

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 OREGON COAST ALLIANCE,

4 *Petitioner,*

5 vs.

6 CURRY COUNTY,

7 *Respondent,*

8 and

9 CROOK FAMILY LLC,

10 *Intervenor-Respondent.*

11 LUBA No. 2013-033

12 OREGON SHORES CONSERVATION COALITION,

13 *Petitioner,*

14 vs.

15 CURRY COUNTY,

16 *Respondent,*

17 and

18 CROOK FAMILY LLC,

19 *Intervenor-Respondent.*

20 LUBA No. 2013-034

21 FINAL OPINION

22 AND ORDER

23 Appeal from Curry County.

24 Sean T. Malone, Eugene, filed a petition for review and argued on behalf of petitioner
25 Oregon Coast Alliance.

26 Courtney Johnson, Portland, filed a petition for review and argued on behalf of
27 petitioner Oregon Shores Conservation Coalition. With her on the brief was Crag Law
28 Center.

1 M. Gerard Herbage, County Counsel, Gold Beach, filed a response brief and argued
2 on behalf of respondent.

3
4 Damien R. Hall, Portland, filed a response brief and argued on behalf of intervenor-
5 respondent. With him on the brief were Timothy V. Ramis and Jordan Ramis PC.

6
7 RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,
8 participated in the decision.

9
10 REMANDED

10/11/2013

11
12 You are entitled to judicial review of this Order. Judicial review is governed by the
13 provisions of ORS 197.850.

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NATURE OF THE DECISION

Petitioner Oregon Coast Alliance (OCA) and petitioner Oregon Shores Conservation Coalition (Shores) appeal a county decision approving a destination resort tentative master plan and granting tentative subdivision approval.

FACTS

Intervenor proposes to develop a destination resort on its property located in the county. The challenged decision is the county’s decision on remand from *Oregon Coast Alliance v. Curry County*, 63 Or LUBA 324 (2011) (*Crook Point I*). We take the relevant facts from *Crook Point I*:

“The proposed destination resort is located on a 378-acre tract zoned Forestry-Grazing. The tract is bounded on the west by the Pacific Ocean, on the north by the Crook Point unit of the Oregon Islands National Wildlife Refuge (NWR) and Pistol River State Park, and on the south by Boardman State Park. Most of the tract is bordered on the east by Highway 101, although a portion of the tract is located east of the highway. Significant portions of the subject property have slopes greater than 25 percent, and are thus subject to a county Natural Hazard Overlay Zone. The property is developed with farm outbuildings and several single-family dwellings used as vacation rentals, and is located between the cities of Gold Beach and Brookings.”

“ * * * * *

“The application proposed an 18-hole golf course, a nine-hole golf course, golf shop, golf lodge, spa lodge, and interpretative center, an equestrian center, 175 overnight lodging units, resort owner and employee housing, and a land division into 11 lots (10 residential and one large remainder lot). * * *” *Id.* at 327.

After our decision in *Crook Point I*, the county accepted additional evidence and held four hearings, and adopted an order approving the application with conditions. These appeals followed.

1 **COASTAL SHORELANDS BOUNDARY**

2 **A. Introduction**

3 The subject property is bounded by the Pacific Ocean on its west. Statewide Planning
4 Goal 17 (Coastal Shorelands) requires the county to identify coastal shorelands, and establish
5 policies and regulate uses of coastal shorelands in accordance with the standards set out in
6 Goal 17. “Coastal Shorelands” is defined in the definitions to the Goals as “[t]hose areas
7 immediately adjacent to the ocean, all estuaries and associated wetlands, and coastal lakes.”

8 Goal 17 requires the county to identify as coastal shorelands “[l]ands contiguous with
9 the ocean, estuaries, and coastal lakes,” and provides that coastal shorelands must include, at
10 a minimum, “[a]reas subject to ocean flooding and lands within 100 feet of the ocean shore
11 * * *” as well as “[a]djacent areas of geologic instability where the geologic instability is
12 related to or will impact a coastal water body[.]”¹ One of the major disputes between the
13 parties after our decision in *Crook Point I* continues to be the exact location of the “coastal

¹ As relevant here, Goal 17 provides:

“Lands contiguous with the ocean, estuaries, and coastal lakes shall be identified as coastal shorelands. The extent of shorelands shall include at least:

- “1. Areas subject to ocean flooding and lands within 100 feet of the ocean shore or within 50 feet of an estuary or a coastal lake;
- “2. Adjacent areas of geologic instability where the geologic instability is related to or will impact a coastal water body;
- “3. Natural or man-made riparian resources, especially vegetation necessary to stabilize the shoreline and to maintain water quality and temperature necessary for the maintenance of fish habitat and spawning areas;
- “4. Areas of significant shoreland and wetland biological habitats whose habitat quality is primarily derived from or related to the association with coastal water areas;
- “* * * * *
- “6. Areas of exceptional aesthetic or scenic quality, where the quality is primarily derived from or related to the association with coastal water areas; and
- “7. Coastal Headlands.”

1 shorelands” boundary on the subject property.² Understanding the parties’ central dispute
2 and how we resolve that dispute requires a fairly detailed explanation of the county’s
3 acknowledged comprehensive plan program to implement Goal 17.

4 As we explained in *Crook Point I*, the county has adopted as a part of the Curry
5 County Comprehensive Plan (CCCP) a map of the location of the shorelands boundary
6 throughout the county. *Id.* at 331; Record 595.³ We explained in *Crook Point I* that “the
7 scale of the map is such that it is impossible to determine the exact location of the boundary
8 [on the subject property]. * * *” *Id.* The coastal shorelands boundary is identified on the
9 map by a thick dotted line that is mostly adjacent to and parallel with Highway 101. The
10 thick dotted line is probably several hundred feet wide.

