

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

LAND USE
BOARD OF APPEALS
DEC 22 3 07 PM '89

MARTHA LYNN GRAY,
Petitioner,
vs.
CLATSOP COUNTY,
Respondent,
and
JAMES R. OWEN and JEANNETTE
GOODRUM,
Intervenors-Respondent.)

LUBA No. 89-055
FINAL OPINION
AND ORDER

Appeal from Clatsop County.

Susan D. Marmaduke, Portland, filed the petition for review. With her on the brief was Olson and Marmaduke. Martha Lynn Gray, Seaside, argued on her own behalf.

No appearance by respondent.

John L. Shurts and Steven Pfeiffer, Portland, filed the response brief. With them on the brief was Stoel, Rives, Boley, Jones and Grey. John L. Shurts argued on behalf of intervenors-respondent.

SHERTON, Chief Referee; HOLSTUN, Referee; KELLINGTON, Referee, participated in the decision.

REMANDED 12/22/89

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals a decision of the Clatsop County Board of Commissioners approving a development permit for a beachfront protective structure (seawall).

MOTION TO INTERVENE

James R. Owen and Jeanette Goodrum, the applicants below, move to intervene in this proceeding on behalf of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Intervenors-respondent (intervenors) Owen and Goodrum own adjoining beachfront properties 1.0 and 0.7 acres in size, respectively. These properties are designated Rural Lands by the Clatsop County Comprehensive Plan (plan). The properties are zoned Coastal Residential (CR), with overlay zone designations of Flood Hazard Overlay (FHO), Geologic Hazard Overlay (GHO), Shorelands Overlay (SO) and Beaches and Dunes Overlay (BDO). The properties are located between Arcadia Beach State Wayside to the north and Hug Point State Park to the south.

Intervenors filed a joint application to construct a seawall which would connect to the northern terminus of the existing seawall on intervenor Goodrum's property and run along the northernmost three feet of the bank facing the ocean on that property. The proposed seawall would extend along the southern 92 feet of the bank facing the ocean on intervenor Owen's

1 property and then turn to the east and, wholly within the Owen
2 property, extend an additional 32 feet along the southern bank
3 of Red Rock Creek.¹ The seawall is proposed to be constructed
4 of treated timber, and to rise to an elevation of 22.5 feet.
5 The existing dwelling on the Owen property is located about 20
6 feet back from the crest of the ocean bank. Record 132.

7 After a public hearing, the county planning commission
8 issued an order approving the development permit for the seawall
9 on November 15, 1988. Both petitioner and the Oregon Parks and
10 Recreation Division filed appeals of the planning commission's
11 decision. The board of commissioners decided to hear the
12 appeals based on the evidentiary record established before the
13 planning commission. Record 75. On April 26, 1989, the board
14 of commissioners issued its decision denying the appeals and
15 approving the development permit for the proposed seawall. This
16 appeal followed.

17 FIRST ASSIGNMENT OF ERROR

18 "The Board majority erroneously determined that there
19 is a critical need to protect an existing structure
20 threatened by erosion hazard, in violation of its own
21 Beaches and Dunes Policies of the Comprehensive Plan.
22 The Board improperly construed the comprehensive
plan's 'critical need' standard to ignore the
necessity of showing that the erosion threat to a
structure is highly likely at some time in the near
future."

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24
25 ¹The Owen property has a total of 145 feet of ocean frontage. It is
26 bisected by Red Rock Creek. Seawall construction is not proposed on the
portion of the Owen property north of Red Rock Creek.

1 SECOND ASSIGNMENT OF ERROR

2 "Under a legally correct construction of the plan's
3 'critical need' standard, there is no substantial
4 evidence in the record to support a finding of
 'critical need' to build a seawall to protect an
 existing structure from the threat of erosion."

5 In these assignments of error, petitioner challenges
6 (1) the county's interpretation of a comprehensive plan policy
7 concerning shoreline stabilization structures, and (2) the
8 evidentiary support for a county determination of compliance
9 with that plan policy.

