

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 PEOPLE FOR RESPONSIBLE PROSPERITY,
5 COLUMBIA RIVERKEEPER, DAVID SHANNON,
6 PETER HUHTALA and BOB GOLDBERG,
7 *Petitioners,*
8

9 vs.

10 CITY OF WARRENTON,
11 *Respondent,*
12

13 and

14 SKIPANON NATURAL GAS, LLC,
15 *Intervenor-Respondent.*
16

17 LUBA No. 2006-016
18

19 FINAL OPINION
20 AND ORDER
21

22 Appeal from City of Warrenton.
23

24 Brett VandenHeuvel, Portland, filed the petition for review and argued on behalf of
25 petitioners.
26

27 No appearance by the City of Warrenton.
28

29 Roger A. Alfred, Portland, filed the response brief and argued on behalf of
30 intervenor-respondent. With them on the brief were Mark D. Whitlow and Perkins Coie,
31 LLP.
32

33 BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.
34

35 DAVIES, Board Member, did not participate in the decision.
36

37 AFFIRMED
38

06/29/2006
39

40 You are entitled to judicial review of this Order. Judicial review is governed by the
41 provisions of ORS 197.850.
42

NATURE OF THE DECISION

Petitioners appeal ordinances that amend the comprehensive plan map and text and development code map and text to facilitate a Liquefied Natural Gas (LNG) terminal in the Columbia River estuary.

FACTS

The area subject to the challenged plan and zoning amendments is located in the Columbia River estuary, and consists of the East Skipanon Peninsula (ESP), a shoreland area created from dredge spoil deposits next to the Skipanon River, and a large area of adjoining estuarine waters to the north of the ESP. The ESP is part of Youngs Bay, and is located in close proximity to the Columbia River deep-draft navigation channel and the Skipanon River waterway. From 1979 to 2001, the ESP was designated and zoned for water-dependent industrial uses, but no industrial uses developed there during that period of time. In 2001, the city approved a request from the Port of Astoria to redesignate the ESP “other shorelands,” and apply a “Conservation” plan designation, and a new Urban Resort and Recreation zone, in order to facilitate development of a proposed golf course. The golf course proposal did not come to fruition, however.

In 2005, intervenor applied to the city to redesignate 96 acres of the ESP as Especially Suited for Water-Dependent (ESWD) shorelands and rezone the same area as Water-Dependent Industrial Shorelands (I-2). The application also proposed redesignating approximately 370 acres of adjoining estuary as Aquatic Development and rezoning the same area Aquatic Development (A-1). In addition, intervenor requested that the city codify an earlier code interpretation that LNG importation, regasification and transfer is a permitted use in the I-2 zone. Intervenor did not seek permits for a particular use allowed in the I-2 zone, but it is undisputed that intervenor contemplates constructing an LNG terminal and regasification facility on the subject property, which will require federal, state and local

1 permits. To address questions raised by the state Department of Land Conservation and
2 Development intervenor submitted a conceptual plan of an LNG terminal. The plan depicts a
3 1500-foot ship berth and a large ship-turning basin in an A-1 zoned portion of Youngs Bay
4 that is connected to the ESP via a 1000-foot dock and pipeline, with the proposed
5 regasification and transfer facility located on the ESP. Record 1624.

6 The city planning commission recommended approval of the proposed plan and
7 zoning map and text changes. After conducting a *de novo* hearing, the city commission
8 voted to approve the requested amendments. This appeal followed.

9 **FIRST, SECOND, THIRD, FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

10 In these assignments of error, petitioners argue that the city impermissibly deferred
11 analyses required under Statewide Planning Goals 9 (Economic Development)¹ and 16
12 (Estuarine Resources),² and failed to adopt adequate findings supported by substantial
13 evidence demonstrating that the amendments comply with those goals.

14 Petitioners' major theme, particularly in the first assignment of error, is that the city
15 erred in (1) failing to address the alleged negative economic impacts that the LNG facility
16 allowed under the proposed plan amendments would have on commercial and
17 noncommercial boating in the area, (2) deferring consideration of such negative impacts to
18 the proceedings on a site review permit application for a specific LNG terminal.
19 Specifically, petitioners contend that federal agencies will impose an exclusion zone, the size

¹ Goal 9 is “[t]o provide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare, and prosperity of Oregon’s citizens.”

² Goal 16 is to:

“To recognize and protect the unique environmental, economic, and social values of each estuary and associated wetlands; and

“To protect, maintain, where appropriate develop, and where appropriate restore the long-term environmental, economic, and social values, diversity and benefits of Oregon’s estuaries.”

1 and conditions yet to be determined, around tankers traveling to or docked at an LNG facility
2 and the facility itself, and that exclusion zone could negatively affect fishermen and other
3 boaters trying to use the navigation channel. According to petitioners, the city deferred such
4 considerations until federal agencies approve a specific LNG terminal with specific
5 exclusion zones, and the applicant subsequently files a site review application. Petitioners
6 argue that the city was inconsistent in this respect, because it found that the proposed
7 amendments comply with Goals 9 and 16 based on consideration of the economic *benefits*
8 that might result from a hypothetical LNG terminal, without considering the *adverse*
9 economic and environmental impacts that might also result from an LNG terminal.

10 **A. Issues Raised in the Petition for Review**

11 As an initial matter, intervenor argues that while the petition for review repeatedly
12 refers to the requirements of Goals 9 and 16, the petition actually cites only a few passages
13 from either goal, and two of the cited passages are to “guidelines” that are suggested
14 approaches rather than mandatory approval criteria. According to intervenor, the only non-
15 guidelines cited by petitioners either do not provide standards applicable to post-
16 acknowledgment plan amendments or are complied with, for the reasons explained in the
17 city’s findings. In addition, intervenor argues that petitioners refer interchangeably to Goals
18 9 and 16, without recognizing that what may be a requirement under one goal is not a
19 requirement under the other. Because the petition for review has not identified any
20 applicable approval requirements in Goals 9 or 16 that the city failed to address adequately,
21 intervenor argues, the arguments under these assignments of error do not provide a basis for
22 reversal or remand.

