

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

3
4 DENNIS REGEN and VICTORIA REGEN,
5 *Petitioners,*

6
7 vs.

8
9 LINCOLN COUNTY,
10 *Respondent,*

11
12 and

13
14 DEPARTMENT OF LAND CONSERVATION
15 AND DEVELOPMENT and OREGON SHORES
16 CONSERVATION COALITION,
17 *Intervenors-Respondent.*

18
19 LUBA No. 2004-202

20
21 FINAL OPINION
22 AND ORDER

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24 Appeal from Lincoln County.

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26 Lawrence R. Derr, Portland, filed the petition for review and argued on behalf of the
27 petitioners. With him on the brief was Josselson, Potter & Roberts.

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29 No Appearance by Lincoln County.

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31 Steven E. Shipsey, Assistant Attorney General, Salem, filed a response brief and argued on
32 behalf of intervenor-respondent Department of Land Conservation and Development.

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34 William K. Kabeiseman, Portland, filed a response brief on behalf of intervenor-respondent
35 Oregon Shores Conservation Coalition. With him on the brief was Garvey Schubert Barer.

36
37 Ian K. Whitlock, Assistant Attorney General, Salem, filed a state agency brief on behalf of
38 the Oregon Parks and Recreation Department. With him on the brief was Hardy Myers, Attorney
39 General.

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41 HOLSTUN, Board Chair; BASSHAM, Board Member; DAVIES, Board Member,
42 participated in the decision.

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AFFIRMED

04/29/2005

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

NATURE OF THE DECISION

Petitioners appeal a county land use consistency determination.

FACTS

This case presents a question of statewide planning goal interpretation. Statewide planning Goal 18 (Beaches and Dunes) became effective on January 1, 1977. Goal 18 Implementation Requirement 5 only allows new “beachfront protective structures” “where development existed on January 1, 1977.”¹ Lincoln County’s zoning ordinance includes substantively identical language, which was adopted to implement Goal 18.²

Fishing Rock Subdivision is a 25-lot subdivision that was approved in 1992. Petitioners own a house on lot 10 in Fishing Rock Subdivision. The house on lot 10 sits on a bluff that overlooks the Pacific Ocean. During the process of approving Fishing Rock Subdivision, intervenor Department of Land Conservation and Development (DLCD) took the position that there was no

¹ Goal 18, Implementation Requirement 5 provides:

“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 * * * ‘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 [Implementation Requirement] (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.”

² As relevant here, Lincoln County Code (LCC) 1.0105(4) provides:

“Beachfront protective structures may be permitted only where development existed on January 1, 1977, unless an exception to Statewide Planning Goal 18, implementation requirement 5, has been adopted as part of the comprehensive plan.”

1 development on the 11-acre parcel that was subdivided to create Fishing Rock Subdivision and for
2 that reason beachfront protective structures would not be permitted.³ DLCD argued at that time
3 that the subdivision should be designed with that prohibition against future beachfront protective
4 structures in mind. Supplemental Record 2.

5 In December, 2003, ocean waves eroded a fissure in the bluff in front of lot 10. The bluff
6 has eroded and the edge of the bluff now comes within a few feet of petitioners' house. Petitioners
7 suggest that the houses on adjacent lots and the houses on other lots along the bluff may ultimately
8 be placed in danger if the wave undercutting is allowed to continue.

9 After the fissure in the bluff formed, petitioners sought Oregon Parks and Recreation
10 Department (OPRD) approval for an Ocean Shore Permit to install a concrete barrier to seal the
11 fissure to stop the bluff from eroding further into petitioners' lot. OPRD Ocean Shore Permit
12 applications require certification from the county that the improvements that are the subject of the
13 application are consistent with the county comprehensive plan and zoning ordinance. The county
14 planning department indicated on petitioners' application that the request "is not consistent with the
15 local comprehensive plan and zoning ordinance." Record 104.⁴ Petitioners appealed that
16 determination to the county planning commission.

17 During the planning commission proceedings, it was determined that in 1977 there was a
18 house on the eleven-acre parcel that later was subdivided in 1992 to create Fishing Rock
19 Subdivision (hereafter the 1977 house). Apparently the 1977 house is no longer on the property,
20 but it was located on the part of the eleven-acre parent parcel where lot 6 is platted today.

³ As discussed later in this opinion, petitioners contend that the eleven acres that were subdivided to create Fishing Rock Subdivision were developed in 1977.

