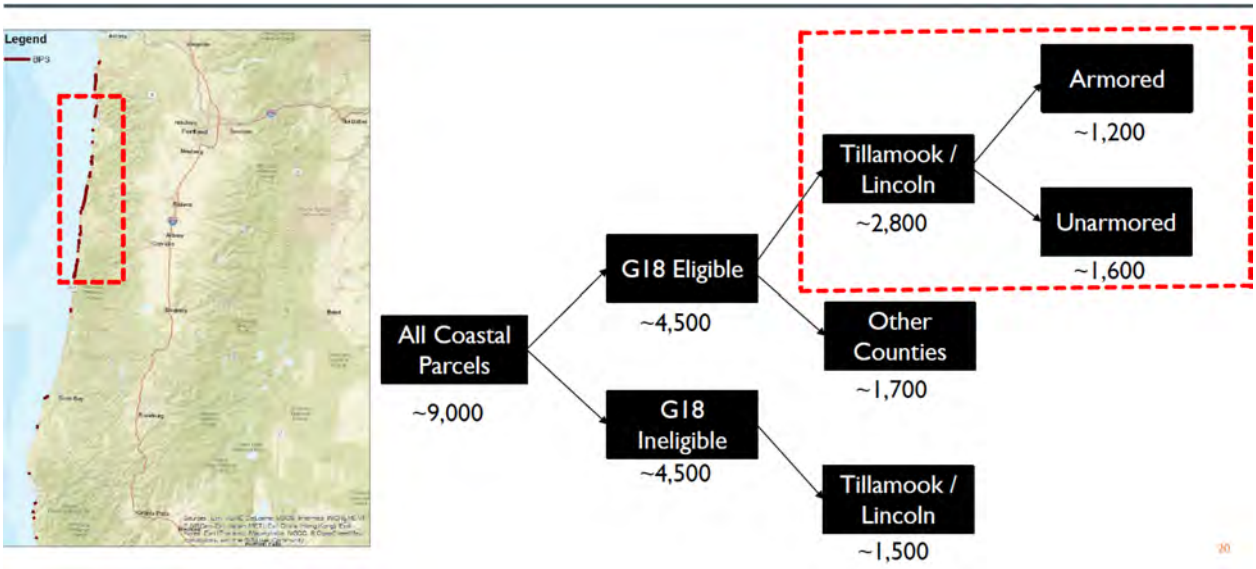
[1] In DLCD's report to the legislature "2017-19 Biennial Report", p 46 DLCD explained:
"Goal 18: Pre-1977 Development Focus Group: The department will initiate and lead a Policy Focus Group of relevant stakeholders to review the policies contained in and related to Statewide Planning Goal 18: Beaches and Dunes. With the increase of erosion and flooding potential on the Oregon coast due to climate change, private and public investments along the oceanfront are increasingly at risk of damage or ruin. It has been demonstrated in certain instances that the policies encompassed by Goal 18, specifically those relating to the allowance of shoreline armoring (e.g. riprap, seawalls), may not be flexible or comprehensive enough to deal with the realities of a changing climate. A policy focus group has been convened by the department to analyze the current policy framework in order to proactively address identified issues and discuss potential recommendations."

building an ocean front home. I could not help but wonder if Portlanders who bought or build west of I-5, would too "have it coming" when the Cascadia hits.[2]

As I gave my three minute oral testimony representing 14 land owners (and I explained this representation), the Goal 18 Focus Group committee member sitting across from me disrespectfully smirked – clearly disinterested in my point view and he had no qualms to let me know it. The keeper of the 3-minute timer seemed eager to let me know my time was up. It was and is abundantly clear that this group's ultimate findings should have no credibility.

A further hint that the "Focus Group" group had little use for the inequities suffered by the "ineligible" property owners affected by Goal 18's mean policy, is in the Draft Final Report's characterization of the property owners who managed to attend the "focus group" meetings (as bystanders only). These people are dismissed in the Draft Final Report as representing a "small segment of stakeholders affected * * *". Draft Final Report p. 5. The affected stakeholders are not "small". There are at least 4,500 Oregonians who own "ineligible" oceanfront property. And, they were the poor saps the plight of whom was supposed to be the focus of the committee.

