

W.S.A.

AGENDA COVER MEMO

Memorandum Date: October 13, 2006
Agenda Date: October 25, 2006

TO: Lane County Board of Commissioners

DEPARTMENT: Public Works Department, Land Management Division

PRESENTED BY: Kent Howe, Planning Director
Stephen Vorhes, Assistant County Counsel

TITLE: DISCUSSION AND ORDER/IN THE MATTER OF RESPONDING TO THE LUBA REMAND OF THE DECISION ENACTING ORDINANCE NO. PA 1229 AND SUPPORTING THAT ORDINANCE BY ADOPTION OF ADDITIONAL SUPPLEMENTAL FINDINGS TO FURTHER SHOW HOW MODIFICATIONS TO THE *LANE COUNTY COASTAL RESOURCES MANAGEMENT PLAN* COMPLY WITH STATEWIDE GOAL 16 (LMD File PA 05-5506, City of Florence & Shelter Cove Homeowners Association)

I. MOTION

Move approval of the proposed Order with Exhibits A and B.

II. AGENDA ITEM SUMMARY

Ordinance No. PA 1229 amended the Lane County *Coastal Resources Management Plan* (CRMP) text and diagram by the redesignation of ten acres of Management Unit C identified as "Sub-Area C-1" from "Natural" to "Conservation" on Map 1 of the Plan and the addition of text describing that change. The ordinance was adopted by the Board of County Commissioners on February 22, 2006. That action was appealed to the Oregon Land Use Board of Appeals (LUBA). Two issues were remanded by LUBA to Lane County for action. This item presents the Board with a response to the LUBA remand supporting the changes.

III. BACKGROUND/IMPLICATIONS OF ACTION

A. Board Action and Other History

On May 17, 2004, by means of City Ordinance No. 6, Series 2004, the Florence City Council amended the *Coastal Resources Management Plan* designations and the accompanying text for Sub-area C-1 of Estuary Management Unit C from "Natural" to "Conservation" as recommended by the Florence Planning Commission. On May 21, 2005, application number PA 05-5506 was made by the City of Florence and the Shelter Cove Homeowners Association for co-adoption of the portion of City Ordinance No 6, Series 2004, that amended the *Coastal Resources Management Plan*. On February 22, 2006, the Board of County Commissioners enacted Ordinance No. PA 1229.

That action was appealed to the Oregon Land Use Board of Appeals (LUBA) and on September 8, 2006, LUBA issued its decision upholding the county action on most of the issues raised by the petitioners, but remanding the action based on two issues. The LUBA decision was not appealed to the Court of Appeals.

B. Analysis

The two issues that led to the LUBA remand relate to the adequacy of the County's findings with respect to the Goal 16 requirement that the County "[c]onsider and describe in the plan the potential cumulative impacts of the alterations and development activities envisioned. Such a description may be general but shall be based on the best available information and projections." OAR 660-015-0010(1).

County staff has worked with the applicant and City of Florence staff to respond to the remanded issues. The proposed order explains the response and describes evidence in the existing record to address both of those issues. Responding to the remand issues does not require reopening the record for additional evidence.

The supplemental findings and description of the evidence in the record in Exhibit B of the proposed order establishes that the amendments to the CRMP did not affect its compliance with Goal 16 because the language added to the plan, the plan itself and the subsequent review of specific proposals for development in the redesignated area by the permitting authorities establish sufficient consideration of "potential cumulative impacts of the alterations and development activities envisioned" by the amendments enacted by the Board in Ordinance No. PA 1229. There is a considerable body of evidence in the record addressing the impacts that may occur as a result of the change in the designation for Sub-Area C-1. The evidence in the record analyzes impacts already considered and described in the acknowledged CRMP and shows that the potential cumulative impacts of the change in designation for Sub-Area C-1 is consistent with the overall cumulative impacts anticipated in the acknowledged CRMP. The evidence in the record shows that, due to changes in the ecological condition of the area, the amendment is consistent with the Goal 16 requirements for comprehensive plans.

C. Alternatives / Options

1. Adopt the Order with Exhibits A and B.
2. Amend the Order or Exhibit B
3. Do not adopt the Order and provide additional direction on the remand.

D. Recommendation

Option 1.

E. Timing

Action on the remand will provide an opportunity to continue permitting efforts to address erosion in the area.

IV. IMPLEMENTATION/FOLLOW-UP

Notice of the final Board action will be provided to the parties.

V. ATTACHMENTS

Order with Exhibits A and B.

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF LANE COUNTY, OREGON

ORDER No. 06-10-25-1

-) IN THE MATTER OF RESPONDING TO THE LUBA
-) REMAND OF THE DECISION ENACTING ORDINANCE
-) NO. PA 1229 AND SUPPORTING THAT ORDINANCE BY
-) ADOPTION OF ADDITIONAL SUPPLEMENTAL FINDINGS
-) TO FURTHER SHOW HOW MODIFICATIONS TO THE
-) *LANE COUNTY COASTAL RESOURCES MANAGEMENT*
-) *PLAN COMPLY WITH STATEWIDE GOAL 16 (LMD File PA*
-) *05-5506, City of Florence & Shelter Cove Homeowners Assoc.)*

WHEREAS, on February 22, 2006, by means of Ordinance No. PA 1229 the Board of County Commissioners amended the Lane County *Coastal Resources Management Plan* (CRMP) text and diagram by the redesignation of ten acres of Management Unit C identified as "Sub-Area C-1" from "Natural" to "Conservation" on Map 1 of the Plan and the addition of text describing that change as requested in the application filed by the City of Florence and the Shelter Cove Homeowners Association; and

WHEREAS, that action was appealed to the Oregon Land Use Board of Appeals (LUBA) and on September 8, 2006, LUBA issued its decision upholding the county action on most of the issues raised by the petitioners, but remanding the actions based on two issues as described in the LUBA decision attached as Exhibit "A" and incorporated herein; and

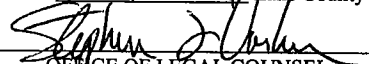
WHEREAS, in response to the LUBA remand, supplemental findings and analysis based on evidence in the record, which is attached hereto as Exhibit "B" and incorporated herein, have been prepared containing additional detail on consideration of potential impacts of the change and specifically addressing the text added to the Plan; and

WHEREAS, the Board of County Commissioners has reviewed the record and is now ready to take action based upon the evidence and testimony already in the record.

NOW THEREFORE, IT IS HEREBY ORDERED that the findings previously adopted in support of Ordinance No. PA 1229 are further supplemented as described in Exhibit "B" attached and incorporated here by this reference to establish that the evidence in the record confirms the changes to the Lane County *Coastal Resources Management Plan* adopted by that ordinance do not affect its compliance with Statewide Planning Goal 16 and the Board further concludes the cumulative impacts of activities authorized by the changes are adequately addressed by the amendments to the CRMP, the evidence and analysis contained in the record and the fact that more specific impact analysis will be considered further in more detail in subsequent permitting decisions reached before any development occurs.

ADOPTED this 25th day of October, 2006.

Chair, Lane County Board of Commissioners

APPROVED AS TO FORM
Date 10-18-2006 Lane County

OFFICE OF LEGAL COUNSEL

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SEP08'06 PM12:26 LUBA

OREGON SHORES CONSERVATION COALITION
and LANDWATCH LANE COUNTY,

Petitioners,

vs.

LANE COUNTY,

Respondent,

and

CITY OF FLORENCE
and GEORGE E. BYNON,

Intervenors-Respondent.

LUBA No. 2006-048

FINAL OPINION
AND ORDER

Appeal from Lane County.

James D. Brown, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Cascade Resources Advocacy Group.

Stephen L. Vorhes, Assistant County Counsel, Eugene, filed a joint response brief and argued on behalf of respondent.

