

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

4 ROBERT RUDELL and WILLIAM RUDELL,
5 *Petitioners,*

6
7 vs.
8

9 CITY OF BANDON,
10 *Respondent,*

11 and
12

13 DEPARTMENT OF LAND CONSERVATION
14 AND DEVELOPMENT, JOCELYN BIRO,
15 CAROL A. GOULARTE and DAVID H. TJOMSLAND,
16 *Intervenors-Respondents.*
17

18
19 LUBA No. 2011-032
20

21 FINAL OPINION
22 AND ORDER
23

24 Appeal from the City of Bandon.
25

26 Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioners.
27 With him on the brief was the law office of Bill Kloos PC.
28

29 Shala McKenzie Kudlac, Bandon, filed a response brief and argued on behalf of
30 respondent. With her on the brief was Carleton Law Offices.
31

32 Erin L. Donald, Assistant Attorney General, Salem, filed a response brief and argued
33 on behalf of intervenor-respondent Department of Land Conservation and Development.
34 With her on the brief was John R. Kroger, Attorney General.
35

36 Jocelyn Biro, Beaverton, filed the response brief and argued on her own behalf. With
37 her on the brief was Carol A. Goularte and David H. Tjomsland.
38

39 BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN, Board Member,
40 participated in the decision.
41

42 AFFIRMED

10/25/2011
43

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

NATURE OF THE DECISION

Petitioners appeal a city decision that denies their application for a conditional use permit to construct a single family dwelling.

FACTS

The critical question in this appeal is the geographic extent of a foredune. Bandon Municipal Code (BMC) 17.24.040(D) prohibits the location of any structure on an “identified foredune.” BMC 16.42.010 defines “foredune” as “the dune closest to the high tide line that extends parallel to the beach. The foredune can be divided into three sections: the frontal area (closest to water); the top surface; and the lee or reverse slope (backside).”¹

We repeat the basic facts from *Rudell v. City of Bandon*, 62 Or LUBA 279 (LUBA No. 2010-037, November 29, 2010) (*Rudell I*):

“Petitioners applied for site plan and conditional use approval to construct a 2,490 square foot single family dwelling on their two contiguous lots that together total approximately 8,850 square feet. The property is zoned Controlled Development 2 (CD-2) and is within the city’s Shoreland Overlay (SO) zone. The CD-2 zone allows single family dwellings as permitted uses, while the SO zone allows dwellings as conditional uses.

“The subject property is located north of Sixth Street at its western terminus. Sixth Street is unimproved for most of the subject property’s street frontage along Sixth Street, except for a 15-foot section improved at the southeastern corner. The eastern boundary line of the subject property abuts the western boundary of the South Jetty Sewer Improvement District (LID). The property slopes upward from east to west from a low elevation of 13 feet above mean sea level at the eastern boundary to a high elevation of 17.5 feet at the western boundary, on the slopes of a dune. The western boundary of the property abuts property that is zoned Natural Resource/Open Space, and the beach and Pacific Ocean lie to the west of that property. * * *” *Id.* at 280-81.

¹ BMC 17.24.040(D), and the BMC 16.42.010 definition of “foredune,” presumably are intended to implement Statewide Planning Goal 18 (Beaches and Dunes), which generally prohibits development on beaches, active foredunes and certain conditionally stable foredunes and interdune areas. As discussed below, the statewide planning goals do not provide a general definition of “foredune” like BMC 16.42.010, but include a definition of the general term “dune,” and definitions of various subcategories of dunes, including three types of foredunes.

1 In the initial proceedings, petitioners argued to the city that the landward extent of the
2 foredune is located west of the proposed building footprint, where there is a significant
3 change in the degree of slope from the top of the foredune. According to petitioners that
4 significant change in the degree of slope from the top of the foredune occurs between 16 and
5 17 feet in elevation above mean sea level. In the decision under review in *Rudell I*, the city
6 council determined that entire subject property was located on the foredune, and thus
7 development is prohibited by BMC 17.24.040(D). However, the city’s findings did not
8 explain the basis for that conclusion or cite any supporting evidence. LUBA sustained
9 petitioners’ challenge to that finding as inadequate and unsupported by the record. We
10 remanded, stating that “if the city again determines that the entire property is located on a
11 foredune, or locates the eastern edge of the foredune elsewhere on the property, the city must
12 explain the basis for its conclusion and identify evidence in the record that supports that
13 conclusion.” *Rudell I*, 62 Or LUBA at 286.

14 As relevant here, LUBA also sustained petitioners’ argument that the city cannot
15 apply certain CD-2 zone approval standards, because such standards are not “clear and
16 objective,” and thus cannot be applied to deny “needed housing” pursuant to ORS
17 197.307(6).

18 On remand, the city accepted additional evidence, including topographic maps based
19 on LIDAR technology, and ultimately adopted proposed findings drafted by intervenor-
20 respondent Department of Land Conservation and Development (DLCD), which was also a
21 party to the proceedings in *Rudell I*. With respect to determining the landward extent of the
22 foredune, the city council relied upon the BMC 16.42.010 definition of “foredune,” which
23 describes the “lee or reverse slope” as part of the foredune, and concluded that “the foredune
24 extends easterly from the top surface of the dune to the point where the slope reaches its
25 lowest elevation and the ground becomes relatively flat or horizontal.” Based on topographic
26 maps showing that the entire property is located on the reverse slope of the foredune under

1 the city’s interpretation of BMC 16.42.010, the city again denied the application. This
2 appeal followed.