11 The CCCP text also defines the coastal shorelands boundary on the subject property,
12 as the “top of the cliff along the seacliff shoreline.” CCCP 15.3, Segment 16. CCCP 15.3
13 provides a method for determining the exact location of the coastal shorelands boundary in
14 the circumstances presented here, where the coastal shorelands boundary on the subject
15 property is defined in the comprehensive plan text as the “top of the cliff along the seacliff
16 shoreline.” CCCP 15.3 provides:

17 “The location of the coastal shorelands boundary is shown on the Coastal
18 Shorelands Inventory map (see Comprehensive Plan Inventory Atlas). * * *

19 “The coastal shoreland boundary defined by the Curry County Comprehensive
20 Plan generally parallels the Oregon Coast Highway in the southern two-thirds
21 of the county except in the larger estuaries where the boundary extends
22 upstream to the head of tide. *Where the coastal shorelands boundary is*
23 *defined as the top of the seacliff; however, it will be modified on a case by*
24 *case basis to be a specific line as defined by analysis of the cliff erosion*

² We explained in *Crook Point I* that the exact location of the coastal shorelands boundary on the subject property is important because lands located to the west of the boundary are subject to different and more rigorous development standards. *Id.* at 331.

³ The record includes the record from the county’s previous decision that was appealed in *Crook Point I*. Citations to the record of the proceedings on remand are “Record XXX” or “Supplemental Record XXX.”

1 geological hazard as required under [Curry County Zoning Ordinance
2 Section 3.252].

3 “A specific description of the coastal shorelands boundary in Curry County is
4 provided below and is shown on the ‘Coastal Shorelands’ inventory map.”
5 (Emphasis added.)

6 **B. The County’s Decision**

7 In its initial decision challenged in *Crook Point I*, the county adopted the boundary
8 that was proposed by the applicants based on a “Geologic Hazard Overview” submitted by
9 intervenor. *Crook Point I* at 328. That boundary closely paralleled the shoreline and
10 included only cliff areas directly affected by wave erosion. Petitioners challenged the
11 boundary location and argued that the county failed to comply with the requirement in CCCP
12 15.3 that any boundary modification be based on a geologic hazard analysis under Curry
13 County Zoning Ordinance (CCZO) 3.252. Petitioners also argued that the county
14 misconstrued the provisions of the CCCP that implement Goal 17 in failing to include within
15 the boundary “[a]djacent areas of geologic instability.”

16 In resolving the assignment of error, we first noted that the boundary shown on the
17 comprehensive plan map “generally depict[s] the shoreland boundary along most of the
18 subject property as immediately adjacent and parallel to Highway 101, with discernible land
19 areas westward of the dotted line in many places.” *Crook Point I* at 333. Where the
20 comprehensive plan map shows Highway 101 is the shoreland boundary, no additional
21 analysis is required. However, where the comprehensive plan text designates the top of the
22 sea cliff as the shoreland boundary, additional analysis is required. We agreed with
23 petitioners that where the top of the sea cliff is the shoreland boundary, the boundary includes
24 “not only those lower portions of a cliff subject to direct wave action, but also those adjacent
25 portions that are geologically unstable.” *Id.* at 334. We also agreed with petitioner that the
26 boundary location must be established based on a geologic hazard analysis conducted
27 pursuant to CCZO 3.252. *Id.*

1 On remand, intervenor’s certified engineering geologist submitted a geologic hazard
2 analysis (the Rodine Report) that identified the coastal shorelands boundary “at the elevation
3 of the upper limit of hydraulic action of the ocean.” Supplemental Record 32. That analysis
4 also identified “adjacent areas of geologic instability related to, or impacting on, the ocean[.]”
5 *Id.*; Supplemental Record 41, 46-55. The coastal shorelands boundary identified in the
6 Rodine Report was adopted by the county in its order approving the application. The
7 boundary adopted by the county generally parallels the shoreline and in many areas is located
8 along the eastern edge of the ocean shore or at the mid-point of the seacliffs. Supplemental
9 Record 47-53.

10 In adopting the boundary, the county interpreted the CCCP’s Goal 17 element to
11 require that the coastal shorelands boundary include adjacent geologically unstable lands only
12 if the instability is related to or will impact a coastal water body, as the language of Goal 17
13 itself requires. Record 25. The county also concluded that the Rodine Report was sufficient
14 to satisfy the CCCP 15.3 requirement that the coastal shorelands boundary line be established
15 based on the analysis required under CCZO 3.252. Record 26.

16 The county further concluded that the boundary is consistent with the CCCP 15.3
17 definition of the boundary as the “top of the cliff along the seacliff shoreline.” Finally, the
18 county concluded that the boundary is consistent with the requirement in Goal 17 that the
19 coastal shorelands boundary include, as relevant here, “lands within 100 feet of the ocean
20 shore * * *.” Record 27. Petitioners challenge those conclusions in this appeal.

21 **C. Post Acknowledgement Plan Amendment**

22 As explained above, the county’s adopted and acknowledged comprehensive plan
23 map identifies the location of the coastal shorelands boundary, and the comprehensive plan
24 text further identifies that boundary for the subject property. We understand petitioners to
25 argue that in adopting the challenged decision, the county misconstrued the applicable law in
26 impermissibly amending the location of the coastal shorelands boundary on the

1 acknowledged map without processing the decision as a post-acknowledgement plan
2 amendment (PAPA) pursuant to the requirements in ORS 197.610. OCA Petition for Review
3 18-20; Shores Petition for Review 13-14.

4 Intervenor responds that petitioners are precluded by the holding in *Beck v. City of*
5 *Tillamook*, 313 Or 148, 831 P2d 678 (1992) from raising that issue. Intervenor points out
6 that in the decision challenged in *Crook Point I*, the county modified the location of the
7 coastal shorelands boundary pursuant to the process set out in CCCP 15.3. Petitioners argued
8 that the county failed to follow the process set out in CCCP 15.3 because the modified
9 boundary location was not based on a geologic hazard analysis conducted according to CCZO
10 3.252. But no party argued in *Crook Point I* that the county’s decision was a PAPA that
11 amended the county’s acknowledged comprehensive plan map.

12 We agree with intervenor that petitioners are precluded by the holding in *Beck* from
13 challenging the county’s decision on the basis that the county erred in failing to process the
14 decision as a PAPA. Petitioners do not explain why the issue that is raised in OCA’s fourth
15 assignment of error and Shores’ second subassignment of error under the first assignment of
16 error could not have been raised in the challenge to the county’s initial decision that we
17 resolved in *Crook Point I*. That issue could have been raised in the appeal of the county’s
18 initial decision, but was not.

