MEMORANDUM
Legal Department, City of Salem, Rm. 225 City Hall, Phone: (503) 588-6003

To: Salem Planning Commission

From: Thomas V. Cupani

Date: January 28, 2022

Subject: Applicant's Right to Review Findings

In light of Ms. Kellington's letter of January 27, 2022, and the incomplete description of the case law contained in the letter and attachments it is necessary to provide the Planning Commission a more accurate over-view of the case law in this area.

As a preliminary matter, whenever considering a legal argument regarding precedent, whether it is a judge's opinion in a case or a prior decision by a City Council, it is important to examine how that argument is presented. Does the advocate provide context for the decision? For example:

- What are the factual and procedural background leading up to the opinion?
- Does the advocate quote the actual language of the opinion or simply describe what they believe the opinion to say?
- Does the advocate provide precedent that is contrary to their position and attempt to distinguish it based on context?

If there is no context, little or no quotation and if it exists, no contrary precedent, then the legal argument should be viewed with skepticism.

There are at least three cases that are instructive regarding whether an applicant has a right to object to findings prepared by staff. It should be noted that in each case the matter was at the final decision stage for the regulator involved. In the case currently before the Planning Commission, it may be appealed to the City Council.

In *Arlington Heights Homeowners Assoc. v. City of Portland*, 41 Or. LUBA 560 (2001), LUBA was confronted a case that had been appealed and remanded to LUBA on several occasions and had been sent back to the City for further decision. The City allowed the intervenor to prepare the findings in the matter. The petitioner objected arguing that they had a right to rebut the proposed findings. LUBA stated: "Petitioner has no right to rebut findings that may have been proposed by intervenor following our remand in Carlsen III." *Id. at p. 564.* [1]

In *Frewing v. City of Tigard et al* 52 Or. LUBA 518 (2006), another case which had

1 "Carlsen III was a name given to a prior appeal of the same matter.

multiple appeals, LUBA considered a situation where the City of Tigard did not give the applicant an opportunity to review and comment of the findings prepared by staff. LUBA citing the ruling in *Arlington Heights Homeowners Assoc.* noted that petitioner (applicant) cited "no authority that requires the city to provide petitioner with an opportunity to review and comment on proposed findings prior to their adoption." *Frewing* at p. 533.

In the case cited by applicant's attorney, *Columbia Riverkeeper, et al v. Clatsop County et al* 58 Or. LUBA 190 (2009), the matter was on appeal from a County Commissioner decision upholding the authorization of a proposed LNG site. After the County Commissioners' approval, the County invited intervenors to draft findings for the County's consideration. The intervenors and staff traded versions of the findings and the County held a meeting at which staff testified regarding the outstanding issues. Several parties objected to the testimony and consideration of the documents from intervenors and staff on the findings. Applicant argued, citing ORS 197.763(6)(e), that the County had made a procedural error allowing the additional testimony. LUBA disagreed, stating "nothing cited to us in the statute or cases interpreting the statute requires that the local government re-open the evidentiary hearing to allow all participants an opportunity to respond to proposed findings or supporting arguments submitted by the prevailing applicant. The statute is simply silent on that point." *Columbia Riverkeeper* at p. 200. LUBA found that it was not a procedural error to reopen the record and entertain the objections nor was such a procedure required. A conclusion that this case establishes a right to object to findings by any party is simply not supported by the plain language of the case.

It was on the basis of these cases, counsel for the Planning Commission gave the following advice:

1) There is no right by applicant to object or comment on the findings prepared by staff. The findings prepared by staff could be considered on their own merits.

2) Planning Commission could, if it so chose to do so, hear those objections without committing a procedural error.

3) Although not required, the Planning Commission could reopen the record or hearing to allow such comment. By reopening the record, it also allows other interested parties to comment on the subject matter being considered.

The cases cited above are attached for your convenience.

User Name: Tom Cupani
Date and Time: Monday, January 24, 2022 4:33:00 PM PST
Job Number: 162605924

Document (1)

1. *41 Or. LUBA 560*
   Client/Matter: -None-
   Search Terms: 41 Or LUBA 560
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41 Or. LUBA 560; 2001 Ore. Land Use Bd. App. LEXIS 248

Oregon Land Use Board of Appeals

November 26, 2001

LUBA No. 2001-099

State of Oregon Land Use Board of Appeals

Reporter
41 Or. LUBA 560 *; 2001 Ore. Land Use Bd. App. LEXIS 248 **

ARLINGTON HEIGHTS HOMEOWNERS ASSOCIATION, Petitioner, vs. CITY OF PORTLAND, Respondent, and OREGON HOLOCAUST MEMORIAL COALITION, Intervenor-Respondent

Core Terms

city, remand, was, land use decision, evidentiary hearing, challenged decision, master plan, zoning ordinance, has, land use regulation, petition for review, intervenor, memorial, siting, comprehensive plan, motion to dismiss, city council, legal theory, rebut

Panel: [1]** Michael A. Holstun, Board Member

Opinion

[*560]
ORDER

MOTION TO ALLOW REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to respondent's and intervenor-respondent's (collectively respondents') motion to dismiss this appeal for lack of jurisdiction. We allow the motion and consider the reply brief. **[*561]** *See* *Boom v. Columbia County, 31 Or LUBA 318, 319 (1996)* (reply brief allowed where respondent challenges petitioner's standing and LUBA's jurisdiction).

MOTION TO DISMISS

Carlsen v. City of Portland, 36 Or LUBA 614 (1999) (*Carlsen I*) was our initial decision in this matter. *Carlsen I* was remanded to us by the *Court of Appeals. Carlsen v. City of Portland, 169 Or App 1, 8 P3d 234 (2000)* (*Carlsen II*). Following the Court of Appeals' remand in *Carlsen II*, we issued our final decision in *Carlsen v. City of Portland, 39 Or LUBA 93 (2000)* (*Carlsen III*), in which we remanded the

city's decision based on a number of inadequacies in the city's findings. This **[**3]** appeal concerns the city council's decision following our remand in *Carlsen III*.

The challenged decision grants approval for intervenor to site, in Washington Park, a memorial to the victims of the Holocaust. The city moves to dismiss this appeal, arguing that *Carlsen II* and *Carlsen III* addressed and resolved petitioner's arguments concerning whether the disputed proposal is a permitted use in the city's Open Space zone and whether the Washington Park Master Plan (park master plan) constitutes a conditional use master plan under the city's zoning ordinance. Petitioner's two assignments of error in this appeal concern the park master plan and the memorial siting criteria, which do not constitute the kind of land use decision making criteria that are described in the statutory definition of "land use decision." [1] For that reason, the city argues that we do not have jurisdiction to review the challenged decision and must dismiss the appeal.

[4] [*562]**

We rejected a similar argument in *Carlsen III*. All issues that the petitioner raised in *Carlsen I* concerning the city's zoning ordinance were resolved in the city's favor by *Carlsen II* and *III*. Nevertheless, LUBA did not dismiss the appeal or transfer the appeal to circuit court as the petitioner had requested in the event LUBA concluded that it did not have jurisdiction. We explained that under our statutory authority to review land use decisions for compliance with "applicable law," LUBA had jurisdiction to consider whether the appealed decision complied with the memorial siting policy and park master plan, even if those documents were not comprehensive plans or land use regulations. *Carlsen III, 39 Or LUBA at 98-100*.

For similar reasons, we deny respondents' motion to dismiss this appeal. On remand, the city did not adopt a decision that was limited to responding to the issues we identified in *Carlsen III* regarding the park master plan and the memorial siting criteria. Had the city so limited its decision, respondents' motion might have merit. What the city actually did following our remand is readopt its prior decision **[**5]** with additional findings that are included in that decision and distinguished from the prior decision by italic type. [2] Therefore, the challenged decision applies the city's zoning ordinance and, for that reason alone, the Court of Appeals' decision in *Carlsen II* already has established that the challenged decision is a land use decision. [3]

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[1] If the challenged decision is a land use decision, LUBA has exclusive jurisdiction to review the decision. ORS 197.825(1). As relevant here, the city's decision is a land use decision if it is "final" and it "concerns the * * * application of" "the [statewide planning] goals," "[a] comprehensive plan provision" or "[a] land use regulation." ORS 197.015(10)(a)(A). There is no dispute that the challenged decision is final. However, there is also no dispute that the park master plan and memorial siting criteria are not comprehensive plan provisions or land use regulations. *Carlsen II, 169 Or App at 16*; *Carlsen III, 39 Or LUBA at 106-07*.

[2] As petitioner notes, the original decision was nine pages long, the supplemental decision is 20 pages long. Record 1-9; Remand Record 10-29. The supplemental decision includes the following:

> "*The language appearing in this Supplemental decision in regular type is the language of the City Council's initial decision which was the subject of the prior LUBA review. The language appearing in italics has been added by the City Council in response to the issues remanded by LUBA. The combined language constitutes the Council's supplemental decision and responds to LUBA's remand*." Remand Record 10 (italics in original, underlining added).

[3] Based on our conclusion in *Carlsen III* that the city correctly applied its zoning ordinance to determine that the disputed park master plan is not a conditional use master plan, it is also a land use decision for that reason.

[6]**

1 Respondents appear to be correct that the petition for review includes no argument that the challenged decision **[*563]** violates the statewide planning goals or the city's comprehensive plan, the zoning ordinance or any other city land use regulation. Respondents also appear to be correct that in the current posture of this case, any such arguments have been waived under *Beck v. City of Tillamook, 313 Or 148, 831 P2d 678 (1992)*, even if they were presented in the petition for review. However, just because petitioner may be barred in this appeal from continuing to challenge the part of the city's supplemental decision applying the city's zoning ordinance does not mean that the supplemental decision does not apply the zoning ordinance. The supplemental decision does apply the zoning ordinance and, for that reason, is a land use decision. For essentially the same reasons that we provided in *Carlsen III*, we therefore have jurisdiction to consider petitioner's arguments related to the park master plan, the memorial siting criteria and the procedures the city followed on remand in considering those issues.

SAIF v. Shipley, 326 Or 557, 955 P2d 244 (1998), **[**7]** cited by respondents in their response to petitioner's motion to take evidence not in the record, does not alter our conclusion that we have jurisdiction over this appeal. [4] The jurisdictional question in *Shipley* was determined by the nature of the claim. Where the nature of the claim changed during the administrative proceedings to a medical services dispute, the Supreme Court concluded that the Workers' Compensation Board lost jurisdiction over the claim. Here, by contrast, the question of our jurisdiction does not turn on the nature of the issues presented by petitioner. Rather the question of our jurisdiction turns on the nature of the *decision* that is appealed. As relevant in this appeal, the question is whether the challenged decision applies a land use regulation. As we have explained, the challenged decision does apply a land use regulation. Because it does so, it is a land use decision subject to our review for compliance with "applicable law." *Carlsen III, 39 Or LUBA at 99*.

[8] [*564]**

The motion to dismiss is denied.

MOTION TO TAKE EVIDENCE NOT IN THE RECORD

A. Introduction

Our evidentiary scope of review is generally limited to the local record. ORS 197.835(2)(a). ORS 197.835(2)(b) does provide that we may consider evidence that is not in the record and make any required findings of fact where there are "procedural irregularities not shown in the record that, if proved, would warrant reversal or remand * * *."

Petitioner contends that there are such disputed allegations of fact, which, if resolved in petitioner's favor, would warrant reversal or remand. In petitioner's first assignment of error, petitioner argues that the city erred by failing to provide it with an opportunity to present argument and evidence to the city council, following LUBA's remand in *Carlsen III*. In support of the first assignment of error, petitioner advances three separate legal theories. The motion for evidentiary hearing is based on respondents' response to two

[4] Petitioner moves to strike the additional jurisdictional arguments because they were not presented in respondent's original motion to dismiss. Petitioner contends, correctly, that such additional arguments are not specifically allowed by our rules. Nevertheless, because they concern the issue of our jurisdiction, a question that will almost certainly arise in any appeal of our decision in this matter, we elect to consider those additional arguments.

of those legal theories. We discuss those legal theories below and address petitioner's arguments concerning certain disputed factual allegations surrounding those legal theories.

B. Right to Rebut [9] Findings Prepared by Intervenor-Respondent**

Petitioner contends the findings that the city adopted in this case were drafted by intervenor-respondent. [5] Citing *DLCD v. Crook County, 37 Or LUBA 39 (1999)*, petitioner contends it had a right to rebut those proposed findings and that the city erred by failing to provide an opportunity to rebut the proposed findings.

[10]**

DLCD v. Crook County is inapposite. In that case the county elected to conduct a hearing on remand and failed to provide notice of the hearing to the petitioner who had prevailed in the initial appeal to LUBA. In those proceedings on remand, the applicant was permitted to submit a "Supplemental Burden of Proof Statement," which included additional evidence as well as proposed findings. The county's error in that case was allowing a hearing following remand where the applicant was permitted to submit argument and evidence, without taking appropriate steps to provide the petitioner the same opportunity.

Returning to the facts in this case, petitioner's underlying premise that it has a right to rebut proposed findings is incorrect. *Sorte v. City of Newport, 26 Or LUBA 236, 244-45 (1993)*; *Adler v. City of Portland, 24 Or LUBA 1, 12 (1992)*. Petitioner has no right to rebut findings that may have been proposed by intervenor following our remand in *Carlsen III*. It therefore follows that an evidentiary hearing is unnecessary to establish whether intervenor drafted the findings the city adopted on remand, and gave them **[**11]** to the city attorney. Even if petitioner can establish that such is the case, it would provide no basis for reversal or remand.

C. Right to Present Argument and Evidence to Respond to New and Changed Interpretations

In *Gutoski v. Lane County, 155 Or App 369, 963 P2d 145 (1998)*, the Court of Appeals agreed with LUBA that "in certain limited situations" it might be reversible error for a local government to refuse to reopen its local evidentiary hearing to allow "additional evidence and/or argument responsive to the decisionmaker's interpretations of local legislation * * *." *155 Or App at 373*. The Court of Appeals went on to provide the following explanation of the circumstances in which this obligation might be present:

[*566]

> "* * * We also agree with LUBA, however, that *at least* two conditions must exist before it or we may consider reversing a land use decision on that basis. First, the interpretation that is made after the conclusion of the initial evidentiary hearing must either significantly change an existing interpretation

[5] Petitioner bases this contention on a March 8, 2001 letter from the city to the parties that indicates that one of the city councilors asked that intervenor prepare revised findings to respond to the issues LUBA identified in *Carlsen III*. Citing discussion on pages 31 and 32 of the remand record and communications from the city attorney's office on pages 33 and 34 of the remand record, the city contends it is clear that the city attorney prepared the findings. The city further argues that "assuming for the sake of argument [that intervenor] prepared a draft set of findings, the record is clear that the findings that were ultimately presented to and adopted by the [City] Council originated with the City Attorney's Office." Respondent's Brief 25. The city further clarifies in an affidavit attached to respondents' response to petitioner's motion to take evidence that an attorney in the city attorney's office asked the attorney for intervenor to prepare draft findings and then edited those findings before sending the findings to the city council.

> or, for other reasons, be beyond the range of interpretations **[**12]** that the parties could reasonably have anticipated at the time of their evidentiary presentations. Second, the party seeking reversal must demonstrate to LUBA that it can produce specific evidence at the new hearing that differs in substance from the evidence it previously produced and that is directly responsive to the unanticipated interpretation." *155 Or App at 373-74* (emphasis in original; footnote omitted).

As petitioner recognizes, whether the principle described in *Gutoski* even applies in this case is an issue that we may or may not have to reach in our decision on the merits. [6] For purposes of this order we will assume that *Gutoski* applies. We will further assume the first *Gutoski* condition (significant change in an existing interpretation or an interpretation that could not be anticipated) is not an issue. [7] Given these assumptions, the question becomes whether petitioner has sufficiently identified the "specific evidence" that petitioner would have provided to the city if it had been given a chance and **[*567]** that such "specific evidence" would directly respond to the "unanticipated interpretation." *Id.*

[13]**

Petitioner submitted a letter to the city in which it requested an opportunity to present argument and evidence to city council. The city rejected that request without considering it on the merits. Remand Record 31-32. Therefore, to the extent petitioner was required to make such a request locally to preserve its right to argue error under *Gutoski*, petitioner did so.

