BEFORE THE BOARD OF COMMISSIONERS
OF TILLAMOOK COUNTY, OREGON

RECONSIDERATION OF A GOAL EXCEPTION REQUEST FOR APPROVAL OF AN EXCEPTION TO STATEWIDE PLANNING GOAL 18, IMPLEMENTATION MEASURE (IM) 5; APPROVAL OF A COMPREHENSIVE PLAN AMENDMENT FOR A "COMMITTED" EXCEPTION AND/OR A "REASONS" EXCEPTION TO GOAL 18, IMPLEMENTATION MEASURE 5 FOR THE CONSTUCTION OF SHORELINE STABILIZATION ALONG THE WESTERLY LOTS OF THE PINE BEACH SUBDIVISION AND FIVE OCEANFRONT LOTS TO THE NORTH LOCATED WITHIN THE BARVIEW/TWIN ROCKS/WATSECO UNINCORPORATED COMMUNITY BOUNDARY ALONG WITH FLOODPLAIN DEVELOPMENT PERMIT REQUEST FOR THE INSTALLATION OF A BEACHFRONT PROTECTIVE STRUCTURE (RIP RAP REVETMENT) WITHIN AN ACTIVE ERODING FOREDUNE EAST OF THE LINE OF ESTABLISHED VEGETATION IN THE COASTAL HIGH HAZARD (VE) ZONE, AN AREA OF SPECIAL FLOOD HAZARD WITHIN THE FLOOD HAZARD OVERLAY ZONE ON MULTIPLE PROPERTIES IDENTIIFED AS LOTS 11-20 OF PINE BEACH REPLAT UNIT #1, DESIGNATED AS TAX LOTS 114 THROUGH 123, OF SECTION 7DD, AND TAX LOTS 3000, 3100, 3104, 3203, AND 3204 OF SECTION 7DA, ALL LOCATED IN TOWNSHIP 1 NORTH, RANGE 10 WEST OF THE WILLAMETTE MERIDIAN, TILLAMOOK COUNTY, OREGON.	)	LUBA REMAND FINDINGS OF FACT, CONCLUSIONS AND ORDER #851-21-000086-PLNG-01 #851-21-0000086-PLNG

REMAND FROM THE STATE OF OREGON LAND USE BOARD OF APPEALS (LUBA) No. 2021-101 IN THE MATTER OF OREGON COAST ALLIANCE (Petitioners), OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT (Intervenor-Petitioner) vs. TILLAMOOK COUNTY (Respondent) and MICHAEL ROGERS et al. (Intervenors-Respondents).

This matter came before the Tillamook County Board of Commissioners for a public hearing on March 14, 2023.

The Board of Commissioners, being fully apprised of the of the testimony, record and files in this matter, now finds as follows:

1. The files in this proceeding can be found in the office of the Tillamook County Department of Community Development under Ordinance Amendment request #851-21-000086-PLNG-01 and Floodplain Development Permit request #851-21-000086-PLNG.

2. The Notice of Remand Hearing was mailed to all affected and interested parties on February 14, 2023, and was noticed in a proper manner according to the requirements of ORS 197 and 215.

3. The Tillamook County Board of Commissioners opened a de novo public hearing on March 14, 2023. Public testimony was received at the hearing. The Board then deliberated and voted

unanimously (3-0) to re-approve Ordinance Amendment request #851-21-000086-PLNG-01 and Floodplain Development Permit request #851-21-000086-PLNG, subject to the Conditions of Approval. Staff were then directed to prepare written findings for final adoption.

NOW, THEREFORE, THE BOARD OF COUNTY COMMISSIONERS FOR TILLAMOOK COUTY, OREGON, ORDERS AS FOLLOWS:

Section 1. In the matter of the remand from the State of Oregon land use board of appeals (LUBA) NO. 2021-101 regarding Ordinance Amendment request #851-21-000086-PLNG-01 and Floodplain Development Permit request #851-21-000086-PLNG; the Board of County Commissioners re-approved both requests based upon the evidence and testimony in the record request demonstrating that all applicable criteria have been met.

Section 2. Ordinance Amendment request #851-21-000086-PLNG-01 and Floodplain Development Permit request #851-21-000086-PLNG are hereby approved.

Section 3. The findings and conditions attached as "Exhibit A" are hereby incorporated by reference and adopted in support of this order.

DATED this 3rd day of May, 2023.

BOARD OF COUNTY COMMISSIONERS
FOR TILLAMOOK COUNTY, OREGON

	Aye	Nay	Abstain/Absent
Erin D. Skaar, Chair	✓		
Mary Faith Bell, Vice-Chair	Y		
David Yamamoto, Commissioner			

ATTEST: Tassi O'Neil, County Clerk

Special Deputy

APPROVED AS TO FORM:

William K. Sargent, County Counsel

TILLAMOOK COUNTY STATE OF OREGON

"Exhibit A"

BEFORE THE TILLAMOOK COUNTY BOARD OF COMMISSIONERS
#851-21-000086-PLNG-01 & #851-21-000086-PLNG

ON REMAND FROM THE OREGON LAND USE BOARD OF APPEALS
FINAL OPINION AND ORDER 2021-01:

I. Procedural matters.

A. Scope of the Remand Proceedings

The Board held a public hearing on Tuesday, March 14, 2023 at 5:00 p.m. As stated in the notice, the purpose of the hearing was to consider a LUBA remand regarding a request for approval of a reasons exception to Statewide Planning Goal 18, Implementation Requirement (IR) 5 and corresponding Comprehensive Plan amendment for the construction of shoreline stabilization along the westerly lots of the Pine Beach Subdivision and five lots in the George Shand Tracts subdivision, located within the Barview/Twin Rocks/Watseco Unincorporated Community Boundary, along with Floodplain Development Permit Request #851-21-000086-PLNG. The subject properties are Lots 11-20 of the Pine Beach Replat Unit #1, designated as Tax Lots 114 through 123, of Section 7DD, and the George Shand Tracts lots, which are Tax Lots 3000, 3100, 3104, 3203 and 3204 of Section 7DA, all in Township 1 North Range 10 West of the Willamette Meridian, Tillamook County, Oregon.

The County's procedures on remand are governed by TCLUO §10.130, state statutes, and relevant case law.

TCLUO §10.130(1) provides that when a decision is remanded by LUBA, the Board of Commissioners may decide whether the matter shall proceed before the final review authority or a subordinate review authority. Given the time constraints for decision-making on remand discussed below and the fact that the remand involves a goal exception for which the Board of Commissioners must make the final decision, the Board of Commissioners determined that it will decide the matter on remand.

TCLUO §10.130(2) says that final action must be taken on the application within 90 days of the effective date of the remand order. TCLUO §10.130(2)(c) further provides, "The 90-day period shall not begin until the applicant requests in writing that the County proceed with the application on remand." Note that ORS 215.435(1) requires that the County make a decision within 120 days after the remand proceeding is triggered by an applicant. However, because the local code is more restrictive than the state statute, the TCLUO's 90-day period is probably controlling. *Naumes Properties, LLC v. City of Central Point*, 46 Or LUBA 304, 311 n 9 (2004) ("A local government is entitled to adopt local land use standards that are more stringent than the

minimum state standards."). This applicant submitted its request for remand per TCLUO §10.130(2)(c) on February 8, 2023 and, therefore, the 90-day period ends on May 8, 2023. This decision was adopted before the expiration of that 90-day period. TCLUO §10.130(2)(d) allows the 90-day period to be extended for a reasonable period at the request of the applicant. The applicant extended the 90-day period until May 30, 2023. However, the Board adopts its decision within the 90-day window provided in TCLUO §10.130(2)(c). The TCLUO provides no other further relevant procedural requirements for the remand proceeding.

As part of the remand, the Board determined to conduct a public hearing to enable the parties to address LUBA's remand.

The Board determined that the only issues that would be addressed on remand would be the issues remanded by the LUBA decision. Issues that were not appealed to LUBA, as well as those issues that were appealed and resolved in the County's favor by LUBA, are considered resolved or waived. *Beck v. City of Tillamook*, 313 Or 148, (1992) (issues that were resolved or could have been resolved by LUBA in a first appeal, cannot be raised in a second appeal to LUBA of a local remand order); *Portland Audubon v. Clackamas County*, 14 Or LUBA 433, *aff'd,* 80 Or App 593, 722 P2d 748 (1986). *See also Holland v. City of Cannon Beach*, 154 Or App 450, 962 P2d 701 (1998), *rev den.*, 328 Or 115 (1998); *McCulloh v. City of Jacksonville*, 49 Or LUBA 345 (2005); *Halverson-Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 193, 205 (2000); *Dickas v. City of Beaverton*, 17 Or LUBA 578, 582-3 (1989); *Hearne v. Baker County*, 16 Or LUBA 193, 195 (1987), *aff'd*, 89 Or App 282, 748 P2d 1016, *rev den,* 305 Or 576 (1988). *Mill Creek Glen Protection Ass'n v. Umatilla County*, 88 Or App 522, 526, 746 P2d 728 (1987). No person objected to the scope or manner of conduct of the remand proceedings.

The Board finds that the following new issues are beyond the scope of the remand hearing:

- ❖ the argument that applicant must show a demonstrated need for an exception to fulfill an obligation required by Goal 3-19, <u>*in addition to*</u> establishing that the unique factual circumstances of the case justify a reasons exception;

- ❖ the three paragraphs set forth on page 7 of Oregon Shores Conservation Coalition and Surfrider Foundation's ("OS/SR's") March 14, 2023 letter under the heading "social and economic consequences" addressing OAR 660-023-0040 and Statewide Planning Goal 5;

- ❖ the paragraph set forth on page 8 of OS/SR's March 14, 2023 letter setting forth arguments concerning alleged "mandatory conditions" set forth in TCLUO §3.510(14); and

- ❖ the paragraph set forth on page 8 of OS/SR's March 14, 2023 letter addressing TCLUO §§3.530(4)(A)(2) & 3.530(4)(A)(4).

The Board finds that these issues were not raised at LUBA and are therefore waived.

B. <u>Request to Keep the Record Open Beyond the March 14, 2023 Public Hearing.</u>

OS/SR requested "that the record remain open for the maximum time allowable under the Tillamook County Code and Oregon State law, so that additional material may be added to the record as appropriate in response to new facts raised by proponents of this application during the hearing." However, the hearing held on March 14, 2023 was not the "initial evidentiary hearing" and therefore there is no requirement to hold the record open. Moreover, the proponents did not raise new facts at the March 14, 2023 public hearing. Instead, they chose to summarize their previously-submitted testimony, and critique evidence submitted by the applicant that was available on the County's website at least two (2) weeks prior to the hearing. The Board was within its range of discretion when it decided to close the record at the public hearing held on March 14, 2023.

C. Materials Referenced at an Internet Link to a Website Address/URL are Not Part of the Record When Not Physically Placed Before the Decisionmaker.

Some opponents submitted letters into the record late in the afternoon on the day of the March 14, 2023 hearing and attempted to incorporate materials found on the Internet by referencing website addresses / URLs (universal resource locators). The Board declines to include the materials referenced at an internet link into the record for the reasons set forth below.

OAR 660-004-0000(4) requires:

> ***(4) When taking an exception, a local government may rely on information and documentation prepared by other groups or agencies for the purpose of the exception or for other purposes, as substantial evidence to support its findings of fact. Such information must be either included or properly incorporated by reference into the record of the local exceptions proceeding. Information included by reference must be made available to interested persons for their review prior to the last evidentiary hearing on the exception.***

ORS 197.835(2)(a) provides that review of a land use decision by the Land Use Board of Appeals "shall be confined to the record." OAR 661-010-0025(1) provides guidance pertaining to the documents that become part of the record:

> ***(1) Contents of Record: Unless the Board otherwise orders, or the parties otherwise agree in writing, the record shall include at least the following:***
> ***(a) The final decision including any findings of fact and conclusions of law.***
> ***(b) All written testimony and all exhibits, maps, documents or other materials specifically incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker.***
> ***(c) Minutes and tape, CD, DVD or other media recordings of the meetings conducted by the final decision maker, if created by the final decision maker or incorporated into the record by the final decision maker. A verbatim transcript of media recordings shall***

not be required, but if a transcript has been prepared by the governing body, it shall be included.

