

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON  
3

4 JERRY SLEPACK and  
5 DONNA SLEPACK,  
6 *Petitioners,*  
7

8 vs.  
9

10 CITY OF MANZANITA,  
11 *Respondent,*  
12

13 and  
14

15 RICHARD LUCE and  
16 BEVERLY LUCE,  
17 *Intervenors-Respondent.*  
18

19 LUBA No. 2002-179  
20

21 FINAL OPINION  
22 AND ORDER  
23

24 Appeal from City of Manzanita.  
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26 Thomas Johnson, Portland, filed the petition for review and argued on behalf of  
27 petitioners. With him on the brief was Kramer and Associates.  
28

29 William R. Canessa, Seaside, and John W. Shonkwiler, Portland, filed a joint  
30 response brief on behalf of respondent and intervenors-respondent. With them on the brief  
31 were John W. Shonkwiler, PC and Moberg, Canessa, Faber & Hooley. John W. Shonkwiler  
32 argued on behalf of intervenors-respondent.  
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34 BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,  
35 participated in the decision.  
36

37 AFFIRMED

03/26/2003  
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39 You are entitled to judicial review of this Order. Judicial review is governed by the  
40 provisions of ORS 197.850.

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**NATURE OF THE DECISION**

Petitioners challenge a city determination of oceanside setback distances for five lots abutting the ocean shore.

**MOTION TO INTERVENE**

Richard Luce and Beverly Luce, applicants below, move to intervene on the side of respondent. There is no opposition to the motion and it is allowed.<sup>1</sup>

**FACTS**

In 2001, the city adopted standards for establishing oceanside setbacks. The standards are set out at Manzanita Zoning Ordinance (MZO) 3.085(4), and provide:

- “a. For lots abutting the oceanshore, the setback from the front lot line for buildings hereafter constructed shall be on a direct line with the western foundations of existing adjacent structures and a direct line between the western foundations where there is no structure.<sup>2</sup>
- “b. In cases where the above method of setback determination requires development to be setback further from the westerly property line than is required for protection of the Foredune Management Area, the City Manager may determine the setback distance [that] shall apply. In making a determination, the City Manager shall consider 1) the average front yard setback of structures within 200 feet of both sides of the proposed structure; 2) whether the front yard setback of structures leaves at least 50% of the area of the lot for development; and 3) whether the proposed alignment of structures will not significantly worsen sand accretion in the immediate area. The intent of this provision it to limit this application to those rare and unusual circumstances where [MZO 3.085(4)(a)] produces an unreasonable and inequitable result. \* \* \*<sup>3</sup>

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<sup>1</sup> As the city and intervenors-respondent filed a joint response brief, we refer to them as “respondents.”

<sup>2</sup> We understand this ordinance provision to establish the setback on undeveloped properties by drawing a line from the western foundation of the nearest structures north of the undeveloped properties to the western foundation line of the nearest structure south of the undeveloped properties.

<sup>3</sup> The setback line described in MZO 3.085(4)(a) is also the shoreward (eastern) boundary of the Foredune Management Area Overlay Zone. Manzanita Ordinance No. 98-03, March 4, 1998, page 1.

1           Petitioners own a lot subject to the oceanside setback provisions of MZO 3.085(4).  
2 Their lot is developed with a dwelling located approximately 60 feet from the western  
3 boundary of their lot. Intervenors and others own five undeveloped lots located immediately  
4 north of petitioners’ property. Those properties are also subject to the oceanside setback  
5 requirements. In 2002, intervenors and others applied to the city for an oceanside setback  
6 determination pursuant to MZO 3.085(4)(b).

7           The city manager applied the provisions of MZO 3.085(4)(b) and, based on the three  
8 factors listed in that section, determined that the appropriate building setback for the five lots  
9 is approximately 23 feet east of their western boundaries. That setback line is approximately  
10 37 feet west of petitioners’ western building foundation line. The city manager also changed  
11 the building setback line on petitioners’ property to 23 feet east of petitioners’ western  
12 boundary to allow petitioners, if they choose, to move or expand their dwelling to align their  
13 western foundation line with the setback line on the adjacent five lots.<sup>4</sup>

14           Petitioners appealed the city manager’s decision to the planning commission and city  
15 council. Both bodies affirmed the city manager’s interpretation and application of MZO  
16 3.085(4)(b). This appeal followed.

17 **ASSIGNMENT OF ERROR**

18           Petitioners argue that the city erred in allowing a variation from the setback  
19 established under MZO 3.085(4)(a), because the city did not find, as is required by MZO  
20 3.085(4)(b), that the 60-foot setback is more than is “required for protection of the Fore-dune  
21 Management Area” within the meaning of the ordinance. Petitioners contend that the  
22 ordinance does not permit the establishment of an alternative setback if the Fore-dune  
23 Management Area is not protected, even if the result would render the five lots unbuildable.

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<sup>4</sup> As we understand it, the setback line serves two purposes. First, it ensures that development is not located in an area that would have an adverse impact on the city’s Fore-dune Management Area. Second, it aligns oceanside structures at approximately the same alignment to minimize sand accretion.

