



OREGON SHORES CONSERVATION COALITION

April 12, 2019

Mr. Calum Stevenson
Ocean Shores Specialist (Coos Bay)
Oregon Department of Parks and Recreation
12735 NW Pacific Coast Hwy
Seal Rock, Oregon 97376

Via Email to: calum.stevenson@oregon.gov

**Re: Permit No. 2908-19
Tai Dang Ocean Shore Alteration Permit for Shoreline Protection Structures
Comments of Oregon Shores Conservation Coalition**

Dear Mr. Stevenson:

Please accept these comments from the Oregon Shores Conservation Coalition and its members (collectively “Oregon Shores”) to be included in the file for Permit No. 2908-19 (Public Notice Period: Mar. 15, 2019 – Apr. 15, 2019). Oregon Shores is a non-profit organization dedicated to protecting the Oregon coast’s natural communities, ecosystems, and landscapes while preserving the public’s access to these priceless treasures in an ecologically responsible manner. Our mission is to assist local residents in land use matters and other regulatory processes affecting their coastal communities, as well as to engage Oregonians and visitors alike in a wide range of advocacy efforts and stewardship activities that serve to protect our state’s celebrated public coastal heritage. For nearly half a century, Oregon Shores has been a public interest participant in legal processes and policy decisions related to land use and shoreline management in the State of Oregon.

The proposed Permanent Rip Rap Permit under consideration for the purposes of this Oregon Parks and Recreation Department (“OPRD” or “Department”) 30-Day Public Notice period is for a structure that has been the subject of a number of permitting requests over the past decade. Oregon Shores has previously been a party of record to many of those processes,

expressing serious concerns about the Project’s harmful potential impacts on public access to the coast, public safety, and natural resources as well as challenging the subject development’s eligibility for shoreline protection itself. Please notify us of any further decisions related to the Applicant’s proposal to convert the existing OPRD Emergency Shoreline Protection Structure (“SPS”) Permit (Permit No. 2907) into a permanent Ocean Shore Alteration Permit for SPS (Permit No. 2908), including any public hearing that may be held before the Department on this matter.

Oregon Shores provides these written comments in order to underscore the apparent deficiencies in the Applicant’s geologic report and to emphasize the importance of a robust review prior to development in a highly dynamic coastal environment—particularly on dune-backed shorelines. In doing so, we hope to lend our knowledge of and experience with coastal land use and development concerns to support an appropriate and informed decision regarding the pending Application. Our comment supports the view that OPRD must deny the permit because the Application fails to demonstrate compliance with applicable SPS criteria contained in the Oregon Revised Statutes (“ORS”), Oregon Administrative Rules (“OAR”), and the Oregon Statewide Planning Goals (“Goals”). As a result, all material placed on the ocean shore must be removed and the condition of the ocean shore restored, in compliance with the conditions of the Emergency Permit.¹

I. Request for Public Hearing

Pursuant to ORS 390.650(3) and OAR 736-020-0003(5)-(6), Oregon Shores requests a public hearing on this application. Oregon Shores’ interest in the present matter arises from our organizational purpose and mission (both of which are discussed on the first page of this comment). We are a frequent public interest participant in legal and policy matters related to land use and shoreline management in Oregon, and have previously been a party of record to a number of processes involving a proposed SPS for the property at issue. The proposed Permanent Rip Rap Project will impact Oregon Shores’ interest in preserving public access to and along the beach. In addition, Oregon Shores has members living in the community where this SPS Project is proposed whose aesthetic and recreational interests will be impacted by the proposed Project.

II. Background and General Analysis

A. Emergency Permit Conditions of Approval

The Applicant is proposing to convert an existing OPRD Emergency SPS Permit (Permit No. 2907) into a permanent Ocean Shore Alteration Permit for an SPS. The Department received written Application materials and support documentation for the Applicant’s Emergency SPS Permit between Dec. 20, 2018 and Dec. 28, 2018. On Jan. 11, 2019, the OPRD issued a written emergency permit pursuant to ORS 390.650(6) (containing applicable statutory procedure relating to emergency permits for Improvement on Ocean Shores) allowing Mr. Tai Dang and Hue Le (“Applicant”) “to place emergency rip rap on the ocean shore at Rockaway Beach, near

¹ See OAR 736-020-0070(3): Terms and Conditions of Permit; See also Permanent Rip Rap Appl., Ex. A, 4.

Saltair Creek, fronting property identified on Tillamook County Map 1N 10W 5BC, [T]ax [L]ot 5100.”² Per the OPRD’s Emergency Rip Rap Letter (contained in Exhibit A of the Application), approval of the Emergency Permit allowed “a temporary exemption from the [OPRD] Ocean Shore Improvement Permit required under ORS 390.650 and OAR chapter 736, division 20 in order to expedite the construction of emergency shoreline protection and avoid loss of a property that is imminently threatened by ocean erosion.”³

The Emergency Permit was issued subject to the condition that the emergency riprap and fill would be in “general conformance” with specific dimensions detailed by the OPRD (discussed in Part II.B. below), unless the Permittee obtained “prior written approval” from the OPRD.⁴ The Applicant was given one year from the issuance of the Emergency Permit (i.e. Jan. 11, 2020), as a condition of Emergency Permit authorization, to obtain “all necessary approvals and complete construction of an approved permanent rip rap project” or else “remove all material placed under the Emergency Permit from the site and restore the shoreline to the same condition as existed prior to the issuance of the Permit.”⁵ The Applicant completed installation of the approved emergency riprap on Feb. 2, 2019.⁶ The Department issued the requisite 30-Day Public Notice on the Applicant’s proposed Permanent Rip Rap Project on Mar. 15, 2019.⁷

B. Design differences exist between the originally proposed Project layout and the “as-built” drawing of the rip rap revetment.