3 **MOTION TO TAKE OFFICIAL NOTICE**

4 Petitioners move to take official notice of several documents relating to
5 acknowledgment of the city’s comprehensive plan between 1981 and 1984, including DLCD
6 staff reports. No party objects to the motion, and it is allowed.

7 **MOTIONS TO FILE REPLY BRIEFS**

8 Petitioners request leave to file a reply brief responding to alleged new matters in the
9 city’s response brief, pursuant to OAR 661-010-0039. There is no opposition to the motion
10 and that reply brief is allowed.

11 Petitioners also request leave to file a separate reply brief responding to an alleged
12 new matter in DLCD’s response brief. DLCD’s response brief argues in support of the city’s
13 primary basis for denial, that the landward edge of a “foredune” is determined by where its
14 reverse slope ends, and the proposed dwelling must be denied because it is located on the
15 reverse slope of the foredune. In the proposed reply brief, petitioners contend that DLCD
16 affirmatively waived any reliance on slope as the determinative factor in deciding the
17 landward extent of a foredune, because DLCD allegedly argued during the first appeal to
18 LUBA that slope is not a determining factor.

19 DLCD opposes the reply brief, arguing that it is not “confined solely to new matters
20 raised in the respondent’s brief,” as required by OAR 661-010-0039. DLCD also disputes
21 that it changed its position between Round I and Round II, or that the doctrine of affirmative
22 waiver otherwise applies to preclude DLCD from defending the city’s findings regarding the
23 significance of slope in determining the location of the foredune.

24 In turn, petitioners move to strike DLCD’s opposition to the reply brief, arguing that
25 instead of explaining why the reply brief is not confined to new matters, DLCD’s opposition

1 consists mostly of a substantive response on the issue of affirmative waiver, in effect
2 constituting a surreply brief not provided for under LUBA's rules.

3 We agree with DLCD that the arguments in its response brief defending the city's
4 findings and interpretation regarding slope are not "new matters" within the meaning of OAR
5 661-010-0039. No party should be surprised when an intervenor-respondent argues that the
6 local government's findings are correct, especially when the intervenor-respondent drafted
7 the findings. If anything, it is petitioners' assertion of affirmative waiver in the reply brief
8 that is a "new matter." A reply brief is a vehicle to respond to new matters, not a vehicle to
9 raise new matters. The fact that petitioners object to DLCD's attempt to file a response to
10 the merits of petitioners' assertion of affirmative waiver demonstrates the impracticality and
11 impropriety of allowing a party to raise an issue such as affirmative waiver for the first time
12 in a reply brief. The motion to file a reply brief is denied; the motion to strike is denied as
13 moot.²

14 **FIRST ASSIGNMENT OF ERROR**

15 Petitioners argue that the city cannot apply its interpretation of the BMC 16.42.010
16 definition of "foredune" to deny the conditional use permit application for a dwelling,
17 because as interpreted that definition is not "clear and objective." According to petitioners, it
18 is undisputed that the dwelling is "needed housing" as defined under ORS 197.303, and
19 therefore subject to ORS 197.307(6), which provides that "[a]ny approval standards, special
20 conditions and the procedures for approval adopted by a local government shall be clear and
21 objective and may not have the effect, either in themselves or cumulatively, of discouraging
22 needed housing through unreasonable cost or delay."

² If we did accept the reply brief and consider the issue of affirmative waiver, we would in fairness consider DLCD's responses thereto. Although we need not decide the issue, we tend to disagree with petitioners that the elements of affirmative waiver are met in this case or would preclude LUBA from considering DLCD's arguments defending the city's findings regarding slope. Among several problems is the fact that the city's response brief expressly concurs with, and arguably adopts as its own, DLCD's arguments regarding slope. Petitioners do not argue that the doctrine of affirmative waiver affects the city.

1 As noted, BMC 16.42.010 defines “foredune” to include the “lee or reverse slope.”
2 The city examined dictionary definitions of “slope,” and concluded that it plainly means an
3 upward or downward slant or inclination, the degree or extent of deviation from the
4 horizontal or perpendicular. Based on that understanding, the city interpreted “foredune” to
5 include the entirety of its lee or reverse slope, extending “easterly from the top surface of the
6 dune to the point where the slope reaches its lowest elevation and the ground becomes
7 relatively flat or horizontal.” Record 11-13.³ In a footnote omitted from the quote at n 3, the
8 city explained:

9 “Throughout this decision we use the term ‘relatively level’ to describe a flat
10 or horizontal rather than sloped ground surface elevation. We use the term

³ The city’s findings state:

“A ‘foredune’ as defined by the BMC includes the following three areas: The frontal area (closest to the water); the top surface; and the lee or reverse slope. The ‘Frontal Area (closest to water)’ is the area between the beach on the west and the top surface. The western extent of the foredune is defined by the beach: (i.e. gently sloping areas of loose material (e.g. sand, gravel and cobbles) that extend landward from the low-water line to a point where there is a definite change in the material type or landform, or to the line of vegetation. The frontal area encompasses the entire slope extending from the intersection with the beach to the top of the dune. The ‘top surface’ is the portion located between the frontal area and the lee or reverse slope. This area is identified as the highest elevations of a dune paralleling the frontal area shown on the topographic contour maps and depicted in transects. The ‘lee or reverse slope (back side)’ is the area that extends from the top surface to the landward point where the slope ends and the ground becomes relatively level (i.e. horizontal).