(d) Notices of proposed action, public hearing and adoption of a final decision, if any, published, posted or mailed during the course of the land use proceeding, including affidavits of publication, posting or mailing. Such notices shall include any notices concerning amendments to acknowledged comprehensive plans or land use regulations given pursuant to ORS 197.610(1) or 197.615(1) and (2).

LUBA's rule states that the record consists of any materials "specifically incorporated into the record" by the final decision maker, during the course of the proceedings before the final decision maker. The rule does not require the final decision maker to incorporate such documents into the record when a physical copy of that document was not placed before the decision-maker. Here, the Board declines to consider such documents referenced by internet link and not physically placed before the Board.

The Board declines to find that web-based materials are part of the "record" when a party simply references a website address/url but does not submit the actual paper or digital contents of the referenced document into its record filings. LUBA has often cautioned that to merely refer to a document does not make the contents of that document part of the record in the proceeding. *See, e.g., Mannenbach v. City of Dallas*, 24 Or LUBA 618, 619 (1992) (simply referring to documents in testimony does not place such documents before the local decision maker.); *Gunderson, LLC v. City of Portland*, 62 Or LUBA 505, 509-10 (2010) (documents prepared by task groups to assist planning staff that are placed on a city website and accessed by links do not become part of the record unless the documents were also physically placed before the decision maker); *Citizens Against LNG, Inc. v. Coos County*, 62 Or LUBA 550, 552 (2010) (posting a hyperlink on the city's website to a video of a public hearing made by a local cable access channel is not sufficient to make the video part of the record, where the video was neither specifically incorporated into the record nor placed before the city decision maker).

Web-based content is neither fixed nor permanent; rather, the content of a website can be changed or deleted without any notice. It is possible that web-based material could change, or be deleted, prior to consideration by or after the Board of Commissioners makes its decision. Similarly, a party attempting to rebut website content based on a website address would have no certainty that the web-based content to which they are responding is the same content the other party intended to reference.

Furthermore, allowing parties to incorporate website materials by reference frustrates administrative and judicial review of land use decisions. Nothing in the TCLUO or in the statutes governing land use proceedings, makes web content that is not printed or downloaded and physically submitted to the decision maker a part of the legal "record." Without a fixed and permanent record, the Board of Commissioners and LUBA will not be able to ascertain reliably the evidence relied upon.

For these reasons, the Board of Commissioners did not attempt to view links to websites listed by the parties. If a party only supported an asserted factual point with a link to the evidence intended to provide the foundation for that asserted fact, the Board of Commissioners

did not accept that alleged point as being supported by evidence in the record.

II. Factual Changes Since the Board's Original Final Decision dated October 19, 2021.

In its remand submittal, the applicant noted that three relevant factual circumstances have changed since the Board approved the revetment and Floodplain Development Permit ("FDP") in the fall of 2021. First, a residence whose construction was underway at the time is now nearly finished on one of the lots that were otherwise "vacant" in the Pine Beach Subdivision. *See* Kellington Law Group Letter dated February 8, 2023, at pp. 5-6, 7.

Second, because the applicants received authorization to construct the BPS from the County, they constructed the BPS consistent with the Board of Commissioner's approval. The BPS is now constructed and operational. The BPS "has successfully protected life and property from flooding" from annual king tides occurring in the 2021-22 and 2022-2023 winter seasons. *See* Applicant's Powerpoint, at slide 3; Kellington Law Group Letter dated February 8, 2023, at pp. 1-3. In this regard, during the winter storm events, the BPS performed as designed, protecting the properties. Contrary to opponent claims that storms would simply wash away the overlying, revegetated beach sand that covers and hides the BPS structure, the BPS stayed intact, and the revetment has an appearance that is virtually indistinguishable from a natural dune. *See* Applicant's Powerpoint, at slides 7-15 (photos of BPS following storm event); Letter from Wendie Kellington dated February 8, 2023, at p. 1-3.

Third, the property to the immediate north of the subject properties, the single property between the subject properties and the Shorewood RV Resort that originally elected not to be part of the applications, has since constructed a BPS that connects to the revetments for the subject properties and the Shorewood RV Resort. That property was developed prior to 1977 and did not require an exception to Goal 18, IR 5 to develop the BPS and, importantly, for whatever reason the opponents did not object to that owner building the BPS to protect their land.

The importance of these second two factual circumstances cannot be underestimated when considering this application. Prior to the time of installation, opponents speculated that there could be hypothetical erosive impacts to the beach and impacts to the ocean itself. Opponents did not detail their concerns but the evidence in the record does not support that the approved BPS will cause significant adverse impacts to either the beach or ocean. Furthermore, the fact that the BPS has been installed means that the impacts associated with the BPS are now known. *See* Natural Resource Assessment Report submitted by Dr. Martin Schott, PhD, of Schott & Associates dated January 2023, at p. 3 ("One season after installation, any change in erosion pattern would have already revealed itself.").

The Board does not find opponents' assertions of speculative impacts to be persuasive or credible. The Board specifically rejects the arguments asserted by Oregon Shores Conservation Coalition and Surfrider Foundation ("OS/SR"), made on page 5 of its letter dated March 14, 2023, that the applicant's Exhibit's 2 – 5 should be "disregarded" because they are "not relevant" to the reasons criteria. LUBA remanded the County's original decision for further proceedings, and the County held a *de-novo* hearing limited to the issues remanded by LUBA. The "ESEE" analysis and "compatibility" analysis were issues that were not resolved at LUBA. The evidence provided by the applicants at Exhibit 2-5 is relevant to both of these issues, and therefore is not

disregarded.

The Board also rejects the argument, made on page 9 of the letter from Charlie Plybon and Phillip Johnson dated March 14, 2023, that "the applicants' post-hoc rationalization of their currently illegal BPS development should be viewed as irrelevant," for the same reason. First, the Board notes that the BPS is not "illegal," rather it was constructed pursuant to this Board's approval. Second, the evaluation of the impacts from the BPS for the ESEE and compatibility analyses should include its actual impacts since the time that it has been installed and operational. One can easily imagine that if the BPS had not performed as expected, the opponents would have pointed out those impacts, and would have voiced their objections had the Board refused to consider those impacts on remand.

III. Legal Analysis.

Issue No. 1: There Is No "Failure" to Adopt Findings Supporting a "Demonstrated Need" for A Goal Exception, Because the Applicant is Relying upon "Unique Circumstances" as the Reason for the Exception.

Opponents claim in their remand submittals that the applicant is required to show that there is a "demonstrated need" for the proposed BPS that is based upon a state planning goal. They are mistaken. OAR 660-004-0022(1) provides two pathways for taking a reasons exception. One pathway is to show a "demonstrated need for the proposed use or activity, based on one or more of the requirements of Goals 3 to 19." LUBA decided that the demonstrated need pathway is not available here. Neither the County nor the applicant can or do rely upon the "demonstrated need" pathway because LUBA rejected it.

LUBA calls other pathway the "catchall" reasons exception pathway. The second pathway is the one upon which this reasons exception is based. As a general matter, LUBA affirmed the application of the second reasons exception pathway in this case.[1] LUBA's affirmance of the "catchall pathway" means that it is a settled issue that the "catchall" reasons exception basis is appropriate as a general matter in this case. Thus, opponents may not now collaterally attack the application of the second pathway by claiming only the first "demonstrated need" pathway may be taken. If the opponents were dissatisfied with that result, their option was to appeal LUBA's decision to the Court of Appeals. They did not do so, and that issue is settled. We explain below in detail the analysis of why this is so.

Part II of Statewide Planning Goal 2 provides a process a local government can follow when taking an "exception" to one of the land use goals, when unique circumstances warrant it. The rules governing exceptions are provided in OAR chapter 660, division 4. There are several goals and goal provisions to which a specific pathway is outlined, but for those where no other specific pathway exists or fits, a general "reasons" exception applies. Since there is not a specific section in OAR 660-004-0022 pertaining to reasons for an exception to allow BPS for an otherwise ineligible property under Goal 18 IR 5, a general " reasons" exception is the appropriate pathway for the applicants. In this case, the County found that unique circumstances

[1] LUBA affirmed the application of the catchall reasons exception to the "developed" lots; LUBA remanded for more adequate findings regarding why the catchall reasons exception applied to the "vacant" lots.

exist in this situation, and that this justifies that the state policy set forth in Statewide Planning Goal 18, IR 5 should not apply.

OAR 660-004-0022(1) provides, in relevant part:

> ***Reasons Necessary to Justify an Exception Under Goal 2, Part II(c)***
>
> ***An exception under Goal 2, Part II(c) may be taken for any use not allowed by the applicable goal(s) or for a use authorized by a statewide planning goal that cannot comply with the approval standards for that type of use. The types of reasons that may or may not be used to justify certain types of uses not allowed on resource lands are set forth in the following sections of this rule.***
> ***** .
> ***(1) For uses not specifically provided for in this division, or in OAR 660-011-0060, 660-012-0070, 660-014-0030 or 660-014-0040, the reasons shall justify why the state policy embodied in the applicable goals should not apply. Such reasons include but are not limited to the following: There is a demonstrated need for the proposed use or activity, based on one or more of the requirements of Goals 3 to 19; and either:***
>
> ***(a) A resource upon which the proposed use or activity is dependent can be reasonably obtained only at the proposed exception site and the use or activity requires a location near the resource. An exception based on this paragraph must include an analysis of the market area to be served by the proposed use or activity. That analysis must demonstrate that the proposed exception site is the only one within that market area at which the resource depended upon can reasonably be obtained; or***
>
> ***(b) The proposed use or activity has special features or qualities that necessitate its location on or near the proposed exception site.***

OAR 660-004-0020(2) repeats these requirements, and adds the clarification that an exception can be justified on the basis of "specific properties" or "situations," as circumstances demand:

> ***660-004-0020 (2) The four standards in Goal 2 Part II(c) required to be addressed when taking an exception to a goal are described in subsections (a) through (d) of this section, including general requirements applicable to each of the factors:***
>
> ***(a) "Reasons justify why the state policy embodied in the applicable goals should not apply." The exception shall set forth the facts and assumptions used as the basis for determining that a state policy embodied in a goal should not apply to specific properties or situations, including the amount of land for the use***

being planned and why the use requires a location on resource land;

The key language of OAR 660-004-0022(1) is as follows: "Such reasons *include but are not limited to* the following: There is a demonstrated need for the proposed use or activity, based on one or more of the requirements of Goals 3 to 19 * * *." The "not limited to" language means that the showing of a "demonstrated need" is only one of many non-exclusive alternatives. LUBA has held that "OAR 660-004-0022(1) provides a non-exclusive set of 'reasons' that, if found to be present, would justify not applying the state policy embodied in the applicable goals." *Todd v. City of Florence,* 52 Or LUBA 445, 460 (2006); *DLCD v. Yamhill County.*, 31 Or LUBA 488, 496-98 (1996). Reasons that are not listed in OAR 660-004-0022(1) can be used to justify an exception under the same. *Morgan v. Douglas County*, 42 Or LUBA 46, 52 (2002).

In *Todd,* LUBA evaluated the sufficiency of the types of unenumerated reasons that could justify an exception, independent of the demonstrated need standard, under OAR 660-004-0022(1). *Todd v. City of Florence*, 52 Or LUBA 445, (2006). *Todd* involved an appeal of an exception to Goal 11's prohibition on the extension of a sewer system outside a UGB, and specifically involved an extension of services from within the UGB onto tribal trust land. The city adopted findings under OAR 660-004-0020(2)(a) and OAR 660-004-0022(1) to justify the same. OAR 660-011-0060(9) allows the extension of a sewer system outside a UGB provided the standards for a reasons exception to Goal 11 have been met, and also sets forth "a non-exclusive example of a reason that might justify [a Goal 11 exception] to 'avoid an imminent and significant public health hazard.'" *Id.*, 451-52 (citing OAR 660-011-0060(9)(a)).

In this case, LUBA agreed with the County that it had provided an adequate "reason" for an exception for the "developed properties" based on the "unique circumstances" presented by the facts of this case:

> "We agree with intervenors that the county adopted sufficient findings that a 'catch-all' reasons exception is appropriate for the residentially developed properties in both the George Shand Tract and the Pine Beach Subdivision, and those findings are supported by the evidence in intervenors' expert's reports.
>
> * * * * *.
>
> "We have concluded that the county has identified a sufficient reason for an exception for the developed lots under the catchall provision, but has not done so for the vacant lots. We have also concluded that because the vacant lots were included in the county's ESEE and alternatives analysis, it is premature for us to address the assignments of error challenging the county's related findings. Similarly, it is premature for us to consider the [Floodplain Development Permit] assignment of error."