2 However, there is no requirement under *Gutoski* that petitioner must move for an evidentiary hearing at LUBA so that it can actually present to LUBA the same evidence that it would submit to the city if given a chance. [8] We agree with petitioner that the burden to comply with the second *Gutoski* condition is essentially a burden to describe or identify the evidence that petitioner *would* submit to the city. There is no reason why the required demonstration under the second **[**14]** *Gutoski* condition cannot be met by including in the petition for review a description of the evidence that petitioner would submit to the city if given a chance. Petitioner included such a description in the petition for review and has elaborated somewhat on that description in the motion for evidentiary hearing. [9] Petitioner and respondents simply disagree about whether petitioner's descriptions of that evidence are adequate to satisfy the second condition under *Gutoski*. That is essentially a question of law. Because we agree with petitioner that it is

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[6] The procedural posture in *Gutoski* was different from the present appeal. In *Gutoski*, the county's initial decision had been remanded for failure to apply a relevant comprehensive plan policy. The county *provided* an evidentiary hearing following LUBA's remand and adopted a new decision. In doing so, the petitioners argued that the county interpreted the plan policy in a way they could not have anticipated. The petitioners contended they could not know what evidence and argument to present until the meaning of the policy was known. Here, the alleged error was the city's failure to provide *any* opportunity for petitioner to present argument or evidence following remand in *Carlsen III*. Petitioner's third legal theory under the first assignment of error is based on this difference and petitioner's position that it enjoys a broader right under *Morrison v. City of Portland, 70 Or App 437, 689 P2d 1027 (1984)* to present argument and additional evidence following a LUBA remand, a right that petitioner argues is not affected by *Gutoski*.

[7] We caution the parties that these assumptions should not be taken as any indication of our position concerning whether one or more of petitioner's arguments that the challenged decision includes significantly changed or unforeseeable interpretations actually demonstrates compliance with the first *Gutoski* condition.

[8] Petitioner argues that such a burden should not be imposed under *Gutoski*. Petition for Review 21 n 14; Petitioner's Motion to Take Evidence Not in the Record 3 n 4.

[9] Presumably the evidence that petitioner would have submitted to the city was either contained in the May 24, 2001 letter that it sent to the city, which the city rejected, or was to be submitted at the hearing if petitioner was successful in its attempts to obtain a hearing on remand. We assume that evidence is what petitioner describes in its petition for review and motion for evidentiary hearing.

only required to *describe* the evidence to LUBA, not actually present that evidence to LUBA, we do not agree an evidentiary hearing is warranted.

[15]**

The motion to consider evidence not in the record is denied.

[*568]

ORAL ARGUMENT

Our October 26, 2001 order suspended this appeal and cancelled oral argument. By separate letter issued this date, oral argument is rescheduled for December 6, 2001. Pursuant to ORS 197.840(b), the statutory deadline for the Board to issue its final opinion and order in this matter is extended to December 14, 2001.

Dated this 26th day of November, 2001.

Michael A. Holstun, Board Member.

1. 26.2.4 LUBA Jurisdiction - Land Use Decision: Statutory Test - Goal, Plan or Land Use Regulation.

Where a local government adopts a decision following remand from LUBA that applies both land use criteria and non-land use criteria, that decision is a land use decision that may be appealed to LUBA. That all issues concerning the decision's compliance with land use criteria may have been resolved or waived under *Beck v. City of Tillamook, 313 Or 148, 831 P2d 678 (1992)*, does not mean that a decision that applies land use criteria s not a land use decision

2. 27.6.1 LUBA Procedures/Rules - Evidentiary Hearings - Generally.

27.6.2 LUBA Procedures/Rules - Evidentiary Hearings - Grounds for.

In demonstrating that a party was entitled to have the evidentiary phase of a local land use proceeding reopened under *Gutoski v. Lane County, 155 Or App 369, 963 P2d 145 (1998)*, one of the things a party must show is that the party would submit specific evidence to respond directly to an unanticipated interpretation in the final written land use decision. However, this burden is met at LUBA by identifying the evidnece; a party need not move for **[**2]** an evidentiary hearing at LUBA to actualy present that evidence to LUBA.

State of Oregon Land Use Board of Appeals

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User Name: Dan Atchison
Date and Time: Monday, January 24, 2022 1:25:00 PM PST
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1. *52 Or. LUBA 518*

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Administrative Materials	Jurisdiction: Oregon

52 Or. LUBA 518; 2006 Ore. Land Use Bd. App. LEXIS 142

Oregon Land Use Board of Appeals

September 12, 2006

LUBA No. 2006-065

State of Oregon Land Use Board of Appeals

Reporter

52 Or. LUBA 518 *; 2006 Ore. Land Use Bd. App. LEXIS 142 **

JOHN FREWING, Petitioner, vs. CITY OF TIGARD, Respondent, and WINDWOOD CONSTRUCTION, Intervenor-Respondent

Prior History:

[1]** Appeal from City of Tigard.

Disposition: AFFIRMED

Core Terms

city, remand, has, was, intervenor, staff, ex parte, donate, city council, assigned error, revise, fence, open space, notice, staff report, disclosure, indirect, city council member, subject property, conflicting interest, proposed findings, ex parte contact, public hearing, arborist, bias, petition for review, criterion, species, metal, rebut

Synopsis

[*520] NATURE OF THE DECISION

Petitioner appeals a city council decision on remand from LUBA that adopts additional findings and condition supporting a residential subdivision.

MOTION TO TAKE EVIDENCE

In support of arguments under the fourth assignment of error, petitioner moves to take evidence not in the record pursuant to OAR 661-010-0045. [1] The fourth assignment of error alleges that the City of Tigard Mayor had indirect

[1] OAR 661-010-0045 provides, in relevant part:

ex parte contacts and that the Mayor has a conflict of interest that precludes his participation in the proceedings on remand. In the motion, petitioner seeks to establish by means of depositions and subpoenas **[**2]** (1) the content of alleged ex parte contacts involving the Mayor and (2) information regarding city goals for obtaining open space, the remuneration paid the Mayor, and the importance of meeting open space goals to the political success of the Mayor.

[*521] As discussed further under the fourth assignment of error, petitioner has not established a sufficient basis to believe that any ex parte contact occurred, and thus has not established **[**3]** a basis to allow evidence outside the record to determine the content of such communications. With respect to the alleged conflict of interest, the facts petitioners allege fall far short of constituting a conflict of interest, and thus petitioner has not demonstrated a basis to take evidence on that ground, either. Accordingly, the motion to take evidence is denied.

Counsel

John Frewing, Tigard, filed the petition for review and argued on his own behalf.

Timothy V. Ramis, Portland, filed a response brief and Gary Firestone, Portland, argued on behalf of respondent. With him on the brief were Gary Firestone and Ramis Crew Corrigan, LLP.

Christopher P. Koback, Portland, filed a response brief and E. Michael Connors, Portland, argued on behalf of intervenor-respondent. With him on the brief was Davis Wright Tremaine, LLP.

Panel: BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision

Opinion By: BASSHAM

Opinion

FINAL OPINION AND ORDER

> "(1) Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning * * * ex parte contacts, * * * or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. * * *
>
> "(2) Motions to Take Evidence:
>
> > "(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding."

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

FACTS

The challenged decision is before us for the third time. In *Frewing v. City of Tigard, 50 Or LUBA 226*, *aff'd 203 Or App 322, 127 P3d 681 (2005) (Frewing II)*, we remanded the city's subdivision approval on a very limited basis: On remand, the city was required to either explain why it is not possible to preserve 23 trees identified in footnote 16 of our opinion, or require that the tree plan be amended to preserve those trees. [2] We further stated:

> "In fulfilling their obligation to preserve trees if possible, the city and applicant are generally entitled to rely on the applicant's **[**4]** tree plan, which was prepared by a certified arborist in consultation with the applicant and the applicant's engineer, to identify the trees it is possible to preserve and the trees it is not possible to preserve. But if a real issue is raised about whether it is in fact possible to preserve particular trees that the tree plan slates for removal, some specific explanation for why those trees must be removed must be included in the city's findings. That findings obligation may in turn necessitate additional justification by the certified arborist. Neither the city nor the intervenor claim that no issue was raised about the trees petitioner identifies on page 15 of his petition for review. *See* n 16.
>
> **[*522]** "However, we also caution that our remand does not obligate the city to provide petitioner another opportunity to identify additional trees that might be preserved. The city's obligation on remand is limited to the trees identified in n 16 of this opinion." *Id. at 251-52*.

[5]**

On remand, the applicant, intervenor-respondent (intervenor), revised the tree plan and proposed to preserve all of the identified trees. The city council held a public hearing at which it accepted testimony from petitioner, among others, and voted to approve the application, with additional findings and a condition requiring intervenor to preserve the 23 identified trees. This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Petitioner contends that the revised tree plan is inconsistent with applicable code requirements. First, petitioner notes that the revised tree plan depicts a new feature, labeled "metal fence on steel posts" that appears to generally demarcate the areas where trees will be removed for development from areas where trees will be protected. Each of the 23 trees identified in *Frewing II* are in the area that will not be developed. However, petitioner observes that some trees in the protected area, including trees in close proximity to the protected trees, are marked for removal. Petitioner contends that it is unclear which trees will be protected and which removed. Further, petitioner argues

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[2] Preservation of trees was an issue pursuant to Tigard Community Development Code (CDC) 18.350.100(B)(3)(a)(1), which provides:

> "The streets, buildings and other site elements shall be designed and located to preserve the existing trees, topography and natural drainage to the greatest degree possible[.]"

that removal of trees in close proximity to the 23 identified **[**6]** trees presents a threat to those protected trees. Finally, petitioner notes that the text and tables of the tree plan were not modified to show preservation of the 23 trees. For these reasons, petitioner argues that the revised tree plan is insufficient to ensure protection of the 23 trees.

Intervenor explains that the "metal fence on steel posts" is not a tree protection/removal boundary *per se*, but simply a fence installed in compliance with the original conditions of subdivision approval, one that generally demarcates areas to be developed from areas that will remain undeveloped. It is clear from the revised tree plan, intervenor argues, which trees will be removed and which protected, on either side of that metal fence. With respect to tree plan text and tables, intervenor notes that the city addressed that issue in its findings, and concluded that **[*523]** with the newly imposed condition requiring protection of the 23 trees, there is no need to modify the text and tables. That condition unequivocally requires protection of the 23 trees, intervenor argues, and there is no reason to believe that those trees will not be protected.

We agree with intervenor. It is clear under the revised **[**7]** site plan and condition that the 23 trees will be protected. The city adopted findings concluding that the revised plan controlled the tree plan text and tables, and petitioner does not challenge those findings. With respect to removal of trees in proximity to the 23 trees, petitioner does not explain why their removal threatens the protected trees, nor has petitioner demonstrated that any additional measures are necessary to protect the trees.

Petitioner next contends that 10 of the 23 identified trees are not identified by species in the tree inventory, as required by CDC 18.709.030.B.1. For example, petitioner argues that some trees are simply identified as "cedar" instead of "Western Red Cedar." The city addressed this issue, finding that petitioner raised it on appeal to LUBA in *Frewing I*, and did not prevail, and therefore that issue cannot be raised on remand. Petitioner disputes that finding, arguing that LUBA did not resolve the issue of species identification on its merits, and therefore that issue is still unresolved, and can be raised again on remand and in the current appeal proceeding.

Intervenor responds, and we agree, that the issue of species identification cannot **[**8]** be raised in this appeal, under *Beck v. City of Tillamook, 313 Or 148, 831 P2d 678 (1992)*. Intervenor argues that petitioner failed to raise this issue in his initial brief in *Frewing II*, and raised it only in a reply brief, which LUBA did not allow. *50 Or LUBA at 229*. Petitioner apparently attempted to raise the issue again before the Court of Appeals, but that court affirmed LUBA's decision, including any contentions regarding the decision not to allow the reply brief and hence not to allow petitioner to belatedly raise the issue of species identification. We agree with intervenor that petitioner waived the issue by failing to raise it in his petition for review in *Frewing II*. *See DLCD v. Douglas County, 37 Or LUBA 129, 143 (1999)* (where the petitioner could have but did not challenge coordinated city population projections in its initial appeal before **[*524]** LUBA, petitioner waives the right to challenge those projections in its appeal of the decision on remand).

Finally, petitioner contends that there is no evidence that the revised tree plan was "prepared by a certified arborist" **[**9]** as required by CDC 18.790.030.A. Intervenor responds that the original tree plan was prepared by a certified arborist, and that there is no requirement under either the city code or LUBA's remand that the revisions to the site

plan to protect the 23 identified trees be prepared by a certified arborist. We agree with intervenor that petitioner has not established either that the code or our remand required that a certified arborist revise the tree plan to reflect that the 23 trees will be protected.

The first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

Petitioner contends that sometime prior to the remand hearing, intervenor submitted to the city engineered drawings showing design changes from the conceptual development designs earlier approved by the city. Petitioner argues that these design changes are "significant changes" that trigger the requirement for a new application, under CDC 18.350.030.E. According to petitioner, the city must address this issue in the course of the remand hearing, and the city erred in failing to do so.

Intervenor responds that the city limited the remand proceedings to the issue of the 23 identified trees, and did not open **[**10]** those proceedings up to other issues. Moreover, intervenor argues that the engineered drawings are simply more detailed finished designs that the conditions of tentative subdivision approval required intervenor to submit. According to intervenor, it is not surprising that more detailed designs differ in some respects from conceptual designs. Intervenor argues that the city will determine in due course whether the submitted designs are consistent with the approved conceptual designs, and that there is no basis to require the city council to conduct that determination under the limited remand from *Frewing II*.

[*525] 2 Again, we agree. As discussed under the fifth assignment of error, the city council limited the scope of the remand proceedings to the issue of the 23 identified trees. None of the alleged design changes cited by petitioner has anything to do with those trees. As intervenor explains, it is common for preliminary subdivision or planned development approvals to require applicants to submit more detailed or final grading or engineering plans, in order to obtain final subdivision or planned development approval. Typically, the local government evaluates those plans to determine **[**11]** whether they are consistent with the approved preliminary or conceptual plans. That determination is usually an entirely separate decision process from the preliminary approval decision, and any decisions that may be required on remand of such tentative approvals from LUBA. Petitioner has demonstrated no basis to require the city to make such determinations in the course of the present remand hearing concerning its preliminary subdivision and planned development decision.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner contends that the city Mayor engaged in an indirect *ex parte* contact with the applicant, and moreover is barred from participating in the decision due to a direct financial conflict.

A. Ex Parte Contact

Petitioner argues that the record indicates that the Mayor engaged in an indirect *ex parte* contact with the applicant regarding possible donation of part of the subject property to the city for open space use. As evidence of the alleged *ex parte* contact, petitioner cites to a newspaper interview with the Mayor, in which the Mayor discussed the possibility that a portion of the subject property would be donated to **[**12]** the city as open space, and was quoted as saying that "free was a very good price." At the February 28, 2006 City Council meeting, petitioner asked the city council members to disclose any *ex parte* contacts. In response, the Mayor described the newspaper interview but stated that any information he received regarding potential **[*526]** donation of property came from communication with staff, and that the Mayor has had no contacts of any kind with intervenor or its representatives. [3]

[13]**

Petitioner cites to CDC 18.390.050.D.8, which provides that city council members shall not "communicate, directly or indirectly, with any party or representative of a party in connection with any issue involved in a hearing, except upon giving notice, and an opportunity to participate." [4] Further, **[*527]** petitioner notes, CDC 18.390.050.D.8,

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[3] Petitioner cites to the following transcript of the February 26, 2006 city council meeting:

> "[Mayor]: I think [petitioner's request for disclosure of *ex parte* contacts] is directed primarily at me because I was the one quoted in the newspaper article and I did have [an interview with a reporter] and I did make a statement with regard to the potential for a portion of this parcel that was unbuildable being given to the city and that was based on a conversation I had I believe with our Community Development Director, Tom Coffee and he might want to confirm whether or not that was the case and that was I guess because they were having a discussion with regard to what would happen in the future with this piece of property because a portion of it was not buildable. But actually I think there was a misquote in the paper in regard to whether or not it had been donated or would be donated because to my knowledge nothing like that has been done yet--no donation has yet taken place. So in fact I don't know whether that actually meant that the property would change hands or that that portion of the property which was not buildable would be made available to the city to improve it so it could be used as open space, * * * because the only discussion I had was just on one brief occasion with a member of City of Tigard staff.
>
> "As far as the principals of [this] development, I've never met or talked to any of them outside of public hearings we've had in this room, would not know them on the street, don't know them in any way. So far as whether the potential that property would be donated to the city biasing me in any way, the fact that I had on previous occasions approved this planned development before there was any mention or discussion or even thought that this might take place, I would think would show that even if I were to approve it tonight, I had approved it previously without any kind of promise or suggestion that this might take place, so I think that would draw into question as to whether or not that would be any type of inducement." Partial transcript of February 28, 2006 City Council Meeting, attached to the Petition for Review, Appendix D-2.