1 According to petitioners, the city completely ignored that step of the analysis and proceeded  
2 directly to the factors that the city manager must consider in establishing the alternative  
3 setback. Petitioners also argue that to the extent the city’s decision can be read to address  
4 protection of the Foredune Management Area, the city’s decision is not supported by  
5 substantial evidence.

6 **A. Waiver**

7 The issue that is presented under the first assignment of error is whether the city erred  
8 because it did not find

9 “that a setback distance under [MZO] 3.085(4)(a) would result in establishing  
10 a setback distance further from the westerly property line than is required for  
11 protection of the Foredune Management Area.” Petition for Review 5.

12 We understand petitioners to argue that such a finding is required before an alternative  
13 setback may be established under MZO 3.085(4)(b).

14 Respondents contend that petitioners waived this issue by not raising it below. ORS  
15 197.763(1); ORS 197.835(3).<sup>5</sup> According to respondents, petitioners’ arguments in the  
16 proceedings before the city were limited to contentions that the proposed alternative setback  
17 would result in more accretion of sand on petitioners’ property, and that the city erred by not  
18 requiring that the owners of the five lots take an exception to Statewide Planning Goal 18

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<sup>5</sup> ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

ORS 197.835(3) provides that LUBA’s review of a land use decision is limited to:

“Issues \* \* \* raised by any participant before the local hearings body as provided by ORS \* \* \* 197.763[.]”

1 (Beaches and Dunes). Respondents contend that petitioners never argued below that the  
2 finding they describe in this assignment of error is required.

3 Petitioners' concede that they did not specifically raise the issue that they present in  
4 this assignment of error. However, they argue that they continually expressed concern  
5 regarding the potential adverse impacts development located closer than 60 feet from the  
6 western boundaries of the adjacent properties would have on the Foredune Management  
7 Area.

8 In *Boldt v. Clackamas County*, 21 Or LUBA 40, 46, *aff'd* 107 Or App 619, 813 P2d  
9 1078 (1991), we stated that the purpose of the "raise or waive it" provision of ORS 197.763  
10 is to "prevent unfair surprise." *Boldt* dealt with a decision approving a permit to construct a  
11 floating dock and boathouse within the Willamette River Greenway. In *Boldt*, the petitioners  
12 did not explicitly argue during the local proceedings that a specific code provision addressing  
13 development within the Willamette River Greenway should be addressed. However, we  
14 concluded that, based on the arguments presented in the record, the issue of compliance with  
15 the criterion was adequately raised, even if the applicable code language relied upon by the  
16 petitioners was not specifically identified.

17 Here, we agree with respondents that petitioners' generalized arguments regarding  
18 the potential impacts on beaches and dunes designated for protection under Goal 18 are  
19 insufficient to raise the issue they present in their assignment of error.<sup>6</sup> Petitioners' argument

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<sup>6</sup> The statement petitioners rely on to raise the issue they present in their assignment of error is described in the August 19, 2002 minutes of the city planning commission hearing. The minutes summarize testimony given by petitioner Jerry Slepach and state, in relevant part:

"[Petitioners] \* \* \* are appealing the application of [MZO] 3.085(4)(b)[.] \* \* \* [Petitioners] maintain that following the City's Manager's determination is inequitable to them and results in a conflict with the ordinance and its intent, specifically paragraph (4)(a)[,] as their house \* \* \* is approximately 60 [feet] east of their westerly property line and would have significant impact from this decision. [Petitioner Jerry Slepach] believes that his longstanding efforts of dune stabilization would be nullified for the benefit of undeveloped lots. \* \* \* In the second point of his appeal, [Petitioner Jerry Slepach] refers to the City Manager mentioning \* \* \* Goal 18 Implementation Requirement 2 which was not included in Manzanita's current Comp[rehensive] Plan revised March 6, 1996. Goal 18 prohibits development on active or

1 that a Goal 18 exception was necessary cannot be fairly read to put the city and the parties on  
2 notice that petitioners took the position that the city erred because it did not first find that the  
3 setback distance that would be required under MZO 3.085(4)(a) was “further from the  
4 westerly property line than is required for the protection of the Foredune Management Area”  
5 Petition for Review 5. Accordingly, that issue is waived.

6 **B. Substantial Evidence**

7 As we stated earlier, petitioners also argue that the city’s decision is not supported by  
8 substantial evidence because there is no evidence in the record that a deviation from the  
9 standard setback provisions of MZO 3.085(4)(a) is more than is necessary to protect the  
10 Foredune Management Area.

11 We conclude above that the issue of whether MZO 3.085(4)(b) requires a finding that  
12 the standard setback under MZO 3.085(4)(a) is more than necessary to protect the Foredune  
13 Management Area, prior to establishing an alternative setback line, was waived.  
14 Consequently, the alleged absence of evidence in support of that finding is not a basis for  
15 reversal or remand.

16 The assignment of error is denied.

17 The city’s decision is affirmed.

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other foredunes that are subject to undercutting and/or wave overtopping without an exception being taken.” Record 55-56.