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BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

OREGON SHORES CONSERVATION COALITION,  
MONICA SCHREIBER, MARK WILSON,  
and HOWARD WATKINS,  
*Petitioners,*

vs.

COOS COUNTY,  
*Respondent,*

and

ROBIN STEVENOT,  
*Intervenor-Respondent.*

LUBA No. 2005-131

FINAL OPINION  
AND ORDER

Appeal from Coos County.

William K. Kabeiseman, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Adam R. Kelly and Garvey Schubert Barer.

No appearance by Coos County.

Dan Terrell, Eugene, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was the Law Office of Bill Kloos, PC.

BASSHAM, Board Member; DAVIES, Board Chair; HOLSTUN, Board Member, participated in the decision.

REMANDED

03/22/2006

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

**NATURE OF THE DECISION**

Petitioners appeal county approval of a recreational planned unit development (R-PUD).

**MOTION TO FILE REPLY BRIEF**

Petitioners move to file a reply brief to address waiver issues raised in the response brief. There is no opposition to the motion, and it is allowed.

**FACTS**

The county’s decision is on remand from LUBA. *Oregon Shores Cons. Coalition v. Coos County*, 49 Or LUBA 1 (2005) (*Sitka Dock*). We recite the pertinent facts from that opinion:

“The subject property is a mostly vacant 216-acre parcel located west of the Cape Arago Highway in the urban unincorporated community of Barview, adjacent to Coos Bay. The entire property is located within the CBEMP [Coos Bay Estuary Management Plan], which implements Statewide Planning Goals 16 (Estuarine Resources) and 17 (Coastal Shorelands). Approximately 174.8 acres of the property consist of low shoreland and tidelands below ten feet in elevation above mean sea level. The remaining 41.2 acres consist of uplands ranging from 10 to 25 feet in elevation above mean sea level. The upland areas are vegetated with grasses and low bushes toward the shoreline, and with tree stands along the highway. A creek enters the property from the east and forks north and south down to the bay.

“The property is the site of a former pulp mill. Current structures include the mill building and a smokestack on the central upland portion, and the pilings of the Sitka Dock extending out into the bay. A large area in the approximate middle of the subject property, including the uplands, is zoned CBEMP Unit 56-UW (Urban Water Dependent). A strip of tideland along the southern shore of the property is zoned CBEMP Unit 57-NA (Natural Aquatic). The Sitka Dock and a small area of shoreland adjoining it is zoned CBEMP Unit 56-DA (Development Aquatic). A large area of tidelands north of the dock is zoned either CBEMP Unit 55A-CA (Conservation Aquatic) or CBEMP Unit 55B-NA (Natural Aquatic).

“A small area in the extreme north is zoned CBEMP Unit 55-UD (Urban Development). On March 25, 2004, intervenor applied for an R-PUD known as Baywater Estates consisting of (1) a 50-slip marina and deep water dock

1 built on the existing mooring piles for the Sitka Dock, (2) a condominium  
2 complex, (3) a commercial building housing a travel agency and rental shop,  
3 (4) a 5,000-square foot restaurant, (5) a 2,500-square foot gym and spa within  
4 the condominium complex, and (6) boardwalks and nature trails. The existing  
5 mill structure and smokestack would be removed, and the mill timbers reused  
6 to construct the restaurant.” *Id.* at 3-5 (footnote and record citation omitted).

7 On review, LUBA sustained one assignment of error in which the petitioners argued  
8 that the county misconstrued CBEMP Policy 16(III)(2)(b) (hereafter, Policy 16), but rejected  
9 all other assignments of error. Policy 16 implements Goal 17 and OAR 660-037-0080(3) and  
10 requires in relevant part that “nonwater-dependent uses” such as residential development  
11 within urban water dependent zones be “incidental and subordinate” to water-dependent  
12 uses. *See* n 4. That policy is implemented by a requirement that the ratio of ground floor  
13 indoor space plus outdoor acreage distributed between nonwater-dependent uses and water-  
14 dependent uses not exceed a 1 to 3 ratio. As proposed, the nonwater-dependent ground  
15 indoor floor space greatly exceeded the water-dependent ground indoor floor space.  
16 However, in the decision at issue in *Sitka Dock I*, the county included 174 acres of  
17 undeveloped land on the subject parcel as “outdoor acreage” attributed to “water-dependent  
18 uses.” Under that approach, the ratio of nonwater-dependent uses to water-dependent uses  
19 easily satisfied the 1 to 3 ratio. However, LUBA held that “outdoor acreage” under the ratio  
20 standard includes only developed outdoor areas, such as parking lots or boat ramps, not  
21 undeveloped areas left in their natural state. Accordingly, LUBA remanded the decision to  
22 the county to recalculate the ratio under a correct understanding of Policy 16.

23 On remand, the county conducted additional proceedings and reviewed a more  
24 detailed development plan. *See* Figure 1, appended to this opinion. The county determined  
25 that Policy 16 applies only to a small portion of the subject property within 300 feet of the  
26 water, in the area of the dock, and therefore the county did not include most of the proposed  
27 condominiums and associated development in calculating the 1 to 3 ratio. The county  
28 considered only the uses within the identified portion and areas to the west, including the

1 dock, marina, and a large area of open water in the bay, and determined under that approach  
2 that the ratio of nonwater-dependent to water dependent uses satisfied the 1 to 3 ratio. The  
3 county excluded from that analysis certain “uncommitted” open areas located adjacent to and  
4 between the condominium units, but attached a condition of approval providing that, if an  
5 appellate review body disagreed with that characterization the applicant will be required to  
6 reduce the dwelling unit density and to create a “wetlands viewing area” sufficient to keep  
7 the ratio above 1 to 3.

8 This appeal followed.

9 **FIRST ASSIGNMENT OF ERROR**

10 Petitioners challenge the county’s determination that Policy 16 applies only to a small  
11 portion of the 56-UW district, and not to the entire district. Further, petitioners argue that the  
12 county erred in including uses that are located in areas zoned other than 56-UW, in  
13 calculating the 1 to 3 ratio under Policy 16.

14 **A. Goal 17 Background**

15 Understanding the arguments made in this case requires some review of the pertinent  
16 requirements of Goal 17, the Goal 17 rule at OAR Chapter 660, Division 037, and the  
17 county’s implementation of those requirements.

18 **1. Goal 17**

19 Goal 17 is “[t]o conserve, protect, where appropriate, develop and where appropriate  
20 restore the resources and benefits of all coastal shorelands, recognizing their value for  
21 protection and maintenance of water quality, fish and wildlife habitat, water-dependent uses,  
22 economic resources and recreation and aesthetics.” In relevant part, Goal 17 requires that  
23 “[shoreland] areas that are suitable for water-dependent uses shall be protected for water-  
24 dependent recreational, commercial, and industrial uses” in urban or urbanizable areas,  
25 exception areas and in unincorporated communities. The goals define “water-dependent” to  
26 mean “[a] use or activity which can be carried out only on, in, or adjacent to water areas

1 because the use requires access to the water body for water-borne transportation, recreation,  
2 energy production, or source of water.”

3 Goal 17 requires counties to protect the “minimum amount” of water-dependent  
4 shorelands, equivalent to the number of acres currently being used for water-dependent uses  
5 plus the number of acres that at any time were used for water-dependent uses and that still  
6 possesses facilities that provide water-dependent uses with access to the adjacent coastal  
7 waters. Any shoreland so designated shall be “suitable for water dependent uses,” which  
8 means at a minimum that the shoreland areas possess or are capable of being developed with  
9 structures or facilities that provide water-dependent uses with access to the adjacent coastal  
10 water body. Goal 17 permits nonwater-dependent uses within water-dependent shorelands  
11 that are “in conjunction with and incidental and subordinate to a water-dependent use.”  
12 Examples of incidental uses include a restaurant on the second floor of an existing seafood  
13 processing plant or a retail sales room as part of that plant. Incidental “means that the size of  
14 the nonwater-dependent use is small in relation to the water-dependent operation[.]”

15 In addition, Goal 17 requires local governments to “determine whether there are any  
16 existing, developed commercial/industrial waterfront areas which are suitable for  
17 redevelopment which are not designated as *especially suited for water-dependent uses.*”  
18 (Emphasis added). Local government must prepare plans for such areas that “allow for a mix  
19 of water-dependent, water-related, and water oriented nondependent uses and shall provide  
20 for public access to the shoreline.”

## 21 2. OAR Chapter 660, Division 037

22 OAR Chapter 660, Division 037 is entitled “Water-Dependent Shorelands” and  
23 implements the above provisions of Goal 17. The general policy thrust of the rule is to  
24 protect scarce sites that are suitable for water-dependent uses from development pressures  
25 that irretrievably commit these sites to nonwater-dependent development. OAR 660-037-

1 0020.<sup>1</sup> Pursuant to OAR 660-037-0050(2), local governments must calculate the minimum  
2 amount of shorelands, based on (1) acreage of shorelands that are currently being used for  
3 water-dependent uses, and (2) acreage of shorelands that at any time were used for water-  
4 dependent uses and still possess a structure or facility that provides water-dependent access.  
5 The calculation of the minimum amount of shorelands to be protected “shall include storage  
6 and other backup land that is, or in the case of former water-dependent uses was, in direct  
7 support of the water-dependent use at the site.” OAR 660-037-0050(2)(c).

