

LAND USE  
BOARD OF APPEALS

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

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JAMES M. AND SARAH K )  
O'DONNELL, )  
 )  
Petitioners, )  
 )  
vs. )  
 )  
CLATSOP COUNTY, )  
 )  
Respondents. )

LUBA NO. 85-071  
FINAL OPINION  
AND ORDER

Appeal from Clatsop County.

James M. O'Donnell and Sarah K. O'Donnell, Arch Cape, filed the petition for review and argued on their own behalf.

Ray W. Shaw, Salem, filed a response brief and argued on behalf of Respondent-Participants U'Ren. With him on the brief were Heltzel, Upjohn, Shaw & Williams.

No appearance by Clatsop County.

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

REMANDED 03/24/86

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

1 NATURE OF DECISION

2 This is a review of a permit allowing construction of a  
3 residence on an oceanfront lot at Arch Cape.

4 FACTS

5 The lot is near the intersection of Pacific Street and  
6 Ocean Road in Arch Cape. Petitioners own a residence to the  
7 northeast of the lot.

8 The Southwest Coastal Design Review Committee recommended  
9 approval of the design proposed by Respondents U'Ren in May,  
10 1985. The County Planning Department then issued a Land and  
11 Water Development Use Permit for the residence. Petitioners,  
12 who objected that the residence did not meet design criteria  
13 and setback regulations in the county ordinance, appealed the  
14 permit to the County Planning Commission. After the Commission  
15 upheld the department's decision, petitioners took a further  
16 appeal to the County governing body. The appeal was denied.

17 FIRST ASSIGNMENT OF ERROR

18 Section 4.035(3) of the Clatsop County Land and Water  
19 Development and Use Ordinance provides:

20 "Approval of a proposed development in an area of  
21 geologic hazards shall be conditioned on the  
22 applicant's agreement to provide the safeguards  
23 recommended and certified by a qualifying engineering  
24 geologist or civil engineer and on satisfying the  
25 criteria set forth above."

26 Petitioners contend this section of the ordinance is  
violated by the county's decision. They argue that the permit  
applicants (U'Rens) were advised by a geologist that the

1 residence should be set back from an oceanfront cliff by at  
2 least 40 feet; however, the site plan approved by the county  
3 reflects a lesser setback (about 36 feet).

4 We uphold this challenge. The geologist selected by the  
5 U'Rens recommended a minimum construction setback of 40 feet  
6 from the cliff edge. Record at 29. Respondents argue that the  
7 recommendation was "clarified" in a letter to the planning  
8 department and they imply that the clarification constitutes a  
9 change. We disagree. The letter states, in pertinent part:

10 "The various factors influencing coastal bluff retreat  
11 are interactive and complex. Utilizing all available  
12 techniques for estimating a condition thirty years  
13 into the future allows one to develop an educated  
14 guess within a reasonable margin of error. Because  
15 some factors such as the severity and frequency of  
16 future winter storms cannot be precisely determined,  
17 it is prudent to allow a 30%+- margin of error in  
18 predictions. This accounts for the 10 foot "safety  
19 buffer" added to the calculated 30 feet of bluff  
20 retreat. Another factor is the impossibility of  
21 knowing how the terrace surface will ultimately be  
22 affected by human activity in the years to come.

23 "Succinctly, I would expect to see up to thirty feet  
24 of local coastal erosion by the year 2015. I would  
25 not be surprised to see as little as twenty feet, or  
26 as much as forty feet.

"I hope this clarifies the intent of my February 12  
report." Record at 26.

21 The letter does not change the setback recommendation. The  
22 author notes that predicting erosion rates is difficult and  
23 concludes that between 20 and 40 feet of erosion can be  
24 expected by 2015. The author adds that it is prudent to allow  
25 a 30%+- margin of error to his calculation of "30 feet of bluff  
26 retreat." Thus, the letter does not change the recommendation;

1 it reaffirms that a prudent setback would be 40 feet from the  
2 cliff.

3 We read section 4.035.3 to require adherence to expert  
4 opinion on questions of geologic hazards. The county's  
5 decision does not conform to the ordinance because it allows  
6 construction of the residence closer to the cliff than the  
7 geologist's recommendation. We therefore sustain this  
8 assignment of error.

