

ARTICLES

EDWARD J. SULLIVAN*

Shorelands Protection in Oregon

Introduction	130
I. Oregon Shoreline Exceptionalism	133
A. Shorelands Ownership and Access	133
B. Public Participation in Shorelands Policy	137
II. Planning Oregon Coastal Shorelands	139
A. Overall Policy of Goal 17.....	140
B. Commands to Planners and Regulators.....	140
C. Use Priorities.....	141
D. Inventory Requirements	141
E. Comprehensive Plan Requirements	141
F. Coastal Shoreland Uses.....	142
1. Protected Areas.....	143
2. Water-Dependent Uses.....	143
a. Protection Generally	143
b. Enhanced Protection	144
c. Temporary and Incidental Uses	147
3. Shoreland Areas Suitable for Redevelopment.....	147
4. Rural Uses	148
G. Plan Implementation Requirements	148
H. Guidelines for the Shorelands Goal	151

* B.A., St. John's University (N.Y.), 1966; J.D., Willamette University, 1969; M.A. (History), Portland State University, 1973; Urban Studies Certificate, Portland State University, 1974; M.A. (Political Thought), University of Durham; Diploma in Law, University College, Oxford, 1984; LL.M., University College, London, 1978. The author expresses his deep appreciation to those who reviewed and commented on this paper, including Dr. Seymour Adler, Victor Affolter, Robert Bailey, Professor James Good, William Kabeiseman, Cameron La Follette, Steven Schell and Matthew Spangler. © by Edward J. Sullivan.

1.	Integration with Other Planning Goals.....	152
2.	Special Provision for Hazards	152
3.	Scenic, Environmental, Historic, and Aesthetic Values.....	152
4.	Planning for Human Activity	153
III.	Regulating Oregon Coastal Shorelands.....	154
A.	The Urban-Rural Divide.....	154
B.	Public Lands.....	156
C.	The Use of Setbacks.....	156
IV.	Economic and Fiscal Concerns in Coastal Development.....	157
V.	The Challenge of Climate Change	161
	Conclusion.....	163

INTRODUCTION

The Oregon Coast extends for 363 miles (584 kilometers), from the mouth of the Columbia River to the California state line,¹ including twenty-nine cities and parts of seven counties.² The cities range in population size from approximately 16,000 for Coos Bay to 400 for Wheeler.³ The upland portion of the Oregon Coastal Zone (generally the area between the peak of the Coast Range and the Pacific Ocean) has about 225,000 people (about 6.5% of the state's population) on 7,800 square miles (2,020,191 hectares) of land.⁴ Since 1971, this area, which contains places of ecological and touristic importance, has been treated differently than the remainder of the state to protect its natural beauty; however, the area is less well-off than the rest of Oregon, especially due to the lessening economic importance of the timber and fishing industries in recent years.⁵

¹ See *Oregon Coast*, TRAVEL OR., <http://traveloregon.com/places-to-go/regions/oregon-coast> (last visited Oct. 16, 2017).

² See *Oregon Coast Cities*, OR. COAST, <http://theoregoncoast.info/Cities.html> (last visited Oct. 16, 2017); *Oregon Coast Counties*, OR. COAST, <http://theoregoncoast.info/Counties.html> (last visited Oct. 16, 2017).

³ See *List of Counties and Cities in Oregon by Population and Name*, SUBURBAN STATS, <https://suburbanstats.org/population/oregon/list-of-counties-and-cities-in-oregon#CW> (last visited Oct. 16, 2017).

⁴ *Oregon's Coastal Zone*, OR. DEP'T OF LAND CONSERVATION AND DEV., http://www.oregon.gov/LCD/OCMP/pages/cstzone_intro.aspx (last visited Oct. 16, 2017).

⁵ PAULA SWEDEEN ET AL., AN ECOLOGICAL ECONOMICS APPROACH TO UNDERSTANDING OREGON'S COASTAL ECONOMY AND ENVIRONMENT 2-4 (2008), <http://www.coastrange.org/CoastalEconomicsReport.pdf>.

In 1971, the Oregon legislature established an agency, the Oregon Coastal Conservation and Development Commission (OCC&DC), to meet land use planning needs on the Oregon Coast.⁶ In 1972, Congress passed the Coastal Zone Management Act to provide funding and standards for state management of coastal areas, including the Great Lakes.⁷ Besides providing funds for coastal planning, the Act had a “consistency provision” requiring federal agencies to undertake their programs consistent with federally approved coastal management plans adopted by states.⁸ Both the funds and the consistency provisions were significant influences that spurred coastal planning and regulation in Oregon, including the adoption of coastal goals.⁹ In large part due to the adoption and implementation of the Coastal Goals, the Oregon Coastal Program has been determined to meet the federal standards, so as to allow for more extensive state management in what would otherwise be within exclusive federal jurisdiction.¹⁰

⁶ *Ocean Resources*, OR. COASTAL MGMT. PROGRAM, https://www.oregon.gov/LCD/OCMP/Pages/Ocean_Intro.aspx (last visited Oct. 16, 2017) (explaining that work of the OCC&DC became the foundation for the coastal planning goals under SB 100 in 1973).

⁷ See 16 U.S.C. § 1452(1) (2012) (declaring the Act’s national policy to “preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone for this and succeeding generations”).

⁸ *Id.* § 1452(2).

⁹ E-mail from Matt Spangler, Regional Representative, Department of Land Conservation and Development, to author (Mar. 21, 2017) (on file with author). Mr. Spangler points out the mutually enforcing relationship between the federal Coastal Zone Management Act and Oregon’s coastal goals, stating:

[T]he funding and federal consistency incentives that you describe as key aspects of the CZMA are contingent upon a state’s [sic] gaining and maintaining federal approval for an overall coastal management program. To gain federal approval, programs do have to meet certain substantive federal policy standards for the management and protection of coastal resources. In Oregon’s case, our federally approved coastal management program is based on our statewide system of land use planning (along with a few other key state agency regulatory authorities). The objective of creating a coastal management program that could gain federal approval was a strong impetus for the adoption of the four coastal goals, which were added to the original Statewide Planning Goals in 1976/ 77. Many of the management concepts incorporated into the coastal goals were thereby strongly influenced by the substantive requirements of the CZMA As a side note, Oregon’s coastal management program gained federal approval in 1977, the same year the coastal goals became effective, and was the second state program in the nation to do so, after Washington’s.

¹⁰ See *Approval of the Oregon Coastal Management Program*, OR. COASTAL MGMT. PROGRAM, http://www.oregon.gov/LCD/OCMP/docs/RPCs/Oregon_Program_Approval_Findings_small-file.pdf (last modified Mar. 16, 2015).

In 1973, the Oregon Legislature enacted Senate Bill 100, the state's planning law that (1) created a new state agency, the Land Conservation and Development Commission (LCDC), with the power to adopt and enforce state land use policies, called "Goals"; (2) required those policies to be included in the comprehensive plans of cities and counties; and (3) required that land use regulations be consistent with plans found to incorporate those goals in their provisions.¹¹

In 1975, LCDC used federal and state funds to formulate four state policies for the Oregon Coast set forth in new goals (together the "Coastal Goals"):

- Goal 16: Estuarine Resources—"To recognize and protect the unique environmental, economic, and social values of each estuary and associated wetlands; and To protect, maintain, where appropriate develop, and where appropriate restore the long-term environmental, economic, and social values, diversity and benefits of Oregon's estuaries."¹²
- Goal 17: Coastal Shorelands—"To conserve, protect, where appropriate, develop and where appropriate restore the resources and benefits of all coastal shorelands, recognizing their value for protection and maintenance of water quality, fish and wildlife habitat, water-dependent uses, economic resources and recreation and aesthetics. The management of these shoreland areas shall be compatible with the characteristics of the adjacent coastal waters; and To reduce the hazard to human life and property, and the adverse effects upon water quality and fish and wildlife habitat, resulting from the use and enjoyment of Oregon's coastal shorelands."¹³
- Goal 18: Beaches and Dunes—"To conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of coastal beach and dune areas; and [t]o reduce the

¹¹ S.B. 100, 57th Leg. Assemb., Reg. Sess. (Or. 1973), <http://www.oregon.gov/LCD/docs/bills/sb100.pdf>. See also Edward J. Sullivan, *The Quiet Revolution Goes West: The Oregon Planning Program 1961-2011*, 45 J. MARSHALL L. REV. 357, 367-71 (2012) [hereinafter *Quiet Revolution*].

¹² Or. Dep't of Land Conservation and Dev., Goal 16: Estuarine Resources, OR. ADMIN. R. 660-015-0010(1) (2018) [hereinafter Goal 16] at 1, <http://www.oregon.gov/LCD/docs/goals/goal16.pdf>.

¹³ Or. Dep't of Land Conservation and Dev., Goal 17: Coastal Shorelands, OR. ADMIN. R. 660-015-0010(2) (2018) [hereinafter Goal 17] at 6, <http://www.oregon.gov/lcd/docs/goals/goal17.pdf>.

hazard to human life and property from natural or man-induced actions associated with these areas.”¹⁴

- Goal 19: Ocean Resources—“To conserve marine resources and ecological functions for the purpose of providing long-term ecological, economic, and social value and benefits to future generations.”¹⁵

These goals (at least the first three) cover different coastal attributes of the same geographical areas and are mutually reinforcing; an activity inconsistent with one of them, such as coastal armoring or conversion of land to a use inconsistent with one goal, will most often constitute a violation of the other affected goals.

Following an introduction, this Article will explore the unique legal and historical role of the Oregon coast in that state’s understanding of itself, especially in terms of public demand for beach access and environmental protection, culminating in the adoption of binding state policies (“goals”) implemented locally. These policies required data gathering, established state coastal values, and required planning and land use regulation by local governments to realize those values in a planning process. This Article then evaluates that process in terms of its public acceptance and effectiveness in order to assist decision makers crafting these types of policies elsewhere.

I

OREGON SHORELINE EXCEPTIONALISM

Oregon’s uniqueness in shorelands management is exemplified in two ways: shorelands ownership and access, and public participation in shorelands policy, each discussed in turn below.

A. Shorelands Ownership and Access

Oregon was admitted to the Union in 1859 and, under the terms of statehood, obtained jurisdiction over navigable waters in the state,

¹⁴ Or. Dep’t of Land Conservation and Dev., Goal 18: Beaches and Dunes, OR. ADMIN. R. 660-015-0010(3) (2018) [hereinafter Goal 18] at 1, <http://www.oregon.gov/LCD/docs/goals/goal18.pdf>.