10 A. Policy Interpretation

11 Clatsop County Land and Water Development and Use Ordinance
12 (DUO) 4.065(5)(b) establishes the following criteria for
13 approval of "beachfront protective structures:"

14 "(i) The structure is to protect development
15 existing on January 1, 1977.

16 "(ii) Visual impacts are minimized.

17 "(iii) Public access is preserved.

18 "(iv) Negative impacts on adjacent property are
 minimized.

19 "(v) Long-term or recurring costs to the public are
 avoided.

20 "(vi) There is a demonstration that the development
21 is being threatened by erosion hazard.

22 "(vii) There is a demonstration that maintenance of
23 existing riparian vegetation and/or planting
 of new riparian vegetation will not provide
 adequate protection."

24 DUO 1.050 requires also that all actions under the DUO be
25
26

1 consistent with the comprehensive plan.²

2 The Beaches and Dunes element of the plan contains the
3 following policy (B&D Policy 1³):

4 "Structural shoreline stabilization methods shall be
5 permitted only if:

6 "a. There is a critical need to protect a structure
7 that is threatened by erosion hazard;

8 "b. Impacts on adjacent property are minimized;

9 "c. Visual impacts are minimized;

10 "d. Access to the beach is maintained;

11 "e. Long-term or recurring costs to the public are
12 avoided; and

13 "f. Riparian vegetation is preserved as much as
14 possible." (Emphasis added.)

15 The county interprets B&D Policy 1 in its decision as
16 follows:

17 "The Beaches and Dunes element of the plan sets forth
18 a list of six criteria that must be met before a
19 'structural shoreline stabilization method' is
20 permitted. * * * Criteria (b) through (e) are directly
21 implemented by criteria (ii) through (v) of [DUO]
22 § 4.065(5)(b) * * *. Criterion (f) above is expressly
23 implemented by [DUO] § 4.034(3)(a)-(b) * * *.

24 _____
25 ²DUO 1.050 provides as follows:

26 "Consistency with Comprehensive Plan. Actions initiated under
this Ordinance shall be consistent with the Clatsop County
Comprehensive Plan as adopted or hereafter amended. Where a
provision of this Ordinance is in conflict with the
Comprehensive Plan, the Comprehensive Plan shall apply. A
provision of this ordinance that is in addition to another
requirement is not in conflict."

³The county's comprehensive plan employs no convenient system for
identifying or referring to plan policies. The plan policies referred to
in this opinion are quoted in full, and are numbered by the Board for the
purposes of this opinion only.

1 "Criterion (a), concerning 'critical need' to protect
2 a structure threatened by an erosion hazard, has no
3 verbatim parallel in the implementing ordinance since
4 no ordinance section expressly repeats the 'critical
5 need' language, nor is the term 'critical need'
6 defined in the plan or ordinance. Thus, the Board [of
7 Commissioners] is called upon to interpret the meaning
8 of this phrase as applied to this request.

9 "After consideration of the applicable policies
10 addressed above and applicable provisions of the plan
11 and ordinance as a whole, the Board concludes that the
12 'critical need' standard [of] the Beaches and Dunes
13 element is implemented by criteria (vi) and (vii) of
14 [DUO] § 4.065(5)(b) * * *. These two ordinance
15 criterion [sic] require that the applicant for a
16 beachfront protective structure demonstrate first that
17 a development is being threatened by erosion hazard
18 and, if so, that nonstructural vegetative solutions
19 are not adequate to remove the threat. Hence, an
20 application which has been shown to meet both aspects
21 of this test also demonstrates that there is a
22 'critical need' for a protective structure, as opposed
23 to some other protective measure.

24 "We find no indication that the policy language was
25 intended to mean or add a more onerous burden than the
26 implementing ordinance language imposes. The word
27 'critical' is appropriately construed, as we do here,
28 to require the Applicants to demonstrate that higher
29 priority measures for erosion control set forth in the
30 policy are not adequate or available to control the
31 erosion threat, thereby justifying resort to the
32 lowest priority solution of structural stabilization.
33 Analyzed in this fashion, the Board concludes that the
34 applicants have demonstrated that a critical need
35 exists for the construction of the seawall in order to
36 protect the developments from the threat of erosion
37 hazard, for the reasons and evidentiary basis set
38 forth above in paragraphs 7(vi)-(vii) and 12.