[4] CDC 18.390.050.D.8 provides:

> "a. Members of the Review Authority shall not:
>
> > "(1) Communicate, directly or indirectly, with any party or representative of a party in connection with any issue involved in a hearing, except upon giving notice, and an opportunity for all parties to participate;

prohibits city council member from taking "notice of any communication, report, or other materials outside the record prepared by proponents or opponents in connection with the particular case unless the parties are afforded an opportunity to contest the materials so noticed." Petitioner argues that the Mayor may have had "indirect" communication with intervenor via city staff, and that the city erred in not allowing petitioner to question the Mayor about his conversation with staff, and to rebut the substance of that conversation.

[14]**

Communication with planning staff is not an *ex parte* communication. ORS 227.180(4); CDC 18.390.050.D.8.d. Here, planning staff apparently informed the Mayor that staff and **[*528]** intervenor had had discussions regarding donating a part of the subject property to the city as open space. It is unclear whether and to what extent ORS 227.180(4) and CDC 18.390.050.D.8.d would allow staff to convey to a decision maker information relevant to a pending land use matter that was gained outside the public hearing process. On the one hand, planning staff receive a great deal of information from, and have significant contacts with, applicants and the public outside the public hearing process, and in turn have significant contacts with governing body members on a wide range of subjects. It is inevitable that on occasion information obtained by staff outside the public hearing process that has some bearing on a land use matter before the governing body will be conveyed to governing body members outside the hearing process. We are aware of no cases suggesting that if staff convey such information to decision makers that such communication with staff is considered an indirect *ex parte* communication **[**15]** with the source of that information.

On the other hand, it certainly seems inconsistent with the purpose of ORS 227.180 and CDC 18.390.050 D.8 to allow staff to convey to decision makers evidence critical to the decision that was gained outside the public hearing process from one of the parties to the decision, and shield disclosure of such evidence under the "staff communication" exception at ORS 227.180(4) and CDC 18.390.050 D.8.d.

"(2) Take notice of any communication, report, or other materials outside the record prepared by the proponents or opponents in connection with the particular case unless the parties are afforded an opportunity to contest the materials so noticed;

"b. No decision or action of the Review Authority shall be invalid due to *ex parte* contacts or bias resulting from *ex parte* contacts with a member of the decision-making body if the member of the decision-making body receiving contact:

"(1) Places on the record the substance of any written or oral *ex parte* communications concerning the decision or action; and

"(2) Makes a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action shall be considered or taken on the subject to which the communication is related.

"* * * *

"d. A communication between City staff and the Review Authority shall not be considered an *ex parte* contact."

However, we need not attempt to determine how broad or narrow the "staff communication" exception is, because we disagree with petitioner that any *ex parte* contact occurred at all in the present case. CDC 18.390.050 D.8.a.1 prohibits *ex parte* contacts with parties "in connection with any issue involved in a hearing." As noted, the only issue remanded by LUBA and considered at the remand hearing was whether to protect the 23 trees identified in our decision. Petitioner does not explain what connection a potential donation of land on the subject property to the city has to that issue. [5] As far as we are advised, that staff **[*529]** and intervenor have discussed donation of open space on the subject property has nothing to do with any approval criteria for **[**16]** the subdivision as a whole, much less the specific tree preservation criterion and the very limited issue to be resolved on remand from *Frewing II*. Because the substance of the communication has no discernible "connection with any issue involved in the hearing," that communication was not a direct or indirect *ex parte* contact that require disclosure or that obligated the city to offer petitioner an opportunity for rebuttal. [6]

[17]**

Although petitioner does not couch it this way, the real focus of his *ex parte* contact argument may be that the Major was "biased" or improperly influenced to approve the application on remand due to his knowledge that intervenor might donate the unbuildable portion of the property to the city, and thus cast his vote based not on the tree preservation criterion and evidence related to that criterion but rather in the hope that the city would obtain "free" open space. [7]

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[5] As far as we can tell, none of the 23 trees are within the stream buffer or open space areas of the property that were presumably the subject of discussion between staff and intervenor.

[6] The city also argues, and we tend to agree, that even if the communication had some connection with any issue involved in the hearing and was otherwise an *ex parte* contact, the Mayor in fact disclosed the substance of that communication at the first opportunity. As far as petitioner has shown, petitioner did not request further disclosure or object to the adequacy of that disclosure below. Before LUBA, particularly in seeking to take evidence outside the record, petitioner appears to argue that the Mayor's disclosure was inadequate. However, it seems to us that the Mayor fully disclosed the substance of his communication with staff, *viz.*, he was informed that staff and intervenor had discussed donating the unbuildable portion of the subject property to the city. Perhaps influenced by his view that the Mayor is biased and has a conflict of interest, petitioner seeks to question the Mayor about a number of things, but as far as disclosure of the substance of the staff communication goes, petitioner has not demonstrated that there is anything more to disclose.

The city further argues that petitioner has not demonstrated that there is anything in the substance of the staff communication with the Mayor to rebut. Although we need not resolve that contention, we tend to agree. Petitioner does not explain what evidence he would (or could) submit to rebut the statement that staff and intervenor have discussed donating the unbuildable portion of the subject property to the city, much less what relation any evidentiary rebuttal to that statement would have to any issue involved in the remand hearing.

[7] The standard for determining actual bias is whether the decision maker "prejudged the application, and did not reach a decision by applying relevant standards based on the evidence and argument presented [during quasi-judicial proceedings]." *Spiering v. Yamhill County, 25 Or LUBA 695, 702 (1993)*. A party alleging disqualifying bias must "show clearly that a public official is

[18]**

[*530] 4 To the extent petitioner makes this argument, we reject it. As the Mayor noted in his disclosure, the Mayor twice voted to approve the subdivision application, including approval of the initial tree plan, before learning from staff that discussions regarding donation of land had occurred. That alone belies the suggestion that the Mayor's vote on remand was improperly based on matters extraneous to the tree preservation criterion and evidence related to that criterion.

B. Conflict of Interest

Petitioner also argues that the Mayor has a direct or substantial financial interest in the decision, and therefore has a "conflict of interest" that bars the Mayor's participation in the decision, under CDC 18.390.050.D.7. [8] Petitioner apparently reasons as follows: (1) one of the goals of the city is to acquire open space, (2) city staff and intervenor have discussed donating open space to the city and such donation presumably will occur only if the application is approved; (3) city voters will be pleased if open space on the property is donated to the city, (4) if the city **[*531]** voters are pleased, then the Mayor will be re-elected in the next election, (5) if the Mayor is re-elected, he will **[**19]** retain the stipend and other emoluments he receives from the city. Therefore, petitioner concludes, the Mayor has a direct financial interest in the challenged decision, and is barred from participating in the PUD decision.

[20]**

5 The city responds, and we agree, that the link between the challenged decision, the potential donation of open space, and the Mayor's chances of re-election are too remote to result in a potential or actual financial conflict of interest. Even if it were clear that the Mayor's vote on this land use matter might affect his re-election, we do not believe the Mayor's desire to please the voters combined with receipt of a stipend for continued service as an elected official constitutes a potential or actual financial conflict of interest.

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incapable of making a decision on the basis of evidence and argument [in the record]." *Schneider v. Umatilla County, 13 Or LUBA 281, 284 (1985)*.

[8] CDC 18.390.050.D.7 provides, in relevant part:

> "Parties to a Type II Administrative Appeal hearing or Type III hearing are entitled to an impartial review authority as free from potential conflicts of interest and pre-hearing *ex parte* contacts as reasonably possible. It is recognized, however, that the public has a countervailing right of free access to public officials. Therefore:
>
> "* * * *
>
> b. Any member of the Review Authority shall not participate in any proceeding or action in which any of the following has a direct or substantial financial interest: The member or member's spouse, brother, sister, child, parent, father-in-law, mother-in-law, partner, any business in which the member is then serving or has served within the previous two years, or any business with which the member is negotiating for or has an arrangement or understanding concerning prospective partnership or employment. Any actual or potential interest shall be disclosed at the meeting of the Review Authority where the action is being taken[.]"

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues that the city committed procedural errors during the remand proceeding, and adopted inadequate findings.

A. Scope of Remand

First, petitioner argues that the city council failed to make an actual determination to limit the scope of the remand hearing to the issue of the 23 trees. According to petitioner, at the hearing the city attorney advised the city council that the scope of the hearing was so limited, but the city council never actually decided to limit the hearing to the issue remanded by LUBA. Petitioner speculates that the city attorney may have **[**21]** misled the city council into believing that it had no choice but to accept a limited scope of remand.

The city cites to a portion of the remand hearing minutes where the Mayor advised petitioner that the only issue before the city council was the 23 trees. Record 155. The city argues that the Mayor, acting as chair of the council, rules on procedural issues such as the scope of hearing, subject to reversal by the council. According to the city, the Mayor ruled **[*532]** that the scope of hearing was limited, and the council accepted that ruling. We agree with the city that the city council effectively limited the scope of hearing. Petitioner's speculation that the city council may have misunderstood its authority to determine the scope of remand does not provide a basis for reversal or remand.

B. Staff Report

Second, petitioner argues that CDC 18.390.050.C.2.h requires that the notice of hearing include a statement that the staff report will be available at least seven days before the hearing. [9] City staff provided a staff report seven days before the remand hearing on February 28, 2006, at the conclusion of which the city council closed the record, deliberated, reached a tentative decision, **[**22]** and continued the matter until March 28, 2006 for adoption of findings and the final decision. At the March 28, 2006 meeting, staff presented proposed findings and conditions, including findings that respond to issues raised by petitioner. The city council voted to adopt those findings in support of its final decision.

Petitioner argues that that the proposed findings and condition constitute a staff report or supplemental staff report, and that the city violated CDC 18.390.050.C.2.h by failing to make that report available to the public **[**23]** at least

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[9] CDC 18.390.050.C.2. implements ORS 197.763(3)(i) and provides, in relevant part:

> "Content of Notice. Notice of a Type II Administrative Appeal hearing or Type III hearing to be mailed, posted and published as provided in Subsection 1 above shall contain the following information:
>
> "* * * *
>
> "h. State that a copy of the staff report shall be available for inspection at no cost at least seven days prior to the hearing, and that a copy shall be provided at a reasonable cost[.]"

seven days prior to the March 28, 2006 meeting. Relatedly, petitioner argues that the city erred in refusing to allow petitioner an opportunity to review and comment on the proposed findings prior to adopting the final decision.

[*533] 6 The city responds, and we agree, that CDC 18.390.050.C.2.h is a notice provision that requires only that the notice include a statement that the staff report is available at least seven days prior to the "hearing." Petitioner does not explain why the March 28, 2006 meeting is a "hearing" or why CDC 18.390.050.C.2.h applies to it. Further, neither the code nor the statute it implements require the city to treat staff-generated proposed findings as a staff report or supplemental report and make those findings available to the public seven days prior to the meeting at which those findings are adopted as part of the final decision. Petitioner also cites no authority that requires the city to provide petitioner with an opportunity to review and comment on proposed findings prior to their adoption. *See* *Arlington Heights Homeowners v. City of Portland, 41 Or LUBA 560, 565 (2001)* (absent local provisions to the contrary, there **[**24]** is no right under Oregon law for opponents to review or rebut proposed findings prior to their adoption).

C. Petitioner's challenges to the findings

Finally, petitioner offers the following critiques of the findings and condition adopted on remand.

1. Condition Requiring Preservation of the 23 Trees

Petitioner contends that the condition "impermissibly waives the requirements" of the tree preservation requirements of the Tigard Code. Petition for Review 18. However, we cannot follow petitioner's argument. Petitioner complains that a "Tree Removal, Protection and Landscape Plan" dated November 19, 2004, fails to comply with various code requirements. Petitioner also complains that the revised tree plan does not identify all trees by species, and that the revised plan proposes to remove certain trees within the stream buffer zone at the west end of the property. What either plan has to do with the condition imposed on remand requiring preservation of the 23 trees, or with the 23 trees, or with any issue within the limited scope of remand, is not explained. Petitioner has not demonstrated any reversible error with respect to the condition requiring preservation of the 23 **[**25]** trees.

[*534] 2. City Forester Standards

Petitioner argued below that the city should impose new standards adopted by the city forester rather than the city's tree preservation regulations, or amend city regulations to incorporate and apply the new standards. The city adopted findings on remand rejecting this argument as being outside the scope of remand. Petitioner asserts on appeal that the city should adopt and apply the new city forester standards, but does not explain why, much less why the city erred in rejecting that issue as being outside the narrow scope of remand.

3. New Fencing

As noted earlier, the revised tree plan depicted a new line described as a "metal fence on steel posts." Petitioner asked the city below to require the applicant to confirm the purpose of that fence. The city's findings reject that

request as being outside the scope of remand. On appeal, petitioner argues that the purpose of the fence is not outside the scope of remand.

As discussed under the first assignment of error, the "metal fence on steel posts" apparently has only a tangential bearing, if any, on the issue of preserving the identified 23 trees. Because the fence was first depicted on the **[**26]** revised tree plan, it is at least arguable that petitioner was entitled to raise new issues regarding the fence. However, the only substantive issue petitioner raises regarding the fence we rejected under the first assignment of error. Under this sub-assignment of error, petitioner advances no cognizable issue other than to complain that the city erred in finding that the purpose of the fence is outside the scope of remand. While that finding may have been technically incorrect, petitioner does not explain why any error in adopting that finding warrants reversal or remand.

4. Ex Parte Contacts

Finding No. 15 responds to petitioner's concerns regarding *ex parte* contacts and states that city council members had declared that they had no contacts with the applicant, and the applicant had declared no contacts with city council members. Petitioner argues that this finding is incorrect and **[*535]** inadequate for reasons set out under the fourth assignment of error. However, we rejected the arguments under the fourth assignment of error, and petitioner's challenge to the city's findings regarding *ex parte* contacts provides no basis for reversal or remand.

5. City Manager Statements [27]**

Finding No. 16 recites that "[t]he City Manager stated that there have been discussions between staff and the applicant on this issue [donating land], but that no Council member was involved or informed of the discussions." Record 6. Petitioner complains that this finding inaccurately states what the city manager actually said at the March 28, 2006 meeting, and further that it conflicts with the statement of the Mayor, in which he indicates that he learned of the discussions through staff.

As quoted in the transcript attached to the petition for review, the city manager stated that "[w]e have referred this particular donation to our Parks and Recreation Advisory Board. No action has been taken [with respect to donation], the city has not taken title in any way whatever, nothing has come to the City Council." Appendix D-2. Petitioner is correct that the finding that no city council member has been "involved or informed of the discussions" is broader than the city manager's statement that "nothing has come to the City Council," and appears to be somewhat inconsistent with the Mayor's statement. However, petitioner does not explain why any inadequacy or inaccuracy in the city's finding **[**28]** that no city council member "was involved or informed of the discussions" warrants remand. We have already rejected petitioner's substantive arguments regarding *ex parte* contacts. Given that disposition, any mischaracterization of testimony or other inadequacy in the findings the city adopted to respond to petitioner's arguments regarding *ex parte* contacts is, at best, harmless error.

The fifth assignment of error is denied.

The city's decision is affirmed.

State of Oregon Land Use Board of Appeals

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User Name: Tom Cupani
Date and Time: Monday, January 24, 2022 4:31:00 PM PST
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Document (1)

1. *58 Or. LUBA 190*
   Client/Matter: -None-
   Search Terms: 58 Or LUBA 190
   Search Type: Natural Language

58 Or. LUBA 190; 2009 Ore. Land Use Bd. App. LEXIS 3

Oregon Land Use Board of Appeals

January 27, 2009

LUBA No. 2008-052

State of Oregon Land Use Board of Appeals

Reporter
58 Or. LUBA 190 *; 2009 Ore. Land Use Bd. App. LEXIS 3 **

COLUMBIA RIVERKEEPER, COLUMBIA RIVER BUSINESS ALLIANCE, OREGON CHAPTER SIERRA CLUB, COLUMBIA RIVER CLEAN ENERGY COALITION, JACK MARINCOVICH and PETER HUHTALA, Petitioners, and COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION and JOHN DUNZER, Intervenors-Petitioners, vs. CLATSOP COUNTY, Respondent, and NORTHERNSTAR ENERGY LLC and BRADWOOD LANDING LLC, Intervenors-Respondents

Prior History:

[1]** Appeal from Clatsop County.

Disposition: REMANDED

Core Terms

intervenor, site, dredge, assigned error, comprehensive plan, zone, was, zone change, terminal, new evidence, bridge, acre, has, staff, reply brief, compliance, transport, map, fill, cumulative impact, permit application, consolidate, notice, river, fish, evidentiary, traffic, ride, mitigate, bus

Synopsis

NATURE OF THE DECISION

Petitioners appeal a county decision approving comprehensive plan amendments, zone changes, and development approvals to allow a liquefied natural gas marine terminal, natural gas pipeline, and related facilities.

Counsel

[2]**

Jannett Wilson, Eugene and Brett VandenHeuvel, Hood River, filed a petition for review and argued on behalf of petitioners. With them on the brief was Goal One Coalition.