¹⁵ Or. Dep’t of Land Conservation and Dev., Goal 19: Ocean Resources, OR. ADMIN. R. 660-015-0010(4) (2018) [hereinafter Goal 19] at 1, <http://www.oregon.gov/LCD/docs/goals/goal19.pdf>.

including tidelands.¹⁶ Because Oregon's mountains, headlands, and dense vegetation (salal) impeded access north and south along the coast, American settlers followed the traditional Native American form of transportation by using boats and shorelines.¹⁷ After the first white settlers took up claims to the Oregon coast in the 1840s, "the shoreline was quickly adapted as a ready-made roadway," with communication between these isolated communities being carried by ship or "horseback riders using the beaches."¹⁸ When automobiles arrived on the scene, the beaches continued to be used as a public highway.¹⁹ From 1874 to 1901, the state sold some of its tideland areas to private persons; however, the state also saw fit to declare thirty miles of beach along the north coast as a public highway, open to the public forever.²⁰ In one of many legislative actions regarding Oregon's beaches, Governor Oswald West proposed, and the Oregon Legislature passed, legislation declaring Oregon beaches to be a public highway for the entirety of the coastline in 1913 (save for those lands that had been previously sold).²¹

Nevertheless, public rights in the beaches were controversial, especially as other states had recognized ownership of dry sand areas by adjacent landowners.²² In response, the 1967 Oregon Legislature enacted what is commonly known as the "Beach Bill,"²³ which declared, in part:

¹⁶ KATHRYN A. STRATON, OREGON'S BEACHES: A BIRTHRIGHT PRESERVED 9–10 (Oregon State Parks Branch, 1977) [hereinafter BIRTHRIGHT], http://oregonstateparks.org/index.cfm?do=main.loadFile&load=_siteFiles%2Fpublications%2Foregon_s-beaches-birthright-preserved113001.pdf.

¹⁷ *Id.* at 5.

¹⁸ *Id.*

¹⁹ *Id.* at 6–7.

²⁰ *Id.* at 10; *see also* 1899 Or. Laws § 4817 B–C.

²¹ BIRTHRIGHT, *supra* note 16, at 11; *see also* 1913 Or. Laws, ch. 47 (forming the State Highway Commission which controlled this "state highway"); BIRTHRIGHT, *supra* note 16, at 17 (revising the law, the legislature declared ownership of the beaches to be "vested" in the state under 1947 Or. Laws, ch. 493); *and* 1965 Or. Laws, ch. 368 (revising the law, the legislature changed the designation of the beaches from public highway to public recreational area).

²² BIRTHRIGHT, *supra* note 16. Only about 3% of Maine's 4000 miles of coastline and only ten of Massachusetts' 1300 miles of coastline are public. *Id.* at 1. Much of the beaches in New Jersey and Florida are subject to payment for use. *Id.* Ninety percent of the beaches along the Gulf Coast are in private ownership. *Id.* Closer to Oregon, less than one-fifth of California's coastline is open to the public. *Id.* at 2.

²³ 1967 Or. Laws, ch. 601, H.B. 1601, 54th Leg. Assemb., Reg. Sess. (Or. 1967), www.orgov.org/beachbilltext.html. *See also* BIRTHRIGHT, *supra* note 16, at 20–33

(1) The Legislative Assembly hereby declares it is the public policy of the State of Oregon to forever preserve and maintain the sovereignty of the state heretofore legally existing over the ocean shore of the state from the Columbia River on the north to the Oregon-California line on the south so that the public may have the free and uninterrupted use thereof.

(2) The Legislative Assembly recognizes that over the years the public has made frequent and uninterrupted use of the ocean shore and recognizes, further, that where such use has been legally sufficient to create rights or easements in the public through dedication, prescription, grant or otherwise, that it is in the public interest to protect and preserve such public rights or easements as a permanent part of Oregon's recreational resources.²⁴

Having made that declaration, the legislature then declared the state to be the owner of these lands:

Ownership of the shore of the Pacific Ocean between ordinary high tide and extreme low tide, and from the Oregon and Washington state line on the north to the Oregon and California state line on the south, excepting such portions as may have been disposed of by the state prior to July 5, 1947, is vested in the State of Oregon, and is declared to be a state recreation area. No portion of such ocean shore shall be alienated by any of the agencies of the state except as provided by law.²⁵

The Beach Bill legislation declaring a state ownership interest was challenged in 1969 by the owners of a tourist facility who claimed ownership of the upland “dry sand” area in *State ex rel. Thornton v. Hay*.²⁶ The Hays, who owned the facility, conceded that the State had ownership of tidelands lying seaward of the ordinary or mean high-tide line, but challenged the rights of the state to limit their use and enjoyment of lands between this line and the visible line of vegetation, generally about sixteen feet above mean sea level.²⁷ While the state asserted a prescriptive easement over these lands due to long public usage of the beaches as a highway, the court relied on the English doctrine of Custom to find in favor of the state.²⁸ The Court

(detailing the colorful circumstances of the events surrounding the passage of the “Beach Bill”).

²⁴ OR. REV. STAT. § 390.610(1)–(2) (2017).

²⁵ *Id.* § 390.615 (2017). *See id.* §§ 390.620–755 (2017) (dealing with regulation, permits, and management of these shorelands).

²⁶ *State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969).

²⁷ *Id.* at 586–87, 462 P.2d at 672–73.

²⁸ *Id.* at 595–98, 462 P.2d at 677–78 (quoting BOUVIER'S LAW DICTIONARY 742 (8th ed. 1914), which describes custom as “a usage as by common consent and uniform

recognized that the knowledge of public use of the beaches as highways was so well known and notorious that notice of the same by land purchasers must be presumed.²⁹ The Court concluded that:

Because so much of our law is the product of legislation, we sometimes lose sight of the importance of custom as a source of law in our society. It seems particularly appropriate in the case at bar to look to an ancient and accepted custom in this state as the source of a rule of law. The rule in this case, based upon custom, is salutary in confirming a public right, and at the same time it takes from no man anything, which he has had a legitimate reason to regard as exclusively his.³⁰

More recently, in *Stevens v. City of Cannon Beach*, the Supreme Court denied a writ of certiorari that would have provided for a constitutional examination of the law of Custom as applied to the Oregon Coast.³¹

Having established state ownership of shorelands between the ordinary high tide and extremely low tide lines, it was far easier for the state to devise a means to regulate the use of those lands.

All private lands in Oregon are planned and zoned under a statewide planning program that implements state policy.³² Moreover, public and private landowners undertaking structural improvements are subject to statewide specialty codes relating to building, plumbing, electrical, and mechanical codes, among others.³³ Thus, enforcement of shorelands policy uses these familiar tools, as well as watchdog public interest groups, to monitor changes to plans and regulations, and individual development proposals. This enforcement allows citizens to participate effectively in the planning and development processes, to enforce state policy through administrative and judicial forums, and serves to attain a high level of compliance.

As a property and public law matter, the use of beaches in Oregon is now unquestioned; however, private lands frequently act as legal barriers to access. The 1967 Beach Bill allows the State to acquire,

practice [that] has become the law of the place, or of the subject matter to which it relates").

²⁹ *Id.* at 598–99, 462 P.2d at 678.

³⁰ *Id.* at 599, 462 P.2d at 678; see also Melody F. Havey, *Stevens v. City of Cannon Beach: Does Oregon's Doctrine Of Custom Find A Way Around Lucas?*, 1 OCEAN & COASTAL L.J. 109, 113–16 (1994).

³¹ *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (Justices Scalia and O'Connor dissenting).

³² See generally *Quiet Revolution*, *supra* note 11.

³³ OR. REV. STAT. § 455.030 (2017) (codes adopted pursuant to this statute).

manage, and regulate such access.³⁴ Upon adoption of Goal 17 (Coastal Shorelands) that access policy has been reinforced.³⁵

B. Public Participation in Shorelands Policy

In addition to the work of the OCC&DC from 1971 to 1975,³⁶ Oregon has an established citizen involvement program under its statutes and Goals, all of which apply to coastal shorelands planning and regulations.³⁷ Citizen participation has long been part of the Oregon planning program,³⁸ although its impact has been questioned.³⁹ Nevertheless, there are formal programs in place to assure that all parties have notice and an opportunity to be heard in the enactment of formal coastal land use policy or land use decisions that implement such policy.⁴⁰ Local governments must make their plans and land use regulations available for public scrutiny.⁴¹ Development proposals at the local level are available for public access and participation, and normally, at least one public hearing must be held.⁴² At the state level, LCDC maintains a website containing relevant statutes, goals, and rules for the state land use program,⁴³ including an outline of the state's coastal management program.⁴⁴ Decisions from the Oregon Land Use Board of Appeals

³⁴ *Id.* §§ 390.630, 390.632, 390.640; OR. ADMIN. R. 736-020-0001 (2017) (requiring permits for significant activity along Oregon's ocean shores, an essential prerequisite for the assertion of public ownership).

³⁵ OR. ADMIN. R. 660-015-010(2) (2017) (providing increased public access).

³⁶ *See Ocean Resources*, *supra* note 6.

³⁷ *See, e.g.*, OR. REV. STAT. §§ 197.040(2), 197.235 (2017) (providing rulemaking and goal formulation); § 197.160 (providing for a State Citizen Involvement Advisory Committee that conducts ongoing review of state and local citizen involvement programs); *and* § 197.633(1)–(2) (providing for periodic review of local plans and regulations).

³⁸ *Quiet Revolution*, *supra* note 11.

³⁹ Edward J. Sullivan, *Remarks to University of Oregon Symposium Marking the Twenty-Fifth Anniversary of S.B. 100*, 77 OR. L. REV. 813, 824–25 (1998).

⁴⁰ *See* OR. REV. STAT. §§ 192.410–505 (2017) (Oregon's Public Records); §§ 192.610–690 (Public Meetings); § 183 (Administrative Procedures Act relating to rulemaking and adjudication by state administrative agencies); §§ 197.225–245 (goal adoption and amendment process by LCDC); §§ 197.319–350 (LCDC Enforcement Order); *and* § 197.763, §§ 215.402–437, §§ 227.160–186 (procedures for local land use hearings).

⁴¹ *Id.* § 215.050, 227.187 (2017).

⁴² *See id.* § 215.412(3) (counties), § 227.175(3) (cities).

⁴³ *Oregon Department of Land Conservation and Development*, OREGON.GOV, <http://www.oregon.gov/LCD/pages/index.aspx> (last visited Oct. 16, 2017).

⁴⁴ *See Oregon Coastal Management Program*, OREGON.GOV, <http://www.oregon.gov/LCD/OCMP/pages/index.aspx> (last visited Oct. 16, 2017).

(LUBA) are published and are available online.⁴⁵ In addition, there are excellent opportunities to have such decisions reviewed at an administrative and judicial level.⁴⁶

There are three nongovernmental “watchdog” organizations that oversee implementation of the Coastal Goals, rules, and local programs. For over forty-five years, 1000 Friends of Oregon has monitored and litigated land use issues, including some coastal issues.⁴⁷ Of even older provenance, the Oregon Shores Conservation Coalition has concentrated its policy and litigation efforts on the Oregon coast, especially to enforce public beach access and to oppose inappropriate beach armoring.⁴⁸ A third, and very active, environmental organization, the Oregon Coast Alliance (ORCA) was formed in 2009 as a coastal “watchdog” specifically to respond to land use threats to coastal resources, using the tools provided by law.⁴⁹ Further, Oregon State University’s Marine Studies Initiative Sea Grant Program provides access to scientific information to assist the public and private sectors.⁵⁰ Together—a funded coastal land use program, property law considerations favoring public use and enjoyment of coastal shorelands, effective citizen watchdogs, and access to scientific knowledge—all give the Oregon program the opportunity for success.