23 Petitioners responded at oral argument that their arguments under Goals 9 and 16 are
24 not limited to the specific guidelines and implementation requirement cited in the petition for
25 review, but also include other goal language that, fairly read, the petition relies upon. We
26 turn, first, to determining what issues are raised in the petition for review.

1 The petition for review cites and quotes one passage from Goal 9 and four passages
2 from Goal 16, found in the petition for review at pages 6 and 25-26. If the petition for
3 review includes other goal citations, quotes or paraphrases, the references are too obscure for
4 us to recognize or trace back to actual goal language.

5 The Goal 9 quotation is to a guideline.³ One of the Goal 16 quotations is to a
6 guideline.⁴ As intervenor notes, the guidelines to the goals are advisory “suggested
7 approaches” and are not mandatory approval criteria or standards that must be satisfied to
8 approve or deny a post-acknowledgment plan amendment. ORS 197.015(10); *Downtown*
9 *Comm. Assoc. v. City of Portland*, 80 Or App 336, 340, 722 P2d 1258 (1986); *Hummell v.*
10 *City of Brookings*, 16 Or LUBA 1, 12-13 (1987); Goal 2 (Land Use Planning), Part III. We

³ Petitioners quote the following Goal 9 guideline:

“The economic development projections and the comprehensive plan which is drawn from the projections should take into account the availability of the necessary natural resources to support the expanded industrial development and associated populations. The plan should also take into account the social, environmental, energy, and economic impacts upon the resident population.”

⁴ Petitioners quote the following Goal 16 guideline:

“In detail appropriate to the level of development or alteration proposed, the inventories for estuarine resources should include:

“* * * * *

“3. Social and economic characteristics--Location, Description, and Extent of:

“a. The importance of the estuary to the economy of the area:

“* * * * *

“e. Public access;

“* * * * *

“g. Existing transportation systems.”

1 agree with intervenor that failure to address or comply with the Goal 9 or 16 guidelines is not
2 reversible error.⁵

3 We do not understand intervenor to dispute that the city must address at least some of
4 three cited and quoted Goal 16 passages, but intervenor argues, for the reasons set out in the
5 city’s findings and discussed below, that the proposed amendments are consistent with the
6 cited Goal 16 passages. We discuss the parties’ arguments regarding Goal 16 below.

7 With respect to Goal 9, however, intervenor argues that petitioners cite only to a Goal
8 9 guideline, and fail to cite or quote any applicable Goal 9 language, which makes it difficult
9 for intervenor to respond to petitioners’ broad contention that the challenged decision is
10 inconsistent with Goal 9.

11 We agree with intervenor that petitioners’ Goal 9 arguments are simply too diffuse
12 and poorly grounded in actual Goal language, or the language of the rule that implements
13 Goal 9 at OAR chapter 660, division 009 (which petitioners do not cite at all), to allow
14 intervenor to respond or the Board to conduct meaningful review.⁶ That difficulty is
15 compounded by the fact that the city adopted extensive findings addressing Goal 9 and Goal
16 9-related comprehensive plan policies, at Record 94-95, 269-72, and 293-94, but with one
17 exception discussed below petitioners do not specifically challenge any of those findings.
18 Consequently, we decline to address petitioners’ contentions regarding Goal 9 further.

⁵ As intervenor points out, the city in fact adopted alternative findings addressing the cited Goal 16 guideline, concluding in relevant part that development of the ESP and aquatic areas would result in “greater diversity in the area’s economy[.]” Record 144. Petitioners do not challenge this finding.

⁶ It may seem obvious to petitioner that something in Goal 9 must require the city to evaluate allegations that development of the industrial uses allowed in the I-2 zone may adversely affect existing economic uses of the estuary. That may in fact be the case, but it is not obvious to us. The challenged plan and zoning amendments allow commercial and industrial uses where such uses were not allowed before. On its face that would seem to be entirely consistent with Goal 9. However, it is not obvious to us that Goal 9 requires evaluation of potential conflicts between *new* Goal 9 uses allowed under the amendments and *existing* Goal 9 uses in the area. Again, that may be the case, but without some citation to specific Goal 9 or Goal 9 rule language to that effect, we decline to accept petitioners’ apparent assumption that Goal 9 requires that evaluation.

1 That said, petitioners quote and discuss two *Goal 16* provisions that refer to economic
2 considerations. We discuss those Goal 16 provisions below. For present purposes, however,
3 we observe only that while the petition for review fails to raise any cognizable issues under
4 Goal 9, the petition does raise economic impact issues under Goal 16. Accordingly, we
5 consider petitioners’ arguments regarding economic impacts of the proposed amendments
6 only to the extent petitioners have demonstrated that Goal 16 requires consideration of
7 economic impacts.