Emily N. Jerome, Eugene, filed a joint response brief and represented intervenor-respondent City of Florence.

George E. Bynon, Florence, filed a joint response brief and argued on his own behalf.

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

REMANDED

09/08/2006

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

NATURE OF THE DECISION

Petitioners appeal a county decision that amends the county Coastal Resources Management Plan.

MOTION TO INTERVENE

The City of Florence (city) and George E. Bynon move to intervene on the side of respondent.¹ There is no opposition to the motions and they are granted.

FACTS

The Coastal Resources Management Plan (CRMP) is a “special purpose” plan jointly adopted by the county and city that in relevant part implements Statewide Planning Goal 16 (Estuarine Resources). Goal 16 generally provides for three types of estuarine management units: natural, conservation and development. For the Suislaw River estuary, the CRMP identifies a 95-acre area known as the “C” estuarine management unit along one bank of the river approximately one mile from the river mouth, and assigns it a “natural” estuarine designation.² As discussed below, the natural estuarine designation prohibits application of riprap to armor river banks except in limited circumstances. The challenged decision amends the CRMP to identify a 10 acre area of the “C” management unit as Sub-Area C-1 and redesignates that sub-area from Natural to Conservation. The intent of that amendment is to allow erosion control measures to be taken that may be inconsistent with the restrictions on placing riprap that apply in natural management units.

Sub-Area C-1 lies at the base of a bluff that has been steadily eroding since the 1930s, in part due to failure of a nearby jetty originally built in the 1890s that is no longer

¹ The county and intervenors-respondent filed a joint response brief. For brevity, we refer to those parties as “respondents.”

² The entire Suislaw estuary is designated as a shallow-draft development estuary. OAR 660-017-0015(3). The estuary includes a mix of natural, conservation, and development management units.

1 maintained. The bluff is within the City of Florence limits. In 1991, the city approved the
2 Shelter Cove residential subdivision on top of the bluff, between the estuary and
3 Rhododendron Drive. A number of homes were subsequently built within the subdivision.
4 In 1994, at the request of the Shelter Cove Homeowners Association, the city adopted map
5 and text amendments to the CRMP and the city comprehensive plan to redesignate Sub-Area
6 C-1 from natural to conservation. In May 2005, the City of Florence and the Shelter Cove
7 Homeowners Association applied to the county to co-adopt the CRMP amendments. The
8 county board of commissioners voted to approve the requested amendments. This appeal
9 followed.

10 **FIRST ASSIGNMENT OF ERROR**

11 Lane Code (LC) 16.400(6)(h)(iii)(aa) requires that amendments to the CRMP comply
12 with the applicable statewide planning goals. Goal 16 is:

13 "To recognize and protect the unique environmental, economic, and social
14 values of each estuary and associated wetlands; and

15 "To protect, maintain, where appropriate develop, and where appropriate
16 restore the long-term environmental, economic, and social values, diversity
17 and benefits of Oregon's estuaries."

18 Goal 16 requires that coastal comprehensive plans classify portions of estuaries into
19 three types of management units: natural, conservation and development. For each
20 management unit, Goal 16 sets out (1) a list of permitted uses and (2) conditionally allowed
21 uses subject to specified requirements. For natural units, Goal 16 lists as a permitted use
22 "riprap for protection of uses existing as of October 7, 1977," and a number of other uses that
23 are allowed "[w]here consistent with the resource capabilities of the area and the purposes of
24 this management unit[.]" For conservation units, the list of permitted uses includes all the
25 permitted and conditionally allowed uses in the natural units, with one exception not relevant
26 here. In addition, Goal 16 provides a list of uses conditionally allowed in conservation units
27 that are not allowed in natural units. The Goal 16 conservation unit description does not

1 specifically refer to riprap. A similar approach is employed for development units. In
2 development units Goal 16 allows all the permitted or conditionally allowed uses in the
3 natural and conservation units, as well as a number of additional uses not allowed in either
4 the natural or conservation units. The Goal 16 development unit description also does not
5 specifically refer to riprap.

6 OAR 660-017-0025 implements Goal 16 and provides in relevant part:

7 “(1)(a) Natural estuaries shall be managed to preserve the natural resources
8 and the dynamic natural processes. Those uses which would change,
9 alter, or destroy the natural resources and natural processes are not
10 permitted. Natural estuaries shall only be used for undeveloped, low
11 intensity, water-dependent recreation; and navigation aids such as
12 beacons and buoys; protection of habitat, nutrient, fish, wildlife, and
13 aesthetic resources; passive restoration measures, and where consistent
14 with the resource capabilities of the area and the purposes of
15 maintaining natural estuaries, aquaculture; communication facilities;
16 placement of low water bridges and active restoration measures.
17 Existing man-made features may be retained, maintained, and
18 protected where they occur in a natural estuary. Activities and uses,
19 such as waste discharge and structural changes, are prohibited. *Riprap*
20 *is not an allowable use, except that it may be allowed to a very limited*
21 *extent where necessary for erosion control to protect:*

22 “(A) *Uses existing as of October 7, 1977;*

23 “(B) Unique natural resource and historical and archeological
24 values, or;

25 “(C) Public facilities; and where consistent with the natural
26 management unit description in Goal #16 (and as deemed
27 appropriate by the permitting agency).

28 “* * * * *

29 “(2) Conservation estuaries shall be managed for long-term uses of
30 renewable resources that do not require major alterations of the
31 estuary. Permissible uses in conservation management units shall be
32 those allowed in section (1) of this rule; active restoration measures;
33 aquaculture; and communication facilities. *Where consistent with*
34 *resource capabilities of the management unit and the purposes of*
35 *maintaining conservation management units, high-intensity water-*
36 *dependent recreation; maintenance dredging of existing facilities;*
37 *minor navigational improvements; mining and mineral extraction;*

1 water dependent uses requiring occupation of water surface area by
2 means other than fill; bridge crossings; and *riprap shall also be*
3 *appropriate. * * ** (Emphases added.)

4 Thus, unlike the Goal 16 conservation unit description, OAR 660-017-0025(2)
5 specifically refers to “riprap,” and appears to allow riprap without the limitations imposed by
6 the Goal 16 natural unit description and OAR 660-017-0025(1)(a), subject only to findings
7 that the riprap is “consistent with resource capabilities of the management unit and the
8 purposes of maintaining conservation management units.” Consistent with OAR 660-017-
9 0025(2), the CRMP allows within conservation units “erosion control structures” subject only
10 to findings that such structures are consistent with resource capabilities and the purpose of
11 the conservation unit.

12 Petitioners argue that, properly understood, Goal 16 allows riprap in conservation
13 units but only subject to all the limitations imposed under the natural management unit. That
14 is, in petitioners’ view, when the Goal 16 conservation unit description lists as allowed uses
15 the uses listed in the natural unit description, that listing “carries forward” the restrictions
16 imposed under the natural management unit, including the provisions that allow riprap only
17 where necessary to protect uses existing on October 7, 1977, etc. According to petitioners,
18 because the express purpose of the challenged CRMP amendments is to allow for erosion
19 control measures to protect development that does not qualify for erosion control protection
20 under the natural management unit, the challenged amendments are therefore inconsistent
21 with Goal 16. Petitioners further argue that OAR 660-17-0025(2) is not intended to allow
22 uses more intensive than those listed for each management unit under Goal 16. To the
23 contrary, petitioners note that OAR 660-017-0025(1) states that “[n]o development or
24 alteration shall be more intensive than that specified in [Goal 16] as permissible uses for
25 comparable management units[.]” Thus, to the extent OAR 660-017-0025(2) purports to
26 allow riprap in conservation units without the natural management unit restrictions,
27 petitioners argue that the rule is inconsistent with the Goal.