Slip op. at 37, 52. Thus, LUBA agreed with the County's initial decision that the application with respect to the developed properties satisfies the OAR 660-004-0020(2)(a) reasons exception requirement to show why the Goal 18, IR 5 policy against revetments on property that was not "developed" on January 1, 1977, should not apply to the subject properties that are developed.

As noted above, the opponents did not appeal that ruling, and are now bound by it. *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992).

In the original decision, the County wrote two alternative and independent sets of findings, one of which justified the reason for the exception under the catchall "unique circumstances" provision, while the other justified the exception in the alternative by showing a "demonstrated need" pursuant to requirements of Goals 3-19. In light of LUBA's acceptance of the catch-all "unique circumstances" reason, and its rejection of the "demonstrated need" findings, the applicant abandoned its prior approach of justifying the exception under the "demonstrated need" pathway on remand. The County understands LUBA's decision as approving the exception based on the unique circumstances of the developed lots presented by the facts of this case, which means that once the reason for having the BPS on the vacant lots is justified, there is no requirement to show a "demonstrated need" based on Goals 3-19.

The County notes that DLCD submitted a letter dated March 6, 2023 in which it agrees with the analysis set forth above:

> "While a county can demonstrate this need based on one or more of the requirements of Goals 3 to 19, they do not have to utilize that approach. *See DLCD v. Yamhill County,* 31 Or LUBA 488, 496-497 (1996) (holding that 'include but are not limited to' means the reasons in OAR 660-004-0022(l)(a) are not exclusive, but that a local government should clearly indicate in the findings that it is not relying on subsection (l)(a))."

Id. at p. 2. DLCD is correct that the applicant is not relying on the "demonstrated need" aspect of OAR 660-004-0022(l)(a).

In its letter dated March 14, 2023, OS/SR appears to take issue with LUBA's conclusion that the County has identified a sufficient reason for an exception for the developed lots. Oddly, Oregon Shores and Surfrider's letter submitted on March 14, 2023 states that they "agree with DLCD's characterization of the approval requirements," *Id.* at p. 3, but it appears that they did not understand that DLCD was agreeing with the applicant's approach of relying only upon the "unique circumstances" reason to justify the exception and need not rely upon the "demonstrated need" pathway to do so. In direct contrast to the DLCD quote set forth above, OS/SR asserts that the applicants must establish "a 'demonstrated' need for the proposed use or activity based on the requirements of one or more Goals 3 to 19." *See* OS/SR letter dated March 14, 2023 at p. 4, 6-7. As the County understands OS/SR's argument, they believe the applicant must show a "demonstrated need" under Goal 3-19 *in addition to* showing that there are "unique circumstances" that justify the exception. The Board respectfully disagrees with OS/SR's argument.

As an initial matter, the opponents did not argue to LUBA that the applicant must show both a "demonstrated need" under Goal 3-19 as well as show that there are "unique circumstances" that justify the exception. All the briefing at LUBA assumed that the "unique circumstances" reasons and the "demonstrated need" reason are alternatives to one another. *See* Petition for Review of Oregon Shores & Surfrider, at p 37 ("As discussed in the third assignment of error, because Respondent misconstrued the applicable law with respect to the only other

alternative reason advanced for the approved Goal 18 IR 5 exception, reversal is the appropriate remedy.") *See also* Petition for Review of Oregon Coast Alliance at p. 6 (incorporating OS/SR's Second Assignment of Error by reference, which includes the quote set forth above). Therefore, that is an issue what could have been but was not raised at LUBA and so is beyond the scope of the remand.

The Board also finds that the following OS/SR argument is beyond the scope of LUBA's remand:

> "In order to demonstrate 'need,' the County must find that it is *unable to satisfy its obligations* under Goals 3-19 absent the proposed exception. *Morgan v. Douglas County*, 42 Or LUBA 46 (2002). Nothing has fundamentally changed about the facts around the ability for the County to satisfy its obligations under Goals 3-19 since the County issued its last Decision, and nothing the Applicant has submitted has satisfied that standard. Instead, the applicant focuses on what has already been done, and resigns any analysis to inevitability, and this application to the unstoppable march of development. This does not satisfy the requirements set forth in Oregon Shores' and Surfrider's prior comments, or address the shortcomings noted by LUBA in LUBA No. 2021-101/104."

OS/SR letter dated March 14, 2023, at p. 6-7.

Because LUBA affirmed the portion of the County's initial decision deciding that there were unique circumstances that justified a reasons exception, any claim that the applicant must also show a "demonstrated need" for an exception is an issue was not preserved at LUBA and is beyond the scope of the remand proceeding and is therefore waived. *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992).

On the merits, and in the alternative to the waiver finding set forth above, the County rejects the opponents' argument as being inconsistent with the express wording of key "not limited to" language of OAR 660-004-0022(1). *See DLCD v. Yamhill County,* 31 Or LUBA 488, 496-497 (1996); *State v. Kurtz*, 350 Or. 65, 75, 249 P.3d 1271 (2011) ("Typically, statutory terms such as 'including' and 'including but not limited to,' when they precede a list of statutory examples, convey an intent that an accompanying list of examples be read in a nonexclusive sense.").

Issue No. 2: Reasons Why BPS Must Be Provided On The Vacant Lots.

In its decision dated September 30, 2022, LUBA faulted the County for not providing an independent rationale for including the vacant lots in the exception. LUBA stated:

> "We do, however, agree with petitioners that the county's evaluation is inadequate with respect to the vacant lots in both areas. The county did not explain the role of the vacant lots and the relative location of any infrastructure in its analysis.

Furthermore, OCA argues in its seventh assignment of error that the county did not adopt findings relating its rationale to the four vacant lots. OCA argues:

> "'The findings do not explain how 'appropriate development,' under Goal 18, includes vacant lots that have not been developed. Merely because some public infrastructure is available does not mean that those vacant lots have been developed to any degree that warrants a goal exception. * * * The findings repeat that 'the proposed exception is necessary for the protection of the structures and associated infrastructure,' but that analysis does not apply to the vacant lots." OCA's Petition for Review 32-33.

"OCA observes that the vacant lots do not contain the people and property that the county states the exception serves to protect. We agree with OCA that the county failed to address why a reasons exception is appropriate to allow BPS on properties that have not been developed with residential uses.

"The county failed to evaluate the relationship between the unique circumstances it identified, the vacant parcels and any related infrastructure, and the proposed BPS. The findings fail to adequately explain why the conservation goal of IR 5 cannot be met on the vacant lots and/or why the conservation goal (no BPS) should yield to development of the BPS, as proposed, on the vacant lots."

Oregon Coast Alliance v. Tillamook County, __ Or LUBA __ (LUBA Nos. 2021-101/104, September 30, 2022), slip op at 37-38. Accordingly, LUBA remanded for more adequate findings about the justification for an exception for the vacant lots. And because LUBA remanded on this basis, LUBA decided that it was "premature" to address the County's ESEE and compatibility findings which were required for the reasons exception.

On remand, the applicant submitted a Technical Memorandum dated February 27, 2023, authored by Chris Bahner PE, D, WRE, of WEST Consultants, Inc. Mr. Bahner provided expert testimony that the developed lots would not receive the benefit of the long-term protection provided by the BPS if gaps exists in that structure at the location of the vacant lots. *Id.* at pp. 2-6. Mr. Bahner points out that any linear BPS revetment featuring "gaps" in the location of vacant lots will suffer what is known as "edge effects" or "shoreline cusps." *Id.* The ocean water will rush in unimpeded between the gaps. As that water returns to the ocean, it will carry off sand back to the ocean assisted by the force of gravity. Furthermore, as more erosion occurs, the effects of passive erosion will destroy the land in the gaps. Wave action will begin to work its way behind the revetment located on the developed lots, and erode the land located directly behind the revetment. Over time, the homes for which the BPS was installed to protect will lose that protection as water attacks the protected land from the sides.

The concept that gaps in BPS armoring will over time undermine the protections provided by that BPS is well understood. For example, the focus group of stakeholders constituted by DLCD to review the equity and consistency of the application of Implementation Requirement #5 of Statewide Planning Goal 18 stated in their Final Report:

> "Currently, the definition of development in Goal 18 includes vacant subdivision lots which were physically improved through construction of streets and provision of utilities to the lot (as of January 1, 1977) as eligible for shoreline armoring. It does not include vacant parcels that were similarly committed to development prior to 1977 but that were not created by statutory subdivision. The result is that, in some cases, isolated ineligible parcels are scattered in between eligible properties in otherwise developed segments of the shoreline. These gaps can make permitting and effective armoring difficult due to the resultant edge effects of isolated structures." (Underline added).

See Goal 18: Pre-1977 Development Focus Group FINAL REPORT to the Oregon Department of Land Conservation & Development, September 2019. at p. 15. Rec. 1969. Similarly, in another passage, the stakeholder group concluded:

> "Currently, buyouts tend to be done on an individual basis – this can create additional erosion problems (holes) for adjacent property owners."

Rec. 1979. The focus group obviously understood that taking a legal approach (vested rights) to the question, instead of a scientific approach, is problematic.

Mr. Bahner provided technical analysis supporting those conclusions. Mr. Bahner provided compelling visual examples of shoreline cusps as they occur when breakwater structures are created. As shown in those photographs, wave action works its way behind the breakwater or rip rap and erodes the land from the sides. The opponents did not submit any evidence to the contrary. For this reason, BPS that is built on a parcel-by-parcel basis with intermittent gaps is scientifically unsound and will fail. The Board is persuaded by Mr. Bahner's analysis, supported by the observations of the DLCD Goal 18 focus group, that only way to protect the developed lots in the George Shand Tracts and the Pine Beach Subdivision is to armor the entire stretch of land that fronts these properties, as the applicants have done. The Board further notes that the applicant has opted to protect the southern flank of the Pine Beach subdivision using jersey barriers.

Mr. Bahner and the applicant also provided evidence, that no party countered, that there is public infrastructure (water, sewer, telephone, gas, electricity), that is installed on the otherwise "vacant" lots in the area of those lots abutting the public street that will be at risk of serious harm, but for the BPS. Along those same lines, Ms. Kellington testified to the Board as follows:

> "And just to be clear, the evidence is that there are utilities in the Pine Beach subdivision adjacent to these developed and

> undeveloped properties. There's an easement there for utilities that has water, sewer, power, cable, gas, and it has all those things. And then there are similar utilities within the Ocean Boulevard right of way on the George Shand Tracts, so this is a real issue."

See Audio of 3/14/2023 hearing, at minute counter 35:45. There is no evidence to the contrary in the record, and the Board accepts this testimony as substantial evidence, especially considering that the area is built out, so it makes sense that utilities exist in the public ROW and on the individual lots.

Opponent ORCA limited its response on remand to legal argument only. ORCA argues that "there is no appropriate development that needs to be protected on the vacant lots. *See* ORCA Letter dated March 14, 2023, at p. 6. ORCA argues that under OAR 660-004-0020(2)(a) an exception can only be taken for "specific properties." *Id.* The Board rejects that legal analysis as being (1) factually inaccurate, and (2) inconsistent with the plain wording of OAR 660-004-0020(2)(a).

It is factually inaccurate because whether properties are developed with houses or not developed with houses does not change the fact that the property at issue is "specific property." There is nothing about the term "specific property" that distinguishes between developed specific properties or undeveloped specific properties. They are both "specific properties."

Moreover, the claim is inconsistent with the express terms of OAR 660-004-0020(2)(a). OAR 660-004-0020(2)(a) requires the decision maker to explain why the state policy at issue should not apply to specific properties *or situations,* ...."). If the exception cannot be said to be taken for "specific properties" it is certainly for a "situation". A "situation" is defined broadly as the:

> "1. the way in which something is placed in relation to its surroundings," "site," "locality," "spot." * * *.
> "5. position with respect to conditions and circumstances * * *.
> "6. Relative position or combination of circumstances in a given moment."