8 Based on that calculation, the local government “shall designate as water-dependent  
9 shorelands” a sufficient total acreage that equals or exceeds the minimum acreage calculated  
10 under OAR 660-037-0050. OAR 660-037-0060(1). Local governments are “encouraged to  
11 designate and protect as water-dependent shorelands an amount that is greater than the  
12 minimum required to be protected” by the rule. OAR 660-037-0060(3).

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<sup>1</sup> OAR 660-037-0020 provides, in relevant part:

- “(1) The Land Conservation and Development Commission (LCDC) recognizes that since the early 1980’s, when comprehensive estuary management plans were acknowledged by LCDC, significant economic changes experienced in coastal communities have affected the demands for shorelands. During this period, most of the shorelands designated for water-dependent development in local estuary plans have remained vacant. As a result of these economic changes, there have been increased pressures to develop the vacant or underdeveloped water-dependent lands for nonwater-dependent uses.
- “(2) The reasons to protect certain shorelands for water-dependent uses are both economic and environmental. Economically, shoreland sites for water-dependent development are a finite economic resource that usually need protection from prevailing real estate market forces. By its very nature, water-dependent development can occur only in shoreland areas and only in certain shorelands with suitable characteristics relating to water access, land transportation and infrastructure, and surrounding land use compatibility. Once these suitable sites are lost to nonwater-dependent uses, they are very difficult and expensive to recover, if at all. \* \* \*
- “(3) As a matter of state policy, it is not desirable to allow these scarce and non-renewable resources of the marine economy to be irretrievably committed to, or otherwise significantly impaired by, nonindustrial or nonwater-dependent types of development which enjoy a far greater range of locational options.”

1           Next, OAR 660-037-0080 requires local governments to adopt land use regulations to  
2 protect water-dependent shorelands designated in OAR 660-0037-0060. A water-dependent  
3 shoreland is protected when “the siting of future water-dependent uses will not be preempted  
4 by the presence of nonwater-dependent uses.” OAR 660-037-0080(2).<sup>2</sup> To protect a  
5 designated site, local land use regulations must do one of the following: (1) allow only water-  
6 dependent uses, (2) allow nonwater-dependent uses that are in conjunction with and  
7 incidental and subordinate to water-dependent uses on the site, subject to a 1 to 3 (nonwater-  
8 dependent to water-dependent) ratio test, or (3) allow temporary nonwater-dependent uses.  
9 OAR 660-037-0080(3). One of the techniques a local government may use to protect

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<sup>2</sup> OAR 660-037-0080 provides, in relevant part:

- “(2) A designated water-dependent shoreland is protected for water-dependent uses when:
  - “(a) the operation of a water-dependent use is not threatened by nonwater-dependent uses; and
  - “(b) the siting of future water-dependent uses will not be preempted by the presence of nonwater-dependent uses.
- “(3) To protect a designated water-dependent shoreland site, local land use regulations may do any of the following:
  - “(a) Allow only water-dependent uses.
  - “(b) Allow nonwater-dependent uses that are in conjunction with and incidental and subordinate to water-dependent uses on the site.
    - “(A) Such nonwater-dependent uses shall be constructed at the same time as or after the water-dependent use of the site is established, and must be carried out together with the water-dependent use.
    - “(B) The ratio of the square footage of ground-level indoor floor space plus outdoor acreage distributed between the nonwater-dependent uses and the water-dependent uses at the site shall not exceed 1 to 3 (nonwater-dependent to water-dependent).
    - “(C) Such nonwater-dependent uses shall not interfere with the conduct of the water-dependent use.
  - “(c) Allow temporary nonwater-dependent uses that involve minimal capital investment and no permanent structures. \* \* \*”

1 designated water-dependent shorelands is a “[t]raditional water-dependent zoning district”  
2 that lists the uses and activities allowed in the zone. OAR 660-037-0080(4)(a).

3 Finally, OAR 660-037-0090 provides that local governments may rezone water-  
4 dependent shoreland sites to allow nonwater-dependent uses if the rezone complies with all  
5 applicable goals, including Goal 17.

### 6 **3. County Implementation of Goal 17 and the Goal 17 rule**

7 Pursuant to OAR 660-037-0050, the county determined that 1,440.5 acres of the  
8 estuary are planned and zoned for water-dependent uses, and that 496.52 acres are the  
9 “minimum amount of acreage required to be protected for water-dependent use.” That  
10 determination is reflected in CBEMP Policy 16a.<sup>3</sup> Policy 16a also appears to implement  
11 OAR 660-037-0090 in providing that any request to rezone shoreland designated for water-  
12 dependent use will require a demonstration that at least the minimum amount of 496.52 acres  
13 remains designated for water-dependent use.

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<sup>3</sup> Policy 16a provides:

“Local government shall protect \* \* \* for water-dependent use at least the minimum acreage determined necessary under the standards of Statewide Planning Goal #17 for the protection of sites suitable for water-dependent uses and special allowance for new nonwater-dependent uses in urban water-dependent units.

- As of January 1, 2000, there were 1,440.5 acres of Coos Bay Estuary shoreland planned and zoned for water-dependent use in the unincorporated portions of Coos County.
- 496.52 acres has been determined to be the minimum amount of acreage required to be protected for water-dependent use within the estuary shoreland units of the unincorporated portions of the Coos Bay Estuary.

“Any request to rezone shoreland designated for water-dependent use within the unincorporated portions of the Coos Bay Estuary will require demonstration by the applicant that at least the minimum acreage amount of 496.52 acres will remain designated for water-dependent use.

“This policy shall be implemented through provisions in ordinance measures that require the above findings be made at the time an application for rezoning is approved.”



1           The county also adopted Policy 16, which is an entirely separate policy from Policy  
2 16a. As noted, Policy 16 implements OAR 660-037-0080(3) and permits nonwater-  
3 dependent uses in urban water-dependent management units such as 56-UW only if such uses  
4 are in “conjunction with and incidental and subordinate to a water-dependent use,” subject to  
5 the ratio test.<sup>4</sup>

6           The county protected coastal shoreland sites by adopting a number of site-specific  
7 management units around the estuary, essentially site-specific zones. A number of the zones  
8 are urban water-dependent (UW) zones, while other zones implement other Goal 17  
9 designations. As noted, the county applied the 56-UW zone to a 41.2-acre portion of the  
10 subject property that includes the site of the former pulp mill.

11           In addition, the county developed a map entitled Coos Bay Estuary Management Plan  
12 (hereafter “inventory map”), a reduced scale version of which is found at Record 50. The  
13 inventory map legend states that the map concerns “Tentative Goal 16/Goal 17 Development

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<sup>4</sup> CBEMP Policy 16(III) implements OAR 660-037-0080, and provides, in relevant part:

“Permissible Nonwater-Dependent Uses. Unless otherwise allowed through an Exception, new nonwater-dependent uses which may be permitted in ‘Urban Water-dependent (UW)’ management units are a temporary use which involves minimal capital investment and no permanent structures, or a use in conjunction with and incidental and subordinate to a water-dependent use. Such new nonwater-dependent uses may be allowed only if the following findings are made, prior to permitting such uses:

“\* \* \* \* \*

- “2. Use in conjunction with and incidental and subordinate to a water-dependent use:
  - “a. Such nonwater dependent uses shall be constructed at the same time as or after the water-dependent use of the site is established, and must be carried out together with the water-dependent use.
  - “b. The ratio of the square footage of ground-level indoor floor space plus outdoor acreage distributed between the nonwater-dependent uses and the water-dependent uses at the site shall not exceed 1 to 3 (nonwater-dependent to water-dependent).
  - “c. Such nonwater-dependent uses shall not interfere with the conduct of the water-dependent use.”

1 Priority Areas.” The Goal 17 portion of the legend states that it concerns “AREAS  
2 ‘ESPECIALLY SUITED FOR WATER-DEPENDENT USES.’” As discussed further  
3 below, the map includes two designations that are applied to a rectangular strip of land on the  
4 subject property, approximately 300 feet wide, that covers only a few acres at the tip of the  
5 peninsula near the Sitka Dock. The two designations are (1) “deep water close to shore with  
6 supporting land transport facilities suitable for ship and barge facilities” and (2) “potential  
7 for recreational utilization of coastal water or riparian resources.” This strip of land, which  
8 the county refers to as the “designated area,” appears to include only the extreme western  
9 portion of the 56-UW zone and several small portions of beach or tidelands zoned 56-DA.  
10 The inventory map applies no Goal 17 designations to any other portion of the 56-UW zoned  
11 portion of the property. The map applies several Statewide Planning Goal 16 (Estuarine  
12 Resources) designations to a large area offshore, within the 56-DA zone, that includes part of  
13 the Sitka Dock.