19 OCA’s fourth assignment of error and a portion of Shores’ second subassignment of
20 error under the first assignment of error are denied.

21 **D. Adjacent Areas of Geologic Instability**

22 Goal 17 provides that coastal shorelands must include, as relevant here, “adjacent
23 areas of geologic instability where the geologic instability is related to or will impact a
24 coastal water body[.]” The county’s Goal 17 element, however, provides that coastal
25 shorelands includes “adjacent areas of geologic instability,” without the express qualifiers
26 included in the Goal 17 description, which limit the types of geologic instability to those that

1 are related to or will impact a coastal water body. In response to arguments that the county's
2 Goal 17 element is broader than Goal 17, the county interpreted the CCCP's Goal 17 element
3 consistent with Goal 17 to require only those lands adjacent to the coastal shorelands
4 boundary to be included where the geologic instability is "related to or will impact a coastal
5 water body," and not to require the coastal shorelands boundary to include *all* adjacent areas
6 of geologic instability. Stated differently, the county interpreted the CCCP's Goal 17 element
7 to be as protective as, but not more protective than, Goal 17.

8 Petitioners argue that the CCCP Goal 17 element is more protective of coastal
9 shorelands than Goal 17, and that the county erred in interpreting the CCCP to the contrary.
10 OCA Petition for Review 6-13; Shores Petition for Review 10. Petitioners argue that the text
11 of CCCP 15.2 requires the coastal shorelands boundary to be located in a manner that places
12 more land within the boundary than is required by Goal 17's language, by requiring adjacent
13 areas of geologic instability to be included in the boundary even where the geologic
14 instability is not associated with a coastal water body.

15 We disagree with petitioners that the county erred in interpreting CCCP 15.2 to
16 require what Goal 17 itself requires, and not more. CCCP 15.2 provides in relevant part:

17 *"Goal 17 defines coastal shorelands as land contiguous with the ocean,*
18 *estuaries and coastal lakes. It further states that the extent of shorelands shall*
19 *include at least:*

20 "1. lands which are directly affected by the hydraulic actions of the coastal
21 water body;

22 "2. adjacent areas of geologic instability[.]" (Emphases added.)

23 Contrary to petitioners' and the county's reading, CCCP 15.2 cannot reasonably be
24 understood to be a county-adopted definition of the term "coastal shorelands." Rather, CCCP
25 15.2 is essentially the CCCP's restatement, abbreviated in some instances, of Goal 17's
26 requirements. *See* n 1. The fact that the county chose to abbreviate in the CCCP a summary
27 of Goal 17's requirement to identify coastal shorelands in the way that it did does not support

1 a conclusion that the county chose to adopt a Goal 17 program that is more protective than
2 the goal.

3 OCA's first, second, and third assignments of error and a portion of Shores' first
4 subassignment of error under the first assignment of error are denied.

5 **E. CCCP 15.3 & CCZO 3.252 Cliff Erosion Geologic Hazard Analysis**

6 As explained above, the CCCP text identifies the location of the coastal shorelands
7 boundary that is shown on the comprehensive plan map as "the top of the seacliff * * *."
8 CCCP 15.3 allows the specific boundary of the coastal shorelands on the subject property to
9 be located "as defined by analysis of the cliff erosion geological hazard as required under
10 [CCZO Section 3.252.]"⁴ Although CCCP 15.3 could be clearer, to be consistent with Goal
11 17 the coastal shorelands boundary that is identified by that CCZO 3.252 analysis must
12 extend a sufficient distance landward to include all areas of "cliff erosion geological hazard"
13 that are either "related to" the ocean or "will impact" the ocean. CCZO 3.252 in turn requires
14 the applicant for development in a natural hazards overlay zone to:

15 "present a geologic hazard assessment prepared by a geologist at the
16 applicant's expense that identifies site specific geologic hazards, associated
17 levels of risk and the suitability of the site for the development activity in view
18 of such hazards. The geologic hazard assessment shall include an analysis of
19 the risk of geologic hazards on the subject property, on contiguous and
20 adjacent property and on upslope and downslope properties that may be at risk
21 from, or pose a risk to, the development activity. The geologic hazard
22 assessment shall also assess erosion and any increase in storm water runoff
23 and any diversion or alteration of natural storm water runoff patterns resulting
24 from the development activity. The geologic hazard assessment shall include
25 one of the following:

26 "a) A certification that the development activity can be accomplished
27 without measures to mitigate or control the risk of geologic hazard to
28 the subject property or to adjacent properties resulting from the
29 proposed development activity.

⁴ CCZO 3.252 is set out in the appendix to this opinion.

1 “b) A statement that there is an elevated risk posed to the subject property
2 or to adjacent properties by geologic hazards that requires mitigation
3 measures in order for the development activity to be undertaken safely
4 and within the purposes of Section 3.250.”

5 In adopting the modified boundary, the county interpreted CCCP 15.3:

6 “As used in Comprehensive Plan 15.3 and Section 16, the term ‘top of the
7 seacliff’ and derivations thereof, is intended as a placekeeper and general
8 guide as to the location of the Coastal Shorelands line, which is to be
9 developed by site specific and on-site investigation and assessment of natural
10 hazards. As used therein, ‘top of the seacliff’ does not serve as a hard
11 minimum elevation as to dictate the alignment of the Coastal Shorelands line.
12 For one reason, as is the case here, the ‘top of the seacliff’ is not always an
13 accurate description of the terrain. The site’s two miles of coastline has
14 varying topography and is not accurately characterized as a continuous
15 seacliff.” Record 25.

16 **1. Consistency with the Comprehensive Plan**

17 Shores argues that the county’s interpretation of CCCP 15.3 is inconsistent with the
18 text of CCCP 15.3 that defines the coastal shorelands boundary on the subject property as
19 “the *top of the seacliff * * **,” because the boundary adopted by the county closely parallels
20 the shoreline and in many areas is located along the bottom of the seacliffs or at the mid-point
21 of the seacliffs. Shores also argues that the county’s interpretation of CCCP 15.3 is
22 inconsistent with the comprehensive plan map that locates the shorelands boundary line east
23 of the subject property in many places. Shores Petition for Review 12-13. Shores points to
24 the comprehensive plan map itself and to *Crook Point I*, where we noted that the boundary
25 shown on the comprehensive plan map “generally depict[s] the shoreland boundary along
26 most of the subject property as immediately adjacent and parallel to Highway 101, with
27 discernible land areas westward of the dotted line in many places.” *Crook Point I* at 333.

