KELLINGTON LAW GROUP, PC

Wendie L. Kellington
P.O. Box 2209
Lake Oswego OR 97035

Phone (503) 636-0069
Mobile (503) 804-0535
Email: wk@klgpc.com

February 8, 2023

Tillamook County Board of Commissioners
c/o Sarah Absher, Director
Tillamook County
Department of Community Development
1510 B Third St.
Tillamook, OR 97141

RE: Request to Initiate Remand Proceedings for Local File #851-21-000086-PLNG and PLNG-01.

Dear Chairman Yamamoto and Members of the Board:

As you know, this firm represents the Applicants for the above-referenced matters. The Applicants own a total of 15 beachfront lots in the Pine Beach and George Shand Tracts subdivisions, situated in Tillamook County's acknowledged, urban unincorporated community of Twin Rocks/Barview/Watseco (hereinafter "Subject Properties"). A variety of opponents challenged your approval at LUBA. On September 30, 2022, LUBA ruled against those opponents on key issues, but remanded the Board's approvals for the County to adopt findings revolving around four then-vacant lots (now only 3 are vacant) and to potentially write additional findings on two exceptions standards related to those vacant lots and on one floodplain development permit standard, TCLUO 3.510(10)(h). *Oregon Coast Alliance v. Tillamook County*, __ Or LUBA __ (LUBA Nos. 2021-101/104, September 30, 2022). A copy of LUBA's decision is attached as Exhibit 1.

The Applicants hereby respectfully request that the County begin the LUBA remand proceedings. ORS 215.435; TCLUO Section 10.130(2)(c).

I. Executive Summary

On the recommendation of your staff and planning commission, the Board of Commissioners approved the request for a Goal 18 exception and floodplain development permit (also called an "FDP" in this letter) to construct a continuous beachfront protective structure (BPS or revetment) on their own property (not on the dry sand beach). The approved BPS was required to be maintained by the property owners and they have been doing that. The BPS has been installed and looks like a dune. It has held up remarkably well even in the face of unprecedented King Tides. This is what the revetment looks like:

Note in the image below, you can see in the background the more traditional BPS that was installed over 20 years ago at the Shorewood RV Park. However, the BPS you approved in this case, looks like a dune and is several feet east (landward) of the Shorewood BPS (on the owners' backyards, not the dry sand beach).

On appeal, LUBA affirmed the County's findings that adequate reasons justified the Goal 18 exception for the lots that were developed with homes. On that critical issue, LUBA agreed with your decision and disagreed with the opponents. LUBA decided that the peril these Applicants' lots face is caused by highly unique circumstances that are not present elsewhere in Oregon.

However, for the (then) four vacant lots, LUBA remanded instructing the County to adopt additional findings. Specifically, LUBA wanted more findings about why it is necessary to protect the vacant lots, including whether protecting the vacant lots was necessary to protect the developed lots or public infrastructure.

Because LUBA wanted more findings regarding the four (then) vacant lots, LUBA decided that it was premature for them to deal with other opponent arguments. Accordingly, LUBA punted on resolving opponent objections on two reasons exception standards and on the County's floodplain development permit requirements. LUBA justified punting on those topics, by saying that it was possible that the findings about the vacant lots might result in corresponding changes to the findings about those standards. Consequently, the County's findings on the two exception standards and County floodplain standards remain unresolved

and can be beefed up on remand to address the variety of issues that opponents raised in their LUBA briefing.

On remand, the Board of Commissioners should accept new evidence and argument limited the issues that LUBA remanded on and the issues that LUBA punted. These issues are: (1) the Goal 18, Implementation Requirement 5 reasons exception for the vacant lots (OAR 660-004-0020(2)(a)); (2) the reasons exception ESEE and compatibility analysis required by OAR 660-004-0020(2)(c) and (d) for the BPS (both vacant and developed lots); and (3) compliance with the County's floodplain development standards for the temporary construction impacts of the revetment – TCLUO 3.510(10)(h) – which is the only FDP standard that opponents raised in their LUBA appeal. The Board should make its final decision within 90 days following submission of this letter unless the Applicants request an extension, which is not expected. After the record closes and the Board deliberates to make an oral decision, the Board should then instruct the Applicants to provide re-approval findings to provide to the Board (if re-approval is the Board's decision), for consideration and adoption.

