BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BRENDA WILLHOFT, GARY WILLHOFT,
TOM McCARTHY and ALICE L. SANDERS,
Petitioners,

vs.

CITY OF GOLD BEACH,
Respondent,

and

TURTLE ROCK, LLC,
Intervenor-Respondent.

LUBA Nos. 2000-090 and 2000-091

FINAL OPINION
AND ORDER

Appeal from City of Gold Beach.

Douglas M. DuPriest, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hutchinson, Anderson, Cox, Coons and DuPriest.

No appearance by City of Gold Beach.

John C. Babin, Brookings, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Babin and Keusink.

HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member, participated in the decision.

REMANDED 01/25/2001

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a letter and a conditional use permit concerning the Turtle Rock Recreational Vehicle (RV) Park.

MOTION TO INTERVENE

Turtle Rock, LLC, the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

The subject property is located along the south side of the Hunter Creek Estuary, just east of State Highway 101 and the Pacific Ocean. As we explained in *Willhoft v. City of Gold Beach*, 38 Or LUBA 375 (2000) (*Willhoft I*), intervenor seeks to expand an existing 50-space RV park. In 1996 intervenor's predecessor in interest (predecessor) was granted a conditional use permit to expand the RV park. In 1998, intervenor's predecessor was granted an extension of that 1996 conditional use permit. In *Willhoft I*, we held that under the Gold Beach Zoning Ordinance (GBZO) the 1996 conditional use permit expired before the city granted the 1998 extension. The effect of our decision in *Willhoft I* is that intervenor no longer has city approval to expand the existing RV park.[1]

While the appeal that led to our decision in *Willhoft I* was pending before LUBA, the city initiated what all parties characterize as an enforcement proceeding to consider whether intervenor was in violation of the terms of the 1996 conditional use permit. The enforcement proceeding was instituted because intervenor placed fill in the estuary and adjoining floodplain in 1998-99, and the 1996 conditional use permit did not authorize placement of fill in the floodplain or the estuary. Both the Oregon Division of State Lands and the Army Corps of Engineers issued cease and desist orders in March 1999, directing that intervenor

[1]On September 23, 2000, intervenor submitted an application for conditional use approval to expand the RV park. The city's decision on that application is not before us in this appeal.

cease filling activity on the subject property. FP Record 256-58, 263-64.[2]

The city council conducted a final evidentiary hearing regarding the 1996 conditional use permit enforcement proceeding on May 8, 2000. On May 30, 2000, approximately a month and half before our decision in *Willhoft I*, the city council voted to refuse to consider intervenor's request to eliminate one of the conditions of approval attached to the 1996 conditional use permit. The city council also voted not to revoke the 1996 conditional use permit. That May 30, 2000 decision is reduced to writing in a May 31, 2000 letter signed by the city planning director. Petitioners appeal that letter in LUBA No. 2000-090.

At the same May 8, 2000 evidentiary hearing in which the city council considered enforcement questions concerning the 1996 conditional use permit, the city council also considered intervenor's application for conditional use approval for a floodplain permit (hereafter floodplain permit). On May 30, 2000, the city granted conditional use approval for the requested floodplain permit. Among other things, the floodplain permit grants "after-the-fact" approval for the fill that intervenor had previously placed on the subject property and authorizes "some additional fill/grading." FP Record 6. Petitioners appeal the floodplain permit in LUBA No. 2000-091.

INTRODUCTION

A. The Hunter Creek Estuary

Estuarine resources are protected by Statewide Planning Goal 16 (Estuarine Resources) and city comprehensive plan and land use regulation provisions that have been adopted and acknowledged to protect those resources. The boundary of the Hunter Creek Estuary is the mean higher high tide elevation or the line of non-aquatic vegetation, where present, whichever results in the higher elevation. Gold Beach Comprehensive Plan (GBCP)

[2]The city filed a three-volume record in LUBA No. 2000-090. We follow the parties and cite to that record as the Conditional Use Permit Record or "CUP Record." The city filed a separately paginated two-volume record in LUBA No. 2000-091 along with a supplemental record in that appeal. We follow the parties and cite to that record as Floodplain Permit Record or "FP Record."