1 Respondents argue generally that the challenged decision does not approve
2 application of riprap or any other erosion control measure; it simply adopts a plan designation
3 that will allow the landowners to seek future permits for an “erosion control structure” free of
4 the restrictions imposed under the natural management unit. According to respondents,
5 “[t]he analysis of any specific activity or development for compliance with Goal 16 must
6 await an application requesting that review.” Response Brief 10. Respondents also disagree
7 with petitioners that the Goal 16 conservation unit description imposes the same limitations
8 on riprap and other erosion control structures that are imposed under the natural unit
9 description. Respondents contend that neither OAR 660-017-0025(2) nor the CRMP is
10 inconsistent with the Goal in allowing riprap in conservation units subject only to a finding
11 that such structures are consistent with resource capabilities and the purpose of the unit. In
12 any case, respondents argue, even if the CRMP is inconsistent with the goal in this respect,
13 the CRMP is acknowledged to comply with the goal and the rule, and nothing in the
14 challenged decision allows petitioners to challenge whether unamended CRMP provisions
15 listing uses allowed in the conservation unit comply with the goal.

16 It is not clear to us that a future permit for an erosion control structure would be
17 directly subject to review for compliance with Goal 16. Respondents do not cite any code or
18 CRMP provisions requiring that permits to construct erosion control structures comply with
19 the statewide planning goals. However, we agree with respondents that petitioners cannot in
20 the course of appealing a decision that redesignates estuarine waters to a conservation unit
21 challenge the fact that the CRMP allows riprap or erosion control structures in conservation
22 units without making such structures subject to the same limitations that govern in natural
23 units. Reduced to essentials, petitioners’ argument is that the existing CRMP provisions
24 governing riprap in conservation units are inconsistent with Goal 16. However, those CRMP
25 provisions are acknowledged to comply with Goal 16, and petitioners do not explain how

1 they can challenge those acknowledged CRMP provisions in the context of a decision that
2 simply switches one acknowledged Goal 16 unit designation for another.³

3 The first assignment of error is denied.

4 **SECOND ASSIGNMENT OF ERROR**

5 Goal 16 requires that coastal comprehensive plans:

6 “Consider and describe in the plan the potential cumulative impacts of the
7 alterations and development activities envisioned. Such a description may be
8 general but shall be based on the best available information and projections.”⁴

³ Although we need not and do not resolve petitioners’ arguments regarding the correct interpretation of OAR 660-017-0025(2), we tend to agree with respondents that the CRMP is consistent with OAR 660-017-0025(2) with respect to what standards apply to a proposal for riprap or erosion control structures in a conservation unit. The third sentence of OAR 660-017-0025(2) expressly allows riprap in conservation units subject only to the requirement for findings that the riprap is consistent with resource capabilities and the purpose of the management unit. Petitioners argue that those requirements are in addition to those imposed by OAR 660-017-0025(1)(a) with respect to natural units. However, OAR 660-017-0025(2) separately refers to the “permissible uses” listed in OAR 660-017-0025(1) and the conditional uses, including “riprap” that is allowed where “consistent with the resource capabilities of the management unit and the purposes of maintaining conservation management units[.]” There is no suggestion in OAR 660-017-0025(2) that any limitations that apply to the “permissible uses” listed in OAR 660-017-0025(1)(a) also apply to conditional uses separately listed in OAR 660-017-0025(2). Moreover, petitioners’ reading has the effect of making it more difficult to gain approval for riprap in conservation units than it would be for natural units. Under the Goal 16 natural unit description and OAR 660-017-0025(1)(a), riprap that complies with the stated limitations is not subject to any requirement for findings regarding consistency with resource capabilities, etc. Riprap under the Goal 16 conservation unit description and OAR 660-017-0025(2) is subject to those findings requirements. Under petitioners’ view, riprap in conservation units is subject to both sets of standards. Because the conservation unit generally allows more intensive development than the natural unit, it seems anomalous to impose more rigorous standards on riprap in conservation units than in natural units.

We also need not and do not address petitioners’ further argument that OAR 660-017-0025(2) is inconsistent with Goal 16. Again, however, we tend to agree with respondents that there is no inconsistency. While Goal 16 is admittedly less than clear regarding what standards apply to riprap in conservation (and development) units, the Land Conservation and Development Commission (LCDC) promulgated both the goal and the rule, and presumably understands what uses are allowed by the goal. As OAR 660-017-0025(1) indicates, LCDC clearly believed that the uses allowed under the rule are not more intensive than those allowed under the goal.

⁴ Goal 16 lists the following requirements for coastal comprehensive plans:

“Based upon inventories, the limits imposed by the overall Oregon Estuary Classification, and needs identified in the planning process, comprehensive plans for coastal areas shall:

- “1. Identify each estuarine area:
- “2. Describe and maintain the diversity of important and unique environmental, economic and social features within the estuary;

1 The challenged decision states that “[t]he proposed change is to allow for examination
2 of the site for erosion control that could reduce loss of the bank * * *” Record 21. The
3 county’s findings characterize riprap and other structural solutions as being preferable to and
4 more effective than nonstructural solutions. Record 20. Petitioners argue that the county
5 failed to consider the “potential cumulative impacts of the alterations and development
6 activities envisioned” by the challenged plan amendment. Petitioners cite to testimony from
7 the National Marine Fisheries Service (NMFS) that the cumulative impacts of armoring Sub-
8 Area C-1 combined with existing erosion control structures along the river could be harmful
9 to habitat. Record 266-67. According to petitioners, NMFS recommended that the county
10 develop a comprehensive strategy to address current and future erosion issues.

11 Respondents cite to evidence suggesting that the net impact of installing an erosion
12 control structure in Sub-Area C-1 would be ecologically beneficial, but respondents do not
13 cite to any findings, much less comprehensive plan language, indicating that the county
14 considered the “potential cumulative impacts of the alterations and development activities
15 envisioned” by the plan amendment. Respondents do not argue that the Goal 16
16 “Comprehensive Plan Requirements” are inapplicable to the challenged plan amendments.
17 However, we understand respondents to argue that it is unclear at this point whether any
18 erosion control structure or other solutions will be applied for and approved, and that the
19 exact nature of any such structure or solution is unknown.⁵ While that may be true, Goal 16

“3. Classify the estuary into management units; and

“4. Establish policies and use priorities for each management unit using the standards
and procedures set forth below.

“5. Consider and describe in the plan the potential cumulative impacts of the alterations
and development activities envisioned. Such a description may be general but shall
be based on the best available information and projections.”

⁵ Respondents also emphasize that any particular erosion control structure applied for will be subject to permit requirements under various federal, state and local regulations. However, respondents do not indicate

1 goes on to specify that the cumulative impacts analysis “may be general but shall be based on
2 the best available information and projections.” Apparently there is a considerable body of
3 evidence in the record discussing potential erosion control solutions and likely consequences.
4 Respondents offer no reason why the county cannot rely on that evidence and other necessary
5 evidence to conduct a “general” cumulative impacts analysis. It may be that the cumulative
6 impacts of likely measures taken to reduce erosion in Sub-Area C-1 may be negligible;
7 nonetheless, Goal 16 requires that they be considered and the results of that consideration
8 included in the comprehensive plan, in this case the CRMP.

9 The second assignment of error is sustained.

10 **THIRD ASSIGNMENT OF ERROR**

11 The county may initiate amendments to the CRMP or applicants may request an
12 amendment. When applicants request an amendment, LC 16.400(9) provides:

13 “Requests must set forth compelling reasons as to why the amendment should
14 be considered at this time, rather than in conjunction with a periodic Plan
15 update.”