14 Finally, the county codified the 56-UW zone at Coos County Zoning and Land  
15 Development Ordinance (ZLDO) 4.5.310 through 4.5.312. ZLDO 4.5.310 states the  
16 management objective for the district, and is discussed at length below. ZLDO 4.5.311 is a  
17 list of uses and activities allowed, conditionally allowed, or prohibited in the 56-UW zone.  
18 All of the allowed or conditionally allowed uses, including “Recreation PUD,” are subject to  
19 listed General Conditions. General Condition 3 states that “[a]ll uses shall be consistent with  
20 Policy #16, regarding areas ‘suitable for water-dependent uses.’” As noted, in the county’s  
21 initial decision it applied Policy 16 to the entire subject property, including the entire 56-UW  
22 zone. On remand, it determined that Policy 16 applies only to the rectangular strip of land  
23 designated on the inventory map as being “especially suited for water-dependent uses,” and  
24 certain areas and structures westward of that designated area.

25 With that overview, we turn to the parties’ arguments.

1           **B.       Application of Policy 16 to Areas Zoned 56-UW**

2           The county’s conclusion that Policy 16 applies only to the “designated area,” the 300-  
3 foot wide strip of land across the end of the peninsula closest to the dock, is based on (1)  
4 language in ZLDO 4.5.310, (2) the inventory map, and (3) General Condition 3 in ZLDO  
5 4.5.311.

6           ZLDO 4.5.310 states, in full:

7           “This shoreland district shall be managed so as to insure that the unique  
8 qualities of the district closest to deep water access for water-dependent uses  
9 are protected and utilized for such development. However, nonwater-  
10 dependent uses may be allowed as per Policy#16a. Water-related and  
11 nonwater-dependent/nonwater related uses shall be appropriate for portions of  
12 the district not ‘suitable for water-dependent uses.’ (See Inventory Map:  
13 ‘Goal #16/Goal #17 Development Priority Areas’).

14           “Development of the district shall be consistent with a site development plan  
15 that must be submitted to and reviewed by the County Planning. The site plan  
16 may only be approved if it protects the area’s unique qualities for water-  
17 dependent uses; water-related and nonwater-dependent/nonwater-related uses  
18 may only be approved if such uses do not inhibit or preclude water-dependent  
19 uses of the shoreline, and are compatible with the overall development plan  
20 for the district.” (Underline and parenthesis in original).

21           The board of commissioners interpreted the first paragraph of ZLDO 4.5.310 to  
22 distinguish between different portions of the 56-UW district, a portion that is “closest to deep  
23 water access” and a landward portion that is “not ‘suitable for water-dependent uses.’”<sup>5</sup> The

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<sup>5</sup> The county’s findings state, in relevant part:

“The Board of Commissioners interprets [ZLDO 4.5.310] in the following manner. This paragraph consists of three sentences and a parenthetical statement. The first sentence provides that the portions of the 56-UW district closest to the deep water access shall be managed for water-dependent uses. That sentence explains that the primary objective for the 56-UW district is to protect those areas closest to the deep water portions of Coos Bay and to develop them for water-dependent uses. The second sentence modifies the objective spelled out in the first sentence, and is also directed to that portion of the district that has unique qualities for water-dependent uses. The second sentence provides that even though the portion closest to deep water access is preferably utilized for water-dependent uses, nonwater-dependent uses may be allowed if the requirements of Policy 16a are met. If the requirements of Policy 16a cannot be met, nonwater-dependent cannot be approved on the area designated as suitable for water-dependent uses. The third sentence looks to the remainder of the property and provides that water-related and nonwater-dependent/nonwater-

1 board of commissioners found that the inventory map cited in the parenthetical identifies the  
2 two portions of the 56-UW district. According to the county, the portion of the district  
3 “closest to deep water access” is subject to Policy 16a and Policy 16, while “water-related  
4 and nonwater-dependent/nonwater related uses” are allowed on the remainder of the 56-UW  
5 zone without regard to Policy 16a, Policy 16 or any CBEMP policy.

6 Turning to the inventory map, the county found that the phrase “suitable for water-  
7 dependent uses” in the third sentence of ZLDO 4.5.310 and in General Condition 3  
8 corresponds to the phrase used on the inventory map for “AREAS ‘ESPECIALLY SUITED  
9 FOR WATER-DEPENDENT USES.’”<sup>6</sup> Therefore, the county concluded, the only area of  
10 the 56-UW zone that is “suitable for water-dependent uses” and hence subject to Policy 16 is  
11 the strip of land designated as “especially suited for water-dependent uses” on the inventory  
12 map.

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related uses are appropriate for those portions of the property that have not been designated as  
‘suitable for water-dependent uses.’ The ending parenthetical statement directs one to an  
inventory map that shows the development priority area located in the 56-UW district.”  
Record 15 (emphasis in original, footnote omitted).

<sup>6</sup> The county’s findings state, in relevant part:

“The Board of Commissioners finds \* \* \* that the CCZLDO 4.5.310 characterization  
‘suitable for water dependent uses’ corresponds to the area designations on the Inventory  
Map for Goal #17 ‘(AREAS ‘ESPECIALLY SUITED FOR WATER-DEPENDENT  
USES’).’

“Testimony from [petitioners] posits that, because the Inventory Map uses the language  
‘especially suited for water-dependent uses’ and that the General Condition 3 under  
CCZLDO 4.5.311 uses the language ‘suitable for water-dependent uses,’ the Inventory Map  
is not the source for determining where on the subject property Policy #16 applies.

“The Board of Commissioners notes that CCZLDO 4.5.310 uses the same ‘suitable for water-  
dependent uses’ language that is used in CCZLDO 4.5.311, and that CCZLDO 4.5.310  
expressly directs one to the Inventory Map. Because the same language is used by both code  
provisions and they are in the same article of the code, the Board of Commissioners  
concludes that the ‘suitable’ code language refers to the ‘especially suited’ language used in  
the Inventory Map. There is no other language on the Inventory Map that the Code language  
could possibly refer to. The Board of Commissioners concludes that the ‘suitable for water-  
dependent uses’ language of CCZLDO 4.5.310 and 4.5.311 mean the same thing, and that it  
directs one to the Inventory Map to determine areas suitable for water-dependent uses and the  
applicability of CBEMP Policy #16.” Record 16 (footnote omitted).

1 ZLDO 4.5.310 itself does not mention Policy 16. The pertinent trigger for  
2 application of Policy 16 in the 56-UW zone is General Condition 3, part of the conditions  
3 that apply to all uses allowed in the 56-UW zone. General Condition 3 provides that “[a]ll  
4 uses shall be consistent with Policy #16, regarding areas ‘suitable for water-dependent  
5 uses.’” The county emphasizes the last phrase, and reads that phrase as limiting the  
6 application of Policy 16 to areas that are “suitable for water-dependent uses,” *i.e.*, the area  
7 designated on the inventory map as being “especially suited for water-dependent uses.”

8 Petitioners agree that ZLDO 4.5.310 appears to distinguish between two portions of  
9 the 56-UW zone, but argue that the county misunderstands the difference between the two.  
10 According to petitioners, the first sentence identifies the area that is “closest to deep water  
11 access for water-dependent uses” that must be “protected and utilized for such development.”  
12 The second sentence relates to that protected area, and clarifies that “nonwater-dependent  
13 uses may be allowed” in that area closest to deep water access “per Policy#16a,” *i.e.*, only if  
14 that area is *rezoned* to allow nonwater-dependent uses under the requirements of Policy 16a.  
15 Petitioners agree with the county that the third sentence of ZLDO 4.5.310 relates to the rest  
16 of the 56-UW zone, in which “[w]ater-related and nonwater-dependent/nonwater related uses  
17 shall be appropriate for portions of the district not ‘suitable for water-dependent uses.’” Like  
18 the county, petitioners read the reference to the inventory map as demarcating the two  
19 distinct portions described in the first and third sentences of ZLDO 4.5.310. However,  
20 petitioners’ understanding of where Policy 16 applies is the mirror image of the county’s.  
21 Petitioners contend that *Policy 16a* governs the protected or designated area “closest to deep  
22 water access,” while *Policy 16* governs the remainder of the 56-UW zone. Nothing in  
23 ZLDO 4.5.310, petitioners argue, suggests that Policy 16 applies *exclusively*, or indeed at all,  
24 to the protected area closest to deepwater access.