77. The GBCP includes a large-scale map (one inch = 1000 feet) that shows the approximate location of the Hunter Creek Estuary. Petition for Review 3; GBCP 79.[3] The Hunter Creek Estuary is designated as a "Natural" estuary. GBCP 77. The estuary is zoned Estuarine Resources-1 (ER-1). The ER-1 zone strictly limits placement of fill in the estuary itself. The city's May 30, 2000 floodplain permit decision authorizing the existing fill is based on the city's understanding that none of the fill that was illegally placed in the estuary remains in the estuary. Petitioners dispute that understanding.

B. The Coastal Shoreland

The coastal shoreland in this area is the area that lies between the boundary of the Hunter Creek Estuary and its 100-year flood boundary. This area is subject to the city's Shoreland Overlay (SO) zone. Fill is permissible in the SO zone, provided relevant approval criteria are met. Petitioners contend the city failed to apply the correct approval criteria and failed to demonstrate that those criteria are met.[4]

LUBA NO. 2000-090

As noted earlier, LUBA No. 2000-090 concerns the May 31, 2000 decision regarding the city proceedings to enforce the 1996 conditional use permit. As previously noted, our decision in *Willhoft I* concludes that the 1996 conditional use permit expired before the city

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[3]The portion of the GBCP that discusses the Rogue River Estuary includes the following explanation for how estuarine boundaries are established:

> "* * * Generally, the Estuarine Boundary is based on the line of Mean Higher High Water (MHHW) as determined by local modification of the Mean High Water line shown on the [Division of State Lands] DSL maps or the line of non-aquatic vegetation, whichever is higher. The MHHW line is considered to be a representative boundary for the inclusion of all intertidal areas in the estuary and as a logical separation between the 'estuarine' and 'shoreland' areas except in certain scattered locations where aquatic vegetation is found above the MHHW-elevations. The Division of State Lands and Corps of Engineers claim jurisdiction up to the line of non-aquatic vegetation in the permit process (see DSL Administrative Rule on Removal and Fill, OAR 141-85-105). As the scale of the plan map does not permit these areas to be identified accurately the DSL and Corps will identify the line of non-aquatic vegetation on a case-by-case basis during permit review." GBCP 61-62.

[4]There is no dispute that at least some of the fill that was placed on the subject property in 1998 was placed in and remains in the shoreland area that is subject to the city SO zone.

attempted to extend it in 1998. Because the 1996 conditional use permit is void, intervenor argues that a decision in the present appeal of the May 31, 2000 decision refusing to (1) revoke that expired permit or (2) grant intervenor's request for relief from one of its conditions "would have no practical effect" and for that reason LUBA No. 2000-090 is moot. Intervenor-Respondent's Brief 8.

We agree with intervenor.[5] *See Heiller v. Josephine County*, 25 Or LUBA 555, 556 (1993) (LUBA appeal moot where decision on review is rescinded). LUBA No. 2000-090 is dismissed.[6]

FIRST ASSIGNMENT OF ERROR

In their first assignment of error, petitioners argue that it was error for the city to approve the floodplain permit because the conditional use permit for the proposed expansion of the RV park was subsequently reversed by LUBA's decision in *Willhoft I*. We understand petitioners to argue that the conditional use permit for the expansion of the RV park must precede the floodplain permit that is challenged in this appeal. However, the only authority petitioners cite for that position is Gold Beach Flood Damage Prevention Ordinance No. 422 (Flood Ordinance) 4.3-1(2), which provides, in part, that in approving a floodplain permit the city must:

> "determine that all necessary permits have been obtained from those Federal, State, or local governmental agencies from which prior approval is required." Petition for Review App-10.

Although intervenor presumably must obtain new conditional use approval for any expansion of the existing RV park now that the 1996 conditional use permit has expired, petitioners

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[5]Our only question concerning the mootness of LUBA No. 2000-090 is a finding of fact in that decision concerning whether all of the fill that was placed in the estuary has been removed. Because that issue is also presented in LUBA No. 2000-091, and must be resolved there, we see no reason to address the question in LUBA No. 2000-090 as well.

[6]The four assignments of error addressed below all concern the floodplain permit decision that is challenged in LUBA No. 2000-091.

make no attempt to demonstrate that "prior approval" of that expansion is required *before* any required floodplain permit is approved.[7]

Petitioners also include under the first assignment of error an allegation that the city erred by approving fill in the floodway. Under the Flood Ordinance, approval of fill in the floodway requires "certification by a registered professional engineer or architect * * * that [such fill will] not result in any increase in flood levels during the occurrence of the base flood discharge."[8] Flood Ordinance 5.3(1); Petition for Review App-13.