Like the previously approved Emergency Permit, the Permanent Rip Rap Permit Application seeks approval to construct a riprap revetment of basalt armor stone (approximately 3-foot diameter) and approximately 81 feet long, 30 feet wide, and 15 feet in height.⁸ The riprap revetment will be placed along the dune-backed shoreline of Rockaway Beach between S 6th Street and the mouth of Saltair Creek, and will run for the full shoreline frontage of Tax Lot 5100 (along its western face).⁹ According to the OPRD’s Emergency Permit, the purpose and description of the authorized emergency work is as follows:

To provide adequate protection for Tax Lot 5100 at 211 S 6th Street, [A]pplicant may armor the shoreline with rip rap, using geotextile fabric and pit-run quarry rock. The armoring may extend from about 22 feet National Geodetic Vertical Datum (NGVD) down to about 7 feet, the functional bottom of Saltair Creek and lower reach of erosional base level. The bluff face may be covered with geotextile fabric (Mirafi 500X) that is overlain with about 3 feet of pit-run, covered with a second blanket, and then protected with carefully stacked 3 feet diameter boulders. The finished wall shall slope down toward the beach at a Horizontal to 1 Vertical inclination. The wall shall be keyed into

² Tai Dang, Ocean Shore Permit Application: Shoreline Protection Structures, OPRD Permit #2908-19, Ex. A, 1 (*hereinafter* Permanent Rip Rap Appl.).

³ Permanent Rip Rap Appl., Ex. A, 1.

⁴ *Id.* at 3.

⁵ *Id.* at 4.

⁶ *See* Permanent Rip Rap Appl., Ex. A, 3 (requiring that placement of material authorized by the Emergency Permit to be complete on or before Feb. 15, 2019).

⁷ OPRD, 30-Day Public Notice of Permit Application, OPRD Permit #2908 (*hereinafter* Public Notice).

⁸ *See* Public Notice.

⁹ *See* Permanent Rip Rap Appl., Dec. 20, 2018 Horning Study, 2.

beach sand at 7 feet NGVD, or about 5 feet beneath the winter beach surface. The [D]epartment understands that the exposed face of the armor to bottom of the trench will be about 21 feet, or 23 feet after the toe trench is backfilled with sand. The toe of the structure shall not extend beyond the beach zone line as described in 1967 and shown on Figure 8 of the Horning December 20, 2018 report, terminating at the north property line and against a rock beach access road adjacent to the south property line.¹⁰

In its Second Supplemental Application Support Submission dated Feb. 4, 2019, the Applicant asserts that the emergency and permanent shoreline protection riprap structures “are of the same type and design,” and that “[n]o physical change to the rip rap will occur under the permanent approval.”¹¹ However, Exhibit I of the Application discloses that:

At the southern end, near South Sixth Street, there are *minor differences* between the proposed layout and the as-built drawing. Rather than forming a straight line from the western edge of the revetment to the dune banks, the rock was installed roughly curved, with two angle points located near the southern property line.¹²

The Applicant does not provide evidence sufficient to objectively analyze the degree of difference between the proposed layout and the as-built drawing included in Exhibit I. The Applicant’s Civil Engineer asserts that this changed configuration was “necessary to create adequate protection for the southern end of [the Applicant’s] property” and that the “as-built” layout “minimizes any impact to the neighboring property or the city road to the south of the property.”¹³ It does not provide any explicit analysis of what impacts might accrue as a result of said change to the indicated public coastal access point is immediately to the south of the property or the neighboring southerly property.¹⁴ Further, the Applicant has not sufficiently established that the “as built drawing” demonstrates “general conformance” with originally proposed layout of SPS at the south end of the property (near South 6th Street), as required by the conditions contained in the original OPRD Emergency Permit.¹⁵ It is unclear from the Application materials whether the Applicant sought prior written approval from OPRD for its changes to the dimensions of the southern portion of the SPS. For these reasons, the Applicant has not demonstrated general conformance as required by the Emergency Permit. On the basis of the current record, the OPRD cannot approve the Permanent Rip Rap Application Request.

C. The Permanent Rip Rap Application fails to demonstrate that the subject property is eligible for a beachfront protective structure under Goal 18.

The Department must evaluate the Permanent Rip Rap Application against the Ocean Shore Alteration Permit Standards (OAR 736-020-0005 through 736-020-032), and review it for consistency with the Goals and/or the City of Rockaway Beach’s Acknowledged Comprehensive

¹⁰ Permanent Rip Rap Appl., Ex. A, 3.

¹¹ Permanent Rip Rap Appl., Second Supp. Support, 1 (Feb. 4, 2019).

¹² See Permanent Rip Rap Appl. Ex. I, 4; See also Permanent Rip Rap Appl. Ex. I, 3 (emphasis added).

¹³ See Permanent Rip Rap Appl. Ex. I, 3.

¹⁴ Permanent Rip Rap Appl. Ex. I, 3 (noting the presence of a “City Road”).

¹⁵ *Id.*; See Permanent Rip Rap Appl., Ex. A, 3.