In the absence of code definitions of ‘lee’ and ‘reverse slope’ we reviewed the dictionary definitions of ‘lee,’ ‘reverse slope’ and ‘slope.’

“[Definitions omitted]

“These dictionary definitions support the city’s conclusion that the foredune extends easterly to a point where the ground becomes relatively level or horizontal. * * * [The t]erm ‘reverse slope’ clearly supports a decision that the geographic extent of the foredune is where the slope ceases its descent or declination away from the top surface (i.e. at the bottom of the slope). The term ‘slope’ clearly supports the same conclusion regarding the geographic extent by describing the term slope in relation to a downward slant or inclination; the ground forming an angle with the plane of the horizon; or deviation from the horizontal or perpendicular. These dictionary definitions of terms used in the BMC definition of ‘foredune’ support the conclusion that the foredune extends easterly from the top surface of the dune to the point where the slope reaches its lowest elevation and the ground becomes relatively flat or horizontal.” Record 11-13 (footnote omitted).

1 'relatively' as a modifier because ground elevation can never be absolutely
2 level." Record 12, n 1.

3 Petitioners challenge the substance of the city's interpretation under the second
4 assignment of error. For purposes of the first assignment of error, petitioners accept the
5 city's interpretation of BMC 16.42.010, but argue that ORS 197.307(6) precludes the city
6 from applying that interpretation, because as interpreted the city's definition of "foredune" is
7 not clear and objective.

8 Petitioners' arguments focus on the use of the phrase "relatively" flat or horizontal.
9 According to petitioners, "relatively" is an inherently subjective qualifier, which grants the
10 city considerable discretion in locating the landward extent of the foredune, and hence in
11 approving or denying proposed needed housing.

12 DLCD responds that the actual approval standard at issue is BMC 17.24.040(D),
13 which provides that "[n]o structure shall be located on identified foredunes." Petitioners do
14 not argue that BMC 17.24.040(D) is not clear and objective, DLCD observes, nor that the
15 BMC 16.42.010 definition of "foredune" is itself not clear and objective, to the extent that
16 definition is an "approval standard" for purposes of ORS 197.307(6). According to DLCD,
17 the key language in the BMC 16.42.010 definition of "foredune" is "slope," which the city
18 interpreted according to various dictionary definitions to mean essentially "not flat." Under
19 that straightforward interpretation, DLCD argues, the foredune ends when the landward
20 slope running down from the top of the dune ends, and as the footnote in the decision
21 explains, the city describes the land form that occurs after that transition with the language
22 "relatively flat or horizontal" simply to acknowledge the fact that ground elevation is never
23 absolutely level. Further, DLCD argues that LUBA has already held that determining
24 whether land is sloped is a clear and objective inquiry. *Home Builders Assoc. v. City of*
25 *Eugene*, 41 Or LUBA 370, 410-11 (2002) (rejecting an argument that a standard prohibiting
26 development on land that meets or exceeds 20 percent slope is not clear and objective,
27 because "the slope of a property is an objectively determinable fact").

1 We agree with DLCD that to the extent the city’s interpretation of the BMC
2 16.42.010 definition of “foredune” is subject to analysis under ORS 197.307(6), that
3 definition as interpreted is sufficiently clear and objective to pass muster under the statute.
4 As we held in *Home Builders Assoc.*, the slope of a property is an objectively determinable
5 fact. Under the city’s interpretation, the foredune ends where the slope leading down from
6 the top of the foredune ceases to incline downward, at the point where there is no longer any
7 measureable downward slope. That is about as clear and objective as a non-numeric
8 standard can get.⁴

9 In *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158, *aff’d*
10 158 Or App 1, 970 P2d 685 (1999), we described the kind of approval standards that violate
11 ORS 197.307(6) as including standards that “involve subjective, value-laden analyses that
12 are designed to balance or mitigate impacts of the development on (1) the property to be
13 developed or (2) the adjoining properties or community.” In *Rudell I*, we held that a code
14 standard requiring that the property be “safe to build” is not clear and objective. The BMC
15 16.42.010 definition of “foredune” as interpreted by the city does not involve a subjective,
16 value-laden analysis designed to balance or mitigate impacts of development, such as
17 whether the property is “safe to build.” It involves an objective determination of basic
18 topography and elevation, whether the proposed building site is located on a slope inclining
19 from the top of a foredune. With modern surveying equipment and technology, determining
20 whether a building site is located on a “slope” or not involves little subjectivity or value-
21 laden judgment.

⁴ We note that, under the second assignment of error, petitioners argue in favor of a definition of “foredune” for purposes of applying the city’s code and Goal 18, based on a federal code definition of “primary frontal dune,” to the effect that the “inland limit of the primary frontal dune occurs at the point where there is a distinct change from a relatively steep slope to a relatively mild slope.” Petition for Review 19 (quoting 44 CFR §59.1). In our view, petitioners’ preferred interpretation is far more unclear and subjective than even the most extreme characterization of the city’s interpretation of the code definition of “foredune.”