25 In support of that interpretation, petitioners point out that OAR 660-037-0080  
26 requires counties to identify and designate lands as “water-dependent shorelands,” which the

1 county presumably did in zoning the entire peninsula 56-UW. Petitioners note that  
2 OAR 660-037-0080(3) provides three methods to protect water-dependent shorelands, the  
3 first of which is to allow *only* water-dependent uses, under OAR 660-037-0080(3)(a). The  
4 second, under OAR 660-037-0080(3)(b), allows nonwater-dependent uses when they are “in  
5 conjunction with and incidental and subordinate to water-dependent uses.” The third, not  
6 relevant here, allows temporary nonwater-dependent uses. Petitioners argue that nothing in  
7 OAR 660-037-0080 suggests a fourth option, in which a county may designate land as water-  
8 dependent shorelands and yet allow unrestricted nonwater-dependent uses, ungoverned by  
9 the ratio standard at OAR 660-037-0080(3)(b)(B). According to petitioners, ZLDO 4.5.310  
10 indicates that in adopting the 56-UW zone the county chose to *prohibit* nonwater-dependent  
11 uses in the protected, designated area closest to deepwater access, pursuant to OAR 660-037-  
12 0080(3)(a), and allow such uses only if that portion is rezoned under Policy 16a. The county  
13 chose to allow nonwater-dependent uses in the remainder of the 56-UW zone pursuant to  
14 OAR 660-037-0080(3)(b), petitioners argue, subject to the ratio standard in Policy 16.

15 The county rejected that interpretation in part by noting that the third sentence of  
16 ZLDO 4.5.310 refers to portions of the 56-UW district that are “not ‘suitable for water-  
17 dependent uses,’” followed by a reference to the inventory map. Clearly, the county reasons,  
18 some portions of the 56-UW district are *not* suitable for water-dependent uses, as depicted on  
19 the inventory map. Because Policy 16 has meaning and application only for lands that *are*  
20 suitable for water-dependent uses, the county concludes, Policy 16 does not apply to those  
21 lands that are not depicted on the inventory map as being “suitable for water-dependent  
22 uses.”

23 Petitioners respond that the county’s interpretation fails to explain why the county  
24 applied the 56-UW zone, which implements the water-dependent provisions of Goal 17, to an  
25 entire site if the county believed that only a very small portion of that site is in fact “suitable  
26 for water-dependent uses.” With respect to General Condition 3, petitioners dispute that the

1 phrase “regarding areas ‘suitable for water-dependent uses’” is intended to limit application  
2 of Policy 16 to specific portions of the 56-UW zone. Petitioners note that other UW zones  
3 have similar language under their general conditions, for example the 60-UW and 61-UW  
4 zones, but the district management objectives for those zones do not refer to the inventory  
5 map or suggest that Policy 16 applies only to a portion of those zones.

6 Intervenor responds to the last point by citing to other UW zones, such as the 66-UW  
7 zone, that (1) explicitly recognize that some areas within the zone are not “suitable for water-  
8 dependent uses,” (2) cite to the inventory map to delineate those areas, and (3) like the 56-  
9 UW zone impose general conditions that apply Policy 16 with the qualifying phrase  
10 “regarding protection of areas ‘suitable for water-dependent uses.’” ZLDO 4.5.795 and  
11 4.5.796.<sup>7</sup>

12 Neither the county’s interpretation nor petitioners’ interpretation can be entirely  
13 squared with the pertinent code, goal and rule language. The county’s interpretation gives  
14 little meaning to the second sentence of ZLDO 4.5.310, which can be read to suggest that  
15 rezoning under Policy 16a is the means, perhaps the only means, to approve nonwater-  
16 dependent uses in the area “closest to deep-water access.” Further, as petitioners point out,  
17 there seems little sense in applying a zone intended to implement the water-dependent  
18 protections of Goal 17 to an entire site, if in fact the county believed that only a few acres of  
19 that site are “suitable for water-dependent uses.”

20 On the other hand, petitioners’ interpretation gives little meaning to the third sentence  
21 of ZLDO 4.5.310, which appears to indicate that some portion of the 56-UW is not suitable

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<sup>7</sup> ZLDO 4.5.795 states the management objective for the 66-UW zone, as follows:

“The waterfront area of this shoreland district shall be managed for water-dependent and water-related uses. Temporary nonwater-dependent/nonwater-related uses are allowed as per Policy #16 in this area. The inland area is not well-suited for water-dependent/water-related uses. (See inventory map ‘Goal #16 and Goal#17 Priority Development Areas’ for delineation of the area considered ‘suitable for water-dependent uses’).”

1 for water-dependent uses and thus presumably not subject to Policy 16. As evidenced by  
2 ZLDO 4.5.795, quoted at n 7, intervenor appears to be correct that the county’s  
3 acknowledged code sometimes includes within UW zones areas that the county does not  
4 believe are “suitable for water-dependent uses.”

5 Further, as again evidenced by ZLDO 4.5.795, it is clear that in drafting the  
6 regulations governing UW zones the county regarded the inventory map as delineating the  
7 area considered “suitable for water-dependent uses.” That is somewhat problematic, because  
8 the words “suitable for water-dependent uses” appear nowhere on the inventory map.  
9 Instead, the Goal 17 legend on the map refers to “AREAS ‘ESPECIALLY SUITED FOR  
10 WATER-DEPENDENT USES.’” Both phrases are in quotes, indicating that the phrases are  
11 based on specific sources. As far as we can tell, the phrase “especially suited for water-  
12 dependent uses” occurs in only one place in Goal 17, in a section that concerns  
13 redevelopment of existing developed commercial/industrial waterfront areas that are “not  
14 designated as especially suited for water-dependent uses.”<sup>8</sup> Goal 17 directs that such areas  
15 that are suitable for redevelopment and that are *not* designated as being “especially suited for  
16 water-dependent uses” be planned to allow for a mix of water-dependent, water-related and

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<sup>8</sup> We repeat the relevant terms of Goal 17:

“Local governments shall determine whether there are any existing, developed commercial/industrial waterfront areas which are suitable for redevelopment which are not designated as especially suited for water-dependent uses. Plans shall be prepared for these areas which allow for a mix of water-dependent, water-related, and water oriented nondependent uses and shall provide for public access to the shoreline.”

We note also that the phrase “especially suited for water-dependent uses” occurs in Goal 16, as follows:

“Where consistent with the purposes of this management unit and adjacent shorelands designated especially suited for water-dependent uses or designated for waterfront redevelopment, water-related and nondependent, nonrelated uses not requiring dredge or fill; mining and mineral extraction; and activities identified in (1) and (2) above shall also be appropriate.

“In designating areas for these uses, local governments shall consider the potential for using upland sites to reduce or limit the commitment of the estuarine surface area for surface uses.”



1 water-oriented non-dependent uses. Goal 17 does not specify what standards or  
2 requirements apply to sites that *are* designated as being “especially suited for water-  
3 dependent uses.” However, we note that OAR 660-009-0025(4), part of the administrative  
4 rules governing industrial and commercial development, requires if local governments adopt  
5 policies to provide for specific uses with special site requirements, the local governments  
6 shall adopt policies and land use regulations protecting “coastal shoreland sites designated as  
7 especially suited for water-dependent use” for industrial and commercial uses.<sup>9</sup>

8 By contrast, the phrase “suitable for water-dependent uses” appears in a number of  
9 different places in Goal 17 and the Goal 17 rule, and is at the heart of the administrative rule.  
10 It is not clear to us whether the Goal 17 phrase “especially suited for water-dependent uses”  
11 is simply an unfortunate lexical variation on the more prevalent phrase “suitable for water-  
12 dependent uses,” or whether it is a distinct subset of that broader category with an  
13 independent significance.

14 The county treated the iteration of those phrases in ZLDO 4.5.310 and the inventory  
15 map as meaning essentially the same thing. While that may or may not be consistent with  
16 Goal 17, a point we do not decide, it seems reasonably clear that when the county adopted  
17 ZLDO 4.5.310 and the inventory map it did not appreciate a potential distinction between the  
18 two, if any exists. As the county found, there is no other possible correlate on the inventory  
19 map for the phrase “suitable for water-dependent uses” than the phrase “especially suited for  
20 water-dependent uses,” and read together the code and map clearly link those two phrases  
21 together. The county’s plan and code are acknowledged to comply with Goal 17, so any  
22 error in drafting the plan and code to interchangeably use the phrases “suitable for water-

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<sup>9</sup> However, effective January 1, 2007, OAR 660-009-0025(4) is amended to delete the adverb “especially,” so that the rule will apply to “coastal shoreland sites designated as suited for water-dependent use under Goal 17.” The intent of that amendment is not clear to us, but it suggests that the Land Conservation and Development Commission does not perceive or no longer perceives any distinction between sites that are “especially suited” and those that are “suited” or “suitable.”

1 dependent uses” and “especially suited for water-dependent uses” cannot be challenged now.  
2 The county correctly concluded that ZLDO 4.5.310 read in context with the inventory map  
3 treats the portion of the district outside the cross-hatched designated area as being “not ‘-  
4 suitable for water-dependent uses’” as that phrase is used in Goal 17 and the Goal 17 rule.

5 That conclusion in turn suggests that requirements such as Policy 16 that apply only  
6 to shorelands designated as “suitable for water-dependent uses” do not apply to the  
7 undesignated areas of the 56-UW zone. While that conclusion is not compelled by the text of  
8 ZLDO 4.5.310 or 4.5.311, it is consistent with that text and context. In this respect, we note  
9 that ZLDO 4.5.311 includes an additional Policy 16 trigger. A “Special Condition” applies  
10 Policy 16 to commercial, industrial and port facilities, energy production and water-borne  
11 transportation uses otherwise permitted in the 56-UW zone. The parties do not discuss the  
12 significance of this special condition, but it seems to support the county’s view that Policy 16  
13 does not apply throughout the 56-UW zone. The above-cited special condition would be  
14 redundant and unnecessary if General Condition 3 applies throughout the zone, as petitioners  
15 contend.