8 **B. Deferred Consideration of Economic Impacts of an LNG Terminal**

9 As noted, petitioners argued to the city that it must address alleged negative economic
10 impacts of an LNG terminal, including the effect of hypothetical exclusion zones and LNG
11 tanker traffic on commercial and noncommercial marine traffic in the estuary. The city
12 disagreed that such matters must be determined and evaluated in the context of a plan
13 amendment that does not in fact approve an LNG terminal.⁷ The city reasoned that the size

⁷ The city’s Goal 9 findings state, in relevant part:

“Opponents have raised numerous issues with respect to the potential economic impacts of an LNG import terminal, which are addressed below in Section VI, and are hereby incorporated by reference into this finding, and none of which persuade the City Commission that adoption of the proposed Comprehensive Plan Amendments is inconsistent with Goal 9. With respect to opponents’ arguments, in addition to all of the responses set out in Section VI, the City Commission finds that they are addressed to a proposed LNG import terminal development that is not part of the Applications. What if any adverse economic impacts there will be from an LNG import terminal on the ESP cannot be determined with certainty until a specific development proposal is prepared which includes, for example, a determination of the applicable exclusion (land) and safety and security (water) zones associated with the facility. As the evidence in the record establishes, these details cannot be finalized before the Applicant has entered the FERC [Federal Energy Regulatory Commission] process. Once a development proposal is in place during the FERC process, the WDC [Warrenton Development Code] requires that the applicant demonstrate both a public need for the project and that the project’s public benefits outweigh its adverse consequences. The current record contains ample evidence of the potential positive economic impacts of the LNG import terminal for the City of Warrenton, and that such development would further the City’s Goal 9 policies. Adoption of the Comprehensive Plan Amendments, however, does not predetermine the outcome of the evaluation of the specific development proposal under the WDC during the FERC process.” Record 95.

The pertinent findings in the above-referenced “Section VI” state:

1 of exclusion zones and similar variables involved with any LNG terminal are determined by
2 federal agencies, in the course of obtaining required federal permits. Until a specific
3 terminal is proposed to federal agencies and approved, the city concluded, it is impossible for
4 the city to determine what impacts if any exclusion zones and LNG tanker traffic may have
5 on maritime traffic in the estuary. In any case, the city imposed a condition of approval
6 requiring that prior to issuance of permits to develop an LNG terminal, the applicant
7 demonstrate pursuant to development code standards—including standards that implement
8 Goal 16—that the terminal will not unreasonably interfere with public trust rights such as
9 commercial or recreational boating.⁸ According to the city, such code standards will suffice
10 to ensure that if a specific LNG proposal in fact includes exclusion zones or other features
11 that negatively impact maritime traffic in the estuary, such impacts will be appropriately
12 addressed.

“Opponents have objected to deferring certain determinations to the site design review and LNG permitting stages as being somehow inconsistent with the applicable approval criteria for the Amendments. * * * The City Commission finds these arguments to be without merit. The Comprehensive Plan does not defer decisions on amending the Comprehensive Plan to the development stage, it defers approval of specific development proposals to a development stage. Contrary to the assumption made by opponents * * * none of the proposed Amendments approves the development of an LNG import terminal on the Site. The Amendments make modifications to the Comprehensive Plan and the and WDC that the Applicant has supported by substantial evidence. The only decisions that are deferred to the development stage are those that relate to a specific development proposal rather than appropriate comprehensive plan and zoning designations of the Site. The Comprehensive Plan does not contain approval criteria for a development proposal; it contains policies that are implemented through provisions in the WDC, which then establish the approval criteria for individual development applications. * * *” Record 122.

⁸ Condition 2 provides:

“Prior to issuance of permits to develop the Site for an LNG importation, regasification and transfer facility, the Applicant shall, in a Type III Quasi-Judicial procedure, demonstrate compliance with all applicable land use laws, provisions and procedures, which shall include the City of Warrenton Development Code; specifically, but not limited to: Site Design Review criteria of Chapter 4.2, the estuarine development provisions of Chapter 3.11 (Columbia River Estuary Shoreland and Aquatic Area Development Standards), Chapter 3.12 (Impact Assessments and Resource Capability), with Section 3.11.2(2)(c) requiring demonstration that an LNG import terminal will not unreasonably interfere with the public trust rights, such as commercial and recreational boating in the Skipanon Waterway.” Record 125-26.

1 Finally, the city adopted findings that in fact address petitioners’ evidence and
2 arguments regarding negative economic impacts of an LNG terminal, and conclude that
3 petitioners’ evidence is speculative and unreliable and fails to demonstrate a basis to deny
4 the proposed plan amendments.⁹

5 Petitioners are correct that, as a general principle, goal compliance issues raised by a
6 plan amendment must be addressed and resolved at the time the plan amendment is adopted.
7 *1000 Friends of Oregon v. Washington County*, 17 Or LUBA 671, 683 (1989). At least
8 where adequate information is reasonably available to determine whether uses allowed by the
9 amendment are consistent with applicable goal requirements, a local government cannot

⁹ The city’s Section VI findings include the following, under the heading “Economic Impacts of LNG”:

“* * * [T]he City Commission finds that the Applicant has provided substantial site-specific expert testimony indicating that an LNG import terminal represents a substantial economic development opportunity for the City of Warrenton, provided that any actual proposed development satisfies the applicable WDC criteria. Opponents have submitted a substantial amount of material into the record in an effort to rebut the Applicant’s evidence. The City Commission finds that this evidence is not reliable and is based on feared impacts that, should they become a real possibility, would be addressed as part of the site design review during FERC’s LNG permitting stage.

“Opponents have offered a laundry list of potential economic impacts from an LNG import terminal but no systematic site-specific analysis to determine whether any of these impacts—positive or negative—would likely materialize in Warrenton, and what the relative costs and benefits would actually be. In contrast, the Applicant has offered expert analysis of the predictable economic impacts of an LNG import terminal on the City of Warrenton’s economy.

“The letters, newspaper articles, and other documents offered by opponents in support of their contention that an LNG import terminal would undermine commercial fishing, the cruise industry, and other river commerce because of the presence of safety and security zones around the LNG import vessels are also not persuasive. They are based on speculation and assumptions about what the size and scope of these zones will be, as well as worst case scenarios and reports that rely on questionable methodologies. Substantial evidence in the record suggests that the actual size of these zones and the scope of the limitations that they impose vary, are adapted to the specific needs and requirements of a particular location, and are determined in part based on potential adverse impacts on competing uses. The precise size and scope of these zones will be determined by the Coast Guard. Not until that determination is made can the actual impacts be assessed during FERC’s LNG permitting process through application of the WDC’s Chapter 3.11 and 3.12 criteria regarding, for example, interference with public trust rights, public need, and the requirements to demonstrate that the public benefits of a development outweigh its adverse impacts.” Record 123-24.