Julie A. Carter, Portland, filed a petition for review and argued on behalf of intervenor-petitioner Columbia River Inter-Tribal Fish Commission.

John Dunzer, Seaside, filed a petition for review and argued on his own behalf.

E. Andrew Jordan, Portland, filed a joint response brief on behalf of respondent. With him on the brief were Jordan Schrader Ramis PC, Michelle Rudd, Elaine Albrich, Sarah Stauffer Curtiss, Stoel Rives LLP, Edward J. Sullivan, Carrie A. Richter and Garvey Schubert Barer PC.

Michelle Rudd, Portland, filed a joint response brief and argued on behalf of intervenor-respondent NorthernStar Energy LLC. With her on the brief were Elaine Albrich, Sarah Stauffer Curtiss, Stoel Rives LLP, E. Andrew Jordan and Jordan Schrader Ramis PC.

Edward J. Sullivan, Portland, filed a joint response brief and argued on behalf of intervenor-respondent Bradwood Landing LLC. With them on the brief were Carrie A. Richter, Garvey Schubert Barer PC, E. Andrew Jordan and Jordan Schrader Ramis PC.

Panel: BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision; RYAN, Board Member, did not participate in the decision

Opinion By: BASSHAM

Opinion

[*192] FINAL OPINION AND ORDER

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

FACTS

Intervenors-respondents (intervenors) propose to develop a liquefied natural gas (LNG) marine terminal, natural gas pipeline, and related facilities at Bradwood Landing on the Columbia River. The proposed site is located approximately 20 miles east of the City of Astoria at the former mill site and company town of Bradwood. The subject property consists of nine parcels totaling 411 acres with over a mile of frontage on the Columbia River. The subject property has upland forested areas and lowlands consisting mostly of estuarine shore lands and wetlands that adjoin the Columbia River where the proposed terminal would be

located. The only structures **[**3]** currently on the property are an abandoned pole barn and a small concrete building.

[*193] The proposed terminal site is 38 river miles from the Pacific Ocean and lies at the junction of the main channel of the Columbia River and Clifton Channel, a large side channel navigable by small watercraft. The proposal calls for large, ocean-going vessels to transport LNG to the terminal, where the LNG will be temporarily stored and then re-gasified before being sent out by pipeline. The proposed underground pipeline would extend south and east from the terminal for 36 miles and thence under the Columbia River to connect with an interstate natural gas pipeline near Longview, Washington. The first six miles of underground pipeline would be in Clatsop County.

The proposed development involves a variety of land uses and activities and the county's decision includes numerous comprehensive plan amendments, zone changes, and development approvals that include: a bridge replacement, concrete batch plants, a construction worker park-and-ride facility, dredging of the Columbia River and disposal of the dredged materials, power lines, in-water facilities, storage and staging areas, LNG storage tanks and gasification **[**4]** plant, underground pipeline, railroad realignment, and road improvements.

The county planning commission recommended approval of the consolidated applications for land use approvals and permits over petitioners' and intervenors-petitioners' objections. The board of county commissioners subsequently approved the various applications for the proposal. This appeal followed.

MOTION TO STRIKE

Intervenors move to strike Appendix D from petitioners' petition for review. Appendix D is a letter to the Federal Energy Regulatory Commission (FERC) from the Columbia River Estuary Study Taskforce (CREST) regarding the draft environmental impact statement review for the proposed development. Petitioners cite Appendix D as evidentiary support for one of their assignments of error.

Petitioners request that we take official notice of Appendix D. LUBA may take judicial notice of "[p]ublic and private official acts of the legislative, executive and judicial departments of this state * * *." OEC 40.090(2). Petitioners contend that CREST is a consultant of the board of county commissioners, and therefore the letter is an "official publication" of the county. However, even if petitioners were correct **[**5]** that a letter from CREST could be considered an "official act" of the county, LUBA does not take judicial notice of documents that are otherwise subject to official notice, if cited for their evidentiary value. *Friends of Deschutes County v. Deschutes County, 49 Or LUBA 100, 103 (2005)*. The portion of CREST letter that petitioners seek to rely on, that "the scale of this project is unprecedented in the Lower Columbia" is cited for its evidentiary value with respect to a disputed factual issue in this appeal, and therefore petitioners' request that we take official notice of that document is denied.

Intervenors' motion to strike Appendix D to petitioners' petition for review is granted.

MOTION TO FILE REPLY BRIEF

Petitioners and intervenor-petitioners move to file a reply brief. Intervenors object to the motion on the grounds that it was not filed "as soon as possible after respondent's brief is filed" and that the reply brief is not "confined solely to new matters raised in the respondent's brief."

LUBA will deny permission to file a reply brief that is not filed "as soon as possible" after the response briefs only if a respondent's substantial **[**6]** rights are prejudiced. *Shaffer v. City of Salem, 29 Or LUBA 592, 593-94 (1995)*. Where respondents do not have adequate time to review the brief and prepare a response for oral argument, their substantial rights are prejudiced, and a request to file a reply brief will be denied. *Sequoia Park Condo. Assoc. v. City of Beaverton, 36 Or LUBA 317, 322*, *aff'd 163 Or App 592, 988 P2d 422 (1999)*. Whether respondents have adequate time to respond to the motion and prepare for oral argument depends on the length of the reply brief and the timing of oral argument. *Id*.

The two response briefs were filed by first class mail on November 3 and 4, 2008, and presumably were received by petitioners two or three days later. The reply brief was filed by first class mail on Friday, November 14, 2008. Although it might have been prudent to do so, petitioners did not send respondents a copy of the proposed reply brief by electronic mail or facsimile on the date it was mailed. Intervenors (and LUBA) did not receive the reply brief until Monday, November 17, 2008. Oral argument was held on Thursday, **[**7]** November 20, 2008. Although it is a close question, we do not agree with intervenors that the reply brief was not filed "as soon as possible." Even if the reply brief was not filed as soon as possible, intervenors had three days prior to oral argument to read and prepare responses to a six-page reply brief. Intervenors have not demonstrated that any delay in filing the reply brief prejudiced their substantial rights. We therefore will not strike the reply brief as untimely filed.

[*195] Intervenors also move to strike the reply brief because it is not "confined solely to new matters raised in the respondent's brief." "New matters" warranting a reply brief tend to be "arguments that assignments of error should fail regardless of their stated merits, based on facts or authority not involved in those assignments." *Cove at Brookings Homeowners Assoc. v. City of Brookings, 47 Or LUBA 1, 4 (2004)*; *D.S. Parklane v. Metro, 35 Or LUBA 516, 527-28 (1999)*, *aff'd 165 Or App 1, 994 P2d 1205 (2000)*. Sections A through G of the reply brief respond to seven alleged "new matters," including arguments **[**8]** in the response briefs that petitioners have waived certain issues. In our view, most of the arguments in sections A through G of the reply brief appropriately respond to new matters raised in the response briefs. We see little point in attempting to tease apart the few inappropriate arguments from the appropriate portions of the reply brief.

Section H of the reply brief is not a response to a "new matter," but actually a motion to strike (or request that LUBA disregard) various statements in intervenors' summary of material facts that petitioner contends are not supported by the record. We will consider Section H as a motion filed under OAR 661-010-0065, and disregard any factual allegation in the response brief (or any brief for that matter) that is not supported by the record.

The reply brief is allowed.

MOTION TO TAKE OFFICIAL NOTICE

Intervenors move LUBA to take official notice of various provisions of Clatsop County ordinances and plans. There is no objection to the motion, and it is granted.

FIRST ASSIGNMENT OF ERROR (CRITFC) [1]

[1] We follow the parties in using the acronym "CRITFC" for intervenor-petitioner Columbia River Inter-Tribal Fish Commission. In addition, we first address CRITFC's assignments of error rather than petitioners', because CRITFC's first two assignments of error allege that the county committed various procedural errors. Generally, LUBA addresses procedural assignments of error before substantive assignments of

[9]**

CRITFC argues that the county committed a procedural error that violated its substantial rights by allowing intervenors the unilateral right to submit new evidence after the public hearing had been closed. According **[*196]** to CRITFC, the county should have allowed CRITFC to respond to intervenors' new evidence, and the county's denial of that opportunity prejudiced its substantial rights. [2]

CRITFC's argument is based on ORS 197.763(6), which sets out minimum requirements for proceedings following the initial evidentiary hearing. [3] In particular, CRITFC relies on ORS 197.763(6)(c), which provides that where the local government leaves the record open for **[*197]** additional written evidence, arguments **[**10]** or testimony, any participant may request in writing an opportunity to respond to that any new evidence submitted during the period the record is open. If such a request is made, the local government must reopen the record pursuant to ORS 197.763(7). [4]

[11]**

The board of county commissioners held a public hearing on October 22, 2007, and continued that hearing to November 19, 2007. At the conclusion of the November 19, 2007 hearing, the county established a post-hearing schedule that allowed all parties the opportunity to submit additional evidence on or before November 26, 2007. The county allowed intervenors--and only intervenors--an additional seven days,

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error, because, if sustained, procedural assignments of error often require remand for additional evidentiary proceedings and adoption of new or amended findings.

[2] Intervenors argue that CRITFC waived this argument because it did not object below to the procedure followed by the county. Although CRITFC did not object, other participants did, and that was sufficient to preserve the issue on appeal to *LUBA. Spiering v. Yamhill County, 25 Or LUBA 695, 714-15 (1993)*.

[3] ORS 197.763(6) provides:

> "(a) Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection or leaving the record open for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection.
>
> "(b) If the hearings authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence, arguments or testimony. If new written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence, arguments or testimony for the purpose of responding to the new written evidence.
>
> "(c) If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section.
>
> "* * * *
>
> "(e) Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant's final submittal shall be considered part of the record, but shall not include any new evidence. This sevenday period shall not be subject to the limitations of ORS 215.427 or 227.178 and ORS 215.429 or 227.179."

[4] ORS 197.763(7) provides:

> "When a local governing body, planning commission, hearings body or hearings officer reopens a record to admit new evidence, arguments or testimony, any person may raise new issues which relate to the new evidence, arguments, testimony or criteria for decision-making which apply to the matter at issue."

until December 3, 2007, to submit evidence to rebut the evidence submitted by November 26, 2007. Several parties objected to limiting the opportunity to submit rebuttal evidence to intervenors. On December 3, 2007, intervenors submitted several documents that petitioners allege included new evidence: a letter from intervenors' attorney, and a letter from intervenors' **[**12]** senior vice president, attached to which was an e-mail from a representative from NW Natural Gas and a letter from the Director of the Oregon Department of Energy. The county rejected petitioners' request to re-open the record to allow petitioners an opportunity to respond to the alleged new evidence submitted on December 3, 2007. The county concluded that intervenors' December 3, 2007 submittals did not include any new evidence, and appear to have treated the December 3, 2007 submittals as the applicant's final written argument, for purposes of ORS 197.763(6)(e).

Petitioners argue that the county erred in concluding that the December 3, 2007 submittal included no new evidence, and therefore the county erred in accepting the submittals without offering petitioners an opportunity to respond to that new evidence. If the December 3, 2007 submittal is considered final written argument under ORS 197.763(6)(e), petitioners contend, it is clear that submitting new evidence as part of the applicant's final written argument violates ORS 197.763(6)(e). If the December 3, 2007 submittal is instead a continuation of the evidentiary open record period (a record erroneously left open only to intervenors), **[**13]** petitioners argue that ORS 197.763(6)(c) requires the county to re-open the record on receipt of a written request by any participant, to allow an **[*198]** opportunity to respond to new evidence submitted during the open-record period.

Intervenors respond, initially, that the county's proceedings were not governed by ORS 197.763(6)(c), and that the statute's directive to reopen the record in any event does not provide endless opportunities for evidentiary rebuttal and surrebuttal. Although not entirely clear, we do not believe any party disputes that the October 22, 2007 hearing was the "initial evidentiary hearing" for purposes of ORS 197.763(6)(a). The county continued that hearing to November 19, 2007, presumably pursuant to ORS 197.763(6)(b). *See Wetherell v. Douglas County*, __ Or LUBA __ (LUBA No. 2007-133, February 12, 2008) (discussing relationship between ORS 197.763(6)(a), (b) and (c)). At the November 19, 2007 hearing, presumably in response to requests from the parties, the county chose to keep the evidentiary record open to all participants for seven days, apparently pursuant to ORS 197.763(6)(c). The county also allowed "rebuttal by applicant until December 3, 2007." **[**14]** Record 25. It is not clear from the county's decision or the record whether (1) the county intended that the applicant have until December 3, 2007, to provide final written argument pursuant to ORS 197.763(6)(e), or (2) the county intended to re-open the record to allow intervenors the opportunity to submit evidentiary rebuttal, as contemplated by the second sentence of ORS 197.763(6)(c) and 197.763(7), followed by a subsequent opportunity for final written argument, or (3) the county was pursuing some third option not contemplated by the statute at all. Because the county's decision appears to treat the December 3, 2007 submittal as the applicant's final written argument under ORS 197.763(6)(e), and intervenors did not subsequently attempt to submit a final written argument, the most reasonable conclusion is that both the county and intervenors intended the December 3, 2007 submittal to be the applicant's final written argument, not a separate evidentiary submittal. [5]

[15]**

[5] The December 3, 2007 letter from intervenors' attorney is labeled "Legal Argument and Commentary on Evidence" and states that "[w]e do not submit any new evidence in this letter[.]" Record 1651. Similarly, the December 3, 2007 letter from intervenor Bradwood's senior vice president claims that it "does not include any evidence that is not already contained in the record of these proceedings." Record 1675.

As petitioners note, ORS 197.763(6)(e) clearly prohibits including any "new evidence" as part of the applicant's final written argument. Intervenors dispute that the December 3, 2007 submittals included any "new evidence" within the meaning of ORS 197.763(6)(e). According to intervenors, all of the factual statements in the three documents submitted on December 3, 2007, are reiterations of evidence already in the record. In **[*199]** the alternative, intervenors argue that, to the extent any new facts or evidence not already in the record was inadvertently included in the December 3, 2007 submittal, petitioners have not demonstrated that any new evidence relates to any applicable approval criteria, or that the county relied upon any such new evidence to determine whether applicable approval criteria are met.

We agree with intervenors that petitioners have not established that any of the statements in the documents submitted on December 3, 2007 constitutes "new evidence" for purposes of ORS 197.763(6)(e). In addition, to the extent any factual statements might constitute evidence not already in the record, petitioners have not demonstrated that such statements relate to any applicable approval **[**16]** criteria or that the county relied upon such statements to determine whether applicable approval criteria are met. Rather than address each of the parties' contentions regarding factual statements in the December 3, 2007 documents, we focus on what appears to be petitioners' strongest and most developed argument that the county accepted new evidence after the close of the record, on which it relied to determine compliance with applicable approval criteria.

As discussed under CRITFC's third assignment of error, an applicable comprehensive plan policy requires a finding that proposed use of coastal shorelands satisfies a need that cannot be accommodated on shorelands in urban and urbanizable areas. The debate below regarding this plan policy centered on the suitability of a site within the City of Warrenton that has been planned and zoned for a similar LNG terminal proposed by one of intervenors' competitors. The December 3, 2007 letter from intervenors' attorney includes several responses to arguments below that the existence of that alternative urban site means that the Bradwood Landing site is not needed to satisfy any need for an LNG terminal. Intervenors' attorney asserted that **[**17]** the proposed LNG terminal in the City of Warrenton could not serve certain local markets, had not received all required permits, and faced various environmental challenges. Record 1658, n 2. In the county's final decision, it recited those statements, in partial support for its conclusion that the proposed LNG terminal at the Bradwood Landing site satisfies a need that cannot be satisfied on urban shorelands. Record 141, 306-07. Petitioners contend that the statements in the December 3, 2007 letter constitute "new evidence," and the county erred in relying on that new evidence to find compliance with applicable approval criteria.

Intervenors respond that the disputed statements regarding the City of Warrenton site in the December 3, 2007 letter are not "new evidence," but simply recitations of testimony already in the record. **[*200]** Record 3089, 3419-20. Intervenors are correct. Similarly, CRITFC's remaining arguments under this assignment of error do not establish a basis for reversal or remand.

CRITFC's first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR (CRITFC)

CRITFC contends that the county erred in allowing intervenors to submit new evidence and argument to the county **[**18]** in the course of submitting and resolving disputes over the proposed findings and conditions of approval.

On December 13, 2007, the county tentatively approved the consolidated applications and requested that intervenors draft proposed findings for the county's consideration. On February 5, 2008, intervenors submitted proposed findings for the county's consideration. On February 27, 2008, county staff submitted a 23-page memorandum to the board of commissioners, taking issue with several proposed findings and conditions of approval, and recommending modifications. On March 4, 2008, intervenors submitted to staff a 31-page response, along with revised proposed findings. On March 5, 2008, county staff prepared a four-page memorandum to the board of commissioners commenting on intervenors' response to the earlier staff memorandum.

