



ORCA: Oregon Coast Alliance

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Protecting the Oregon Coast

August 10, 2011

Dunes City City Council
P.O. Box 97
Westlake, OR 97493

Re: Proposed Dunes City Ordinances 210 and 211

Sent via electronic mail

Dear City Council members,

Oregon Coast Alliance is an Oregon non-profit corporation whose mission is to protect and restore coastal natural resources, and work with coastal residents for sustainable communities. We write this testimony on our own behalf and our members' behalf.

Dunes City on January 14, 2010 enacted Ordinance 203, entitled "Septic System Maintenance." This created Chapter 157 in the Dunes City ordinance code. Dunes City is currently considering Ordinances 210 and 211, which would repeal Ordinance 203 directly or render it ineffective, thus ending Dunes City's proactive septic maintenance program. The reason for Ordinance 203 is simple: many Dunes City residents live in the vicinity of Woahink and/or Siltcoos Lakes, and the majority of Dunes City residents use Woahink Lake, Siltcoos Lake, Little Woahink Lake, Woahink Creek and/or the Siltcoos River as their source of drinking water. Dunes City has a water right for Woahink Lake, and provides permits to residents who apply for water use; other residents obtain water from nearby sources as listed above, or from wells. All these sources are vulnerable to contamination from failing septic systems.

Woahink, Little Woahink, Siltcoos Lakes and their tributaries are all near one another, and hydrologically connected in the manner well understood in dunal lake ecosystems. Sandy soils are porous. Therefore, to protect against contamination of the drinking water supply, the City enacted Ordinance 203. Oregon Coast Alliance notes that there have been at least two Public Health Advisories listed for Siltcoos Lake in the recent past, in September 2007 and October 2008.

It is simply good policy to have a drinking water ordinance in place that requires prudent care of septic systems in the area, as any overflow, leakage or failure would seep into one or another of the connected lakes, or their tributaries, and very easily foul the drinking water supply.

Oregon Coast Alliance opposes both Ordinance 210 and Ordinance 211, for several reasons.

Dunes City is Fulfilling a Critical Need for Septic Oversight

Ordinance 211 states, “The State of Oregon has reserved unto itself, unless it has entered into an agreement with one of its counties pursuant to ORS 454.725, jurisdiction over wastewater disposal systems in the state of Oregon...” and continues by noting that the State has entered into such an agreement with Lane County for the oversight of waste disposal systems.

Ordinance 211 fails to note that the Department of Environmental Quality (DEQ)’s rules *also* require that the owner of an on-site wastewater treatment system maintain that system in working order. OAR 340-071-120(2). The county, as agent for DEQ, is prohibited from allowing any system to operate in contravention of DEQ rules or otherwise discharge untreated wastewater into ground, surface or public waters. OAR 340-071-130(1-4). Owners must at all times maintain and operate their systems in accordance with DEQ rules. OAR 340-071-130(13).¹

Oregon permits local ordinances to be enacted which are stricter than state law, if the ordinance follows the requirements in state law. Nothing in Oregon statute prohibits a municipality from proactively enacting legislation to require inspection, evaluation and pumping of septic systems. The only matter pre-empted by the State of Oregon or Lane County is the authority to permit **new** wastewater treatment systems. There is no pre-emption of maintenance of *existing* septic systems.

OAR 340-071-0120 specifically authorizes DEQ to enter into agreements with local governments, which then authorizes the local entity to become DEQ’s agent in permitting onsite wastewater systems. The purpose of this Rule is to protect public waters from public health hazards. However, this power does not eliminate the power of municipalities to pass an ordinance stricter than DEQ or a delegated County may have for wastewater inspection and evaluation. On the contrary, OAR 340-071-0130 lists the responsibilities of a local agent, and enumerates the responsibilities and prohibitions of “any person” with respect to wastewater. Given that such requirements are mandatory, it is perfectly in accordance with the law that Dunes City enact a septic evaluation and maintenance ordinance. It essentially implements the requirements of OAR 340-071-0130 that neither Lane County nor DEQ has the staff or resources to undertake.