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Plan (“RBCP”).¹⁶ OAR 736-020-0010 contains six General Standards that must be applied, where applicable, to each application for an ocean shore permit.¹⁷ OAR 736-020-0010(6) (Compliance with LCDC Goals)¹⁸ states in part:

(6) Compliance with LCDC Goals – The proposed project shall be evaluated against the applicable criteria included within Statewide Land Conservation and Development Goals #5: Natural Resources, Scenic and Historic Areas, and Open Spaces, #17: Coastal Shorelands, #18: Beaches and Dunes, and #19: Ocean Resources, and other appropriate statewide planning goals. In accordance with the Statewide Land Conservation and Development Commission *Goal #18, permit applications for beachfront protective structures on the ocean shore shall be considered only where development existed on January 1, 1977...*¹⁹

Goal 18 contains Oregon’s coastal land use regime applicable to Beaches and Dunes and includes Implementation Requirement 5. Implementation Requirement 5 permits beachfront protective structures, such as the permanent engineered rip rap contemplated by this Application, only for development that existed prior to Jan. 1, 1977 or areas where an exception to Goal 18 has been taken. The OPRD issued the Emergency Permit in this matter solely on the basis of its determination that development existed on Tax Lot 5100.²⁰ The Applicant does not provide substantive analysis sufficient to establish eligibility under the first criterion, both with respect to case law and photographic evidence (see Part II.D. of this comment). Oregon Shores believes that the Applicant should offer a clear analysis prior to any decision on its Permanent Application, and requests that the Department makes such information accessible for public review as soon as it is available. We are providing the below eligibility analysis based on materials the Applicant previously entered into the public record during a matter before the City of Rockaway Beach in May 2015.

The Application states that the large home and deck structures on Tax Lot 5100 were constructed in 2008 (See Dec. 4, 2018 Letter Decision), though the Dec. 20, 2018 Horning Geosciences Report states that the home was built circa 2009. The property under consideration for the purposes of the Applicant’s present Permanent Rip Rap Request was previously developed with two small cottages prior to Jan. 1, 1977.²¹ The OPRD references tax assessors’ records and photographic evidence provided by the Applicant demonstrating previous development.²² However, as discussed in Part II.D of this comment, Oregon Shores was not able to locate such information within Application materials. Per publicly available data, both cottages were removed after a fire in the mid-1990s. The lot that included the cottages was subsequently partitioned into two lots.²³ The large house currently situated on Tax Lot 5100 does not lie within the footprint of the development that existed on the property in 1977. The

¹⁶ See Public Notice, 2; See also OAR 736-020-0010: General Standards.

¹⁷ OAR 736-020-0010: General Standards.

¹⁸ Please note: the LCDC Goals are synonymous with the Oregon Statewide Planning Goals.

¹⁹ OAR 736-020-0010(6): General Standards – Compliance with LCDC Goals (emphasis added).

²⁰ Permanent Rip Rap Appl., Ex. A, 2-3 (distinguishing *Regen v. Lincoln County*, 49 Or LUBA 386 (2005)).

²¹ Permanent Rip Rap Appl., Ex. A, 2.

²² *Id.*

²³ Permanent Rip Rap Appl., Ex. A, 2.

Applicant is seeking to construct a protective structure for the development that extends approximately 50-60 feet towards the ocean from where the development existed in 1977. Because the current house occupies a different area than the development that existed as of 1977, the Project is not consistent with either Goal 18 or the RBCP.

LUBA has offered guidance as to what area where development existed in 1977 might be eligible for riprap:

Just as the text of Goal 18, Implementation Requirement 5 ... does not expressly protect pre-1977 *development*, it does not expressly protect ‘entire parcels’ where development was sited only on a small portion of the parcel. Such a broad interpretation would be inconsistent with the purpose of Goal 18, Implementation Requirement 5.²⁴

The Department cannot conclude on the basis of the present record that the 2008 construction of the home 50-60 feet seaward of the prior footprint is within the area where development existed as of January 1, 1977. Oregon Shores believes that this interpretation focusing on the footprint of pre-existing development is reasonable with respect to establishing eligibility under the first Goal 18 criterion. As LUBA explained in *Regen*, this sort of interpretation makes sense, given that “different development requires different protective structures that can vary significantly in the amount of space they require.”²⁵

The Application materials are similarly deficient when it comes to explicitly establishing eligibility under the second criterion contained in Goal 18 Implementation Requirement 5. The Applicant asserts, without direct citation to the RBCP, that the property upon which the home is located “is subject to two Goal 18 exceptions, including a specific Goal 18 exception approved by the City on May 9, 2001.”²⁶ The Applicant should provide the boundaries of the Goal 18 exceptions to which it refers, and demonstrate its eligibility under both.

The Permanent Application does not demonstrate that the property is eligible for SPS under either Goal 18 or the RBCP. The purpose of Goal 18, as it exists in state regulations and as it is embodied in city and county plans, is to both to protect the state’s public beaches (preserved for common use through Oregon’s pioneering Beach Bill) from the spread of intruding shoreline structures and to discourage reckless development in areas subject to known coastal hazards through providing prospective landowners and developers with the advance knowledge that such development will not later be eligible for protection by riprap or other armoring. On the basis of the present record, it is unclear whether this property is eligible for a shorefront protective structure under Statewide Planning Goal 18 and the standards set forth in OAR 736-020-0010(6). The Applicant should provide explicit analysis of this matter before the Permanent Application is approved.

D. The Permanent Rip Rap Application appears to be missing information purporting to show development on the subject property prior Jan. 1, 1977.

²⁴ *Regen v. Lincoln County*, 49 Or LUBA 386 (2005). (emphasis in original).

²⁵ *Id.* at 395.

²⁶ Permanent Rip Rap Appl., Second Supp. Support, 2 (Feb. 4, 2019).