⁴⁵ See *Land Use Board of Appeals*, OREGON.GOV, <http://www.oregon.gov/LUBA/Pages/index.aspx> (last visited Oct. 16, 2017).

⁴⁶ OR. REV. STAT. §§ 197.805–850 (2017) (local government land use decisions are generally reviewable by LUBA, a specialized administrative agency with timelines for decision-making and an excellent record on review); §§ 197.650–651, 197.850 (decisions by LUBA and LCDC are reviewable by right by the Oregon Court of Appeals); and § 19.270 (review by the Oregon Supreme Court is discretionary).

⁴⁷ 1000 FRIENDS OF OR., <https://www.friends.org> (last visited Oct. 16, 2017); see also *1000 Friends of Or. v. Land Conservation & Dev. Comm’n*, 301 Or. 447, 724 P.2d 268 (Or. 1986) (important court decision on the Oregon program involving the extent of rural development in coastal Curry County).

⁴⁸ See OR. SHORES CONSERVATION COAL., <https://www.oregonshores.org> (last visited Oct. 16, 2017). See also *Oregon Shores Conservation Coal. v. Lincoln Cty.*, 164 Or. App. 426, 992 P.2d 936 (Or. Ct. App. 1999); *Oregon Shores Conservation Coal. v. Oregon Dep’t of Fish & Wildlife Comm’n*, 62 Or. App. 481, 662 P.2d 356 (Or. Ct. App. 1983).

⁴⁹ See OR. COAST ALL., <http://www.oregoncoastalliance.org> (last visited Oct. 16, 2017) (setting out a number of specific cases in which the Oregon Coast Alliance has “made a difference”).

⁵⁰ See *About MSI*, OR. STATE UNIV., <http://marinestudies.oregonstate.edu/about> (last visited Oct. 16, 2017). See also *Oregon Sea Grant*, OR. STATE UNIV., <http://seagrant.oregonstate.edu> (last visited Oct. 16, 2017) (describing the Sea Grant Program, which operates under the auspices of the National Oceanic and Atmospheric Administration (NOAA)); *Sea Grant*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., <http://seagrant.noaa.gov> (last visited Oct. 16, 2017).

II PLANNING OREGON COASTAL SHORELANDS

Prior to enactment of the land use laws, the Oregon coast was subjected to development schemes that were incompatible with coastal ecology and dynamic coastal geological processes. The most notorious was the resort town of Bayocean Park, built by a developer in the early twentieth century on Bayocean Spit, the sandspit that creates Tillamook Bay.⁵¹ It was advertised as the “Atlantic City of the West,” and attracted the wealthy of Portland and other cities, but flourished for less than a decade.⁵² In 1916, a single jetty was built at the mouth of Tillamook Bay that caused such severe wave-borne erosion on Bayocean Spit to the south, that it breached entirely in 1952, and ocean waters took their toll.⁵³ In the two decades before the breach, Bayocean Park slowly, building by building, fell into the sea.⁵⁴ The Army Corps of Engineers spent decades on engineering projects—including a second jetty—to restore Bayocean Spit and, while sand has begun to accumulate there once again, there is no reasonable prospect of further development.⁵⁵

The town of Lakeport in northern Curry County, also built in the early twentieth century, was on the banks of Floras Lake, a 236-acre shallow dunal lake, just inland from the Pacific Ocean about ten miles from present Port Orford.⁵⁶ The idea was to build a canal to connect the lake with the sea, and two supporting jetties in the open ocean, to create a maritime port.⁵⁷ However, the lake was shallow, the town was far from any transportation or population centers, and it had

⁵¹ E-mail from Cameron LaFollette, Director, Oregon Coast Alliance, to author (Mar. 4, 2017) (on file with the author) (discussing the history of the failed town). *See also* BERT WEBBER & MARGIE WEBBER, *BAYOCEAN: THE OREGON TOWN THAT FELL INTO THE SEA* (Webb Research Group, 1989).

⁵² WEBBER & WEBBER, *supra* note 51, at 7.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 119. *See also* e-mail from Vic Affolter, former Tillamook County Planning Director, to author (Apr. 12, 2017) (on file with the author) (discussing how efforts for development of the area under the goals have failed and that those efforts are now aimed more at public acquisition of the area).

⁵⁶ Cameron La Follette, *Lakeport*, OR. ENCYCLOPEDIA (last updated Nov. 1, 2017), <https://oregonencyclopedia.org/articles/lakeport/#.WkKyu1Q-eCQ>. *See generally* BERT WEBBER & MARGIE WEBBER, *LAKEPORT, GHOST TOWN OF THE SOUTH OREGON COAST: AN OREGON DOCUMENTARY* (Webb Research Group 1990).

⁵⁷ Follette, *supra* note 56.

neither cargo nor means of transport.⁵⁸ Lakeport lasted for less than a decade as a speculation bubble, and collapsed about 1911 when it became clear that the proposed canal would drain the lake without building expensive locks, as its elevation was slightly higher than the nearby ocean.⁵⁹ Land use planning would have prevented this disaster by requiring forethought and vigorous discussion of whether a port on a shallow lake in a remote area was feasible.

Today, Goal 17 helps to protect Oregon's coast from disasters like Bayocean Park and Lakeport. As is unique to the Coastal Goals, Goal 17 and its implementing administrative rules provide state policy for Oregon shorelands that are, in fact, far more detailed than almost any Statewide Goal.⁶⁰ This detail may account for the relative lack of litigation on state coastal policy.

The following divisions of Goal 17 set out state shorelands policy.

A. Overall Policy of Goal 17

As mentioned previously, Oregon takes a conservationist view of shoreline resources, emphasizing their retention and protection, allowing for development only "when appropriate," reciting the environmental and economic values of coastal areas, integrating shorelands planning under Goal 17 with planning under the other Coastal Goals, and limiting adverse impacts on these values by human activity.⁶¹

B. Commands to Planners and Regulators

The Goal recognizes that federal, state, and local public agencies have an interest in shorelands. Goal 17 requires each of these actors to understand the relationship between shorelands and other coastal resources, especially their geological and hydrological interconnections, and commands them to "maintain the diverse environmental economic and social values" of shorelands and coastal water quality.⁶² These requirements for coordination, having an adequate factual base, and responding to multiple policy objectives

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See generally Goal 17, *supra* note 13; OR. ADMIN. R. 660, Div. 37 (2017) [hereinafter Division 37].

⁶¹ Goal 17, *supra* note 13, at 1 (providing that "[t]he management of these shoreland areas shall be compatible with the characteristics of the adjacent coastal waters").

⁶² *Id.* at 1.

and potential tradeoffs,⁶³ are consistent with state land use policy found in Goal 2 (Land Use Planning)⁶⁴ and Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces).⁶⁵

C. Use Priorities

Goal 17 also establishes six categories of priorities for potential uses on coastal shorelands, with clear preferences for conservation over development, and water dependent uses over nonwater-dependent uses.⁶⁶ Those priorities are implemented in the next section regarding inventory requirements.

D. Inventory Requirements

The initial shorelands planning task is to determine a shorelands planning area, not necessarily to prohibit development, but as “an area for inventory, study, and initial planning for development and use to meet the Coastal Shorelands Goal.”⁶⁷ This planning area is described in Goal 17 as the area west of the Pacific Coast Highway (State Highway 101), plus areas within 1000 feet of estuary shorelines and within 500 feet of coastal lake shorelines.⁶⁸ The inventories that must be undertaken in this area deal with geologic and hydrologic hazards and “shoreland values,” which include “fish and wildlife habitat, water-dependent uses, economic resources, recreational uses, and aesthetics.”⁶⁹

E. Comprehensive Plan Requirements

Under Oregon’s statutory scheme, cities and counties undertake planning and land use regulation, subject to state policy direction.⁷⁰ Goal 17 commands that local governments both identify coastal

⁶³ *Id.*

⁶⁴ See generally Or. Dep’t of Land Conservation and Dev., Goal 2: Land Use Planning, OR. ADMIN. R. 660-015-0000(2) (2018) [hereinafter Goal 2], <http://www.oregon.gov/lcd/docs/goals/goal2.pdf>.

⁶⁵ See generally Or. Dep’t of Land Conservation and Dev., Goal 5: Natural Resources, Scenic and Historic Areas, and Open Spaces, OR. ADMIN. R. 660-015-0000(5) (2018) [hereinafter Goal 5], <http://www.oregon.gov/lcd/docs/goals/goal5.pdf>.

⁶⁶ Goal 17, *supra* note 13, at 1.

⁶⁷ *Id.* at 2.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1–2.

⁷⁰ OR. REV. STAT. § 197.005(3)–(4) (2017) (provides legislative “findings” regarding the direction of the Oregon planning program); see also *id.* §§ 197.175(2), 197.250.

shorelands and establish land use policies and uses for these areas.⁷¹ The identified coastal shorelands must include those “[l]ands contiguous with the ocean, estuaries, and coastal lakes,” and must include seven specific areas often identified with coastal shorelands:

1. Areas subject to ocean flooding and lands within 100 feet of the ocean shore or within 50 feet of an estuary or a coastal lake;
2. Adjacent areas of geologic instability where the geologic instability is related to or will impact a coastal water body;
3. Natural or man-made riparian resources, especially vegetation necessary to stabilize the shoreline, and to maintain water quality and temperature necessary for the maintenance of fish habitat and spawning areas;
4. Areas of significant shoreland and wetland biological habitats whose habitat quality is primarily derived from or related to the association with coastal water areas;
5. Areas necessary for water-dependent and water-related uses, including areas of recreational importance, which utilize coastal water or riparian resources, areas appropriate for navigation and port facilities, dredge material disposal and mitigation sites, and areas having characteristics suitable for aquaculture;
6. Areas of exceptional aesthetic or scenic quality, where the quality is primarily derived from or related to the association with coastal water areas; and
7. Coastal headlands.⁷²

The present provisions largely date from 1984, when LCDC revised the Goal to limit its scope so as to exclude waters affected by coastal action, to geologic instability or natural qualities related to coastal resources, and to add dredge mitigation and disposal sites to the list of water-related or water-dependent uses.⁷³ The revised goal also limited its application to aesthetic resources to those inventoried by the local government.⁷⁴

F. Coastal Shoreland Uses

Having identified the shoreland planning area, its resources, and its values, the Goal requires that the parameters of allowed uses be

⁷¹ Goal 17, *supra* note 13, at 4.

⁷² *Id.* at 2–3.

⁷³ See Oregon Secretary of State, File LCDC 6-1984, filed and effective October 19, 1984; Or. Land Conservation and Dev. Commission, *Proposed Amendments to the Statewide Planning Goals for Coastal Resources* (June 1984) (on file with the author).

⁷⁴ Oregon Secretary of State, File LCDC 6-1984, filed and effective October 19, 1984.

provided.⁷⁵ The goal mentions four specific use categories, each discussed in turn below.