Existing systems are subject to review at any time under DEQ statutes. “Any person” may request such a review on any system. OAR 340-071-155. DEQ or the agent must produce a report on the system including any evidence that the system may be

¹ OAR 340-071-130(13) Operation and maintenance. Owners of onsite systems must operate and maintain their systems in compliance with all permit conditions and applicable requirements in this division and must not create a public health hazard or pollute public waters.

malfunctioning.² A failing system must be immediately repaired. OAR 340-071-215(1). Needed repairs must go through the same application process as for initial systems, and are subject to the same approval criteria. OAR 340-071-160(2). Before the system can be put back into use, the repairs must qualify for a “Certificate of Satisfactory Completion” just the same as new systems. If a failing system cannot be repaired, it must be decommissioned. OAR 340-071-185. Dunes City’s ordinance is thus fulfilling state law requirements in an appropriate and extremely necessary manner; it is far preferable to require regular septic maintenance and pumping than for DEQ or its agent to step in only at the time of septic failure, when damage has already occurred.

DEQ does require a permit renewal every few years, but it does not require a septic owner to demonstrate whether the system is failing or is working well. The owner need only demonstrate that the septic system in use has not been changed to another kind or size. Thus, Dunes City’s ordinance fills a critical gap: neither DEQ nor Lane County has an active program of septic maintenance and oversight.

The Dunes City Comprehensive Plan Requires a Septic Ordinance

Under the land use laws, Ordinance 203 likely qualifies as a “second-level” land use ordinance. ORS 197.015 (11) defines “land use regulation” as as, among other things, “any...land division ordinance adopted under ORS 92.044...or similar general ordinance establishing standards for implementing a comprehensive plan.” Let us then turn to ORS 92.044 (1)(b), the standards governing approval of plats and plans, which requires taking into consideration the location and surrounding area of a subdivision or partition. ORS 92.044 (1)(b)(E) includes requirements for “Facilitating adequate provision of...water supply, sewerage, drainage...or other needs.” Since inadequate septic maintenance will likely lead to continuing health advisories such as those already issued for Siltcoos Lake in 2007 and 2008, with the result that drinking water may have to be trucked in from outside sources, the proper functioning of Ordinance 203 is critical to Dunes City’s efforts to meet the requirements of the land use laws. Though it is a septic maintenance ordinance rather than an ordinance for *providing* drinking water, its regulation directly affects provision of drinking water in the manner described above.

Ordinance 203’s direct relationship to the land use laws is buttressed by the fact that the Dunes City Comprehensive Plan contains several policies that focus specifically on protection of the drinking water supply. Most especially applicable are policies B8, E1,

² 340-071-0155 (3) - The agent must:

- (a) Examine the records available on the existing system, including all permit records and pumping and other maintenance records;
- (b) Conduct a field evaluation of the existing system; and
- (c) Issue a report of findings to the applicant. The report must address the information obtained relevant to system performance such as age; usage; records of installation, maintenance, and repairs; type, size, capacity and condition of components; evidence of any failures; other relevant information (e.g., condition of repair area if known); and a complete sketch of the system showing location and distances of major components.

E2, E3, E5, E6 and I10. Of all these, the most directly on point is policy E6, which states, “The City shall adopt a program to improve maintenance of septic systems for the benefit of all residents.”

This is as clear and unambiguous as language can be. Both Ordinance 210 and 211 would either remove a section of, or amend, the Dunes City Zoning Code. Prior to taking such action, the City Council must first determine whether the repeal or amendment of Ordinance 203 is *consistent* with the Dunes City Comprehensive Plan. Oregon law prohibits a municipality from adopting a zoning code provision that makes provisions of the Comprehensive Plan redundant or meaningless. Both Ordinance 210 and 211 would do exactly that: render meaningless the Comprehensive Plan Policies cited above.

Oregon law also **prohibits** “back door” attempts to amend the Comprehensive Plan through findings used to amend the zoning code. If a local government wishes to amend its Comprehensive Plan policies, it must do so directly, before changing a zoning code provision that reduces required regulation. In other words, to amend the Comprehensive Plan, Dunes City must go through all required steps, including a finding of consistency with all statewide planning goals through a post-acknowledgement plan amendment (PAPA). As part of the process, the City must also demonstrate compliance with all relevant state and federal laws.