The evidence submitted in this remand request demonstrates that the application warrants approval:

- Not having the revetment cover all the Subject Properties – ones with dwellings and ones without – will cause the revetment to fail to adequately protect the properties that are developed with dwellings. The undeveloped properties' location interspersed among the properties developed with dwellings means that if they are not protected, that there will then be gaps in the BPS that will allow high velocity floodwaters to flow through the gaps and behind the BPS, which will cause damage to not only the vacant lots, but also nearby developed lots, causing "flank erosion" that deprives the revetment of its efficacy.
- There are no natural resources that will be harmed in any way by the revetment.
- The revetment either increases or has no impact on property values of the homes it protects and those around it.
- The revetment is already installed so opponents' arguments about temporary construction impacts are moot. Regardless, during installation of the revetment, no properties were exposed to a greater risk of flooding because of the construction techniques that were used. Rather, flood risks were at all times, including during construction, reduced.
- There is simply no reason not to approve the revetment – it harms no one, helps many and meets all relevant standards. There can be no credible evidence otherwise.

II. Detailed Analysis

A. The Matter, Subject Properties, and Initial Approval

1. The Proposal

To refresh the Board on the matter before it, Applicants sought and obtained land use approval to develop a beachfront protective structure (BPS or "revetment") on their own property, to be maintained by the property owners. It is important to recall that the revetment was not on the dry sand beach. Rather, it was built entirely on privately owned property. Accordingly, no Oregon Parks and Recreation Department (OPRD) approval was necessary. Per the County Board approval, the landowners promptly installed the BPS.

The BPS helps to prevent wave run-up and overtopping that otherwise threatens the Subject Properties during king tides and extreme storm events such as the recent events over the Christmas holidays and in January 2023. The extreme ocean hazards these properties faced was triggered by two things. One, there were two successive El Niño/La Niña events in the late 1990s. Second, these events had a uniquely adverse influence on the Rockaway littoral cell subregion due to those two unusually closely placed jetties cabining the subregion in which the Subject Properties exist. That unhealthy and unusual interaction led to a reversal from the decades-old historic pattern of beach prograding (growth) to the steady erosion of the Rockaway beachfront caused by forces that affect no other location on the Oregon coast. The result of that unexpected reversal of the littoral patterns was that homes and public infrastructure that were built hundreds of feet from the shoreline and that had an extensive, vegetated natural buffer from ocean impacts, are now threatened during major storm events. Attached as Exhibit 2 are photos taken from the 1990s showing how extensive the natural buffer was prior to this sudden reversal. Exhibit 3 shows the approved revetment – which visually looks like a beach dune - following December 2022 storm events. LUBA held that the unexpected reversal of natural littoral processes, due to the interaction of the two late-1990's El Niño/La Niña events and the two unusually closely placed jetties, is sufficient reason to justify the reasons exception for the BPS. That is a settled issue that may not be relitigated now.

2. The Subject Properties

The Subject Properties include the 15 oceanfront lots of the Pine Beach Subdivision and the George Shand Tracts (also referred to as the "Ocean Blvd. Properties"). Eleven of the properties were developed with houses at the time of application. The four "vacant" lots included the two adjacent southernmost properties of the George Shand Tracts and two separate lots in the Pine Beach

Subdivision, where on one, a house was in the final planning stages for construction, which the BPS design accounted for (Exhibit 4). That house is now nearly completed. Two George Shand and one Pine Beach Subdivision lots remain undeveloped with homes (vacant), but they have been, at all times material, developed with public infrastructure to serve them.

All of the Subject Properties are in an acknowledged plan designation of "Residential" and all are in the County's acknowledged Community Medium Density Urban Residential zone. They are all in the acknowledged urban unincorporated community of Twin Rocks/Barview/Watseco, where the County's acknowledged plans say the County will accommodate urban, medium density housing development.

The Subject Properties are also located within the County's Beach and Dune (BD) and Flood Hazard (FH) overlay zones. Portions of the Subject Properties are within the FEMA Flood Hazard Zone VE, a Coastal High Hazard area under the FH overlay zone.

