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VIA EMAIL: STEVE.SHIPSEY@DOJ.STATE.OR.US

Mr. Steven Shipsey
Oregon Dept. of Justice
100 SW Market Street
Portland, OR 97201

Re: Salishan Leaseholders, Inc. Emergency Permit For Structural Alteration to the Oceanshore

Dear Steve:

This letter follows up on my call from last week. As you will recall, this firm represents Salishan Leaseholders, Inc. (“SLI”). SLI owns land identified as T8S, R11W, Section 9AA, Tax lot 235, which is common area for the leasehold (a “park”). Exhibit 1. Oregon Parks and Recreation Department (“OPRD”) recently denied SLI’s application for an emergency permit submitted on January 11, 2024. SLI plans on submitting a new application based on the evolving situation, and therefore the issues I raise below require your attention.

I. Facts.

On February 28, 1978, a Lincoln County Circuit Court judge found that Salishan had a vested right to complete development in the leasehold, despite Statewide Planning Goal 18. Exhibit 2. Subsequent to that ruling, Lincoln County adopted an exception to Goal 18 for the entire spit subject to that development. Large portions of the spit have since been armored with protective structures.

Tax Lot 235, however, remains unarmored. Over the past winter, the Pacific Ocean has rapidly eroded the foredune on TL 235.

I visited the site on January 29, 2024. SLI has sent me additional images that were taken on February 6, 2024. The four images below show that over 10 feet of erosion has occurred between Monday, January 29, 2024 and Tuesday, February 6, 2024:

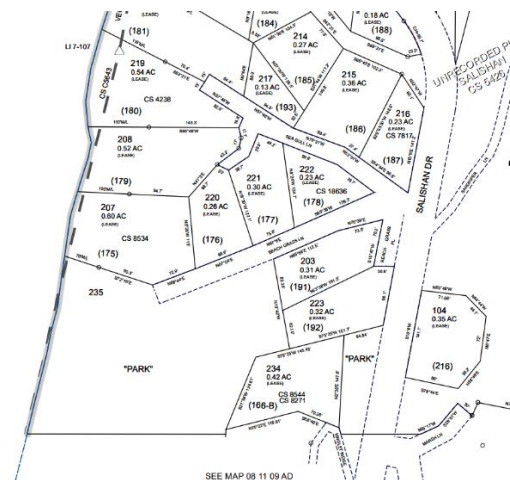




Image 1: Jan. 29 2024



Image 2: February 6, 2024



Image 3: Jan. 29 2024



Image 2: February 6, 2024

II. Legal Analysis.

We believe that the erosion that is taking place on the foredune is sufficient to enable OPRD to issue an emergency permit. For the reasons set forth below, we believe that OPRD may issue an emergency permit to protect “property boundaries,” not just “property” in the narrow sense of manmade improvements. Having said that, the erosion is happening at such a rapid rate that it is just a matter of time before property will be lost.

A. Jurisdictional Limits of the Oregon Parks and Recreation Department.

As explained in more detail below, OPRD has jurisdiction over the “ocean shore” as that term is defined in state law. OPRD is responsible for the review and issuance of permits for alterations to the ocean shore, in accordance with standards designed to promote the public health, safety and welfare. Thus, when considering whether any permit is required from OPRD, the first task is to determine the exact location of the “ocean shore.” This is because OPRD has no jurisdiction over land that falls outside of the ocean shore, as it is delineated on a case-by-case basis.

In 1967, the Oregon Legislature passed the “Oregon Beach Bill” which asserted state ownership of the “ocean shore.” As now codified, the Oregon Beach Bill defined the term “ocean shore” as follows:

390.605 Definitions. As used in ORS 390.610, 390.620 to 390.676, 390.690 and 390.705 to 390.770, unless the context requires otherwise:

(2) “Ocean shore” means the land lying between extreme low tide of the Pacific Ocean and the statutory vegetation line as described by ORS 390.770 or the line of established upland shore vegetation, whichever is farther inland. “Ocean shore” does not include an estuary as defined in ORS 196.800.