1. Protected Areas

The Goal provides that “[m]ajor marshes, significant wildlife habitat, coastal headlands, and [identified] exceptional aesthetic resources” be “protected” in a manner “consistent with protection of natural values.”⁷⁶ However, the Goal allows for timber management consistent with the Oregon Forest Practices Act,⁷⁷ as well as agriculture and low-intensity water-dependent recreation.⁷⁸

2. Water-Dependent Uses

Oregon strictly limits urban uses to those areas within Urban Growth Boundaries (UGBs) and those areas outside UGBs that have been built or committed to non-resource uses, or is a recognized urban unincorporated community.⁷⁹

a. Protection Generally

Goal 17 requires that water-dependent recreational, commercial, and industrial uses in shorelands be “protected” to the extent of their current or historic use, while retaining those structures and facilities that provide or provided for water-dependent use.⁸⁰ Shoreland areas within estuaries may be designated to provide the minimum amount of protected shorelands, but those shorelands must be “suitable” for water dependent uses.⁸¹ Moreover, those uses in shoreline areas must be consistent with applicable statewide planning goals and “shall possess, or be capable of possessing, structures or facilities that provide water-dependent uses with physical access to the adjacent coastal water body.”⁸²

⁷⁵ *Id.* at 4.

⁷⁶ *Id.* at 3.

⁷⁷ *Id.* See also OR. REV. STAT. § 197.277 (2017) (excluding county regulation of forest practices, which are regulated solely under the Oregon Forest Practices Act).

⁷⁸ Goal 17, *supra* note 13, at 3.

⁷⁹ See generally Edward J. Sullivan, *Urbanization in Oregon: Goal 14 and the Urban Growth Boundary*, 47 URB. L. 165 (2015).

⁸⁰ Goal 17, *supra* note 13, at 3, 6.

⁸¹ *Id.* at 3.

⁸² *Id.*

b. Enhanced Protection

In 1999, about twenty-five years after the adoption of the coastal goals, LCDC promulgated administrative rules to deal with the significant pressures for conversion of shorelands designated for water-dependent uses to other uses.⁸³ Fearing the loss of these lands and, by inference, pressures to convert more environmentally sensitive lands for development, the Commission established priorities for use of water-dependent shorelands, concluding that “[a]s a matter of state policy, it is not desirable to allow these scarce and non-renewable resources of the marine economy to be irretrievably committed to, or otherwise significantly impaired by, nonindustrial or nonwater-dependent types of development which enjoy a far greater range of locational options.”⁸⁴ Local governments may (but are not required to) take advantage of the expanded use provisions of the Goal; but if they do, they must revise their plans consistent with all provisions of the goal and rules.⁸⁵

The 1999 rules were prospective in operation and applied to any plan amendment, rezoning, or revision to plans and land use regulations as a part of periodic reviews that involved previously designated water-dependent shorelands.⁸⁶ In the absence of these changes, local governments were not otherwise obliged to amend their plans and regulations.⁸⁷

Water-dependent uses in estuarine areas as designated under Goal 16 were given additional preservation obligations; however, those additional protections are beyond the scope of this paper. Generally, however, local governments must calculate a minimum amount of shorelands to be protected under a combination of factors, including

⁸³ See Division 37, *supra* note 60; Or. Shores Conservation Coal. v. Coos Cty. (*Or. Shores I*), 49 Or. LUBA 1, 15–16 (2005) (Division 37 was promulgated to implement Goal 17’s provisions, which included protection of water-dependent use sites in shoreland areas.).

⁸⁴ OR. ADMIN. R. 660-037-0020(3) (2017).

⁸⁵ *Id.*

⁸⁶ OR. ADMIN. R. 660-037-0030 (2017) (changing the size or shape of a water-dependent shoreland site, allowing otherwise unpermitted nonwater-dependent use, or prohibiting all water-dependent uses and activities on a site).

⁸⁷ *Id.* (amendments to goals normally become effective when adopted or on a prescribed effective date, however, this goal requires local governments to address newly effective goals regardless of whether they have incorporated them into their plans and land use regulations); see OR. REV. STAT. § 197.646(3) (2017). See generally Goal 16, *supra* note 12 (discussing the additional preservation obligations for water-dependent uses in estuarine areas; these additional protections are beyond the scope of this paper).

those lands currently protected for water-dependent uses, those lands “that at any time were used as water-dependent uses and still possess a structure[] or facilit[y] that provide[s]” for water-dependent uses, and lands used for storage and other backup land that is, or was, in direct support of a water-dependent use.⁸⁸ Local governments have flexibility in calculating such areas and in trading off protected areas within the estuary, so long as the total protected area requirement is met.⁸⁹

The 1999 rules regarding locational requirements for water-dependent shorelands reinforced the requirement that water-dependent uses be limited to urban or other non-rural areas permitted for urban uses, and required that the water-dependent use be (1) compatible with other adjacent uses (either outright or through the imposition of conditions) and meet all applicable statewide planning goals; (2) have adequate public and private transportation and public utility services available; (3) provide or plan for adequate storage, parking or “other backup land” for the use; (4) be capable of providing the water-dependent use with access to the adjacent coastal water body; and (5) if transportation, commercial fishing, or recreational boating uses are designated, have an adequately sized navigational channel for access.⁹⁰

Once designated, a water-dependent use site must be “protected for water-dependent recreational, commercial, and industrial uses” by assuring that the operation of those uses are not threatened or preempted by nonwater-dependent uses.⁹¹ This result may be accomplished by (1) limiting uses to those that are water-dependent or allowing nonwater-dependent uses only if the uses are in conjunction with and “incidental and subordinate” to water-dependent uses; and (2) by allowing any “temporary” nonwater-dependent uses only if they involve minimal capital investment and have no permanent

⁸⁸ Goal 17, *supra* note 13, at 3.

⁸⁹ OR. ADMIN. R. 660-037-0050 (2017).

⁹⁰ OR. ADMIN. R. 660-037-0070 (2017). Subsection (1)(c) of the rule generally “grandfathers in” for development those lands that did not require an exception to one or more statewide planning goals, meaning that the new development for nonwater-dependent uses would be required to take such an exception. *Id.* Moreover, if a site were the subject of an exception previously, it would not require a new exception if it were of the same size and shape as the excepted site, there were no use changes except to allow a permitted nonwater-dependent use under the Goal, and the local government justified retention of the site under the rule. *Id.* Subsection (2) allows certain other criteria to be used to justify site suitability for water-dependent development. *Id.*

⁹¹ OR. ADMIN. R. 660-037-0080(1)–(2) (2017).

structures.⁹² Any change of use to allow nonwater-dependent uses is discouraged under that portion of the Goal that deals with “permissible nonwater-dependent uses, which may require a goal exception.”⁹³ Even before the 1999 rules were adopted, preservation of shorelands for water-dependent uses already had an implicit policy under Goal 17.⁹⁴ Deviation from that preservation policy, or for uses otherwise inconsistent with Goal 17, was permissible only through the use of an “exception” to the Goal, which required a rigorous process.⁹⁵

One of the more controversial aspects of this protection policy is a limitation on nonwater-dependent uses. This limitation requires that ground-level indoor floor space plus outdoor acreage maintain a one-to-three ratio between nonwater-dependent uses and water-dependent uses, so that the former does not overtake the latter.⁹⁶ In *Oregon Shores Conservation Coalition v. Coos County*, LUBA found it was error to include tidelands in their natural state, adding:

The 1-to-3 ratio in Policy 16 and the rule is calculated based on (1) the square footage of ground-level indoor floor space, plus (2) “outdoor acreage” distributed between the non-water-dependent uses and the water-dependent uses at the site. However, read in context we believe that the county’s approach is incorrect, and that the narrower reading is most consistent with the text, context and purpose of Policy 16 and the rule.⁹⁷

In a later iteration of the same case, *Oregon Shores Conservation Coalition v. Coos County*, LUBA found it was error to include open

⁹² OR. ADMIN. R. 660-037-0080(3)–(4) (2017).

⁹³ OR. ADMIN. R. 660-037-0090 (2017).

⁹⁴ *Niemi v. Clatsop Cty.*, 6 Or. LUBA 147, 155–56 (1982).

⁹⁵ See OR. ADMIN. R. 660-004-0022(9) (2017); Memorandum from James Ross, DLCD Director to LCDC on *Reasons for Coastal Zone Exceptions* (Mar. 8, 1984) (on file with the author).

⁹⁶ OR. ADMIN. R. 660-037-0080(3)(b)(B) (2017).

⁹⁷ *Or. Shores I*, 49 Or. LUBA 1, 8 (2005). LUBA said that the scope of “outdoor acreage” was unclear and might include (as the County determined),

all non-indoor areas within the property boundaries, and even undeveloped open spaces or tidally submerged lands. . . . However, [the term] could also refer less expansively to outdoor areas that [were] actually developed and used as or in conjunction with the proposed non-water-dependent and water-dependent uses, [such as] docks, ramps, parking lots, roads, trails, picnic areas, boardwalks, etc., and thus not include any undeveloped lands for purposes of calculating the 1-to-3 ratio.

Id. at 22–23. However, given the conservationist bent of the Goal, LUBA interpreted the term more narrowly. *Id.* at 23.

water areas in the ratio, and limited the calculation to the protected water-dependent use areas.⁹⁸

c. Temporary and Incidental Uses

Finally, temporary uses involving “minimal capital investment and no permanent structures,” or uses “in conjunction with and incidental and subordinate to a water-dependent use” are also permitted.⁹⁹

3. Shoreland Areas Suitable for Redevelopment

Goal 17 also allows existing and developed commercial or industrial waterfront areas that are suitable for redevelopment, but not especially suited for water-dependent uses, to be planned and developed for a mix of water-dependent, nonwater-dependent, and water oriented nondependent uses.¹⁰⁰ However, plans for such uses must provide for public access to the shoreline.¹⁰¹ This provision allows for those areas transitioning from resource use (fish processing plants and timber transport facilities) to be redeveloped.¹⁰² More importantly, it makes a critical distinction that resonates throughout the application of Goal 17—the primacy of water-dependent uses in shorelands and the allowance of other uses in certain parts of those shoreland areas by sufferance.¹⁰³

The Goals distinguish between “water-dependent” and “water-oriented” uses: water-dependent uses are “[a] use or activity which can be carried out only on, in, or adjacent to water areas because the use requires access to the water body for water-borne transportation, recreation, energy production, or source of water;” and a water-oriented use is “[a] use whose attraction to the public is enhanced by a

⁹⁸ Or. Shores Conservation Coal. v. Coos Cty. (*Or. Shores II*), 51 Or. LUBA 500, 523–24 (2006).

⁹⁹ Goal 17, *supra* note 13, at 3–4. These uses were placed in Goal 17 in 1984 at the behest of port districts and local governments for areas Especially Suited for Water Dependent Uses (ESWD) but not immediately necessary for use within the 20-year planning period. Examples of those incidental uses were included in revised guidelines for the amended Goal. *See also* discussion of 1984 amendments *supra* note 73.

¹⁰⁰ Goal 17, *supra* note 13, at 4.

¹⁰¹ *Id.* (This use of water-dependent designated lands for nonwater-dependent uses was another part of the 1984 goal amendments.); *see also* discussion of those amendments, *supra* note 73.

