

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

3  
4                                   RUTH MORELAND and FRAN RECHT,  
5   *Petitioners,*

6  
7   vs.

8  
9                                   CITY OF DEPOE BAY,  
10   *Respondent,*

11   and

12  
13  
14                                   RICHARD ALLYN, VALERIE ALLYN,  
15                                   REAL ESTATE CENTRE, INC. AND  
16                                   GREY INVESTMENTS, INC.  
17   *Intervenors-Respondent.*

18  
19   LUBA No. 2005-062

20  
21   FINAL OPINION  
22   AND ORDER

23  
24                                   Appeal from City of Depoe Bay.

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26                                   Ruth Moreland and Fran Recht, Depoe Bay, filed a joint petition for review and argued on  
27 their own behalf.

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29                                   David M. Gordon, Newport, filed a response brief and argued on behalf of respondent.  
30 With him on the brief was Macpherson, Gintner, Gordon and Diaz.

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32                                   Dennis L. Bartoldus, Newport, filed a response brief and argued on behalf of intervenors-  
33 respondent.

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35                                   BASSHAM, Board Member; DAVIES, Board Chair; HOLSTUN, Board Member,  
36 participated in the decision.

37  
38   AFFIRMED   08/05/2005

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

**NATURE OF THE DECISION**

Petitioners appeal a decision approving construction of two retaining walls on a publicly-owned portion of an ocean front bluff.

**MOTION TO INTERVENE**

Richard Allyn, Valerie Allyn, Real Estate Centre, Inc., and Grey Investments, Inc., (intervenors) move to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

**MOTION TO FILE REPLY BRIEF**

Petitioners seek permission to file a four-page reply brief, pursuant to OAR 661-010-0039.<sup>1</sup> Intervenors object, arguing that the proposed reply brief (1) is untimely, (2) is not limited to “new matters” raised in the response briefs, and (3) merely embellishes arguments made in the petition for review.

The proposed reply brief was filed on July 12, 2005, 12 days after the response brief was filed. Oral argument was conducted on July 21, 2005. While the reply brief was not filed “as soon as possible” after the response brief was filed, that is a technical violation of our rules that does not warrant striking the reply brief, absent prejudice to other parties’ substantial rights. OAR 661-010-0005. Intervenors do not argue that filing the reply brief 12 days after the response brief, but nine days prior to oral argument, prejudiced their substantial rights, and we do not see that it did.

The proposed reply brief responds to waiver arguments made in the response briefs. Assertions that assignments of error in the petition for review are waived are “new matters” that warrant a reply brief. *Robinson v. City of Silverton*, 37 Or LUBA 521, 525 (2000). Finally, we

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<sup>1</sup> OAR 661-010-0039 provides, in relevant part:

“A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent’s brief is filed. A reply brief shall be confined solely to new matters raised in the respondent’s brief. \* \* \*”

1 disagree with intervenors that the reply brief merely embellishes arguments made in the petition for  
2 review.

3 The proposed reply brief is allowed.

4 **FACTS**

5 The challenged decision is on remand from this Board. *Moreland v. City of Depoe Bay*,  
6 48 Or LUBA 136 (2004). We summarized the pertinent facts as follows:

7 “Intervenors own two adjacent oceanfront lots, tax lots 6500 and 6600, each  
8 developed with a single-family dwelling. Tax lots 6500 and 6600 are zoned Retail  
9 Commercial (C-1) and Coastal Shorelands Overlay (C-S). The western property  
10 line for tax lots 6500 and 6600 corresponds roughly with the edge of a bluff that  
11 slopes steeply down to the beach. Westward of the western property line is tax lot  
12 7300, a five-acre parcel that is a publicly owned park, although it is not clear which  
13 public entity owns it. Tax lot 7300 consists of cliffs, sand and vegetation, and is  
14 zoned Public Facilities (PF) and C-S.

15 “The sand bluff on which tax lots 6500 and 6600 sit is currently experiencing an  
16 average erosion rate of 3.7 inches per year, which threatens to compromise decks  
17 placed in front of each dwelling and which will cause the bluff to erode to the  
18 foundations of the dwellings in 68 years. Intervenors made a request to the city  
19 council for an easement or legal permission to construct two tiered structural walls  
20 on tax lot 7300, one at the toe of the bluff and the other near the top, in order to  
21 protect tax lots 6500 and 6600 from the effects of further erosion. The city council  
22 required intervenors to file an application with and obtain the approval of the city  
23 planning commission.