16 Petitioners argue that the applicant, the residential subdivision homeowners’
17 association, failed to provide “compelling reasons” to consider the CRMP amendment.
18 According to petitioners, because the county failed to adopt findings stating that the applicant
19 had set out compelling reasons it was error for the county to even consider the proposed
20 amendment.

21 Respondents argue that LC 16.400(9) is not an approval criterion or a provision that
22 requires a specific finding of compliance. According to respondents, LC 16.400(9) is
23 designed to assist the planning commission in determining whether an applicant-initiated
24 plan amendment should be considered as an individual matter, or whether the county should
25 wait and consider the proposed amendment as part of periodic review. Respondents argue

that such standards require evaluation of the “potential cumulative impacts of the alterations and development activities envisioned” by this plan amendment.

1 that the planning commission clearly felt that immediate action was required, given the stated
2 need to protect the existing subdivision from erosion.

3 We tend to agree with respondents that LC 16.400(9) is not an applicable approval
4 criterion or a provision that requires a particular finding. It is, at best, an application
5 requirement intended to assist the county in deciding how to proceed on the application. The
6 county clearly made a choice to proceed immediately rather than wait for periodic review,
7 based on the information provided in the application. Petitioners do not dispute that evidence
8 that the bluff below the residential subdivision is eroding and could lead to the subdivision
9 falling into the river is a "compelling reason" for purposes of LC 16.400(9). The county's
10 failure to make findings regarding LC 16.400(9) is harmless error, if it is error at all.

11 The third assignment of error is denied.

12 **FOURTH ASSIGNMENT OF ERROR**

13 Petitioners argue that several findings are not supported by substantial evidence.⁶

14 **A. LC 16.400(6)(h)**

15 Under LC 16.400(6)(h)(iii)(bb), in order to approve a comprehensive plan
16 amendment, the county must find that the amendment is one of the following:

17 "(i-i) necessary to correct an identified error in the application of the Plan; or

18 "(ii-ii) necessary to fulfill an identified public or community need for the
19 intended result of the * * * amendment; or

20 "* * * * *"

⁶ As a review body, we are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must consider and weigh all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

1 The county found that both subsections were satisfied:

2 “The proposed amendments are necessary to correct an error in the application
3 of the Plan Designation that has changed over time. There is an identified
4 community need to slow, and eliminate if possible, the erosion of the
5 riverbank to protect property. Corrective actions may also improve the quality
6 of the degraded habitat.” Record 17.

7 The county interpreted “identified error” to mean not only that the CRMP was
8 erroneous when first implemented, but also to encompass changed circumstances where the
9 CRMP is no longer accurate. Under *Church v. Grant County*, 187 Or App 518, 524, 69 P3d
10 759 (2003) and ORS 197.829(1), we may overturn a local government’s interpretation of its
11 own ordinances only if that interpretation is inconsistent with the express language, purpose,
12 or policy of the ordinance.⁷ The county’s interpretation is not inconsistent with the express
13 language, purpose, or policy of the ordinance. There is also substantial evidence to support
14 the county’s decision that circumstances have changed since the CRMP was implemented.

15 The county found in the alternative that preventing erosion of the banks below the
16 bluff was necessary to fulfill an identified public or community need. Petitioners argue that
17 because, as the county repeatedly emphasizes, the decision does not itself approve any riprap,
18 the decision does not “fulfill” an identified community need. Although the decision itself
19 does not approve riprap or other erosion control measures, it lays the groundwork for
20 installation of such measures, which the county believed to be “necessary to fulfill an
21 identified public or community need.” We agree with respondents that the county’s findings

⁷ ORS 197.829(1) provides, in relevant part:

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

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]”

1 demonstrate that both (i-i) and (ii-ii) are met, either of which is sufficient to satisfy LC
2 16.400(6)(h).

3 **B. Protection of Clam Beds**

4 One of the county's reasons for finding that the natural designation no longer is
5 appropriate for Sub-Area C-1 is because clam beds in that area are no longer productive.

6 "Evidence presented, both at the hearing and in the record of the city approval,
7 shows that the CRMP designation of 'Natural' for [MU] C-1 was largely
8 based on the need to protect the existence of Pittock clam beds. As the 'inner'
9 jetty failed, allowing the riverbank to collapse, the resulting sand covered the
10 clam beds to the point they are no longer productive. The loss of this habitat
11 no longer warrants the 'Natural' designation of this part of the [MU] and
12 accommodates the change to 'Conservation.'" Record 15.

13 Petitioners dispute the finding that CRMP "Natural" designation for the Sub-Area C-1
14 portion of management unit C was "largely based" on the need to protect clam beds.
15 According to petitioners, the designation included other reasons based on other
16 characteristics, and the description notes that the clam beds are located "predominantly
17 outside of the jetty," not in the Sub-Area C-1 area.

18 Petitioners are correct that the management unit C designation lists six rationales for
19 the natural designation for that unit, only one of which refers to the clam beds. Presumably,
20 not all of those rationales apply to the Sub-Area C-1 portion of management unit C, and
21 petitioners do not identify what other rationales might apply to that portion. The basic
22 rationale for designating Sub-Area C-1 conservation is that whatever clam beds existed in
23 that portion have been smothered by eroding sand. While there is conflicting evidence on the
24 remaining habitat value of Sub-Area C-1, a reasonable person could conclude, as the county
25 did, that the reduction in habitat value in Sub-Area C-1 warrants redesignation of that area to
26 conservation.

1 **C. Effects on Adjacent Areas**

2 The county's decision adds language to the CRMP stating that more productive
3 estuary areas would be buffered by the "moderate" designation of Sub-Area C-1, as an
4 apparent justification for redesignating that area from a natural to a conservation unit:

5 "The sensitivity of the more productive adjacent estuary is buffered by the
6 moderate designation of this estuary management unit." Record 12.

7 Petitioners argue that this statement is an apparent attempt to address concerns raised below
8 regarding the cumulative impact of installing erosion control structures in Sub-Area C-1,
9 including testimony that such structures would likely push the erosion problem to another
10 location on the river. According to petitioners, there is no evidence supporting the above
11 statement that designating Sub-Area C-1 conservation will "buffer" more productive areas of
12 the estuary, and all the evidence is to the contrary.

13 The decision itself does not cite any evidence in support of the above text, or explain
14 how the conservation designation "buffers" more productive parts of the estuary.
15 Respondents do not specifically respond to this sub-assignment of error or cite to evidence
16 supporting that statement. While it is not clear what role the above-quoted text plays in the
17 county's justification, it appears that it may relate in part to the issue of cumulative impacts
18 that must be considered under Goal 16, discussed under the second assignment of error.
19 Accordingly, remand is warranted under this sub-assignment of error to identify evidence
20 supporting the above-quoted text, and/or adopt findings explaining what role that text plays
21 in justifying the redesignation and the role, if any, the text plays in the county's cumulative
22 impacts analysis.

23 This sub-assignment of error is sustained

24 The fourth assignment of error is sustained in part and denied in part.

25 The county's decision is remanded.

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2006-048 on September 8, 2006, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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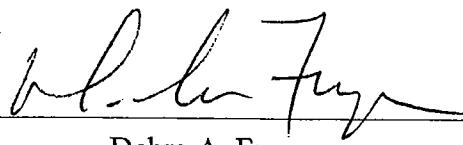
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Dated this 8th day of September, 2006.