Thus, passage of Ordinance 210 or 211 will amend the Comprehensive Plan in a prohibited manner, circumventing the required public process.

Dunes City Must Meet Goal 5 and Goal 6 Requirements

The Dunes City Comprehensive Plan has components reflecting the requirements of both Goal 5 and Goal 6 of the land use laws.

Goal 5 requires, among other things, identification of fish and wildlife resources associated with the lakes in the area covered by the Plan. The continuing contamination problems of Siltcoos Lake clearly have an adverse effect on fish and wildlife of the Lake, and thus Dunes City, by repealing or hamstringing Ordinance 203, will be acting in a manner inconsistent with Goal 5. This will apply equally to Woahink and/or Little Woahink Lakes, should they also begin to experience wastewater contamination after a repeal of Ordinance 203.

Goal 6 deals specifically with air, water and land resource quality. The Goal has language requiring that waste and process discharges from future development, when combined with existing development, neither violate *nor threaten to violate* state or federal environmental quality statutes. The Goal strongly recommends that Comprehensive Plans investigate methods of implementing the Goal, including enforcement of local health and safety ordinances.

Furthermore, Comprehensive Plans, to implement Goal 6, must consider the carrying capacity of the land, air and water; find ways of buffering land uses that will cause conflicts; and coordinate with river basins described in environmental quality statutes and

rules. Siltcoos Lake is currently listed as a 303(d) limited water body for aquatic weeds and/or algae under the federal Clean Water Act, and has been since 1998. No Total Maximum Daily Load (TMDL) has been set for the Lake. That means DEQ cannot authorize any new or increased discharges that would increase the weed problem until the TMDL is completed. See *Friends of Pinto Creek v. EPA*, 504 F.3d 1007 (9th Cir. 2007). Increased nutrient loads from failing or overloaded septic systems could very likely cause additional weed problems, as phosphorus and other nutrients are the primary cause of such weeds.

Ordinances 210 and 211, if either are enacted, will potentially allow new or increased discharges of nutrients into Siltcoos Lake as a result of failing or poorly maintained septic systems. This will clearly be in violation of both Goal 6 and the federal Clean Water Act.

Repeal of Ordinance 203 Will Likely Trigger A Building Moratorium

If Dunes City repeals or renders ineffective its septic maintenance ordinance, it is failing to address the existing problems causing algae and weeds in Siltcoos Lake, which most probably include increased phosphates from poorly maintained septic systems. A similar problem may well develop on Woahink or Little Woahink Lake as well as a result of lack of septic maintenance. This failure on the City's part may very well affect the City's ability to grant additional building permits in the near future. DEQ has the authority to cease issuing new septic permits in situations where additional development will add to the pollution load. See OAR 340-071-0460 (1).

Essentially, this effort to repeal or severely restrict Ordinance 203 is initiating a de facto moratorium on new development in Dunes City, once water quality problems reach a point that DEQ and/or Lane County exercises its authority over new septic permits.

Conclusion

Ordinance 203 is an excellent ordinance that accomplishes several things very effectively: (1) It complies with Dunes City Comprehensive Plan policies on water quality and septic maintenance; (2) It complies, and is consistent with, Land Use Goal 5 and Goal 6, as well as state and federal environmental quality statutes; (3) It provides a critical service of septic oversight that neither DEQ nor Lane County are able to regularly fulfill; (4) It complies with DEQ requirements for protections of Siltcoos Lake, which is a water-quality-limited lake required by law to have a program in place for pollution reduction.

It would be short-sighted for Dunes City to fail to oversee and maintain the septic systems of its residents, who enjoy Woahink and Siltcoos Lakes and other nearby waterbodies by both living on their fringes and drinking water from them. ORCA urges the City Council to deny both Ordinance 210 and 211 and retain Ordinance 203 as part of the Dunes City zoning code.

Many thanks for the opportunity to testify. Please enter this testimony into the record of this matter, and notify ORCA of any further action taken by Dunes City.

Sincerely,

Cameron La Follette

Cameron La Follette
Land Use Director