24 “Intervenors accordingly filed an application for “substantial development” in the C-  
25 S zone, as owners of tax lots 6500 and 6600. Record 6. After conducting two  
26 hearings, the planning commission denied the application, concluding that  
27 intervenors failed to demonstrate that (1) there is a need to locate the retaining walls  
28 on public property, (2) the proposed structures are allowed in the PF zone, (3) the  
29 walls comply with C-S zone requirements, (4) the walls comply with Federal  
30 Emergency Management Agency (FEMA) requirements, (5) the walls are  
31 consistent with various requirements derived from Statewide Planning Goal 17  
32 (Coastal Shorelands), and (6) the owner of tax lot 7300 has authorized the  
33 application.

34 “Intervenors appealed the planning commission decision to the city council, which  
35 reversed the planning commission decision, approving the application with  
36 conditions. \* \* \*” *Id.* at 141-42 (footnotes omitted).

1 We sustained two assignments of error, denied two others, and remanded for the city to  
2 adopt a reviewable interpretation explaining why the proposed walls are allowed in the P-F zone.  
3 We also remanded for the city to apply the provisions of Depoe Bay Zoning Ordinance (DBZO)  
4 3.360(5). On remand, the city conducted further hearings and, on April 6, 2005, reapproved the  
5 request, after adopting additional findings. This appeal followed.

6 **FIRST ASSIGNMENT OF ERROR**

7 Petitioners challenge the city’s finding that the proposed retaining walls are allowed as  
8 accessory uses within the P-F zone.<sup>2</sup>

9 The P-F zone does not include retaining or stabilization walls on the list of uses that are  
10 allowed outright or conditionally in the zone.<sup>3</sup> The city found that the proposed walls are accessory  
11 to use of the property as a “public park,” because the walls not only protect intervenors’ property  
12 but also protect the public using the beach from falling rocks or debris.<sup>4</sup>

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<sup>2</sup> Petitioners also challenge the city’s finding that retaining walls are not “structures” as defined in the DBZO. Because we sustain the city’s alternative conclusion that the walls can be viewed as *accessory* structures, we do not address petitioners’ challenge to the city’s finding that the walls are not structures.

<sup>3</sup> DBZO 3.350 provides, as relevant:

“\* \* \* In a P-F zone, the following uses are permitted subject to the applicable provisions of Articles 4, 5, and 13 of this ordinance:

- “a. Public parks and playgrounds, swimming pools, golf courses or similar recreation facility intended for use by the public.
- “b. Public schools and associated facilities.
- “c. Hospitals.
- “d. Government use
- “e. Solid Waste disposal facility.”

<sup>4</sup> The city’s findings state, in relevant part:

“The City Council finds that the proposed stabilization walls are allowed in the P-F zone. \* \* \* The stabilization walls will serve a public safety function in that the walls will prevent further erosion and disintegration of the bluff. This will enable the public to continue to access the shoreline at this location, and prevent the public from being hit by eroding or falling rocks, dirt and other debris.

1           Petitioners contend that there is no evidence that the bluff presents any risk to public users  
2 of the beach, and that the sole justification for the proposed walls is to protect intervenors’ houses.  
3 We understand petitioners to argue that walls intended to protect adjoining property cannot be  
4 “accessory uses” under the DBZO, which defines “accessory use” as a “structure or use  
5 subordinate and normally incidental to the main use of a property and located on the same lot as the  
6 main use.” DBZO 1.030(2).<sup>5</sup>

7           Intervenors cite to testimony that the public uses the rocky area below the bluff and that  
8 erosion of the bluff presents a threat to users of the area. According to intervenors, the fact that the  
9 proposed walls benefit both private property and the public property on which they will be  
10 constructed does not mean that the walls are not “accessory” to public use of the park.<sup>6</sup>  
11 Intervenors contend, and the city found, that retaining walls—as well as other structures necessary  
12 or beneficial for public use such as stairs, fences and benches—are common in public parks. While  
13 such structures are not specifically listed as permitted or conditional uses in the P-F zone,  
14 intervenors argue, they are allowed as accessory uses or structures to the public park use of the  
15 property. Intervenors argue that the city’s interpretation that the proposed retaining walls are

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“\* \* \* \* \*

“e.       The retaining walls to be constructed in this case, while serving to protect private property, also protect public property. The walls protect a cliff that is listed on maps as being a park. The area below the proposed stabilization walls is used by the public and providing a wall to stabilize the bank provides safety for the users of the area below.

“\* \* \* \* \*

g.       Retaining walls can be allowed as part of a park which is a listed as an allowed use in the P-F zone and they can also be considered a government use since they serve a function of protecting areas used by the public, as is the rocky area below the retaining walls proposed here.” Record 7-8.