The Applicants applied for a post acknowledgement plan amendment (PAPA) for an exception to Goal 18, Implementation Requirement 5[1] and a floodplain development permit to establish the revetment. Goal 18, IR 5 generally prohibits development of beachfront protective structures to protect development that did not exist on January 1, 1977 and says that for those properties, an exception is necessary for revetments to be approved.

The Tillamook County Board of Commissioners approved the requested Goal 18 exception and Flood Plain Development Permit applications, adopting alternative Goal 18 findings of approval for the George Shand Tract properties, and imposed 9 conditions of approval. *See*, Local Files #851-21-000086-PLNG-01; #851-21-000086.

---

[1] Goal 18 Implementation Requirement 5 provides, in relevant part:

> "Permits for beachfront protective structures shall be issued only where development existed on January 1, 1977. * * *. For the purposes of this requirement * * * "development" means houses, commercial and industrial buildings, and vacant subdivision lots which are physically improved through construction of streets and provision of utilities to the lot and includes areas where an exception to (2) above has been approved. The criteria for review of all shore and beachfront protective structures shall provide that:
>
> (a) visual impacts are minimized;
>
> (b) necessary access to the beach is maintained;
>
> (c) negative impacts on adjacent property are minimized; and
>
> (d) long-term or recurring costs to the public are avoided."

3. Factual Changes Since the Board's Approval

Changes in factual circumstances have occurred since the Board approved the revetment and FDP in 2021. First, as noted above, a residence that was in planning stages at the time of approval, is now nearly finished on a lot that was previously "vacant" in the Pine Beach Subdivision.

Second, Applicants received authorization to construct the BPS and have constructed it consistent with the Board of Commissioners' approval. The BPS is in place and is currently doing a good job of protecting lives and property. In this regard, during recent 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 revegetated beach sand stayed intact, and the revetment has an appearance that is virtually indistinguishable from a natural dune. *See* Exhibit 3 (photos of BPS following storm event).

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 these applications, has since constructed a BPS that connects to the revetments for the Subject Properties and also connects to the Shorewood RV Resort revetment. Exhibit 5. 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 raise a fuss. The County approved that revetment.

LUBA's Opinion and Remand

LUBA described its decision and remand guidance:

> "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 52.

Thus, LUBA agreed with your decision that the application satisfies the OAR 660-004-0020(2)(a) reasons exception requirement. Specifically, LUBA agreed that the Applicants had adequately demonstrated 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 with houses on them. That is an important holding. It decides, contrary to the opponents' protestations, that an exception based on highly unusual circumstances *is* appropriate under the facts here for the properties that are developed with homes.

The unique "reason" that LUBA agreed justifies the exception for the lots developed with houses is the unique and lasting man-made disruption to the natural littoral processes in the Rockaway littoral subregion. This disruption was caused by the effects of two manmade jetties in unusually close proximity and El Niño/La Niña events of the late 1990s. Slip op at 36-37; *see also*, slip op at 29-30 (quoting relevant findings). LUBA's conclusion is now "law of the case."[2] That means that LUBA has conclusively decided that there are unique facts facing the lots with houses adequate to justify a reasons exception so they can be protected with a revetment.

However, LUBA said there was more work to do for the vacant lots. For the vacant lots, LUBA held that the "reasons" analysis for the "vacant" lots (ones without houses on them) in both the Pine Beach Subdivision and George Shand Tracts needed to be beefed up. Slip op at 37-38. Simply put, LUBA made a distinction between the developed lots and the four "vacant" ones. LUBA explained:

> "[T]he 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." Slip op at 38.

LUBA told the County to adopt findings explaining why the "vacant" lots need to be protected with the revetment. The short answer is that if they are not protected, then flank erosion from wave run-up on the "vacant" lots will cause the

---

[2] The "law of the case" doctrine says that on review of post-remand proceedings, petitioners are foreclosed from raising issues at LUBA that were "conclusively decided against them by the first final and reviewable LUBA decision." Moreover, issues that could have been but were not raised in the first LUBA proceedings, may not be raised on remand. *Beck v. City of Tillamook*, 313 Or 148, 150, 831 P2d 678 (1992). *See Green v. Douglas County*, 63 Or LUBA 200, 206, *rev'd and rem'd on other grounds*, 245 Or App 430, 263 P3d 355 (2011) (under *Beck*, a party at LUBA fails to preserve an issue for review if, in a prior stage of a single proceeding, that issue is decided adversely to the party or that issue could have been raised and was not raised).

revetment to fail – harming the properties with houses on them that LUBA said were entitled to the revetment. And will also eventually tear out the then exposed urban infrastructure (water, sewer, gas, electricity, cable etc.), that is installed on the eastern outer perimeter of those "vacant" lots.