⁴ In a letter to petitioners, the county planning director explained:

"Pursuant to [LCC] 1.0105(4), only sites that were developed prior to January 1, 1977 are eligible for beachfront protective structures. The Lincoln County Comprehensive Plan identifies the Fishing Rock subdivision as a location that was not developed prior to 1977 and thus is not * * * eligible for beachfront protective structures. * * *" Record 123.

1 Because the 1977 house was located on the eleven-acre parent parcel, the planning commission
2 concluded that there was development on the eleven-acre parent parcel on January 1, 1977. For
3 that reason, the planning commission concluded that petitioners therefore qualify for a beachfront
4 protective structure and that the planning staff erred in concluding otherwise. Record 65.

5 DLCD appealed the planning commission's decision to the board of county commissioners.
6 DLCD took the position below that Goal 18, Implementation Requirement 5 and LCC 1.0105(4)
7 both "prohibit ocean shore structures for development built after January 1, 1977." Record 58. In
8 testimony before the board of county commissioners, DLCD modified its position somewhat and
9 suggested that if petitioners' house were located on the same part of the eleven-acre parcel that the
10 1977 house occupied, it might qualify for a beach protective structure under Goal 18,
11 Implementation Requirement 5 and LCC 1.0105(4). Petition for Review 10. However, DLCD
12 maintained that the existence of the 1977 house did not mean that the entire beach frontage of the
13 eleven-acre parcel is an area "where development existed in 1977," within the meaning of Goal 18,
14 Implementation Requirement 5 and LCC 1.0105(4).

15 The board of county commissioners reversed the planning commission's decision. The
16 board of county commissioners relied on the planning staff report to the planning commission and a
17 memorandum from county counsel as findings to support its decision. Record 3.⁵ In addition, the
18 board of county commissioners adopted the following finding:

⁵ The county counsel's memorandum includes the following observation:

"I agree with [petitioners' attorney] that neither LUBA nor the courts have interpreted Goal 18, implementation requirement 5, in any fashion that applies to the circumstances in this case. I also agree that the original single-family house would likely be eligible for beachfront protection for that development. However, [petitioners' attorney] fails to recognize that the subsequent act of subdividing the land after 1977 has rendered the newly created lots and development on those lots ineligible for protection. In short there has been intervening 'development' of the property (subdivision) that occurred after 1977 and this new 'development' which includes the subject property, must adhere to the requirements of the law. * * *" Record 8 (footnote omitted).

In the omitted footnote, county counsel pointed out that the 1977 house is no longer on the property but he observed that "I also think a strong argument could be made that the original house and any remainder lot it occupied in a later subdivision, might also remain eligible for protection." *Id.*

1 “B. The record before the Planning Commission indicates that the single-family
2 residence built in 1966 constructed on the undivided whole of what is now
3 called the Fishing Rock Subdivision was located on Lot 6 of the Fishing
4 Rock Subdivision, which is four lots south of the subject property, which is
5 Lot 10 of the Fishing Rock Subdivision. There is no evidence in the record
6 that this 1966 structure was ever located on Lot 10.” Record 4.⁶

7 This appeal followed.

8 **ASSIGNMENT OF ERROR**

9 Petitioners’ assignment of error is as follows:

10 “Respondent improperly construed the applicable law and made a decision contrary
11 to LCDC Goal 18, Implementation Requirement 5, when it determined that
12 petitioners’ property was not developed on January 1, 1977.” Petition for Review
13 4.

14 Based on petitioners’ arguments that follow the above-quoted assignment of error, it is not
15 altogether clear to us how petitioners believe Goal 18, Implementation Requirement 5 and LCC
16 1.0105(4) should have been interpreted and applied in this case. In their petition for review,
17 petitioners contend that the planning commission was right, and the board of county commissioners
18 is wrong.⁷ In other words, petitioners argue the planning commission’s interpretation that the beach
19 frontage of petitioners’ lot should be eligible for a beachfront protective structure under Goal 18,
20 Implementation Requirement 5 and LCC 1.0105(4) because a single house was located on the
21 eleven-acre parent parcel on January 1, 1977, was correct.

⁶ The “1966 structure” is the same dwelling that we are referring to as the 1977 dwelling in this opinion.

⁷ Under Goal 18, Implementation Requirement 5, *see* n 1, counties are directed to adopt comprehensive plans that “identify areas where development existed on January 1, 1977.” Apparently, Lincoln County has not done so. Petitioners argue:

“In the absence of a local plan provision specifically identifying the developed areas, the Planning Commission’s use of the pre-existing lawful parcel is reasonable, provides the missing definition consistent with all related language of the provisions, and should be upheld. The only alternative short of a legislatively enacted definition by LCDC or respondent is case by case decision making without any standard. That would be arbitrary and unreasonable.” Petition for Review 12.