ORS 390.605(3) and ORS 390.635 grant OPRD jurisdiction over the “Ocean Shore State Recreation Area,” which is defined in the same manner as the “ocean shore,” which is to say: the area between extreme low tide and either the statutory vegetation line or the “line of upland shore vegetation,” whichever is further inland. Thus, persons seeking to delineate the exact location of the ocean shore must apply two definitions, and rely on the line that is the most landward of the two.

The statutory vegetation line is defined by ORS 390.770, as follows:

390.770 Vegetation line described. Except for the areas described by ORS 390.760, ORS 390.640 applies to all the land located along the Pacific Ocean between the Columbia River and the Oregon-California boundary between extreme low tide and the lines of vegetation as established and described according to the Oregon State Plane Coordinate System of 1927, as follows: [lists Survey data]

Thus, this is a surveyed line which is fixed in location. The “statutory vegetation line” is shown as a heavy dashed line on the county tax assessor’s map, and in this case it happens to be more or less co-terminus with the western property boundary of the open space tract annotated as “park” on the tax assessor’s map. Exhibit 1.

The “line of established upland shore vegetation” is not further defined in the statute. To fill in this gap, the OPRD defines the term at OAR 736-020-0002(11):

(11) “Line of Established Upland Shore Vegetation” -- means 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.

As defined, the “line of established upland shore vegetation” can change over time, as conditions in the field change. Note that the definition of “Line of Established Upland Shore Vegetation” is

intended to be a relatively straight line. The rule specifically is intended to not include “minor gaps, breaks or landward indentations.” An example of where this issue came into play can be found in the case of *Moreland v. Lincoln City*, 50 Or LUBA 44 (2005).

Based on my reading of this definition, it appears that the current erosion is occurring well within a “minor gap, break or landward indentation” of the traditional vegetation line, which is visible on aerial photography published by Google Earth. Indeed, the most recent photographs included above show well-established vegetation succumbing to the ocean waves.

When we met with OPRD staff on January 29, 2024, I asked staff to show us where they understood the “line of established upland shore vegetation” to occur on this property. They were understandably a bit hesitant to commit to any location at that time. Nonetheless, my understanding was that they would follow up at some point with that information after proper consultation with DOJ and/or other OPRD personnel. As far as I know, that has not yet happened, and I would certainly appreciate that determination being made in a prompt and timely manner.

B. Emergency Permits For Improvements and Alterations to the Ocean Shore.

Since 1969, OPRD and its predecessor have regulated the “ocean shore” to implement the statutory mandates of the Beach Bill. OAR 736-020-0001. OPRD rules provide procedures and standards for permits to make improvements on the ocean shore, construct pipelines, cables or conduits across the ocean shore, or to remove products along the ocean shore. A permit is required for any of these activities if they occur within the “ocean shore,” which, as noted above, is defined to mean the “land lying between the extreme low tide of the Pacific Ocean and the statutory vegetation line as described by ORS 390.770 or the line of established upland shore vegetation, whichever is further inland.” ORS 390.605(2); OAR 736-020-0002(13).

ORS 390.650(6) is the provision of state statute that governs emergency permits for improvements to the ocean shore:

(6) The State Parks and Recreation Department may, upon application therefor, either written or oral, grant an emergency permit for a new improvement, dike, revetment, or for the repair, replacement or restoration of an existing, or authorized improvement where property or property boundaries are in imminent peril of being destroyed or damaged by action of the Pacific Ocean or the waters of any bay or river of this state. Said permit may be granted by the department without regard to the provisions of subsections (1), (2), (3), (4) and (5) of this section. Any emergency permit granted hereunder shall be reduced to writing by the department within 10 days after granting the same with a copy thereof furnished to the applicant. (Underline Emphasis added)

Notably, the statute uses the phrase “property or property boundaries.” The statute does not define either term. Nonetheless, by differentiating between “property” and “property boundaries,” the legislature is focused on protecting both physical manmade structures and land. When the legislature uses different terms in the same or related statutes, the court presumes that

the legislature intended different meanings. *PGE v. BOLI*, 317 Or 606, 610–612, 859 P2d 1143 (1993); *State v. Guzek*, 322 Or 245, 906 P2d 272 (1995).