1 defer findings of goal compliance to subsequent permit decisions to which the goals do not
2 apply. *Friends of Yamhill County v. Yamhill County*, 47 Or LUBA 160, 171 (2004).

3 The parties dispute what Goal 16 requires in terms of evaluating the economic
4 impacts of the plan amendments, and when those impacts must be evaluated. Petitioners cite
5 to a Goal 16 provision that requires comprehensive plans to “maintain the diversity of
6 important and unique environmental, economic and social features within the estuary.”¹⁰
7 Intervenor responds that the quoted language is part of a section entitled “Comprehensive
8 Plan Requirements” that merely creates a planning requirement, and does not provide
9 standards applicable to post-acknowledgment plan amendments.

10 We disagree. Nothing cited to us in Goal 16 suggests that the obligation for
11 comprehensive plans to “maintain the diversity of important and unique environmental,
12 economic and social features within the estuary” is not an on-going obligation. If a plan
13 amendment would threaten to diminish the diversity of important and unique environmental
14 features, etc., then the local government must address that issue. Further, we note that the
15 quoted language simply reflects Goal 16 itself, which is to “protect the unique
16 environmental, economic, and social values of each estuary,” and to “protect, maintain,

¹⁰ Petitioners cite to the following Goal 16 provision:

“Based upon inventories, the limits imposed by the overall Oregon Estuary Classification, and needs identified in the planning process, comprehensive plans for coastal areas shall:

- “1. Identify each estuarine area;
- “2. *Describe and maintain the diversity of important and unique environmental, economic and social features within the estuary;*
- “3. Classify the estuary into management units; and
- “4. Establish policies and use priorities for each management unit using the standards and procedures set forth below.
- “5. Consider and describe in the plan the potential cumulative impacts of the alterations and development activities envisioned. Such a description may be general but shall be based on the best available information and projections.” (Emphasis added).

1 where appropriate develop * * * the long-term environmental, economic, and social values,
2 diversity and benefits of Oregon’s estuaries.” See n 2. There is no dispute that Goal 16
3 applies.

4 Petitioners also cite to a Goal 16 implementation requirement requiring that “actions
5 which would potentially alter the estuarine ecosystem shall be preceded” by an impact
6 assessment that includes information, among other things, on the “expected extent of impacts
7 of the proposed alteration” on “recreation and aesthetic use, navigation and other existing
8 and potential uses of the estuary[.]”¹¹

9 The city found that the amendments are consistent with implementation requirement
10 1 because that requirement is expressly implemented through WDC 3.12, which requires an
11 impact assessment for any development that could have an adverse impact on the estuary.
12 Record 139. Intervenor argues that implementation requirement 1 is not itself a criterion
13 applicable to post-acknowledgment plan amendments, but rather a directive to the city to
14 adopt code standards that require an impact assessment, which the city has done. At oral
15 argument, petitioners disputed that position. However, we agree with the city and intervenor

¹¹ Goal 16, Implementation Requirement 1 provides:

“Unless fully addressed during the development and adoption of comprehensive plans, actions which would potentially alter the estuarine ecosystem shall be preceded by a clear presentation of the impacts of the proposed alteration. Such activities include dredging, fill, in-water structures, riprap, log storage, application of pesticides and herbicides, water intake or withdrawal and effluent discharge, flow-lane disposal of dredged material, and other activities which could affect the estuary’s physical processes or biological resources.”

“The impact assessment need not be lengthy or complex, but it should enable reviewers to gain a clear understanding of the impacts to be expected. It shall include information on:

- “a. The type and extent of alterations expected;
- “b. The type of resource(s) affected;
- “c. The expected extent of impacts of the proposed alteration on water quality and other physical characteristics of the estuary, living resources, recreation and aesthetic use, navigation and other existing and potential uses of the estuary; and
- “d. The methods which could be employed to avoid or minimize adverse impacts.”

1 that, once the city has implemented requirement 1 by adopting code standards that require an
2 impact assessment of specific development proposals, the city is not required to conduct that
3 same impact assessment when adopting plan amendments that allow a range of development
4 uses in the estuary.¹² In other words, the compliance of the plan amendments with
5 implementation requirement 1 is assured by the fact that any specific development proposal
6 will be evaluated under code standards that directly implement that goal provision.

7 In sum, the only applicable goal requirement cited to us regarding economic
8 considerations is the Goal 16 requirement that the city “maintain the diversity of important
9 and unique * * * economic * * * features within the estuary.” In our view, that requirement
10 is much more limited than petitioners appear to believe. The obligation to “maintain the
11 diversity” of important and unique economic features of the estuary does not require that the
12 city evaluate all potential negative economic consequences of particular uses allowed by the
13 plan amendments, or require that the city protect existing economic uses against new,
14 perhaps competing or conflicting economic uses. Instead, the city must consider whether the
15 uses allowed by the proposed amendments are consistent with maintaining the *diversity* of
16 important and unique economic features within the estuary. On its face, adopting plan
17 amendments that allow the ESP and adjoining estuary to be used for a new economic use
18 would seem to be consistent with maintaining (indeed, improving) the diversity of the
19 estuarine economy. Only if there were substantial evidence that the plan amendments would
20 likely *reduce* the diversity of important and unique economic features within the estuary
21 would the city’s Goal 16 obligation to maintain that diversity be at issue.

22 Here, the city adopted a number of findings concluding that the proposed
23 amendments are consistent with the applicable goals, including findings rejecting the
24 evidence and allegations of negative economic impacts cited by petitioners. That is, contrary

¹² We might feel differently if the city had not implemented requirement 1 by adopting code standards requiring an impact assessment.