39 "Appellant Gray argues that the County must instead
40 utilize a dictionary definition of 'critical.'
41 Appellant further argues that the proper definition of
42 'critical' is 'forming or having the nature of a
43 crisis,' from the American Heritage Dictionary.
44 Finally, appellant argues that no 'crisis' exists
45 because the Owen house is not teetering on the edge of
46 the bank and about to fall into the ocean.

47 "The Board concludes that reference to a dictionary

1 definition is neither necessary nor helpful and,
2 accordingly, we reject this contention. First, it is
3 not necessary because an analysis of the plan and
4 applicable ordinance provisions establish the meaning
5 of the relevant criterion and [DUO] § 1.032 * * *
6 expressly negates reliance upon a dictionary in such
7 circumstances. Second, it is not helpful because
8 various dictionaries provide various meanings of the
9 term 'critical,' meanings that are not necessarily
10 consistent." Record 19-21.

11 Petitioner contends that the "critical need" requirement of
12 B&D Policy 1.a is not implemented by DUO 4.065(5)(b).
13 Petitioner recognizes that neither "critical" nor "critical
14 need" is defined in the county's plan or land use regulations.
15 However, petitioner contends "critical" is "a word in common
16 usage which * * * connotes a sense of urgency, i.e., something
17 that requires immediate attention, that cannot be postponed."
18 Petition for Review 7.

19 Petitioner argues that the county misconstrued B&D
20 Policy 1.a as not requiring that the erosion threat to the
21 existing structure be "critical," i.e., that there be "an
22 imminent danger of damage to the structure due to erosion."
23 Petition for Review 8. According to petitioner, under
24 B&D Policy 1.a, an applicant for a seawall permit must show that
25 it is highly likely that an existing structure will be
26 threatened by erosion in the near future. Petitioner maintains
that in this case, it is not likely that the existing house on
the Owen property will be threatened by erosion, even within the
next two decades.

Petitioner asserts that the county's decision interprets
B&D Policy 1.a as requiring nothing other than what is required

1 by DUO 4.065(5)(b)(vi) and (vii). Petitioner contends such an
2 interpretation improperly overlooks the requirement for urgency
3 or immediacy in the "critical need" provision of B&D Policy 1.a.
4 Petitioner argues that a zoning ordinance cannot establish a
5 less restrictive approval standard than that required by the
6 plan.⁴ Baker v. City of Milwaukie, 271 Or 500, 533 P2d 772
7 (1975).

8 Intervenor point out that the six approval standards of
9 B&D Policy 1 for "structural shoreline stabilization methods"
10 and the seven approval standards of DUO 4.065(5)(b) for
11 "beachfront protective structures" are for the same use.
12 According to intervenors, the county properly concluded that the
13 six plan criteria are fully implemented by criteria in the DUO.⁵
14 However, with regard to B&D Policy 1.a ("there is a critical
15 need to protect a structure that is threatened by erosion
16 hazard"), intervenor concedes that it may "require something
17 different of an applicant than a demonstration that a
18 development is being threatened by an erosion hazard [a
19 requirement imposed by DUO 4.065(5)(b)(vi)]; otherwise the
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22 ⁴Petitioner also notes that DUO 1.050 provides that where there is a
23 conflict between plan and DUO provisions, the plan provision controls. See
n 2, supra.

24 ⁵Intervenors assert the county correctly concluded that B&D Policy 1.b
25 through 1.e are implemented by the nearly identical provisions of
26 DUO 4.065(5)(b)(ii) through (v). Intervenors also maintain the county
correctly interpreted B&D Policy 1.f as being implemented by
DUO 4.034(3)(a)-(b). According to intervenors, this leaves only B&D
Policy 1.a to be accounted for.

1 'critical need' portion of the provision would be superfluous."
2 Intervenor-Respondent's Brief 7.