1 It is true, as petitioners emphasize, that the above-quoted finding and the
2 accompanying footnote describe the land form that may follow the point where the landward
3 slope of the foredune ceases as “relatively flat or horizontal” and “relatively level.”⁵ As the
4 footnote explains, that is not intended to introduce subjectivity or discretion into the
5 determination of the point where the slope ends, but rather acknowledges that no natural
6 terrain is ever *absolutely* flat. However, that the city acknowledges that terrain with no
7 measurable slope is not absolutely flat does not detract from the clarity and objectivity of the
8 BMC 16.42.010 definition of “foredune,” as interpreted by the city. That definition as
9 interpreted by the city is sufficiently clear and objective for purposes of ORS 197.307(6).

10 The first assignment of error is denied.

11 **SECOND ASSIGNMENT OF ERROR**

12 Under the second assignment of error, petitioners argue that the city’s interpretation
13 of BMC 16.42.010 definition of “foredune” is contrary to the text and context of relevant
14 statewide planning goal definitions. Further, petitioners argue that the city’s broad
15 interpretation of “foredune” potentially encroaches on and consumes other Goal 18-identified
16 land forms, such as “younger stabilized dune,” “interdune areas,” and “deflation plain,” and
17 is thus inconsistent with Goal 18. In addition, petitioners contend that the city’s view of
18 foredune is not supported by any of the delineations in the record from several experts, and is
19 contrary to the city’s historic practice of allowing development on what the city now deems
20 to be part of the reverse slope of the foredune. Finally, petitioners urge LUBA to interpret
21 “foredune” to hold in the first instance that for purposes of Goal 18 and implementing code
22 language the inland limit of a foredune occurs at the point where there is a “distinct change

⁵ As petitioners point out, the land form that exists landward of the point where the slope of a foredune ceases need not be flat or horizontal at all, or might be only briefly so. The slope could run into the base of a vertical bluff, or into the toe of an adjoining dune.

1 from a relatively steep slope to a relatively mild slope,” similar to the federal code definition
2 of “primary frontal dune.” Petition for Review 28.

3 **A. Goal 18 Definitions**

4 The Statewide Planning Goals do not provide a general definition of the term
5 “foredune,” as the city’s code does, but does provide several related definitions, including
6 “Dune” and “Foredune, Active.” The Goal definition of “Dune” is a collective term
7 comprising a number of more refined dune and foredune landforms, and is broadly described
8 as a “hill or ridge of sand built up by the wind along sandy coasts.”⁶ The Goal definition of
9 “Foredune, Active” describes that landform in relevant part as an “unstable barrier ridge of
10 sand paralleling the beach and subject to wind erosion, water erosion, and growth from new
11 sand deposits.”⁷ The Goals also define two additional sub-categories of foredune,

⁶ The Goals also define a number of sometimes overlapping sub-categories of “dunes,” which in turn include different types of “foredunes.”

“**DUNE, ACTIVE.** A dune that migrates, grows and diminishes from the effect of wind and supply of sand. Active dunes include all open sand dunes, active hummocks, and active foredunes.

“**DUNE, CONDITIONALLY STABLE.** A dune presently in a stable condition, but vulnerable to becoming active due to fragile vegetative cover.

“**DUNE, OLDER STABILIZED.** A dune that is stable from wind erosion, and that has significant soil development and that may include diverse forest cover. They include older foredunes.

“**DUNE, OPEN SAND.** A collective term for active, unvegetated dune landforms.

“**DUNE, RECENTLY STABILIZED.** A dune with sufficient vegetation to be stabilized from wind erosion, but with little, if any, development of soil or cohesion of the sand under the vegetation. Recently stabilized dunes include conditionally stable foredunes, conditionally stable dunes, dune complexes, and younger stabilized dunes.

“**DUNES, YOUNGER STABILIZED.** A wind-stable dune with weakly developed soils and vegetation.

“**DUNE, COMPLEX.** Various patterns of small dunes with partially stabilized intervening areas.”

⁷ The Goals provide the following definitions:

1 conditionally stable foredune and older foredune, that appear to build on the definition of
2 “Foredune, Active.” *See* n 7.

3 Petitioners note that both the definitions of “Dune” and “Foredune, Active” similarly
4 refer to a “ridge of sand” or “barrier ridge of sand.” According to petitioners, the essential
5 characteristic of the general term “dune” as well as the sub-type “foredune” for purposes of
6 Goal 18 is that it is a “ridge” of sand. A “foredune” is further characterized as a “barrier.”
7 Neither “ridge” nor “barrier” is defined in the Goals, but petitioners argue that the most
8 relevant dictionary definitions of “ridge” suggests that the term includes only the upper
9 elevation of a land form, not the entire land form that rises above a base elevation.⁸
10 “Barrier” clearly indicates something that blocks or impedes, presumably in this case wind
11 and waves. Petitioners argue:

12 “When delimiting the foredune or barrier ridge from the surroundings, one
13 must distinguish which portion of the landform acts as a barrier to the passage
14 of storm waves, and one must also distinguish between the upper part of the
15 landform, which is the foredune or dune ridge, and the lower part of the land
16 form, which is something else.” Petition for Review 19.

17 Petitioners contend that the city’s expansive interpretation of the BMC 16.42.010 definition
18 of “foredune” is inconsistent with these Goal definitions, because it includes the lower slopes

“**FOREDUNE, ACTIVE.** An unstable barrier ridge of sand paralleling the beach and subject to wind erosion, water erosion, and growth from new sand deposits. Active foredunes may include areas with beach grass, and occur in sand spits and at river mouths as well as elsewhere.