On March 5, 2008, the board of county commissioners held a meeting at which staff testified regarding the outstanding issues between staff and intervenors regarding the findings and conditions. On March 14, 2008, intervenors submitted to staff more revised findings and a six-page document titled "Supplemental Safety Condition." On March 17, 2008, county staff **[**19]** submitted a memorandum to the board of commissioners commenting on the revised findings and proposing certain modifications.

Finally, at the March 20, 2008 hearing, the board of county commissioners conducted a meeting to consider the revised findings. Several parties objected to the county's consideration of the additional documents from intervenors and staff, intervenors submitted a letter responding to procedural objections, and the board of county commissioners eventually rejected the procedural objections and adopted the revised findings in support of the challenged decision.

CRITFC acknowledges that local governments may solicit proposed findings from the parties to be used in the local government's decision. *Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 21, 569 P2d 1063 (1977)*. Furthermore, staff advice regarding differing conclusions that a final decision maker could draw from the evidence in the record is also permissible. *Gooley v. City of Mt. Angel*, __ Or LUBA __ (LUBA No. 2007-206, March 18, 2008). However, CRITFC argues that the county went beyond these allowable practices by accepting new testimony **[**20]** and evidence that the county improperly relied upon in making the challenged decision. According to CRITFC, the county committed procedural error that prejudiced its substantial rights by allowing intervenors to submit new evidence and argument after the record had been closed, without allowing CRITFC an opportunity to respond to the new evidence.

CRITFC's procedural arguments are based on ORS 197.763(6) and cases applying that statute. However, nothing cited to us in ORS 197.763(6) governs submissions of proposed findings or other communications with the decision maker regarding findings during the period between the oral tentative decision and issuance of the final written decision. Certainly nothing cited to us in the statute or cases interpreting the statute requires that the local government re-open the evidentiary hearing to allow all participants an opportunity to respond to proposed findings or supporting arguments submitted by the prevailing applicant. The statute is simply silent on that point.

It is noteworthy, however, that ORS 197.763(6)(e) permits the applicant and the applicant alone to submit final written argument. That final written argument certainly could and often **[**21]** does include proposed findings and conditions, and arguments in support thereof. By extension, it also seems consistent with the statutory scheme to allow the applicant to submit *revised* findings or conditions and arguments in favor of those revised findings or conditions, *after* the final decision maker's oral decision, in circumstances where planning staff has objected to some findings or conditions, and proposed modified or alternative findings and conditions. At that point in the process, the final decision maker has already made

the critical decision that the application complies with applicable approval criteria, and the only remaining task is to adopt findings expressing the final decision maker's precise rationale for that conclusion, and conditions of approval that the final decision maker deems necessary. We do not see that the statute is offended by allowing the applicant and planning staff to exchange views on how to resolve their differences regarding findings and conditions of approval, or by allowing the applicant to submit revised findings and conditions in response to that exchange of views. That planning staff subsequently presents such revised findings and **[**22]** conditions to the final decision maker, along with a staff recommendation informed by the exchange of views between staff and the applicant, does not violate any statutory provision cited to us.

[*202] That said, we agree with CRITFC that proposed or revised findings and any supporting argument submitted after the close of the evidentiary record must not include any new evidence, at least no new evidence that the decision maker relies on to demonstrate compliance with an approval criterion. It would clearly be reversible error for the final decision maker to rely upon any new evidence submitted after the close of the evidentiary record to conclude that the application satisfies or does not satisfy applicable approval criteria. *Brome v. City of Corvallis, 36 Or LUBA 225, 232-233 (1999)*, *aff'd sub nom Schwerdt v. City of Corvallis, 163 Or App 211, 987 P2d 1243 (1999)*.

With that framework in mind, we turn to CRITFC's specific arguments that intervenors' post-decision submittals included new evidence that the county relied upon. CRITFC cites to a number of responses that intervenors submitted to planning staff, in an **[**23]** effort to resolve disagreements between staff and intervenors regarding specific proposed findings or conditions, and argues that those responses include new argument and evidence. The responses clearly include argument, but it is much less clear that they include any new evidence. To the extent that they do, CRITFC makes no effort to demonstrate that the county relied upon any new evidence in those responses to conclude that any applicable approval criteria are met.

As one example of alleged new evidence, CRITFC cites to a table intervenors prepared that lists in one column the staff comment on the original proposed findings and in an adjoining column intervenors' response. The table at Record 877 includes a staff comment on proposed condition 2, noting that staff had originally recommended a condition of approval requiring a flagger for controlling traffic at a narrow point on the road to the proposed park and ride, but that intervenors instead proposed a condition that the road simply be widened. Staff commented that it had no objection to widening the road instead of using a flagger, but that the board of commissioners should decide. The table at Record 877 also lists intervenors' **[**24]** response, which agrees that board action is required and notes that "Bradwood Landing discussed with staff allowing either use of a flagger or widening the road as opposed to providing only for a flagger." *Id*. CRITFC argues that that response constitutes "new evidence," because it suggests modifying condition 2 to allow intervenors the option of either widening the road or using flaggers. However, that response appears to us to be an argument regarding what condition 2 should require, and not "evidence" at all. To the extent it is evidence, CRITFC makes no attempt to demonstrate that it is "new evidence" that the county relied upon to determine compliance with an applicable approval criterion. The rest of **[*203]** CRITFC's arguments under this assignment of error also demonstrate no basis for reversal or remand.

CRITFC's second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR (CRITFC)

Northeast Community Plan Policy (5)(e), an element of the Clatsop County Comprehensive Plan (CCCP), provides in relevant part:

> "Coastal shoreland in areas outside of urban or urbanizable areas shall only be used as appropriate for * * * [w]ater-dependant commercial and industrial uses and **[**25]** water-related uses only upon a finding by the governing body of the County that such uses satisfy a need which cannot be accommodated on shorelands in urban and urbanizable areas."

CRITFC argues that the county erred in finding that the proposal complies with Policy (5)(e), given that there are urban lands within the county that are planned and zoned to allow for an LNG terminal. *See People for Responsible Prosperity v. City of Warrenton, 52 Or LUBA 181 (2006)* (affirming a city decision approving comprehensive plan and zoning amendments to allow an LNG terminal similar to that proposed in the present case). The county rejected that argument below, finding that (1) the proposed Bradwood Landing LNG terminal satisfied a site-specific "need" to redesignate and rezone a small portion of the Bradwood Landing site, (2) the Bradwood Landing project satisfied the "need" to fund infrastructure improvements to Clifton Road, (3) there is insufficient evidence that the City of Warrenton site is a viable location for an LNG terminal, and (4) in any case, there is a need for additional sources of natural gas in the region, and it is not clear that the LNG terminal **[**26]** proposed within at the City of Warrenton site can serve certain regional markets. Record 140-142, n 88. CRITFC challenges each of these conclusions.

We tend to agree with CRITFC that the first two reasons, identifying a "need" to rezone part of the Bradwood Landing site and a "need" to obtain funding to improve Clifton Road, are specious reasons for concluding that Policy 5(e) is met. Policy 5(e) is clearly focused on the need for the proposed "use," here, an LNG terminal, not rezoning needed to accommodate that use or public infrastructure needed to support the use. Under Policy 5(e), the question is whether the proposed use of rural coastal shoreland satisfies a need that can be accommodated on coastal shoreland sites on urban or urbanizable lands.

The county comes closer in finding that there is a regional need for additional sources of natural gas, and in its alternative findings there is **[*204]** insufficient evidence that the City of Warrenton site is a viable location for an LNG terminal, or that a terminal at that site can serve all local markets. We understand the county to have found that even if a LNG terminal is built at the City of Warrenton site, there will be an unmet regional **[**27]** need for additional sources of natural gas, and thus that need cannot be accommodated by relying solely on the Warrenton site, whether it is viable or not. CRITFC does not challenge that finding of unmet regional need, and instead focuses its argument on the evidence supporting the findings regarding the viability of the Warrenton site and whether a terminal at that site can serve all local markets. However, the finding that there is a regional need for LNG that cannot be met even if a competing LNG terminal is built at the Warrenton site seems a sufficient basis for concluding that Policy 5(e) is met. In addition, other than questioning the sufficiency of the testimony the county relied upon, CRITFC has not demonstrated that the county's alternative findings--regarding the viability of the Warrenton site and whether it can serve all local markets--are not supported by substantial evidence. While the testimony the county cites is not overwhelming, CRITFC cites to no countervailing evidence.

CRITFC's third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR (CRITFC)

The proposed development consists of numerous individual applications that were consolidated for review of **[**28]** the entire proposed development. As part of the overall LNG terminal project, intervenors propose to dredge in the Columbia River to provide a turning basin for large container ships. The portion of the river where intervenors plan to dredge currently has a comprehensive plan designation of Conservation and is zoned Aquatic Conservation-2 (AC-2). The AC-2 zone does not list dredging as a permitted or conditional use. In order to allow dredging, intervenors also applied for, and the county approved, a comprehensive plan amendment to redesignate the proposed dredging area to Development and change the zoning to the corresponding zone Aquatic Development (AD). The AD zone allows dredging as a permitted use.

The so-called "goal-post rule" at ORS 215.427(3)(a) provides in relevant part that:

> "If * * * the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application **[*205]** shall be based upon the standards and criteria that were applicable at the time the application was first submitted." [6]

[29]**

CRITFC argues that under ORS 215.427(3)(a), the proposed dredging in the area redesignated to Development and rezoned to AD must **[*206]** be reviewed under the "standards and criteria" applicable at the time the consolidated applications were deemed complete. According to CRITFC, the "standards and criteria" that were in effect on the date the applications were complete include the pre-existing Conservation plan designation, which CRITFC contends does not authorize dredging. Therefore, CRITFC argues, the county erred in approving the proposed dredging in the areas redesignated Development and

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[6] We set out the complete text of ORS 215.427(3)(a), and some of its immediate context, below:

> "(1) [F]or land within an urban growth boundary and applications for mineral aggregate extraction, the governing body of a county or its designee shall take final action on an application for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 120 days after the application is deemed complete. The governing body of a county or its designee shall take final action on all other applications for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 150 days after the application is deemed complete * * *.
>
> "* * * *
>
> " (3)(a) If the application was complete when first submitted or the applicant submits additional information, as described in subsection (2) of this section, within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted.
>
> "(b) If the application is for industrial or traded sector development of a site identified under section 12, chapter 800, Oregon Laws 2003, and proposes an amendment to the comprehensive plan, approval or denial of the application must be based upon the standards and criteria that were applicable at the time the application was first submitted, provided the application complies with paragraph (a) of this subsection.
>
> "* * * *
>
> "(7) [T]he period set in subsection (1) of this section does not apply to an amendment to an acknowledged comprehensive plan or land use regulation or adoption of a new land use regulation that was forwarded to the Director of the Department of Land Conservation and Development under ORS 197.610 (1).
>
> "* * * *
>
> "(9) A county may not compel an applicant to waive the period set in subsection (1) of this section * * * as a condition for taking any action on an application for a permit, limited land use decision or zone change except when such applications are filed concurrently and considered jointly with a plan amendment."

rezoned AD, because dredging is inconsistent with the Conservation plan designation. We understand CRITFC to argue that, under the present circumstances, the applicant must first obtain a comprehensive plan amendment (and a concurrent zone change, if necessary to avoid a plan/zone conflict). Only when those decisions are final and effective, can the applicant file permit applications for development consistent with the new comprehensive plan map designation.

Intervenors respond that the effect of the goal-post rule is modified where the applicant files a consolidated set of zoning change and permit applications **[**30]** to authorize a use that is not allowed under the existing zoning designation, but is allowed under the proposed zone. Intervenors rely on ORS 215.416(2), which requires counties to "establish a consolidated procedure by which an applicant may apply at one time for all permits or zone changes needed for a development project." When such consolidated applications are filed, intervenors argue that, notwithstanding the goal post rule, the "standards and criteria" that apply to the proposed development are supplied by the *proposed* new zoning designation, not the zoning designation that existed on the date the applications were filed. *See* *NE Medford Neighborhood Coalition v. City of Medford, 53 Or LUBA 277, 282*, *aff'd* *214 Or App 46, 162 P3d 1059 (2007)* (under ORS 215.416(2), a permit application is judged by the standards and criteria applicable under the proposed new zone, not the preexisting zone, even if the zone change application was not filed on the same date as the permit application and was only later consolidated with the permit application).

Based on that premise, we understand intervenors to argue **[**31]** that when a proposed development and zone change requires a concurrent comprehensive plan map amendment, and the applicant files a consolidated set of applications for comprehensive plan map amendment, zone change, and permit approval, such consolidated applications fall within the implied ORS 215.416(2) exception to the goal post rule at ORS 215.427(3)(a). Where such consolidated applications are filed, intervenors argue, the goal post rule does not require that the permit application be evaluated against the comprehensive plan map designation in effect on the date the consolidated applications are filed, just as the goal post rule does not **[*207]** require that the permit application be reviewed against the zoning standards that applied on the date the consolidated applications for permit approval and a zone change are filed.

We agree with intervenors, although for a somewhat different reason. The statutory scheme in which the goal post rule is embedded distinguishes between permits, zone changes and comprehensive plan amendments. Plan amendments, for example, are not subject to timelines that otherwise govern applications for permits or zone changes. ORS 215.427(7). Although the goal post **[**32]** rule at ORS 215.427(3)(a) uses the term "application," the statutory context makes it clear that the goal post rule applies only to "applications for a permit, limited land use decision or zone change." *Rutigliano v. Jackson County, 42 Or LUBA 565, 571 (2002)*. The statutory scheme is largely silent, however, on whether and how the goal post rule at ORS 215.427(3)(a) applies to permit and zone map change applications that are filed contemporaneously with, and dependent upon, comprehensive plan map amendments. [7]

[7] The statute is not entirely silent. In 2003, the legislature amended ORS 215.427(3) to add subsection (b), which as noted above provides that where an application for industrial or traded sector development on certain identified sites is combined with a comprehensive plan amendment, "approval or denial of the application must be based upon the standards and criteria that were applicable at the time the application was first submitted." Although the intent and effect of ORS 215.427(3)(b) is not entirely clear to us, by specifying that the goal post rule applies in certain circumstances where proposed development is combined with a proposed comprehensive plan amendment, the statute suggests that in other circumstances not governed by ORS 215.427(3)(b) the effect of combining a development application with a comprehensive plan amendment is that the goal post rule does *not* apply to that proposed development.

[33]**

In *Rutigliano*, we held that an application to amend the county's unified comprehensive plan and zoning map is not an application for a permit or a zone change for purposes of the goal post rule. *Id. at 575*. In other words, we held in that case the county was required to apply to that map amendment applicable standards and criteria in effect on the date of the decision, and could not apply superseded standards and criteria in effect when the map amendment application was filed.

In *Friends of the Applegate v. Josephine County, 44 Or LUBA 786, 790 (2003)*, we extended the reasoning in *Rutigliano* to circumstances where the county has a separate comprehensive plan map and zoning map. We held that the goal post rule does not apply to a zoning map amendment application that is filed contemporaneously with a comprehensive plan map amendment, where the zoning map amendment is dependent on the **[*208]** plan map amendment. [8] In that circumstance, the standards and criteria that apply to the zoning map amendment are those that are otherwise applicable at the time the county makes its decision, and the goal post statute does not operate **[**34]** to "freeze" the standards and criteria for zone changes that were in effect on the date the applications were filed.

In the present case, it requires only **[**35]** a short extension of the reasoning in *Friends of the Applegate* to conclude that, where the applicant files and the county approves a consolidated set of applications for (1) a comprehensive plan map amendment, (2) a zone change that is dependent on that plan map amendment, and (3) a development permit that is dependent on that zone change, the goal post rule at ORS 215.427(3)(a) does not apply to "freeze" in place the standards and criteria that applied to that development permit as of the date the applications were filed. In that circumstance, all three sets of applications are evaluated under the standards and criteria that are applicable at the time the county makes its decision. That is, for the permit application, the governing standards and criteria are those supplied by the new zoning designation, not the old zoning designation. Similarly, it is irrelevant that the old comprehensive plan designation in effect on the date the consolidated applications were filed does not authorize the proposed development activity allowed under the permit. That old comprehensive plan designation is not part of "standards and criteria" that apply to that permit application.

Consequently, **[**36]** we reject CRITFC's argument that the county must deny the proposed dredging permit because it is inconsistent with the Conservation plan map designation that was in effect on the date the consolidated applications were filed.

CRITFC's fourth assignment of error is denied.