¹⁰² Goal 17, *supra* note 13, at 4.

¹⁰³ *Id.* at 3–4.

view of or access to coastal waters.”¹⁰⁴ “Nonwater-dependent” uses are not otherwise defined, though the term appears several times in the Goal and is framed as a negative from the definition of “water-dependent” uses.¹⁰⁵

4. Rural Uses

For shorelands outside UGBs not committed to non-resource use or recognized as unincorporated communities, the uses allowed are limited to:

- (a) farm uses as provided in ORS Chapter 215;
- (b) propagation and harvesting of forest products consistent with the Oregon Forest Practices Act;
- (c) private and public water-dependent recreation developments;
- (d) aquaculture;
- (e) water-dependent commercial and industrial uses, water-related uses and other uses only upon a finding by the county that such uses satisfy a need which cannot be accommodated on uplands or in urban and urbanizable areas or in rural areas built upon or irrevocably committed to non-resource use.¹⁰⁶

This allowance of both urban and nonwater-dependent uses in rural coastal shorelands provides a financial incentive for landowners to obtain approval of a use otherwise prohibited in rural and coastal shoreland areas.¹⁰⁷

G. Plan Implementation Requirements

The final portion of Goal 17 relates to particular duties of various public agencies within coastal shoreland areas.¹⁰⁸ State law specifically prohibits counties from regulating forest practices.¹⁰⁹ However, Goal 17 requires the Oregon Department of Forestry to “recognize the unique and special values” of shorelands when

¹⁰⁴ *Oregon’s Statewide Planning Goals & Guidelines: Definitions*, OREGON.GOV, <http://www.oregon.gov/LCD/docs/goals/oldgoal14definitions.pdf> (last visited Nov. 2, 2017).

¹⁰⁵ *Or. Shores II*, 51 Or. LUBA 500, 503 (2006).

¹⁰⁶ Goal 17, *supra* note 13, at 4.

¹⁰⁷ *Holloway v. Clatsop Cty.*, 52 Or. LUBA 644, 652 (2006) (showing that while difficult to undertake successfully, such a result is possible; in this case, land to which an exception to the Urbanization Goal had previously been taken).

¹⁰⁸ Goal 17, *supra* note 13, at 1.

¹⁰⁹ OR. REV. STAT. § 197.522 (2017).

developing standards and policies for forest uses, and to develop or amend practices and policies (including its administrative rules) to protect and maintain those values.¹¹⁰ Both the Oregon Departments of Forestry and Parks and Recreation are obligated by statute to address unique coastal shorelands values.¹¹¹ Additional requirements provide protection for potential dredge spoil mitigation sites, where materials from channel maintenance and deepening projects may be placed.¹¹² A general directive to maintain and, where appropriate, restore and enhance the vegetative fringe adjacent to coastal waters, is also provided.¹¹³

Perhaps the most controversial feature of the Implementation Requirements is its hostility toward “armoring” structures along the coast.¹¹⁴ Implementation Requirement 5 provides:

Land-use management practices and non-structural solutions to problems of erosion and flooding shall be preferred to structural solutions. Where shown to be necessary, water and erosion control structures, such as jetties, bulkheads, seawalls, and similar protective structures; and fill, whether located in the waterways or on shorelands above ordinary high water mark, shall be designed to minimize adverse impacts on water currents, erosion, and accretion patterns.¹¹⁵

Prohibiting or discouraging the use of riprap armoring is also found under Goal 18, Beaches and Dunes,¹¹⁶ and in the very limited authorization for riprap in natural or conservation management units

¹¹⁰ Goal 17, *supra* note 13, at 4.

¹¹¹ *Id.* (specifically charging the State Parks and Recreation Department, in conjunction with local governments, with providing increased public access to shorelands).

¹¹² *Id.*

¹¹³ *Id.* at 4–5 (requiring maintenance of riparian vegetation because of the impacts removal of that fringe would have on water quality, fish and wildlife habitat, recreational use and aesthetic resources. However, maintenance must be “consistent with water dependent uses.”).

¹¹⁴ Goal 18, *supra* note 14. Implementation Requirement 5, states, in material part: “Permits for beachfront protective structures shall be issued only where development existed on January 1, 1977. Local comprehensive plans shall identify areas where development existed on January 1, 1977.” *Id.* at 2.

¹¹⁵ Goal 17, *supra* note 13, at 5.

¹¹⁶ *See* Goal 18, *supra* note 14, at 2, Implementation Requirement 5 (requiring landowners and local governments to account for coastal erosion when the development occurs, rather than depending on subsequent beachfront structures that may affect downstream lands); *Regen v. Lincoln Cty.*, 49 Or. LUBA 386, 392–95 (2005) (where pre-1977 house was build on an upland part of a parcel and no longer exists, subsequent protective structure not permitted for proposed beachfront dwelling).

of shoreland areas under Goal 16, Estuarine Resources.¹¹⁷ Matt Spangler, a regional coastal representative for the Department of Land Conservation and Development, explains the armoring policy this way:

The purpose of this policy, of course, is to limit long term, cumulative impacts from shoreline hardening, such as scouring and lowering of the beach profile, that can over time result in the loss of the dry sand public beach. The policy is premised on a basic “grandfathering” concept, allowing development that occurred prior to the adoption of the policy to qualify for hard protection, but precluding shore hardening for new development. New development must instead account for shoreline erosion through non-structural approaches (e.g., increased setbacks). In the face of increased ocean erosion occurring in conjunction with climate change and sea level rise, limiting hard structures and allowing natural shoreline migration is a critical policy tool for conserving and maintaining Oregon’s ocean beaches.¹¹⁸

Despite the predominate role of the Department of Land Conservation and Development Commission in the formulation and application of coastal policy, other state agencies have a role as well. For example, the Oregon Department of Parks and Recreation regulates “beachfront protective structures” along the Oregon Coast under standards weighted towards conservation.¹¹⁹ Under Goal 17, local land use regulatory agencies also have authority in the area.¹²⁰

Climate change and the natural processes of coastal erosion, combined with the economic value of proximity of residences and business on coastal shorelands, has frequently resulted in local conflicts over the use of structures to prevent those residences and businesses from being undermined or destroyed.¹²¹ For it is in the implementation of state shorelands policies through application of

¹¹⁷ Goal 16, *supra* note 12, at 2–4, Management Units 1(b) and (2).

¹¹⁸ E-mail from Matt Spangler, Regional Coastal Representative, Department of Land Conservation and Development, to author (Mar. 21, 2017) (on file with the author).

¹¹⁹ See OR. ADMIN. R. 736, Div. 020 (2017).

¹²⁰ See *Terra v. Newport*, 36 Or. LUBA 582, 602–04 (1999) (justification for removal of a bluff and excavation in a setback area did not show adequate consideration of impacts on erosion rates leading to a remand for failure to meet this implementation requirement as codified in the City’s land use regulations, which must be interpreted consistent with the implementation requirement); *Moreland v. Depoe Bay*, 50 Or. LUBA 44, 53–55 (2005) (the court gave deference to local government in application of implementing regulations).

¹²¹ See Mark Floyd, *Impacts of El Niño, La Niña on Pacific Ocean Communities, Beaches could Expand in 21st Century*, OR. STATE UNIV. (Sept. 22, 2015), <http://oregonstate.edu/ua/ncs/archives/2015/sep/impacts-el-niño-la-niña-pacific-ocean-communities-beaches-could-expand-21st-century>.

land use regulations that most people experience the force of those policies. Perhaps the most celebrated coastal incident involving the intersection of the regulatory process and property damage liability from the approval process was that of The Capes development in Tillamook County, Oregon. County approval of the development in 1991–92 was predicated on a geotechnical engineering report.¹²² When the bluff on which the development was situated began to slide in 1998, the landowners requested, and were denied, permits to armor the bluff under Goal 18, Implementation Requirement 5.¹²³ Other solutions were found but a number of lawsuits resulted (as well as confidential settlements).¹²⁴ It should be noted that damages in this instance would not be covered under the National Flood Insurance Program, so that lot owners were “on their own” for insurance purposes.¹²⁵

H. Guidelines for the Shorelands Goal

Guidelines are not binding but provide for recognized best practices in meeting goal requirements and give insight into how state goal compliance expectations are framed.¹²⁶ The following examples suffice to show how the guidelines interact with the goals.

¹²² Victor Affolter, *Lessons from the Capes* (2012) (on file with the author).

¹²³ *Id.* (The permits were requested under the related Goal 18, Implementation Requirement 5, and denied because the development did not exist on January 1, 1977). See, e.g., *Regen v. Lincoln Cty.*, 49 Or. LUBA 386, 391–95 (2005) (holding that the existence of one house along the shoreline in 1977 did not qualify an eleven acre parcel for a beachfront protective structure under Goal 18).

¹²⁴ Affolter, *Lessons from the Capes*, *supra* note 122; see also PORTLAND STATE UNIV., PEOPLE AND THE LAND: AN ORAL HISTORY OF OREGON’S STATEWIDE LAND USE PLANNING PROGRAM, *Interview by Bob Rindy with Vic Affolter*, Former Planning and Cmty. Dir. for Tillamook Cty. 12–14 (July 15, 2015), http://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1021&context=planoregon_interviews.

¹²⁵ See Affolter, *Lessons from the Capes*, *supra* note 122. This was a most unsatisfactory situation in which the danger was known and purportedly met through the recommendations in the engineer’s report. The failure occurred when the recommendations were insufficient and the engineer judgment-proof. The goals did not contemplate this outcome.

¹²⁶ OR. REV. STAT. § 197.015(9) (2017). The Statute defines “guidelines” as,

suggested approaches designed to aid cities and counties in preparation, adoption and implementation of comprehensive plans in compliance with goals and to aid state agencies and special districts in the preparation, adoption and implementation of plans, programs and regulations in compliance with goals. Guidelines shall be advisory and shall not limit state agencies, cities, counties and special districts to a single approach.

Id.

1. Integration with Other Planning Goals

The Goal 17 Guidelines call out consistency with other state policies, such as the planning process and substantive goals regarding natural resources, the environment, natural hazards and disasters, recreational needs and the economy of the state.¹²⁷ In particular, the Guidelines provide for policy consistency and provide that (1) the detailed planning process provided for by Goal 2 (Land Use Planning) be utilized; and (2) the planning for shorelands be coordinated with that for estuarine resources under Goal 16 (Estuarine Resources) and other applicable goals, particularly those goals relating to agricultural and forest lands; open spaces, scenic and historic areas, and natural resources; air, water, and land resources quality; areas subject to natural disasters and hazards; recreational needs; and the economy of the state.¹²⁸

2. Special Provision for Hazards

Both the inventory and flood plain provisions of the Guidelines counsel local governments to focus on water and geologic hazards, particularly the 100-year flood plain, when formulating plans and land use regulations.¹²⁹ The flood hazard portions of the Guidelines provide particularly prophetic advice on flood plain management: “In the development of comprehensive plans, the management of uses and development in floodplain areas should be expanded beyond the minimal considerations necessary to comply with the National Flood Insurance Program and the requirements of the Flood Disaster Protection Act of 1973.”¹³⁰

3. Scenic, Environmental, Historic, and Aesthetic Values

The Guidelines reinforce the conscious consideration of values associated with Goal 5 (Natural Resources, Scenic and Historic

¹²⁷ Goal 17, *supra* note 13, at 3–5.