“**FOREDUNE, CONDITIONALLY STABLE.** An active foredune that has ceased growing in height and that has become conditionally stable with regard to wind erosion.

“**FOREDUNE, OLDER.** A conditionally stable foredune that has become wind stabilized by diverse vegetation and soil development.”

⁸ Webster’s Third New International Dictionary 1953 (1981) defines “ridge” in relevant part as:

“**2 a :** a range of hills or mountains or the upper part of such a range : an extended elevation between valleys * * * **3 :** a top or upper part esp. when long and narrow : CREST * * *”

1 of a sloping land form that cannot accurately be described as part of the “ridge” and do not
2 act as a “barrier” to storm waves.

3 DLCD responds that petitioners rely upon a selective reading of the dictionary
4 definition of “ridge,” which describes that term broadly to include a “range of hills or
5 mountains” and “an extended elevation between valleys.” Further, DLCD argues that
6 petitioners do not explain the basis for their view that only the top portion of a foredune, and
7 not the base of the foredune, plays a role in dissipating storm waves or preventing
8 overtopping. According to DLCD, it is not inconsistent with any of the Goal 18 definitions
9 or dictionary definitions of their constituent terms to view the foredune in the present case, as
10 the city did, as “essentially a ridge of sand extending from the beach to the west to its highest
11 elevation(s) and continuing easterly to its lowest elevations.” Record 10.

12 In any case, DLCD argues, even if the city’s interpretation of the BMC definition of
13 “foredune” is more expansive than the relevant Goal 18 definitions, the city is entitled to
14 regulate Goal 18 resources more restrictively than Goal 18 requires. *See Westfair Associates*
15 *Partnership v. Lane County*, 25 Or LUBA 729, 732-33 (1993) (to the extent a local
16 government does not run afoul of other goal requirements or other applicable legal
17 requirements, a local government may regulate more restrictively than the goal requires).

18 We agree with DLCD that the Goal definitions of “Dune” or “Foredune, Active” and
19 the relevant dictionary definitions of “ridge” do not compel the conclusion that a “foredune”
20 for purposes of Goal 18 includes only the top or upper portion of the land form. It is not
21 necessarily inconsistent with those definitions for the city to interpret the code definition of
22 “foredune” to include its entire lee or reverse slope. The city’s interpretation is at least as
23 consistent with the relevant Goal and dictionary definitions as the interpretation proffered by
24 petitioners.

25 In addition, DLCD is correct that the city may regulate dunes and foredunes more
26 restrictively than the minimum required by Goal 18, as long as that more restrictive

1 regulation does not conflict with any other Goal, administrative rule or statutory requirement.
2 The city has apparently chosen to regulate foredunes more restrictively or protectively than
3 Goal 18 requires. We note that the prohibition on development of “identified foredunes” at
4 BMC 17.24.040(D) appears to apply to all types of foredunes, not just the subset of active
5 foredunes, and conditionally stable foredunes subject to ocean undercutting or wave
6 overtopping on which Goal 18 prohibits development.⁹ That suggests that the city intended
7 to regulate foredunes more restrictively than Goal 18 does, at least in that regard.

8 Further, as noted earlier, petitioners request that we take official notice of a number
9 of documents related to the acknowledgment of the city’s comprehensive plan, and cites
10 those documents for the negative proposition that nothing in them expressly indicates an
11 intent on the city’s part to regulate foredunes more restrictively than Goal 18 requires. From
12 our review of those materials, that does not appear to be the case. We note that the July 25,
13 1983 staff report concluded that the city’s comprehensive plan and implementing regulations
14 complied with Goal 18, because the city had adopted a regulation, presumably the precursor
15 to BMC 17.24.040(D), that “prohibits all structures on all identified foredunes” in the CD-2
16 zone. July 25, 1983 staff report, p. 22. That supports the above reading of BMC
17 17.24.040(D), that the regulation prohibits development on all identified foredunes, even
18 stabilized foredunes not subject to ocean undercutting, etc., that are not otherwise subject to
19 the corresponding Goal 18 prohibition on development. While none of the staff reports
20 appear to discuss where and how to locate the landward edge of a foredune, that is not
21 particularly surprising, since Goal 18 itself does not specify how to locate the landward edge
22 of a foredune. Nonetheless, the acknowledgment documents do suggest that the city

⁹ Requirement 2 of Goal 18 provides, in relevant part:

“Local governments and state and federal agencies shall prohibit residential developments and commercial and industrial buildings on beaches, active foredunes, on other foredunes which are conditionally stable and that are subject to ocean undercutting or wave overtopping, and on interdune areas (deflation plains) that are subject to ocean flooding.”

1 intended to regulate foredunes more restrictively than required under Goal 18. That in turn
2 lends some support to DLCD’s view that, when the city chose to adopt a definition of
3 “foredune” phrased in different terms than related Goal definitions, and which specifically
4 describes the foredune to include the “lee or reverse slope (backside),” the city intended to
5 define foredune to include the entire “reverse slope,” not some unspecified portion of that
6 slope, even if Goal 18 itself would not require that the “foredune” encompass the entire
7 reverse slope.