The Draft "Final Report" is indeed strange. At Draft Final Report at p 17, there is an inconsistent claim that there are 961 lots on all of the Oregon Coast as ineligible for shoreline armoring.[3] This is either wrong or misleading. The economist's presentation that is the source of the 961 number in the Draft Final Report said that there are **4,500 ineligible** parcels on the Oregon coast, not 961:



Source S. Dundas 5.22.19 G18 Focus Group Power Point presentation

[2] "Kenneth Murphy, who directs *FEMA*'s Region X, the division responsible for Oregon, Washington, Idaho, and Alaska, says, 'Our operating assumption is that everything west of Interstate 5 will be toast.'" https://www.newyorker.com/magazine/2015/07/20/the-really-big-one

[3] You get 961 from adding up the ineligible lots listed on the graph.

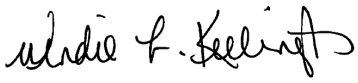
Another disappointing statement in the Draft Final Report opines that eligibility for shoreline armoring does not affect property values. This statement lacks the slightest amount of credibility and no policy decisions should be based upon it. Ask yourself - if regular citizens knew that Oregon land use rules forbad them from protecting an oceanfront home when the ocean comes gunning for it, would they buy the home? The answer is obvious, no one would buy that home. That means that properties eligible for ocean armoring and those that are not, have very different property values. What the economist's argument betrays is that most who buy or inherit ocean property have no idea about Oregon's irrational Goal 18 rule. In fact, most property owners whom I run into in my practice not only have no idea about it, they can't believe it when I tell them. Ocean armoring very much affects property values. Ocean armoring in fact is the ultimate arbiter of property values - the inability to armor a home, means all of its value and all of the property it sits on, will be lost when ocean currents change. The statement to the contrary in the Draft Final Report should be disregarded.

Goal 18 ought to be amended. The magic date of January 1, 1977 should be removed from Goal 18 entirely. Instead, the right to oceanfront armoring for everyone should be the same – everyone should be subject to the same performance standards. January 1, 1977 adds nothing to the conversation, but misery and arbitrary entitlement.

Please understand that the homes Goal 18 inequitably treats, were largely built hundreds of feet away from the ocean in compliance with all land use and building code laws. Many have public sewer extended to them (it will be lovely when the ocean splits those apart). Further, once those homes fall into the ocean, the ocean will be rapidly gunning for the next homes and, then, not long later, for the downtowns of whole beachfront cities creating completely foreseeable and avoidable economic chaos for coastal communities (and environmental blasphemy); after all, everyone knows that climate change is here.

Oregon is smart enough to respond to climate change with a thoughtful, forward looking, performance standards-based policy, which addresses its interests while it still can. In doing so, Oregon can protect beach goers, aesthetics, private property, whole coastal economies and public infrastructure. Oregon should jettison its backward looking Goal 18 rule that cares only about whether property was developed half a century ago. The current ocean policy is unjustifiable especially for our state that prides itself upon knowing something about good land use policy.

Very truly yours,



Wendie L. Kellington

WLK:wlk
CC: Clients

OREGON SHORES
CONSERVATION COALITION

September 30, 2019

Department of Land Conservation and Development ("DLCD")
C/o Meg Reed, Coastal Shores Specialist
635 Capitol Street NE Suite 150
Salem, OR 97301

Via Email to: dlcd.goal18@state.or.us, meg.reed@state.or.us

Re: Oregon Department of Land Conservation & Development
Goal 18: Pre-1977 Development Focus Group
Comments of Oregon Shores Conservation Coalition

To the Members of the Goal 18: Pre-1977 Development Focus Group:

Please accept these comments from the Oregon Shores Conservation Coalition and its members (collectively "Oregon Shores") to be included in the final report for Oregon Department of Land Conservation & Development's ("DLCD" or "Department") Goal 18: Pre-1977 Development Focus Group .[1] Oregon Shores is a non-profit organization dedicated to protecting the Oregon coast's natural communities, ecosystems, and landscapes while preserving the public's access to these priceless treasures in an ecologically responsible manner. Our mission includes assisting people in land use matters and other regulatory processes affecting their coastal communities, as well as engaging Oregonians and visitors alike in a wide range of advocacy efforts and sustainable stewardship activities that serve to protect our state's celebrated public coastal heritage. For nearly half a century, Oregon Shores has been a public interest participant in policy decisions and legal processes related to land use and shoreline management in the State of Oregon. Please notify us of any further decisions, reports, or notices related to this focus group, including any public hearing that may be held before the Department on this matter.

[1] *See* DLCD, *Goal 18: Pre-1977 Development Focus Group*, Oregon Coastal Management Program, (January 16, 2019) [hereinafter *Pub. Notice*] *available at* https://www.oregon.gov/lcd/OCMP/Pages/Goal-18-Focus-Group.aspx.

In January 2019, the DLCD initiated a focus group to review the usage of Oregon Statewide Planning Goal 18, Implementation Requirement #5 (Goal 18, IR #5).[2] Specifically, the Goal 18: Pre-1977 Development Focus Group ("Focus Group") was tasked to consider the consistency and equity of the application of the Goal 18 allowance for protection of pre-1977 development. The main concepts under consideration included:

- The definition of "beachfront protective structure;
- Protection of public infrastructure and assets; and
- Private property "in-fill" eligibility.

Oregon Shores has previously been a party of record to multiple processes at the state and local level involving shoreline protection structures ("SPS") in order to express serious concerns about the harmful potential impacts such structures impose on public access to the coast, public safety, and natural resources. We hope to lend this knowledge of coastal land use and development to support an appropriate and informed process regarding these important topics.

1. Background of Goal 18, IR #5

Permitting processes for SPS and Goal 18, IR #5 trace their origin to the Oregon legislature's decision to adopt the "Beach Bill," now codified in ORS Chapter 390. In 1967, the legislature proclaimed the state's sovereignty over what is now called the "ocean shore" – the dry sand area of the beach.[3] The legislature further adopted a clear policy in favor of preserving the ocean shore for future recreational uses and doing "whatever is necessary" to protect the public's scenic and recreational use of the ocean shore. [4] Goal 18, IR #5 is an acknowledgment of the legislature's requirement to protect public beaches and limit development that would otherwise threaten the public's free use and access to them. Goal 18, IR #5 allows for beachfront protective structures, such as engineered rip rap and concrete seawalls, only for development that existed prior to 1977. According to one authority, the purpose of the policy

> [I]s to limit long term, cumulative impacts from shoreline hardening, such as scouring and lowering of the beach profile, that can over time result in the loss of the dry sand public beach. The policy is premised on a basic "grandfathering" concept, allowing development that occurred prior to the adoption of the policy to qualify for hard protection, but precluding shore hardening for new development. New development must instead account for shoreline erosion through non-structural approaches (e.g., increased setbacks). In the face of increased ocean erosion occurring in conjunction with climate change and sea level rise, limiting hard structures and allowing natural shoreline migration is a critical policy tool for conserving and maintaining Oregon's ocean beaches.[5]

[2] *See* Or. Dep't of Land Conservation & Dev. (DLCD), *Goal 18: Beaches and Dunes*, OAR 660-015-0010(3), 2 *available at* https://www.oregon.gov/lcd/OP/Documents/goal18.pdf [*hereinafter* Goal 18, IR #5].
[3] *See* ORS 390.610(1); *See State ex rel Thornton v. Hay*, 254 Or. 584, 598, 462 P.2d 671 (1969) (upholding the legislature's declaration of ownership of the ocean shore).
[4] *See* ORS 390.610(4).
[5] Edward J. Sullivan, *Shorelands Protection in Oregon*, 33 J. Envtl. Law & Litigation 129, 150 (2018) (citing Matt Spangler, Senior Coastal Policy Analyst, DLCD) [*hereinafter Sullivan*].