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**Remand Response and Supplemental Findings
Supporting Ordinance No. PA 1229 Amending
Lane County Coastal Resources Management Plan.**

Introduction

On February 22, 2006, the Board of County Commissioners enacted Ordinance No. PA 1229 and amended the Lane County *Coastal Resources Management Plan* (CRMP) text and diagram by the redesignation of ten acres of Management Unit C identified as "Sub-Area C-1" from "Natural" to "Conservation" on Map 1 of the Plan and the addition of text describing that change. That action was appealed to the Oregon Land Use Board of Appeals (LUBA) and on September 8, 2006, LUBA issued its decision upholding the county action on most of the issues raised by the petitioners, but remanding the action based on two issues. Both issues relate to the adequacy of the County's findings with respect to the Statewide Planning Goal 16 requirement that the County "*Consider and describe in the plan the potential cumulative impacts of the alterations and development activities envisioned. Such a description may be general but shall be based on the best available information and projections.*" OAR 660-015-0010(1). The LUBA decision was not appealed to the Court of Appeals.

In reviewing the LUBA decision, the requirements of Goal 16 and the record for this matter, it is clear that the evidence in the record sufficiently addresses both of the issues and that Goal 16 does not require any further amendment of the CRMP. For that reason, the Board can review the record and supplement the findings and explanation of compliance with Goal 16 without reopening the record or reviewing additional evidence. The following additional findings and analysis of the evidence in the record, the existing acknowledged provisions of the CRMP and the adopted textual amendments to the CRMP provide further support for the action of the Board enacting Ordinance No. PA 1229.

Findings and analysis

Statewide Planning Goal 16: Estuarine Resources requires a local government adopted coastal area comprehensive plan to "*Consider and describe in the plan the potential cumulative impacts of the alterations and development activities envisioned. Such a description may be general but shall be based on the best available information and projections.*" OAR 660-015-0010(1). The CRMP was acknowledged as having complied with this requirement since its adoption in 1980 and revision in 1982 to comply with Statewide Planning Goals 16, 17, 18 and 19. The LUBA decision addressed this provision of Goal 16 and concluded the county decision failed to make specific findings or adopt plan text that clearly indicated consideration of the "potential cumulative impacts of the alterations and development activities envisioned" as a result of the CRMP amendments enacted by Ordinance No. PA 1229. The LUBA decision acknowledged the record might contain considerable evidence on potential erosion control solutions and likely consequences. It also noted that the County's decision included the adoption of CRMP text on how the designation change "buffers" other more sensitive parts of the estuary that might relate to the cumulative impact consideration called for under Goal 16.

The following supplemental findings and evidence in the record establish that the amendments to the CRMP do not affect its compliance with Goal 16 because the language added to the plan, the plan itself and the subsequent review of specific proposals for development in the redesignated area by the permitting authorities establish sufficient consideration of "potential cumulative impacts of the alterations and development activities envisioned" by the amendments enacted by the Board in Ordinance No. PA 1229.

1. The Coastal Resource Management Plan

Lane County *Coastal Resources Management Plan* was originally adopted in the 1980s and subsequently acknowledged by the Oregon Land Conservation and Development Commission (LCDC)(Record 302-446). As called for by Goal 16, Lane County's CRMP requires measures which center around the concept of estuarine "management units", which are areas in which certain activities can occur and others cannot. Record 308-330. Because some of the coastal resources information used in the CRMP is dated, and because natural systems do experience change, management unit boundary changes are to be expected. Record 306.

Consistent with the requirements of Goal 16 and the designation of the Siuslaw River as a Shallow Draft Development Estuary, the estuarine areas along the river were placed into three management units (MU's): Natural, Conservation or Development. Record 308. Each management unit is a unique biological, physical and economic unit. The unique features of each specifically designated MU are described and any special considerations based on those features are established in the CRMP. Record 308-330. The intent is to provide a diverse mixture of use and preservation of the Siuslaw estuary's natural resources such that the long-term economic, environmental and social values can be maintained as called for by Goal 16. Record 308.

The Natural MU is designed to assure the protection of significant fish and wildlife habitats, the continued biological productivity within the estuary and maintain a level of diversity essential to provide for a long-term, dynamic ecosystem which can withstand a variety of pressures. Major tracts of salt marsh, tide flats and eel grass and algae beds are found in this MU, since they are the areas of primary biological productivity without which the health of the entire estuary along the Siuslaw River could not be maintained. Record 308.

The primary purpose of the Conservation MU is preservation of long-term use of renewable resources which do not require major alteration of the estuary. The majority of the Siuslaw River estuary is included in this MU to reflect the predominantly rural, sparsely developed nature of the estuary. Although certain commercial and recreational uses may be consistent with the resource capabilities and purpose of this MU, the CRMP also contemplates that "each proposal will be evaluated on its potential for maintenance and enhancement of biological productivity" when specific details of a development proposal are provided, in order to implement Goal 16. Record 309-310 (emphasis added).

The Development MU provides for navigational, public, commercial and industrial water-dependent needs. The CRMP assigns the dredged navigation channel and the jetties to this category, essentially responding to the existing situation at time of adoption. As with the other management units, when considering further development along the estuary it will be necessary to review the individual and cumulative effects of a specific development proposal to determine further impact both on the natural systems and the local economy. Record 311.

The Siuslaw River estuary is a dynamic area. The erosion influences of ocean waves, river currents and tides are constantly changing the estuary. New estuarine lands can be created by man, and they are also created by natural means. In addition, the CRMP recognizes many acres of former intertidal lands and other estuarine habitat had been lost prior to the initial planning effort. It describes some of those processes and the possibilities of new estuarine lands being created by man, as well as by natural means. Record 314.

As the CRMP indicates, Lane County does not have a program designed to return previous tideland to the estuary, although both passive and active restoration can occur. Passive estuary restoration is a permitted use in the Natural and Conservation MU's. Active restoration is a permitted use in the Conservation MU, and a Special Use in the Natural and Development MU's. Record 314. The CRMP recognizes these restoration efforts can have a positive cumulative impact that will allow a degraded area to be restored and recover biologically while acting as a buffer to further impacts to adjacent MU's. For that reason, as part of the challenged amendments, language was added to the text of the CRMP describing both the reasons for and consequences of the redesignation while recognizing the potential for some benefits of placing a designation on Sub-Area C-1 to provide a buffer and the potential for erosion control structures that could provide some relief to the more sensitive and productive estuary areas. Part of that recognition fulfills the CRMP intent of providing a diverse mixture of use and preservation of the natural resources to maintain the long-term economic, environmental and social values of the Siuslaw River estuary. Record 308.

In addition, the CRMP recognizes approval of any active restoration project in the management units that allow such activities must address:

- the base conditions to be restored;
- the cause of the loss or degradation; and
- the location and extent of actions necessary to achieve the restoration objective. Activities associated with active restoration shall be subject to the respective standards for the activity. Additionally, active restoration actions related to the distribution and abundance of relevant amenities and attributes that have been lost or diminished, must demonstrate that the proposed actions are consistent with the original conditions. Record 314.

In all three of the CRMP Estuarine MU's, any use which could cause a significant degradation of the estuary must be preceded by a full review of the impacts of the proposed alteration. The acknowledged Lane County CRMP relies on the U.S. Army "Corps of Engineers Section 10/404 permit process to determine when a significant degradation, other than dredge or fill, will occur." Record 314 (emphasis added). That public process provides anyone with the opportunity to supply information on the significance of any degradation or any reduction in natural values that might occur as a result of the specific proposed activity. All uses listed as conditionally permitted in any of the CRMP MU's are allowed only if they are shown to be consistent with the resource capabilities of the area. Record 315. As the CRMP points out, the procedures for making the determinations of impact assessments and resource capabilities are contained in the applicable zoning ordinances. Significant development projects which are likely to have measurable impacts on the estuarine system may need to be evaluated for cumulative impacts in conjunction with other projects of similar scope. The CRMP directs such evaluation to be done within the procedures described in the Plan (ACOE Section 10/404 permit and zoning permit processes) and contemplates this evaluation being done at the time an actual development proposal becomes specific enough to evaluate all the potential impacts. That evaluation supplements the CRMP discussions of various estuary types. Record 315.