The Applicant's Permanent Project Proposal appears to be missing documents relevant to evaluating its compliance with OAR 736-020-0010(6). Specifically, Oregon Shores was unable to locate Exhibit B, an attachment that the Applicant stated would contain "[p]hotographs establishing [the] property was developed on Jan. 1, 1977."²⁷ The Applicant is responsible for submitting information pertinent to establishing the presence of development on Tax Lot 5100 prior to Jan. 1, 1977 and should do so in conjunction with its Permanent Application request. Oregon Shores requests that the Department make such data available for public review as soon as it is available.

E. The OPRD should assess whether or not the proposed Project on the subject property complies with applicable criteria contained within the City of Rockaway's acknowledged comprehensive plan.

OAR 736-020-0010(6) (Compliance with LCDC Goals) further states that a proposed project must be "consistent with local comprehensive plans where such plans have been approved by LCDC."²⁸ The OPRD Ocean Shore Permit Application for SPS contains a "City/County Planning Department Affidavit" which must be completed and submitted along with a completed Ocean Shore Permit Application.²⁹ The City of Rockaway Beach did certify that the subject property met Goal 18 eligibility.³⁰ As of the writing of this comment, however, the City had not made any certification as to whether the proposed is consistent with the applicable criteria RBCP and Rockaway Beach Zoning Ordinance ("RBZO").³¹ In contrast to the Applicant's assertion within its Second Supplemental Support Application that the "City attorney [had] confirmed in his letter (Exhibit C) that the rip rap is not regulated by the City and the City code," the City of Rockaway's comment on the OPRD Emergency Rip Rap Permit was limited in relevant part to the following:

The [C]ity of Rockaway Beach is aware of OPRD's January 11, 2019, letter decision as an "emergency rip rap permit" to allow Tai Dang to place rip rap on his Rockaway Beach property. City's "permission" as you cite in your letter has never been required of anyone for an Oregon Parks and Recreation Department (OPRD) permit. As part of [OPRD] rip rap permit process, City responds to OPRD request by advising OPRD whether or not the subject property complies with City's land use regulations...³²

Approval of an OPRD emergency permit for temporary shoreline protection should not be used as a means to circumvent applicable criteria within acknowledged local comprehensive plans or the zoning ordinances that implement them. The OPRD should carefully consider

²⁷ See Permanent Rip Rap Appl., Second Supp. Support, 2 (Feb. 4, 2019); See also Permanent Rip Rap Appl., Second Supp. Support, 7 (Feb. 4, 2019) (referencing an "attached pictorial essay by Mr. Matt Chesley" as "Exhibit B").

²⁸ OAR 736-020-0010(6).

²⁹ Permanent Rip Rap Appl., Application Form: City/County Planning Department Affidavit, Part I, 9 (Dec. 23, 2018) (accessed Apr. 10, 2019).

³⁰ *Id.*

³¹ Permanent Rip Rap Appl., Application Form: City/County Planning Department Affidavit, Part II, 9 (Dec. 23, 2018).

³² Permanent Rip Rap Appl., Ex. C (Jan. 15, 2019).

whether the proposed project is consistent with the applicable criteria in RBCP and the Rockaway Beach Zoning Ordinance (“RBZO”).

III. The Applicant fails to demonstrate compliance with applicable criteria in OAR chapter 736, division 20 (Beach Construction/Alteration Standards).

The OPRD’s Jan. 11, 2019 Emergency Permit letter authorized rock and fill placement solely as a “temporary protection” measure. This Application seeks permanent approval for a riprap revetment structure initially approved under an emergency permit.³³ OPRD must evaluate the Application for compliance with applicable ocean shore alteration permit standards contained in OAR chapter 736, division 20. These rules implement the ocean shores statutory mandates

[T]o protect and preserve the scenic and recreational values and public rights in the ocean shore, permit certain types of development according to standards of review and grant emergency permits where property is in imminent peril of destruction by the Pacific Ocean or natural forces.³⁴

OAR chapter 736, division 20 stresses the importance of careful, case-by-case decision-making on ocean shore alteration permits.³⁵ Given that “[e]ach site on the ocean shore presents different conditions and applicants [with] varying project needs,” evaluations “point up the relative significance of the general, scenic, recreational, safety, and other interests of the public.”³⁶ When acting on any application for an ocean shore permit under ORS 390.640, OAR 736-020-0005(1) requires the Department to consider:

- (a) Provisions necessary to protect the affected area from any use, activity or practice that is not in keeping with the conservation of natural resources or public recreation;
- (b) The public need for healthful, safe, aesthetic surroundings and conditions; the natural, scenic, recreational, economic and other resources of the area and the present and prospective need for conservation and development of those resources;
- (c) The physical characteristics or the changes in the physical characteristics of the area, and the suitability of the area for particular uses and improvements (This may include bank alignments, topography, shoreline materials and stability, width of the beach, past erosion, storm water levels, sand movement, water currents, adjoining structures, beach access, land uses, etc.);

³³ OAR 736-020-0070(3).

³⁴ OAR 736-020-0001: Scope and Purpose (stating that OAR 736-020 implements the statutory mandates contained in ORS 390.605 to 390.660 and 390.690 to 390.770).

³⁵ See OAR 736-020-0005: Factors Evaluated.

³⁶ OAR 736-020-0005(1): Factors Evaluated.

- (d) The land uses, including public recreational use; the improvements in the area; the trends in land uses and improvements; the density of development; and the need for access to particular sites in the area[; and]
- (e) The need for recreation and other facilities and enterprises in the future development of the area and the need for access to particular sites in the area.³⁷

In addition, public opinion in response to public notice or hearings on an application shall be considered in evaluating each proposed ocean shore project.³⁸ Considered together, and in accordance with the intent of the Legislature, the factors listed in OAR 736-020-0005(1) and (2) assist in the overall decision for granting or denying an ocean shore permit.³⁹ Under these factors of evaluation, the Applicant fails to demonstrate compliance with applicable criteria. These are discussed below.