Intervenor responds that although the city approved the fill that had been placed in the 100-year *floodplain*, intervenor did not seek and the city did not approve fill in the *floodway*. Intervenor also points out that intervenor's engineer stated that there was no fill remaining in the floodway. Intervenor-Respondent's Brief 11.

Because petitioners do not develop their argument that the city improperly approved fill in the floodway, and in view of intervenor's position that any fill that was placed in the floodway has been removed, we reject petitioners' argument that the city erred by approving fill in the floodway.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Under the second assignment of error petitioners argue the city improperly authorized fill for non-water dependent uses in the Hunter Creek Estuary.

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[7]As noted earlier in this opinion, intervenor is seeking such conditional use approval for an expansion of the RV park.

[8]Portions of the 100-year floodplain may also fall within the floodway. The Flood Ordinance includes the following definition of "floodway":

> "'FLOODWAY' means the channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than one foot." Flood Ordinance 2.0; Petition for Review App-9.

A. Failure to Locate the Estuary Boundary

Petitioners argue under this subassignment of error that the city erred by failing to identify precisely where the estuary boundary is located and by implicitly accepting the applicant's position concerning the location of the estuary boundary. Petitioners argue these errors are critical because the city must know where the boundary of the estuary was located before the filling occurred and where that boundary is now located before it can adopt a supportable position concerning whether all the fill that was placed in the estuary has been removed.[9]

One of the difficulties we have faced in reviewing the challenged decision and the parties' arguments is that defined terms are sometimes used interchangeably.[10] That problem aside, we agree with petitioners that the record includes conflicting evidence concerning whether all of the fill that intervenor placed in the estuary has been removed. Nevertheless, we agree with intervenor that the city's position that all such fill has been removed is supported by substantial evidence.

Petitioners first fault the city for attaching a map that was prepared by intervenor to its decision. Petitioners contend that the attached map does not accurately locate the boundary of the estuary. However, petitioners do not establish that the city attached the disputed map to express the city's view concerning the location of the estuary boundary, and

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[9]The challenged decision includes the following finding:

> "No development associated with the RV park, including any fill or disturbance, is proposed within the estuary boundary. As stated in [the 1996 conditional use permit] the applicant's engineer must certify that no development has occurred within the estuary at the completion of this project." FP Record 6.

[10]For example, the city and intervenor apparently believe the floodway and estuary boundaries coincide in at least some locations and appear to use the terms interchangeably. But the factors that establish the location of the estuary boundary and floodway are different, and the estuary boundary and floodway need not be coterminous.

it is not clear from the decision why that map was attached. Petitioners fail to establish that attaching the map is error.

Petitioners also argue that the estuary boundary depicted on the map that is attached to the challenged decision is inconsistent with the location of the estuary boundary shown in the comprehensive plan. We do not agree the estuary boundary shown on the map attached to the challenged decision is inconsistent with the Hunter Creek Estuary boundary shown in the comprehensive plan.[11] Even if it is, petitioners have not established that the city attached the disputed map to express the city's position concerning the location of the estuary boundary, and nothing in the decision itself suggests that the map was attached for that purpose.

We turn to the evidence cited by the parties concerning removal of fill from the estuary. Intervenor cites a number of maps and photographs that it says show that the estuary actually extends landward or south of its prior location.[12] Petitioners, on the other hand, cite evidence that they contend shows the existing bank line is now located north of its former location before the fill was placed on the subject property in 1999.[13]

We do not agree that the evidence noted in the preceding paragraph, or other evidence cited by the parties, is sufficient to establish the precise location of the estuary boundary before or after fill was placed in the estuary. However, the critical question that must be answered under this subassignment of error is whether the city's implicit finding that

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[11]As we noted earlier, the comprehensive plan map is a very large-scale map. It is not possible to determine if the comprehensive plan map and the map attached to the decision are inconsistent.

[12]Intervenor cites two post-fill photographs at FP Record 584 and 589. Intervenor contends that if those photographs are compared with the topographic map that appears at CUP Record 72 and the 1996 topographic map that appears at CUP Record 197 "one can readily see that the bank line is more than thirty feet further south than before development started." Intervenor-Respondent's Brief 4. We assume that intervenor's citations to CUP Record 72 and CUP Record 197 are mistaken, and that intervenor intended to cite to CUP Record 1072 and CUP Record 1197.