Goal 18, IR #5 is also a recognition that hardened structures such as the engineered concrete seawalls and rip rap revetments will have impacts on the beaches, bluffs, and dunes upon which they are built as well as neighboring properties and coastline. As one authority has put it, these hardened structures "damage virtually every beach they are built on. If they are built on eroding beaches – and they are rarely built anywhere else – they eventually destroy them."[6] Another authority has described why this is true:

> "The ability of beaches to retreat landward and build seaward in response to changes in sea level, storm waves, and other natural processes is fundamental to their protective role as well as to their continued existence. Shoreline hardening to thwart nature's ebb and flow is therefore the antithesis of beach conservation."[7]

As this Focus Group demonstrates, DLCD is the lead agency in the formulation and application of coastal policy in relation to Goal 18, IR #5.[8] The Oregon Department of Parks and Recreation also regulates "beachfront protective structures" along the Oregon Coast "under standards weighted towards conservation."[9] The local land use departments of coastal cities and counties also play a role in implementing Goal 18, IR #5. Theoretically, each are bound by the legislature's clear policy prioritizing the protection of the public's interest in the beach. However, Goal 18, IR #5 in practice differs significantly from the theory underlying its adoption in the first place. Specifically, the short-term interests of private development are frequently given preference over the public's long-term interest in the beach. Oregon Shores believes that specific guidance and clarification regarding the scope of property considered eligible for protection under Goal 18, IR #5 could be a step toward bridging the gap between theory and practice.

2. The scope of the property considered eligible for hardened shorefront protective structures should be limited to the footprint of the pre-1977 structure originally on the site.

Goal 18, IR #5 permits hardened beachfront protective structures only for development that existed prior to Jan. 1, 1977 or areas where an exception to Goal 18 has been taken. Goal 18, IR #5 does not specify what extent of the parcel with pre-existing development might be eligible for a beachfront protective structure. In *Regen v. Lincoln County*, LUBA offered guidance upon this issue. This case involved a single tax lot of the Fishing Rock subdivision, which had been partitioned from a larger parcel upon which a home had been constructed prior to 1977. In this case, LUBA stated:

> Just as the text of Goal 18, Implementation Requirement 5 ... does not expressly protect pre-1977 *development*, it does not expressly protect 'entire parcels' where development was sited only on a small portion of the parcel. Such a broad interpretation would be inconsistent with the purpose of Goal 18, Implementation Requirement 5.[10]

[6] Cornelia Dean, *Against the Tide: the Battle for America's Beaches*, 53 (2001).
[7] Pillkey, Orrin H., quoted in *Duke Research,* 60 (1992).
[8] *See Sullivan*, 150.
[9] *Id.*, (citing OAR Ch. 736, Div. 20).
[10] *Regen v. Lincoln County*, 49 Or. LUBA 386, 393 (2005) (emphasis in original).

In *Regen*, LUBA rejected the argument that the existence of one pre-1977 house on an upland portion of a larger parcel justified beachfront protection of the entire parcel where the pre-1977 house no longer existed, the parcel was subsequently subject to subdivision, and the post-1977 structure was not located on the same part of the parcel as the pre-1977 development. LUBA cited the following explanation by Oregon Shores to support this finding:

> Implementation Requirement 5 is an acknowledgment that * * * beachfront protective structures are man-made structures that cause problems – they cause problems for adjacent property owners, they cause problems for non-adjacent owners and they cause problems for the state, which owns and manages in trust for the public the ocean shore and all lands westward of the ocean shore. Because [the Land Conservation and Development Commission] knew that such structures can cause problems and also recognized that some development had already occurred in reliance on the ability to build such structures, it adopted Implementation Requirement 5. * * * The State would not interfere with the right of property owners who owned developed property to protect that property, because they may have developed with the expectation that their structures could be protected. However, new development will only occur with the knowledge that beachfront protective structures will not be allowed. New development will not be allowed to cause problems for others.[11]

Oregon Shores believes that this interpretation focusing on the *footprint* of a pre-existing development is reasonable and far more accordance with the policy underlying the eligibility determination process under Goal 18, IR #5. As LUBA explained in *Regen*, this sort of interpretation makes sense, given that "different development requires different protective structures that can vary significantly in the amount of space they require."[12] Amending Goal 18, IR #5 to reflect LUBA's determination in *Regen* could go toward encouraging more sustainable coastal development practices and discouraging the use of harmful SPS.