9 SECOND ASSIGNMENT OF ERROR

10 Section 3.108.4 of the ordinance allows a residence in the  
11 single family district to occupy up to 40% of the lot.  
12 Petitioners argue that the approved residence exceeds the 40%  
13 maximum. In support, they insist that the lot is .14 acre  
14 (6,098 sq. ft.) and that the house covers 42% of the lot (2,560  
15 sq. ft.). They add that if the calculation includes the  
16 portions of the lot occupied by the deck, driveway and  
17 walkways, the coverage is increased to nearly 53%.

18 The county found that the assessor's records show the lot  
19 is .16 acre. There is substantial evidence in the record  
20 (staff report) to support the finding. Although petitioners  
21 insist that the assessor's records previously listed the lot as  
22 .14 acres, the county was entitled to rely on the current  
23 listing.

24 Whether the lot coverage standard is satisfied, as the  
25 county maintains, depends on how much of the proposed  
26 improvement must be considered in calculating lot coverage.

1 The decision states that the floor area of the residence covers  
2 35% of the lot (2,455 sq. ft.) and that section 3.108.4 is  
3 therefore satisfied. As noted, however, Petitioners insist  
4 that lot coverage cannot be calculated by floor area alone.  
5 They state:

6 "The 40% coverage is intended, particularly with  
7 hazardous ocean front property, to prevent catastrophe  
8 by preserving the natural vegetation that had  
9 protected the lot before it was developed. One of the  
10 major causes of the kind of catastrophe that is  
11 threatening Arch Cape and Falcon Cove is a 'looking  
12 the other way' interpretation of the 40% restriction  
13 and allowing decks, driveways, walkways, and other  
14 additions that create as hazardous conditions as the  
15 house itself." Petition at 6.

16 Although preservation of natural vegetation is a valid  
17 zoning objective, particularly in coastal areas, we do not  
18 believe section 3.108.4 is intended to achieve that objective.  
19 The text of the provision does not support petitioners'  
20 reading. The provision applies throughout the county's single  
21 family district, not just where tides and ocean winds give  
22 special importance to natural landscape features. Further, we  
23 note that another section of the ordinance specifically  
24 addresses the objective of preserving the landscape. See  
25 Section 4.108.3, discussed in the fourth assignment of error.  
26 Given the specific provision, petitioners' reading of Section  
3.108.4 cannot be sustained.

We believe that the approach reflected in the county's  
final order is the more reasonable interpretation of section  
3.108.4. That is, in calculating maximum lot coverage, the

1 floor area of the proposed dwelling and garage are to be  
2 included, but decks and paved areas, such as driveways and  
3 walkways, should not be included. See Anderson, American Law  
4 of Zoning 2d, section 9.65 (1976). Accordingly, we reject  
5 petitioners' challenge.

6 The second assignment of error is denied.

7 THIRD ASSIGNMENT OF ERROR

8 Section 3.108.9 of the ordinance states that buildings on  
9 ocean lots shall have a maximum height of 18 feet. Petitioners  
10 complain that it is impossible to determine whether this  
11 standard is satisfied because no measurements were taken before  
12 the land was disturbed by construction activity. However, the  
13 county's finding is that:

14 "The designer/builder shot the grade elevations of the  
15 undisturbed ground elevation prior to construction....  
16 According to the designer's final working drawings for  
17 the house, the house will be 18 feet high measured  
18 from the average elevation of the undisturbed ground  
19 elevation prior to construction at all corners of the  
20 building site." Record at 13.

21 There is substantial evidence in the record for this finding.

22 Based on the foregoing, the third assignment of error is  
23 denied.

24 FOURTH ASSIGNMENT OF ERROR

25 In this assignment of error, petitioners claim the county's  
26 decision violates three design standards in the county  
ordinance. The first standard requires that "[t]he location,  
height, bulk, shape, and arrangement shall be in scale and  
compatible with the surroundings." Section 4.108.1. The

1 county's order concludes this standard is satisfied because the  
2 roof design, building shape and number of stories of the  
3 residence is typical of the majority of ocean front residences  
4 in Arch Cape. Petitioners do not contend that the finding  
5 lacks support in the record, but instead argue that "...[a]  
6 small house would be appropriate, but the house which has been  
7 built maximizes lot coverage and virtually covers the entire  
8 lot." Petition at 7.

9 Petitioners' argument that the residence is too big for the  
10 lot invites us to substitute our judgement for the county's on  
11 a question of aesthetics, not law. We may not do so. Further  
12 analysis under Section 4.108.1 is unwarranted.