¹²⁸ *Id.* at 5.

¹²⁹ *Id.* For an excellent discussion of the challenges and responses regarding flood hazards and inundation, see Courtney B. Johnson & Steven R. Schell, *Adapting to Climate Change on the Oregon Coast: Lines in the Sand and Rolling Easements*, 28 J. ENV. L. & LITIG. 449, 475–80 (2013).

¹³⁰ Goal 17, *supra* note 13, at 6. The Guidelines suggest a distinction between floodways, where flood waters are expected to flow, and flood fringes, which is the area between the floodway boundary and the outer limits of the 100-year flood plain, be made for regulatory purposes and recommend that nonwater-dependent emergency structures not be constructed in the flood plain. *Id.*

Areas, and Open Spaces),¹³¹ Goal 8 (Recreation),¹³² and the other Coastal Goals, as a recommended approach and best practice, so that the values in those goals are also important in the evaluation, planning and regulation of shorelands.¹³³

4. Planning for Human Activity

The Guidelines provide for a less robust emphasis on development than for conservation. In discussing “Development Needs,” the Guidelines speak of dredged material disposal sites and the maintenance and enhancement of waterfront communities.¹³⁴ Further, in speaking to transportation policy, the Guidelines stress coordination of the Transportation Goal¹³⁵ with Goal 17, but stress impacts of transportation systems on coastal resources and the need for access to coastal shorelands and waters.¹³⁶ As an outlier, the Guidelines provide for examples of uses in conjunction with and incidental to a water-dependent use, along with suggested limitations on those uses.¹³⁷ The Guidelines define incidental through comparison “that the size of nonwater-dependent use is small in relation to the water-dependent operation and that it does not interfere with conduct of the water-dependent use.”¹³⁸ Additionally, a temporal relationship for a building must exist between a nonwater-dependent use and a water-dependent use in order for it to be “incidental.”¹³⁹

¹³¹ Goal 5, *supra* note 65.

¹³² Or. Dep’t of Land Conservation and Dev., Goal 8: Recreational Needs, OR. ADMIN. R. 660-015-0000(8) (2017) [hereinafter Goal 8], <http://www.oregon.gov/lcd/docs/goals/goal8.pdf>.

¹³³ See OR. ADMIN. R. 660-015-0010(1)–(4) (2017).

¹³⁴ Goal 17, *supra* note 13, at 6 (providing that “coastal shoreland plans should designate appropriate sites for water-dependent activities, and for dredged material disposal” and preserve “[h]istoric, unique, and scenic waterfront communities,” including nonwater-dependent uses in such areas).

¹³⁵ OR. ADMIN. R. 660-015-0000(12) (2017); see also Edward J. Sullivan, *The Connection between Land Use and Transportation: The Oregon Experience*, 48 URB. L. 839 (2016).

¹³⁶ Goal 17, *supra* note 13, at 6 (the Transportation Guideline to Goal 17 provides for “close” coordination of planning between the Shorelands and Transportation Goals, noting that transportation systems may “significantly affect” coastal shorelands resources and values).

¹³⁷ *Id.* (providing an example that “a restaurant on the second floor of an existing seafood processing plant” is an incidental water-dependent use).

¹³⁸ *Id.*

¹³⁹ *Id.* (noting that the “nonwater dependent use must be constructed at the same time or after the water-dependent use of the site is established and be carried out together with the water-dependent use”).

Now that the direction to plan has been established, let us examine how this direction has been implemented “on the ground” and the conflict issues that have arisen as a result.

III

REGULATING OREGON COASTAL SHORELANDS

Planning for the conservation and development of shoreland areas is a useless exercise if those plans are not implemented through effective regulations. While the general regulatory program is described in Section II of this Article, this section examines some of the more unique aspects of the Oregon shorelands program.

A. The Urban-Rural Divide

A principal feature of Oregon’s land use program is its use of UGBs to separate urban and rural land uses.¹⁴⁰ Urban uses—such as employment centers, industrial uses, and large-scale residential areas—are generally allowed only within a UGB to conserve scarce resource lands and allow urban uses to be served efficiently by infrastructure.¹⁴¹

For these same reasons, planning and land use regulation for shorelands segregate land uses along urban and rural lines.¹⁴² In addition to the requirements of other goals, particularly Goal 14 (Urbanization), the classification of uses according to their urban character is reinforced.¹⁴³ Goal 17 sets the priority of shoreland uses:

General priorities for the overall use of coastal shorelands (from highest to lowest) shall be to:

1. Promote uses which maintain the integrity of estuaries and coastal waters;

¹⁴⁰ See Sullivan, *Urbanization in Oregon: Goal 14 and the Urban Growth Boundary*, *supra* note 79, at 172.

¹⁴¹ See *id.* at 192 (discussion of 1000 Friends v. LCDC, 239 P3d 272 (Or. App., 2010); Edward J. Sullivan, *A Timely, Orderly, and Efficient Arrangement of Public Facilities and Services—The Oregon Approach*, 49 WILLAMETTE L. REV. 411, 457–66 (2013).

¹⁴² Statewide Planning Goal 14, Urbanization, effectively divides nonfederal land into two categories, urban and rural, and generally prohibits urban uses outside urban growth boundaries. Or. Dep’t of Land Conservation and Dev., Goal 14: Urbanization, OR. ADMIN. R. 660-015-0000(14) (2018) [hereinafter Goal 14], <http://www.oregon.gov/LCD/docs/goals/goal14.pdf>. Thus, rural uses (farm and forest uses for example) would normally be located outside urban growth boundaries, while urban-type uses (such as most residential, commercial and industrial uses not oriented to rural settings) would be prohibited.

¹⁴³ *Id.*

2. Provide for water-dependent uses;
3. Provide for water-related uses;
4. Provide for nondependent, nonrelated uses which retain flexibility of future use and do not prematurely or inalterably commit shorelands to more intensive uses;
5. Provide for development, including nondependent, nonrelated uses, in urban areas compatible with existing or committed uses;
6. Permit nondependent, nonrelated uses which cause a permanent or long-term change in the features of coastal shorelands only upon a demonstration of public need.¹⁴⁴

As previously noted, the Goals define “water-dependent,” a key term dealing with coastal development, as a use that can be conducted *only* on, in, or adjacent to water areas.¹⁴⁵ Goal 17 also provides for the identification, protection, and limitation of uses of shorelands not possessing identified natural values:

Location. Shorelands in the following areas that are suitable for water-dependent uses shall be protected for water-dependent recreational, commercial, and industrial uses:

- (a) urban or urbanizable areas;
- (b) rural areas built upon or irrevocably committed to non-resource use; and
- (c) any unincorporated community subject to OAR Chapter 660, Division 022 (Unincorporated Communities).¹⁴⁶

Implementing administrative rules relating to the location and suitability of a water-dependent use requires that such uses be located within a UGB or otherwise meet alternative standards that limit location to developed areas.¹⁴⁷ Overall, these policies limit

¹⁴⁴ Goal 17, *supra* note 13 (emphasis added).

¹⁴⁵ OR. ADMIN. R. 660-015-0000 (definitions) (2017), <http://www.oregon.gov/LCD/docs/goals/definitions.pdf>.

¹⁴⁶ Goal 17, *supra* note 13. *See* OR. ADMIN. R. 660-037-0080(4) (2017) (describing techniques for water-dependent shoreland protection, including traditional zoning regulations and the use of a “floating” water dependency performance standard which would allow for both mixed water-dependent and non-water-dependent uses with quantitative performance measures for retaining water-dependency such as overall acreage, floor space square footage, waterfront lineal footage or other suitable measures). This rule provision was added in 1984.

¹⁴⁷ OR. ADMIN. R. 660-037-0070(1) (2017) (providing that certain areas suitable for water-dependent uses, i.e., urban and urbanizable areas, built or committed rural areas or recognized unincorporated communities, “shall be protected” for water-dependent recreational, commercial, and industrial uses).

development to areas within UGBs or already-developed areas, in the absence of an overriding public need to locate the water-dependent use outside the UGB.¹⁴⁸ This is a difficult prospect.

B. Public Lands

With certain exceptions, including those discussed above regarding the Coastal Zone Management Act,¹⁴⁹ federal lands are not subject to state land use regulation.¹⁵⁰ With regard to other public and private lands, Oregon law provides that such lands are subject to state and local regulation.¹⁵¹ Thus, unlike many other states, local plans and regulations consistent with state policy prevail over state and other plans (such as those for school districts) and regulations relating to land use.¹⁵²

C. The Use of Setbacks

Though commonly used in Oregon and elsewhere to protect shoreland areas, setbacks are not mentioned in the Coastal Goals or their administrative rules. However, limiting construction to certain distances from property lines is recognized as a valid measure to advance broader public goals.¹⁵³ Setbacks have been justified under other Coastal Goals, including Goal 18 oceanfront setbacks,¹⁵⁴ and if

¹⁴⁸ Goal 2, *supra* note 64 (a difficult endeavor requiring the Goal Exception under Goal 2). *See also* OR. REV. STAT. § 197.732 (2015) (providing justification as to “why the state policy embodied in the applicable goals should not apply”).

¹⁴⁹ *See* 16 U.S.C. § 1456(c) (2012).

¹⁵⁰ American Society of Planning Officials, *Planning Advisory Service, Information Report No. 112, Public Property Zoning Problems* (1958), <https://planning-org-uploaded-media.s3.amazonaws.com/document/PAS-Report-112.pdf>.

¹⁵¹ OR. REV. STAT. § 197.180(1) (2015) (except those relating to the primacy of the Oregon State Board of Forestry rules over timber management practices (which nullify similar efforts by counties), and to existing state agency programs mandated by law).

¹⁵² *See Quiet Revolution, supra* note 11, at 392 (emphasizing incorporation of state policy into local plans and land use regulations, which apply to all non-federal lands in the state); *Or. Shores Conservation Coal. v. Lincoln Cty.*, 164 Or. App. 426, 434–35, 992 P.2d 936, 941 (Or. Ct. App. 1999) (holding that once a plan is formally “acknowledged” by LCDC as meeting the goals, the plan becomes the vehicle for implementing state policy); *Friends of Neabeack Hill v. City of Philomath*, 139 Or. App. 39, 49–50, 911 P.2d 350, 356 (Or. Ct. App. 1996), *rev. denied*, 323 Or. 136, 916 P.2d 311 (1996) (new natural resource information does not trigger goal compliance and must await later plan amendment).

¹⁵³ *Coast Range Conifers v. Or. State Bd. of Forestry*, 339 Or. 136, 148–49, 117 P.3d 990, 997 (Or. 2005).