8 **B. Other Goal 18 Land Forms**

9 Petitioners next argue that, even if the city’s interpretation of BMC 16.42.010
10 definition of “foredune” is consistent with related Goal 18 definitions of “Dune” and
11 “Foredune, Active,” the city’s interpretation necessarily brings BMC 16.42.010 into conflict
12 with other Goal-defined land forms, including “interdune areas” and “deflation plains.”

13 The Goals define “interdune areas” as “[l]ow-lying areas between higher sand
14 landforms and which are generally under water during part of the year. (See also Deflation
15 Plain.)” A deflation plain is apparently a sub-type of interdune area, defined as “[t]he broad
16 interdune area which is wind-scoured to the level of the summer water table.” No party
17 contends that there are any interdune areas or deflation plains in the vicinity of the subject
18 property. However, petitioners argue that an interdune area or deflation plain as defined
19 could theoretically occur at the bottom of the reverse slope of a foredune. If so, petitioners
20 argue, the BMC 16.42.010 definition of “foredune” as interpreted by the city could encroach
21 upon those goal-defined land forms, because the bottom of the landward slope of the
22 foredune could overlap with the characteristics of an interdune area or deflation plain. To
23 illustrate this argument, petitioners imagine a summertime stroll down the reverse slope of a
24 foredune toward an adjoining interdune area that is under water, or a deflation plain that is
25 wind-scoured to the level of the water table. At some point, petitioners posit, the stroller
26 could reach the water level before reaching the bottom of the slope. In that circumstance,

1 petitioners argue, the foredune as defined by the city would encroach upon the interdune area
2 or deflation plain. Petitioners contend that interpreting the BMC 16.42.010 definition of
3 “foredune” in a manner that could encroach upon Goal 18-defined land forms is necessarily
4 inconsistent with Goal 18. To avoid that result, petitioners contend, the city must interpret
5 BMC 16.42.010 to locate the landward edge of a foredune somewhere higher up its reverse
6 slope, not at the bottom of the slope. Again, petitioners suggest that the logical place to
7 locate the landward edge of a foredune is where there is a distinct change in the slope from a
8 relatively steep to relatively mild slope, consistent with the federal definition of “primary
9 frontal dune.”

10 DLCD responds that nothing in the definitions of “interdune area” or “deflation
11 plain,” or other Goal 18-defined landforms, prevents such landforms from beginning at the
12 point where the reverse slope of the foredune ends. Further, DLCD argues that the
13 geomorphic categories described in the Goal definitions are not mutually exclusive, and the
14 possibility of overlapping landforms in a particular circumstance is not necessarily
15 inconsistent with Goal 18. We understand DLCD to argue that if a foredune under the city’s
16 definition overlapped with a landform subject to a lesser level of protection under Goal 18 or
17 the city’s regulations, the city would necessarily apply the more restrictive level of
18 protection, and doing so is not inconsistent with Goal 18. DLCD repeats its argument that
19 the city is entitled to adopt regulations more restrictive than Goal 18 requires.

20 DLCD is generally correct that there is significant overlap among the various Goal 18
21 landform categories. For example, the general definition of “Dune” and the various
22 subcategories of “dunes” explicitly include the three types of foredunes. *See* n 6. A
23 conditionally stable foredune, for example, is an example of a recently stabilized dune. *Id.*
24 The same dune form (hill or ridge of sand), therefore, can equally be described as both a
25 “dune” and a “foredune,” if it meets the characteristics of both. Even within the sub-
26 categories of “dunes” there is some overlap: the subcategory of “recently stabilized dunes”

1 also includes “younger stabilized dunes.”¹⁰ This definitional scheme does not suggest
2 particularly rigid or mutually exclusive boundaries, at least between categories and sub-
3 categories of dunes and foredunes.

4 We also generally agree with DLCD that determining where one Goal 18 landform
5 ends and another begins may depend on which landform is more restrictively regulated,
6 either under the Goals or under local code definitions. If there is doubt regarding the
7 location of the transition between a more restrictively regulated landform and a less
8 restrictively regulated landform, that doubt should be resolved in favor of the more
9 restrictively regulated landform. As explained above, the city is entitled to regulate
10 foredunes more restrictively or protectively than required under Goal 18, and the city has
11 apparently chosen to do so. Thus, if the city had chosen to define “foredune” expansively in
12 a manner that results in encroachment upon a lesser regulated landform, such as an older,
13 younger, or recently stabilized dune, that would not necessarily be inconsistent with Goal
14 18.¹¹ In the case of interdune areas subject to ocean flooding and wet deflation plains, Goal
15 18 and the city’s regulations both prohibit any development of those landforms, in the same
16 manner as foredunes, so those landforms are subject to the same level of restrictions. If the
17 city’s definition of foredune happened to encroach upon or overlap a portion of an interdune

¹⁰ The term “younger stabilized dune,” although defined in the Goals, does not appear in Goal 18, or in any goal, as far as we can tell. From its description and inclusion in the sub-category of recently stabilized dune, it seems to be a more stabilized variant of a recently stabilized dune, perhaps an intermediate form between a recently stabilized dune and an older stabilized dune.