1 If all eleven acres of the parent parcel are viewed as a parcel “where development existed
2 on January 1, 1977,” simply because a single house was located on some part of the eleven-acre
3 parent parcel on January 1, 1977, then all of the oceanfront lots in Fishing Rock Subdivision could
4 potentially qualify for beachfront protective structures.⁸ We agree with intervenors that such an
5 interpretation is not required by the language of Goal 18, Implementation Requirement 5 and LCC
6 1.0105(4) and is inconsistent with the apparent purpose of those provisions.

7 All parties contend that a textual and contextual analysis supports their view of Goal 18,
8 Implementation Requirement 5 and LCC 1.0105(4). The text of Goal 18, Implementation
9 Requirement 5 and LCC 1.0105(4), viewed in context, is ambiguous.⁹ Again, as relevant, Goal 18,
10 Implementation Requirement 5 and LCC 1.0105(4) provide that “[b]eachfront protective structures
11 may be permitted only where development existed on January 1, 1977 * * *.” The ambiguity is
12 whether Goal 18, Implementation Requirement 5 and LCC 1.0105(4) identify the *locations where*
13 beachfront protective structures may be approved or *what* those beachfront protective structures
14 may be authorized to protect. While the effect on the ground of those different interpretations may
15 or may not be significant in any particular case, they are different interpretations and they both find
16 textual and contextual support. Based on the text of Goal 18, Implementation Requirement 5 and
17 LCC 1.0105(4) and the contextual laws cited by petitioners, we believe either interpretation is
18 possible.¹⁰

⁸ Petitioners do not make this argument, but if petitioners are eligible for a beachfront protective structure based on the 1977 dwelling, we do not see any reason why the other lots would not be equally qualified to apply for such a structure.

⁹ We do not set out the parties’ respective contextual analyses in this opinion. In our view, neither the text nor the contextual laws the parties cite clearly resolve the ambiguity in Goal 18, Implementation Requirement 5 and LCC 1.0105(4).

¹⁰ Perhaps the strongest contextual support cited by petitioners is a related provision of Goal 18, Implementation Requirement 5 itself, which directs that “[l]ocal comprehensive plans shall identify *areas* where development existed on January 1, 1977.” That is at least some indication that waiver of the prohibition against beach protective structures was extended to areas where development existed rather than the particular development that may have occupied that area on January 1, 1977.

1 Petitioners contend that Goal 18, Implementation Requirement 5 and LCC 1.0105(4) allow
2 beachfront protective structures in areas where development existed on January 1, 1977. DLCD
3 argues in its brief that Goal 18, Implementation Requirement 5 and LCC 1.0105(4) should be
4 interpreted to permit beachfront protective structures only where those structures are necessary to
5 protect *development* that existed on January 1, 1977. We agree with petitioners that the text of
6 Goal 18, Implementation Requirement 5 and LCC 1.0105(4) does not expressly say that
7 beachfront protective structures can only be approved to protect *development* that existed on
8 January 1, 1977. Therefore, for purposes of this opinion, we assume without deciding that
9 beachfront protective structures may be approved in *areas* where development existed on January
10 1, 1977, without regard to whether any development that now occupies those areas existed on
11 January 1, 1977.

12 It is undisputed in this case that the only development that existed on January 1, 1977 was
13 the 1977 dwelling. We understand petitioners to argue that Goal 18, Implementation Requirement
14 5 and LCC 1.0105(4) *must* be interpreted to apply to the entire eleven-acre parcel, even though
15 the 1977 dwelling only occupied a small area of that parcel. We reject that argument.¹¹ Just as the
16 text of Goal 18, Implementation Requirement 5 and LCC 1.0105(4) does not expressly protect
17 pre-1977 *development*, it does not expressly protect “entire parcels” where development was sited
18 on only a small portion of the parcel. Such a broad interpretation would be inconsistent with the
19 purpose of Goal 18, Implementation Requirement 5.¹² It seems far more likely to us that Lot 6

¹¹ While the eleven-acre parcel probably leaves some room for reasonable persons to differ on this point, if the parent parcel had instead been an 1000-acre parcel with two miles of beach frontage, we assume petitioners would not contend that a single dwelling on that otherwise undeveloped 1000 acre parcel in 1977 would permit a post-1977 subdivision of the undeveloped portion of the 1000 acres into hundreds of lots and subsequent construction of beachfront protective structures to protect each of the homes on those lots.