3. Broader policy changes are necessary in order to ensure that Goal 18, IR #5 is applied in a fashion that is consistent, equitable, and in accordance with its policy prioritizing the public's interest in the beach.

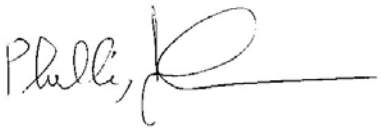
Oregon Shores believes a broader policy change is needed to adequately address coastal development issues in light of our improved understanding of the dynamic forces bearing on Oregon's coast and the manner in which our coastal landscapes are responding to climate change. Given the increases in storm surge and wave height we are already experiencing on the Oregon coast, and given what we know of further predicted changes resulting from long-term climate change, sea level rise, and cyclical climatic events such as El Niño (which can be intensified by climate change), these requests for protective structures permits are likely to increase. Allowing installation of hardened structures along the shore, which can deprive the beach of a sand source that may help to mitigate the progressive loss of sand from Oregon's bluff-backed shorelines due to increasing erosion, does not protect the public's interest in the beach as required by the policy underlying Goal 18, IR #5. Further, allowing the installation of

[11] *Regen*, 393, FN 12.
[12] *Id.* at 395.

protective structures exacerbates the risks to public health and safety as well as to shorefront properties by encouraging investment in shorefront protection rather than incentivizing moving developments away from shoreline areas and coastal hazards. All in all, the result is prioritizing the protection of private property in the short-term at the expense of neighboring properties whose structures will be impacted by increased erosion caused by the proposed hardened SPS and the public's long-term interest in preserving the beach.

Thank you for the opportunity to comment on this matter.

Sincerely,



Phillip Johnson
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From: David Smith, SeaRidge
September 30, 2019

About the attachments:

The excel data attachmented depict Lincoln and Gleneden beaches presented at the August focus group meeting during audience comments. The first (...size data) represents status (red-ineligible, green-eligible, light green-exception), lots with (black) & without (white) rip rap, frontage scale, pertinent notes.
The second (...un-rip rapped...) shows only those lots remaining without rip rap on the 2 beaches.
All depictions are derived from State or County sources with frontage footage calculated using the LC assessor map tool.

Of note:
21 of the 34 red (ineligible properties) are rip rapped by permit process.
78 of the 277 green (eligible) and light green (exception) properties that are rip rapped the State references as having "No permit." (It remains unclear how many of these are illegal rip rap or just lost permits.)
Of the 132 Salishan lots all are noted as having an "exception." Since it has been well and often established there has never been a Goal 18 exception it is unclear what this exception represents or under what process it was granted. There are 12 other properties like this--1 other in Lincoln County, the remainder in Tillamook County. They are none other on the coast.
Since all 2.6+ miles of the Salishan front properties are currently undergoing a process of total replacement of rip rap it is possible some of this will be cleared up.

The primary consideration of this data is to point out heavily developed areas--all existing in heavily populated areas--are exceptions to the vast majority of the Oregon Coastline. Most of the Oregon Coast is red (ineligible.)
Only in the populated pockets development has existed in large numbers for long periods of time. The small numbers of red (ineligible) properties in these pockets and large numbers of green (eligible) lots are a clear testament of this.

Of Lincoln City's 454 lots 29 are red (ineligible) with 5 of those 29 red properties rip rapped.

All anyone has to do is walk any of these beaches to realize this. No one needs this data to confirm the visual impact of miles of beach with a few holes where people have been fortunate not to have been forced to rip rap. Yet, their time is coming.