Webster's Third New International Dictionary, Unabridged (2002 ed, p. 2129). The Board interprets the term "situation" consistent with its plain meaning / dictionary definition. According to dictionary definition set forth above, a situation can describe a "site," a "locality," or a "spot." These are not property-specific terms, and instead refer to land without regard to ownership boundaries or whether the site is developed or vacant. The Board further finds that the term "situation" also describes a "condition or circumstance," and is not expressly or implicitly limited to a specific property. Otherwise, the phrase "or situations" would be mere surplusage. In this case, the condition or circumstance pertains to fifteen continuous properties featuring twelve homes and three vacant lots with residential utility infrastructure installed in them that were in danger of being destroyed if a revetment was not built to save them from annual king tides and major storms.

Under ORCA's proposed interpretation, the phrase or "situation" would be meaningless.

Oddly, ORCA literally ignores the term in its letter, perhaps unaware that the phrase exists. However, it is a maxim of statutory interpretation that construction of a statute or rule that renders one of its clauses meaningless is to be avoided. *See, e.g., Pac. Coast Recovery Serv. v. Johnston,* 219 Or App 570, 576–577, 184 P3d 1127 (2008); *State v. Mayorga,* 186 Or App 175, 180, 62 P3d 818 (2003); *Godfrey v. Fred Meyer Stores (In re Godfrey),* 202 Or App 673, 682, 124 P3d 621 (2005)). With all due respect, the Board finds that ORCA's stated premise – that the law requires property-specific analysis – is flawed. ORCA provides no reason to conclude that the vacant lots are ineligible for an exception.

The opponents also advance a mistaken argument that the vacant properties must be assessed on their own, as opposed to being "lumped in" with the analysis of lots developed with homes. First, the Board notes that it does advance a separate subset of reasons to justify the reasons exception to Goal 18, IR 5 for the vacant lots, per LUBA's remand – to protect the "developed lots" and also to protect the public infrastructure installed in the otherwise vacant lots. Second, the Board is unaware why there cannot be shared reasons exception for Goal 18, IR 5 exception for a single BPS and the opponents cited none.

In this case, the most persuasive reason to treat all fifteen lots as a "batch" is the simple fact that the evidence establishes - and the Board finds - that the BPS must be situated along the entire stretch of land in question in order to provide the necessary protection. If ocean waves are allowed to flow freely through gaps in the BPS, then the BPS will eventually be ineffective as to all of the lots due to the edge effects of wave action. And the public infrastructure installed in the otherwise vacant lots will be at significant risk of damage both to that infrastructure and if that infrastructure is broken by causing pollution to the public beach and ocean. As recognized by DLCD's Goal 18: Pre-1977 Development Focus Group's Final Report, any gaps in the armoring can make "effective armoring difficult due to the resultant edge effects of isolated structures." Rec-1969.

Beyond that fact, the County also identified eight reasons that apply to all lots regardless of development status. To recap, the findings identify eight things that are at risk if BPS is not permitted: (1) lives, (2) real property, including 40 lots further to the east, (3) public and private infrastructure (water and sewer utilities, roads, etc.), (4) personal property (cars, etc.), (5) the beach and the environment, (6) property value / tax revenue, (7) public agency resources, and (8) loss of buildable lands. LUBA Rec-24; 35; 42-44; 50. In particular, the County adopted these unchallenged findings that apply to all of the lots:

> "Likewise, retaining the value of the fifteen subject properties will result in maintenance of their property tax income to the County that would be lost if the Subject Properties are not protected. Furthermore, if the Subject Properties are claimed by the ocean, it will be an emergency of significant proportion. It will require the activation of several emergency services and agencies, to include local, state and potentially federal: fire, medical, environmental responses, FEMA, EMS, which will put a wholly avoidable significant economic strain on responsible agencies."

LUBA Rec. 43.

Unchallenged findings from the March 25, 2021 West Memo further elaborate on the risk to an even broader set of forty properties:

> "There is a high level of risk for future damage to structures, lots and infrastructure in the Pine Beach subdivision and Ocean Boulevard properties. There are fifteen lots and eleven homes (4 lots are undeveloped) that are significantly threatened by coastal erosion and flooding, and forty homes threatened by coastal flooding. Coastal flooding will also have an adverse impact on the water and sewer systems that Pine Beach subdivision and the Ocean Boulevard properties. Furthermore, if erosion is allowed to continue unchecked by the recommended revetment, the Pine Beach and Ocean Boulevard properties' water and sewer infrastructure is at risk as is Pine Beach Loop, which is the vehicular access to the Pine Beach subdivision development."

OS/SR asserts that "edge effects" or "shoreline cusps" are not a "unique" problem and therefore cannot form the basis of a reasons exception. The unique problem is not edge effects or shoreline cusps. The "unique" circumstances are those posed by the effects of the closely spaced jetties that occur only in the subregion of the Rockaway Littoral cell. LUBA has already determined that for the developed properties that reason is unique enough to warrant a reasons exception to justify the installation of BPS on the properties developed with homes. LUBA's remand required the County to (1) "address why a reasons exception is appropriate to allow BPS on properties that have not been developed with residential uses"; (2) "evaluate the relationship between the unique circumstances it identified, the vacant parcels and any related infrastructure, and the proposed BPS"; and (3) "adequately explain why the conservation goal of IR 5 cannot be met on the vacant lots and/or why the conservation goal (no BPS) should yield to development of the BPS, as proposed, on the vacant lots."

A reasons exception is appropriate to allow BPS on the property that is not yet developed with homes because the unique circumstances associated with the two jetties will cause those properties to erode away in the absence of the BPS. The policy of Goal 18, IR 5 – protection of beaches – cannot be met on the subject properties including the vacant properties. This is because the natural forces affecting the beach in this subregion of the Rockaway Littoral Cell have been irrevocably altered by the unique circumstances of the two closely spaced man-made jetties, a unique circumstance accepted by LUBA as an appropriate justification for a Goal 18, IR 5 reasons exception. Erosion is occurring at this location an alarming rate as a consequence of those unique circumstances. If the otherwise vacant lots are not protected with the BPS, the applicants demonstrated, as a factual matter, that the developed lots will not receive the benefit from the BPS because a BPS with gaps in the location of vacant lots (both those vacant at the time of the LUBA appeal and now) will be eroded away by flank erosion. The analysis on this topic set forth in the Technical Memorandum dated February 27, 2023, authored by Chris Bahner PE, D, WRE, of WEST Consultants, Inc. is hereby incorporated by this reference.

As discussed below, the applicants also demonstrated that there is public infrastructure in or adjacent to the vacant lots that abuts the public road, and that leaving the "vacant lots" unprotected will expose the public infrastructure installed in those lots to significant damage. The plat of Pine Beach shows the location of utility easements. LUBA Rec. 2217. The

Technical Memorandum dated February 27, 2023 authored by Chris Bahner PE, D, WRE, of WEST Consultants, Inc. provides detailed reasons why it is important to protect public infrastructure such as utilities. *Id.* at p. 6. *See* audio of 3/14/2023 hearing, at minute counter 35:45 (Kellington testimony, stating "And just to be clear, the evidence is that there are utilities in the Pine Beach subdivision adjacent to these developed and undeveloped properties. There's an easement there for utilities that has water, sewer, power, cable, gas, and it has all those things. And then there are similar utilities within the Ocean Boulevard right of way on the George Shand Tracts, so this is a real issue."). None of the opponents call any of this testimony into question, or otherwise challenge the facts and assumptions which underpin that analysis. The Board accepts Mr. Bahner's analysis and Ms. Kellington's testimony as credible evidence as to the need to protect utilities. The Board finds that this is a valid and independent basis for granting a reasons exception to protect vacant lots.

ORCA objects that the applicant justifies the revetment, in part, on the need to protect "public infrastructure" installed on the otherwise vacant lots. *See* Letter from Sean Malone dated March 14, 2023, at p. 6. ORCA asserts that the applicant "has not demonstrated that any impacts to this public infrastructure have occurred as a result of past flooding." Rather, ORCA asserts that that the concern about the risk of future damage is based upon "mere speculation." The suggestion inherent in ORCA's argument is that BPS cannot be approved under a goal exception unless prior actual damage has already occurred to whatever structures are intended to be protected by the revetment. The Board rejects that argument. It is unnecessary that the public must have already suffered a catastrophic loss of public infrastructure in order to justify a Goal 18, IR 5 exception in the unique circumstances present here. To the contrary, the Board finds that the evidence in the record is credible and persuasive that the public infrastructure installed in and adjacent to the vacant lots adjacent to the ROW is exposed to significant and future harm in the absence of the BPS.

The record shows that the landform fronting the beach has eroded over 142 feet from 1994 to 2021. Rec. 1991, 2051-2059. It is not "speculative" to believe that future erosion will continue at the same or similar rates. In fact, Mr. Bahner's expert analysis predicts that such erosion will continue. *See* Chris Bahner PE, D, WRE, of WEST Consultants, Inc. Technical Memorandum dated February 27, 2023, at p. 12-13. His analysis reflects a prediction and expert judgment regarding the probability of future events or conditions based on past events and scientific analysis. The Board rejects ORCA's assertion that Mr. Bahner's expert prediction is unsupported "speculation." Nonetheless, as LUBA has noted in the context of conditions of approval intended to alleviate future problems, "nothing in life or land use is ever completely certain." *Conte v. City of Eugene*, 77 Or LUBA 69, 87 (2018).

ORCA also faults the applicant for not using "end protective measures" as an alternative to using BPS to protect the vacant lots:

> "The applicant has not demonstrated that it cannot utilize the 'end protection measures.' The applicant alleges that 'there is simply not enough room on the developed properties to do so and still provide them with the protections they require.'
>
> "In a report from West Consultants, the applicant alleges that there is only five feet available to place the construction, but there

> appears to be roughly five feet in the picture provided with end protection measures. Other than a bare allegation that there is not enough room, there is no expertise or objective information provided by West Consultants to support that conclusion. Even if there is not sufficient room for the end protection measures in the photograph provided, that does not mean that there are not alternative means or protection measures that could be used. If the applicant is alleging that it is not just a physical problem, but rather a legal problem related to setbacks, then the applicant has not demonstrated that a variance is not possible. West Consultants also allege – without any support in the record – that the vacant lot owners are unwilling to allow protection measures to be placed on the vacant lots or sell the vacant lots."

See ORCA Letter dated March 14, 2023, at p. 5. ORCA does not explain why such an alternative to the proposed design would need to be considered by a decision-maker, and the Board finds that such an alternative is not expressly required by the Goal 2 exceptions standards.

Nonetheless, in an abundance of caution, the Board observes that the applicant did expressly consider and reject alternatives. WEST considered the feasibility of using flank protection as an alternative to a continuous north-south wall. In WEST's memo dated February 27, 2023, Mr. Bahner details the reasons why flank protection is not feasible or desired in this situation. *See* Chris Bahner PE, D, WRE, Technical Memorandum, WEST Consultants, Inc. at pp. 3. WEST concluded that the use of flank protection is not feasible for the vacant lots for a variety of reasons, chief among them being that at the location there is an extremely active erosion zone that would overpower whatever flank protection that could be placed in the small side yards. *Id.* Mr. Bahner also described why a continuous but undulated BPS design would not be feasible. He noted that due to the physics of wave energy, the gaps would become a point of vulnerability: the increased wave velocity created by the gaps would erode the ground surface at a greater rate, and thereby create a trough which would undermine the flank protection. *Id.* The Board finds that his analysis is credible and persuasive, and hereby adopts it as its own.

As shown in the above-quoted passage from ORCA's letter dated March 14, 2023, ORCA expresses confusion over why end protective structures are not the equivalent of the BPS revetment. The reason is that a successful BPS at this location requires certain engineering to provide the required protection. To provide the necessary protection, the BPS was engineered with a launchable toe "to ensure the rock revetment is not undermined by scour at the structure." Rec. 1993. This method provides toe scour protection by placing extra riprap at the toe of the slope. The extra riprap provides protection against undermining the structure, because the riprap "launches" downslope if any erosion occurs beneath the riprap section. As shown in the record, the amount of toe protection is 12.5 feet. Rec. 1994. There is not enough room on the vacant lots to place such toe protection sides on the developed lots, because it would require at least 20 feet or more of room to install those end protective measures. The developed lots do not have 20 feet in their side yards to provide such protection. This is because those side yards are developed on each of the properties with residential structures. The developed lots have no right to install their protection on the vacant lots which the owners of the developed lots do not own. No variance would solve this problem. There is no room on the developed lots to provide such protection – with a variance or otherwise.