OPRD adopted rules that implement this statutory authority. OAR 736-020-0050 is entitled “Eligibility for Emergency Permit,” but it omits the “or property boundaries” language:

(1) In accordance with ORS 390.650(6), an emergency permit for a new improvement or alteration may be issued, unless otherwise prohibited by law, to provide immediate and temporary protection where property is in imminent peril of being destroyed or damaged by action of the Pacific Ocean or waters of a bay or river, landslide, or other natural disaster. Said permit may be granted by the Department prior to the Ocean Shore Improvement Permit process required under ORS 390.650(1), (2), (3), (4), and (5).

Note that the OAR 736-020-0050(1) limits the authorization to “property,” and not “property or property boundaries.” The rule is internally inconsistent in this regard, because the definition of “emergency permit” set forth at OAR 734-020-0002(6) includes the complete “property or property boundaries” phrase:

(6) “Emergency Permit” — means a written or oral permit for a new improvement, or the repair, replacement or restoration of an existing or authorized improvement, deemed necessary to protect property or property boundaries in imminent peril of being destroyed or damaged by action of the Pacific Ocean or the waters of a bay or river.

OAR 736-020-0050(2) defines the term “property” in a fairly narrow manner to include only man-made infrastructure:

(2) “Property” shall be defined as an upland building, road, street, highway, sewer or water line, or other infrastructure improvement.

See also OAR 736-020-0002(15) (Same definition). Another key definition – the phrase “imminent peril” is found at OAR 736-020-0050(3). It goes to the heart of the finding that OPRD is required to make before it can issue an emergency permit.

(3) “Imminent Peril” shall be defined as a situation in which property is likely to be severely damaged or destroyed by action of the Pacific Ocean or waters of a bay or river, or by landslide or other natural disaster, and where such damage would be likely to occur prior to the time required for approval of an Ocean Shore Improvement Permit.

See also OAR 736-020-0002(8) (Same definition). Two aspects of this definition are noteworthy. First, it requires OPRD to determine if the actions of the Pacific Ocean are “likely” to cause severe damage or destruction to property or land. The term “likely” means “probable” or “having a better chance of existing or occurring than not.” Webster’s Third New World Int’l Dictionary, Unabridged (2002), at 1310. Second, it includes a temporal element inasmuch as it

requires that the potential damage from the Pacific Ocean will likely occur before a standard Ocean Shore Improvement permit could be issued. Although it is not entirely clear to me how long it would take to prepare, submit, and be granted a standard Ocean Shore Improvement permit, it is a factual quotation that can be answered based on past history. Given the scope of the information required, the delay in getting a design profession up to speed, and related issues, it is likely a process that takes six (6) months or more.

It appears that the land has eroded at an extremely rapid rate, with at least 30 feet of dune being lost in the past month alone. At the current rates of erosion, the entire property will be lost within a few years. It is also clear that at current rates of erosion, there is imminent peril to the home located at TL 207. The emergency permit application will address these issues in more detail. For purposes of this letter, however, we seek concurrence from DOJ and OPRD that the statute authorizes emergency permits for damage to land, irrespective of manmade improvements.

C. Critique of the Prior OPRD Denial Letter (undated but sent by email on January 20, 2024).

In his letter sent via email on January 20, 2024, Christopher B. Parkins, Central Operations Resource Manager denies the requested Emergency Permit submitted by Salishan Leaseholders, Inc. Exhibit 3. We do not intend to appeal that letter, because any appeal would not resolve the matter in a timely manner. Nonetheless, SLI does intend to submit a new Emergency Permit application based on the new information summarized above. As discussed below, the conclusions set forth in the January 20, 2024 letter appear to be arbitrary and capricious. We would appreciate OPRD and DOJ reconsider their stance on these issues as they deliberate on the new permit application.

Mr. Parkins concedes that the term “property” defined at OAR 736-020-0050(2) can be interpreted broadly enough to include “the home at 20 Beach Grass Lane and the platted portion of Beach Glass Lane.” However, he draws the factual conclusion that neither the home or road in question are likely to be destroyed or damaged by the Pacific Ocean before a standard Ocean Shore Improvement permit could be issued. This seems to go against the weight of the evidence in the record, which is that the ocean has created a localized rip embayment which “can cause extensive destruction in short periods of time.”