13 Petitioners next direct our attention to the following  
14 design provision:

15 "Protection of ocean views. The blocking of scenic  
16 views of existing or proposed dwellings on adjacent  
17 lots and other lots that may be impacted shall be  
18 minimized in the construction of the structure."  
19 Section 4.108.2.

20 Their contention is that the approved residence maximizes,  
21 rather than minimizes ocean view obstructions because of its  
22 double north/south ridge line.

23 In pertinent part, the county's discussion of the view  
24 question reads as follows:

25 "Conclusion: Two parcels (tax lots 1200 and 1600)  
26 will have scenic views obstructed by the proposed  
residence. However, it is doubtful that tax lot 1200  
ever had a view to the ocean due to the heavily wooded  
area comprising (sic) of shore pines and high salal on  
the applicants parcel prior to site excavation. Prior

1 to site excavation, the appellants' [O'Donnell] scenic  
2 view of the ocean could have been partially obstructed  
3 by the dense vegetation and trees. The obstruction of  
4 scenic views by the new residence may impact the  
5 appellants ocean/scenic views. The SDRO regulations  
6 were developed to permit construction of uses allowed  
7 by the zone with special concern for existing views.  
8 It was further recognized that there were vacant lots  
9 that would be built upon and would obstruct some  
10 views. However, regulations on height, setback,  
11 coverage were included within the zone to give the  
12 SWCDRC, Department of Planning and Development,  
13 Planning Commission and Board of Commissioners  
14 guidance on minimum standards of that development.  
15 See conditions of approval. The SWCDRC and Department  
16 of Planning and Development, in their reviews felt  
17 that the applicant has met the minimum standards  
18 satisfactorily." Record at 15.

19 The gist of the finding is that oceanfront construction could  
20 be anticipated by neighboring landowners enjoying unobstructed  
21 or slightly obstructed views and that height, setback and lot  
22 coverage regulations must guide development. The difficulty  
23 with that approach, however, is that it nullifies section  
24 4.108.1 of the ordinance. The provision says that scenic views  
25 "shall be minimized in the construction of the structure." The  
26 provision is not an alternative to satisfaction of setbacks,  
27 height limitations and lot coverage rules. It is an  
28 independent standard. A land use decisionsmaking body may not  
29 disregard such a standard.

30 We conclude that the county has not adequately addressed  
31 section 4.108.2. Petitioners' challenge under this provision  
32 is therefore upheld.

33 Petitioners' final claim arises under section 4.108.3 of  
34 the ordinance. The section states:

1 "Preservation of Landscape. The landscape shall be  
2 preserved in its natural state to the maximum extent  
3 possible by minimizing tree, vegetation and soil  
4 removal. Cut and fill construction methods are  
discouraged. Roads and driveways should follow slope  
contours in a manner that prevents erosion and rapid  
discharge into natural drainages."

5 Petitioners maintain that section 4.108.3 was violated by  
6 removal of all vegetation, including a large tree, during  
7 construction of the residence. They add that cut and fill  
8 construction methods were used, despite the fact that section  
9 4.108.3 discourages such methods.

10 The county's findings indicate that the proposal would  
11 preserve vegetation at the top of the shoreline bluff. The  
12 findings also note that shore pines and salal "will be required  
13 to be removed to allow for construction of the proposed house."  
14 Finally, the order states "It is questionable that an  
15 attractive tree should have been removed in the front yard  
16 setback area adjacent to Pacific Street." Record at 15-16.

17 The findings are not responsive to the design standard set  
18 forth in section 4.108.3. Like the standard on ocean views,  
19 section 4.108.3 requires "maximum" preservation of natural  
20 landscape features. The findings do not evaluate the design  
21 plan in terms of this standard, but seem to place the question  
22 of site clearing in the landowner's control. As we stated  
23 previously, the county may not disregard regulatory standards;  
24 a proposal may not be approved unless all applicable standards  
25 are found to be satisfied.

26 We are advised that the residence has already been con-

1     structured. Thus, some damage to the natural vegetation (e.g.,  
2     tree removal) has been done. This Board is not empowered to  
3     order corrective action by the builder. Our task is to review  
4     the county's decision for conformity with applicable  
5     standards. Our review under section 4.108.3 compels us to  
6     conclude that the findings do not demonstrate compliance with  
7     the standard.

8             The fourth assignment of error is sustained in part. The  
9     decision does not demonstrate compliance with sections 4.108.2  
10    (ocean views) and 4.108.3(landscape preservation) of the county  
11    ordinance.

12            Remanded.