Even if somehow, there would have been enough room to place end protective measures along the edges of the developed lots, Mr. Bahner noted that any east-to-west oriented BPS that is subjected to wave energy running parallel to the rock structure would be a point of vulnerability for such flank protective structures. Obviously, wave energy running parallel to BPS will be much more likely to cause scouring due to the increased velocity of the water and gravitational assist occurring as water rushes back to the ocean. The end protective structure located at the southern end of the site are less vulnerable to this problem because there is significant space to the south for waves to dissipate. But at the gaps at the vacant lots, the velocity of wave action would be significantly greater leading to wave action scour that would undermine the effectiveness of such end measures. Thus, while the end protective structure used on the south end of Pine Beach Lot 11 can provide protection, it is certainly not as a great of protection as the "launchable toe" BPS design that the Board finds is essential for the success of BPS at the vacant lots.

ORCA complains that the WEST memo claims that the vacant lot owners are unwilling to allow protection measures to be placed on the vacant lots or sell the vacant lots as an alternative to placing rip-rap along their frontage. This is incorrect. The Board finds that the vacant lot owners are willing to establish BPS on their properties which is evident by the fact that they have applied for BPS on their properties. What they seek is effective BPS and this is evident from the various applicant submittals. It is also evident that jersey barriers (like on the south end of the Pine Beach subdivision) would be ineffective protection at the vacant lots- both for the developed lots as well as for the undeveloped lots and for the public infrastructure that is installed to serve them and the Board so finds. What the Board finds the vacant lots owners are unwilling to do is to sacrifice their lots. The Board finds that the credible and persuasive evidence demonstrates that at the location of the vacant lots, jersey barriers would be ineffective protection for either the developed or the vacant lots (or their public infrastructure). This applies regardless of whether such jersey barriers are installed on the developed lots or the vacant ones. Further, to the extent that ORCA argues that the vacant lots should be used to create a curved BPS with a launchable toe, the Board does not understand what benefit that would provide. Specifically, if ORCA does not object to BPS being installed on the interior of the vacant lots, then the Board does not understand why ORCA would object to BPS on the ocean facing portion of the same lots. Moreover, the Board finds that the WEST memo analysis is credible and persuasive that a non-linear BPS will be less effective and cause dangerous wave action velocities at the interior areas.

Issue No. 3: ESEE Analysis.

The third standard for an exception is known as the "ESEE Consequences" standard, and requires an analysis of the various consequences of taking the proposed action:

> ***OAR 660-004-0020(2)(c) The long term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and***

A local government must compare the long-term environmental, economic, social, and energy consequences of allowing the proposed activity at the proposed site with the consequences of locating the proposed activity in other areas also requiring a goal exception. ORS 197.732(2)(c)(C); *Jensen v. Clatsop County,* 14 Or LUBA 776, 782–784 (1986); *Loos v. Columbia County,* 16 Or LUBA 528, 536–539 (1988); *Murray v. Marion County,* 23 Or LUBA 268, 279–280 (1992). This does not impose an absolute standard requiring that the local government choose the best site for the consequences. Rather, the government may choose a preferred alternative if the consequences are "not significantly more adverse" than choosing a different site that also requires a goal exception. *1000 Friends of Oregon v. Yamhill County,* 52 Or LUBA 418, 428–429 (2006), *aff'd w/o op.*, 21 Or App 435, 155 P3d 891 (2007). However, a decision that merely speculates that development of alternative exception sites would have significantly more adverse consequences is insufficient where it is not clear that the local government considered any other potential exception areas. *Wetherell v. Douglas County*, 44 Or LUBA 567 (2003).

In light of the fact that the applicant has provided an adequate reason why the vacant lots need to be armored to protect the developed lots, the Board finds that the prior ESEE analysis continues to apply to both the developed and the "vacant" lots. The findings that the Board has already adopted properly determines:

- that the revetment is in the applicants' backyards, not the dry sand beach where the public conducts recreational activities;
- the entire unincorporated community including where the revetment is, and the beach all the way to the ocean, is subject to a Goal 17 "Coastal Shorelands" exception;
- the revetment harms no neighboring property and changes nothing except to protect the applicants' properties; and
- the ocean and beach will continue to do what nature commands, and the revetment will not change the course of nature except to protect the properties it is supposed to protect.

Critically, the opponents never identified an alternative site that undermines the applicant's analysis to show there is anywhere else for the BPS with fewer adverse ESEE consequences. Perhaps this is understandable, since there is no other location where the applicant could place a revetment that would have less ESEE consequences and still accomplish the goal of protecting the subject properties. *See* Technical Memorandum dated May 27, 2021 by Chris Bahner PE, D, WRE, of WEST Consultants, Inc, at p. 3. Because no other locations for the BPS exist, and because no other alternative is feasible to provide the necessary protection for the subject properties, it follows that adding BPS to the subject properties cannot result in impacts that are "significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site." As detailed by the applicant, the only other locations where a revetment or its equivalent could be located are the ocean or the public dry sand beach, both of which are non-starters as alternatives for obvious reasons, not the least of which is the fact that the State owns these lands. Moreover, these public dry sand beach and ocean areas are where the public has a right to recreate and placing the BPS on these public areas would have more consequences on public use than putting the BPS on private lands that the public has no right to use.

As an initial matter, the Board finds that the ESEE analysis is not affected by the presence of BPS on the vacant lots. Stated another way, whatever impacts might be caused by the BPS onto adjacent properties, those impacts are no different with or without BPS built on vacant lots. All of the vacant lots are interior to the BPS and create no additional impact. However, the evidence demonstrates the converse (viz.), that the absence of the BPS on the vacant lots has significant adverse consequences to the developed lots, to public infrastructure on and adjacent to the vacant lots and because of increased velocity in the "gaps" at the vacant lots, on the safety of persons occupying the properties on either side of the vacant lots due to increased wave action velocity in the gaps during King Tides and storm events. *See* Chris Bahner PE, D, WRE, of WEST Consultants, Inc., Technical Memorandum dated February 27, 2023, at p. 2-3.

The opponents did not introduce new evidence on remand. Rather, they resubmitted their arguments set forth in their LUBA briefs. In this regard, at LUBA, the opponents argued that the County did not evaluate the environmental consequences of the BPS on the beach itself. For example, DLCD argued that the findings failed to analyze the disruption of sand supply and the impact of shoreline armoring to the beach. *See* DLCD Pet. Rev. at p. 45.

With regard to disruption of sand supply, the Board finds that, contrary to the statement made by DLCD to LUBA, the findings did in fact address this issue. The applicant's expert reports provided a detailed evaluation of this issue, and those reports were incorporated into this Board's original decision as our own. The applicant's expert reports thus incorporated as findings, found that the potential loss of sand nourishment due to the BPS was negligible. *See* Technical Memorandum dated May 27, 2021 by Chris Bahner PE, D, WRE, of WEST Consultants, Inc, at p. 11-13. LUBA Rec. 1260-62. This is consistent with the opponents' evidence, which states that "most of the sand along the world's beaches come from rivers and streams," and not from the dunes themselves. LUBA Rec. 1083, 1085 (illustrations showing sand being supplied by a river and being transported south by currents). The BPS will protect the developed dunes which occur east of the BPS, thereby denying the littoral cell a small amount of sand (6,420.00 c.y. out of a system that includes 3,2000,000 c.y. of sand). LUBA Rec. 1260-62. This represents only a 0.2% reduction in the active sediment volume, which is a decrease that would be imperceptible. The Board does not find the opponents' challenges credible or persuasive to the conclusions of WEST Consultants with regard to the potential for the revetment to disrupt sand supply.

ORCA's remand submittal included an argument that betrayed a misunderstanding of what the expert evidence shows. In this regard, ORCA argued:

> "[I]If the 'proposed BPS will not have any affect [*sic*] on the rate or extent of beach losses,' then it is unclear why the BPS is being proposed to allegedly protect to the dwellings. Indeed, such a statement is conflicted by later allegations within the EESE analysis that allege that '[t]he long-term environmental impact of the proposal is positive because it will protect native shoreline trees, shrubs, vegetation, from further losses due to most flooding events brought about by the change from a prograding beach to a retrograding beach .... ' Appx 29. These findings are inconsistent, alleging at times that the BPS will not affect the rate

> or extent of beach losses while at the same time protecting the subject properties."

See ORCA Pet. Rev. at p. 17. ORCA takes the challenged findings out of context and fails to distinguish between the "active erosion" and "passive erosion" that the challenged findings discuss. On remand, Mr. Bahner again discussed the difference between passive erosion and active erosion:

> "Passive erosion is associated with the shoreline migrating landward on either side of the structure, and it will take place regardless of the structure constructed. It is associated with the fact that the revetment structure is intended to fix the shoreline in place.
>
> By design, shoreline protection measures do have an influence on passive erosion. Indeed, the main purpose of these measures is to protect against future passive erosion. Land not protected by the shoreline protection structure will continue to erode in the same manner as it has in the past."

See Technical Memorandum, Chris Bahner PE, D, WRE, WEST Consultants, Inc. dated February 27, 2023, at p. 12. Thus, the BPS will protect the land that is located directly behind the BPS (*i.e.* to the east of the revetment) from passive erosion, but it will not protect any land that is located north or south of the revetment from passive erosion.

In contrast, active erosion refers to the potential erosive effects that the BPS itself could have on the direction wave action, a concept that the opponents describe as "flank erosion." The evidence in the record that the Board finds to be persuasive and credible is that the BPS will not cause "active erosion." Mr. Bahner defined "active erosion" as "the assertion that the proposed structure induces or accelerates beach erosion." *Id.* He quoted a study that defines active erosion as follows:

> "Localized, accelerated erosion that might occur because of interactions between armoring structures and waves is referred to as active erosion. This type of erosion includes scour at the base of a protection structure or on adjacent segments of shoreline, and changes in overall beach morphology."

Id. at 13. Mr. Bahner concluded that the BPS will not cause active erosion.

> "In summary, the above citations support the conclusion that the proposed revetment structure, which is considered to be Type II structures under the Weggel Classification system, will not have an adverse impact" on the surrounding southern property * * *."

Id. at 14.

The Board finds this evidence is persuasive and credible. Since Type II structures under

the Weggel classification system are those that sit up high enough on the beach that they have minimal impacts on the coastal processes within the littoral cell system, it is logical that they would not be expected to cause a significant adverse impact on surrounding property. *See* LUBA Rec. 1260. The Board finds it both credible and persuasive that the BPS meets the Weggel Type II structure classification. To recap, Weggel defined a classification system for coastal revetment structures that depends on their location on the beach and water depth at the toe. At one extreme (Type I), the structure is located landward of the limit of storm wave runup and has zero impact on coastal processes. At the other extreme (Type VI), the structure is located seaward of the normal breaker line and has a pronounced influence on the coastal processes. Mr. Bahner testified that the proposed revetment will be located above the stillwater line and below the total water line (stillwater line plus wave runup). A large part of the reason that the Board rejects the testimony of the opponents is that they presented very generalized evidence about the impact of BPS on adjacent lands without addressing Mr. Bahner's expert analyses or considering where BPS fits in the Weggel classification system.

Thus, ORCA's argument that questions the statement that the "proposed BPS will not have any effect on the rate or extent of beach losses" is referring to a statement about active erosion: the statement that the BPS will not cause active erosion is entirely accurate when considering the location of the BPS. The findings stating that the BPS will not cause active erosion is a point that the Board finds is credible, persuasive and correct and is not undermined by any credible or persuasive evidence otherwise.

In direct contrast, when the second finding at issue states that "[t]he long-term environmental impact of the proposal is positive because it will protect native shoreline trees, shrubs, vegetation, from further losses due to most flooding events brought about by the change from a prograding beach to a retrograding beach * * *." That finding is specifically referring to the revetment's now-proven ability to protect the land behind it from passive erosion. Thus, ORCA's passage on page 17 of its Petition for Review misunderstands our findings. ORCA confuses particular findings relating to passive erosion (that will happen regardless of the BPS) with findings regarding active erosion. The referenced Board findings reflect, and Board specifically finds here that the evidence establishes that the BPS does not make passive erosion any worse. The BPS protects the subject properties from passive erosion but does not change how passive erosion occurs anywhere else. The Board's findings also explain and we reiterate here that the evidence establishes that the BPS does not cause active erosion anywhere.