LUBA decided to punt on other of the opponents' challenges. Specifically, LUBA decided that it was "premature" to address the opponents' challenges to the Board's ESEE analysis and Floodplain Development Permit (FDP). LUBA said the Board's "vacant" lots analysis might affect how the Board looked at the ESEE analysis and FDP analysis. Slip op at 47-48 (Goal 18); slip op at 51 (Floodplain Development Permit discussion). Because LUBA punted on the issues about the ESEE analysis and Flood Plain Development Permit, they remain "live" issues on remand. Given LUBA distinguished between the developed and "vacant" lots, it would be wise for the findings to expressly address the "vacant" lots under those standards.

The sole Floodplain Development Permit issue raised on appeal concerns the meaning and application of TCLUO 3.510(10)(h).[3] Opponents claimed that the construction process for the BPS would remove vegetation and so necessarily violated that standard. Their claims about the County's FDP standards were limited to these claims speculating about the temporary effects of constructing the flood protection (BPS). On remand, the County should explain that the BPS has been constructed and did so without increasing potential flood damage, even during the period of construction. Supplemental findings should explain that the contractor was careful to construct the BPS in segments of three-lots at a time, digging a trench for the placement of the basalt rock for the revetment about 10-feet into the lots toward the houses and placing the excavated sand on the oceanward side of the lots, creating a berm, to prevent flooding. Moreover, the Board should interpret this standard to make clear it does not prohibit the temporary removal of vegetation during construction of a structure such as the BPS at issue here, that is designed to *decrease* flood damage. Under state statutes and caselaw, LUBA is required to afford deference to any express interpretation of the County's Floodplain Development Permit provisions. Thus, a granular interpretation by the Board of Commissioners of TCLUO 3.510(10)(h) is wise.

[3] TCLUO 3.510(10)(h) "[p]rohibit[s] man-made alteration of sand dunes, including vegetation removal, which would increase potential flood damage."

To summarize, on remand the County must adopt findings that:

- Justify a reasons exception for the "vacant" lots.
- Bolster the previous Goal 18 ESEE and compatibility findings and the Flood Plain Development Permit findings to better reflect the distinctions LUBA found significant and to respond to the issues raised by opponents in their LUBA briefing.

Remand Process

The County's procedures on remand are governed by TCLUO 10.130 REMANDS, state statutes and relevant case law. TCLUO 10.130(1) provides that when a decision is remanded by LUBA, the Review Authority, the Board of Commissioners in this instance, may decide whether the matter shall proceed under the 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 anyway, the Board of Commissioners should conduct and decide the 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."[4] This letter is the written request from the applicant referred to in TCLUO 10.130(2)(c) and triggers the 90-day clock.

TCLUO 10.130(2)(d) allows the 90-day period to be extended for a reasonable period at the request of the applicant.

The TCLUO provides no other further relevant procedural requirements for the remand proceeding.

New evidence and testimony is warranted given the significance LUBA gave to distinguishing between the developed lots and the "vacant" lots, a distinction not drawn in the first Board processes. Old and new evidence and testimony regarding the "vacant" lots not only supports findings justifying the "reasons" requirement of

[4] 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, the County code is more restrictive than the state statute and, while it is uncertain, it is wise to assume that the TCLUO's 90-day period is the applicable period.

OAR 660-004-0020(2)(a) for the "vacant" lots but also supports findings for the ESEE and compatibility analysis under OAR 660-004-0020(2)(c) and (d).