<sup>5</sup> The city amended several DBZO definitions, including the definition of accessory use, after intervenors filed their application. All quotes are from the DBZO in effect when the application was filed.

<sup>6</sup> Intervenors also suggest that the city has a legal obligation to provide lateral support for intervenors’ property, and that obligation is sufficient to justify the retaining walls. However, the findings do not cite or rely upon this justification, and we do not regard it further.

1 accessory to park use of the property is not inconsistent with the express language of the ordinance  
2 or its purpose or any underlying policy, and therefore must be affirmed. ORS 197.829(1); *Clark v.*  
3 *Jackson County*, 313 Or 508, 836 P2d 710 (1992); *Church v. Grant County*, 187 Or App  
4 518, 69 P3d 759 (2003).

5 We agree with intervenors. Petitioners have not demonstrated that it is inconsistent with the  
6 relevant text of the DBZO to allow construction of retaining walls on an eroding bluff within a public  
7 park, as accessory to that park use, or as a public safety measure. That the walls primarily benefit  
8 an adjoining landowner does not preclude their status as accessory uses or structures under the  
9 code. The city's interpretation to that effect is affirmed.

10 The first assignment of error is denied.

## 11 **SECOND ASSIGNMENT OF ERROR**

12 Petitioners argue that approval of the retaining wall is not consistent with Statewide Planning  
13 Goal 17 (Coastal Shorelands) and city legislation implementing the goal, in particular  
14 DBZO 13.020.

15 Respondents argue that no issue was raised regarding Goal 17 during the first appeal, and  
16 therefore any such issues have been waived under *Beck v. City of Tillamook*, 313 Or 148, 155-  
17 56, 831 P2d 678 (1992). Further, respondents argue that LUBA addressed and rejected  
18 petitioners' arguments under DBZO 13.020 in the first appeal, finding that such arguments had been  
19 waived. 48 Or LUBA at 150. Such resolved issues cannot be litigated again under *Beck*,  
20 respondents contend. *See Louisiana Pacific v. Umatilla County*, 28 Or LUBA 32, 35 (1994)  
21 (under *Beck*, issues presented in the first appeal and rejected by LUBA and issues which could  
22 have been, but were not, raised in the first appeal may not be considered in the local proceedings on  
23 remand).

24 Petitioners reply that the issue of compliance with Goal 17 could not have been raised  
25 during the initial proceedings or appeal, and therefore is not waived under *Beck*, because during the  
26 initial proceedings and appeal the city had not yet explained why it believed the proposed walls

1 were allowed under the P-F zone. We understand petitioners to argue when the city supplied that  
2 explanation in the decision on remand, that opened the door for petitioners to raise new, unresolved  
3 issues such as compliance with Goal 17. With respect to DBZO 13.020, petitioners argue that they  
4 cite those code provisions only as context for their Goal 17 argument.

5 We agree with intervenors that the issues raised under Goal 17 and DBZO 13.020 are  
6 waived under *Beck*. Petitioners have not demonstrated that the issue of Goal 17 compliance could  
7 not have been raised during the initial proceedings and appeal. We perceive nothing in the findings  
8 concluding that the walls are allowed uses in the P-F zone that might open the door to raising the  
9 issue of whether the proposed walls are allowed under Goal 17. With respect to DBZO 13.020, it  
10 appears to us that petitioners rely on that code provision as more than context for their Goal 17  
11 arguments. In any case, petitioners' arguments under this assignment of error are either waived or  
12 do not provide a basis for reversal or remand.

13 The second assignment of error is denied.

#### 14 **THIRD ASSIGNMENT OF ERROR**

15 Petitioners contend that the city failed to coordinate with the Oregon State Parks and  
16 Recreation Department (state parks), and failed to adopt findings of compliance with state laws  
17 governing development within the "ocean shore," as defined by ORS 390.605(2).<sup>7</sup> According to  
18 petitioners, because one of the proposed walls is within the "ocean shore," and hence within the  
19 state parks' jurisdiction, intervenors must obtain a permit from state parks, pursuant to  
20 ORS 390.640.

21 Intervenors respond that a state parks Coastal Land Use Coordinator conducted a site visit  
22 of the property, and submitted a letter delineating the ocean shore boundary, and hence the  
23 jurisdiction of the agency. Based on the site plan submitted into the record, intervenors argue, it is

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<sup>7</sup> ORS 390.605(2) defines "ocean shore" to mean "the land lying between extreme low tide of the Pacific Ocean and the statutory vegetation line as described by ORS 390.770 or the line of established upland shore vegetation, whichever is farther inland."