1 to petitioners’ argument, the city did not *defer* findings of compliance with Goal 16, but
2 instead determined that the proposed plan amendments are consistent with applicable Goal
3 16 requirements. As we understand the applicable Goal 16 language, those findings are
4 adequate and supported by substantial evidence. There is no evidence that an LNG terminal
5 is likely to *reduce* the diversity of existing maritime uses of the estuary. At best, petitioners’
6 evidence suggests that (1) if federal agencies impose large, strict exclusion zones for LNG
7 tankers, and (2) if too many LNG tankers dock at the terminal during a given period of time,
8 there may be significant delays that could negatively impact commercial fishermen, cruise
9 ships and recreational boaters attempting to use the navigation channels or cross the bar at
10 the same time as transiting tankers. As the city explained, petitioners’ concerns are
11 speculative and depend on worst case scenarios and variables that cannot be known at the
12 present time. Even if those variables were known at the time of the city’s decision, we fail to
13 see that the cited delays and similar inconveniences are the kind or degree of impacts that
14 could possibly result in a failure to “maintain the diversity of important and unique * * *
15 economic * * * features within the estuary.”

16 To the extent the city deferred consideration of petitioners’ evidence and arguments
17 concerning adverse impacts on maritime traffic, that deferral seems appropriate. As
18 explained, evidence of such impacts is only contingently relevant to the only applicable Goal
19 16 requirement cited to us. Consideration of such evidence is highly relevant, however,
20 under the code standards cited in Condition 2, which require evaluation of whether a specific
21 LNG terminal will interfere with the public trust rights, including commercial and
22 recreational boating.

23 Moreover, as noted, whether and to what extent an LNG terminal will adversely
24 impact existing maritime traffic depends entirely on conditions imposed by federal agencies
25 that are beyond the control of the applicant and city and that cannot be known at the present
26 time. In *Friends of Yamhill County*, 47 Or LUBA at 171, we declined to foreclose the

1 possibility that express deferral of goal compliance issues to a subsequent development
2 approval decision might be permissible, where sufficient information is unavailable to allow
3 the local government to determine and ensure that uses allowed by the amendments are
4 consistent with applicable goals. Even if the city’s decision is understood to defer to a
5 subsequent proceeding consideration of issues potentially relevant under the Goal 16
6 requirement to maintain diversity of important and unique economic features, that deferral
7 seems appropriate in the present case. That is because the information necessary to
8 determine whether and the extent to which a particular LNG facility will adversely impact
9 existing maritime traffic is unknowable at the present time, and can only be known when a
10 particular federally-approved proposal is submitted to the city. In such circumstances, it
11 seems proper to find that the plan amendment complies with the Goal 16 requirement, based
12 in part on reliance that issues raised regarding speculative adverse impacts of a particular
13 development will be adequately addressed under the code standards that apply to that
14 specific proposal and that are designed to address that specific issue.

15 For the foregoing reasons, we disagree with petitioners that the city deferred
16 consideration of the economic impacts of an LNG terminal or that any deferral of issues
17 relevant under Goal 16 was inappropriate.

18 **C. Feasibility of Goal Compliance**

19 Petitioners make a related argument that the city erred in failing to adopt a finding
20 that compliance with the Goal requirements is “feasible.”

21 Even under the assumption that the city deferred a finding of goal compliance,
22 petitioners do not explain why the city is required to find that goal compliance is feasible.
23 The cases cited for that proposition involve subdivisions and similar types of two-stage
24 development proposals under acknowledged plans and development ordinances, not post-
25 acknowledgment plan amendments subject to the goals. In any case, we agree with
26 intervenor that the city found the plan amendments comply with applicable goal

1 requirements, and did not defer a finding of goal compliance. We are aware of no obligation
2 under such circumstances for the city to find that compliance with the goals is “feasible.”

3 **D. Opportunity for Public Participation**

4 Petitioners also contend that the city committed procedural error in failing to provide
5 an adequate opportunity for the public to comment on economic impact issues, because there
6 was inadequate information available during the plan amendment proceedings regarding the
7 size of exclusion zones, frequency of LNG tankers, etc.

8 Intervenor responds, and we agree, that specific information on the size of exclusion
9 zones and frequency of LNG tankers, etc., is unknowable until the appropriate federal
10 agencies determine those variables and a specific proposal is presented to the city. That
11 information will presumably be available during the proceedings on the permit application
12 necessary to site a specific LNG terminal, proceedings subject to notice and hearing.
13 Petitioners have not established that the city committed procedural error by not requiring that
14 information to be available during the plan amendment proceedings.

15 **E. Condition 2**

16 Under the third assignment of error, petitioners challenge condition 2, which as noted
17 above requires that prior to issuance of a permit to construct an LNG facility the applicant
18 demonstrate compliance with all applicable “land use laws.” *See* n 8. Petitioners repeat their
19 arguments that the city impermissibly deferred a finding of compliance with Goal 16 to the
20 site design review proceeding, and we reject those arguments for the reasons set out above.

21 Petitioners also argue that the scope of “land use laws” may include the Oregon
22 Coastal Management Program (OCMP), which implements a federal statute. Petitioners state
23 that it is unclear whether the FERC will determine during its proceedings whether a proposed
24 LNG terminal complies with the OCMP, applicable statewide planning goals, and local plan
25 policies and land use regulations. Although it is not at all clear to us, petitioners appear to
26 argue that the city erred in delegating to FERC the issue of compliance with statewide

1 planning goals and local provisions, or that the city was required to find that compliance with
2 FERC standards will satisfy the goals.