3 Intervenor argue, however, that the "something different"
4 required by the "critical need" provision of B&D Policy 1.a is
5 not, as petitioner argues, a greater degree of seriousness in
6 the erosion threat. Intervenor contend that petitioner's
7 interpretation of the "critical need" provision depends on
8 making a choice between potentially inconsistent dictionary
9 definitions of the word "critical." Intervenor also argue that
10 for B&D Policy 1.a to be interpreted as petitioner suggests, it
11 would have to be rewritten to require a demonstration that a
12 structure is "critically threatened by erosion hazard."
13 Intervenor-Respondent's Brief 8.

14 Intervenor note that the plan sets forth a broad "policy
15 preference" for nonstructural shoreline stabilization methods
16 which is carried out through DUO 4.065(5)(b)(vii). However,
17 intervenor contend that, as there is no specific "approval
18 criterion" in the plan that requires a demonstration of need for
19 more than nonstructural stabilization methods, the county's

20 "* * * construction of the term 'critical need' to
21 require a demonstration that structural stabilization
22 is needed over the preferred nonstructural solutions,
23 as opposed to applying that concept to the threat of
erosion, is internally consistent with the context and
purpose of the plan." Intervenor-Respondent's
Brief 9.

24 According to intervenor, under both B&D Policy 1.a and
25 DUO 4.065(5)(b)(vi) and (vii), what an applicant for a shoreline
26 stabilization structure must demonstrate is that (1) a structure

1 is threatened by the erosion hazard; and (2) nonstructural
2 stabilization methods of protection are not adequate.

3 Intervenor's argue the county reasonably and correctly
4 construed the "critical need" provision of B&D Policy 1.a to
5 require a need for a protective structure which cannot be met by
6 nonstructural stabilization methods. According to intervenors,
7 this interpretation is most consistent with the structure and
8 content of the plan as a whole. Intervenor's argue that under
9 this interpretation, (1) the approval criteria in the plan carry
10 out the plan's own broad nonstructural preference, and (2) the
11 county's ordinance criteria are consistent with and adequate to
12 carry out the approval criteria in its plan.

13 The meaning of local legislation is a question of law which
14 must be decided by the reviewing body to which it is presented.
15 McCoy v. Linn County, 90 Or App 271, 275, 752 P2d 323 (1988).
16 When we interpret a provision of a comprehensive plan or zoning
17 ordinance, we construe the plan or ordinance as a whole and give
18 effect to its overall policy. Clatsop County v. Morgan, 19
19 Or App 173, 178, 526 P2d 1393 (1974); Kellogg Lake Friends v.
20 Clackamas County, ___ Or LUBA ___ (LUBA No. 88-061, December 22,
21 1988), slip op 10, aff'd 96 Or App 536 (1989). Also, where
22 possible, we read plan or ordinance provisions together in a
23 manner which gives meaning to all their parts. Kenton
24 Neighborhood Assoc. v. City of Portland, ___ Or LUBA ___ (LUBA
25 No. 88-119, June 7, 1989), slip op 16; Forest Highlands
26 Neighborhood Assoc. v. Portland, 11 Or LUBA 189, 193 (1984).

1 In this subassignment of error, we must determine the
2 interpretation of B&D Policy 1.a which best gives effect to the
3 overall policy of, and meaning to all the parts of, two plan
4 policies relating to shoreline stabilization structures. The
5 two related policies are B&D Policy 1, quoted supra, and B&D
6 Policy 2, which provides:

7 "The priorities for shoreline stabilization for
8 erosion control are (from highest to lowest):

9 "a. Proper maintenance of existing riparian
10 vegetation;

11 "b. Planting of riparian vegetation;

12 "c. Vegetated rip rap;

13 "d. Non-vegetated rip rap;

14 "e. Bulkhead or seawall.

15 "Where rip rap, bulkheads or seawalls are proposed as
16 beach front protective measures, evidence shall be
17 provided that higher priority methods of erosion
18 control will not work."⁶ (Emphasis added.)