A. The Applicant does not demonstrate compliance with applicable General Standards contained in OAR 736-020-0010.

OAR 736-020-0010 contains six general standards to be applied to each application for an ocean shore permit. Each are discussed below.

OAR 736-020-0010(1) Project Need — There shall be adequate justification for the project to occur on and alter the ocean shore area.

The Applicant indicates, without supporting evidence, that the “upland location” of the installed riprap itself avoids impacts on the ocean shore area. However, data within the Application materials suggest the opposite conclusion to be true. The placement of the emergency riprap on the subject property’s dune-backed shorefront risks significantly altering the adjacent ocean shore area. Both of the Applicant’s shoreline erosion studies acknowledge the potential for wave reflection off the installed rip rap revetment, and potential erosion on the north end of the SPS (toward the inlet of Saltair Creek).⁴⁰ Both shoreline erosion studies dismiss, without sufficient supporting analysis, these erosion effects as negligible.⁴¹ Prior to any approval of the proposed Rip Rap Project, the Applicant must provide a more robust analysis of the proposed Permanent Rip Rap’s effect on the adjacent shoreline. On the basis of the current record, the Applicant has not demonstrated adequate justification for the Project to alter the adjacent ocean shore area.

OAR 736-020-0010(2) Protection of Public Rights — Public ownership of or use easement rights on the ocean shore shall be adequately protected.

³⁷ OAR 736-020-0005(1)(a)-(e): Factors Evaluated.

³⁸ OAR 736-020-0005(2).

³⁹ OAR 736-020-0005(3).

⁴⁰ See e.g. Permanent Rip Rap Appl., Feb. 4, 2019 Horning Study, 12.

⁴¹ *Id.*

The Application materials indicate that the closest public coastal access point is immediately to the south of the property.⁴² The Applicant insists, again on the basis of the alleged “upland” location of the proposed riprap, that the “public will continue to have the same use rights that it always had west of the [SVL] regardless of the permanent approval of the rip rap.”⁴³ The Application does not explain how the new large riprap structure will impact access to and along the shore, particularly during high tides or storm events when the crossing of the Saltair Creek outlet could become more dangerous to the public as a result of the riprap shore backing. As discussed in the above analysis of OAR 736-020-0010(1), this analysis of the potential impacts of the riprap revetment on the adjacent beach is insufficient.

Hardened structures such as the proposed riprap revetment affect the beaches on which they are built. Even relatively small amounts of riprap revetment structures contribute to increased erosion of adjacent properties, increased scour (resulting in beach loss), and sand entrapment (preventing beach sand replenishment). Oregon is nationally renowned for protecting public ownership of and access to its breathtaking coastline. As mentioned in Part II.B. above, the Application indicates that the closest public coastal access point is the City road immediately to the south of the property. The Application does not explain how the new, 81-foot riprap structure will impact access to and along the shore, particularly during high tides or storm events when the crossing of the Saltair Creek outlet could become more dangerous to the public as a result of the riprap shore backing. Based on the present record, the Applicant does not demonstrate compliance with OAR 736-020-0010(2).

OAR 736-020-0010(3) Public Laws — The applicant shall comply with federal, state, and local laws and regulations affecting the project.

As discussed throughout this comment, the Applicant has not provided sufficient information to evaluate the Application’s compliance with requisite state and local criteria. The Applicant incorrectly states that the City Attorney for the City of Rockaway Beach “confirmed...that no City of Rockaway Beach requirements apply to proposal for rip rap.”⁴⁴ As noted in Part II.E above, the City of Rockaway Beach does not draw any conclusion on whether any City of Rockaway beach requirements apply to the Permanent Rip Rap Proposal. It states, in substantive part:

The [C]ity of Rockaway Beach is aware of OPRD’s January 11, 2019, letter of decision as an “emergency rip rap permit” to allow Tai Dang to place rip rap on his Rockaway Beach property. City’s “permission” as you cite in your letter has never been required of anyone for an Oregon Parks and Recreation Department (OPRD) permit. As part of [OPRD] rip rap permit process, City responds to OPRD request by advising OPRD whether or not the subject property complies with City’s land use regulations...⁴⁵

In addition, Part II.C. demonstrates that the Applicant has not provided sufficient Goal 18 eligibility analysis to justify approval. Finally, as discussed in Part III, the Applicant should

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⁴³ Permanent Rip Rap Appl., Second Supp. Support, 5 (Feb. 4, 2019).

⁴⁴ Permanent Rip Rap Appl., Second Supp. Support, 5 (Feb. 4, 2019).

⁴⁵ Permanent Rip Rap Appl., Ex. C (Jan. 15, 2019).

resolve any issues of jurisdiction and regulatory authority over its proposed use prior to any decision on the Permanent Rip Rap Application currently under consideration. For these reasons, OPRD cannot conclude that the Applicant has complied with state and local laws and regulations as required by OAR 736-020-0010(3).

OAR 736-020-0010(4) Alterations and Project Modifications — There are no reasonable alternatives to the proposed activity or project modifications that would better protect the public rights, reduce or eliminate the detrimental effects on the ocean shore, or avoid long-term cost to the public.