[13]The evidence cited by petitioners includes a photo at CUP Record 458; maps at CUP Record 628, 635, 762; testimony by one of the petitioners that is attached to the petition for review; and a letter signed by a representative of the Oregon Department of Fish and Wildlife at FP Record 274-75.

all the fill that was placed in the estuary has been removed is supported by substantial evidence. Substantial evidence is evidence a reasonable person would rely upon to support a conclusion. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988).

The record includes a November 1, 1999 letter from the intervenor's engineer. CUP Record 531-33. In that letter, the intervenor's engineer notes the GBCP provisions that establish the upper limit of the Hunter Creek Estuary. *See* n 3. The letter goes on to explain how the mean higher high tide level at the mouth of the Rogue River can be used to establish the mean higher high tide level at Hunter Creek. CUP Record 532. The engineer then concludes that "[t]here is no development in the estuary of Hunter Creek and there never has been," based on his understanding of how estuary boundaries are identified and his "observance of conditions on site October 23 and 24, [1999]." *Id*. Intervenor also cites a July 1, 2000 letter from the Army Corps of Engineers, which appears to take the position that the Corps is satisfied that the fill has been removed from the estuary. CUP Record 122.[14] In addition, the record includes evidence that intervenor contracted for the delivery of 5,000 cubic yards of fill on February 2, 1999, and that approximately 4,700 cubic yards was delivered. CUP Record 308. The record also includes evidence that approximately 4,680 cubic yards of fill subsequently was removed from the west end of the property and 700 cubic yards subsequently removed from the east end of the property, for a total of 5,380 cubic yards of fill removed. CUP Record 309.

The evidentiary value of intervenor's engineer's letter is somewhat compromised by its failure to include any maps showing the engineer's location of the estuary boundary. Additionally, we cannot tell why the engineer believed there never has been any fill placed in

[14]Intervenor also cites letters from the city's engineer (CUP Record 1227), Oregon Department of Fish and Wildlife (CUP Record 801) and Division of State Lands (CUP Record 304). Those letters are either equivocal or do not address the question of whether fill has been removed from the Hunter Creek Estuary.

the estuary, because he does not explain how he reached that conclusion.[15] Nevertheless, that letter lends some support to the city's conclusion in the floodplain permit decision that all the fill that intervenor placed in the Hunter Creek Estuary in 1999 has been removed. When that letter is viewed with the Corps of Engineer's July 1, 2000 letter and the evidence concerning the amount of fill that was placed on and removed from the property, we conclude that a reasonable person could conclude that all the fill that was placed in the estuary has been removed, although it is an exceedingly close question.

Our conclusion that the city's decision concerning the removal of fill from the estuary is supported by substantial evidence necessarily rejects petitioners' argument that the city was required to adopt a map in its decision that specifically identifies the location of the Hunter Creek Estuary. Had the city done so, the parties' and our job would certainly have been made easier. However, we do not agree with petitioners that adopting such a map was an essential evidentiary predicate to the city's finding that all fill that was improperly placed in the estuary has been removed. The city is entitled to rely on intervenor's engineer's and Corps of Engineers' letters and the evidence concerning the delivery and removal of fill to conclude that all fill that was placed in the estuary has been removed.

The first subassignment of error is denied.

B. Second Subassignment of Error

Petitioners argue under the second subassignment of error that the city erred by allowing fill within the estuary. For the reasons we have already explained in resolving petitioners' first subassignment of error, we agree with intervenor that the city's implicit finding that all fill that was improperly placed in the estuary has been removed is supported by substantial evidence. Because the challenged decision does not authorize fill in the estuary, this subassignment of error provides no basis for reversal or remand.

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[15]That conclusion also appears to be inconsistent with other undisputed evidence in the record.

The second subassignment of error is denied.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

A. Application of the County's SO Zoning Standards and Criteria

It is undisputed that intervenor placed fill in the shoreland portion of the subject property that lies above the estuary boundary and within the 100-year floodplain. That portion of the subject property is subject to the city SO zone. The city's SO zone was adopted in 1984 and has been acknowledged by the Land Conservation and Development Commission (LCDC) pursuant to ORS 197.251. Therefore, the acknowledged SO zone, rather than Statewide Planning Goal 17 (Coastal Shorelands), applies to the shorelands portion of the subject property.