19 Thus, contrary to intervenors' arguments and the county's
20 interpretation, the above-emphasized portion of B&D Policy 2
21 itself establishes an approval criterion for stabilization
22 structures requiring a demonstration that the preferred methods
23 of erosion control will not work. It is this requirement of B&D
24 Policy 2 which is partially implemented by the requirement of

25 ⁶We note that although the parties do not include the emphasized
26 provision in their quotes of this plan policy in their briefs, both the
quote of this policy in the county staff report (Record 113) and the copy
of the current plan Beaches and Dunes policies submitted to us by the
county do include the emphasized language.

1 DUO 4.065(5)(b)(vii) for a demonstration that maintenance or
2 planting of riparian vegetation will not provide adequate
3 erosion protection.⁷ Thus, we conclude that B&D Policy 2
4 already requires what the county and intervenors would interpret
5 the "critical need" provision of B&D Policy 1.a to require.

6 Furthermore, as was described above, the county and
7 intervenors interpret the "critical need" provision of B&D
8 Policy 1.a to require simply that there be a "critical need" for
9 the construction of a seawall because nonstructural methods are
10 not adequate to protect against erosion. Thus, as well as
11 making the "critical need" provision surplusage in light of the
12 requirements of B&D Policy 2, the county's interpretation would
13 essentially change B&D Policy 1.a to state "[t]here is a
14 critical need to construct a seawall to protect a structure that
15 is threatened by erosion hazard." B&D Policy 1.a requires that
16 there be a "critical need to protect a structure."

17 B&D Policies 1 and 2 express a strong preference for
18 nonstructural methods of erosion control and impose strict
19 limitations on the circumstances in which structural methods
20 will be allowed. B&D Policies 1.a and 2, taken together,
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22 ⁷This provision of B&D Policy 2 is only partially implemented by
23 DUO 4.065(5)(b)(vii) because this ordinance provision does not require a
24 demonstration that higher priority structural erosion control methods will
25 not work. For instance, if a seawall is proposed, DUO 4.065(5)(b)(vii)
26 requires only a demonstration that maintenance or planting of riparian
vegetation will not provide adequate erosion protection. B&D Policy 2
requires, in addition, a demonstration that vegetated and non-vegetated rip
rap are inadequate. We note the county recognized this additional
requirement of B&D Policy 2 in its findings at Record 17-19.

1 provide that structural methods of shoreline stabilization will
2 only be allowed if (1) an existing structure is threatened by
3 erosion; (2) that threat creates a critical need to protect the
4 structure;- and (3) higher priority methods will not work to
5 provide adequate protection to the structure.⁸ In this context,
6 we interpret "critical need to protect the structure" to mean
7 that it is reasonably probable that the structure will suffer
8 damage due to the threatened erosion in the near future.⁹

9 Thus, we agree with petitioner that the interpretation of
10 the "critical need" provision of B&D Policy 1.a expressed by the
11 county in the challenged decision is incorrect. This
12 subassignment of error is sustained.

13 B. Evidentiary Support

14 Petitioner argues that the record does not contain
15 substantial evidence to support a determination of compliance
16 with B&D Policy 1.a.

17 We determined in the previous subassignment of error that
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20 ⁸We note that the interpretation of the "critical need" provision
21 advocated by the county would conceivably allow approval of a stabilization
22 structure any time erosion is advancing towards an existing structure and
23 nonstructural methods of control are inadequate to stop that erosion, even
24 if it might take 20 years or more for the erosion to reach the structure.
25 We do not believe such an interpretation is consistent with the overall
26 intent of B&D Policies 1 and 2.

27 ⁹Our interpretation of B&D Policy 1.a does not necessarily mean that
28 there is a conflict between the plan and the DUO. We believe that the
29 provision of DUO 4.065(5)(b)(vi) requiring that "development is being
30 threatened by erosion hazard" can reasonably be interpreted to require the
31 same reasonable probability that the development will be damaged by erosion
32 in the near future that is required by B&D Policy 1.a. However, the county
33 did not interpret DUO 4.065(5)(b)(vi) in this manner.

1 the county misconstrued the applicable law in making its
2 determination of compliance with B&D Policy 1.a. Therefore, no
3 purpose would be served by determining whether the record
4 contains substantial evidence to support that determination.