That more protection will be needed in these pockets is old news confirmed by each year's permit requests and well established by scientific fact gathering. It is not projected to get better.

There seems to be a tipping point here where a line has been crossed where so much rip rap exists the remaining parcels without rip rap become an ever greater focus of wave energy redirected from the surrounding "protected" properties. In this the destructive storm cycles, sea level rise, and storm surges have gained a new ally in the growth of hard protection.

It is unlikely population will recede from these population gathering points or removal of rip rap will suddenly become popular. Owners are not likely to become donors.

No matter what side any are on it seems clear we are all in the same boat.

Finding a way to do this may mean accepting things we do not want to. Protecting our public infrastructure is important and paramount, but is likely to add a great deal of shore protection structures. It would be far more feasible to do that than moving infrastructure.

Maybe the time has come to look at these localized population density areas with a new and realistic view. We all know and have experienced a lot more than those who did a wonderful job in the 1960's.

We now face things they did not. Are we up to the challenge?

David Smith

TOTALS OF ALL LOTS: 349 lots with 298 R/R (85.4%)

R/R	lot with rip rap or BPS (2 lots have concrete wall)
no r/r	lot without rip rap or BPS (beach protective structure)
347	last of buildable lots
	property eligible for rip rap
	property ineligible for rip rap
	property with exception
	Section (1-4) totals/information
	Narrow white area is walkway, beach access or street
note italics	*indicate research needed*
data lot #	reference number to locate full data base info
BPS	Beachfront Protective Structure (includes 2 concrete seawalls south of Sijota st.)

miles	feet	section	data lots	# of lots	
1.2843	6781	sect 1	1-86	86	Fishing Rock thru Cavalier
0.9979	5269	sect 2	87-158	72	Cavalier thru WorldMark
0.6479	3421	sect 3	159-217	59	WorldMark to Salishan Southern border
2.6773	14136	sect 4	218-349	132	Salishan to Siletz Bay opening
5.6074	**29607**	**Totals**	**1-349**	**349**	

Fishing Rock to end of Salishan spit (Siletz bay opening)

Remaining lots w/o rip rap or BPS (beachfront protective structure)

of 13 red lots:
- 7 are residential all in Section 1
- 2 are unbuildable (Schoolhouse creek area)-- in Section 2
- 2 are Gleneden State Park--in Section 2
- 2 are Commercial World Mark resort--in Section 2

13 Total red w/o rip rap

of 36 green lots:
- 30 are in Section 1 (3 unbuildable lots- Rush Place area)
- 2 are in Section 2 (2 questionable building status-Schoolhouse creek area)
- 4 are in Section 3

36 Total green w/o rip rap

of 2 light green lots: 2 are in Section 4 (2 "Park" acreage lots-24 acre-2,447' frontage to end of Salishan spit with possible rip rap according to 2002 State survey field report)

2 Total Light green w/o rip rap? (see above)

all lots w/o rip rap: 51 (14.6%)

Lots with rip rap:

49 in Section 1 (includes 16 rip rapped red lots)
64 in Section 2
55 in Section 3 (includes 5 rip rapped red lots)
130 in Section 4

298 Total lots with rip rap/BPS--(85.4%)

349 Total all lots Fishing Rock to end of Salishan spit

Quick view:

349	Total lots Fishing Rock to end of Salishan spit (Siletz Bay opening)
298	Total lots with rip rap/BPS (includes 21 rip rapped red lots)---85.4%
51	Total lots w/o rip rap (Includes 13 red lots)---14.6%

Note: of 34 total red lots 21 are rip rapped in sections 1-3

UN-RIPRAPPED properties 9/5/2019 Fishing rock to north end of Salishan Spit

From Fishing Rock north to south border of "Holiday Hills Trailer Resort" (data lot #s 1-69):