Turning to the opponents' issue of "shoreline armoring to the beach," the Board notes that this issue is of particular concern to the opponents. Their concern is that the BPS would prevent beachgoers from traversing north / south along the beach. The Board finds that the credible and persuasive evidence demonstrates that the BPS will not adversely impact t the beach for the reasons set forth below.

First, with regard to the issue of north-south beach accessibility, WEST concluded that:

> "the revetment has no impact on the north-south beach access in front of the revetment. The beach will continue to be accessible when it is now accessible and will be inaccessible due to extreme high tides and storms."

See Chris Bahner PE, D, WRE, Technical Memorandum, WEST Consultants, Inc. dated 27 February, 2023, at p. 9.

To arrive at this conclusion, WEST studied beach monitoring data available from the Northwest Association of Networked Ocean Observing Systems (NANOOS) website (NANOOS, 2021) and a 2014 erosion hazard study (DOGAMI, 2014). Based on this data, WEST concluded that "there is a high probability that the beach will remain in front of the Subject Property shoreline revetment in the future." *Id.* The Board finds this conclusion and its related analyses to be persuasive and credible.

In light of the opponents' LUBA briefing concerning the compatibility criterion,[2] on remand the Pine Beach owners and George Shand tract owners hired Dr. Martin Schott, PhD, and Ms. Juniper Tagliabue, of Schott & Associates, a firm consisting of ecologists and wetlands specialists. Dr. Schott conducted a site visit on January of 2023 with the intent of identifying any such impacts which might have been caused by the BPS. Notably, the BPS had been in place for over a year at the time of the site visit. Schott & Associates prepared a Natural Resources Assessment Report dated January 2023. This report demonstrates that the environmental consequences of the revetment are either neutral or positive.

For example, the Board finds Dr. Schott's conclusion that organisms inhabiting the beach and shallow waters just offshore from the revetment will not be affected by the revetment, as persuasive and credible:

> "The Pacific Ocean is located directly adjacent to the west of the subject property boundaries. The ocean is actively eroding the beach as documented in WEST Consultant's technical memorandum, historical aerial photographs, and photographs provided by property owners. The revetment was constructed to protect property including homes and infrastructure from further beach erosion. Construction of the revetment does not result in any changes to functions of either the ocean or the beach, apart from protecting life and property. Fauna and flora inhabiting the shallow waters of the ocean directly west of the BPS shall not experience any different conditions as a result of its installation. Vegetation is unable to root within the sandy intertidal zone of the beach. Animal species present on the sandy beach include a variety of small species which are generally unseen. Larger invertebrates, including crustaceans and mollusks may also be present. These species burrow in the sand during periods of exposure for protection and emerge to forage when the tides allow. These species are generally dependent on detritus provided by the incoming tides and deposited at the high tide line. Once in the intertidal zone, the organic detritus is broken down and made available by the mechanical force of waves pounding against the shore and the activity of the many different organisms that live and forage there. These ecological systems will be

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[2] *See* OS /SR Petition for Review brief at page 47.

unaffected by the presence of the BPS."

See Id. at p. 2.

The Board accepts the analysis and conclusions set forth in the Schott report as credible and persuasive.

In their sole submission on remand, , opponent ORCA adds a new discussion about the ESEE analysis and speculated that there could be hypothetical impacts to the beach and the ocean itself. As an example, opponent ORCA states:

> "In addition, it is important to note that the simple fact that revetment is on the applicant's property does not mean that the revetment will not have impacts to the dry sand beach where the public recreates. In fact, that is the concern with revetment: that it will have impacts elsewhere. Indeed, the applicant's remand letter includes quotes from studies, as well as site-specific reports, that concede the potential for impacts, though the applicant attempts to cast those as positive or neutral effects."

See Letter from ORCA dated March 14, 2023, at p. 6.

This argument is difficult to understand. The opponents never detailed their concerns, or explained what the potential adverse impacts to the dry sand beach could be. ORCA vaguely suggests that "the revetment will have impacts to the dry sand beach where the public recreates." However, ORCA provides no detail, other than to say that the "petitions for review are included in the record, and ORCA relies on the ESEE arguments therein because the applicant is "largely rely[ing] upon the findings that the Board already adopted." The Board is unaware of any significant adverse impacts from the BPS on the dry sand beach where the public recreates. The only evidence in the record regarding adverse impacts to the public beach is that for .1% of the year during significant storms and King Tides when the beach is otherwise impassible, it will also be impassible at the location of the BPS. *See* Chris Bahner PE, D, WRE, Technical Memorandum, WEST Consultants, Inc. dated 27 February, 2023, at p. 9-10. The Board finds that the BPS does not have an adverse impact on public recreation on the dry sand beach.

The Board also finds that the photographs provided by the applicant accurately demonstrated that the BPS is visually unintrusive and is in fact indistinguishable from the natural dune and so has no adverse visual effect on the public using the beach (or ocean) either.

At LUBA, the opponents speculated that the BPS will adversely impact the forested foredunes located south of the subject properties. However, at this point the BPS is installed and therefore, any adverse impacts of the BPS would have manifested themselves during King Tides and winter storms. *See* Natural Resource Assessment Report submitted by Dr. Martin Schott, PhD, of Schott & Associates dated January 2023, at p. 3 (so stating). Stated another way, the parties can observes how the BPS operates and the actual effect – or lack thereof – it has had on adjacent lands and resources. The applicant's experts concluded that there has not been even any early signs of any adverse impacts and the opponents do not call that conclusion into question.

Dr. Schott and Ms. Tagliabue found no impacts to any identified natural resources, including the foredunes, beach, Smith Lake or the ocean. The opponents speculated about potential adverse impacts but those have not come to pass, and actual experience has been to the contrary. The applicant's experts concluded that – barring unforeseen future changes in the littoral cell - those foredunes will continue to erode away just like they have been doing over the past 25 years. The Board finds as persuasive and credible that those foredunes continue to erode as Mr. Bahner concluded in the absence of BPS protection, breakwaters, or similar structural solution. The Board also finds that the BPS at the approved location has the least adverse impact on any resource or other property and the best chance to perform the required protective function for the properties at issue.

In addition, the Board finds that the most persuasive and credible evidence in the record demonstrates that the primary driver of any future loss of any of the land to the south will be passive erosion, which the Board concludes is not changed or worsened on that property by the BPS and that such erosion will likely continue to destroy the dunes at the same or similar rate as it previously had:

> "[W]e do expect the ocean to continue to erode these forested dunes, albeit at a somewhat slower rate than the younger foredunes that were eroded from between the mid-to-late 1990s to the 2020 time period. Assuming that current erosion patterns continue, the only feasible way to preserve these forested dunes over the long term is to provide sand renourishment and/or PBS similar to the structure installed at Pine Beach."

See Natural Resource Assessment Report submitted by Dr. Martin Schott, PhD, of Schott & Associates dated January 2023, at p. 3.

Mr. Bahner echoed this same conclusion:

> "Land not protected by the shoreline protection structure will continue to erode in the same manner as it has in the past. This includes the forested land located south of the Pine Beach lots. Barring any unforeseen changes to the littoral cell, the area to the south will continue to erode at either historical rates or a slightly reduced rate, accounting for the fact that the lands to the east feature more deeply rooted and established forests which should erode more slowly than the younger dunes that eroded over the past 20 years."

See also Technical Memorandum dated February 27, 2023 authored by Chris Bahner PE, D, WRE, of WEST Consultants, Inc, at p. 12.

OS/SR makes another argument that the Board also rejects. They state:

> "The County must then determine whether the value of protecting private property outweighs the loss of the public beach, which is a reasonably foreseeable impact of permitting the beachfront

> protective structures which fundamentally alter the way sediment is transported throughout the littoral cell."

See letter from Charlie Plybon and Phillip Johnson dated March 14, 2023, at p. 7. The Board rejects this analysis, because it assumes alleged facts which are not in the evidentiary record. The opponents assume that the permitting of the beachfront protective structure at issue will result in "the loss of the public beach." However, the Board finds that the persuasive and credible evidence in the record does not support OS/SR's conclusion, and therefore rejects it. The Board finds that the loss of the public beach is not a "reasonably foreseeable impact" of the BPS, because the BPS is a Type II structure under the Weggel classification system and is not built close to the water line. This is a key factual distinction from the examples cited by the opponents: the lower the elevation of the BPS in relation to the water line, the more likely that the BPS will cause a loss of the public beach. *See* Technical Memorandum dated June 10, 2021 by Chris Bahner PE, D, WRE, of WEST Consultants, Inc, at p. 4. In this case, the BPS is only in contact with wave action during the larger winter storms.

The opponents also argue that the social and economic consequences of allowing the BPS have not been considered. *See* letter from Charlie Plybon and Phillip Johnson dated March 14, 2023, at p. 7. The Board first reviews the LUBA record to see if any of the LUBA Petitioners preserved that issue in their Petitioners for Review. The only place that a discussion of economic consequences appears at LUBA occurs when ORCA makes the following argument in its brief to LUBA in a section addressing preservation of error:

> Oregon Shores also argues that the Applications' economic analysis is likewise deficient. It fails to acknowledge the economic impacts to adjacent properties, and the immeasurable impact of the public's loss of its beach. As noted, the Applications focus almost exclusively on the value of the existing homes and the possibility of damage to water and sewer facilities."), [Rec.] 1393 ("The Applicants' materials fail to provide the analysis required by this criterion, particularly with respect to potential adverse impacts to resource values in the vicinity of the proposed exception area. Absent more detailed information the Planning Commission cannot complete an analysis of the comparative adverse impacts and the ESEE consequences consistent with this rule."); R 1662 ("some degree of impact is conceded. It is incumbent upon the applicant to address those impacts."; R 1663; R 264 ("The economic analysis continues to be deficient. It fails to acknowledge the economic impacts to other properties as a result of placing riprap. The applicant focuses almost exclusively on the value of the existing homes and the possibility of damage to water and sewer facilities. Moreover, the notion that remedial action would not occur for such facilities is far-fetched. The applicant has not provided a serious attempt at an economic analysis.").

However, this is the last time ORCA mentions "economic consequences" in its Brief to

LUBA. Likewise, neither OS/SF or DLCD direct any attention at LUBA to the "economic" prong of the ESEE analysis: OS/SR did not set forth any assignment of error related to ESEE analysis, and DLCD limited its Fourth Assignment of Error to environmental consequences. The Board finds that the opponents did not preserve any issue at LUBA pertaining to social or economic consequences.

Nonetheless, in the alternative to the finding of waiver on the issue of economic consequences, the applicants submitted the report of a recognized expert in real estate economics. *See* letter from Dr. Eric Fruits, PhD., dated February 19, 2023. Dr. Fruits explained that the impacts of the revetment are positive:

> "In summary, (1) Dundas & Lewis find the presence of a shoreline protection structure has *no effect* on surrounding properties while (2) Walsh et al. find that a riprap structure is associated with a *positive* effect on both subject properties and surrounding properties. Thus, based on available empirical evidence, it would be reasonable to conclude the riprap revetments in this matter would not reduce surrounding property values and would likely be associated with increased property values for surrounding properties."

Id. at 4. The opponents do not provide any evidence to the contrary. Instead, they assert that the analysis provided by Mr. Fruits is insufficient:

> "To the extent that social consequences are contemplated by the materials submitted by the Applicant, those considerations are taken in tandem with the economic consequences. Regarding the economic consequences, the Applicant has submitted a report (labeled as Applicants' Exhibit 8) authored by Dr. Eric Fruits, PhD. Dr. Fruits discusses impacts to adjacent private property values only. The narrow scope of this review aside, Dr. Fruits' conclusions are at direct odds with a peer-reviewed study published in 2020 on this same subject in the Journal of the Association of Environmental and Resource Economists. This government-sponsored study, as summarized by NOAA's National Centers for Coastal Ocean Science, analyzed the ocean-front housing market in Oregon from 2004-2015. The researcher found that armoring properties legally eligible for such protection can increase their value 13-22%, but adjacent, unarmored properties sell for 8% *less*, due to the potential for increased damage from deflected wave action.
>
> "The proponents of this application have not fully demonstrated the economic or social consequences which are likely to flow from an approval of this application. The County should deny this application on those grounds, or, alternately, find that the potential conflicts resulting from the BPS outweigh the supposed benefits to the individual property owners seeking to armor their

> private property at the expense of the public beach." (Footnotes omitted).