The Applicant’s geotechnical engineer asserts that “Tax Lot 5100 requires protection from high-energy waves surging up Saltair Creek.”⁴⁶ He lists and analyzes three options for shoreline protection: (1) Sand Dune Repair, (2) Soil Barriers and Burritos, and (3) Rip Rap Barrier.⁴⁷ In addition to their ability to withstand erosion for “several years,” the advantages of the potential use of soil barriers and soil burritos to protect the home include creating habitat that can support protective shoreline vegetation. However, this option is summarily dismissed without a robust discussion of success and failure rates of the use of soil burritos. After simply opining that “the proximity of [Tax Lot] 5100 to the creek channel and higher wave energy may result in the failure of the burritos,” the report asserts that Rip Rap Barrier is the best option for protecting the subject property. As discussed throughout this comment, non-structural or vegetative shoreline stabilization solutions are preferable to structural, hardened revetments within Oregon’s coastal land use planning regime. Non-structural or vegetative shore stabilization solutions are preferred choices in the OPRD regulations and, where feasible, provide better protection for public use, public safety, and scenic preservation. The Applicant should provide a more robust discussion of the feasibility of a vegetative shoreline stabilization solution prior to any decision on its Permanent Rip Rap Application materials.

OAR 736-020-0003(2)(b) requires applications for ocean front protective structures, such as the permanent riprap placement proposed by the Applicant, to be accompanied by an analysis of hazard avoidance alternatives. This includes:

[R]elocation of existing buildings or other infrastructure, or increased setbacks for new buildings or infrastructure. Such analysis shall describe why hazard avoidance alternatives are not feasible, or if tried, why they were not successful. Relevant factors may include topographic limitations, limits of area for relocation, or cost.⁴⁸

With respect to hazard avoidance alternatives, both the Dec. 2018 and Feb. 2019 Horning Geosciences Reports state that the subject house “cannot be relocated any father east of its present location, because of the setback and small size of the parcel.” This analysis is inadequate to support a robust evaluation of the Application’s compliance with OAR 736-020-0003(b). The Applicant must provide a more explicit discussion of the relevant hazard avoidance alternative factors within OAR 736-020-0003(2)(b) prior to any approval of the proposed request.

⁴⁶ Permanent Rip Rap Appl., Feb. 4, 2019 Horning Study, 9.

⁴⁷ Permanent Rip Rap Appl., Feb. 4, 2019 Horning Study, 9-11.

⁴⁸ OAR 736-020-0003(2)(b).

OAR 736-020-0010(5) Public Costs — There are no reasonable special measures which might reduce or eliminate significant public costs. Prior to submission of the application, the applicant shall consider alternatives such as nonstructural solutions, provision for ultimate removal responsibility for structures when no longer needed, reclamation of excavation pits, mitigation of project damages to public interests, or a time limit on project life to allow for changes in public interest.

The Applicant states that the non-structural, vegetative barrier options discussed in both of its shoreline erosion studies are not “reasonable special measures, as they fail to provide the needed long-term protection for the property.”⁴⁹ There is insufficient evidence to evaluate the validity of this claim. In fact, information disclosed elsewhere within the Application materials suggest the opposite conclusion. The Feb. 4, 2019 geosciences study estimates that the Rip Rap Barrier will only “eliminate” the geologic hazards facing the subject property (shoreline erosion and shoreline retreat) for the next 50 years.⁵⁰ Because this estimate of the proposed Permanent Rip Rap barrier’s lifespan is provided without any substantive analysis of the established climate trends of sea level rise and extreme weather events, it is reasonable to conclude that the “50 year” figure is an overestimation.⁵¹ In either case, the Application omits data sufficient to evaluate potential adverse impacts (and subsequent cost to the taxpayer) on the adjacent public coastal shore lands over the proposed Permanent Rip Rap Project’s lifespan. The Applicant should provide a more robust analysis of non-structural SPS alternatives, and offer a provision for ultimate removal responsibility of the riprap revetment in the event that its utility diminishes.

OAR 736-020-0010(6) Compliance with LCDC Goals — The proposed project shall be evaluated against the applicable criteria included within Statewide Land Conservation and Development Goals #5: Natural Resources, Scenic and Historic Areas, and Open Spaces, #17: Coastal Shorelands, #18: Beaches and Dunes, and #19: Ocean Resources, and other appropriate statewide planning goals. In accordance with the Statewide Land Conservation and Development Commission Goal #18, permit applications for beachfront protective structures on the ocean shore shall be considered only where development existed on January 1, 1977. The project shall be consistent with local comprehensive plans where such plans have been approved by LCDC[...]

The proposed Permanent Rip Rap Project must be evaluated against applicable criteria included with Goal 17 and Goal 18, and be consistent with the RBCP. As discussed above, the Applicant has yet to meet its burden with respect to Goal 18 eligibility or show consistency with applicable standards contained within the RBCP. Given its insufficient consideration of non-structural alternatives in conjunction the proposed Project, the Applicant similarly fails to demonstrate compliance with the requisite criteria in Goal 17. Oregon’s laws recognize and address the detrimental effects of hardened shoreline structures, such as the permanent riprap revetment proposed by the Applicant, and the requirement to protect the public beaches. Goal 17, addressing Coastal Shorelands, states a preference for “non-structural solutions” over structural solutions to problems such as erosion: “Land use management practices and non-structural solutions to problems of erosion and flooding shall be preferred to structural solutions.”

⁴⁹ Permanent Rip Rap Appl., Second Supp. Support, 7 (Feb. 4, 2019).

⁵⁰ Permanent Rip Rap Appl., Feb. 4, 2019 Horning Study, 12.

⁵¹ Permanent Rip Rap Appl., Feb. 4, 2019 Horning Study, 9, 12.