1 clear that the proposed walls are located eastward of the ocean shore boundary delineated by state  
2 parks. The city relied upon this evidence to conclude that the proposed retaining walls are outside  
3 the state parks' jurisdiction and not regulated by ORS chapter 390.<sup>8</sup>

4 Petitioners dispute this conclusion, arguing that the site plan shows part of the lower wall  
5 westward of the line of established upland shore vegetation. However, we agree with intervenors  
6 that petitioners misunderstand the evidence. On a photograph, the coordinator drew a line depicting  
7 the actual contours of the established upland shore vegetation. The coordinator then drew a heavier  
8 line mostly westward of that line of vegetation, that connects the "gaps" between landward  
9 indentations in the line of vegetation. Record 123. According to the coordinator, that heavier line is  
10 the landward boundary of the "ocean shore," and hence the state park's jurisdiction. As far as we  
11 can tell, and petitioners have not demonstrated otherwise, the site plan locates the walls westward  
12 of that heavier line.

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<sup>8</sup> The city's findings state, in relevant part:

"The applicants submitted additional information to address this issue of compliance with [DBZO 3.360(5)]. Among the information the applicants submitted was a geotechnical report prepared by David Reich of Oregon Geotechnical Services, a licensed professional engineering geologist in the State of Oregon. The applicants also submitted a drawing prepared by Andrew Stricker of Stricker Engineering, a licensed engineer in the State of Oregon showing the location of the wall and the structural components of the wall. The applicants also submitted a letter and photo from Steve Williams, north coast land use coordinator for the Oregon State Parks Department indicating where the Beach Zone Line is located and advising that if the retaining wall is located behind that line it will be outside the area of state jurisdiction and not subject to the beach bill. The drawings show and the applicants confirmed that the drawing done by Mr. Stricker located the retaining walls east of that line and that it is outside the area of State jurisdiction (Beach Zone Line).

\*\*\*\*

"The opponents argue that in addition to DBZO 3.060, ORS 390.605 to 390.660, ORS 390.690 to 390.770, and OARs 736-020-003 through 736-020-0032 are pertinent. They are mistaken because those statutes only apply to the area between extreme low tide and the statutory vegetation line as described by ORS 390.770, or the line of established upland shore vegetation, which is farther inland. The letter from Steve Williams shows that if the retaining wall is built behind the line he described in his December 1, 2004 letter, the statutes do not apply. The retaining walls will be built behind this line." Record 10.



1           Petitioners do not explain why the response from the state parks coordinator is insufficient  
2 to satisfy any coordination obligation the city is under, and have failed to demonstrate that the  
3 proposed walls are subject to state park’s jurisdiction and subject to the statutes cited.

4           The third assignment of error is denied.

5           **FOURTH ASSIGNMENT OF ERROR**

6           Petitioners challenge the city’s findings of compliance with the requirements of  
7 DBZO 3.360(5).

8           **A.       Riparian Vegetation**

9           DBZO 3.360(5) prohibits or limits permanent destruction of riparian vegetation within the  
10 “zone of riparian vegetation.”<sup>9</sup> The DBZO defines “zone of riparian vegetation” with respect to the

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<sup>9</sup> DBZO 3.360(5) provides, in pertinent part:

“The following standards will be applied in reviewing an application for a land use action in the C-S zone.

“a.       Riparian Vegetation

“1.       Permanent removal of riparian vegetation shall be permitted only in conjunction with a use which requires direct access to water.

“2.       Except as provided for in (1) above, no development which could result in permanent destruction of riparian vegetation shall be located within the zone of riparian vegetation as defined below.

“3.       Temporary removal of riparian vegetation may be permitted subject to a revegetation plan approved by the city which specifies:

“a)       temporary stabilization methods, and

“b)       the method and timing of permanent revegetation with native species.

“4.       Definitions: Zone of Riparian Vegetation

“a)       Ocean and Estuary—The area between the point of mean higher high water and 50 feet landward measured on the existing grade.

“\* \* \* \* \*

“c.       Exceptional Aesthetic Resources

1 ocean and estuary areas as “[t]he area between the point of mean higher high water and 50 feet  
2 landward measured on the existing grade.” DBZO 3.060(5)(a)(4)(a).