5 This subassignment of error is denied.

6 The first and second assignments of error are sustained, in
7 part.

8 THIRD ASSIGNMENT OF ERROR

9 "There is no substantial evidence in the record to
10 support a finding that higher priority methods of
erosion control will not work."

11 Petitioner argues that "[e]ven if it were assumed that the
12 rate of bank regression were sufficient to pose a real threat to
13 the house in the near future * * *, there is no substantial
14 evidence in the whole record to support a finding that higher
15 priority erosion protection measures would not work." Petition
16 for Review 18. Petitioner argues that groundwater saturation is
17 a major factor affecting the stability of the bank. Petitioner
18 further argues that with improved drainage, it may be that a
19 higher priority erosion control method would sufficiently slow
20 the bank erosion process. According to petitioner, there is not
21 a sufficient evidentiary basis in the record for concluding that
22 a seawall should be built without first trying the higher
23 priority measure of riparian vegetation together with the
24 planned drainage improvements.

25 We infer from the language of petitioner's assignment of
26 error that she is challenging the evidentiary support for a

1 determination of compliance with the requirement of B&D Policy 2
2 that "higher priority methods of erosion control will not work."
3 With regard to riparian vegetation, it appears that
4 DUO 4.065(5)(b)(vii) ("maintenance of existing riparian
5 vegetation and/or planting of new riparian vegetation will not
6 provide adequate protection") and B&D Policy 2 require the same
7 thing -- a demonstration that maintenance and planting of
8 riparian vegetation will not work to adequately protect an
9 existing structure from a threat of erosion damage identified
10 pursuant to B&D Policy 1.a and DUO 4.065(5)(b)(vi).

11 In this case, the county has not properly identified a
12 threat of erosion damage to an existing structure sufficient to
13 satisfy B&D Policy 1.a and DUO 4.065(5)(b)(vi). Until it does
14 so, it is not possible for it to determine whether higher
15 priority means of erosion control can adequately protect against
16 that threat, or for us to determine that there is substantial
17 evidence in the record to support such a determination.¹⁰

18 The third assignment of error is sustained.
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23 ¹⁰As guidance to the county on remand, we note that if a threat of
24 damage to an existing structure due to erosion is properly identified, and
25 there is evidence in the record that the severity of that threat is linked
26 to or partially attributable to on-site drainage problems (as intervenors
appear to concede in their briefs), we consider it unlikely that B&D
Policy 2 and DUO 4.065(5)(b)(vii) could be satisfied without considering
whether the combined effects of higher priority erosion control measures
and required or planned drainage improvements would result in protection
adequate to alleviate the threat of damage.

1 FOURTH ASSIGNMENT OF ERROR

2 "The Board's majority decision violated the Beaches
3 and Dunes policy requiring that 'impacts on adjacent
4 properties are minimized' in that there is no
 substantial evidence in the record showing that
 impacts on the beach are minimized."

5 B&D Policy 1 provides in relevant part:

6 "Structural shoreline stabilization methods shall be
7 permitted only if:

8 "* * * * *

9 "b. Impacts on adjacent property are minimized;

10 "* * * * *"¹¹

11 Petitioner argues that under B&D Policy 1.b, the applicants
12 have the burden of proving that impacts on adjacent property are
13 minimized.¹² Petitioner contends that the publicly owned beach
14 to the west of the proposed seawall is such an adjacent
15 property. Petitioner argues that the county improperly

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17 ¹¹DUO 4.065(5)(b)(iv) contains the virtually identical approval
18 criterion for beachfront protective structures, that "negative impacts on
 adjacent property are minimized."

19 ¹²Petitioner also cites the following provision from page 5 of the Ocean
 and Coastal Lake Shorelands section of the comprehensive plan:

20 "(4) Structural shoreline stabilization - Implementation
21 Requirement 6 establishes a preference for land use
22 management practices and nonstructural solutions over
23 structure-1 [sic] solutions to problems of erosion and
 flooding, and requires that structural solutions be
 designed to minimize adverse impacts on water currents
 and erosion and accretion patterns."