[*209] FIFTH ASSIGNMENT OF ERROR (CRITFC)

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[8] We stated in *Friends of the Applegate*:

> "* * * [A]s the concurring opinion in *Rutigliano* pointed out, our reasoning in that case logically applies equally to cases where 'the plan amendment is necessary to effect the zone change.' *42 Or LUBA at 578* (Board Member Bassham concurring). That is the situation that we have here. We conclude that the fixed goal post rule established by ORS 215.427(3) does not apply to an application for a zone change where (1) that application for a zone change is part of, or submitted contemporaneously with, an application for a comprehensive plan amendment, and (2) the zone change is requested to implement the requested comprehensive plan amendment rather than as a separate request that could be approved independently of the requested comprehensive plan map amendment request." (Footnote omitted.)

The site of the proposed LNG terminal is accessed from Clifton Road via Bradwood Road, a private road that includes a bridge crossing of Hunt Creek. As part of the consolidated applications, the county approved replacing the existing Hunt Creek Bridge with a new bridge that will be able to sustain the heavier vehicles and more frequent trips anticipated by the development. The current bridge span rests on pilings in the creek, while the replacement bridge will have a "clear span" that reaches across the creek. CRITFC argues that the county improperly approved the replacement bridge.

Clatsop County Land and Water Development and Use Ordinance (LWDUO) 3.035(1) provides with respect to each of the applicable zones:

> "Except where otherwise specifically regulated by this ordinance, the following improvements are permitted outright uses and activities:
>
> "(A) Normal operation, maintenance, **[**37]** repair, and preservation activities of existing transportation facilities."

The county found that the proposed bridge was allowed as "maintenance and repair of an existing transportation facility." LWDUO 1.030 defines "maintenance and repair" as:

> "Routine upkeep of an existing structure or remedial restoration of a damaged structure in current use or operation. Maintenance and repair may involve changes in the structure's location, configuration, orientation, or alignment if these changes are limited to the minimum amount necessary to retain or restore its operation or function to meet current building, engineering or safety standards."

In addition to LWDUO 3.035, the county also relied on County Road Standard S4.210(2) which provides that maintenance and replacement of bridges are permitted, and any increased width is necessary to meet current safety and engineering standards. [9]

[38]**

[*210] CRITFC argues first that "maintenance and repair" of a bridge does not include complete replacement of that bridge. CRITFC contends that while LWDUO 3.035 would permit intervenors to repair the existing bridge, it does not authorize construction of an entirely new bridge.

LWDUO 1.030 defines "maintenance and repair" to include changes in the structure's "location, configuration, orientation, or alignment," under certain circumstances, which does not suggest that "maintenance and repair" is limited to repairing an existing structure. Changing the "location" or "alignment" of a structure like a bridge would in most cases entail a new structure at a new location. In addition, LWDUO 3.035 must be read in context with S4.210(2), which clearly provides that bridge replacement is a permitted use in all zones. The county was within its discretion under ORS 197.829(1) to interpret "maintenance and repair" to authorize replacing a deteriorating bridge with a new bridge.

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[9] S4.210(2) provides:

> "Maintenance and repair of roads and railroads and maintenance and replacement of bridges shall be permitted regardless of the plan designation through which the road or railroad passes, provided:
>
> "(A) The same alignment is maintained; and
>
> "(B) The same width is maintained, except that necessary enlargements to meet current safety and engineering standards may be permitted; and
>
> "(C) The number of travel lanes is not increased."

CRITFC next challenges the county's finding that bridge replacement is necessary to meet current building, engineering or safety standards. According to CRITFC, the county's finding is not supported by substantial evidence, **[**39]** and therefore the county erred in finding that the new bridge qualifies as "maintenance and repair" for purposes of the LWDUO 1.030 definition. [10]

[40]**

The county found that the existing bridge would not support anticipated vehicle loads during construction of the proposed LNG facility. CRITFC cites to testimony that the existing bridge is "fine for car traffic," and argues that simply because the existing bridge cannot handle the large **[*211]** construction vehicles necessary to build the LNG terminal does not mean that the existing bridge does not comply with current building, engineering or safety standards. CRITFC argues that the record and decision do not identify a single current building, engineering or safety standard that the existing bridge does not meet.

The county found that the existing bridge is deteriorated and no longer capable of carrying heavy loads. [11] CRITFC does not dispute that finding. The existing bridge provides access to the industrially-zoned Bradwood Landing site, and presumably was intended to handle truck traffic generated by the timber mill that formerly existed on that site. While the county's decision does not identify any particular current engineering or safety standard that the existing structure no longer meets, a reasonable person could conclude from the record that the existing deteriorated structure **[**41]** no longer is capable of carrying the heavy loads it was originally designed for. The fact that the existing bridge is still "fine for car traffic" does not mean that it complies with current engineering standards for its intended use, providing access to an existing industrial-zoned site. While it would have been clearer if the county or intervenors' engineering experts had specifically referenced safety or engineering standards that require a stronger bridge, CRITFC has not demonstrated that the county's finding that the new bridge qualifies as "maintenance and repair" under the LWDUO 1.030 definition is not supported by substantial evidence.

[42]**

CRITFC's fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR (CRITFC)

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[10] As a review body, we are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984)*; *Bay v. State Board of Education, 233 Or 601, 605, 378 P2d 558 (1963)*; Carsey v. Deschutes County, 21 Or LUBA 188, *aff'd* ***108 Or App 339, 815 P2d 233 (1991)***. In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must consider and weigh all the evidence in the record to which we are directed, and determine whether, based on the evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland, 305 Or 346, 358-60, 752 P2d 262 (1988)*; *1000 Friends of Oregon v. Marion County, 116 Or App 584, 588, 842 P2d 441 (1992)*.

[11] The county's findings state:

> "The age of the existing span is unknown, but it certainly is several decades old. Pictures of the bridge illustrate its severely worn condition. The applicant states that the bridge 'has deteriorated due to age and is no longer able to carry heavy construction loads.' A November 13, 2007 letter from [intervenors' engineering expert] was placed in the record indicating that the new bridge has been designed to meet engineering standards service to an industrial site. A September 5, 2007 memo from [another expert] was also submitted noting the lack of certification of the existing bridge and its inability to handle anticipated loads. * * *" Record (footnotes omitted).

Intervenors propose a 1.6-mile electrical power line supported on poles to provide power for the LNG terminal. The poles will range in height from 55 to 105 feet. Most of the poles will be located in an F-80 zone. CRITFC argues that the poles will violate the 45-foot height restriction in the F-80 zone.

[*212] LWDUO 3.557 provides that the F-80 zone has a "maximum building height" of 45 feet. The county found that wooden poles supporting electrical power lines are not "buildings" under the LWDUO and are therefore not subject to the 45-foot height limit. CRITFC argues that the county did not adequately explain its interpretation and that whatever interpretation the county made was wrong.

LWDUO 1.030 defines "building" as a "structure built for the support, shelter, or enclosure of persons, animals, chattels, or property of any kind." A "structure" is defined as "[a]nything constructed, erected, portable, or located on the ground or water, or attached to the ground or to an existing structure, including but not limited to, residences, apartments, barns, stores, offices, factories, sheds, cabins, mobile and **[**43]** floating homes, and other buildings." The county found that although the power poles are structures, they are not buildings, so the 45-foot height limit does not apply.

> "As staff indicated in the initial staff report, the building height limitation applies to buildings enclosing space and is not applicable to the power lines. The building height limitations are intended to apply to enclosed structures and not powerlines." Record 97.

CRITFC argues that the county's findings explaining its interpretation are inadequate. While the findings are brief, they are sufficient to explain the county's reasoning that the 45-foot height limit applies only to buildings, and buildings are structures that in some manner enclose space. CRITFC also argues that the county's interpretation is inconsistent with the express language of the LWDUO. According to CRITFC, the definition of building demonstrates that it applies to all structures, not just enclosed structures. We do not agree. The definition of building clearly states that buildings are structures that, in addition to merely being structures, also support, shelter, or enclose something. If the height requirement applies to all structures **[**44]** there would be no need to define buildings as a subset of structures. CRITFC finally argues that because the poles hold up powerlines that they "support * * * property[.]" We agree with the county, however, that read in context it is reasonably clear that the term "support" means more than simply holding something up, and that the term has more in common with the contextual terms "shelter" and "enclosure." Under CRITFC's proposed interpretation, a flag pole or a fence is a "building." We cannot say that the county's interpretation is contrary to the express language, purpose, or underlying policy of the LWDUO.

CRITFC's sixth assignment of error is denied.

[*213] SEVENTH ASSIGNMENT OF ERROR (CRITFC)

CRITIFC argues that the county improperly deferred evaluating compliance with five sets of approval criteria through conditions of approval that require future plans or information to be submitted and evaluated at a subsequent hearing.

Intervenors first argue that this issue was not preserved below, and therefore cannot be raised on appeal. ORS 197.763(1); ORS 197.835(3). CRITFC's assignment of error, however, challenges the findings that were adopted after the public hearings had ended and **[**45]** the record had been closed. Issues regarding compliance with the five sets of approval criteria were raised below, and therefore CRITFC may challenge the findings and conditions of approval adopted to ensure compliance with those approval criteria. *See* *Lucier v. City of Medford, 26 Or LUBA 213, 216 (1993)* (petitioners need not raise issues

below regarding the adequacy of findings, as long as issues were raised below regarding compliance with approval criteria).

Intervenors also argue that CRITFC's arguments are not sufficiently developed for review. CRITFC identifies five sets of approval criteria it believes were improperly deferred, and provides record citations for the challenged findings and conditions. CRITFC argues that the county failed to adopt findings that it is "feasible" to comply with the conditions, and further argues that the subsequent proceedings in which the county will evaluate compliance with those conditions are inadequate. While relatively brief, CRITFC's arguments are sufficiently developed for review.

CRITFC identifies five sets of standards for which the county imposed conditions of approval requiring intervenors to present a **[**46]** plan or further information to the county for subsequent approval, prior to receiving building permits. [12] According to CRITFC, the county erred in two respects: (1) by failing to adopt adequate findings that it is "feasible" to comply with each approval criterion, and (2) by deferring consideration of each approval criterion to a "Type IIa" proceeding that does not offer the same notice and opportunity for public participation as the Type IV process the county employed in making the present decision.

[*214] In *Rhyne v. Multnomah County, 23 Or LUBA 442,447-48 (1992)*, we set out the options involved in multi-stage land use approvals:

> "Where the evidence presented during the first stage approval proceedings raises questions concerning whether a particular approval criterion **[**47]** is satisfied, a local government essentially has three options potentially available. First, it may find that although the evidence is conflicting, the evidence nevertheless is sufficient to support a finding that the standard is satisfied or that feasible solutions to identified problems exist, and impose conditions if necessary. Second, if the local government determines there is insufficient evidence to determine the feasibility of compliance with the standard, it could on that basis deny the application. Third, if the local government determines that there is insufficient evidence to determine the feasibility of compliance with the standard, instead of finding the standard is not met, it may defer a determination concerning compliance with the standard to the second stage. In selecting this third option, the local government is not finding all applicable approval standards are complied with, or that it is feasible to do so, as part of the first stage approval (as it does under the first option described above). Therefore, the local government must assure that the second stage approval process to which the decision making is deferred provides the statutorily required notice and **[**48]** hearing, even though the local code may not require such notice and hearing for second stage decisions in other circumstances." *23 Or LUBA at 447-48* (citation and footnotes omitted).

It is not entirely clear under each approval criterion whether the county is proceeding under the first option (finding of compliance or feasibility of compliance, combined with conditions of approval to ensure compliance), or the third option (deferral to a subsequent public review process). [13] If the county is

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[12] The conditions require intervenors to submit a shoreland erosion monitoring plan, a final environmental mitigation plan, a decommission plan, an agreement with local emergency providers, and a final erosion control plan.

[13] With respect to three of the five sets of standards, the standards do not require any particular plan to be submitted or evaluated, but the county appeared to find compliance with each standard, and simply required submission of a plan or information not required by each standard, to ensure compliance with the standard. With respect to the two standards that require a plan, intervenors submitted draft plans that

proceeding under the third option, it is not required to adopt a finding that it is feasible to comply with the approval criterion. *Gould v. Deschutes County*, _ Or LUBA _ (LUBA No. 2008-068, September 11, 2008), *appeal pending* (A140139).

[49]**

We assume for purposes of this opinion that the county pursued the third option. CRITFC's only argument directed at deferral is that the Type IIa process the county required does not provide the identical level of **[*215]** notice and opportunity for public participation as the Type IV process the county employed in the present case. According to CRITFC, (1) the Type IIa process requires notice only to those nearby the property, while the Type IV process requires notice to the general public; (2) the Type IIa process requires a hearing before the hearings officer with a potential appeal to the board of county commissioners, who may hear the appeal on the record, while the Type IV process requires hearings before the planning commission and the board of county commissioners; and (3) the Type IIa process involves a different decision maker--the hearings officer--who had no participation in the first-stage decision.

CRITFC provides no authority for the proposition that the public process called for when a local government proceeds under the third *Rhyne* option must be the identical process that was provided during the first stage. The Type IIa process provides for notice and a hearing, which **[**50]** is all that is required under *Rhyne*. CRITFC has not established that the Type IIa process is insufficient to provide an appropriate level of notice and opportunity for public participation.

CRITFC's seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR (CRITFC)

As part of the proposed LNG terminal, intervenors propose to establish a park and ride facility approximately three miles east of the Clifton Road and Highway 30 intersection, on parcels zoned General Commercial (GC). The park and ride is proposed as a short term use as its purpose is solely to provide parking for construction workers during construction of the terminal. "Bus stations" are conditional uses in the GC zone. The county approved the park and ride as a "bus station."

CRITFC argues that the county misconstrued the applicable law in determining that the proposed park and ride facility is a "bus station." [14] According to CRITFC, merely because the construction workers will take a bus to the construction site does not make the park and ride facility a "bus station."

[51]**

The county's findings state:

> **[*216]** "* * * the applicant has submitted detailed findings which conclude that the proposed park and ride facility does not conflict with any provision, goal, or policy of the Comprehensive Plan. We agree. We see no provision, goal or policy in the Comprehensive Plan that deals with the matter of

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the county evaluated and approved conceptually, but imposed a condition requiring intervenor submit and obtain county approval of the final plan, prior to proceeding with construction.

[14] CRITFC does not challenge any of the findings that the conditional use approval criteria are met, so this assignment of error is resolved by whether the county properly interpreted "bus station" to include park and ride facilities.

bus stations or park and ride facilities in a GC zone. We therefore find that the proposed use does not conflict with any policies or provisions in the Comprehensive Plan * * *.

"* * * [W]e understand compliance with the LWDUO to be a matter of consistency with the applicable zoning, approval criteria, and development standards. The chief question here is whether the proposed park and ride facility may properly be considered a 'bus station.' The answer to that is 'Yes.' The LWDUO provides no definition of 'bus station,' 'park and ride,' or even 'parking lot.' The proposed use will consist of a parking area to which Bradwood Landing's construction workers will drive and park their cars. The workers then would board shuttle buses to take them to the construction site at Bradwood.

"The key elements of the proposed land use are thus parking and buses. The GC zone provides **[**52]** for a wide range of commercial uses that typically involve large parking lots, and the phrase 'bus station' is broad enough to include a park and ride facility where the 'ride' is provided by buses." Record 103 (emphasis omitted).

Under *Church* and ORS 197.829(1), we must affirm a local government's interpretation of a local ordinance that is consistent with the express language, purpose, or policy of the ordinance. CRITFC argues that the primary purpose of the park and ride facility is to park cars, and that the facility is not a "bus station" simply because workers will ride in a bus to the terminal site, as opposed to a carpool or some other form of transportation. However, the county's code offers no definitions that might limit the scope of "bus station," and we cannot say that interpreting the term "bus station" to encompass a facility where drivers park their cars and board a bus is inconsistent with the express language of the LWDUO. [15]

[53]**

CRITFC's eighth assignment of error is denied.

FIRST ASSIGNMENT OF ERROR (PETITIONERS)

In order to allow dredging of the Columbia River, the county approved a zone change for 46 acres of the river from AC-2 to AD, **[*217]** pursuant to the eight criteria applicable to zone changes at LWDUO 5.412. [16] Petitioners argue that the county's decision does not comply with various provisions of LWDUO 5.412. We address those allegations in turn.

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[15] CRITFC also argues that the county improperly deferred final approval of the park and ride bus station to a later Type IIa approval process. As we held in the seventh assignment of error, the county committed no error by deferring complying with certain approval criteria to a later Type IIa proceeding.

[16] LWDUO 5.412 requires findings with respect to zone changes that:

"(1) The proposed change is consistent with the policies of the Clatsop County Comprehensive Plan.

"(2) The proposed change is consistent with the statewide planning goals (ORS 197).

"(3) The property in the affected area will be provided with adequate public facilities and services * * *

"(4) The proposed change will insure that an adequate and safe transportation network exists to support the proposed zoning and will not cause undue traffic congestion or hazards.