See letter from Charlie Plybon and Phillip Johnson dated March 14, 2023, at p. 7. The obvious distinction between OS/SR's conclusion regarding the Dundas report and the expert analysis by Dr. Fruits is that the Dundas evaluation of reduced property value depends upon the BPS causing active erosion: "but adjacent, unarmored properties sell for 8% *less, due to the potential for increased damage from deflected wave action"* (Emphasis supplied.) Here, the Board finds that the persuasive and credible evidence in the record demonstrates that the BPS *does not* increase the potential for damage to unarmored properties from deflected wave action. *See* Technical Memorandum, Chris Bahner PE, D, WRE, WEST Consultants, Inc. dated February 27, 2023, at p. 12.

Further, OS/SR's footnote 11 cites to an article entitled "Estimating Option Values and Spillover Damages for Coastal Protection: Evidence from Oregon's Planning Goal 18." By Steven J. Dundas and David J. Lewis, Journal of the Association of Environmental and Resource Economists 2020 7:3, 519-55. This document was not placed in the record, and therefore was not considered by the Board.

Nonetheless, as noted above, OS/RS summarizes the article's conclusion by stating that "[t]he researcher found that armoring properties legally eligible for such protection can increase their value 13-22%, but adjacent, unarmored properties sell for 8% *less*, due to the potential for increased damage from deflected wave action." The Board reiterates its finding that such circumstance does not apply in the subject case because the evidence that the Board finds to be credible and persuasive demonstrates the BPS does not cause damage to unarmored property. Also, the Board observes that the adjacent properties to the north are already armored, and the property to the south is zoned Recreational Management ("RM") and is a largely undeveloped camp owned by a nonprofit.

In footnote 10 of its letter dated March 14, 2023, OS/SR argues:

> "The reasonably foreseeable loss of public beach from the hastened erosion caused by the BPS should also be fairly considered in this analysis. The applicant bears the burden of demonstrating the loss of this public property, and has not done so. *See, e.g.,* OAR 660-023-0040(2)(a)."

Id. at p. 7.

The Board has three responses. First, the ESEE analysis in this case proceeds from OAR 660-040-0020 & OAR 660-040-0022, not OAR 660-023-000 *et seq*. Therefore, OAR 660-023-0040(2)(a) does not apply. Second, the issue was not raised in the original proceeding or in the LUBA appeal, and is therefore is an issue that cannot be raised on remand under "raise it or waive it" principles. Third, the argument starts from an unsubstantiated premise that the Board rejects: *i.e.* that there will be a "foreseeable loss of public beach from the hastened erosion caused by the BPS." The opponents' assertions do not undermine the conclusion and analysis of the applicant's experts; that there will not be any perceivable loss of the public beach from the BPS and the Board agrees with this conclusion and finds that the applicants' evidence in this

regard is persuasive and credible. *See* Chris Bahner PE, D, WRE, Technical Memorandum, WEST Consultants, Inc. dated February 27, 2023, at p. 9.

Nonetheless, the Board finds that the social and economic consequences to the County and its residents are more severe if the BPS is not allowed on the subject property. The Board concludes there are no significant adverse ESEE consequences of allowing the BPS - either to adjacent properties or to the public. In contrast, the Board finds that the consequences of not allowing BPS on the subject properties are severe, not only to the applicants' properties and their lives but also to the public infrastructure located on the properties of the developed lots as well as the undeveloped lots and the harm to the public beach and ocean if the homes and their contents and public infrastructure are allowed to be claimed by the ocean.

Issue No. 4: Compatibility Analysis

The final of the four standards for a "reasons" exception requires an analysis of whether the BPS will be compatible with adjacent uses. In this regard, OAR 660-004-0020(2)(d) provides as follows:

> ***(d) "The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts." The exception shall describe how the proposed use will be rendered compatible with adjacent land uses. The exception shall demonstrate that the proposed use is situated in such a manner as to be compatible with surrounding natural resources and resource management or production practices. "Compatible" is not intended as an absolute term meaning no interference or adverse impacts of any type with adjacent uses.***

LUBA case law addressing Goal exceptions point out that a local government must adopt findings that (1) describe the uses adjacent to the proposed use exception area and (2) explain why the proposed use is or will be rendered compatible with those uses in order to satisfy ORS 197.732(2)(c)(D): *Jensen v. Clatsop County,* 14 Or LUBA 776, 784-6 (1986); *Loos v. Columbia County,* 16 Or LUBA 528, 539-41 (1988); *Murray v. Marion County,* 23 Or LUBA 268, 280-2 (1992). This test does not require compliance with the compatibility standard before an exception is approved; it is sufficient that there is a showing that compliance will be achieved. *Schrock Farms, Inc. v. Linn County,* 31 Or LUBA 57, 66, *aff'd,* 142 Or App 1 (1996). .

The Board's original findings provided the required analysis. The following supplements those findings' analysis.

As a general matter, the Board finds that the compatibility analysis of non-applicant owned adjacent property is not affected by the presence or absence of BPS on the applicants' vacant lots. Stated another way, whatever impacts might be caused by the BPS onto non-applicant owned adjacent properties, those impacts are no different with or without BPS built on vacant lots. All of the vacant lots are interior to the BPS, and therefore create no additional impact. Provided however, the public infrastructure in the land adjacent to the vacant lots would be adversely affected if the vacant lots were not protected for the reasons explained above. Further, if only the developed lots were protected, the Board finds that the evidence establishes that the

vacant lots would then be "adjacent" property and would be adversely affected by high velocity wave action.

In their brief to LUBA, opponents OS/SR argued that the County "failed to identify and consider all adjacent recreational and natural resource uses" when conducting the compatibility requirement set forth at OAR 660-004-0020(2)(d). *Id.* at p. 48. According to the opponents, the County omitted "analysis regarding the foredune and provides only minimal analysis of the ocean and shoreline." This is mistaken. The original findings were robust on this topic. Rec. 46. the Board reiterates that the location of the dry sand beach adjacent to the BPS is subject to a Goal 17 exception that runs all the way to the ocean itself. Moreover, the original findings explained that the BPS has no impact on the public beach, ocean, or adjoining properties regardless of the Goal 17 exception.

Moreover, the Board finds that on remand, the applicants commissioned a natural resources assessment. The Natural Resource Assessment Report submitted by Dr. Martin Schott, PhD, of Schott & Associates dated January 2023 reinforces the Board's previous findings and identifies surrounding natural resources and determines that the construction of the revetment was and is compatible with surrounding natural resources with no impacts to said resources. *Id.* at p. 3. The Board finds this analysis to be persuasive and credible and adopts it as its own and incorporates it herein by this reference as supplemental findings. The Schott analysis is especially persuasive because of the fact that it is based on a site visit that occurred thirteen months after construction. This post-construction analysis means that there is no need to speculate about future impacts because whatever impacts would result from construction would have already begun to reveal themselves. The Board further notes that the opponents submitted no evidence that rebuts or otherwise calls into question the conclusions set forth in that expert report. In particular, the Board finds that the evidence establishes that the BPS will protect "what remains of the back dunes and associated forest community," which is more environmental protection than will occur if those are allowed to erode away. *Id.*

The Board also notes that OS/SR asserts:

> "Shoreline hardening not only 'reduces abundance and diversity of marine habitats and associated fauna' but also 'exacerbates erosion and prevents upslope transgression of coastal habitats with sea level rise.'

See letter from Charlie Plybon and Phillip Johnson dated March 14, 2023, at p. 6. The Board disagrees with this statement and rejects it findings that the analyses by both West and Schott to the contrary is more credible and persuasive. This letter cites Gittman et al, "*Reversing a tyranny of cascading shoreline-protection decisions driving coastal habitat loss*" (2021). However, that document was not placed into the record. Moreover, the Board did not search for the document online or otherwise make attempt to physically place the document into the record. Therefore, the Board has not considered this document. Opponents generalized unsupported statement is not credible evidence that undermines the applicant's experts' conclusions in the record. that the applicants' evidence is specific to this particular BPS and the Board finds that it is more credible than the opponents' generalized assertions. For this reason, the Board finds that opponents' generalized statement quoted above does not undermine the site-specific analysis from the highly qualified experts who have visited the site to include West that has designed the

BPS specifically to address the site parameters and limitations.

The Board also finds that the evidence from Chris Bahner PE, D, WRE, of WEST Consultants, Inc, strongly suggests that the beach in question will continue to exist and will continue to provide north-south pedestrian accessibility in all but the worst of the winter storm conditions when the public beach is not accessible regardless. *Id.* at 9-10. The Board notes that opponents do not challenge that conclusion.

The Board concludes that the credible and persuasive evidence demonstrates BPS is compatible with adjacent uses and surrounding natural resources.

Issue No. 5: Floodplain Development Permit.

TCLUO §3.510(10)(h) is a provision applicable to sand dunes in a flood hazard zone. It states that the County shall:

> ***"Prohibit man-made alteration of sand dunes, including vegetation removal, which would increase potential flood damage."***

The Board finds that TCLUO §3.510(10)(h) does not prohibit *all* man-made alterations to sand dunes. Rather it only prohibits man-made alterations of sand dunes to the extent that they increase the potential for flood damage to occur at or near the location of the man-made alternation.

The original findings, which incorporated the WEST Memo dated March 25, 2021, include a detailed analysis of the revetment design. Included in those findings was the following passage:

> "The construction of the rock revetment structure will require removal of the shrubs and trees where the structure will be built. All excavated sand shall be placed over and seaward of the rock revetment structure. It is also important that the disturbed area be re-planted with native grasses, shrubs, and trees; standard staked silt fences be placed along the disturbed area to prevent aeolian erosion; and that area is annually maintained in such conditions." (Emphasis supplied).

The Board finds, based on the photographic evidence in the record, that that is exactly what happened. During construction, the contractor placed the excavated sand seaward of the location where the BPS was installed. This was done, as designed, so that the excavated sand offered temporary protection against flooding during construction. *See* Technical Memorandum dated February 27, 2023, authored by Chris Bahner PE, D, WRE, of WEST Consultants, Inc, at p. 8 (showing photos of the construction).

With that design and construction practice in mind, the original findings explained that the proposal complies with TCLUO §3.510(10)(h):

> "The purpose of the proposed BPS is to decrease potential flood

> damage. Accordingly, and *in order to accomplish this purpose*, the man-made alteration of sand dunes, including vegetation removal, *will be temporary and is required in order to install and locate the proposed BPS*. The proposed beachfront protective structure will be back filled with sand and revegetated. The disturbed area surrounding the proposed beachfront protective structure will be restored to its natural state, monitored annually and replanted when necessary as part of the maintenance program to ensure that native beach grasses and shrubs establish on the site. Therefore, once the native vegetation is reestablished after replanting, there will be minimal if any impacts and no permanent disturbance to the actively eroding dune adjacent to the Subject properties. The establishment of the BPS will protect the dune and its vegetation and reduce potential flood damage." (Emphasis added).

At LUBA, opponents argued that the findings set forth above fail to address the time period "before the vegetation is reestablished." The opponents read into that statement an unwarranted negative implication: to wit, that during construction and before the native vegetation is reestablished, there will be an increased risk of flood damage. ("The findings do not address the impacts before the vegetation that was removed is reestablished, and in the absence of such findings, the applications cannot satisfy TCLUO §3.510(10)(h)."). Stated another way, the opponents speculated that there may be a temporary period of time when the BPS *might* "increase the potential for flood damage."

One opponent posited their own interpretation of the County FDP standards: that no revetment or other flood protection could ever be approved, because constructing a revetment or other flood protection requires temporarily removing vegetation, which the opponents claimed necessarily violated County's FDP rules.

LUBA did not reach this assignment of error, stating that the issue was "premature." *See Oregon Coast Alliance v. Tillamook County,* __ Or LUBA __ (LUBA No. 2021-101 and LUBA No. 2021-104), slip op at 51. LUBA's opinion did not account for the fact that the BPS was in place at the time LUBA decided the case (actions taken after the decision under review became final are not part of the record and generally are not relevant to LUBA's review.).