3 The city found that the proposed retaining walls are located more than 100 feet eastward of  
4 the mean higher high water line, outside the zone of riparian vegetation, and therefore none of the  
5 requirements of DBZO 3.360(5) apply.<sup>10</sup> Petitioners contend, however, that the city misconstrued  
6 DBZO 3.360(5). Petitioners note that the C-S zone as a whole applies to lands subject to ocean  
7 flooding within 100 feet of the ocean shore. DBZO 3.360(2). According to petitioners,  
8 DBZO 3.360(5)(a)(1) and (3) govern removal of riparian vegetation within C-S zone outside the  
9 50-foot “zone of riparian vegetation,” and allow such removal under prescribed circumstances.  
10 Petitioner argue that DBZO 3.360(5)(a)(2) is the only code provision that refers to and applies  
11 within the 50-foot “zone of riparian vegetation.” Therefore, petitioners argue,  
12 DBZO 3.360(5)(a)(1) and (3) apply, and allow permanent removal of riparian vegetation only if  
13 associated with a use that requires access to water, and temporary removal of riparian vegetation  
14 only after approval of a revegetation plan that complies with DBZO 3.360(5)(a)(3). Petitioners  
15 contend that neither requirement is met here.

16 DBZO 3.360(5)(a) is not clearly drafted, and could be interpreted as petitioners understand  
17 it, such that DBZO 3.360(5)(a)(2) applies within the “zone of riparian vegetation,” while  
18 DBZO 3.360(5)(a)(1) and (3) apply more broadly in the C-S zone not limited to the zone of  
19 riparian vegetation. However, it is more plausibly interpreted as the city council obviously

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“Development in areas of exceptional aesthetic resources or coastal headlands shall not substantially alter the existing visual character of the area.”

<sup>10</sup> The city’s findings state, in relevant part:

“The applicants also submitted a survey \* \* \* [that] clearly shows that the retaining wall will be back much further than 50 feet from mean high tide. By being more than 50 feet above the mean higher high tide line, the walls are outside of the area of riparian vegetation, since subsection 4(a) defines the zone of riparian vegetation as the area between the point of mean higher high water and 50 feet landward measured on the existing grade. Therefore the riparian vegetation section of section 3.360 does not apply.” Record 10.

1 understood it, such that the requirements of subsections (1), (2) and (3) apply only within the zone  
2 of riparian vegetation. DBZO 3.360(5)(a) as a whole governs “riparian vegetation,” which suggests  
3 that all of its subsections are concerned with protecting vegetation within the defined “zone of  
4 riparian vegetation,” not with vegetation outside that zone. The city council’s interpretation of  
5 DBZO 3.360(5)(a) is certainly within its discretion under ORS 197.829(1) and *Clark*.

6 **B. Exceptional Aesthetic Resources**

7 DBZO 3.060(5)(c) requires that development in “areas of exceptional aesthetic resources”  
8 shall not “substantially alter the existing visual character of the area.” See n 7. The city council  
9 found, based on a site plan, that the proposed retaining walls will not substantially alter the existing  
10 visual character of the area.<sup>11</sup>

11 Petitioners argue that the city’s findings are inadequate and fail to explain how two 100-foot  
12 long walls, 12 to 18 feet in height, do not “substantially alter the existing visual character of the  
13 area.” That the visual impact is mitigated by texture, paint and vegetation is insufficient, petitioners  
14 contend; such measures will not prevent the walls from changing the visual character of the area  
15 from one of natural landforms to concrete walls.

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<sup>11</sup> The city council’s findings state, in relevant part:

“g. \* \* \* Pursuant to DBZO 3.060(4), the applicants have submitted a detailed site plan and/or written statement demonstrating how the proposed activity will conform to this standard.

“h. The information provided by the applicant demonstrates that the retaining wall will be textured to reduce reflection from the wall and that it will be painted in natural colors to blend with the surrounding area. The applicant has also submitted a vegetation plan that shows how vegetation will be planted in the area between the retaining walls and the top of the walls to help screen the wall.

“\* \* \* \* \*

“j. The information and explanation furnished by the applicants, including the information showing the location of the retaining wall, design of the wall, the texturing, painting and vegetation surrounding the retaining wall is sufficient to comply with the requirements of DBZO 3.360 and demonstrate that the wall will not substantially alter the existing visual character of the area. \* \* \*” Record 10-11.

1           Intervenors respond that petitioners simply disagree with the aesthetic judgment of the city  
2 council. Intervenors also point out that the “visual character” of the area features several similar  
3 walls, including a wall four lots north of the subject area. Given the less than objective “visual  
4 character” standard, and evidence that mitigation measures such as texture, paint and vegetation will  
5 reduce the visual impact of the proposed walls, intervenors argue that the city’s findings are  
6 adequate to demonstrate compliance with DBZO 3.060(5)(c). We agree.

7           The fourth assignment of error is denied.

8           The city’s decision is affirmed.