3 If that is petitioners' argument, we do not understand it. Condition 2 does not
4 delegate anything to FERC, or rely on FERC proceedings to satisfy the goals or other
5 standards that the city is required to address in this decision. As intervenor explains, the
6 FERC proceedings and any city proceedings are entirely separate. This assignment of error
7 does not provide a basis for reversal or remand.

8 **F. Substantial Evidence Regarding Economic Impacts**

9 Under the fourth assignment of error, petitioners argue that the city's findings
10 regarding economic impacts are not supported by substantial evidence. Initially, petitioners
11 contend that the evidence the city relied upon—the economic opportunities analysis
12 submitted by intervenor's experts and similar studies—focuses exclusively on the positive
13 economic benefits of an LNG facility, and does not address petitioners' evidence of adverse
14 impacts. Petitioners then review the evidence they submitted, and argue that considering that
15 evidence, no reasonable decision maker could rely on the evidence in the whole record to
16 conclude that the proposals comply with the goals.

17 As explained above, petitioners have not advanced a cognizable Goal 9 challenge to
18 the city's extensive economic findings, and the only economic challenge advanced under
19 Goal 16 is under the obligation to maintain the diversity of important and unique economic
20 features within the estuary. While we tend to agree with petitioners, in the abstract, that a
21 decision maker would err in relying solely on the positive (or negative) impacts of a plan
22 amendment without considering countervailing evidence of negative (or positive) impacts,
23 that is not what occurred here. The city did consider petitioners' evidence, but rejected it as
24 unpersuasive and speculative. LUBA will defer to a local government's choice between
25 conflicting evidence, if a reasonable person could reach the decision the local government
26 made, in view of all the evidence in the record. *Mazeski v. Wasco County*, 28 Or LUBA 178,

1 184 (1994), *aff'd* 133 Or App 258, 890 P2d 455 (1995). As explained above, petitioners'
2 evidence falls short of demonstrating that an LNG terminal allowed under the proposed
3 amendments would reduce the diversity of important and unique economic features within
4 the estuary. The city's findings regarding economic impacts are supported by substantial
5 evidence.

6 **G. Goal 16 Requirement to Maintain the Integrity of the Estuarine**
7 **Ecosystem**

8 Under the fifth assignment of error, petitioners advance several arguments based
9 again on the Goal 16 requirement to "maintain * * * the diversity of important and unique
10 environmental * * * features of the estuary." See n 10. Further, petitioners cite to goal
11 language requiring that the highest priority for management and use of estuarine resources
12 are uses that "maintain the integrity of the estuarine ecosystem."¹³

13 Goal 16 sets out three estuarine management units: natural, conservation, and
14 development. Natural areas are designated to assure the protection of significant fish and
15 wildlife habitats and of continued biological productivity. Conservation areas also protect
16 natural resources and benefits, and include tracts of significant habitat smaller or of less
17 biological importance than those in natural areas. Conservation areas may include areas that

¹³ Goal 16 states, in relevant part:

"Comprehensive plans and activities for each estuary shall provide for appropriate uses (including preservation) with as much diversity as is consistent with the overall Oregon Estuary Classification, as well as with the biological, economic, recreational, and aesthetic benefits of the estuary. Estuary plans and activities shall protect the estuarine ecosystem, including natural biological productivity, habitat, diversity, unique features and water quality.

"The general priorities (from highest to lowest) for management and use of estuarine resources as implemented through the management unit designation and permissible use requirements listed below shall be:

- "1. Uses which maintain the integrity of the estuarine ecosystem;
- "2. Water-dependent uses requiring estuarine location, as consistent with the overall Oregon Estuary Classification[.]"

1 are partially altered and adjacent to existing development of moderate intensity. Finally,
2 development areas are designated for navigation, and commercial and industrial water-
3 dependent uses. Development areas include deep-water areas adjacent or in proximity to the
4 shoreline and areas of minimal biological significance needed for uses that require alteration
5 of the estuary and that are not allowed in natural or conservation areas.

6 The challenged amendments designate approximately 370 acres of the estuary for
7 development. Petitioners cite to evidence that an LNG facility may involve loss of two acres
8 of intertidal mudflats that are essential habitat for salmon, and dredging and other
9 modifications in up to 200 acres of estuarine waters for the turning basin and ship berth.

10 Intervenor's consultants submitted evidence that the likely impacts of an LNG
11 terminal would occur in areas with limited biological value and that any adverse impacts can
12 be effectively mitigated. The city adopted extensive findings addressing Goal 16 concluding
13 that the estuary areas under consideration were of minimum biological significance and were
14 appropriately designated and zoned for development.¹⁴ The city considered countervailing
15 evidence and argument submitted by petitioners, but chose to rely on the applicant's expert
16 testimony.¹⁵

¹⁴ For example, the city adopted the following findings to address the Goal 16 language quoted at n 13 giving highest priority to uses that maintain the integrity of the estuarine ecosystem:

“The City Commission finds that Applicant’s proposal to reclassify the aquatic areas as Aquatic Development is consistent with these priorities. As discussed below, the areas to be classified as Aquatic Development have been substantially altered by development activities in the past in anticipation of their use for bulk marine cargo importation. Specifically, because of the significant alteration by, in particular, fill, they are of comparatively limited biological significance within the overall estuarine ecosystem. In addition, once the Aquatic Development management unit designation is in place, any actual development proposal for the aquatic area will have to comply with numerous environmental impact avoidance, minimization and mitigation requirements imposed by the federal, state and local governmental permitting processes for in-water development in the Columbia River Estuary. Therefore, reclassification will also be consistent with the priority of maintaining the integrity of the estuarine ecosystem.” Record 128.