However, it appears that the city's SO zone standards and criteria that apply in this case have not been codified into the city's zoning ordinance. More importantly, both the city and the Department of Land Conservation and Development (DLCD) were unable to find the city's acknowledged SO zone standards and criteria. FP Record 512-13. To solve this problem, the city applied *Curry County's* SO zone provisions.[16] Petitioners assign error to the city's application of Curry County's SO zone standards and criteria rather than the city's SO zone standards and criteria.

Although DLCD's and the city's solution to the missing city SO zone standards and criteria may have some facial pragmatic appeal, we agree with petitioners that it was legal error for the city to apply the county's SO zone standards and criteria. Although the city may well be correct that the city's and county's acknowledged SO zone standards and criteria are

[16]This apparently was done at a DLCD staff person's suggestion. FP Record 512-13. That suggestion was based on a former city planner's recollection that the city's SO zone provisions were similar to the county's. FP Record 512.

similar, we cannot assume that is the case.[17] Therefore, the city's SO zone standards and criteria may well include requirements that the city did not consider in approving the disputed floodplain permit.[18] Accordingly, the city's decision must be remanded so that the city can apply the correct SO zone standards and criteria in approving the disputed fill in the shoreland portion of the subject property.

On remand, if the city and DLCD are ultimately unable to locate the city's acknowledged SO zone standards and criteria, the city obviously will be unable to apply those standards and criteria. In that unusual circumstance, rather than apply the county's or some other jurisdiction's land use regulations implementing Goal 17, we conclude that the city must either (1) deny the application (because the city cannot know whether its SO zone standards and criteria are satisfied) or (2) apply Goal 17 directly, since Goal 17 would have applied directly prior to acknowledgement of the city's SO zone.[19] Alternatively, intervenor could withdraw the disputed application, and the city could adopt a new SO zone and submit it to DLCD for acknowledgment. Following acknowledgment, the application could be submitted for review under the city's newly acknowledged SO zone standards and criteria.

The first subassignment of error is sustained.

B. Second through Sixth Subassignments of Error

Petitioners challenge the adequacy of the city's findings that apply and find compliance with the county's SO zone standards and criteria. It is possible that some of the issues that are raised in those subassignments of error are not resolved adversely to

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[17]As petitioners point out, applying the county's SO zone standards and criteria presents anomalies because those provisions were written with the county rather than the city in mind. Petition for Review 22 n 13.

[18]Similarly, the city's SO zone standards and criteria may make it clear that the city need not directly apply certain GBCP shorelands-related provisions that petitioners argue the city erred by failing to apply. Petition for Review 23-24.

[19]Under ORS 227.178(3), the applicant is entitled to have its application reviewed for compliance with the city permit approval criteria that are in effect on the date the application is submitted. However, if those approval criteria cannot be located, they cannot be applied.

petitioners by our denial of petitioners' first and second assignments of error. If so, they may be raised in proceedings on remand applying the city's SO zone provisions or Goal 17. However, it is equally possible that they cannot or will not be raised on remand. Even if they are raised, they may not present the same questions that are presented in the current unusual posture of this case concerning the shorelands portion of the subject property. We therefore do not consider those subassignments of error. If the issues presented in those subassignments of error arise on remand, the city can address them in its decision on remand in applying its SO zone provisions or Goal 17.

The third assignment of error is sustained in part.

FOURTH ASSIGNMENT OF ERROR

In the fourth assignment of error, petitioners allege that the challenged decision violates Goals 16 and 17. We have already concluded that the city's decision that the floodplain permit does not approve any fill in the Hunter Creek Estuary itself is supported by substantial evidence. Petitioners' only Goal 16 argument is based on their position that the challenged decision authorizes fill in the Hunter Creek Estuary. Accordingly, we reject petitioners' argument that the challenged decision violates Goal 16.

With regard to Goal 17, we have already concluded that the city must either apply its acknowledged SO zone provisions or apply Goal 17 directly. The city did neither. Accordingly, we sustain petitioners' argument under the fourth assignment of error that the city's decision does not comply with Goal 17.

The fourth assignment of error is sustained in part.

The city's decision is remanded.