16 Finally, petitioners argue that even if the county’s interpretation is consistent with the  
17 text of the applicable code provisions, the county’s interpretation is inconsistent with Goal  
18 17 and the Goal 17 rule. Petitioners argue that no deference is due the county’s  
19 interpretation of local regulations implementing the goals, and that the county’s  
20 interpretation cannot be affirmed in any event under ORS 197.829(1)(d).<sup>10</sup> We agree with

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<sup>10</sup> ORS 197.829(1) provides:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

1 petitioners that because the pertinent code provisions appear to implement the goal and rule  
2 no deference is owed to the county’s interpretation of those code provisions. However,  
3 petitioners’ argument that the county’s interpretation is inconsistent with the goal and rule is  
4 based on petitioners’ view that the county designated the entire site as being “suitable for  
5 water-dependent uses.” As explained above, the county drafted ZLDO 4.5.310 in a manner  
6 that makes it reasonably clear that the county intended to designate only a small portion of  
7 the subject property as being suitable for water-dependent uses. Any error in doing so cannot  
8 be challenged now.

9 **C. Application of Policy 16 to Areas Outside the 56-UW Zone**

10 Petitioners next argue under this assignment of error that the county erred in  
11 considering areas of the subject property—indeed areas located beyond the property  
12 boundaries out in Coos Bay—that are not zoned 56-UW, in finding that the proposed  
13 development complies with the Policy 16 1 to 3 ratio. According to petitioners, much of the  
14 square footage attributed to water-dependent uses—a large stretch of open water, the marina,  
15 the dock, and the beach and tidelands segments—lie entirely or partially outside of the 56-  
16 UW zone, and within the 56-DA zone. Petitioners argue that the county can consider only  
17 development within the 56-UW zone, in applying the 1 to 3 ratio.

18 Intervenor responds that petitioners waived this issue by failing to raise it below.  
19 ORS 197.763(1).<sup>11</sup> The closest petitioners came to raising this issue, intervenors argue, is  
20 language buried in a paragraph in the following written testimony:

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“(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

“(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

<sup>11</sup> ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the

1 “Applicant has allocated 274,756 square feet as ‘Marina—committed space,’  
2 explaining that ‘[t]he marina dock commits an area from the edges of the  
3 dock, to the breakwater structure, to the shore[.] \* \* \* That area is required for  
4 the boats to maneuver in and out of the marina.’ *This area is outside of the*  
5 *56-UW zone, and apparently outside of the property boundaries, and cannot*  
6 *be used to justify nonwater dependent uses within the 56-UW zone or on the*  
7 *subject property.* This area is ‘left in its natural state’ and remains  
8 undeveloped; no physical structures are involved. Applicant cannot count an  
9 expansive stretch of the Coos Bay estuary as a developed water-dependent use  
10 for purposes of calculating the nonwater dependent/water dependent ratio.”  
11 Record 122-23 (ellipsis in original, italics added).

12 Intervenor contends that the above does not mention the 56-DA zone and at best  
13 raises the issue that water areas off the subject property should not be calculated under the 1  
14 to 3 ratio. That testimony does not raise the issue presented here, intervenor argues, which is  
15 whether it is error to include areas or uses that are zoned 56-DA, in calculating the 1 to 3  
16 ratio.

17 Intervenor parses that testimony too narrowly. The quoted passage clearly objects to  
18 consideration of water areas “outside of the 56-UW zone,” and argues that such areas cannot  
19 be used to justify nonwater-dependent uses within the 56-UW zone. That it does not name  
20 the 56-DA zone seems immaterial. A reasonable decision maker would recognize that  
21 testimony as raising the issue that water areas outside the 56-UW zone should not be  
22 included in the ratio calculation, because they are outside the 56-UW zone, and would have  
23 adopted findings addressing that issue.

24 However, we agree with intervenor that the quoted testimony objects only to  
25 consideration of the open water areas, and does not raise any issue with respect to other  
26 facilities or areas such as the marina, dock and beach areas. We note that the testimony goes  
27 on to object to the beaches on a different basis, and does not raise any objections to the  
28 marina or dock. In fact, the testimony appears to include the marina and dock within the

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local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

1 square footage allocated for “uses that are properly included within the applicable definition  
2 of ‘water dependent.’” Record 123. Read in context, a reasonable decision maker would not  
3 have recognized that the testimony objects to consideration of the marina, dock and beaches  
4 on the basis that they are outside the 56-UW zone. Accordingly, our analysis below applies  
5 only to the issue raised regarding open water areas outside the 56-UW zone.<sup>12</sup>

6 Turning to the merits, intervenor argues that the county reasonably considered the  
7 project as a whole, including areas of open water in the 56-DA zone that are necessary to  
8 access the marina, in calculating the 1 to 3 ratio. Further, intervenor points out that the  
9 inventory map designates much of the open water area that the county considered under Goal  
10 16 for “Water Dependent Use Protection.” The area of the estuary so designated is not  
11 contiguous with the area designated under Goal 17, but includes part of the Sitka Dock and  
12 surrounding waters and extends out to the deep water channel. The inventory map legend  
13 includes two designations for that estuarine area: (1) deep-water areas adjacent or in  
14 proximity to the shoreline, and (2) areas of minimal biological significance needed for uses  
15 requiring alteration of the estuary. Record 156. We understand intervenor to argue that it is  
16 appropriate to take into account under the Policy 16 ratio test estuarine waters that are  
17 designated for water-dependent use protection under Goal 16.

18 The 56-DA zone does not mention Policy 16, and none of the general or specific  
19 conditions applicable in that zone require consideration of Policy 16. As far as we can tell,  
20 the Policy 16 ratio standard does not apply to any of the uses allowed in the 56-DA zone.  
21 Indeed, Policy 16 appears to apply only within UW (Urban Water Dependent) districts.  
22 Presumably that is because OAR 660-037-0080, which Policy 16 implements, applies only to  
23 water-dependent shorelands, not to estuarine areas. While we tend to agree with intervenor  
24 that it makes sense to evaluate the project as a whole, including areas of the project not

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<sup>12</sup> This open water area is the same area as use item 2, discussed under the second assignment of error.

1 subject to Policy 16, that logic would seem to dictate that the county also consider the  
2 remainder of the subject property on which condominium development is proposed. If a  
3 seaward area of the project that is not subject to Policy 16 is nonetheless taken into  
4 consideration under that policy, consistency would seem to demand that landward areas of  
5 the project not subject to the policy would also be taken into consideration, even though the  
6 policy does not apply to those landward areas.

7 In any case, intervenor cites nothing in the ZLDO, Goal 17 or the rule that authorizes  
8 the county to determine the 1 to 3 ratio by taking into account outdoor acreage that is outside  
9 the area designated for protection as water-dependent shorelands, *i.e.*, outside the 56-UW  
10 zone.<sup>13</sup> Goal 17 states that “water-dependent shorelands shall possess, or be capable of  
11 possessing, structures or facilities that provide water-dependent uses with physical access to  
12 the adjacent coastal water body.” The goal appears to distinguish between water-dependent  
13 shorelands and the “adjacent coastal water body.” Nothing cited to us suggests that water-  
14 dependent shorelands include adjacent coastal water bodies that are not designated for  
15 protection as water-dependent shorelands, for purposes of Policy 16 or OAR 660-037-  
16 0080(3).

17 The purpose of the ratio test, as we understand it, is to preserve suitable shorelands  
18 for water-dependent uses, by allowing nonwater-dependent uses of such shorelands only if  
19 such uses are “incidental and subordinate” to water-dependent uses of the shorelands. Goal  
20 17 explains that “[i]ncidental means that the size of the nonwater-dependent use is small in  
21 relation to the water-dependent operation[.]” The purpose of the ratio test is undermined if

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<sup>13</sup> As noted above, the area designated on the inventory map as being “especially suited for water-dependent uses” is not located completely within the 56-UW zone, but appears to include certain small areas of beaches and tidelands that are within the 56-DA zone. Given the extremely large scale of the inventory map, the apparent overlap into the 56-DA zone could simply be a mapping error. If one assumes that the overlap was intended, one might argue that at least those beach and tideland areas within the designated area should be subject to Policy 16, notwithstanding that those areas are not within the 56-UW zone. We note, however, that no portion of the open water area that the county considered is within the designated area.