¹⁵ The city’s findings state, in relevant part:

1 Petitioners first argue that the city failed to consider critical information on the
2 operation of the LNG facility, in choosing to redesignate the area from a conservation to a
3 development management unit under the cited Goal 16 passages. Specifically, petitioners
4 fault the city for failing to determine the number of LNG tankers per week that will use the
5 facility, and the number of tug boats required, and the amount of thrust the tug boats will use.
6 According to petitioners, high-thrust tug boats will stir up sediment and degrade the benthic
7 environment of Youngs Bay. Further, petitioners argue that the city failed to address how
8 often the turning basin will require maintenance dredging.

9 Intervenor responds, and we agree, that the city was not required to evaluate the
10 specific details of a hypothetical LNG terminal in order to determine whether the aquatic
11 areas should be designated for development under applicable Goal 16 requirements. Nor is it
12 clear why information regarding the hypothetical number of tankers and the high-thrust tugs
13 used in the navigation channel and in the dredged development areas of the bay is necessary
14 to determine whether the subject area should be designated for development. The key
15 finding of the city is that the specific aquatic areas redesignated for development have

Opponents offered extensive testimony and a significant volume of documents in opposition to the Applicant's proposal to classify the aquatic management units on the Site as Aquatic Development. The City Commission considered the arguments and evidence and finds that the Applicant's analysis and site-specific expert testimony regarding the natural features of the Site are more credible and directly responsive to the applicable approval criteria, and therefore the City Commission finds that the opponents' objections with respect to the Aquatic Development management unit designation of the aquatic areas of the Site are not well taken.

"Opponents offered argument and evidence regarding the biological significance of Youngs Bay and argue on that basis that designating the aquatic areas on and adjacent to the ESP as Aquatic Development is not consistent with Goal 16 or the applicable Comprehensive Plan policies. The opponents are incorrect. SNG's [Skipanon Natural Gas] Application acknowledges the biological importance of Youngs Bay as a whole. That, however, is not the salient issue. As the environmental reports submitted on behalf of the Applicant demonstrate, the issue is the biological significance of the specific portion of Youngs Bay that SNG proposes to reclassify. Opponents offer no credible evidence on this issue, and as the Applicant's environmental reports conclude, the available evidence suggests that the proposed Aquatic Development area does not contain any unique habitat, as that term is defined by the Oregon Department of Fish and Wildlife." Record 146.

1 already been significantly altered by development and have only limited biological
2 significance. That finding is based on several expert studies, and petitioners cite to no
3 countervailing evidence. While petitioners cite to evidence that Youngs Bay as a whole has
4 significant biological value, petitioners do not cite to substantial evidence that development
5 use of the subject area will adversely impact other portions of Youngs Bay or the biological
6 productivity of the bay as a whole, or that maintaining the subject area for conservation is
7 necessary to maintain the integrity of the estuarine ecosystem.

8 Petitioners next argue that the city erred in relying on future environmental permitting
9 to minimize impacts. Reliance on such future permits is not a substitute for a finding of goal
10 compliance, petitioners contend. However, as explained above, the city did not defer a
11 finding of goal compliance. The city determined that designating the subject aquatic areas
12 for development is consistent with applicable Goal 16 requirements. As additional support
13 for that finding, the city noted that any specific proposal must comply with numerous
14 environmental impact avoidance, minimization and mitigation requirements, under federal,
15 state and local permitting processes. *See* n 14. We see no error in finding that the general
16 type of uses allowed by a plan amendment are consistent with applicable goal requirements,
17 and at the same time relying on permitting processes that implement the goal and are
18 designed to address and mitigate the possibility that specific development proposals may
19 have more intense impacts than others, as an additional basis for concluding that the plan
20 amendments are consistent with the goals.

21 Finally, petitioners challenge the city's finding that loss of two acres of intertidal
22 mudflat essential for juvenile salmon can be mitigated. According to petitioners, any loss of
23 such essential habitat is inconsistent with the Goal 16 obligation to maintain the diversity of
24 important environmental features, even if mitigated. Further, petitioners argue that the city
25 in fact imposed no requirement for mitigation as a condition of approval, and there is not

1 substantial evidence in the record that appropriate mitigation sites are available to ensure that
2 estuarine resources will be maintained.

3 Intervenor responds that the two acres of habitat are identified as “category 2”
4 habitat, not irreplaceable “category 1” habitat. According to intervenor, the Oregon
5 Department of Fish and Wildlife goal for category 2 habitat is “no net loss of habitat quality
6 or quantity.” Intervenor’s consultants testified that potential mitigation sites are available in
7 the vicinity. Intervenor argues that the standards applied during the federal, state and local
8 permitting processes necessary to site an LNG terminal suffice to ensure that any loss of
9 category 2 habitat will be mitigated. We agree with intervenor that petitioners have not
10 demonstrated that potential loss of the two acres is categorically inconsistent with Goal 16,
11 and the development standards applied during federal, state and local permitting processes
12 are sufficient to ensure that any loss is mitigated. While the city did not impose a specific
13 condition requiring mitigation, it did require in condition 2 that any subsequent development
14 proposal comply with all applicable local laws, including code provisions implementing Goal
15 16 that appear to require that loss of significant habitat be mitigated. We agree with
16 intervenor that Goal 16 does not require more in the context of the present plan and zoning
17 amendments.

18 The first, second, third, fourth and fifth assignments of error are denied.

19 **SIXTH ASSIGNMENT OF ERROR**

20 Warrenton Comprehensive Plan (WCP) 4.370(3) provides:

21 “Fish and wildlife resources will be protected in part by including an
22 extensive amount of local water area, including Alder Cove and Youngs Bay
23 in ‘conservation aquatic’ or ‘natural aquatic’ zones. In addition, identified
24 significant shoreland and wetland habitats will be included in a conservation
25 category to protect those areas from uses inconsistent with the preservation of
26 natural values.”