Pursuant to OAR 736-020-003(2)(c) as well as OAR 736-020-0010(4), the Applicant is required to demonstrate consideration of non-structural solutions, including vegetative stabilization, and has not sufficiently done so to justify approval in this matter.

B. The Application does not demonstrate compliance with requisite criteria contained within OAR 736-020-0003(2)(c).

OAR 736-020-003(2)(c) states that an application “for an ocean front protective structure greater than 50 feet in length,” such as the proposed project, must be accompanied by a report from a registered professional geologist experienced in coastal processes that describes potential impacts arising from the proposed project.⁵² The Application’s shoreline erosion studies fail to provide sufficient information to evaluate potential adverse impacts as required by OAR 736-020-003(2)(c)(B) and OAR 736-020-003(2)(c)(D). Each are discussed below.

1. OAR 736-020-0003(2)(c)(B): The bank or bluff stability and erosion rates on the subject property and adjacent properties and the potential impacts of the proposed project on bluff stability and erosion rates on the subject and adjacent properties;

OAR 736-020-0003(2)(c)(B) requires that the proposed Permanent Rip Rap Project describe the potential impacts of the proposed project on erosion rates on the subject and adjacent properties. As discussed above, sufficient information to evaluate the potential adverse impact resulting from changes between the proposed layout and the “as built” project has not been provided. Similarly, the Application materials do not provide sufficient information to evaluate the extent to which the “as built” project will affect erosion rates with respect to the public beach access point via S 6th Street (located immediately south of the subject property) or the Saltair Creek inlet (located immediately north of the subject property). As such, the Applicant has not demonstrated consistency with this criterion.

2. OAR 736-020-0003(2)(c)(D): The known or suspected geologic and seismic hazards in the project area and how the proposed project may affect or be impacted by those geologic and seismic hazards.

The Application’s shoreline erosion study indicates that the main geologic hazards facing the subject property are shoreline erosion and shoreline retreat. It acknowledges that the effects of extreme weather events (“ocean storminess”) and sea level rise related to climate warming are projected to increase “in about five decades” (the projected lifespan of the rip rap), and will subsequently cause the installed riprap to be exposed to storm surges more frequently as well as necessitate ongoing repairs.⁵³ Given publicly available information on climate warming, this analysis is inadequate and likely inaccurate. Severe storm events and sea level rise related to climate change are already well documented phenomena on the Oregon coast, and are increasing in frequency and severity at a much faster rate than anticipated. The Applicant should provide

⁵² See OAR 736-020-003(c); See also OAR 736-020-0003(c)(A)-(D).

⁵³ Permanent Rip Rap Appl., Feb. 4, 2019 Horning Study, 12.

further information order to allow robust evaluation of how the proposed Project will affect or be impacted by known geologic hazards in the Project area.

Both shoreline erosion studies included within the Application materials appear to be analyzing the feasibility and potential adverse impacts of the proposed Permanent Rip Rap Application on the basis of the assumption that the inlet of Saltair Creek (which is currently oriented southward) will at some point in the future “shift northward once again and steer erosional forces away from Tax Lot 5100.” Publicly available data on climate warming (referenced by the Applicant’s geotechnical engineer above) suggests the opposite conclusion. Specifically, that Saltair Creek will continue its southerly course, increasing erosional impacts to the northern boundaries of the subject property. If Saltair Creek resumed its traditional northerly course, it could be the presence of the riprap having the effect of pushing the creek to the north, potentially to the detriment of property owners on the north side of the creek. Again, the Applicant must provide further discussion on both issues prior to approval of its proposed project.

C. The Application fails to demonstrate compliance with requisite public access and safety standards.

Pursuant to OAR 736-020-0020, a proposed SPS project (1) shall not be a detriment to public recreation use opportunities within the ocean shore area except in those cases where it is determined necessary or legally required to protect sensitive biological resources such as state or federally listed species, and (2) shall avoid blocking off or obstructing public access routes within the ocean shore area except in those cases where it is determined necessary or legally required to protect sensitive biological resources such as state or federally listed species.⁵⁴

As discussed above, the Application indicates that the closest public coastal access point is immediately to the south of the property. The Application does sufficiently explain how the proposed Permanent Rip Rap Project will impact recreational access to and along the shore, particularly during high tides or storm events when the crossing of the Saltair Creek outlet could become more dangerous to the public as a result of the riprap shore backing. It excludes pertinent analysis of known physical impacts (such as sand loss) that riprap revetments impose on dynamic natural beach processes. Absent such a discussion, the Applicant cannot demonstrate consistency with OAR 736-020-0020.

Pursuant to OAR 736-020-0025, a proposed SPS project “shall be designed to avoid or minimize safety hazards to the public and shoreline properties.”⁵⁵ OAR 736-020-0025(3), containing requisite standards relating to “Neighboring Properties,” states that a proposed project must be “designed to avoid or minimize ocean erosion or safety problems for neighboring properties.”⁵⁶ As discussed above, the “as built” design of the proposed Permanent Rip Rap Project differs from the original layout. OPRD cannot conclude that the Application demonstrates consistency with OAR 736-020-0025(3) until further analysis detailing the “as

⁵⁴ OAR 736-020-0020: Recreation Use Standards.

⁵⁵ OAR 736-020-0025: Safety Standards.

⁵⁶ OAR 736-020-0025(3): Safety Standards – Neighboring Properties.

built” design’s potential adverse erosional impacts on neighboring properties and public access points is provided.

For the reasons stated above, the Application fails to demonstrate compliance with requisite public access and safety standards.

IV. General comments on the OPRD’s jurisdiction over the proposed Project.

Oregon Shores provides general comments on the below two matters raised by the Applicant for the purposes of clarity and preservation.