In this case, the Board takes official notice of the provisions in the Florence City Code Title 10, Chapter 19, especially the provisions in 10-19-4 and 10-19-6, to conclude significant impact assessments and consideration of potential cumulative impacts of the alterations and development activities envisioned by the CRMP amendments will be required for any activity proposed for location within Sub-Area C-1 as redesignated by Ordinance No. PA 1229. That assessment and evaluation process conducted by the City of Florence, together with reviews

required by state and federal agencies, will continue to assure any activities occurring within the area affected by the action of the Board enacting Ordinance No. PA 1229 and amending the CRMP will continue to comply with the Goal 16 requirements for comprehensive planning. Those standards provide adequate assurance that evaluation of the "potential cumulative impacts of the alterations and development activities envisioned" by the CRMP amendments will occur prior to development.

As pointed out by the CRMP, diversity of uses within the estuary is essential to the economic well-being of the area and is indicated by the "Shallow-Draft" designation given the Siuslaw River Estuary by LCDC. Record 315. Providing this diversity while maintaining the health of the estuary is the underlying concern behind the review and evaluation of all uses or proposed alterations such that the long-term economic, environmental and social values of the Siuslaw estuary's natural resources can be maintained. Record 315. The Board specifically recognizes restoration efforts in one MU can have a positive cumulative impact to the estuary by buffering further impacts to more sensitive and productive adjacent MU's. As the evidence and testimony presented in the proceedings leading to enactment of Ordinance No, PA 1229 indicated, the designation change to recognize Sub-Area C-1 in the estuary and provide for the possibility of erosion control or bank stabilization activity would have negligible impacts and might actually benefit that and adjacent areas. That evidence and the explanations of those with expertise reflected in the studies of the effects of erosion on the estuary convinced the Board the amendments were consistent with and would not affect the CRMP compliance with the comprehensive planning requirements of Goal 16.

The county decision is supported by significant and extensive information in the application and affirmed by overwhelming testimony and evidence in the record, including specific statements from the Director of the United States Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Habitat Conservation Division, Oregon State Habitat Office ("NOAA Fisheries").¹ Record 8-22, 42-45, 68, 69-82, 126-131, 168-184, 189-191, 192-193, 259-264, 271-284, 286-290, 455-473, 476-482, 536-769. The findings and conclusions of the Board on the suitability of the change from "Natural" to "Conservation" for the new Sub-Area C-1 relied on extensive studies of the entire management unit and specific testimony and evidence showing the appropriateness of the change, including the initial recommendation of NOAA Fisheries made to the city that the change from "Natural" to "Conservation" should only involve the small area now in Sub-Area C-1 because the studies support the analysis of erosion effects in the area. Record 616-621 (citing evidence at Record 615, 639-681, 715-768). The actions of the city planning commission and council to adopt the CRMP changes for Sub-Area C-1 relied extensively on the same studies cited by NOAA Fisheries.² Record 588-595, 615, 634-638, 639-681, 715-768.

Based on the extensive studies and consistent testimony and evidence presented during the county proceedings, the Board reached the conclusion that the amendments to the CRMP

¹ The initial letter from NOAA Fisheries recommended the very change adopted by the Board based on several studies contained in the original application. Record 192-193, 616-621. Some of the discussions in later NOAA Fisheries letters addressed general concerns with the use of riprap for bank stabilization and urged consideration of alternatives similar to those described by the applicants.

² Those actions confirmed the evidentiary support and analysis justifying the CRMP change and, like the county decision, did not authorize any specific activity or development without further review by all agencies with authority over those activities. As described above, that review includes extensive impact analysis to assure consideration of "potential cumulative impacts of the alterations and development activities envisioned" by the CRMP amendments.

creating a new Sub-Area C-1, redesignating it from "Natural" to "Conservation" and adopting text amendments related to the creation and redesignation of Sub-Area C-1 complied with Goal 16 and that conclusion resulted in the following simple findings:

"The specific map change made to the CRMP involved the creation of a small, 10-acre section of Estuarine Management Unit C, which is located between the failed 'inner' jetty and the river bank. This area is referred to on maps and text as Subarea C-1.

" * * * *

"Evidence presented, both at the hearing and in the record of the city approval, shows that the CRMP designation of 'Natural' for Estuarine Management Unit C-1 was largely based on the need to protect the existence of Pittock (sic) clam beds. As the 'inner' jetty failed, allowing the riverbank to collapse, the resulting sand covered the clam beds to the point they are no longer productive. The loss of this habitat no longer warrants the 'Natural' designation of this part of the Management Unit and accommodates the change to 'Conservation'.

"The exhibits that are included in the application have the scientific background information supporting the change of plan designation for a small ten acre subarea of the MU that is now identified as C-1. * * * The proposed change is to allow for examination of the site for erosion control that could reduce the loss of the bank and be compatible with current identified resource values." Record 15, 20-21.

Those findings together with the extensive studies and evidence referenced in the county decision and here describe the factual background and analysis necessary to conclude creating Sub-Area C-1 and redesignating it "Conservation" met all the requirements of Goal 16 applicable to the initial county decision, a conclusion confirmed by the NOAA Fisheries. Record 618-619. As described in more detail below, those studies and evidence in the record establish consideration of the "potential cumulative impacts of the alterations and development activities envisioned" as a result of the CRMP amendments enacted by Ordinance No. PA 1229. The final detailed analysis of any specific activity or development for compliance with Goal 16, including further detailed estuarine impact assessments, must await an application requesting that review and providing more specific information on the proposal. None of the Goal 16 protections related to "riprap" or any other activity that might be proposed, including erosion control alternatives recommended by the NOAA Fisheries, were removed or affected by the CRMP amendments adopted by the county decision.

As established in the county decision, the creation of Sub-Area C-1 and redesignation of that area as a "Conservation" management unit relied largely on assessments of the effects of erosion on the clam beds and the general habitat conditions in that area contained in the extensive studies of the small Sub-Area C-1. Record 20, 615, 639-681, 715-768. The extensive studies included in the original application, the city actions and the confirmation by NOAA Fisheries that those studies supported the creation and redesignation of Sub-Area C-1, together with consistent testimony and evidence provided to the Board collectively and cumulatively establish the effect of erosion on the productive clam beds and the rest of the habitat in the estuary. Loss of productive clam beds and other attributes of the estuary that were part of the reason for the original designation as "Natural" made that designation in the CRMP erroneous. Record 69-82, 588-595, 618-619, 634-638. In addition, the testimony and

evidence indicate efforts to halt that erosion could provide a buffer and have a beneficial impact on the adjacent more sensitive estuarine areas. No contrary evidence in the record refutes that evidence or the conclusions drawn in the studies or by this Board then and now.

One of the final presentations made by an environmental geologist representing the Shelter Cove Homeowners to the Board stressed several important aspects of the amendment and provided the most recent update on the urgency and the status of efforts to explore an "environmentally beneficial and innovative completely concealed and planted 'live' solution" to the erosion that has affected the productive clam beds in Sub-Area C-1. Record 69-82. Most of that summary presentation highlighted several of the facts in the record that established the effect of erosion on the estuary, particularly the area identified as Sub-Area C-1 as follows:

"Sand blanket has smothered the endangered Piddock clam bed.

"Very few benthic organisms.

"No eelgrass and low abundance of salmonid organisms.

"Almost no riparian vegetation.

"If the bank erosion could be stopped, the unique siltstone habitat would be reestablished in a short period of time." Record 73.

On the specific solutions under consideration, the testimony describing the results of a December 8, 2005, meeting with seven state and federal regulatory agencies indicated:

"NOAA, DEQ and ODFW agree after the onsite visit that due to location, area bank hardening, dredging and toe elevation, any erosion control structure will:

- Be out of the water.
- Have no impact on 'simplifying stream channels, altering hydraulic processes, or preventing natural channel adjustments.'
- Benefit ecology & wildlife habitat, not harm it.
- Have a positive impact on water quality." Record 79.