28 Intervenor responds that the county’s interpretation of CCCP 15.3 is not inconsistent
29 with the express language of the CCCP or with the comprehensive plan map, and is required
30 to be affirmed under ORS 197.829(1)(a). As intervenor explains it, CCCP 15.3 contemplates
31 that comprehensive plan map does not show the precise location of the coastal shorelands

1 boundary on the subject property, and the “top of the seacliffs” does not describe the precise
2 location of the boundary either. According to intervenor, the precise location may be located
3 as the result of an analysis of the geologic hazard from cliff erosion conducted under CCZO
4 3.252, and that CCZO 3.252 cliff erosion geologic hazard analysis establishes the specific
5 boundary line.

6 We agree with intervenor that the county’s interpretation of the phrase “top of the cliff
7 along the seacliff shoreline” is not inconsistent with the express language of CCCP 15.3. The
8 phrase “top of the cliff along the seacliff shoreline” can be interpreted to refer to a conceptual
9 point that describes the landward edge of a cliff erosion hazard area, rather than the highest
10 elevation of a seacliff. The county’s interpretation of the phrase as a “general guide as to the
11 location of the [boundary] line” is plausible. *Siporen v. City of Medford*, 349 Or 247, 259,
12 243 P3d 776 (2010).

13 We also agree with intervenor that the county’s interpretation of CCCP 15.3 is not
14 inconsistent with the comprehensive plan map. We understand the county to have concluded
15 that its comprehensive plan map essentially shows the coastal shorelands boundary in
16 conceptual terms because the location of the boundary on the subject property is not easily
17 discernible on the map due to its small scale. Given that conclusion and the fact that (1) the
18 plain language of CCCP 15.3 directs the county to locate the specific boundary based on the
19 CCZO 3.252 cliff erosion geologic hazard analysis and (2) the text of CCCP 15.3 includes
20 nothing that directs the county to use or rely on the map to locate the “top of the seacliff,” the
21 county’s interpretation of the conceptual boundary shown on its comprehensive plan map and
22 the process set out in CCCP 15.3 to specifically locate the boundary on the subject property is
23 plausible, and is required to be affirmed under ORS 197.829(1)(a).

24 Shores’ first and second subassignments of error under the first assignment of error
25 are denied.

1 **2. “Cliff Erosion”**

2 CCCP 15.3 and CCZO 3.252 do not fit well together, and the text of CCCP 15.3
3 sheds little light on how the “analysis of the cliff erosion geological hazard as required under
4 CCZO 3.252” is to be used to locate the coastal shorelands boundary. However, because
5 CCCP 15.3 was adopted to implement Goal 17, the county’s interpretation of CCCP 15.3
6 must not be inconsistent with Goal 17. ORS 197.829(1)(d). At a minimum, as we explain
7 below, in order for the county’s interpretation of CCCP 15.3 to be consistent with Goal 17,
8 the cliff erosion geologic hazard analysis must consider geological instability from all causes
9 of “cliff erosion” where the geologic instability could “impact” the ocean.

10 Petitioners argue that the express language of CCZO 3.252 requires the county to
11 assess *all* geologic hazards anywhere on the property, such as from earthquakes, and not only
12 geologically unstable areas that are related to or will impact a coastal water body. We
13 disagree with petitioners that the CCZO 3.252 analysis that is performed for the purpose of
14 modifying the coastal shorelands boundary must assess all geologic hazards everywhere on
15 the property. As intervenor explains it, the Rodine Report is a limited geographic and
16 informational assessment of the geologic hazards only on the portion of the subject property
17 closest to the ocean and only in order to establish the location of the coastal shorelands
18 boundary, prepared and submitted in response to our remand of the county’s decision
19 regarding the location of the coastal shorelands boundary on the property. As intervenor
20 explains it, an additional geologic hazards assessment will be performed in accordance with
21 CCZO 3.252 that will consider geologic hazards on the entire property, in order to comply
22 with CCZO 4.083(20) and to allow the county to determine whether the natural hazards
23 overlay zone criteria are met, consistent with condition 23.

24 The county found:

25 “The * * * argument confuses the multiple natural hazards assessments that
26 are required of the Applicant. The assessment in question is intended, per
27 [CCCP] 15.3, to assist in identification of the Coastal Shorelands boundary,

1 by relative location to which the standards applicable to elements of the resort
2 are determined. Further, site and development specific natural hazards
3 assessments will occur pursuant to condition 23, but the location of the
4 Coastal Shorelands boundary is irrespective of the proposed development.”
5 Record 26.

6 As we understand the above findings, the county concluded that CCCP 15.3 requires a partial
7 assessment of the cliff erosion geologic hazard in the area that may reasonably be located
8 within the coastal shorelands boundary, and does not require completion of all of the
9 requirements of CCZO 3.252 for either that area or the entire property at the threshold stage
10 of setting the boundary location. CCCP 15.3 appears to allow a limited scope geologic
11 hazard analysis limited to the coastal areas and to “cliff erosion geologic hazards” that does
12 not include all geologic hazards such as earthquakes. The county’s understanding and
13 explanation of the interplay between CCCP 15.3 and CCZO 3.252 for the purpose of locating
14 the coastal shorelands boundary is plausible and we therefore affirm that interpretation. ORS
15 197.829(1)(d); *Siporen*.

16 Petitioners next allege that the county misconstrued CCZO 3.252 because the Rodine
17 Report that the county relies on fails to correctly analyze the geologic hazard from cliff
18 erosion on the property by limiting its analysis to erosion of cliff faces that occurs from ocean
19 waves hitting the cliff faces. Petitioners argue that the Rodine Report fails to analyze cliff
20 erosion geologic hazards that are not the result of waves but that still “could impact” the
21 ocean, due to erosion from increased storm water runoff or alteration of creeks or streams
22 from the proposed destination resort, or from introduction of man-made features such as
23 lakes, or from shoreline retreat. OCA Petition for Review 27-30; Shores Petition for Review
24 20-21.