Regarding the FDP findings, at LUBA the Oregon Coast Alliance challenged the Board's decision finding compliance with TCLUO 3.510(10)(h). They argued that allowing any temporary vegetation removal to construct the revetment is prohibited under that standard. The Board should respond to their claim in the remand decision, which is unlikely to be particularly burdensome. TCLUO 3.510(10)(h) simply says the County will "Prohibit man-made alteration of sand dunes, including vegetation removal, which would increase potential flood damage." Opponents argued that County standard forecloses *any* vegetation removal – even if it is for a revetment that will *decrease* potential flood damage. On remand, the Board should explain that the temporary removal of vegetation to construct the approved revetment did not *increase* the potential for flood damage in fact, but rather *decreased* that potential. The Board should explain that the experienced contractor installed the revetment in segments of three houses each. Findings should further explain that the contractor left the foredune facing the ocean completely intact and excavated *behind it*, to the tune of excavating the revetment trench about 10-feet from the vegetated dune toward the houses. In other words, there was never a time during the revetment's construction, when the foredune vegetation in front of the excavated trench was removed. The findings should further explain that upon excavation, the sand from the trench was placed in *front of the trench* creating a barrier between any ocean flood risk and the Subject Properties; a barrier that did not previously exist, that provided more flood protection than before.

Further, the Board will have the opportunity to expressly interpret whether TCLUO 3.510(10)(h) even applies to temporary construction impacts for the installation of facilities designed to decrease flood damage. Please note in that regard that LUBA is required to defer to any plausible Board interpretation of its own code. Finally, the Board should note that in any event, opponents' arguments are moot as the revetment has been installed and there were no increases in potential flood risks in fact. Rather, the converse was the case here.

Remand Issues and Evidence

Applicants present evidence, which is attached as Exhibits 6,[5] 7[6] and 8[7] to support reapproval of the revetment. Applicants request that the Board instruct them to draft approval findings for your and your staff's review if, after the Board's remand processes, the Board agrees that reapproval is appropriate.

[5] West Consultants remand supplement.
[6] Schott and Associates Natural Resources Assessment.
[7] Real Estate Economics Report by Economics International Corp.

Exhibits 6, 7 and 8 are the type of site-specific expert witness evidence that LUBA concluded is superior to generalized statements from publications and appropriate to support approval of a reasons exception.