After describing the continuing problems created by erosion, including the effects on the estuary, homes, utilities and public infrastructure, the testimony concluded "[s]topping the erosion and revegetating the banks will restore & significantly benefit estuary ecology." Record 80. None of the evidence presented in the county proceedings leading to the enactment of Ordinance No. PA 1229 establishes that any final erosion control proposal will include riprap or cause significant individual or cumulative negative adverse impacts for adjacent areas of the estuary or the lower Siuslaw River.

The consistent testimony and evidence presented to the Board not only contradicted all the speculative assertions of negative or adverse impacts presented by "rip-rap", it also established that agreement existed among several regulatory agencies that the proposed erosion control solution under consideration at that time would not have an impact on "simplifying stream channels, altering hydraulic processes, or preventing natural channel adjustments." Record 79. That testimony and evidence in the record clearly establishes consideration of the "potential cumulative impacts of the alterations and development activities envisioned" by the CRMP amendments and supports the accuracy of the portion of the discussion statement added to the CRMP text as the consideration and rationale for the change to redesignate Sub-Area C-1. That statement follows several explanations for the change that relied on the extensive evidence and testimony of the effects of erosion and the negligible or potentially beneficial impacts of erosion control efforts before concluding:

"The sensitivity of the more productive adjacent estuary is buffered by the moderate designation of this estuary management unit." Record 12.

This cryptic description of the ultimate impact of the designation change summarizes the evidence and analysis of potential effects of the change, as well as generally describing the "potential cumulative impacts of the alterations and development activities envisioned" by the CRMP amendments. Based on the evidence and testimony in the record, the Board concluded sufficient consideration of those impacts had occurred prior to adoption of the amendments and that conclusion remains valid. As described here, the CRMP contemplates additional impact analysis to maintain the overall balance and diversity of the uses and activities in the Siuslaw River estuary. The evidence and testimony presented throughout the county proceedings and relied upon by the Board in enacting Ordinance No. PA 1229 sufficiently indicates consideration of the "potential cumulative impacts of the alterations and development activities envisioned" by the CRMP amendments adopted by that action. The Board continues to rely on that analysis and the supplemental findings found here to conclude the amendments and the CRMP with those changes continues to comply with Goal 16. Adequate consideration of impacts was a part of the decision leading to the enactment of Ordinance No. PA 1229, even if the findings adopted at the time did not specifically indicate that was the case.

The findings included in the county decision relied on evidence of the identified potential for beneficial impacts from erosion control and recognized the need for further permit applications and federal, state and local agency reviews to evaluate impacts of a specific proposal before any particular activity or development could occur in the new Sub-Area C-1. Record 13-22. Those reviews will include extensive impacts analysis of the specific proposal under the acknowledged implementing regulations adopted by the City of Florence to assure continued compliance with all the applicable provisions of Goal 16 and the Goal 16 Rule, as well as review by state and federal agencies. The amendments to the CRMP adopted by the county decision change none of the management unit categories, definitions, priorities for uses or the specific uses that are permitted within those management unit categories. Nothing in Goal 16 or the Goal 16 Rule compels adoption of anything more than the current acknowledged CRMP provisions governing uses in the designated management units. Those and the amendments to the CRMP already reflect sufficient consideration of "potential cumulative impacts of the alterations and development activities envisioned" by the amendments. The evidence in the record also supports the "buffer" text adopted as part of the amendment redesignating Sub Area C-1 and allowing the potential for review of further erosion control efforts in that area.

2. The Evidence and Testimony in the Record

There is a considerable body of evidence in the record that addresses the cumulative impacts that may occur as result of the change in the MU designation for Sub-Area C-1. The evidence in the record analyzes the cumulative impacts already considered and described in the acknowledged CRMP and shows that the potential cumulative impacts of the change in the MU designation for Sub-Area C-1 is consistent with the overall cumulative impacts anticipated in the acknowledged CRMP. The evidence in the record shows that, due to changes in the ecological condition of the area, the change in designation for Sub-Area C-1 is consistent with the Goal 16 requirements for comprehensive plans.

In fact, based on the evidence and testimony in the record before the Board, there is significant evidence to show that the erosion control structure intended by the homeowners is likely to have a positive cumulative impact on the estuary and will allow the degraded area to be restored and to recover biologically. Much of this is summarized in the initial application

submitted by the City of Florence and the Shelter Cove Homeowners Association identified in the record as item 51. Record 536-768. Especially because of the bank restoration process, and as more specifically addressed below, the adjacent "Natural" C MU will be "buffered" by filtering chemicals, moderating temperatures, ameliorating further smothering biological effects of rapid sand loss, and providing aquatic food sources to the more sensitive "Natural" area. Record 69-82. That potential impact of the CRMP amendment, as reflected in the testimony and evidence and the text adopted as part of the plan, provides a sufficient basis for concluding the change did not affect the plan compliance with Goal 16, including consideration of the "potential cumulative impacts of the alterations and development activities envisioned" by the CRMP amendments.

The following are findings and citations from the record that provide evidence supporting the analysis and conclusions of this Board that the overall cumulative impact of the proposed erosion control project with regard to Goal 16 of the CRMP would be beneficial. Furthermore, there is no evidence in the record that refutes these findings of fact and conclusions of law or the evidence on which they are based.

a) The natural and man-caused erosion which has occurred since the adoption of the CRMP has had a significant negative impact on estuarine ecology that was not anticipated in the CRMP.

An erosion report prepared for the Shelter Cove subdivision by an independent consultant, Wilbur TERNYK, states that, until 2001, no comprehensive study documenting the impacts of the "massive erosion sedimentation" had been conducted. Record 605. That study further states that "there is clear proof that significant loss of natural wildlife values occurs every year that the erosion is not corrected." Record 605; 640-642.

Contrary to the conditions at the time the CRMP was adopted, a Shellfish Project Leader with the Oregon Department of Fish and Wildlife (ODFW) states that, after a field inspection in 2002, "[i]n area 'C1', I found no significant softshell clam or ghost shrimp populations in the mudflat and the rocky intertidal area had few healthy barnacles or mussels. No living piddock clams were observed." Record 615. Based on ODFW's findings, the Oregon Department of Land Conservation and Development, Coastal Management Program officially concurred with the proposal to amend the CRMP to redesignate Sub-Area C-1 from "Natural" to "Conservation." Record 613. The change was further supported by the analysis of impacts performed by the NOAA Fisheries. Record 616 – 620.

In October, 2001, a study of the area was released by Robert H. Ellis, Ellis Ecological Services, Inc. That study, entitled "An Evaluation of Effects of Severe Bank Erosion on the Benthic Macroinvertebrate Community and General Habitat Conditions Near Shelter Cove Siuslaw River Estuary, Oregon" included the following indications in its executive summary:

- "1. Sub area C1 contained significantly ($P < 0.05$) lower numbers and fewer taxa of benthic macroinvertebrates than nearby control sites (zoned natural) on the outside of the jetty. However, no significant difference was found in total number of benthic organisms or total number of taxa when sample data from Sub-Area C1 were compared with sample data collected from Area B (zoned Conservation).
- "2. Abundance of salmonid food organisms in the benthic samples was low in all areas but lowest in Sub-Area C1.

- "3. Inspection of siltstone outcroppings within Sub-Area C1 revealed that very few benthic organisms were present on the siltstone. No evidence of living piddock clams was found.
- "4. No eel grass was present within Sub-Area C1.
- "5. No seal haul out area was observed in Sub Area C1." Record 716.