1 the county can take into account large areas of coastal waters that are *not* designated for  
 2 protection as water-dependent shorelands, because that would significantly expand the  
 3 permissible size of nonwater-dependent uses on such shorelands, potentially dwarfing any  
 4 water-dependent uses in the shorelands areas that *are* designated for protection. Indeed, that  
 5 is essentially the present case. The open water area is by far the largest component of the  
 6 “water-dependent uses” the county considered under the ratio test, and its large size allows  
 7 intervenor to greatly increase the size and extent of nonwater-dependent uses proposed on  
 8 the protected shorelands. It seems more consistent with that purpose to focus the analysis  
 9 under the ratio test to those water-dependent and nonwater-dependent uses that exist or are  
 10 proposed within the area designated for protection as water-dependent shorelands, *i.e.*, within  
 11 the 56-UW district. Consequently, we agree with petitioners that the county erred in  
 12 determining the ratio test based on the 274,756-square foot open water area outside the 56-  
 13 UW zone.

14 The first assignment of error is sustained, in part.

15 **SECOND ASSIGNMENT OF ERROR**

16 The county identified 22 distinct types of structures, facilities or areas that it  
 17 considered for purposes of the Policy 16 ratio standard, summarized in the margin.<sup>14</sup> It

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<sup>14</sup> The following table is based on the table at Record 41:

Use	Water-Dependent	Nonwater-Dependent	Not Committed
(1) Marina-Dock	44,774 square feet		
(2) Marina-Committed Space	274,756		
(3) Marina-Staging Area/Viewing	14,585		
(4) Marina-Parking Area	39,943		
(5) Marina-Guard House	400		
(6) Marina-Offices	1,250		
(7) Marina-Rental Shop	2,500		
(8) Marina-Travel Agency		1,250	
(9) Marina-Restaurant		5,000	
(10) Wetland Mitigation Bank	127,471		
(11) Residential Dwelling Units And Driveways		79,549	
(12) Undeveloped Upland			

1 categorized each structure, facility or area as water-dependent, nonwater-dependent, or “not  
 2 committed,” that is, committed to neither water-dependent nor nonwater-dependent uses  
 3 The structures, facilities and areas considered all lie within the designated area, the 300-foot  
 4 wide strip of land, or are seaward of that area. The county concluded that there are 122,195  
 5 square feet of nonwater-dependent uses, and 701,084 square feet of water-dependent uses,  
 6 resulting in a ratio that exceeds one to five.

7 Petitioners challenge the county’s categorization of use items 2 (marina, committed  
 8 space), 10 (developed wetland mitigation bank), 12 (undeveloped upland open space) and 17  
 9 through 21 (five beach segments).<sup>15</sup> With respect to items 2, 10, and 17-21, the county  
 10 concluded that these areas are “committed” by water-dependent development and therefore  
 11 appropriately considered as outdoor areas distributed to water-dependent uses. With respect  
 12 to item 12, upland open spaces that lie between and among the proposed condominium units,  
 13 the county took the opposite view that these areas are not “committed” by the adjoining  
 14 nonwater-dependent development and therefore categorized these areas as non-committed.

15 Item 2 is a 274,756-square foot area of open water that is bounded by the dock on the  
 16 southwest and northwest, partially bounded by a proposed breakwater to the northeast, and  
 17 by the shoreline to the southeast. The county categorized this area as being committed to

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Open Space			130,119
(13) Road		36,396	
(14) Beach Access-Dock Stairs	144		
(15) Improved Beach Access Path	1,750		
(16) Rental Shop Beach Access Ramp	360		
(17) Beach – Segment 1	22,321		
(18) Beach – Segment 2	67,607		
(19) Beach – Segment 3	52,216		
(20) Beach – Segment 4	25,507		
(21) Beach – Segment 5	25,500		
(22) Beach – Not Committed			57,884
<hr/>			
TOTALS	701,084 square feet	122,195	188,003

<sup>15</sup> Petitioners also object to use item 3, the staging area/viewing deck, but do not explain the basis for that objection. Intervenor argues that the Board should decline to consider this undeveloped argument. If the Board considers it, intervenor argues that a staging area is an appropriate part of a marina that includes a rental agency offering kayaks and similar equipment. We agree with both arguments.



1 development by the dock and marina uses.<sup>16</sup> We already concluded, above, that the county  
2 erred in taking this area into account in determining the one-to-three ratio, because this area  
3 lies entirely outside the 56-UW zone and is not “water-dependent shorelands” subject to  
4 Goal 17 or Policy 16. However, because there is not much authority on that issue either way,  
5 and our conclusion is not free from doubt, we also consider petitioners’ challenges to item 2  
6 under this assignment of error.<sup>17</sup>

7 Item 10 is a 127,471-square foot artificial wetland that will be used to mitigate  
8 wetland losses to condominium development elsewhere on the property and will function as  
9 the storm water management facility for that condominium development. The county  
10 categorized item 10 as a water-dependent use.<sup>18</sup>

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<sup>16</sup> The county’s findings regarding item 2 state:

“The open space committed to marina use is identified as item (2) in the table and annotated site plan. That open area is enclosed by the marina dock on the southwest and northwest, by the physical breakwater structure to the northeast, and by the shoreline to the southeast. This area is committed to marina traffic use for navigation and to other water recreation uses that will originate from the shoreline closest to the marina dock. A marina includes the area where boats are berthed and must navigate. Consequently, this committed space is part of the ‘recreational marinas’ example of a water-dependent use provided above and is classified here as a water-dependent use. The Board of Commissioners notes that the area calculated in the table does not include any areas that lie outside of the perimeter formed by the physical dock and breakwater structure.” Record 22.

<sup>17</sup> Intervenor asserts, initially, that petitioners affirmatively waived any issue regarding item 2 during the proceedings before LUBA in *Sitka Dock*, by conceding that the “marina” is a water-dependent use. Petitioners respond, and we agree, that petitioners did not affirmatively waive the issues raised with respect to item 2 under this assignment of error. Intervenor cites to a passage in LUBA’s decision that summarizes petitioners’ arguments, as the source of petitioners’ alleged concession. That passage, even if it is an accurate summary of petitioners’ position during that appeal, did not concede that the county can include a large expanse of open water as “outdoor space” committed by development to water-dependent use.

<sup>18</sup> The county’s findings regarding item 10 state:

“The Board of Commissioners concludes that the developed wetland mitigation area, use item (10) is a water-dependent use. The Board agrees with Applicant’s rebuttal argument that the wetlands mitigation bank satisfies the definition of ‘water-dependent.’ The Applicant has established that the mitigation bank is a developed use that will convert non-wetland areas to wetlands. The Applicant has submitted evidence that the wetlands mitigation bank will serve multiple purposes. Those include acting as a stormwater facility to process stormwater runoff from the developed areas, mitigating the filling of isolated inland wetlands, and enhancing the water cleansing effect of the existing estuarine wetlands. The mitigation bank consolidates all of the wetlands mitigation into a single area along Coos Bay and Third Creek to achieve

1 Items 17-21 are five beach segments that the county claimed are committed to water-  
2 dependent uses because of nearby water-dependent development, such as the dock stairs, a  
3 beach access path, and the ramp that extends down from the rental shop.<sup>19</sup>

4 Finally, use item 12 is an area totaling 130,119 square feet that includes the open  
5 spaces that are between and among the condominium dwelling units that are proposed within  
6 the designated area. The county treated item 12 as “not committed” to either water-  
7 dependent or nonwater-dependent uses, and thus did not include it in calculating the 1 to 3  
8 ratio.<sup>20</sup> With that overview, we turn to the parties’ arguments.

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maximum effectiveness. The Board notes that portions of the developed wetland mitigation bank that lie outside of the Designated Area have not been included in the area calculations table.” Record 23-24.

<sup>19</sup> The county’s findings state, in relevant part:

“Use items (17) through (21) are the various beach segments which are committed to recreational uses by the physical development of use items (14) through (16), consequently each is classified here as water-dependent. Beach segments 1 and 2, use items (17) and (18), lie to the immediate southwest of the dock. Because they are adjacent to the marina dock where visiting boats will berth, marina users will access these beach segments directly from the dock. The Board of Commissioners notes that only that portion of segment 1 that lies within the Designated Area is included in the area calculations table. Beach segment 3, use item (19), which is located to the immediate northeast of the dock and is accessed by stairs from the dock, forms the majority of the shoreline that lies in the marina area and can be expected to be frequently used for marina-related purposes. Beach segment 4 is the area around the end of the ramp that extends from the tourist rental shop. Consequently, that beach segment will be used by departing and returning sea kayaks, sailboards and other water-bound rented recreational devices. Beach segment 5, use item (21), is the portion of the bay-side beach area that is reached via the improved beach access path, use item (15). This area of beach is the farthest removed from the immediate vicinity of the dock and marina that still has direct public access to commit it to active-water-dependent recreational uses. It is also the beach area that is directly accessed from the parking lot by day-users. Thus, it is also categorized as water-dependent.

“The final beach segment is use item (22). That is the area of beach to the northeast of beach segment 5 that continues along Coos Bay to the mouth of Third Creek. There is no direct public access to this beach area and there is no other development that commits this beach area to a particular use. At most, this beach area would be used infrequently for low-intensity recreational purposes. Consequently, this beach area is categorized as not committed.” Record 25.