25 We agree with petitioners that the boundary the county adopted on remand is not
26 based on substantial evidence in the record where the Rodine Report does not analyze the
27 “cliff erosion geologic hazard” from causes of erosion other than waves hitting the shore,
28 such as stormwater runoff or diversion or alteration of water courses, or wind or rain. If

1 erosion of sea cliffs or other “adjacent areas of instability” from any source “will impact a
2 coastal water body,” those sea cliff areas or other areas must be included in the coastal
3 shoreland. Specifically, the Rodine Report excludes from the coastal shorelands boundary an
4 area that contains sandy soils and groundwater flow that the report concludes have eroded the
5 area and deposited slide materials in the ocean. Supplemental Record 33-35. The Rodine
6 Report also excludes from the coastal shorelands boundary an area that the report
7 characterizes as “in a state of rapid erosion.” Supplemental Record 35. It is difficult to
8 imagine how those areas do not qualify as “adjacent areas of geologic instability” that “will
9 impact a coastal water body.” Even if it is possible to explain why they do not, which we
10 seriously question, excluding those areas without such an explanation is inconsistent with
11 Goal 17’s mandate to include within the shorelands boundary “[a]djacent areas of geologic
12 instability where the geologic instability * * * will impact a coastal water body[.]”

13 Shores’ first and second subassignments of error under the first assignment of error
14 and a portion of OCA’s seventh assignment of error are denied. A portion of OCA’s fifth,
15 sixth, seventh, eighth, and ninth assignments of error, and a portion of Shores’ fifth
16 subassignment of error under the first assignment of assignment of error are sustained.

17 **F. Lands Within 100 Feet of the Ocean Shore**

18 Goal 17 requires that coastal shorelands must include “lands within 100 feet of the
19 ocean shore[.]” The phrase “ocean shore” is not defined in Goal 17 or in the Goal
20 definitions.⁵ However, “ocean shore” is defined in ORS 390.605(2) for purposes of the
21 statutes declaring ownership of and regulating the use of the Pacific Shore for scenic and
22 recreational use (ORS 390.610, 390.620 to 390.676, 390.690 and 390.705 to 390.770) as
23 “land lying between extreme low tide of the Pacific Ocean and the statutory vegetation line as
24 described by ORS 390.770 or the line of established upland shore vegetation, whichever is

⁵ The definitions to the Goals include a definition of “shoreline” as “* * * mean higher high water[.]” But the word “shoreline” is not used in Goal 17.

1 farther inland.” We can think of no reason why LCDC would have intended a different
2 meaning for “ocean shore” and we therefore assume for purposes of this opinion that the
3 phrase “ocean shore” as used in Goal 17 has the meaning defined in ORS 390.605(2).

4 The county concluded that (1) Goal 17 is not an applicable approval criterion, and (2)
5 the boundary proposed in the Rodine Report is located beyond 100 feet from the ocean shore:

6 “Goal 17 is not directly applicable as an approval criteria to this application
7 because the County has an acknowledged comprehensive plan. * * *
8 Alternatively, the Board interprets the Comprehensive Plan 15.2 definition of
9 Coastal Shoreland boundary to be consistent with Goal 17 with regards to the
10 100 foot standard. Consistent with this interpretation, * * * Rodine references
11 the 100-foot standard in multiple submittals and has located the Coastal
12 Shorelands boundary beyond 100 feet from the ocean shore. The specific
13 location of the boundary will be finalized down to the foot, as is needed to
14 determine compliance with the 100 foot standard, by a survey that will be
15 prepared prior to Final Master Plan review, pursuant to Condition 25. * * *
16 Therefore, the argument as to the consistency of the final, precise, surveyed
17 alignment of the Coastal Shorelands boundary is properly brought at the Final
18 Master Plan review. The Board rejects this argument as unsupported by any
19 applicable criteria, or alternatively as premature and not ripe until the final
20 survey of the Coastal Shorelands boundary is available.” Record 27.

21 Shores argues that the county’s interpretation of the CCCP to locate the specific boundary
22 line on the subject property misconstrues the applicable law and is inconsistent with Goal 17
23 because the boundary is located closer than “* * * 100 feet from the ocean shore.” Shores
24 also argues that the county’s conclusion that the boundary is located beyond 100 feet from the
25 ocean shore is not supported by substantial evidence in the record.

26 Intervenor responds that Goal 17 does not apply directly to the county’s decision and
27 therefore even if the boundary is inconsistent with Goal 17’s 100-foot setback, it provides no
28 basis for reversal or remand of the decision. Intervenor also takes the position that the
29 Rodine Report provides substantial evidence that the adopted boundary is 100 feet eastward
30 of the ocean shore.

31 To the extent intervenor argues that because the county’s program to implement Goal
32 17 has been acknowledged, the challenged decision approving a tentative destination resort

1 master plan is not subject to review for compliance with the statewide planning goals, we
2 agree with intervenor’s argument. ORS 197.175(2)(c) and (d). However, in interpreting
3 CCCP 15.3, the county may not adopt an interpretation of its comprehensive plan that is
4 inconsistent with Goal 17, and LUBA is not required to affirm an interpretation that is
5 inconsistent with the goals. *See Leathers v. Marion County*, 144 Or App 123, 130-31, 925
6 P2d 148 (1996) (county interpretation of acknowledged land use legislation is reversible
7 under ORS 197.829(1)(d) if the interpretation would allow uses that are prohibited by the
8 statewide planning goals that the legislation was adopted to implement); *Jackson County*
9 *Citizens League v. Jackson County*, 171 Or App 149, 156, 15 P3d 42 (2000) (a county
10 comprehensive plan urbanization policy that was adopted to implement Goal 14 must be
11 interpreted consistently with Goal 14’s prohibition against approval of urban uses on rural
12 land.)