The Ellis Report includes substantial detail as to these conclusions and the effects of erosion, including the effects of failing to stop that erosion. Record 715-768 See, for example, those portions of the report at Record 737-738.

A PowerPoint presentation made at the February 22, 2006, Board meeting also supports the finding that the County sufficiently considered the potential cumulative impacts of its action and whether such impacts were consistent with the CRMP which already addresses the cumulative impacts of the CRMP as a whole. Record 69-82.

- b) Redesignating area C-1 to make it possible to stop the erosion will allow the estuary to rebound biologically, potentially returning it to a biological condition more like that anticipated in the CRMP.**

The Ellis report, discussed above, states that "[i]f the bank erosion could be stopped, the unique siltstone habitat would likely be re-established in a short period of time. Piddock Clams, which were abundant when Area C was established, would likely recolonize the exposed siltstone within a short period of time since remnant populations of the two species of Piddock Clams still occur in a small part of the siltstone outcrop." Record 717.

In a letter from Mike Broch (an affected homeowner, Geologist and Co-Chair of the North Cove Bank Preservation Coalition), to Bridgette Lohrman (NOAA Fisheries), Mr. Broch addresses NOAA's concerns about the next steps that may be pursued with respect to Sub-Area C-1 after the redesignation. Mr. Broch states:

"I also want to assure you that, while our coalition of land owners does desire to control the devastating erosion that threatens our community, we are also environmentally minded people who actually wish to improve the ecology of the north cove estuary, not threaten it. As you know, biological studies and evaluations of record indicate that the erosion in Shelter Cove has been an ecological disaster and that controlling that erosion will have a significant beneficial impact on the ecology of the area; especially beneficial would be the likely return of the endangered Piddock clam. Also we would propose at our expense, not with public money, to completely revegetate the denuded sand banks with native vegetation, dramatically improving riparian habitat. Ideas that we would like to discuss in the long term would be to possibly fund studies to monitor ecological progress, clam bed seeding, etc." Record 178-179.

- c) The cumulative impacts of the area's redesignation are impacted by the fact that the surrounding estuary has been hardened against erosion.**

An enclosure to the Ternyik report, discussed above, describes the extensive jetties that have been constructed in the area. It indicates that the North Jetty is about 9,790 ft. long and the South Jetty is about 6,700 ft. long. Record 646. The PowerPoint presentation described above showed the area that has been hardened with a red outline that included rip-rap covering

the entire east and west banks of the lower Siuslaw River in the areas around Shelter Cove extending several thousand feet. Record 71.

- d) The record indicates that the erosion control solution most likely to be proposed is an approved "alternative to riprap" as defined by NOAA Fisheries.**

Evidence in the record shows a preference by some environmental professionals for, at least, an exploration of erosion control solutions that are different from simple placement of "riprap." Record 619-20. The record supports that such alternatives were already being considered by the affected homeowners. In a letter from Mike Broch (discussed above), he also states "I want to personally assure you that we are fully committed to considering alternatives to riprap bank stabilization as defined by Mr. Tehan [of NOAA Fisheries]. We clearly understand that any erosion control solution approved will be done only through the advice and consent of the regulatory agencies and as such we are dedicated to seeking that advice and consent proactively." Record 178. He continues "[w]e want to assure you that we are fully committed to considering alternatives to riprap bank stabilization, in complete agreement with Mr. Tehan's recommendation, and strongly desire not only to stop the erosion but to improve the ecology of the Siuslaw River estuary." Record 179.

- e) The erosion control solution the homeowners intended to propose and described in the record is an innovative environmental design that is mostly out-of-the-water, will be entirely covered and planted with native vegetation, and will have a restorative impact on estuarine and riparian habitat.**

The County's consideration of the potential cumulative impacts of the amendment took into account the nature of the erosion control solution that the homeowners presented during the local process. In the above-discussed letter from Mike Broch addressing the next steps that may be pursued with respect to Sub-Area C-1 after the redesignation, Mr. Broch states:

"In regards to essential fish habitat (EFH) for Coho, the geological setting of the north cove shows that any acceptable erosion control solution proposed will have minimal impact on EFH. For example, toe elevations at the base of our north cove banks vary from 8.1 feet above sea level to over 9.4 feet (see APPENDIX I). This means that any erosion control structure proposed and approved by the agencies will be out of the water 99.9% of the year, except for a few hours annually during a few very high tides (see APPENDIX II). These very few high tides reach a maximum elevation of about 9.39 feet (2006 – 2011: tide information source is; University SC Wethey Laboratory Tide Tables for the Siuslaw Entrance at <http://tbone.biol.sc.edu/tide/>). In other words, the erosion of our banks is the result of waves impacting soft sand banks located above the base water level, exacerbated by seeps along a somewhat higher ancestral shoreline horizon. Thus, EFH is not a direct issue in this area, at least in regards to the location of any possible erosion control structure, which again will be an out-of-water structure.

"There are a number of other important facts about the setting of the north cove that are important. For example the north cove banks are located more than 1,200 feet away from the actual river channel across very extensive shallow sand shoals (see APPENDIX III) and the entire cove is also very shallow and emergent during even moderate low tides (see APPENDIX IV). As such, any erosion control structure would have no impact on "simplifying stream channels,

altering hydraulic processes, or preventing natural channel adjustments", some of the other concerns expressed by NOAA in the April 15, 2004 letter of record. In fact the Siuslaw River channel is dredged each year by the ACOE, ensuring that there are no natural channel adjustments". Record 179.

Further, in the PowerPoint presentation made to the Board on February 22, 2006, the homeowners presented significant detail as to their preferred erosion control solution for the area. Record 69-82. That presentation included a photo at +8.27' High Tide, 11-17-05, and illustrations showing that the bank toe is almost entirely out of the water and explaining why any erosion control solution will be out of the water and have no chance of being overtopped by even a +100 year storm event. The PowerPoint presentation also provided information as to the environmentally beneficial and innovative aspects of the proposed solution, including showing how it could be a completely concealed, planted and "live" restorative project.

The homeowners indicated that the relevant government agencies, after an onsite visit to the site, in December 8, 2005, agreed that due to location, area bank hardening, dredging and toe elevation, any erosion control structure will:

- "- Be out of the water.
- "- Have no impact on "simplifying stream channels, altering hydraulic processes, or preventing natural channel adjustments.
- "- Benefit ecology & wildlife habitat, not harm it.
- "- Have a positive impact on water quality." Record 79.

The homeowners also indicated that ODFW would be writing a grant to monitor estuary recovery and one member of that agency observed to homeowner representatives while at the site "I am personally excited about your efforts to stop the erosion and improve the ecology." Record 79, 81. The presentation to the Board included extensive evidence of the effects of erosion and the efforts to address those effects with a restorative erosion control solution that would substantially benefit the ecology of the lower Siuslaw River. Record 42-44, 69-82.

Conclusion

Based on the analysis above, the Board concludes there is a considerable body of evidence in the record addressing the impacts that may occur as result of the change in the designation for Sub-Area C-1. That evidence in the record analyzes impacts already considered and described in the acknowledged CRMP and shows that the potential impacts of the change in designation for Sub-Area C-1 is consistent with the overall cumulative impacts anticipated in the acknowledged CRMP. The evidence in the record shows that, due to changes in the ecological condition of the area, the amendment was consistent with the Goal 16 requirements for comprehensive plans when adopted. These supplemental findings and descriptions of the evidence in the record establish and the Board concludes the amendments to the CRMP did not affect its compliance with Goal 16 because the language added to the plan, the plan itself and the subsequent review of specific proposals for development in the redesignated area by the permitting authorities assure sufficient consideration of "potential cumulative impacts of the alterations and development activities envisioned" by the amendments enacted by the Board in Ordinance No. PA 1229.