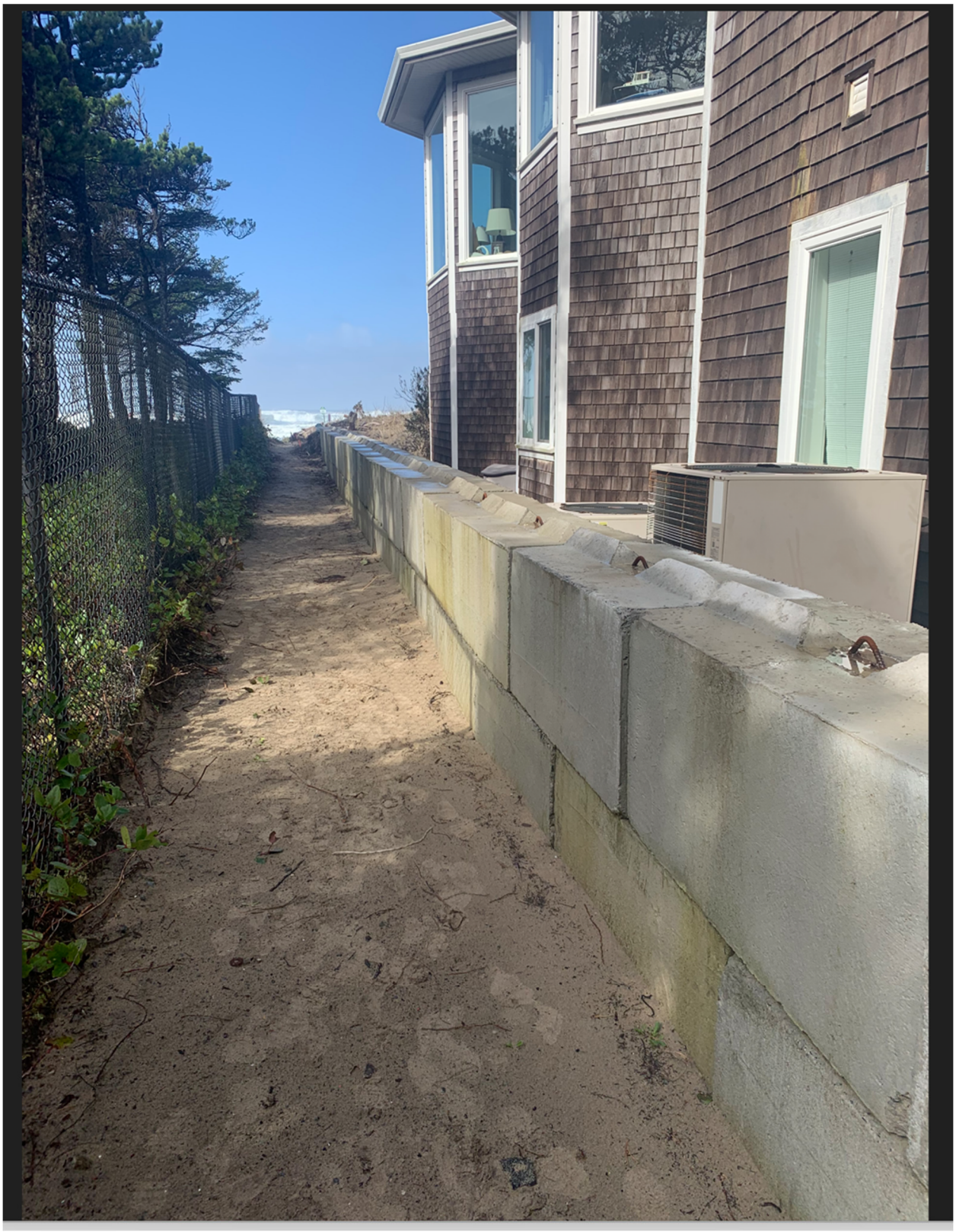
Concerning the reasons justifying an exception to Goal 18, IR 5 for the "vacant" lots sandwiched between properties that are developed with homes, Applicants' expert Chris Bahner, West Consulting, has written a supplemental report. Mr. Bahner is the engineer whose other reports are also in the record and who designed the BPS. His supplement explains that the revetment is necessary to be continuous, as it is designed and installed, in order to protect the developed lots and public infrastructure. He explains why leaving revetment "gaps" at the vacant lots deprives the revetment of its utility to protect the developed lots and risks harm to the developed lots. His analysis identifies at least three reasons that a continuous BPS as approved and constructed is superior and necessary, rather than one that contains gaps at the vacant lots.

The first reason essentially states the obvious; a BPS with holes it in effectively defeats the purpose of the BPS. BPS with gaps significantly reduces the protection against coastal flood risk that a continuous BPS provides. This is because the ocean will flow through the gaps and will flood the areas behind and around the revetment. The continuous BPS significantly reduces flood risk on the Subject Properties from the unprotected risk of 20 to 50% annual chance of ocean flooding to an 8% annual chance of ocean flooding with the revetment is installed. A BPS with holes in it returns the developed properties to a significant chance of ocean flooding.

Second, leaving gaps in the BPS at the vacant lots would not protect against future coastal "passive" erosion on the developed lots, which could eventually reach and undermine the homes near the gaps and the public infrastructure exposed to ocean erosion at and around such gaps. Passive erosion will continue at and around the gaps in the BPS just as passive erosion will continue along the beach to the south of the BPS. The littoral processes now present along this stretch of the coast would be disrupted through the creation of shoreline cusps, which are crescentic seaward projections, as passive erosion continues in the BPS gaps at the "vacant" lots. These cusps are not the type of natural beach process that the conservation goal of Goal 18, IR 5 seeks to preserve. Furthermore, these "cusps" could ultimately damage the BPS structure near the gaps and pose public safety threats due to increases in water flow velocity through the narrow gaps where the vacant lots are situated.

Third, it is physically not possible to construct end protection measures (like the ecology block wall along the south end of the structure) along the borders of gaps on the developed properties to connect to the BPS to provide the necessary flooding and erosion protection to them. There is simply not enough room on the

developed properties to do so and still provide them with the protection they require. An image of the referenced ecology block wall is below:



There can be no doubt that the evidence establishes that reasons justify why an exception is appropriate for the vacant lots and that the conservation goals of Goal 18, IR 5 cannot be met by leaving gaps in the BPS on the vacant lots.