¹¹ In the present case we understand petitioners to argue, based on several studies, that most of the area behind the top of the foredune at issue is a “younger stabilized dune,” based on soil stability and vegetational characteristics. We understand petitioners to argue that the area behind the dune with the soil and vegetation characteristics of a “younger stabilized dune” cannot therefore be part of the foredune, even if located on the slope inclining from the top of the foredune. However, as explained above, there is considerable overlap between dune and foredune categories, and the same basic dune form (a “hill or ridge of sand”) can be described as both a dune and a foredune. Stated differently, the fact that the soil and vegetational characteristics of a portion of a dune form fit the description of one or more dune sub-categories does not mean that the dune is not also a foredune. Further, different portions of the same foredune landform could be active, conditionally stabilized or older, depending on localized soil and vegetational characteristics.

1 area or wet deflation plain, as in petitioners’ hypothetical, there would be no particular
2 regulatory consequence that we can see for purposes of Goal 18.

3 With one exception, the relevant Goal definitions do not attempt to describe how or
4 where to locate the transition between one Goal 18 landform and another. The exception is
5 the definition of “beach,” described as “[g]ently sloping areas of loose material (e.g., sand,
6 gravel, and cobbles) that extend landward from the low-water line to a point where there is a
7 definite change in the material type or landform, or to the line of vegetation.” That definition
8 describes three ways that a beach can end or transition into a different landform. The most
9 likely Goal 18 landform adjoining a beach would be a foredune. Read together with the three
10 Goal definitions of “foredune,” it is reasonably clear that one way to determine where a
11 beach ends and a foredune begins is based on slope: the point where the slope up from the
12 low-water line is no longer “gentl[e]” and there is a “definite change” to a steeper slope.
13 That is consistent with petitioners’ view that the *landward* boundary of a foredune should be
14 located not at the bottom of its reverse slope but at the point on the reverse slope where there
15 is a distinct change in the degree of slope. But as noted the Goal definitions do not describe
16 even in general terms where and how to locate the landward edge of a foredune, as it
17 effectively does for the seaward edge of a foredune in the definition of “beach.” Nothing in
18 Goal 18 or other Goal definitions would prescribe how or where to determine the boundary
19 between the reverse slope of a foredune and adjoining Goal 18 landforms that are not
20 beaches. The goal and definitions are simply silent in that regard. In short, petitioners have
21 not demonstrated that it is necessarily inconsistent with Goal 18 to define a highly protected
22 Goal 18 landform in a geographically expansive way, even if that definition would encroach
23 upon the geographic area of lesser or equally regulated Goal 18 landforms.

1 **C. Prior Delineations and the City’s Practice of Approving Nearby**
2 **Development**

3 Finally, petitioners argue that the city’s interpretation is (1) contrary to four expert
4 studies commissioned by the city, and (2) contrary to the city’s track record of approving
5 development in the area near the subject property.

6 **1. Prior Delineations of the Foregone**

7 The record includes information from four studies commissioned by the city for
8 various purposes over a number of years that all locate the toe or landward edge of the
9 foregone west of the proposed building site on the subject property. According to
10 petitioners, the four studies were based either on the Goal definitions of dune and foregone,
11 which focus on soil stability and vegetation characteristics, or on the federal definition of
12 “primary frontal dune,” which focuses on the point where there is a distinct change in slope.
13 Petitioners relied upon one of these studies to support their position, based on the federal
14 definition of “primary frontal dune,” that the foregone ends where “there is a distinct change
15 from a relatively steep slope to a relatively mild slope,” which petitioners contend occurs
16 between the 16 and 17-foot elevation, west of the proposed building site.

17 Petitioners contend that none of these studies applied the city’s current interpretation
18 of the BMC 16.42.010 definition of “foregone” to include the entire reverse slope of the
19 foregone. According to petitioners, the city’s interpretation “would render meaningless the
20 State Goal classification system of dunes and foregoes, the Federal definition of primary
21 frontal dune, and the opinion of every expert to study this dune.” Petition for Review 25.

22 It is not clear whether the foregoing argument is an evidentiary challenge or a
23 misconstruction of law challenge, or both. To the extent it is an evidentiary challenge, that
24 four studies delineated the landward edge of the foregone using different standards than the
25 applicable BMC 16.42.010 definition of “foregone” does nothing to undermine the city’s
26 conclusion based on that definition that the subject property is located on the reverse slope of
27 the foregone, and thus located on the foregone. There is no factual dispute in this case that

1 the proposed building site is located on a slope that inclines down from the top of the
2 foredune.

3 To the extent the foregoing alleges a misconstruction of law, that argument does not
4 add anything to the above analysis rejecting petitioners’ argument that the city’s
5 interpretation is inconsistent with Goal 18 or the relevant Goal definitions. With respect to
6 the federal code definition of “primary frontal dune,” the city found that that federal
7 definition is intended to determine the location of the flood hazard velocity zone and has no
8 bearing on the meaning of “foredune” under Goal 18 or the city’s definition. Record 15. We
9 agree with the city that it is not bound to apply the federal code definition of “primary frontal
10 zone” in determining the landward edge of the foredune or the meaning of “foredune” as
11 used in Goal 18 and the city’s definition.

12 **2. Prior Development Approvals**

13 Petitioners argue that since 1988 the city has approved nine structures in the area east
14 of the top of the foredune, based in part on prior studies that located the landward edge of the
15 foredune somewhere on the slope inclining down from the top. According to petitioners,
16 some or all of those structures are now located on the foredune under the city’s interpretation
17 of BMC 16.42.010. Petitioners argue that the city’s interpretation is “contrary to its track
18 record in approving development proposals along this stretch of the Bandon coast.” Petition
19 for Review 25.