24 However, we note that this provision appears in a portion of the Ocean and
25 Coastal Lake Shorelands section of the plan which is entitled "State
26 Planning Requirements for Ocean and Coastal Lake Shorelands." This
 subsection appears to describe the requirements of Statewide Planning
 Goal 17 (Coastal Shorelands), not to establish mandatory approval criteria
 for the approval of shoreline stabilization structure permits.

1 dismissed concerns she raised regarding the impact of waves
2 deflected by the seawall and scouring at the base of the wall on
3 the adjacent beach with the following finding:

4 "* * * The concerns raised by the State Parks Division
5 and by Mrs. Gray concerning the impact of waves
6 deflected by the seawall and scouring at the base of
7 the wall, although legitimate, are purely speculative,
8 unsubstantiated by evidence in the record and are
9 rebutted by the testimony of the only acknowledged or
10 professed experts before the Board." Record 8.

11 Petitioner argues that neither of the experts referred to
12 in the above-quoted finding, an engineer and a geologist, was
13 qualified to give an opinion on how ocean currents and waves
14 would react to the proposed seawall. Petitioner maintains that
15 the only evidence in the record actually addressing the subject
16 of the impacts of a seawall on the adjacent beach indicates that
17 a seawall might accelerate beach erosion. Petitioner cites the
18 following excerpt from a 1983 report by an oceanographer
19 concerning the proposed Goodrum seawall:

20 "SEA WALLS AS A CAUSE OF EROSION

21 "Although sea walls can provide some protection from
22 wave attack, in some cases they are observed to
23 enhance the erosion of the fronting beach and adjacent
24 coastal property. This erosion occurs due to waves
25 reflecting off the sea wall, the reflected wave then
26 colliding with the next incoming wave to produce
27 turbulence and the scouring of the beach just seaward
28 of the wall. At times this scouring can be sufficient
29 to undermine the wall itself, causing the wall to fall
30 forward onto the beach. This scour hole usually
31 extends around the end of the seawall, where the
32 erosion is increased still further due to scouring by
33 the wave swash as it washes against the wall edge. I
34 have seen this occur on the Oregon coast, and it has
35 been more fully studied on other coasts as well.
36 Therefore, there is the distinct possibility that the
37 seawall construction would accelerate the erosion

1 along the adjacent coastal properties." Record 154.

2 With regard to the above-quoted report, intervenors note
3 that it was originally submitted to the county in 1983 and does
4 not address the particular project and site at issue in this
5 appeal. Intervenors contend this report does not constitute
6 credible evidence with regard to the particular impacts of the
7 specific seawall proposed.

8 Intervenors also argue that there is evidence in the record
9 that both the engineer and geologist who testified on the
10 applicants' behalf are qualified to give testimony regarding the
11 interaction between ocean waves and seawalls. Intervenors cite
12 oral and written evidence submitted by the engineer and
13 geologist, and argue that this evidence is both credible and
14 directly relevant to the issue of the effects of the proposed
15 seawall on the adjacent beach. Record 142-146; Intervenors-
16 Respondent's Brief, App A at 3-6, 10-11. Intervenors assert the
17 county was free to choose the evidence submitted by the engineer
18 and geologist over any contrary implications suggested by the
19 oceanographer's report.

20 We agree with petitioner that the publicly owned beach to
21 the west of the proposed seawall is "adjacent property" as
22 referred to in B&D Policy 1.b (and DUO 4.065(5)(b)(iv)).
23 Therefore, the county's determination of compliance with B&D
24 Policy 1.b must be supported by substantial evidence in the
25 whole record that the impacts of the proposed seawall on the
26 adjacent beach are minimized.

1 Substantial evidence to support a decision exists when the
2 evidence in the whole record would allow a reasonable mind to
3 reach that decision. Younger v. City of Portland, 305 Or 346,
4 360, 752 P2d 262 (1988). Petitioner cites an excerpt from an
5 oceanographer's report which indicates that a seawall can
6 enhance erosion and scouring of the adjacent beach, and that
7 this phenomenon has been observed on the Oregon coast.
8 Intervenors cite us to written submittals by their engineer and
9 geologist and extensive oral testimony by the engineer.¹³
10 However, although the evidence to which we are cited contains
11 extensive references to a projected lack of impacts due to the
12 seawall on adjacent beachfront properties to the north and
13 south, we can find no reference to the anticipated effects of
14 the proposed seawall on the adjacent beach. In the absence of
15 any evidence that the proposed seawall will have no impacts on
16 erosion and scouring of the adjacent beach, or that such impacts
17 have been minimized, a reasonable person would not find
18 compliance with B&D Policy 1.b.