<sup>20</sup> The county found as follows:

“The area calculations table and annotated site plan includes an extensive area of undeveloped upland open space, use item (12). Submitted evidence and testimony at the hearing establish that the unpaved land around the dwelling units will be undeveloped—there

1           **A.       Committed By Development**

2           Petitioners argue that the county’s categorization of items 2, 10, 12 and 17-21 is  
3 inconsistent with our holding in *Sitka Dock*, and inconsistent with Policy 16, the goal and  
4 rule.

5           In the county’s initial decision in *Sitka Dock* it included large areas of undeveloped  
6 uplands and tidelands as outdoor space distributed to “water-dependent uses.” We rejected  
7 that interpretation of Policy 16 and OAR 660-037-0080 as inconsistent with the text and  
8 purpose of the policy and rule, noting that all of the examples of water-dependent and  
9 nonwater-dependent uses listed in the rule involve structures or facilities of some kind.  
10 Accordingly, we held that “outdoor space” refers to developed outdoor areas such as parking  
11 lots or boardwalks that are “committed by development” to either water-dependent or  
12 nonwater-dependent uses.<sup>21</sup>

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will be no ‘yards’ or gardens. Currently, the ground has been heavily disturbed due to the former industrial use on the site. The Applicant has explained that the remaining undeveloped portions of the property will be restored to their natural sandy condition with native grasses and other plants. This work is proposed to be done by the firm that will construct the wetlands mitigation bank. Consequently, the Board of Commissioners concludes that use item (12) will constitute ‘undeveloped open space’ not committed to a particular use and classifies it as ‘not committed.’” Record 24.

<sup>21</sup> We held in *Sitka Dock*:

“In our view, the requirement that nonwater-dependent uses be ‘incidental and subordinate to water-dependent uses under the 1-to-3 ratio requires a comparison of indoor and outdoor space that is committed by development to either water-dependent or nonwater-dependent uses, not a comparison that includes undeveloped, vacant lands that are left in their natural state and used, if at all, only for passive recreational purposes. It is significant that all of the pertinent uses described in OAR 660-037-0040(6)(a), (b) and (c) involve physical structures or facilities of some kind. Nothing in the rule suggests that undeveloped open spaces used, at most, for passive recreation are either water-dependent or nonwater-dependent uses. That view is also supported by the requirement in Policy 16(III)(2)(a) that the nonwater-dependent uses be constructed at the same time or after the water-dependent uses are established, and that the uses be ‘carried out together.’ It is meaningless to say that vacant lands left in their natural state can be either ‘constructed’ or ‘established.’” 49 Or LUBA at 23 (internal citations omitted).

1           The phrase “committed by development” does not occur in Policy 16 or the rule.  
2           That phrase is our shorthand description of the “outdoor spaces” that may be included in the  
3           ratio calculation, as we understand the policy and the rule. We did not have occasion in *Sitka*  
4           *Dock* to elaborate further on what was meant by that phrase. On remand, the county  
5           accepted intervenor’s argument that “outdoor space” that is “committed by development”  
6           includes not only (1) outdoor areas that are actually developed but also (2) undeveloped  
7           outdoor areas that are proximate to development and that are “committed” by that  
8           development to either water-dependent or nonwater-dependent use.

9           Petitioners challenge that view, arguing that only *developed* outdoor spaces such as  
10          parking lots, staging areas or boardwalks in conjunction with a water-dependent or nonwater-  
11          dependent use may be considered under the ratio test, not undeveloped areas left in their  
12          natural state. Petitioners argue that the county essentially repeated its error in *Sitka Dock* by  
13          again counting large undeveloped areas as outdoor space attributed to “water-dependent  
14          shorelands.” In the alternative, petitioners argue that if undeveloped areas may be committed  
15          by adjoining development, the county erred in categorizing item 12, the undeveloped open  
16          spaces between and among the condominium units, as non-committed space rather than  
17          outdoor space attributed to nonwater-dependent uses.

18          Intervenor responds generally that it is appropriate to consider undeveloped areas that  
19          are committed by surrounding development to particular water-dependent uses. With respect  
20          to item 2, for example, intervenor argues that the open water area around the marina is  
21          committed by the marina, the dock and the breakwater for boat maneuvering and navigation  
22          uses. Similarly, with respect to the beach segments, intervenor argues that the stairs, access  
23          path and ramp commit the beach segments to water-dependent recreational uses.

24          We generally agree with the county and intervenor that undeveloped outdoor spaces  
25          may be so committed by surrounding water-dependent (or nonwater-dependent) facilities to  
26          water-dependent (or nonwater-dependent) uses that it is appropriate under Policy 16 and the

1 rule to include them in the ratio calculation. There seems little doubt that it would be  
2 appropriate to include in the ratio calculation an open area used to store logs and other  
3 materials for a pulp mill, or an open area used for parking in conjunction with a fish  
4 processing plant on the site, notwithstanding that such open areas are not paved or otherwise  
5 developed. Equally, there seems little doubt that undeveloped areas that are adjacent to or  
6 intermingled among nonwater-dependent uses and that have no other practicable use due to  
7 the proximity of the nonwater-dependent uses have been committed to nonwater-dependent  
8 uses.

9 Thus, if Policy 16 and OAR 660-037-0080 applied to open water areas outside the  
10 56-UW zone and coastal shorelands, we might well agree with the county and intervenor that  
11 item 2 is appropriately considered “outdoor space” committed to water-dependent uses under  
12 the policy and rule. It seems clear that the water area immediately around the marina is  
13 dedicated by the marina to boat navigation. However, our agreement on that point does little  
14 to assist respondents, because we concluded above that Policy 16 and the rule do not apply to  
15 areas that are not designated as “water-dependent shorelands,” and such areas cannot be  
16 included in determining the permissible size of incidental and subordinate nonwater-  
17 dependent uses within such shorelands.

18 Items 17-21, the beach segments, present a closer question.<sup>22</sup> OAR 660-037-0040(6)  
19 defines and provides examples of water-dependent and nonwater-dependent uses.<sup>23</sup> The rule

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<sup>22</sup> We note that all or almost all portions of the beach segments are outside the 56-UW zone, and that only one segment is entirely within the designated area. However, as noted above, petitioners raised no issues on these matters with regard to the beach segments, and any such issues are waived.

<sup>23</sup> OAR 660-037-0040(6) provides, in relevant part:

“(a) The definition of ‘water-dependent’ contained in the Statewide Planning Goals (OAR Chapter 660, Division 015) applies. In addition, the following definitions apply:

“(A) ‘Access’ means physical contact with or use of the water.

1 includes “boat ramps” among the examples of recreational water-dependent uses, and that  
2 would clearly include the ramp leading from the rental shop to the beach. The rule does not  
3 list pedestrian stairs or paths among the examples of water-dependent uses, although we note  
4 that it lists “boardwalks” among the uses that are *not* “water-dependent.” See n 23.  
5 Petitioners do not dispute that the stairs and path themselves are water-dependent uses under  
6 the rule, and we therefore assume they are. We understand petitioners to dispute that the  
7 mere presence of a ramp, a set of stairs or a path commits large undeveloped areas of beach  
8 and tideland left in their natural state, for purposes of Policy 16.

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“(B) ‘Requires’ means the use either by its intrinsic nature (e.g., fishing, navigation, boat moorage) or at the current level of technology cannot exist without water access.

“(C) ‘Water-borne transportation’ means uses of water access:

“(i) Which are themselves transportation (e.g. navigation);

“(ii) Which require the receipt of shipment of goods by water; or

“(iii) Which are necessary to support water-borne transportation (e.g. moorage fueling, servicing of watercraft, ships, boats, etc. terminal and transfer facilities).

“(D) ‘Recreation’ means water access for fishing, swimming, boating, etc. Recreational uses are water dependent only if use of the water is an integral part of the activity.

“\* \* \* \* \*

“(b) Typical examples of water dependent uses include the following:

“\* \* \* \* \*

“(B) Commercial - e.g., commercial fishing marinas and support; fish processing and sales; boat sales, rentals, and supplies.

“(C) Recreational - e.g., recreational marinas, boat ramps, and support.

“\* \* \* \* \*

“(c) For purposes of this division, examples of uses that are not ‘water dependent uses’ include restaurants, hotels, motels, bed and breakfasts, residences, parking lots not associated with water-dependent uses, and boardwalks.”

1           Intervenor responds that the ramp, stairs and path will allow people to access the  
2 beach segments for fishing, swimming and non-motorized boating, and therefore it is  
3 appropriate to consider the entirety of those segments to be committed to water-dependent  
4 uses.

5           As we found in *Sitka Dock*, the regulatory focus of the Goal 17 rule is on structures or  
6 facilities that commit water-dependent shorelands to certain uses, not on undeveloped areas  
7 or uses and activities that do not require development. OAR 660-037-0040(6)(a)(D), for  
8 example, defines “recreation” to mean “water access for fishing, swimming, [and] boating,”  
9 and OAR 660-037-0040(6)(b) gives as examples of recreational water-dependent uses  
10 “recreational marinas, boat ramps, and support.” Although it is somewhat counterintuitive,  
11 the activities of “fishing, swimming [and] boating” are not themselves recreational water-  
12 dependent uses of coastal shorelands as the rule employs those terms. It is the *access* for  
13 fishing, swimming and boating provided, for example, by a boat ramp, or perhaps a fishing  
14 or swimming dock, that is the recreational water-dependent use for purposes of the rule, not  
15 the water or shoreline that is used or accessed.