¹⁵⁴ *See Save Or.’s Cape Kiwanda Org. v. Tillamook Cty.*, 177 Or. App. 347, 34 P.3d 745 (Or. Ct. App. 2001) (Goal 18, Beaches and Dunes); *Nicholson v. Clatsop Cty.*, 148 Or. App. 528, 941 P.2d 566 (Or. Ct. App. 1997).

clearly delineated, will be enforced within their delimited areas.¹⁵⁵ LUBA refused to countenance development prohibition outside the setback based on policy arguments from Goal 17, and also rejected a contention that the implementing acknowledged land use regulation was insufficient to meet a plan policy that met the Goal.¹⁵⁶ The case was remanded over inadequate findings and for failure to provide evidence that the site was outside the protected shoreland area.¹⁵⁷ On the other hand, adherence to setback requirements, supported by findings, will be affirmed.¹⁵⁸ Further, a failure to demonstrate, by way of findings, whether a site is within or outside setback lines will be cause for remand.¹⁵⁹ Similarly, the failure to provide findings on the impacts of land development within the setback zone constitutes grounds for remand as well.¹⁶⁰

IV

ECONOMIC AND FISCAL CONCERNS IN COASTAL DEVELOPMENT

As mentioned in the introduction, the Oregon Coast is less wealthy and less politically powerful than some other areas of Oregon.¹⁶¹ The population of the Willamette River Valley, particularly its urban population, overshadows that of the Coast, and is reflected in setting state legislative priorities.¹⁶² The major north-south road at the Coast

¹⁵⁵ Crowley v. City of Bandon, 41 Or. LUBA 87, 98–99 (2001).

¹⁵⁶ *Id.* In other words, LUBA refused to reevaluate the acknowledged land use plan provision and land use regulation to determine whether, in tandem, they met the Goal. *Id.* Those issues had been determined either by the passage of time without an appeal or a resolution of an appeal.

¹⁵⁷ *Id.* at 97–99; *see also* S. Or. Pipeline Info. Project, Inc. v. Coos Cty. (*Pipeline Info. Project I*), 57 Or. LUBA 44 (2008) (inadequate showing that permitting “security zones” around vessels carrying liquid natural gas would not block navigation and thus interfere with public trust rights).

¹⁵⁸ Willhoft v. City of Gold Beach, 41 Or. LUBA 130, 133–35 (2001).

¹⁵⁹ Gray v. Clatsop Cty., 22 Or. LUBA 270, 289–91 (1999).

¹⁶⁰ Terra v. City of Newport, 36 Or. LUBA 582, 602–04 (1999) (remanded for failure to show consistency with Goal 17 standards, but failure to provide a focused Goal 17 challenge, including setback issues, provides no grounds for remand); *see also* Holloway v. Clatsop Cty., 52 Or. LUBA 644 (2006) (providing that Oregon statutes and administrative rules now prohibit construction limitations and prohibitions in designated “tsunami inundation zones”); OR. REV. STAT. § 455.446 (2015); OR. ADMIN. R. 632-005-0000 (2017).

¹⁶¹ SWEDEEN, *supra* note 5.

¹⁶² William G. Robbins, *Willamette Valley*, OREGON ENCYCLOPEDIA (last updated Jan. 24, 2017), https://oregonencyclopedia.org/articles/willamette_valley/#.WeUjP0yZPaY (explaining that, in contrast to the 225,000 coastal residents, about 70% of Oregon’s population of over 4 million reside in the Willamette River Valley between Eugene and

is frequently a two-lane highway, rather than a limited-access freeway.¹⁶³ While government, healthcare, casinos, farming, and forestry are important segments of the economy in Oregon, there is nothing comparable to the information technology industry found in the “Silicon Forest.”¹⁶⁴ Moreover, major projects that are likely to test the boundaries of state land use policies, such as the Shorelands Goal, occur less often than would be the case for policies elsewhere in the state.¹⁶⁵ One important case, *Columbia Riverkeeper v. Clatsop County*, interpreted the meaning of “protect” in the context of the Estuarine and Shorelands Goals and found both goals were oriented to the conservation of coastal resources.¹⁶⁶

There are also cases that may present interesting issues that are not, for one reason or another, litigated. In one controversy over shoreland protection involving the extension of urban services to a tribal casino outside an urban growth boundary, LUBA avoided coming to a decision on the merits, and instead dismissed the case on procedural grounds.¹⁶⁷ In 2007, the last in a series of Goal Exceptions to Goal 17

Portland). See also *List of Counties and Cities by Population and Name*, supra note 3; *Oregon's Coastal Zone*, supra note 4.

¹⁶³ George Kramer, *The Interstate Highway System in Oregon: A Historic Overview*, OREGON DEPARTMENT OF TRANSPORTATION (2004), http://www.oregon.gov/oprd/HCD/OHC/docs/statewide_interstatehighways_2004.pdf (showing no major road connections to the Oregon Coast, as opposed to the North-South connections between Seattle and San Francisco through Interstate 5 and the East-West connection from Portland to Salt Lake City).

¹⁶⁴ See Craig Wollner, *Silicon Forest*, OREGON ENCLYCLOPEDIA (last updated May 31, 2017), https://oregonencyclopedia.org/articles/silicon_forest/#.WeUorEyZPEY (discussing the “Silicon Forest,” an aggregation of high-powered tech companies, generally concentrated in the Portland Metropolitan Area and a few other places that do not include the Oregon Coast).

¹⁶⁵ See 1000 Friends of Or. v. Land Conservation & Dev. Comm’n, 75 Or. App. 199, 210, 706 P.2d 987, 994 (Or. Ct. App. 1985) (discussing the role of Goal 17 in the protection of heron rookeries on coastal shorelands); *Columbia Riverkeeper v. Clatsop Cty.*, 238 Or. App. 439, 463–65, 243 P.3d 82, 95–96 (Or. Ct. App. 2010) (discussing the meaning of “protect” as used in Goal 17); *Cherniak v. Kitzhaber*, 263 Or. App. 463, 479–81, 328 P.3d 799, 807–08 (Or. 2014) (allowing a declaratory judgment case to proceed that dealt with the responsibilities of the state in dealing with climate change).

¹⁶⁶ *Columbia Riverkeeper*, 238 Or. App. at 464–65, 243 P.3d at 96 (concluding that “[p]rotect,” in this context, means more than minimizing the adverse impacts of conflicting development through mitigation. It means inhibiting development that cause significant adverse impacts on the protected resource.”).

¹⁶⁷ *No Casino Ass’n v. City of Lincoln City*, 30 Or. LUBA 79, 84 (1996) (the court finding the case was not timely filed).

was filed to allow for improvements to the Southwest Oregon Regional Airport, but that amendment was not appealed.¹⁶⁸

There are two exceptions to these general land development rules. The first lies in the consistent pressure to build resorts on the coast. Two such resorts, Otter Crest and Salishan, both built before the land use laws were promulgated, demonstrate the inadequacy of land use forethought: Otter Crest is threatened by erosion from the sea,¹⁶⁹ and the private homes on Salishan Spit are in constant danger of undermining from wave action across the largely flat sandspit.¹⁷⁰ Bandon Dunes golf resort, built in the 1990s, was required to place buildings back from the protected shoreland.¹⁷¹ New resort proposals in Curry County,¹⁷² and potentially in Tillamook County, raise conflict with Goal 17 protection goals, as resort developers seek to place their projects as near the sea as possible, to the detriment of fragile coastal ecosystems and in zones where coastal erosion processes are the strongest.

The second exception is in the development pressure to build large housing developments with “ocean views,” generally purchased by non-coastal residents, often as second homes. The most notorious of these was “The Capes” in Tillamook County, built in the early 1990s, and discussed above.¹⁷³ A more recent example is Sebastian Shores, built in the south coast town of Gold Beach in the early 2000s.¹⁷⁴ To permit this development, Gold Beach had to move its shoreland protection line westward, as required by Goal 17.¹⁷⁵ Subsequent

¹⁶⁸ *North Bend Plan Amendment File 005-06*, OR. DEP’T OF LAND CONSERVATION AND DEV. (Feb. 21, 2007), https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/14428/CITY_2007_North%20Bend_005-06_.pdf?sequence=1&isAllowed=y.

¹⁶⁹ See Mark Floyd, *Coastal Survey: Oregon Beaches See More Short-Term Erosion*, OR. STATE UNIV. (Dec. 9, 2013), <http://oregonstate.edu/ua/ncs/archives/2013/dec/coastal-survey-oregon-beaches-see-more-short-term-erosion>.

¹⁷⁰ *Lincoln County Natural Hazards Mitigation Plan, Vol. II: Hazard Annex*, OR. P’SHIP FOR DISASTER RESILIENCE (2015), <https://opdr.uoregon.edu/sites/opdr1.uoregon.edu/files/downloads/Lincoln/Volume%20II%20-%20Hazard%20Annex.pdf>.

¹⁷¹ Coos County Zoning and Land Development Ordinance § 4.10.030(8) and (9), http://www.oregon.gov/LCD/OCMP/docs/Public_Notice/Coos_Ordinance_EPs.pdf.

¹⁷² *Developers Present Destination Resort Plan to Commissioners*, CURRY COASTAL PILOT (Feb. 13, 2016, 6:24 PM), <http://www.currypilot.com/news/4290793-151/developers-present-destination-resort-plan-to-commissioners>.

¹⁷³ Affolter, *supra* note 122.

¹⁷⁴ *Troubled Shores?*, CURRY COASTAL PILOT (Feb. 13, 2016, 6:24 PM), <http://www.currypilot.com/csp/mediapool/sites/CurryPilot/News/story.csp?cid=4292801&sid=919&fid=151>.

¹⁷⁵ *Ordinance 547*, CITY OF GOLD BEACH (May 10, 1999), http://www.oregon.gov/LCD/OCMP/docs/RPCs/1999_Ord547_Shorelands.pdf.

events proved this was unwise, as the development is constantly in danger of severe coastal erosion from wave action, as well as undercutting by nearby Hunter Creek.¹⁷⁶ Continuing buildup of emergency shoreline armoring (riprap) has failed to produce any lasting solution.¹⁷⁷

The most significant appellate court case involving Goals 16 and 17 and their effect on the coastal economy was a review of LUBA's ruling that the County had incorrectly interpreted the Shorelands Goal in *Columbia Riverkeeper v. Clatsop County*, in which the interpretation of "protect" as used in the Goal was significant.¹⁷⁸ After an extensive review of the use of "protect" in Goals 16 and 17 (which acknowledged plan language must be interpreted consistently), the Court concluded: "'Protect,' in this context, means more than minimizing the adverse impacts of conflicting development through mitigation. It means inhibiting development that causes significant adverse impacts on the protected resource."¹⁷⁹

While this case is certainly significant, it is surprising that there are so few appellate court decisions on Goal 17. It appears that Goal 17 and its implementing administrative rules have been interpreted in a manner to conserve natural resources, without overtly prohibiting development.¹⁸⁰ Remands of local decisions may indicate to local

¹⁷⁶ *Troubled shores?*, *supra* note 174.

¹⁷⁷ *Id.* See also James W. Good, *Ocean Shore Protection Policy and Practices in Oregon: An Evaluation of Implementation Success* (Aug. 7, 1992) (unpublished Ph.D. thesis, Oregon State University) (on file online with ScholarsArchive@OSU, Oregon State University), <http://ir.library.oregonstate.edu/xmlui/handle/1957/9045> (criticizing poor plan implementation and regulation, as well as the inconsistent, frequent, and thoughtless use of beachfront structures to deal with coastal erosion).