Data Lot #	Address	tax lot #	(Co. record) Year built	R/R status	*Permit R/R notes*	*Permit ID #*	Notes
SOUTHERN PORTION				R/R= installed riprap (BPS), no r/r= no riprap or (BPS), BPS= Beachfront Protective Structure			
data lots 1-20 all R/R							
21	3855 Lincoln av	08-11-28-BC-04300-00	2002	no r/r	no OPRD/DSL info		
22	3865 Lincoln av	08-11-28-BC-04200-00	2012	no r/r	no OPRD/DSL info		
23	3885 Lincoln av	08-11-28-BC-04101-00	1982	no r/r	no OPRD/DSL info		
data lots 24-25 both R/R							
26	3915 Lincoln av	08-11-28-BC-04000-00	2004	no r/r	no OPRD/DSL info		
27	3925 Lincoln av	08-11-28-BC-03900-00	1977	no r/r	no OPRD/DSL info		
28	3927 Lincoln av	08-11-28-BC-03901-00	1946	no r/r	no OPRD/DSL info		
29	3935 Lincoln av	08-11-28-BC-03800-00	1958	no r/r	no OPRD/DSL info		
30	3955 Lincoln av	08-11-28-BC-03700-00	1958	no r/r	no OPRD/DSL info		
data lots 31-36 all R/R							
37	4043 Lincoln av	08-11-28-BC-02000-00	1938	no r/r	no OPRD/DSL info		
Tide Street beach access							
38	4063 Lincoln av	08-11-28-BC-01900-00	1956	no r/r	no OPRD/DSL info		
39	no site address	08-11-28-BC-01702-00		no r/r	no OPRD/DSL info		
40	4075 Lincoln av	08-11-28-BC-01800-00	1995	no r/r	no OPRD/DSL info		
41	4175 NW Hwy 101	08-11-28-BA-90000-00	1984	no r/r	3 permits		SeaRidge-has "curtain drain" 2000
42	no site address	08-11-28-BA-04700-00		no r/r	BA 300 88	275	Menashe undeveloped lot
data lot 43 R/R							Menashe house lot under above BA 300 88 permit
44	no site address	08-11-28-BA-04900-00		no r/r	no OPRD/DSL info		
45	235 Tillicum	08-11-28-BA-01400-00	1969	no r/r	no OPRD/DSL info		
46	245 Tillicum	08-11-28-BA-01500-00	1970	no r/r	no OPRD/DSL info		
47	249 Tillicum	08-11-28-BA-01600-00	2012	no r/r	no OPRD/DSL info		no permit request history
48	255 Tillicum	08-11-28-BA-01602-00	1997	no r/r	no OPRD/DSL info		no permit request history
data lot 49 R/R							
50	No site address	08-11-21-CD-07600-00		no r/r	no OPRD/DSL info		unbuildable lot-0 value)
51	No site address	08-11-21-CD-07500-00		no r/r	no OPRD/DSL info		unbuildable lot
data lot 52 R/R							
53	no site address	08-11-21-CD-18200-00		no r/r	no OPRD/DSL info		unbuildable lot
	10' extension Division St.						
54	4605 Terrane Place	08-11-21-CD-07100-00	1959	no r/r	no OPRD/DSL info		
55	4625 Terrane Place	08-11-21-CD-17000-00	1948	no r/r	no OPRD/DSL info		
56	4635 Terrane Place	08-11-21-CD-06900-00	1950	no r/r	no OPRD/DSL info		
57	ditto	08-11-21-CD-06800-00	no info	no r/r	no OPRD/DSL info		
58	ditto	08-11-21-CD-06700-00		no r/r	no OPRD/DSL info		
59	no site address	08-11-21-CD-02500-00		no r/r	no OPRD/DSL info		
60	4665 Lincoln av	08-11-21-CD-02400-00	1978	no r/r	no OPRD/DSL info		
data lot 61 R/R							
62	4705 Lincoln av	08-11-21-CD-02201-00	2003	no r/r	no OPRD/DSL info		
63	4715 Lincoln av	08-11-21-CD-02200-00	1972	no r/r	no OPRD/DSL info		
64	4735 Lincoln av	08-11-21-CD-02100-00	1925	no r/r	no OPRD/DSL info		
65	4745 Lincoln av	08-11-21-CD-00204-00	1977	no r/r	no OPRD/DSL info		
66	4755 Lincoln av	08-11-21-CD-14800-00	1993	no r/r	no OPRD/DSL info		
67	4805 Lincoln av	08-11-21-CD-14900-00	1994	no r/r	no OPRD/DSL info		
68	4815 Lincoln av	08-11-21-CD-15000-00	1990	no r/r	Column		County permi 1990 denial # 335-90, sand 343-91
69	4825 Lincoln av	08-11-21-CD-15100-00	2002	no r/r	Column	819	County permi 1990 denial # 335-90, sand 343-91