13 CCCP 15.3 does not exempt or take exception to the Goal 17 minimum requirement
14 that the coastal shorelands “at least” must include “lands within 100 feet of the ocean shore”
15 when locating the coastal shorelands boundary pursuant to CCCP 15.3. Absent such
16 language in CCCP 15.3, we believe the coastal shorelands boundary, at a minimum, must
17 include those lands. As we understand it, the county has located the specific boundary line in
18 some areas that appear to be at the top of the beach, at the bottom or mid-point of the cliffs
19 rising up from the beach. Such locations are arguably where the “ocean shore” ends, as that
20 term is defined at ORS 390.605(2). If so, the county’s boundary delineation has essentially
21 given little or no horizontal depth to the coastal shorelands boundary beyond the “ocean
22 shore” in some places, which is inconsistent with Goal 17’s direction that the coastal
23 shorelands boundary include “lands within 100 feet of the ocean shore.”

24 We agree with Shores that the county’s interpretation that the 100-foot setback from
25 the ocean shore does not apply here misconstrues the CCCP, because CCCP 15.3 does not
26 clearly so provide and CCCP 15.3 must be interpreted to be consistent with Goal 17. ORS

1 197.829(1)(d). We also agree with Shores that the county’s finding that the county has
2 located the boundary eastward of a point 100 feet from the ocean shore is not supported by
3 substantial evidence in the record. The Rodine Report simply does not include any
4 evaluation of or conclusion regarding whether the boundary is located at least 100 feet from
5 the ocean shore. Supplemental Record 33-34.

6 Shores’ third subassignment of error under the first assignment of error is sustained.

7 **DEFERRAL OF CCZO 4.083(20) GEOLOGIC HAZARD ANALYSIS**

8 The CCZO 3.352 provision regarding a geologic hazard analysis is an issue in two
9 ways in this appeal. First, as we describe above, CCCP 15.3 requires the specific boundary
10 of the coastal shorelands on the subject property to be located “as defined by analysis of the
11 cliff erosion geological hazard as required under CCZO Section 3.252.”

12 The second way that the CCZO 3.252 geological hazard assessment is an issue in this
13 appeal is because the application proposes development on portions of the subject property
14 that are subject to the county’s Natural Hazards Overlay zone, and one of the application
15 requirements for development in that zone, CCZO 4.083(20), requires a “[a] geologic hazard
16 assessment prepared by an Oregon certified engineering geologist in accordance with CCZO
17 3.250[.]”

18 In the decision challenged in *Crook Point I* the county deferred finding compliance
19 with the Natural Hazards Overlay zone criteria that rely on the geologic hazards assessment
20 to a later proceeding, and imposed condition 23. We sustained the petitioners’ assignments
21 of error that challenged the county’s decision to defer its determination of compliance with
22 those criteria to a later proceeding because the later proceeding was not infused with the same
23 participatory rights as those allowed in the initial proceeding. *Id.* at 330.

24 On remand, the county concluded that there was substantial evidence in the record to
25 support a future determination that the applicable natural hazards overlay zone criteria can be
26 met. Record 22. The county re-imposed condition 23, which requires submission of a

1 geologic hazards assessment for the entire property that meets the requirements of CCZO
2 3.252 prior to final master plan review, and imposed new condition 36, which requires final
3 master plan review to provide the same participatory rights as tentative plan review. Record
4 39, 42.

5 Petitioners challenge the county’s decision to defer determining whether the
6 application satisfies the applicable natural hazards overlay zone criteria. Shores argues that
7 the county’s deferral of determining compliance with the natural hazards overlay zone criteria
8 misconstrues the applicable law because “determination of the geologic stability and safety of
9 the development site is inextricably entwined with tentative master plan approval, and is
10 inappropriate for deferral.” Shores Petition for Review 23. OCA argues that deferral of the
11 CCZO 3.252 geologic hazard assessment to final master plan review is “invalid * * *.” OCA
12 Petition for Review 33-34.

13 Intervenor responds that petitioners are precluded by the holding in *Beck* from
14 challenging the county’s decision to defer finding compliance with CCZO 4.085(3)(g) and
15 CCZO 3.252 to a later proceeding. Intervenor argues that petitioners did not challenge the
16 county’s deferral of the CCZO 3.252 analysis on any basis other than its failure to provide
17 participatory rights in the future proceeding and therefore petitioners may not now argue that
18 the deferral is improper on a different basis. We agree with intervenor.

19 Petitioners next argue that there is not substantial evidence in the record to support
20 the county’s determination that CCZO 4.085(3)(g) and CCZO 3.252 can be met. According
21 to petitioners, the county made a current finding that it is feasible to satisfy the criterion, and
22 in that circumstance substantial evidence must support that conclusion. Petitioners argue that
23 without a complete CCZO 3.252 geologic hazard assessment, there is not substantial
24 evidence in the record to support a determination that it is feasible to satisfy the criteria.

25 Intervenor responds that the county deferred making the determination until final
26 master plan review, as it is allowed do so provided the later review is infused with the same

1 participatory rights. *Gould v. Deschutes County*, 216 Or App 150, 162, 171 P3d 1017
2 (2007). Intervenor argues that the determination the county made is that the development is
3 possible to attain. *Gould v. Deschutes County*, 227 Or App 601, 611, 206 P3d 1106 (2009) (a
4 finding that compliance with an applicable approval criterion is possible to attain is necessary
5 in order to justify a decision to approve a tentative master plan with a deferral condition).
6 We agree with intervenor that the county has not yet made a determination of compliance
7 with the applicable criteria, and that conditions 23 and 36 read together make clear that the
8 county is deferring making that finding to final master plan review.

9 Shores’ second assignment of error and OCA’s eighth assignment of error and a
10 portion of its ninth assignment of error are denied.

11 **ADVERSE EFFECTS ON SURROUNDING LANDS**

12 CCZO 4.085(3)(b) requires in relevant part that:

13 “Improvements and activities shall be located and designed to avoid or
14 minimize adverse effects of the resort on uses on surrounding lands,
15 particularly effects on farming or forestry operations in the area and on state
16 parks and national wildlife refuges. * * * The applicant shall propose buffers
17 and setbacks as part of the tentative resort plan and the Planning Commission
18 shall determine whether the proposed measures are adequate to avoid or
19 minimize impacts to surrounding lands. *Adverse effects on surrounding lands*
20 *are to be avoided first and minimized if avoidance is not possible.* The
21 Planning Commission may set forth additional conditions to avoid or
22 minimize impacts to surrounding lands.” (Emphasis added.)