Based on the conditions observed, it is apparent that a localized rip embayment has formed, directing ocean waves at this particular location of the Salishan shoreline. Rip embayments can set up at random locations on the shoreline, and are especially destructive due to the development of deeper troughs within the near-shore sand deposits, allowing the maximum energy of waves to reach the bluffs and dunes backing the beaches at a point of focus. As a result, rip embayments can cause extensive destruction in short periods of time, as occurred historically in numerous locations on the Salishan Spit (including the extensive erosion and damage that occurred in the winter seasons of 1971-1972 and 1972-1973 that cause dramatic changes to portions of the spit, including the common area property). Localized rip embayment conditions appear to be occurring at this location, and are particularly impacting on the northern portion of the common area

that has been historically used for construction equipment access to the Salishan shoreline.

See Email dated January 14, 2024 from Adam Reese, LEG, CEG, Principal Engineering Geologist, Earth Engineering, Inc. Exhibit 4. There is no other evidence in the record. However, Mr. Parkins concludes that OPRD “has not received any update demonstrating a significant change from what was observed at that time,” suggesting that the situation has stabilized to the point that damage is not likely in the timeframe of the submittal of a standard permit. This beach is going to experience king tides again on February 8-10, 2024. See <https://tidesandcurrents.noaa.gov/>

Mr. Parkins contends that the “Beach Grass Lane common area” does not meet the definition of “property” set forth at OAR 736-020-0050(2). Mr. Parkins never considers if there is “imminent peril” to the “property boundary” of the common area, which, as discussed above, is part of the test as enunciated in ORS 390.650(6) and the OPRD definition of “emergency permit” set forth at OAR 734-020-0002(6). This failure to follow this statutory requirement results in the decision being inconsistent with applicable law.

Mr. Parkins provides three reasons why the common area does not fall within the definition of “property.” First, he argues that the “use” of the common area as a staging area for various prior Ocean Shore Improvements was “not authorized.” The decision is unclear as to what portion of the common area he is referring to. Most of the common area is clearly not part of the “ocean shore,” and therefore is not subject to OPRD permitting. Although some of the prior work was undoubtedly done within the “ocean shore” as defined, it is not clear from the record what relevance that fact has to do with the merits of this case. For this reason, Mr. Parkin’s first justification is arbitrary and capricious and inconsistent with ORS 390.650(6).

Second, Mr. Parkins states that “Lincoln County has no record of any permitted road or other development on the vacant parcel.” Mr. Parkins does not explain the relevance of this point, and it is not clear what relevance this allegation has in light that Lincoln County is apparently ready and willing to issue a Land Use Compatibility statement (LUCS) for this emergency permit. Notably, the definition of property set forth at OAR 736-020-0050(2) does not require that a road be “permitted.” Nor can this requirement be fairly implied in light of the statutory purpose of the emergency permit. For this reason, Mr. Parkin’s second justification is arbitrary and capricious and inconsistent with ORS 390.650(6).

Third, Mr. Parkins states that “Beach Grass Lane is not an officially designated emergency beach access point.” Again, there is no requirement in the definition of “property” that requires property to be “officially designated” as anything, much less designated as an “emergency beach access point.” As with the other two justifications, Mr. Parkin’s third justification is arbitrary and capricious and inconsistent with ORS 390.650(6).

III. Conclusion.

Thank you for taking my call last week, and also for taking the time to review the issues addressed in this letter. It is my hope that DOJ can provide guidance to ORPD on this matter consistent with the positions asserted in this letter.

Please feel free to call me to further discuss this matter.

Sincerely,

VF LAW, LLP

/s/Andrew H. Stamp

Andrew H. Stamp
Of Counsel

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Enclosures

Exhibit 1: Tax Assessor's Map

Exhibit 2: Lincoln County Circuit Court Vested Right Determination

Exhibit 3: Letter dated January 20, 2024, from Christopher B. Parkins, Central Operations
Resource Manager (Denial of Emergency Permit)

Exhibit 4: Email dated January 14, 2024 from Adam Reese, LEG, CEG, Principal Engineering
Geologist, Earth Engineering, Inc.