Above southern portion of beach contains 32 un-riprapped green parcels, 7 un-riprapped red parcels, totalling 39 un-riprapped parcels with 30 parcels riprapped

(57% of lots in this southern portion are riprapped)

NORTHERN PORTION

70 Holiday Hills Trailer Resort- R/R to north starts here

From south border of "Holiday Hills Trailer Resort" north to Salishan Southern border (data lot #s 70-217):

data lots 70-138 all R/R

139	no site address	08-11-16-DC-07402-00		no r/r	no OPRD/DSL info	unbuildable lot
140	no site address	08-11-16-DC-18200-00		no r/r	no OPRD/DSL info	unbuildable lot

(Wallace Street beach access)

End Coronado Shores north boundary

141	no site address	08-11-16-DC-07201-00		no r/r	no OPRD/DSL info	
142	no site address	08-11-16-DC-07200-00		no r/r	no OPRD/DSL info	

data lots 143-154 all R/R

155	Gleneden State Park	08-11-16-DB-00300-00		no r/r	no OPRD/DSL info	State Park
156	ditto	08-11-16-DB-00200-00		no r/r	no OPRD/DSL info	State Park
157	324 Worldmark Drive	08-11-16-DB-09000-00	1996	no r/r	no OPRD/DSL info	WorldMark resort
158	ditto	08-11-16-DB-00125-00	1996	no r/r	no OPRD/DSL info	WorldMark resort

data lots 159-188 all R/R

189	7035 Neptune Ave	08-11-16-AB-00800-00	1950	no r/r	no OPRD/DSL info	
190	7045 Neptune Ave	08-11-16-AB-00700-00	2000	no r/r	no OPRD/DSL info	

data lots 191-215 all R/R

216	7385 Neptune Av	08-11-09-DD-04101-00	1958	no r/r	no OPRD/DSL info	
217	7395 Neptune Av	08-11-09-DD-04000-00	1948	no r/r	no OPRD/DSL info	last lot before Salishan

Above northern portion of beach contains 6 un-riprapped green parcels, 6 un-riprapped red parcels, totalling 12 un-riprapped parcels with 135 parcels riprapped
(92% of lots in this northern portion are rip rapped)

Salishan properties (data lot #s 218-349):

218 First lot on Salishan southern border

347 Last building site on Salishan spit

data lots (Salishan) 218-347 all R/R per state survey report

348	no site address "Park"	07-11-34-CB-00101-00	10.42 ac	no r/r		"Park" land
349	no site address "Park Area	07-11-34-BD-00100-00	13.58 ac.	no r/r		"Park"-- Land"at end of spit

Siletz Bay opening to ocean here

Above Salishan portion of beach contains 2 un-riprapped light green parcels, 130 light green parcels rip rapped
(99% of lots in Salishan are riprapped)

Synopsis of above data (Fishing Rock to end of Salishan spit) 9/5/2019:

		Total Lots	Lots w/R/R	Un rip rapped lots remaining	% of R/R lots	Notes:
DARK GREEN	Eligible for protection	183	147	36	80%	
Light Green	Eligible due to exceptior	132	130	2	99%	2 lots end of spit is 24 acre unbuildable area
RED	Not Eligible for protectio	34	21	13	62%	2 of 13 are unbuildable lots (Schoolhouse creek area)
Fishing Rock to end of Salishan spit lot totals:		349	298	51	86%	4 of 51 are unbuildable lots