16           Even if it is appropriate to consider some portion of the beach proximate to the access  
17 facility to be part of the facility or to be committed to certain uses by the facility, we agree  
18 with petitioners that there is no basis under the rule to include entire expanses of waterfront,  
19 as the county does here. For example, with respect to item 18, the county found that a set of  
20 stairs 144 square feet in size commits a 67,607-square foot segment of undeveloped beach  
21 and tidelands to water-dependent use, a size ratio that exceeds one to 400. It is difficult to  
22 understand how a facility 144 square feet in size can commit an area 67,607 square feet in  
23 size to particular uses. As a comparison, it seems doubtful that a 144-square foot boardwalk  
24 providing access to an undeveloped 67,607-square foot natural area could possibly “commit”  
25 that area to nonwater-dependent uses.

1           As a final consideration, it is appropriate to consider whether the county’s approach is  
2 consistent with the purpose of the Goal 17 rule, which as noted is to preserve water-  
3 dependent shorelands for water-dependent uses by limiting the size of nonwater-dependent  
4 uses relative to water-dependent uses on the site. Nonwater-dependent uses are allowed only  
5 if “incidental and subordinate” to water-dependent uses. The county’s approach counts as  
6 water-dependent areas five undeveloped beach segments totaling 192,611 square feet in size,  
7 based on a ramp, stairs and path totaling 2,254 square feet in size. By including those beach  
8 segments, the county justified approving over 64,000 square feet of nonwater-dependent  
9 residential development on the site, under the 1 to 3 ratio test. In other words, by  
10 constructing 2,254 square feet of water-access facilities, the applicant is authorized to  
11 construct 64,000 square feet of nonwater-dependent development, under the county’s  
12 approach. It cannot possibly be consistent with the goal and rule to use an approach that  
13 effectively treats 64,000 square feet of nonwater-dependent development as “incidental and  
14 subordinate” to 2,254 square feet of water-dependent facilities.

15           **B.     Wetland Mitigation Bank**

16           With respect to item 10, the wetland mitigation bank, petitioners argue that the  
17 wetland is not “committed by development,” but is simply a vacant natural area that should  
18 not be categorized as a water-dependent use, under our reasoning in *Sitka Dock*. Intervenor  
19 responds that the wetland area is itself a developed water-dependent use, not an undeveloped  
20 area committed by adjoining development. According to intervenor, the wetland mitigation  
21 bank constitutes “development” as that concept is used and defined in the goals, because an  
22 existing upland area will be excavated and terraformed into a functioning wetland.<sup>24</sup> A  
23 wetland is obviously “water-dependent,” intervenor argues, and therefore the county properly  
24 included the wetland acreage as a “water-dependent use.”

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<sup>24</sup> The goals define the term “develop” to include making “a physical change in the use or appearance of land[.]”



1 We tend to agree with intervenor that an artificial wetland/ storm water facility is  
2 “development” as the goals use that term. However, even if so, we disagree with the county  
3 and intervenor that that development is properly viewed as a “water-dependent use.” As far  
4 as we can tell, the sole purposes of the wetlands are to (1) mitigate wetlands losses elsewhere  
5 on the property due to residential development and (2) filter storm water generated by  
6 residential development. The wetlands have nothing to do with any industrial, commercial  
7 or recreational water-dependent use or facility, as far as we are informed.

8 It is true that the wetlands involve water, as intervenor points out, but not all  
9 development that involves water is thereby a water-dependent use. An on-site sewage  
10 facility serving the residential development, or a decorative fountain, would also involve  
11 water, but it would be strange to conclude that such facilities are “water-dependent uses”  
12 within the meaning of the rule. A water-dependent use for purposes of the rule is a  
13 commercial, industrial or recreational use that requires location in proximity to the estuary,  
14 in order to access the estuary. As far as we are informed, the wetlands/storm water facility  
15 could perform its function to mitigate and filter storm water from residential development on  
16 any upland site, regardless of proximity to the estuary. Consequently, we agree with  
17 petitioners that the county erred in categorizing the wetland/storm water facility as a “water-  
18 dependent use” for purposes of Policy 16. If it is properly viewed as development, if  
19 anything it would appear to be a “nonwater-dependent use” associated with and committed  
20 by residential development. If it is not development, it is at most a non-committed area.

21 **C. Open Spaces**

22 Finally, with respect to item 12, the upland open areas between the condominium  
23 units, petitioners argue that these areas will be used as part of the residential development  
24 and are therefore committed by that development to nonwater-dependent uses.

25 Intervenor responds that these areas will be planted and maintained as open spaces,  
26 and will not function as yards or side-yards to the individual condominium units, the owners

1 of which will have no legal right to possess the open spaces. Therefore, intervenor argues, it  
2 is not appropriate to view these open spaces as being committed to nonwater-dependent uses  
3 by the adjoining and surrounding residential development.

4 We agree with petitioners that the county erred in categorizing those spaces as “not  
5 committed.” As explained above, in our view whether a water-dependent or nonwater-  
6 dependent structure or facility “commits” adjoining undeveloped area depends in relevant  
7 part on whether the facility renders other uses of the undeveloped areas impracticable. In  
8 other words, an area that is “not committed” must be at least theoretically available for both  
9 water-dependent and nonwater-dependent uses. Here, the applicant proposes placing  
10 115,945 square feet of nonwater-dependent uses within the designated area, including 22  
11 condominium structures, leaving 130,119 square feet of open areas interspersed among the  
12 nonwater-dependent uses. It seems highly unlikely that a water-dependent use could, or  
13 would, be sited in any part of that open area adjacent to or in proximity to the proposed  
14 condominium structures. As a practical matter, the residential units and roads have  
15 committed those interspersed open areas to nonwater-dependent uses. The fact that the  
16 residents of the condominium units may not have the legal right to use adjoining open areas  
17 as backyards or side yards does not demonstrate that those open areas are not committed to  
18 nonwater-dependent use, or that those areas are available for water-dependent uses.

19 **D. Conclusion**

20 For the foregoing reasons, we conclude that the county miscategorized all or nearly  
21 all of the areas subject to use items 10, 12 and 17-21. In combination with our conclusion  
22 under the first assignment of error with respect to item 2, it is clear that the proposed  
23 development within the designated area does not comply with the 1 to 3 ratio. The second  
24 assignment of error is sustained.

1 **THIRD ASSIGNMENT OF ERROR**

2 Under this assignment of error, petitioners challenge the county’s contingent  
3 condition of approval, which comes into play if an appellate review body disagrees with the  
4 county’s categorization of other use items, in particular use item 12. In that circumstance,  
5 the condition of approval requires the applicant to reduce the number of dwelling units and to  
6 create a “wetland viewing area” so that the ratio continues to exceed 1 to 3. This “wetland  
7 viewing area” is a 25,354-square foot area adjacent to the wetlands mitigation bank,  
8 consisting apparently of a parking lot, picnic tables and viewing platforms, that would  
9 replace four condominium structures. The county categorized the wetland viewing area as a  
10 recreational water-dependent use, because it will allow the public to view wildlife that will  
11 populate the wetland and shoreline areas.

12 Petitioners challenge the contingent condition of approval on several grounds,  
13 arguing that it is not development, and in any case not a water-dependent use or committed  
14 to water-dependent use. Intervenor responds that the viewing area is development, and is  
15 water-dependent because it depends on proximity to the wetland and estuary to afford views  
16 of wildlife. Intervenor urges LUBA to affirm the county’s decision notwithstanding any  
17 errors in categorizing use items, if LUBA concludes that the condition of approval is  
18 sufficient to ensure that development within the designated area satisfies the ratio test.

19 We concluded, above, that the county miscategorized more than one use item, and  
20 even a rough mathematical calculation suggests that the contingent condition of approval,  
21 even if sustained, would not suffice to ensure that development within the designated area  
22 satisfies the ratio test. In any case, we disagree with the county and intervenor that the  
23 wetland viewing platform is properly categorized as a water-dependent use. As noted, the  
24 rules list “boardwalks” among the uses that are nonwater-dependent. *See* n 23. While that  
25 term is not defined, it presumably refers to pedestrian facilities that allow the public to walk  
26 along and view the estuary. The rule further defines “recreation” and “access” in a manner

1 that makes it clear that recreational water-dependent uses require access to, physical contact  
 2 with or use of, estuarine waters. *Id.* Although it is again a somewhat counter-intuitive  
 3 conclusion, a facility that merely allows public viewing of estuarine waters, such as a  
 4 boardwalk or the proposed wetland viewing area, is not a recreational water-dependent use  
 5 for purposes of the rule. Accordingly, the contingent approval of condition does not provide  
 6 a basis for LUBA to affirm the decision.

7 The third assignment of error is sustained.

8 The county's decision is remanded.