20 The city concluded that the proposed building site is located on the foredune under its
21 interpretation of BMC 16.42.010, but did not purport to delineate the landward edge of the
22 foredune under its interpretation with respect to any particular property or other existing
23 dwellings, so we cannot confirm petitioners’ argument that some or all of the dwellings
24 approved since 1988 are located on the foredune under the city’s interpretation. Even
25 assuming that is the case, however, petitioners’ argument does not provide a basis to reverse
26 or remand the decision before us.

1 There appears to be no dispute that in 1994 the city created a local improvement
2 district that includes an area that encompasses the existing developed lots in the South Jetty
3 area. The subject property is located west of that district boundary. It appears that the city’s
4 practice over the intervening years has been to treat lots within the local improvement district
5 as potentially developable lots, while treating lots located west of the district boundary, such
6 as the subject property, as undevelopable. The local improvement district boundary runs
7 roughly parallel to the top of the foredune, but it follows property line boundaries, and
8 presumably has little or no topographic relationship to the landward edge of the foredune.
9 Based on topographic maps in the record, which are not very detailed at that scale, it may
10 well be the case that at least some of the existing dwellings approved since 1988 are located
11 on slopes inclining down from the top of the foredune, and are therefore located on the
12 foredune under the city’s interpretation. Even if so, however, that would simply mean that
13 the city might have erred in approving those particular dwellings. Petitioners do not explain
14 why the city is compelled to repeat previous errors or why such errors would preclude the
15 city from adopting and applying a correct interpretation of BMC 16.42.010 in this case.

16 The second assignment of error is denied.

17 **THIRD ASSIGNMENT OF ERROR**

18 Under the third assignment of error, petitioners assume that the city’s interpretation
19 of the BMC 16.42.010 definition of “foredune” is correct and is not inconsistent with Goal
20 18. However, petitioners argue that even if so the city’s interpretation violates Statewide
21 Planning Goals 9 (Economic Development) and 10 (Housing), by effectively reducing the
22 supply of land available to provide for economic development and housing needs.
23 According to petitioners, the city’s interpretation of the BMC 16.42.010 definition of
24 “foredune” expands the landward boundary of foredunes eastward in a manner that
25 potentially encompasses a large area of land inventoried for economic or residential
26 development under Goals 9 and 10, effectively prohibiting all development over an area

1 planned and zoned for and in many cases already developed with residential uses. Under this
2 circumstance, petitioners argue, the city is obligated to adopt findings addressing whether the
3 city still retains an adequate inventory of commercial, industrial and residentially-zoned
4 lands to meet the city’s identified needs under Goals 9 and 10. Citing ORS 197.829(1)(d),
5 petitioners argue that the city’s interpretation of BMC 16.42.010 must be consistent with the
6 statewide planning goals, even though the challenged decision simply denies a permit
7 application and does not involve a comprehensive plan or land use regulation amendment
8 subject to the goals.¹²

9 DLCD responds the city has no obligation to consider whether its Goal 9 and 10
10 inventories remain adequate to satisfy the land supply requirements of those goals, in the
11 course of interpreting and applying a code definition to approve or deny a conditional use
12 permit application. According to DLCD, such an obligation could be triggered only if the
13 challenged decision was a post-acknowledgment plan amendment to the city’s
14 comprehensive plan or land use regulations.¹³

15 We agree with DLCD. The cases petitioners cite in support of the proposition that
16 the city must ensure that its Goal 9 and 10 inventories remain adequate all involve post-
17 acknowledgment plan amendment decisions. Such decisions must be made in compliance
18 with the goals, which apply directly to the amendment. Petitioners cite no cases or authority
19 that would impose that obligation on the city in the course of issuing a permit decision under

¹² ORS 197.829(1) provides, in relevant part:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

“* * * * *

“(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

¹³ The city in its response brief disputes that the subject property or any of the lots in the South Jetty area are part of the city’s Goal 9 or Goal 10 inventory. We need not reach that argument.

1 its acknowledged plan and land use ordinance. ORS 197.829(1)(d) merely authorizes LUBA
2 to reject an interpretation of a comprehensive plan provision or land use regulation that
3 implements a statute, land use goal or rule, if the interpretation is contrary to the statute, land
4 use goal or rule that the plan provision or regulation implements. BMC 16.42.010
5 implements Goal 18, but does not implement Goals 9 and 10, or any statute or rule cited to
6 us. Nothing in Goals 9 or 10 say anything about how and where to locate the landward edge
7 of a foredune. ORS 197.829(1)(d) is a much more limited vehicle than petitioners suppose,
8 and it does not authorize LUBA to require the city to evaluate the adequacy of the city's
9 Goal 9 and 10 inventory in the context of interpreting a code provision applied to a permit
10 application.

11 The third assignment of error is denied.

12 **FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

13 The fourth and fifth assignments of error challenge the city's findings denying the
14 conditional use permit application for noncompliance with two code standards regarding lot
15 and street frontage and sanitary services. We need not address these assignments of error,
16 because to sustain denial of a permit application the city need identify only one adequate
17 basis for denial. We rejected above the assignments of error directed at the city's primary
18 basis for denial under BMC 17.24.040(D). Therefore, the city's decision must be affirmed
19 regardless of how we would resolve the fourth and fifth assignments of error.

20 We do not reach the fourth and fifth assignments of error.

21 The city's decision is affirmed.