"(5) The proposed change will not result in over-intensive use of the land, will give reasonable consideration to the character of the area, and will be compatible with the overall zoning pattern.

"(6) The proposed change gives reasonable consideration to peculiar suitability of the property for particular uses.

"(7) The proposed change will encourage the most appropriate use of land throughout Clatsop County.

[54]**

A. Applicable Policies of the Comprehensive Plan

1. CCCP Policy 20.2(1) and Policy 20.8

LWDUO 5.412(1) requires that the proposed zone change be consistent with comprehensive plan policies. Petitioners argue that the proposed zone change is inconsistent with two policies from the comprehensive plan elements that implement Statewide Planning Goals 16 (Estuarine Resources) and 17 (Coastal Shorelands). CCCP Policy 20.2(1) provides that "[t]raditional fishing areas shall be protected when dredging, filling, pile driving or when other potentially disruptive activities occur." CCCP Policy 20.8 provides that "[e]ndangered or threatened species habitat shall be protected from incompatible development." Thus, the plan requires that both traditional fishing areas and the habitat of endangered or threatened species be "protected." The parties disagree as to what "protect" means in this context.

[*218] Although the term "protect" or "protection" is not defined in the LWDUO, the code does provide a specific hierarchical framework to use when terms are not defined. LWDUO 1.035 provides:

> "The definition of any word or phrase not listed in this chapter which is in question when administering **[**55]** this Ordinance shall be defined from one of the following sources. The sources shall be consulted in the order listed.
>
> "(1) Clatsop County Comprehensive Plan.
>
> "(2) Any other Clatsop County resolution, Ordinance, codes, or regulation.
>
> "(3) Any statute or regulation of the State of Oregon (including the Uniform Building Code and LCDC Goals and Guidelines).
>
> "(4) Legal definition from case law or law dictionary."

The county noted that the Statewide Planning Goals provide a definition of "protect," but also went on to consider and rely upon a law dictionary definition:

> "State regulation defines 'protect' as to save or shield from loss, destruction, or injury or to save for future intended use. Oregon Statewide Planning Goals -- Definitions. Barron's Law Dictionary defines 'protect' as
>
> > "'to preserve in safety; to keep intact; to take care of and to keep safe. * * * 'Protection' is any measure which attempts to preserve that which already exists. For instance, trade protection attempts to preserve domestic tariffs and custom duties on imported goods.'
>
> "* * * The mitigation actions planned are measures that attempt to preserve the resource and shield it from loss through avoidance **[**56]** and, when necessary, by minimizing impacts, and these measures are appropriate. The appropriate interpretation of 'protect' is to 'shield and attempt to preserve,' and we adopt this interpretation and find that the policies concerning protection and mitigation of impacts on resources are met." Record 63.

As the decision notes, the definitions to Statewide Planning Goals define the term "protect" to mean "[s]ave or shield from loss, destruction, or injury or for future intended use." The term "protect" is used in both Goal 16 and Goal 17, and it is reasonable to assume that the term "protect" as used in CCCP Policy

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"(8) The proposed change will not be detrimental to the health, safety and general welfare of Clatsop County."

20.2(1) and CCCP Policy 20.8, which implement **[*219]** Goal 16 and 17, is intended to have the same meaning. Under the hierarchy established by LWDUO 1.035, the county's definitional search should have ended there. Nonetheless, the county proceeded to the fourth source of definitions listed LWDUO 1.035, a legal dictionary, and chose a different definition of "protect" that introduces an element of intent. Under the county's interpretation, as long as intervenors "attempt" to preserve a resource it has "protected" that resource. It is not entirely clear what the county means by **[**57]** "attempt," but the county apparently understands it to mean using measures that are intended to "minimize" impacts, even if those measures fail to shield the resource from loss and significant adverse impacts on the resource still occur. That view may be consistent with the law dictionary definition the county relies upon, but it is not at all clear to us that it is consistent with the statewide planning goal definition.

The county does not explain why it is permissible under the explicit terms of LWDUO 1.035 to apply the law dictionary definition instead of or in addition to the definition from the statewide planning goals. Not only is the statewide planning goal definition obviously more germane to the meaning of CCCP Policy 20.2(1) and CCCP Policy 20.8, but LWDUO 1.035 explicitly requires the county to apply that definition before turning to a law dictionary definition. We conclude that remand is necessary for the county to apply the statewide planning goal definition of "protect." This sub-assignment of error is sustained.

2. Policy 20.5(1)(b)

In this sub-assignment of error, petitioners also argue that the zone change to AD is not consistent with Policy 20.5(1)(b), which **[**58]** mandates that dredging be allowed only if "a need * * * is demonstrated and the use or alteration does not unreasonably interfere with the public trust rights." Petitioners argue that the county's findings fail to adequately demonstrate that there is a need for the project and that the project will not interfere with the public trust rights.

The county found that there is a need for additional natural gas supplies and various public benefits will flow from the project. Petitioners dispute those findings, arguing that there is no demonstrated need for additional gas supplies and arguing that adverse environmental impacts will outweigh any public benefits.

Although the county's findings addressing Policy 20.5(1)(b) are not detailed, it adopted extensive findings addressing a similar "need" criterion in S4.207(8), S4.209(2), and S4.209(3). The county set out **[*220]** evidence submitted by the applicant and then agreed that the evidence was sufficient to demonstrate need:

> "'The need for the Project and the substantial public benefits that it will provide (in addition to substantial local tax revenue) are described in section 3.1 of this narrative. The pilings and dolphins and the dredging for **[**59]** the turning basin are essential for the Project because they form the marine berth. If the berth were constructed on or within the existing shoreline, much more dredging would be required and much more environmental harm would result. The pilings and dolphins will occupy less than an acre of the river and will not substantially interfere with the public's right to use the river for fishing, boating, commerce, or other uses. The proposed dredging of 700,000 cubic yards is more substantial, but, as discussed in the Alternative Analysis, the Biological Assessment, and sections 3.3.5, 3.4, 3.5, and 6.1.5 of this narrative, Bradwood Landing has minimized the extent and potential harm of the dredging and has proposed very substantial compensatory mitigation and other initiatives to assist the estuarine ecosystem.'
>
> "We agree with applicant's findings in response to criteria (A)-(E) above as they pertain to the in-water structures, dredging and subsequent use of turning basin and moorage by LNG carriers. We also

> agree with applicant's conclusion that the pilings and dolphins 'will not substantially interfere with the public's right to use the river for fishing, boating, commerce, or other **[**60]** uses.' We find that the proposed in-water structures comply with S4.207(8), S4.209(2), and S4.209(3)." Record 114 (emphases omitted; footnote omitted).

In the omitted footnote the findings state:

> "Substantial additional evidence on public need/benefit of the Project, such as the ability to address natural gas needs in the region, the ability to utilize an existing port site and fund improvements to the public infrastructure was submitted into the record during the hearing and deliberation process. After considering all the evidence in the record, we are persuaded by that evidence of the public need for and benefit of the Project." Record 114.

While there is certainly evidence the county could have relied upon to find that there is not a need for the project, there is also evidence the county could rely on to find that there is a need for natural gas in the region, additional users for the existing port site, and funding for public improvements. While the evidence the county relied upon in the findings is not overwhelming and intervenors do not direct us to other evidence in the record, the "need" standard is subjective and we cannot say that the county's interpretation of need **[**61]** and the evidence relied upon to demonstrate that need is in error.

[*221] As to interference with public trust rights, petitioners' entire argument is that there are no findings regarding public trust rights. Intervenors respond that the county addressed interference with public trust rights under another section of the findings, with respect to a virtually identical standard that requires a finding that "[t]he proposed use does not unreasonably interfere with public trust rights." Record 114. While the findings at Record 114 are not particularly compelling, there is no challenge to those findings and we agree with intervenors that those findings appear adequate to address the identical language in Policy 20.5(1)(b) with respect to public trust rights, as well as the standard they were adopted to address.

This sub-assignment of error is denied.

B. Adequate and Safe Transportation Network

LWDUO 5.412(4) requires a finding that "[t]he proposed change will insure that that an adequate and safe transportation network exists to support the proposed zoning and will not cause undue traffic congestion or hazards." Petitioner argues that an "adequate and safe transportation network" includes **[**62]** the Columbia River and any traffic congestion and hazards on the river. According to petitioners, the dredging of the river and the interference with other river activities caused by LNG tankers will cause undue traffic congestion and hazards.

The county disagreed that the Columbia River is part of the county's "transportation network" for purposes of LWDUO 5.412(4):

> "[N]one of the eight criteria in L5.412 mentions marine commerce or river travel. The criteria do mention 'use of the land' and 'suitability of the property' in several places, and they are quite specific about the public facilities and services that must be considered. We thus infer that the zone change criteria are intended to address matters of land use.
>
> "[W]e understand L5.412(4) to deal with man-made transportation facilities such as highways, not with rivers or air. This view is supported by a reading of the Transportation Element of the County Plan. It mentions the importance of the Columbia River with respect to 'water transportation

activities,' but its only policies regarding such transportation have to do with development of port facilities. * * *

"[O]bjectives listed for the County Comprehensive Plan's Transportation **[**63]** Element strongly emphasize land transportation while omitting any mention of water or air travel. * * *

[*222] "[W]e understand the 'traffic' referred to in L5.412(4) to be the volume of land vehicles such as cars or trucks on public roads, not vessel traffic on rivers, air traffic in the skies over the County or rail traffic. We find no definition of traffic' in the LWDUO, the Standards Document, the Transportation Element of the County Comprehensive Plan, or the County's TSP. But all four documents clearly speak of traffic only in the limited context of motor vehicles on streets and roads." Record 181-82.

Petitioners do not challenge these findings or the county's explicit interpretation of "transportation network." Petitioners merely argue that because OAR 660-012-0005(30) defines "Transportation Facilities" to include the Columbia River, the county must necessarily treat the river as part of the county's "transportation network" for purposes of LWDUO 5.412(4). However, OAR 660-012-0005(30) defines transportation facilities, not transportation network, and petitioners have not established that the county is required by the OAR 660-012-0005(30) definition to treat the Columbia River **[**64]** as part of its transportation network for purposes of LWDUO 5.412(4).

This subassignment of error is denied.

C. Dredging's Effect on Health, Safety, and General Welfare

LWDUO 5.412(8) requires a finding that "[t]he proposed change will not be detrimental to the health, safety and general welfare of Clatsop County." Petitioners argue that the dredging allowed by the zone change from AC-2 to AD will lead to the construction of the LNG terminal and that the LNG terminal is extremely dangerous because of the danger of explosion or fire. Petitioners also argue that the LNG tankers that will supply the LNG terminal pose a danger of explosion. According to petitioners, the county did not properly analyze the danger proposed by the LNG terminal and tankers.

The county concluded that LWDUO 5.412(8) focuses on the zone change itself and not any future development that might follow the zone change.

"For reasons stated here and in the preceding sections, we decline to address matters such as 'decrease in quality of life due to fear of explosion of LNG tankers.' We limit ourselves here to public health and safety concerns expressly mentioned in the Comprehensive Plan and land-use regulations. **[**65]** Those have mainly to do with road access and provision of emergency services. The County and other local, state, and federal agencies will deal in other forums with other health and safety issues arising from the Bradwood proposal." Record 202.

[*223] "* * * L5.412(8) focuses on 'the change' (i.e., the proposed rezoning). It doesn't say 'and all subsequent events that might conceivably happen after such a change.' * * * If L5.412(8) were to be interpreted as broadly as [opponent] suggests, then the County could never approve another zone change, because every zone change allows development for which one can imagine a scenario involving some danger, injury, or death." Record 203-04.

We agree with the county that LWDUO 5.412(8) focuses on the zone change, and specifically whether uses allowed by the zone change will affect general health and safety. The zone change at issue rezones a portion of the river from AC-2 to AD. The only direct result of that zone change is that dredging would be permitted. The zone change from AC-2 to AD does not authorize an LNG terminal or river tanker traffic. Dredging in and of itself does not raise dangers to the general health and safety of exploding LNG **[**66]** terminals or tankers, and we agree with the county that LWDUO 5.412(8) does not require the county to consider hypothetical dangers that might arise from ships that transit that dredged area in approving the zone change.

This sub-assignment of error is denied.

D. Consistency With Statewide Planning Goals

LWDUO 5.412(2) requires that zone changes be consistent with the statewide planning goals. Petitioners incorporate their arguments made under the second assignment of error where they argue that the decision violates Goals 16 and 17. We later deny petitioners' second assignment of error. For the same reasons, this subassignment of error is denied.

E. Future Water Dependent Uses

LWDUO 3.754(7) is a development standard for uses in the AD zone and provides that "[u]ses that are water-dependent shall not preclude or conflict with existing or probable future water dependent uses on the site or in the vicinity." Petitioners argue that the dredging, construction and tanker traffic that will be allowed in the AD zone will conflict with fishing and navigation. The county's findings state:

> "We find no evidence that the proposed dredging would preclude or conflict with existing **[**67]** or probable water-dependent uses 'on the site' (Bradwood, in this case). On the contrary, the dredging would facilitate water-dependent development there. We also find no evidence that the proposed dredging, in and of itself, would preclude or conflict with water-dependent uses 'in the vicinity.' We did find some evidence that the combination of dredging, construction, placement of in-water **[*224]** structures, and the berthing of large LNG-14 rrying ships might on occasion conflict with fish, fishing, and fish habitat if unmitigated or uncoordinated. Fishing is a water-dependent use. Avoidance and mitigation measures will be a condition of Project approval. We thus conclude that the proposed dredging and construction will not preclude or conflict with water-dependent uses on site or in the vicinity." Record 76.

Petitioners' argument is essentially that the proposed mitigation does not satisfy LWDUO 3.754(7) because even with mitigation the dredging will "conflict with" fishing and navigation. It is clear that the county does not agree with petitioners that LWDUO 3.754(7) prohibits any possibility of damage whatsoever to "existing or probable future water dependent uses." Although the county **[**68]** decision does not express its rejection of that argument in precisely these terms, we agree with the county that if the mitigation measures are sufficient to avoid material adverse effects to navigation, fish habitat, fish or fishing, the county could find that LWDUO 3.754(7) is satisfied. We do not agree with petitioners that LWDUO 3.754(7) prohibits any use that has our could have any adverse effect whatsoever on existing or future water-dependent uses. The LWDUO clearly anticipates development within the AD zone. Almost any development could have some potential adverse effect on other water-dependent uses. As long as those water-dependent uses are not precluded or materially adversely affected, we believe the county may properly find the proposal complies with LWDUO 3.754(7). In petitioners' eighth assignment of error, we

address the proposed mitigation program. In that assignment of error, we reject petitioners' arguments that the mitigation program is inadequate. For the same reasons, the proposed dredging does not violate LWDUO 3.754(7).

This subassignment of error is denied.

Petitioners' first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR (PETITIONERS) [69]**

In addition to the zone change from AC-2 to AD to allow the proposed dredging, the county also approved a comprehensive plan amendment for 46 acres of the river from Conservation to Development. In order to allow disposal of the dredged material and construction of a rail line, storage tanks, and other development for the LNG terminal, the county also approved a comprehensive plan amendment for 5.35 acres of shoreland from Natural to Development. Petitioners argue these comprehensive plan amendments violate Statewide Planning Goal 16.

[*225] A. Public Need

Implementation Requirement 2 for Goal 16 is identical to Policy 20.5 in the Goal 16 and 17 element of the county's comprehensive plan, requiring that dredging shall be allowed only if a need is demonstrated and the use or alteration does not unreasonably interfere with public trust rights. Petitioners argue that the county improperly found a public need for the project and that the project did not violate the public trust rights. We previously addressed these issues under petitioners' first subassignment of error under their first assignment of error. We deny this subassignment of error for the same reasons.

B. Cumulative Impact [70] Analysis Requirement**

Goal 16 requires counties to "[c]onsider and describe in the plan the potential and cumulative impacts of the alterations and development activities envisioned." Policy 15 of the Goal 16 and 17 element of the county's comprehensive plan also includes the requirement to analyze the cumulative impacts of development activities in certain areas. Petitioners argue that the county erred in finding that it did not have to address cumulative impacts of the proposed comprehensive plan amendment and that even if the county tried to address those cumulative impacts the attempt was inadequate.

The county initially found that the cumulative impacts analysis was not necessary:

> "This is a requirement * * * for local plans to contain a description of the likely cumulative impacts for certain activities. It is not a requirement for local governments to review each development application for cumulative effects.
>
> "Policy 15 is the County's response to that provision of Goal 16. * * * The first few sentences of Policy 15 make clear that it is not intended for use in the review of individual permit applications:
>
> > "'This section addresses the potential combined effects of certain **[**71]** activities on the estuary. The primary reason for addressing cumulative impacts is that they cannot be adequately considered during most permit reviews, yet under certain conditions can become significant planning issues. The Columbia River Estuary Regional Management Plan recognizes that development activities generate cumulative impacts that cannot be readily addressed on a permit-by-permit basis.'" Record 303-04 (emphasis and footnote omitted).