23 In *Crook Point I*, we concluded that “CCZO 4.085(3)(b) clearly gives priority to avoiding
24 adverse effects over minimizing adverse effects, and allows minimization only if ‘avoidance
25 is not possible.’” *Crook Point I* at 335. We sustained petitioners’ assignment of error and
26 remanded the county’s decision for the county to either consider whether adverse effects on
27 surrounding lands have been avoided to the extent possible, or adopt a sustainable
28 interpretation explaining why it is not necessary to consider whether it is possible to avoid
29 any expected adverse effects.

1 In its third assignment of error, we understand Shores to argue that the county
2 misconstrued the applicable law because the county concluded that adverse effects on
3 surrounding lands will be minimized by conditions of approval, without first determining
4 whether avoidance of adverse effects is possible. Shores argues that the county's findings
5 that the development satisfies CCZO 4.085(3)(b) are inadequate because the findings do not
6 first determine that avoidance is not possible before concluding that adverse effects are
7 minimized by conditions of approval, and conflate avoidance and minimization.

8 On remand, the county adopted four pages of findings that conclude that human
9 trespass, predator-related impacts, spread of invasive plants and noxious weeds, impacts on
10 neighboring wildlife habitat, geological impacts, and storm water pollution impacts from
11 construction will be avoided by imposition of conditions 11, 13, 31,15, 10, 16, and 23, and
12 21, respectively. Record 30-31. The county concluded that it is not possible to avoid
13 artificial light trespass and impacts from fragmented wildlife habitat but the impacts can be
14 minimized by condition 12 and by the mitigation agreement between intervenor and the US
15 Fish and Wildlife Service. Record 31-32. The county relied on an analysis prepared by
16 intervenor's land use consultant that analyzed all potential impacts from the resort on
17 surrounding lands, considered whether measures could be taken to avoid the impacts, and
18 then for the impacts that could not be avoided, identifying mitigation measures to minimize
19 the impacts. Record 630-32. We see nothing in the county's findings at Record 30-32 that
20 misconstrues CCZO 4.085(3)(b)'s requirement to determine whether adverse impacts to
21 surrounding properties can be avoided, and if it is not possible to avoid the impacts, to
22 determine whether the impacts can be minimized.

23 Also in a portion of Shores' third assignment of error, we understand it to argue that
24 the county's finding that impacts on neighboring wildlife habitat in the adjacent Oregon
25 Islands National Wildlife Refuge will be avoided through 50 to 100 foot buffers is
26 inadequate, where the buffer for the third green of the golf course is required by condition

1 15(c) to be 50 feet, but the plans submitted by intervenor show the third green located
2 immediately adjacent to the western property line and the refuge. Shores argues that
3 intervenor should not be entitled to rely on the third green as the 50-foot buffer between the
4 development and the adjacent refuge.

5 Intervenor responds that it will “customize the size of each buffer area to relate the
6 pertinent area of the golf course to the adjacent [wildlife refuge].” Response Brief 34.
7 Although that response is not particularly helpful, we think that when the dust settles on what
8 the county has approved, it has approved intervenor’s plans except to the extent that
9 condition 15 requires a larger buffer than shown on the plans, or in the case of the third
10 green, a buffer where none is shown.⁶ The county’s findings and condition 15 are adequate
11 to demonstrate that the buffer areas will avoid impacts on wildlife habitat as required under
12 CCZO 4.085(3)(b).

13 Shores’ third assignment of error is denied.

14 The county’s decision is remanded.

15

⁶ We agree with Shores that the green is not a buffer.

1 Appendix A

2 **Section 3.252. Development in Areas of Geologic Hazards.**

3 Those areas identified as geologic hazard areas shall be subject to the following
4 requirements at such time as a development activity application is submitted to the
5 Director.

6 1. The applicant shall present a geologic hazard assessment prepared by a
7 geologist at the applicant's expense that identifies site specific geologic
8 hazards, associated levels of risk and the suitability of the site for the
9 development activity in view of such hazards. The geologic hazard
10 assessment shall include an analysis of the risk of geologic hazards on the
11 subject property, on contiguous and adjacent property and on upslope and
12 downslope properties that may be at risk from, or pose a risk to, the
13 development activity. The geologic hazard assessment shall also assess
14 erosion and any increase in storm water runoff and any diversion or
15 alteration of natural storm water runoff patterns resulting from the
16 development activity. The geologic hazard assessment shall include one of
17 the following:

18 a) A certification that the development activity can be accomplished
19 without measures to mitigate or control the risk of geologic hazard to
20 the subject property or to adjacent properties resulting from the
21 proposed development activity.

22 b) A statement that there is an elevated risk posed to the subject
23 property or to adjacent properties by geologic hazards that requires
24 mitigation measures in order for the development activity to be
25 undertaken safely and within the purposes of Section 3.250.

26 2. If the assessment provides a certification pursuant to Section 3.252(1)(a), the
27 development activity may proceed without further requirements of this
28 Section.

29 3. If the assessment provides a statement pursuant to Section 3.252(1)(b), the
30 applicant must apply for and receive an Administrative Decision prior to any
31 disturbance of the soils or construction.

32 4. Applications, which require an Administrative Decision pursuant to Section
33 3.252(3), shall provide the following information prior to the Planning
34 Director's determination that the application is complete.