¹² As intervenor DLCD explains:

“As adopted, and presently, Goal 18 is:

““To conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of coastal beach and dune areas; and

1 represents a reasonable interpretation of “where development existed on January 1, 1977,” within
2 the meaning of Goal 18, Implementation Requirement 5. That is the interpretation the board of
3 county commissioners effectively adopted in this case, and we do not see that it is an erroneous
4 interpretation.¹³ We agree with Oregon Shores Conservation Coalition’s argument regarding how
5 this interpretive issue should be resolved:

6 “Petitioners spend a significant amount of time trying to justify the Planning
7 Commission’s use of the parent parcel as the ‘area’ that is subject to the use of
8 protective structures. However, the question is not whether the Planning
9 Commission’s interpretation is reasonable, but whether the County Board of
10 Commissioner’s interpretation is reasonable. * * * By focusing on the pre-existing
11 development, it interpreted the provision to limit [the] beachfront structure to the
12 area they would use to protect the pre-existing structure. This interpretation makes
13 sense; different development requires different protective structures that can vary
14 significantly in the amount of space they require. In this case, because the

“‘To reduce the hazard to human life and property from natural or man-induced actions associated with these areas.’

“The text of Goal 18 clearly establishes that LCDC intended to allow appropriate development while seeking to reduce hazards to property. Implementation Requirement 5 prescribes the manner by which local governments and state agencies are to implement that intent. * * *”
Intervenor-Respondent DLCD’s Brief 11.

Intervenor Oregon Shores Conservation Coalition contends:

“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.” Intervenor-respondent Oregon Shores Conservation Coalition’s Brief 3.

¹³ The county counsel’s memorandum quoted earlier at n 5, seems to leave open the possibility that if petitioners’ house had been constructed on lot 6, it might qualify for a beach protective structure under Goal 18, Implementation Requirement 5 and LCC 1.0105(4), if one was needed to protect the house from beach erosion. The board of county commissioners adopted county counsel’s memorandum in support of its decision. The part of the board of county commissioners’ decision itself quoted earlier in this opinion similarly suggests that petitioners might qualify for a beachfront protective structure if petitioners were the owners of lot 6.

1 Petitioner’s proposed structure would not have protected any area that would
2 require protection in 1977, the County properly concluded that it was not consistent
3 with its code or Implementation Requirement 5.” Intervenor-respondent Oregon
4 Shores Conservation Coalition’s Brief 6.

5 Finally, at oral argument, petitioners advanced a more limited argument that perhaps an
6 unspecified sub-area of the eleven acres where the 1977 house was located qualifies for the
7 exception provided by Goal 18, Implementation Requirement 5 and LCC 1.0105(4), and the
8 county’s decision should be remanded to consider whether petitioners’ house is properly viewed as
9 being within that unspecified sub-area.¹⁴ That argument does not appear to have been presented to
10 the board of county commissioners and, more importantly, is not presented in the petition for
11 review. It also appears to be inconsistent with petitioners’ contention that the planning
12 commission’s whole parcel interpretation should be required, because a case-by-case identification
13 of developed areas that might qualify for beachfront protective structures under Goal 18,
14 Implementation Requirement 5 and LCC 1.0105(4) “would be arbitrary and unreasonable.” *See n*
15 7. While we leave open the possibility that Goal 18, Implementation Requirement 5 and LCC
16 1.0105(4) might be interpreted to allow the county to consider whether the area where
17 development existed on January 1, 1977 is smaller than the eleven-acre parent parcel and larger
18 than lot 6, the county cannot be faulted for not interpreting Goal 18, Implementation Requirement 5
19 and LCC 1.0105(4) to allow it to identify such an area here. No one asked the county to interpret
20 and apply Goal 18, Implementation Requirement 5 and LCC 1.0105(4) in that way. Therefore,
21 even if petitioners had advanced that argument in their brief so that the interpretive issue were
22 properly presented in this appeal, we would reject petitioners’ argument that LUBA should remand
23 the board of county commissioners’ decision to consider an interpretation that the county was not
24 asked to consider when the matter was originally before the board of county commissioners.

25 The county’s decision is affirmed.

¹⁴ We understand petitioners to suggest that such a sub-area might be larger than lot 6 but smaller than the entire eleven-acre parent parcel and might be large enough to include lot 10.