As noted, LUBA decided not to deal with the opponents' arguments against the reasons exception ESEE analysis and compatibility rules. A remand approval decision will largely rely upon the findings that the Board has already adopted *(i.e.* that the revetment is in the Applicants' backyards, not the dry sand beach where the public recreates; 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; and that the revetment harms nothing and changes nothing except to protect the Applicants' properties; the ocean and beach will continue to do what they do and the revetment will not change that except to protect the properties it is supposed to protect).

Nonetheless, in light of the opponents' LUBA briefing, the Applicants have had an expert evaluate the opponents' natural resource claims. In this regard, the Applicants submit the report by recognized expert Dr. Martin Schott, Schott & Associates, demonstrating that the environmental consequences of the revetment are either neutral or positive.

Further, in light of other opponent claims at LUBA that the revetment will have adverse economic impacts on other properties, the Applicants submit the report of a recognized expert in real estate economics who explains similarly that the impacts of the revetment are either positive or neutral. If the Board decides to continue to approve the proposal, the Applicants will prepare findings addressing OAR 660-004-0020(2)(c) and (d) in light of all of the evidence, including that submitted on remand addressing opponents' LUBA claims, demonstrating all required standards are met.

Regarding the County findings of compliance with its own floodplain standards, as explained above, the opponents submitted one substantive challenge at LUBA. That challenge concerned TCLUO 3.510(10)(h), which "[p]rohibit[s] man-made alteration of sand dunes, including vegetation removal, which would increase potential flood damage." As noted above, opponents claimed that the construction process for the BPS would remove vegetation and so necessarily violated TCLUO 3.510(10)(h). Their assertions regarding the County's Floodplain Development Permit standards were limited to this argument against temporary vegetation removal during construction of flood protection (the approved BPS). OCA instead posited their own interpretation of the County FDP standards – that basically no revetment or other flood protection measure could ever be approved because constructing a revetment or other flood protection measures requires temporarily

removing vegetation, which the opponents claimed necessarily violated County's FDP rules.

The opponents' legal and factual premises are wrong and the findings on remand should so explain. On the facts, the Bahner report demonstrates that the construction of the BPS never increased the potential for flood damage. Excavation was behind the vegetated dune toward the houses. The vegetated dune continued to exist during construction. Moreover, excavated sand was placed in *front of the trench* (on Applicants' properties), creating a barrier to ocean flooding that was greater than before. Further the revetment has performed exactly as it was designed to – it has mitigated against flood damage that would otherwise have occurred and has maintained a vegetative cover in the process. TCLUO 3.510(10)(h) was never violated – if it even applies to temporary construction of a facility designed to reduce flood risks.

The Board of Commissioners should simply adopt its own interpretation of how its own code applies in these circumstances. The County might point out that it has not been violating its code for decades by approving revetments and other flood reducing improvements – such as the one at issue here, as well as the one not at issue here that the County approved between the Subject Properties and the Shorewood RV Park, and others. The County should also explain in its findings that regardless, the BPS has been constructed and the issue is moot.

Under state statutes and caselaw, LUBA is required to afford great deference to any such express interpretation of the County's Floodplain Development Permit provisions. Specifically, the Board's express interpretation of its own code will be afforded *Siporen* deference[8] by LUBA and the courts.

Conclusion

The Applicants respectfully request that the County proceed with the LUBA remand. ORS 215.435; TCLUO Section 10.130(2)(c). The Applicants respectfully request that the Board of Commissioners make an oral decision to approve the applications on remand and direct the Applicants to write supplemental findings for

[8] *Siporen* deference refers to the holding in *Siporen v. City of Medford*, 349 Or 247, 262, 243 P3d 776 (2010), which establishes the highly deferential standard that LUBA and the courts are to afford a local government's choice among plausible interpretations of the local code.

the Board's consideration at a subsequent public meeting.

Thank you for your consideration.

Very truly yours,

Wendie L. Kellington

WLK:wlk
CC: Clients