¹⁷⁸ *Columbia Riverkeeper v. Clatsop Cty.*, 238 Or. App. 439, 450, 243 P.3d 82, 89 (Or. 2010).

¹⁷⁹ *Id.* at 464–65, 243 P.3d at 96. *Columbia Riverkeeper* involved application of both the Shorelands and Estuarine Goals (i.e., Goals 16 and 17); however, the word "protect" was contained in both goals and there was a common definition of that term in the goals: to "Save or shield from loss, destruction, or injury or for future intended use." *Id.* at 462. Both LUBA and the Court of Appeals interpreted "protect" to require a high level of avoidance of harm. *Id.* at 463–64. See also *Pipeline Info. Project I*, 57 Or. LUBA at 79–80 (2008) (resulting in a remand for better findings for a conditional use permit for a natural gas receiving terminal in Southern Oregon), *revised findings affirmed*, S. Or. Pipeline Info. Project, Inc. v. Coos Cty. (*Pipeline Info. Project II*), 57 Or. LUBA 301, 314–17 (2008) (affirming the county's decision to approve the terminal).

¹⁸⁰ See *Moreland v. City of Depoe Bay*, 48 OR. LUBA 136, 147, 153 (2004) (after failing to justify use of a structural stabilization wall on shorelands to shore up two existing single family homes the case was remanded for additional findings, rather than reversed on grounds of legal impossibility; but on remand, the new findings were found adequate, 50 Or. LUBA 44 (2005)); *Citizens for Responsible Growth v. City of Seaside*

governments that the “handwriting is on the wall,” so that it will be difficult to secure a permit for the nature and extent of a desired use.¹⁸¹ The complexity of meeting the goal, as well as a shared understanding of avoiding uses that interfere with shoreland values, are also factors in explaining why there is so little conflict or litigation involving Oregon shorelands.

V

THE CHALLENGE OF CLIMATE CHANGE

While Oregon has a reputation for concern for the environment, that concern is only modestly manifested in state activity. For example, in a non-land use proceeding, an effort to consider climate change as part of fish preservation in the allocation of water rights was rejected upon review by the Oregon Court of Appeals.¹⁸² However, that same court later allowed a claim for a declaration that state officials comprising the State Land Board (charged with managing a large percentage of state-owned land and water resources) had “violated their duties to uphold the public trust and protect the State’s atmosphere as well as the water, land, fishery, and wildlife resources from the impacts of climate change.”¹⁸³ Allowing this case to proceed however does not foreshadow an environmentally favorable result on the merits: the Oregon LUBA has thus far failed to

(*Citizens I*), 23 Or. LUBA 100, 115 (1992) (remanding a factory outlet store proposal on shorelands); *Citizens for Responsible Growth v. City of Seaside (Citizens II)*, 116 Or. App. 275, 277–78, 840 P.2d 1370 (1992), *rev. denied* 849 P.2d 524 (Or. 1993) (finding an initial appeal to the Court of Appeals was successful on some grounds); *Citizens for Responsible Growth v. City of Seaside (Citizens III)*, 26 Or. LUBA 458, 467 (1994) (affirming the City’s decision post remand). *See also* *Crowley v. City of Bandon*, 41 Or. LUBA 87, 94–99 (2001) (multiple challenges to expansion of existing dwelling on bluff edge rejected; only successful challenges based on (correctable) findings); *Terra v. City of Newport*, 36 Or. LUBA 582 (1999) (permit for hotel in high density residential development area remanded for additional evidence and more adequate findings (including, *inter alia* Coastal Shorelands issues at 602–604), though other challenges were rejected and project appeared to be feasible).

¹⁸¹ *Or. Shores II*, 51 Or. LUBA at 505–08, 524–36 (2006) (rejecting aggressive inclusion of open water areas to allow for additional nonwater-dependent uses because Goal interpretation that would likely preclude proposed use).

¹⁸² *WaterWatch of Or., Inc. v. Or. Dep’t of Water Resources*, 268 Or. App. 187, 229–30, 342 P.3d 712, 736–37, (Or. Ct. App. 2014) (finding that the environmental organization submitting climate change evidence in objecting to the allocations failed to show how its evidence would change the outcome or its exclusion prejudiced its substantial rights).

¹⁸³ *Cherniak v. Kitzhaber*, 263 Or. App. 463, 466, 328 P.3d 799, 800 (Or. Ct. App. 2014).

entertain any climate change issue in its review of any state, regional, or local government case.

In 2008 and 2009, Oregon Shores Conservation Coalition, a coastal environmental organization with a longstanding interest in the Oregon coast, proposed a new statewide planning goal to deal with sea level rise—a proposal that the Land Conservation and Development Commission (LCDC) did not adopt.¹⁸⁴ Nevertheless, while the state legislature has generally been cautious at the intersection of land use and climate change,¹⁸⁵ the Oregon Department of Land Conservation and Development (DLCD) has studied the issue and proposed a number of initiatives to deal with the same.¹⁸⁶ While the DLCD has published some helpful guides regarding the Oregon Coast,¹⁸⁷ none of the Coastal Goals or administrative rules has been amended to deal with the subject. Such activity would entail time, expense and political capital that the Department and Commission appear to lack.

¹⁸⁴ Winston Ross, *Group Seeks More Protection on Coast*, THE REGISTER-GUARD (Jan. 15, 2009), <http://projects.registerguard.com/csp/cms/sites/web/updates/5820589-55/story.csp>; see also Richard Whitman & Bob Bailey, Oregon Land Conservation and Development Commission, *Response to Petition for a New Statewide Land Use Planning Goal 20: Climate Change—Sea Level Rise* (July 17, 2009), https://www.oregon.gov/LCD/docs/rulemaking/072909/item17_petition_for_goal_20.pdf (explaining that coastal vulnerabilities are one focus of the *Oregon Natural Hazards Mitigation Plan* (2012) prepared by the Oregon Partnership for Disaster Resilience, and ultimately, DLCD staff recommended against the proposed goal).

¹⁸⁵ See OR. REV. STAT. §§ 184.888–899 (2017) (directing the Oregon Transportation Commission to work with regional and local governments to devise a transportation strategy to reduce greenhouse gasses in metropolitan areas); OR. ADMIN. R. 660, Div. 044 (2017) (dealing with reduction of greenhouse gas emissions in metropolitan areas of the state and adopted by LCDC in response to OR. REV. STAT. § 184.888–899 (2015)); OR. REV. STAT. §§ 468A.200–260 (2017) (establishing an Oregon Global Warming Commission to coordinate state and local efforts to reduce greenhouse gas emissions, study this and related issues, and report annually to the legislature).

¹⁸⁶ See *DLCD Planning for Climate Change*, OREGON.GOV, <http://www.oregon.gov/LCD/CLIMATECHANGE/Pages/index.aspx> (last visited Oct. 16, 2017); OREGON TRANSPORTATION AND GROWTH MANAGEMENT PROGRAM, *Cool Planning: A Handbook on Local Strategies to Slow Climate Change* (2011), http://www.oregon.gov/LCD/TGM/docs/cool_planning_handbook.pdf (last visited Oct. 16, 2017); Or. Dep't of Transportation et. al., *CLIMATE SMART STRATEGY FOR THE PORTLAND METROPOLITAN REGION* (2014), <http://www.oregonmetro.gov/climate-smart-strategy> (a planning and infrastructure agency for the Portland metropolitan region).

¹⁸⁷ See generally *Publications*, OR. COASTAL MGMT. PROGRAM, <https://www.oregon.gov/LCD/OCMP/pages/publications.aspx> (last visited Oct. 16, 2017).

CONCLUSION

Shoreline protection has been an objective of Oregon law for nearly a half-century. Competition for shoreline use and access has been a significant aspect of Oregon life for many years before the first state efforts on planning and land use regulation, and is affected by the assertion at the beginning of the last century that ownership and management of the “dry sand” areas of coastal shorelines is vested in the State of Oregon.

The current planning and regulatory program results largely from the infusion of federal funds under the Coastal Zone Management Act; however, active management of Oregon shorelines has taken a typical Oregon approach—enactment of policies in the Oregon Statewide Planning Goals, required inclusion of those goals in the policies of binding local plans, and implementation of those local (and, it follows, state) policies by local land use regulations and actions.

Through circumstances, protection of shorelines has not been directly challenged in a significant manner—probably because the Oregon Coast is not usually viewed as a “hot” area for development, compared to lands in Portland, the Willamette River Valley and parts of Central Oregon, and because the state has a recognized ownership and regulatory position of those lands. However, significant conflict has developed over the extent of the setback from the ocean shore for developments as required by Goal 17, which may limit opportunities to develop highly desirable “ocean view” lots for housing or destination resorts. Much of the litigation has dealt with issues of boundary mapping and interpretation of standards and findings. The most significant challenge to the protection of Oregon shorelines appears to be updating plans and regulations and the development of standards to meet the ongoing problems of climate change.¹⁸⁸ The best outcome for fish and wildlife habitats and other areas of exceptional biological, aesthetic or scenic quality is public

¹⁸⁸ Good, *supra* note 177, at 42, 216, 218; *see also* OREGON SEA GRANT, *Improving Natural Hazards Management on the Oregon Coast*, COASTAL NATURAL HAZARDS POLICY WORKING GROUP (1994), <https://www.gpo.gov/fdsys/pkg/CZIC-gb5010-c58-1994/pdf/CZIC-gb5010-c58-1994.pdf> (explaining extensive recommendations for improvements). However, a lack of funds and policy paralysis resulted in no change to state land use statutes, goals or rules. Good is particularly concerned with inadequate building construction setbacks (and lack of credible erosion rates), the resulting continuing demands for structural solutions to potential erosion and subsequent loss of natural beach replenishment resources. Good, *supra* note 177, at 59–64.

acquisition. Vic Affolter, former Tillamook County Planning Director, has expressed concern over advocacy of public acquisition of coastal shorelands being seen as an implicit undermining of successful regulatory successes that he experienced:

Despite all of the coastal goal's accomplishments, I see your advocating public acquisition as a righteous statement of the goal's limitations, particularly Goal 17. Our biggest achievements in Tillamook County in recent years have been the public acquisitions of Kilchis Point, Whelan Island, the Beltz Farm and [U.S. Fish and Wildlife] acquisition of the land that became their Nestucca Bay Wildlife Refuge, including the Neskowin Marsh Unit.¹⁸⁹

Whether the state has the will and the means to fund regulatory, preservation, and acquisition programs remains to be seen.

¹⁸⁹ E-mail from Vic Affolter, Former Planning and Cmty. Dir., Tillamook Cty, to author (Apr. 12, 2017) (on file with the author). Mr. Affolter provides that:

A notable planning achievement is the Neskowin Hazards Overlay zone that was approved by Tillamook County's [governing body] in July 2016 after a four-year collaborative effort by local citizens, county government, and state and federal agencies. Matt Spangler was very much involved on behalf of DLCD. This is planning as it should be if the resources and commitment are available.