On remand, the Board finds that the issue raised by the opponent is moot because the BPS at issue has been installed and the vegetation is sufficiently reestablished that so whatever concern that might have previously existed regarding any increased potential for flooding during construction did not occur. With hindsight, the Board can now state with certainty that the construction process did not increase potential flood damage. To the contrary, as installed the Board finds that the BPS *decreased and still decreases* the potential for flood damage. The fact that the issue is moot is an independent and stand-alone basis for concluding that TCLUO §3.510(10)(h) is satisfied.

Nonetheless, in an abundance of caution, the Board finds that the WEST report dated February 27, 2023 (which has already been adopted and incorporated in its entirety as supplemental findings of this Board) demonstrates that the BPS complies with TCLUO

3.510(10)(h) and has performed exactly as it was designed to – it has mitigated against flood damage that would otherwise have occurred and maintained a vegetative cover in the process. Notably, the WEST report author, Mr. Bahner, described in detail the process the contractor used to complete the construction. Mr. Bahner concluded that construction was completed "without increasing the potential for flood damage." *See* Chris Bahner PE, D, WRE, Technical Memorandum, WEST Consultants, Inc. dated February 27, 2023 at p. 7. This is the only evidence in the record on this topic, and the Board finds it to be both persuasive and credible. The Board concludes that there was no time when the BPS increased the potential for flood damage.

On remand, ORCA advances a code interpretation that the Board finds is incorrect. In its letter dated March 14, 2023, opponent ORCA repeats its proposed interpretation of TCLUO §3.510(10)(h):

> "TCLUO 3.510(10)(h) "[p]rohibit man-made alteration of sand dunes, including vegetation removal, which would increase potential flood damage." The photos included at Figure 4 of the West Consultants report (Exhibit 6, Page 8 of 21) demonstrates, unequivocally that vegetation was removed during the construction process. As noted in ORCA's petition for review, there is no argument that removal of vegetation is not occurring, and the record contains numerous reports and studies about the well-known and publicly-available information about the adverse impacts from armoring the shoreline, including but not limited to passive erosion. Moreover, the findings and applicants' reports concede that impacts would occur prior to the reestablishment of the vegetation that the applicants would remove or how long it would take for vegetation to re-establish."

Id. at p. 6. OS/SR similarly argues:

> "Because the Applicants' proposed site is located within a VE flood zone, the standards in this section apply. TCLUO Section 3.510(10)(h) requires that development in Coastal High Hazard Areas "[p]rohibit man-made alteration of sand dunes, including vegetation removal, which would increase potential flood damage." The Applications cannot justify TCLUO Section 3.510(10) by acting in conflict with TCLUO Section 3.510(10)—especially given the harmful, long-term impacts that increased proliferation of riprap and alteration of sand dunes will have on the public's beach and surrounding properties."

See letter from Charlie Plybon and Phillip Johnson dated March 14, 2023, at p. 6. The Board rejects the opponents' interpretation of TCLUO §3.510(10)(h) as incorrect and inconsistent with its text, as well as purpose and policy. The opponents erroneously interpret the last clause as a factual conclusion which will occur every time a "man-made alteration" of any sand dune occurs. This is not consistent with the express words of the enactment or its purpose or policy. Rather, the last clause draws a distinction between man-made alterations of sand dunes which do

not increase the potential for flood damage (which are allowed), and man-made alterations of sand dunes which increase the potential for flood damage (which are prohibited).

The Board finds that the County has never interpreted its Code in such a draconian manner as opponents request and finds that the opponents' interpretation is incorrect. The opponents' interpretation essentially writes the qualifying language in the last clause of out of TCLUO §3.510(10)(h). Under the opponents' reading of TCLUO §3.510(10)(h), the provision would simply have been written as shown in the two alternative ways set forth below:

- ***"Prohibit man-made alteration of sand dunes, including vegetation removal. ~~which would increase potential flood damage.~~"***

- ***"Prohibit man-made alteration of sand dunes, including vegetation removal, <u>because it</u> would increase potential flood damage."***

However, the Board finds that such interpretations are contrary to the express words used and the policy of the enactment which is designed to prevent only certain types of vegetation removal – those that increase the potential for flood damage. TCLUO §3.510(10)(h) not only expressly states that the only vegetation removal that is prohibited is that which increases the potential for flood damage, it also has context which demonstrates that it is intended that development is allowed in the V, VE, V1-V30 zones that meet certain standards. *See* TCLUO §3.510(10)(d) (allowing "new construction" that is located "landward of the reach of the mean high tide"). Further the policy of the provision is to avoid increasing flood risk. Projects like the BPS that were specifically designed to *decrease* flood risk and that at all times even during construction did not increase the potential for flood risk are simply not prohibited under the provision. Under opponents' interpretation no such development could be allowed. Similarly, TCLUO §3.510(10)(e) authorizes new construction and substantial improvements. Opponents' interpretation robs the express words used in TCLUO §3.510(10)(h) of any meaning. Opponents' interpretation also runs afoul of ORS 174.010, because it omits or alters the final clause.

Two "corollary" first-level statutory maxims have strong applicability here. First, courts will give effect to all parts of a statute, in order to produce a harmonious whole. ORS 174.010.[3] Second, courts will avoid interpretations that render a portion of the statute redundant or meaningless surplusage.[4] In this case, the last clause of TCLUO §3.510(10)(h) would be meaningless surplusage if the Board of Commissioners had understood it to operate as opponents contend. *See State v. Stamper,* 197 Or.App. 413, 418, 106 P.3d 172, *rev. den.,* 339 Or. 230, 119 P.3d 790 (2005) ("we assume that the legislature did not intend any portion of its

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[3] *Lane County v. LCDC*, 325 Or 569, 578, 942 P2d 278 (1997); *Bolt v. Influence, Inc.,* 333 Or. 572, 581, 43 P.3d 425 (2002) ("we are to construe multiple provisions, if possible, in a manner that will give effect to all"). *See also Davis v. Wasco IED*, 286 Or 261, 267, 593 P2d 1152 (1979); *Tatum v. Clackamas County*, 19 Or App 770, 775, 529 P2d 393 (1974); *Plotkin v. Washington County*, 36 Or LUBA 378 (1996); *Walz v. Polk County*, 31 Or LUBA 363 (1996); *Fechtig v. City of Albany*, 31 Or LUBA 410 (1996) (Ordinance).

[4] *Certain Underwriters at Lloyd's London and Excess Ins. Co., Ltd. v. Massachusetts Bonding and Ins. Co.*, 235 Or.App. 99, 230 P.3d 103 (2010); *State v. Stamper,* 197 Or.App. 413, 417, 106 P.3d 172, *rev. den.,* 339 Or. 230, 119 P.3d 790 (2005); *EQC v. City of Coos Bay,* 171 Or.App. 106, 110, 14 P.3d 649 (2000).

enactments to be meaningless surplusage"). Thus, when one interprets TCLUO §3.510(10)(h) as a harmonious whole, the conclusion is it only applies if the man-made alteration at issue "increases the potential for flood damage."

The Board finds the evidence in the record is overwhelming – persuasive and credible - that the BPS here at no point increased the potential for flood damage. Rather, at all points in time – even during construction – the potential for flood damage was either not increased or reduced. In this regard, the evidence is that during construction sand was dug for the BPS trench and was immediately deposited oceanward creating a large berm that decreased the potential for flood damage. Moreover, once the BPS was installed, it also decreased the potential for flood damage which is evidenced by the fact that it was effective in protecting the subject properties during significant storms and King Tides. The Board observes that no party submitted evidence to support the speculation that the BPS would "increase the potential for flood damage" either during or after constriction. *See* ***Cohen v. Clackamas County***, 3 Or LUBA 26 (1981) (speculation about the future is not "evidence."). On the other hand, the applicant submitted persuasive and credible evidence that the BPS both during its construction and after either did not increase the potential for flood damage or decreased the potential for flood damage and that does not violate TCLUO §3.510(10)(h) in any respect.

Moreover, ORCA's interpretation of TCLUO §3.510(10)(h) would essentially prohibit any temporary alteration of a sand dune that is covered with vegetation. The Board interprets TCLUO §3.510(10)(h) to make clear that it the standard does not prohibit the temporary construction of a structure such as the BPS at issue here, that is designed to *decrease* flood damage and in fact did not increase the potential for flood damage.

If TCLUO §3.510(10)(h) were interpreted to prohibit all temporary construction activities designed to decrease the potential of flooding, no use whatsoever could be approved – including those designed to prevent flooding. The Board finds that is contrary to the express words used in the Code, and also contrary to the purpose of the zone: which is to be protective of dunes. As staff notes, under opponents' interpretation, foredune and remedial grading activities would be prohibited. Installation of piers for construction of a single-family dwelling (a use permitted outright in several residential zones) would also be prohibited as these construction activities result in alteration of the sand dune and vegetation removal. Boardwalks, habitat restoration projects and other types of permitted development such as beach manholes for fiber cable installation would be prohibited under the opponents' interpretation of TCLUO §3.510(10)(h), as these activities also require alteration of the sand dune and vegetation removal activities. These absurd results further demonstrate that opponents' interpretation of TCLUO §3.510(10)(h) is erroneous.

Furthermore, as a second and independent interpretation, the Board finds that TCLUO §3.510(10)(h) only applies to man-made alterations of sand dunes which would increase the potential for flood damage. The clause "including vegetation removal" merely provides one example of the type of alteration that could potentially run afoul of this prohibition in circumstances where permanently removing such vegetation potentially increases the likelihood of flooding due to, as an example, increased potential for wind-blown erosion decreasing the height of a dune.

The Board's interpretations on this topic are entitled to deference, ORS 197.829(1). The

Board observes that the Court of Appeals has upheld an interpretation of a nearly-identical provision even though the interpretation was even more limiting than the interpretation provided here. *See Visher v. City of Cannon Beach*, 158 Or. App. 146, 973 P.2d 372 (1999) (City Council found that the code provision applied only to alterations that would increase potential damage from "100-year floods.").

ORCA mistakenly asserts that the evidence shows that there is still the "potential" for flood damage because of the BPS contrary to TCLUO §3.510(10)(h). *See* ORCA letter dated March 14, 2023, at p. 6. The assertion and conclusion about what the evidence shows are both incorrect. First, the Board expressly disagrees that the fact that there may still exist some potential for flood damage, that such potential exists as a result of the BPS. The installation of the BPS decreased the potential for flood damage. The Board finds that while it is undoubtedly true that there still exists some potential for flooding from large tsunami type waves, the standard does not require the impossible or that BPS be prohibited unless it prevents *all* flooding. Rather, the standard simply prohibits situations that increase the potential for flooding – making it worse than the existing condition. The Board finds that the persuasive and credible evidence is that at all times the BPS decreased the potential for flood damage and that continues to this day. Put another way, the Board finds that the BPS at no time increased the potential for flood damage. The Board rejects any claim to the contrary as less persuasive and not credible.

Further, the Board interprets the term "potential" used in TCLUO §3.510(10)(h) to be used in its ordinary sense: it is an adjective that means "having the capacity or a strong possibility for development into a state of actuality." *See* Webster's New Third International Dictionary, Unabridged (2002), at p. 1775. The Board finds that the potential for flooding is only increased if the change makes it more likely that flooding will become an actuality as compared to the pre-existing condition prior to the alteration. ORCA's assertion - that the fact that there remains some "potential" for flooding - somehow means that the proposal therefore "increases potential flood damage" is rejected as wholly implausible, incorrect and illogical.

ORCA states that "the applicant's letter includes reports and quotes that clearly show the 'potential' contemplated is very real." *See* ORCA Letter dated March 14, 2023, at p. 6. ORCA misreads the applicant's evidence. The Board finds that the applicant's evidence demonstrates that the BPS has significantly decreased the potential for flood damage on the subject properties and has had no adverse effect on other properties around it.

Lastly, the Board of Commissioner finds that at this point, the *removal* of the BPS revetment would violate TCLUO §3.510(10)(h). Any removal of rock would necessarily provide less flood protection than either the existing condition or the condition of the dune prior to the original application and would therefore increase the potential for flood damage. This is an independent and standalone alternative basis for finding that the requirements of TCLUO §3.510(10)(h) are met.

As mentioned previously, the entirety of the Technical Memorandum dated February 27, 2023, authored by Chris Bahner PE, D, WRE, of WEST Consultants, Inc. is hereby incorporated by this reference.

IV.