19 The fourth assignment of error is sustained.
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24 ¹³We note that we agree with intervenors that the evidence cited
25 indicates that the engineer and geologist have extensive professional
26 experience with shoreline stabilization structures and would be qualified
to express opinions on the effects of the proposed seawall on the adjacent
beach.

1 FIFTH ASSIGNMENT OF ERROR

2 "The Board improperly construed Clatsop County's
3 ordinance which provides that 'development in areas
4 subject to erosion shall not result in the * * *
5 exposure of areas to erosion.' Section 4.034(3)(a).
6 The evidence does not support a finding that the
7 seawall would not result in the exposure of areas to
8 erosion."

9 The site of the proposed seawall is subject to the GH0
10 overlay district. DUO 4.034(3)(a) provides as follows:

11 "Development and Use Criteria. The following
12 limitations and requirements shall apply to all
13 developments proposed for areas subject to the
14 specified geologic hazard unless a detailed site
15 investigation finds that the criteria are not
16 appropriate.

17 "* * * * *

18 "3. Erosion and Deposition.

19 "a. Development in areas subject to erosion
20 shall not result in the destruction of
21 stabilizing vegetation or in the exposure
22 of areas to erosion."

23 Petitioner argues that the above-quoted standard is
24 absolute in that it requires that development "shall not result
25 in * * * the exposure of areas to erosion." Petitioner contends
26 the county misconstrued this standard in finding that
DUO 4.034(3)(a) is satisfied by "no significant erosion loss" at
the northern end of the proposed wall. Record 14. Petitioner
contends the standard set by DUO 4.034(3)(a) requires that there
be no additional erosion loss.

Intervenors point out that the county's findings also state
that "establishment of the structure will result in a net
decrease in erosion at and adjacent to the site." Id.

1 Intervenor's argue that even if petitioner's interpretation of
2 DUO 4.034(3)(a) is correct, these two findings, read together,
3 constitute a determination by the county that the area adjacent
4 to the wall will not be exposed to erosion.

5 Intervenor's also argue, in the alternative, that the county
6 correctly interpreted DUO 4.034(3)(a) to allow "a de minimus
7 amount of erosional action * * *, so long as the area in
8 question is not 'exposed to erosion' in the sense that the
9 erosional process will be a destructive and altering force."
10 Intervenor's-Respondent's Brief 28. Intervenor's maintain the
11 county found that wave energy deflected to the north by the
12 proposed seawall will be absorbed by Red Rock Creek with no
13 significant erosion loss and, therefore, properly concluded that
14 the area adjacent to the north end of the wall will not be
15 "exposed" to active erosion.

16 DUO 4.034(3)(a) requires a determination that the proposed
17 seawall will not cause "the exposure of areas to erosion." The
18 county did not expressly make this determination, and did not
19 explain in its decision how it interpreted this standard. While
20 we do not accept petitioner's position that this standard
21 necessarily requires there be absolutely no additional erosion
22 at any point due to the proposed seawall, we also cannot agree
23 with intervenor's that this standard can be interpreted as a
24 requirement that the proposed seawall will cause "no significant
25 erosion loss" or will result in a "net decrease in erosion," as
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1 stated in the county's findings.¹⁴

2 The fifth assignment of error is sustained.

3 The county's decision is remanded.

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24 ¹⁴We note that the county's findings also state that it is possible that
25 the area to the north of the proposed seawall "could see an increase in
26 erosional stress," and that the natural features of the site and design of
the proposed seawall will "minimize any offsite erosional impacts."
Record 6, 7. These statements also fail to establish that the proposed
seawall will not expose areas to erosion.