A. The Applicant does not provide sufficient analysis to evaluate its assertion that it holds claimed rights to install permanent riprap regardless of OPRD permission.

The Applicant asserts that both its Emergency and Permanent Rip Rap Applications are “precautionary,” arguing that:

The public’s rights, and by extension OPRD’s regulatory authority, is limited to[...]an interest in the nature of a recreational easement on the *dry sand beaches westward* of the surveyed ‘vegetation line’ – the ‘Statutory Vegetation Line’ (SVL) (surveyed coordinates are at ORS 390.770). The authority of OPRD to limit the placement of beachfront protective structures is restricted at least as a matter of constitutional law, to protecting the public recreational easement westward of the SVL. Here, the protected structure will be located *wholly eastward* of the SVL.⁵⁷

On this basis, the Applicant concludes that it holds claimed rights to install permanent riprap regardless of OPRD permission.⁵⁸ The Applicant has not provided sufficient analysis in its Permanent Application to evaluate this claim. Should this matter become germane to the present permitting process, Oregon Shores will provide specific comments as allowed and appropriate.

ORS 390.650(1) contains statutory Improvement permit criteria applicable to this matter. It states that:

Any person who desires a permit to make an improvement on any property subject to ORS 390.640 (Permit required for improvements on ocean shore) shall apply in writing to the State Parks and Recreation Department on a form and in a manner prescribed by the department, stating the kind of and reason for the improvement.⁵⁹

OAR 736-020-0002(13) defines “Ocean Shore” as “the land lying between extreme low tide of the Pacific Ocean and the statutory vegetation line as described by ORS 390.770 or the

⁵⁷ Permanent Rip Rap Appl., Second Supp. Support, 3-4 (Feb. 4, 2019) (emphasis in the original).

⁵⁸ Permanent Rip Rap Appl., Second Supp. Support, 4 (Feb. 4, 2019).

⁵⁹ ORS 390.650(1): Improvement Permit Procedure.

line of established upland shore vegetation, whichever is farther inland.”⁶⁰ OAR 736-020-0002(11) defines the “Line of Established Upland Shore Vegetation” as “that line along the Pacific Ocean shore where upland vegetation cover becomes continuous; or, where minor gaps, breaks or landward indentations in the line of continuous vegetation occur, the projected line across the gap, break or landward indentation connecting the line of continuous vegetation on either side.”⁶¹ The Applicant states that it is “unclear whether OPRD would consider the protective structure made permanent to be westward of this line of ‘established upland shore vegetation.’”⁶² The Applicant and the Department should resolve any ambiguity the Applicant may have regarding the SVL and any issue of OPRD’s authority prior to the approval of the Permanent Rip Rap Application.

B. The Applicant fails to provide sufficient analysis for its contention that OPRD denial would constitute a violation of the Fifth Amendment of the United States Constitution, as well as parallel provisions in the Oregon Constitution.

The Applicant does not provide sufficient analysis of the legal elements of an inverse condemnation claim in its Permanent Application to allow for evaluation of its contention that OPRD denial would constitute a violation of the Fifth Amendment of the United States Constitution, as well as parallel provisions in the Oregon Constitution.⁶³ Should this matter become germane to the present permitting process, Oregon Shores will provide specific comment as allowed and appropriate.

V. Conclusion

Oregon Shores believes a broader policy change is needed to adequately address coastal development issues in light of our improved understanding of the dynamic forces bearing on Oregon’s coast and manner in which our coastal landscapes are responding to climate change. Given the increases in storm surge and wave height we are already experiencing on the Oregon coast, and given what we know of further predicted changes resulting from long- term climate change and cyclical climatic events such as El Niño, these requests for protective structures permits are likely to increase. Allowing installation of hardened structures along the shore, which can deprive the beach of a sand source that may help to mitigate the progressive loss of sand from Oregon’s shoreline due to increasing erosion, does not protect the public’s interest in the beach as the Department is required to do. Further, allowing the installation of protective structures exacerbates the risks to public health and safety as well as to shorefront properties by encouraging investment in shorefront protection rather than incentivizing movement away from shoreline areas and coastal hazards. Finally, the Application under consideration here exemplifies the problem created when emergency permits for shoreline protection structures are hastily issued, but then provide presumptive grounds for converting the permit to “Permanent.” There is insufficient time for thorough analysis during the alleged emergency, but then landowners seek to make the SPS permanent by submitting applications with little additional

⁶⁰ OAR 736-020-0002(13): “Ocean Shore.”

⁶¹ OAR 736-020-0002(11): Line of Established Upland Shore Vegetation.

⁶² Permanent Rip Rap Appl., Second Supp. Support, 4 (Feb. 4, 2019).

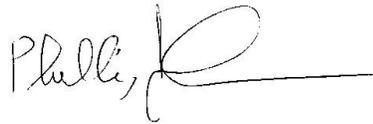
⁶³ Permanent Rip Rap Appl., Second Supp. Support, 4 (Feb. 4, 2019).

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analysis, as though the permanent status of the structure were a foregone conclusion and removal of the structure allowed by the emergency permit were unimaginable. All too often, they are right, but we urge that no such assumption be made here and that rigorous analysis be required.

As discussed above, the Permanent Rip Rap Application is inconsistent with the requisite approval criteria, so there is no reason to allow this kind of impact to the public shoreline based on the information provided. OPRD should deny the Application.

Sincerely,

A handwritten signature in black ink, appearing to read "Phillip Johnson", with a long horizontal line extending to the right.

Phillip Johnson
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