[*226] Intervenors argue that the cumulative impacts analysis is not required at the comprehensive plan amendment stage but rather will be applied at a later permit approval stage. In *Oregon Shores Cons. Coalition v. Lane County, 52 Or LUBA 471, 479-80 (2006)*, however, we held that Goal 16 requires that in adopting a comprehensive plan amendment affecting Goal 16 resources, the local government must adopt plan language that evaluates the potential cumulative impacts, if any. Contrary to the county's finding, the county must therefore consider cumulative impacts as part of this plan amendment. Contrary to intervenors' argument, intervenors identify no later permit approval stage at which such cumulative impacts **[**72]** must be addressed, and the county's above-quoted finding suggests that such impacts are not typically addressed during permit reviews.

Intervenors also argue, however, that the county did conduct a cumulative impacts analysis and found that Goal 16 is satisfied. While there seems to be some confusion as to where in the record the cumulative impacts analysis is located or how the analysis was incorporated into the decision, we agree with intervenors that the analysis is found in Attachment 6, Record 333-354, and was adopted and incorporated into the decision. Record 8, 303.

Petitioners argue that Attachment 6 fails to address the cumulative impacts of the LNG facility and existing uses of the river with respect to fishing, navigation, recreation, tourism, habitat loss to dredging, etc. However, intervenors cite to passages in Attachment 6 that appear to address these impacts. Petitioners have not demonstrated that the analysis of cumulative impacts in Attachment 6 is inadequate.

Finally, petitioners argue that the county failed to properly process adoption of Attachment 6 as a comprehensive plan text amendment under the procedures required by ORS 197.610. As noted, the county apparently **[**73]** adopted Attachment 6 as a text amendment to CCCP Policy 15, Cumulative Impacts. Record 8. We understand petitioners to contend that Attachment 6 was not described or attached to the notice required by ORS 197.610 for a post-acknowledgement plan amendment, and appeared only late in the county's proceedings. Intervenors respond that the county's notice to the Department of Land Conservation and Development indicates that the county intends to adopt both map and text amendments to the CCCP. Record 15505. Intervenors argue that ORS 197.615(1) contemplates that amendments ultimately adopted may differ from those initially proposed, and petitioners have failed to demonstrate that the county procedures were inconsistent with ORS 197.610 or errors provide a basis for reversal or remand. We agree with intervenors.

[*227] This subassignment of error is denied.

Petitioners' second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR (PETITIONERS)

The county's decision also rezones an upland portion of the Bradwood Landing site, under the same zoning change criteria at LWDUO 5.412 applied to the aquatic zone changes. However, petitioners do not advance any specific challenges to the findings **[**74]** that apply the criteria to rezone portions of the upland site. Instead, petitioners simply incorporate their arguments under their first and eighth assignments of error, and argue that for the same reasons the rezoning of the upland portions of the site also was error. Because we reject petitioners' first and eighth assignments of error, those incorporated arguments do not provide a basis to reverse or remand the rezoning of the upland portion of the site.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR (PETITIONERS)

The CCCP designates a portion of the Bradwood site as a Priority I dredge material disposal (DMD) site. Such DMD sites are intended to be reserved for stockpiling dredged material. [17] LWDUO 4.168 provides that "[o]nly those development uses and activities * * * which are determined not to preempt the site's future use for dredged material disposal are allowed, subject to the policies and procedural requirements of the underlying zone." Petitioners argue that the proposed LNG terminal is a preemptive use that is not allowed. LWDUO 4.178 defines preemptive uses as:

> "(1) Uses requiring substantial structural or capital improvements (e.g. construction **[**75]** of permanent buildings);
>
> **[*228]** "(2) Uses that require extensive alteration of the topography of the site, thereby reducing the potential usable volume of the dredged material disposal area * * *; or
>
> "(3) Uses that include changes made to the site that would prevent expeditious use of the site for dredged material disposal * * *."

Intervenors originally requested that the DMD overlay be removed, but the county determined that it was not necessary to remove the DMD overlay in order to approve the LNG terminal because the dredge site would be filled prior to construction **[**76]** of the terminal. The county's findings state:

> "The applicant is concerned that the LNG facilities would be regarded as a 'preemptive use' and that L4.166 and 4.172 thus would prohibit construction of the LNG facility. We believe that concern to be unwarranted for two reasons.
>
> "First, a use is 'preemptive' only if it would limit use of the site for the deposition of dredged material. But if the site has been filled to capacity, no further dredged material is necessarily deposited there. Hence, it cannot be argued that the LNG facility would limit DMD as envisioned in the code and plan.
>
> "Second, the [CCCP] clearly anticipates construction such as that proposed by the applicant at DMD sites after they reach their capacity. Policy P20.5 * * * says, 'The use of shoreland water dependent development sites for dredged material disposal shall occur only when the project sponsor can demonstrate that the dredged material placed on the site will be compatible with the current or future water dependent development' Bradwood is a 'shoreland water dependent development site.' In this case, the 'project sponsor' (Bradwood Landing) has demonstrated that disposal of dredged material * * * will serve **[**77]** as foundation soils to support the LNG tanks and other structures, and it also will be used to construct a berm around the facility." Record 84.

The proposal contemplates continued disposal of dredged material at the DMD site until that site is filled, which will occur prior to construction of the LNG facility. The purpose of the DMD overlay is to preserve such sites from preemptive use until the sites are filled to capacity, at which point the overlay is removed and development may occur. The total capacity for the Bradwood DMD overlay is 420,000 cubic yards, and the proposal will deposit at least that much dredged material on the site before any construction will

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[17] LDWUO 4.116 provides:

> "The purpose of Priority I site designations is to protect important dredge material disposal sites from incompatible and preemptive uses that may limit their ultimate use for the deposition of dredged material, and to ensure that an adequate number of sites will be reserved in order to accommodate dredge material disposal needs resulting from five years of existing and expected water-dependent development and navigation projects."

occur. Record 82. Given that the DMD overlay site will be fully utilized and will fulfill its purpose before any use that could be considered a preemptive use will be constructed, we do not see that the county erred in allowing the proposal to proceed.

[*229] Petitioners' fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR (PETITIONERS)

Petitioners challenge the county's finding that the proposed LNG facility is "small or moderate" in scale.

The Northeast Community Plan, an element of the CCCP, provides that **[**78]** "[d]evelopment activities at Bradwood shall be of small or moderate scale, not involving extensive filling to create new land areas."

Similarly, the Bradwood Subarea Plan, another element of the CCCP, states:

> "The Bradwood industrial site offers limited potential for small to medium sized water-dependent industrial development. There is deep water close to shore, some available vacant land, and railroad access. There are constraints to development, however, including poor highway access and proximity to the wildlife refuge.
>
> "Future development which would require excessive filling (impacting aquatic areas in excess of 20 acres) along the Columbia River shoreline for the purpose of creating additional industrial land is not appropriate. * * *"

The county interpreted the Northeast Community Plan language regarding "small to moderate" in context to mean essentially development that does not require more than 20 acres of fill to create new lands. [18] In **[*230]** addition, the county noted that Bradwood site is exempted from building size limitations that would otherwise apply to MI-zoned properties, from which the county inferred that the "small to moderate

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[18] The county's findings state, in relevant part:

> "One of the central questions in this review is this: What scale industrial use is appropriate at Bradwood? The MI zone is quite precise regarding the type of uses allowed there: it says water-dependent industrial uses are appropriate. The Bradwood site is specifically exempted from the building size limitations in the MI development standards. L3.634(16)(A). Reading the [Northeast Community Plan provisions], we conclude that development activities at Bradwood shall be of a scale not requiring fill of more than 20 acres. The Project will result in the fill of 13 acres. This is well below the 20 acres in the policies (read together) and therefore not extensive fill. Further, even if the 5.35 acres proposed for rezoning to MI is considered, the total remains below 20 acres. If the corresponding creation of a perpetual conservation easement of 4.7 acres of wetlands is included in the new land area, this represents a change of .6 acres, and the aggregate total remains substantially less than 20 acres. We impose as a condition of approval that applicant will not object to the County rezoning the 4.7 MI acres to AN.
>
> "The relationship of amount of fill and non-creation of new land areas (and therefore site size) to the scale of development is also evident in the County's Goal 9 narrative. The Clatsop County Industrial Lands Inventory discusses the size of industrial sites and notes that large industrial users need large sites and the lack of smaller industrial sites (less than 100+ acres) limits the ability of the jurisdiction to attract users that are not large. The corollary of this is that industrial sites smaller than 100 acres in size accommodate small to medium industrial users.
>
> "* * * *
>
> "[Goal 9 provisions] illustrate that large scale industrial developments require at least 100 acres. Bradwood Landing is acquiring 411.6 acres at Bradwood. Only 10% of the site will be used for the development of the terminal. The majority of the terminal site is zoned Marine Industrial. Bradwood Landing seeks to have an additional 5.35 acres zoned MI and will place a perpetual conservation easement prohibiting development on 4.7 acres currently zoned MI but containing rare wetland habitat. The total developed area will be less than 40 acres. Bradwood Landing, which will occupy less than 40 acres and has substantially less than 100 acres zoned industrial is therefore small to medium in scale. This is consistent with the policy restricting large scale fills at the site. Once again, the Plan is clearly relating scale of development to the size of the site." Record 128-29.

scale" limitation is not a limit **[**79]** on the size of the industrial facility itself. The county also cited contextual language in the CCCP Goal 9 element suggesting that "large" industrial sites are those more than 100 acres in size, from which the county inferred that development sites smaller than 100 acres must not be large, *i.e.* must be either small or moderate in scale.

[80]**

Petitioners argue that the nature and scale of the LNG terminal is clearly not "small or moderate." According to petitioners, the "LNG terminal is stunning in its size, scope, and level of impact, one of the largest Clatsop County developments in over 20 years." Petition for Review 32. Petitioners cited to evidence that in addition to the LNG facility itself, the project will require dredging and maintaining over 58 acres of estuary for the turning basin, and over 30 miles of new gas pipelines.

The county's view that the "small or moderate" scale limitation is directed solely at development that requires large amounts of fill is not consistent with the language of the relevant plan provisions. The Northeast Community Plan language is ambiguous, and can be read to link the scale limitation and the fill limitation, as the county read it, or it can be read to embody two requirements: that the development be small or moderate in scale, and that it not involve extensive fill to create new land areas. However, the Bradwood Subarea Plan language makes it clear that they are two separate requirements. The Bradwood Subarea Plan discusses the **[*231]** "limited potential for small to medium sized" industrial **[**81]** use of the site, but relates that limited potential to the site's development constraints, including "poor highway access and proximity to the wildlife refuge." It is only in the second paragraph that the Subarea Plan states that future development that would require excessive filling in excess of 20 acres along the shoreline is inappropriate. Accordingly, we reject the county's interpretation that the "small to moderate" scale limitation is essentially a restatement of the fill limitation, as inconsistent with the text and context of the relevant plan provisions. ORS 197.829(1)(a).

The county is on stronger footing in citing the Goal 9 comprehensive plan element and the fact that the LWDUO specifically exempts the Bradwood site from building size limitations otherwise applicable in the MI zone. The Goal 9 language does suggest that the needs of "small" industrial users can be met by breaking up large industrial sites greater than one hundred acres in size, although that does not necessarily suggest that all industrial development less than 100 acres in size is "small" or "moderate" in scale. The code exemption from building size limitations for the Bradwood site suggests that the **[**82]** county is not concerned with the size of buildings constructed at the Bradwood site. However, the "small to moderate" scale limitation presumably has some meaning independent of the building size limitation. The focus of the scale limitation is "development activities," which presumably encompasses more than construction of buildings. The county apparently viewed the scope of the proposed "development" to include only the 40 upland acres covered by the LNG facility itself. The county declined to consider the area needed for accessory uses such as powerlines, gas pipelines, or the 58 acres of estuary that would be dredged for the ship turning basin.

The LWDUO defines "development" as "[a]ny man-made change to improved or unimproved real estate, including but not limited to: construction, reconstruction, conversion, relocation or enlargement of any structure; any mining, excavation, landfill or land disturbance, any use or extension of the use of land." That term would clearly encompass construction of powerlines and gas pipelines. It is less clear that it would encompass dredging of the estuary, although it would presumably include the pilings and other structures necessary to offload **[**83]** the LNG container ships.

Given that the county erred in its primary conclusion that the scale restriction is a mere restatement of the fill limitation, and because the county erred in limiting the scope of "development activities" to the upland acres covered by the LNG facility itself, we conclude that remand is necessary for the county re-evaluate whether the proposed development **[*232]** activities, considered as a whole, comply with the "small or moderate" scale limitation.

Petitioners' fifth assignment of error is sustained.

SIXTH ASSIGNMENT OF ERROR (PETITIONERS)

Petitioners argue that the county failed to adequately respond to evidence and issues raised by the State of Oregon. Various state agencies' comments found their way into the record. [19] The county found that the comments were draft comments that appear to be directed at the FERC proceedings on this project, rather than comments directed at the county proceedings or applicable county land use approval criteria. Accordingly, the county gave the agency comments "little weight in these proceedings." Record 155.

[84]**

Petitioners argue that the county erred in failing to adopt findings addressing the issues raised in the agency comments, concerning impacts on aquatic life, the geologic hazards of the site, the need for the facility, safety hazards, and the effect on access to traditional fishing areas. Petition for Review 39. According to petitioners, the county is obligated to adopt findings addressing issues raised in the agency comments.

Generally, local governments must adopt findings responding to specific issues raised below in quasi-judicial land use proceedings concerning compliance with approval criteria. *Norvell v. Portland Area LGBC, 43 Or App 849, 853, 604 P2d 896 (1979)*; *Heiller v. Josephine County, 23 Or LUBA 551, 556 (1992)*. Here, as far as petitioners have established, the draft agency comments were not directed at the county proceedings, and do not raise any specific issues with regard to approval criteria applicable to the county land use proceedings. As far as we can tell, the state agency comments are directed at the adequacy of the draft environmental impact statement that was filed with FERC, as part **[**85]** of the FERC proceedings. Petitioners make no attempt to relate any of the state agency critiques of that draft environmental impact statement to any specific approval criterion that was applicable in the county land use proceeding. Accordingly, petitioners have not established that the county **[*233]** was obligated to adopt findings addressing any issues raised in the state agency comments.

Petitioners' sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR (PETITIONERS)

Petitioners argue that the county improperly deferred compliance with certain approval criteria through the imposition of conditions that do not properly allow for public participation at later stages. The same arguments were made by CRITFC under their seventh assignment of error. For the same reasons expressed under our resolution of CRITFC's seventh assignment of error, this assignment of error is also denied.

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[19] There is some dispute as to whether the state agencies actually submitted the comments to the county as their official position or whether draft comments were obtained by other parties who then submitted them to the county. Due to our resolution of this assignment of error, we need not resolve that dispute.

EIGHTH ASSIGNMENT OF ERROR (PETITIONERS)

Petitioners argue that the county erred in relying on mitigation measures without substantial evidence in the record to indicate that the mitigation measures would adequately protect fish and estuarine habitat. As discussed in CRITFC's seventh assignment **[**86]** of error, although the county found it feasible that the mitigation plan would provide the required protections, the county also imposed a condition of approval that in addition to securing all required state and federal permits intervenors must submit a mitigation plan that would be reviewed under the county's Type IIa procedure. We previously held that deferring a determination of compliance with approval criteria to a later stage that affords public participation is permissible under the third *Rhyne* option. Therefore, petitioners' arguments that the mitigation plan is insufficient are premature.

Petitioners' eighth assignment of error is denied.

ASSIGNMENT OF ERROR (DUNZER)

Dunzer's petition for review does not include assignments of error followed by supporting argument, as required by OAR 661-010-0030(4)(d), and the arguments are generally difficult to follow. Dunzer appears to argue that intervenors' method for re-gasification is not energy efficient and therefore violates Statewide Planning Goal 13 (Energy Conservation), unspecified portions of the county's comprehensive plan, and HB 3543 (which calls for reducing the state's greenhouse gasses emissions).

However, **[**87]** Dunzer does not explain how Goal 13 is applicable to the challenged decisions, and we do not see that it is. Dunzer does not **[*234]** identify what comprehensive plan provisions he believes the decision violates. Dunzer does not explain how HB 3543 is applicable as approval criteria to the challenged decisions. Dunzer's arguments do not provide a basis for reversal or remand.

Dunzer's assignment of error is denied.

The county's decision is remanded.

State of Oregon Land Use Board of Appeals

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