35 a) A geologic hazard mitigation report by a geologist prepared at the
36 applicant's expense containing the following information:

37 i) Drawings at scales that allow for clear depiction of the
38 following:

- 1 1. an index map showing the location of the development
2 activity within Curry County;
- 3 2. A topographic site plan that shall include
- 4 a. all adjacent, contiguous and related property identified in the
5 geologic hazard assessment as being at risk from or posing a
6 risk to the development activity;
- 7 b. the degree of slope on the subject and adjacent properties;
- 8 c. all features on the subject and adjacent properties that may
9 cause or contribute to mass movement. Such features shall
10 specifically include any landslide, bluff failure or shoreline
11 erosion that could migrate upslope into the subject or
12 adjacent properties;
- 13 d. the location of all identified geomorphic features and micro-
14 topographic features related to the identified geologic
15 hazards, and
- 16 e. all features or conditions, which gave, rise to the statement
17 pursuant to Section 3.252(1)(b) not otherwise required to be
18 included.
- 19 3. A map that depicts features and conditions associated with
20 any building site or construction site associated with the
21 development activity.
- 22 ii) A technical analysis and narrative describing the following:
- 23 1. The geologic features or conditions of the property as well
24 as those features or conditions which gave rise to the
25 statement pursuant to Section 3.252(1)(b);
- 26 2. All features related to earth movement or geologic
27 instability on, above and below the site;
- 28 a. The results of all geologic and/or engineering tests
29 performed on soils, material, and rock type subsurface data
30 from drill holes, or other data obtained from the site
31 investigation with data points clearly identified on a map;
- 32 b. Whether the proposed development activity can be safely
33 sited on the subject property or at the site in view of the
34 geological hazards and risks that have been identified in the
35 geologic hazard assessment;

- 1 c. All features related to earth movement or geologic
2 instability on, adjacent to, upslope or downslope from the
3 subject property;
- 4 d. A clear statement of all requirements or conditions on the
5 development activity that the geologist has determined are
6 necessary to mitigate the geologic hazards that require
7 mitigation;
- 8 e. A qualitative assessment of the likelihood that the proposed
9 development activity will cause damage or contribute to
10 damage to adjacent properties resulting from geologic
11 hazards disclosed in the geologic hazard assessment or
12 during the course of the preparation of the geologic hazard
13 mitigation report.
- 14 f. A schedule of inspections to be completed by the geologist
15 or engineer to assure compliance with recommendations
- 16 b) In the event that the Director determines that the geologic hazard
17 mitigation report fails to include the required information, fails to
18 analyze or take into account documented hazards associated with the
19 subject property or the proposed development activity, fails to
20 consider new information made available to the Director or has other
21 identified significant deficiencies, the Director shall:
- 22 i) Notify the applicant in writing to identify the deficiencies.
23 Thereafter the applicant shall:
- 24 1. provide a revised geologic hazard mitigation report or, in the
25 applicant's discretion, request the Director to submit the
26 geologic hazard mitigation report for peer professional
27 review at the applicant's expense.
- 28 2. In the event of peer review, the Director shall provide the
29 applicant with a list of three qualified professionals from
30 which the applicant shall choose one to conduct the peer
31 review.
- 32 5. Upon the Director's satisfaction with the geologic hazard mitigation report,
33 Director shall approve it in writing and may thereafter proceed with the
34 determination of whether to grant the application.
- 35 6. If the geologic hazard mitigation report discloses that the entire subject
36 property is subject to geologic hazards that cannot be mitigated or that the
37 subject property does not contain sufficient area that can be mitigated to
38 allow the development activity as proposed, or that the development activity
39 presents a significant risk of damage to or destabilizing adjacent property
40 that cannot be mitigated in the course of the development activity itself, the

- 1 development activity shall not be allowed, and the application shall be
2 denied.
- 3 7. Prior to approval of the development activity, the applicant shall provide a
4 mitigation plan prepared by an engineer or geologist specific to the
5 development activity and based on the approved geologic hazard mitigation
6 report.
- 7 a. The mitigation plan must adequately address all issues identified in
8 the geologic hazard mitigation report and protect the subject
9 property and surrounding lands.
- 10 b. In the event that the development activity is a division of land, the
11 mitigation plan shall specify mitigation measures or improvements
12 that must be implemented on each parcel to assure the protection of
13 the subject property and of other properties from the hazards
14 identified in the geologic hazard mitigation report.
- 15 c. The mitigation plan shall specify which if any measures and
16 improvements must be installed or constructed under the direction of
17 a supervising engineer.
- 18 d. The applicant shall, prior to the issuance of any development
19 permits, record on the title to the subject property a notification that
20 includes a description of the measures or improvements and that also
21 specifies the obligation of subsequent land owners to refrain from
22 interfering with such measures or improvements and to maintain
23 them.
- 24 e. A schedule of inspections to be completed by the geologist or
25 engineer to assure compliance with recommendations.
- 26 8. The Director shall provide notice as required for an Administrative Decision
27 to all affected parties regarding the proposed development in a natural
28 hazard area. The Director shall consider the applicant's reports, proposed
29 mitigation plan and any response from affected parties in making his
30 decision. The Director's review of technical reports, plans and
31 recommendations shall give greater consideration to the comments of
32 engineers or geologists qualified to assess the contents of such reports, plans
33 and recommendations.
- 34 9. Appeals of an Administrative Decision which challenge an assessment,
35 report or plan prepared or approved under Section 3.252(1), (4), (5) or (7),
36 shall be accompanied by an analysis of the challenged document. Such
37 analysis must identify and analyze the purported deficiencies with sufficient
38 clarity to allow the Director to assess the concerns. In the event that the
39 Director does not have adequate technical ability to make such an
40 assessment, the Director may submit the matter for recommendation by an
41 engineer or geologist in which case the appellant and the applicant shall

1 equally share the cost of such peer review. Peer review shall be based on the
2 entire record of the proposed development activity.

3 10. If a possible new geological hazard that has not been mapped is brought to
4 the attention of county officials, the county shall then require that a geologist
5 be hired by the County to investigate the subject site and report on the nature
6 of the hazard and its possible impact to the proposed use and surrounding
7 properties. The cost of this geological hazard investigation is to be paid by
8 the applicant.

9 11. The development activity, if approved, must be constructed as approved and
10 must implement the measures and improvements in the approved mitigation
11 plan. The plans submitted for development permits shall bear a statement
12 from the engineer that they include the mitigation measures contained in the
13 approved mitigation plan. If required by the mitigation plan, installation or
14 construction of such measures and improvements shall be undertaken under
15 the supervision of an engineer.

16 12. Upon the completion of construction and prior to issuance of a certificate of
17 occupancy, the supervising engineer shall certify that the measures and
18 improvements in the approved mitigation plan have been properly installed.
19 In the case of mitigation plans that do not require a supervising engineer,
20 such certification shall be made in the form of a sworn affidavit by the
21 applicant. No as-built changes to the requirements of a mitigation plan will
22 be accepted in the absence of certification of the changes by the engineer or
23 geologist who prepared the mitigation plan.