27 Petitioners contend that the challenged amendments violate WCP 4.370(3) by
28 redesignating over 200 acres from conservation to development, including several acres of

1 wetlands. According to petitioners, to comply with WCP 4.370(3), all of Youngs Bay except
2 for the navigation channels must be zoned conservation or natural aquatic.

3 The city commission disagreed, interpreting WCP 4.370(3) to require only that an
4 “extensive amount of local water,” including portions of Youngs Bay, be zoned conservation
5 or natural aquatic, not that all areas outside the navigation channels be so zoned.¹⁶ Petitioners
6 do not dispute that the challenged amendments leave an extensive amount of local water,
7 including large portions of Youngs Bay, zoned conservation or natural aquatic. The city
8 commission’s interpretation is consistent with the plain language of WCP 4.370(3) and we
9 affirm it. ORS 197.829(1).

10 The sixth assignment of error is denied.

11 **SEVENTH ASSIGNMENT OF ERROR**

12 Petitioners argue that the city failed to address compliance with the requirements of
13 OAR 660-012-0060, part of the Transportation Planning Rule (TPR). OAR 660-012-0060
14 generally applies when local governments adopt comprehensive plan and code amendments
15 that “significantly affect” a transportation facility.¹⁷ According to petitioners, the Columbia

¹⁶ The city commission findings state, in relevant part:

“* * * The City Commission does not interpret this policy to mean that in order to protect fish and wildlife resources, all of Youngs Bay will be designated conservation aquatic or natural aquatic, because that is not what the plain language of the policy requires. Such an interpretation would also create an internal consistency within the existing Comprehensive Plan because the Youngs Bay Subarea already designates certain portions of Youngs Bay, including the navigation channels, as Aquatic Development. The City Commission instead reads and interprets this policy to require that an ‘extensive amount’ of Youngs Bay be designated ‘conservation aquatic’ or ‘natural aquatic.’ Approval of the rezoning of the Youngs Bay portion of the Site to A-1 does not alter the fact that extensive amounts of Youngs Bay remain designated as ‘conservation aquatic’ and ‘natural aquatic.’” Record 250.

¹⁷ OAR 661-012-0060(1) provides, in relevant part:

“Where an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation would significantly affect an existing or planned transportation facility, the local government shall put in place measures as provided in section (2) of this rule to assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. A plan or land use regulation amendment significantly affects a transportation facility if it would:

1 River is a “transportation facility” within the meaning of the TPR. Petitioners contend that
2 the proposed LNG terminal will “significantly affect” marine transportation on the river, and
3 thus the city was required to address and find compliance with OAR 660-012-0060.

4 Specifically, petitioners argue that the proposed LNG terminal will slow marine
5 traffic on the river and thereby “[r]educe the performance of an existing or planned
6 transportation facility below the minimum acceptable performance standard identified in the
7 TSP or comprehensive plan[.]” According to petitioners, WCP 8.350(4) provides the
8 applicable “performance standard” for the subject area of the river, providing in relevant part
9 that “[e]xpansion of local boating and shipping activities * * * should be supported by proper
10 management and maintenance of local waterways.”¹⁸

11 Intervenor responds first that petitioners failed to raise any issues below regarding
12 OAR 660-012-0060, and thus the issues raised under this assignment of error are waived.
13 ORS 197.763(1); ORS 197.835(3). While petitioners generally raised the issue that the
14 proposed LNG terminal would interfere with marine traffic and thus the city must address
15 and find compliance with Goal 12, intervenor argues that petitioners did not cite OAR 660-
16 012-0060, argue that the terminal would “significantly affect” local marine traffic under that

“* * * * *

“(c) As measured at the end of the planning period identified in the adopted transportation system plan:

“* * * * *

“(B) Reduce the performance of an existing or planned transportation facility below the minimum acceptable performance standard identified in the TSP or comprehensive plan[.]”

¹⁸ WCP 8.350(4) provides, in pertinent part:

“Expansion of local boating and shipping activities is advocated by the City. This should be supported by proper management and maintenance of local waterways—such as increasing channel depths where desirable, undertaking periodic dredging to maintain appropriate channel depths, prohibiting reduction of channel areas and setting and enforcing speed limits for the Skipanon Channel. * * *”

1 rule, or cite to WCP 8.350(4) as the source of the pertinent “performance standard.” On the
2 merits, intervenor disputes that the Columbia or Skipanon Rivers are “transportation
3 facilities” within the meaning of OAR 660-012-0060,¹⁹ that WCP 8.350(4) provides the
4 relevant “performance standard” for the rivers, or the plan amendments “significantly affect”
5 any transportation facility.

6 The city adopted findings that address Goal 12 and OAR 660-012-0060 with respect
7 to issues raised by ODOT regarding impacts on area roads and streets. The findings also
8 note that in a December 7, 2005 letter petitioners quoted a passage from Goal 12 requiring a
9 transportation system plan (TSP) to “consider all modes of transportation including * * *
10 water,” and to “facilitate the flow of goods and services so as to strengthen the local and
11 regional economy.” Petitioners argued to the city that this passage from Goal 12 obligates
12 the city to address the impact of the amendments on marine traffic. Record 99. The city
13 responded that the quoted passage specifies the content of a TSP, and does not supply
14 approval criteria for a comprehensive plan amendment that does not amend the TSP. *Id.*

15 We need not address whether petitioners adequately raised below the issue of
16 compliance with OAR 660-012-0060, because we agree with intervenor that even if
17 petitioners raised that issue petitioners have not demonstrated that the city was obligated to
18 address and find compliance with OAR 660-012-0060. We also assume for purposes of this
19 opinion that the Columbia and Skipanon Rivers are “transportation facilities” within the
20 meaning of OAR 660-012-0060 and 660-012-0005(25). Petitioners contend that OAR 660-
21 012-0060 is triggered pursuant to OAR 660-012-0060(1)(c)(B), which refers to plan
22 amendments that reduce the performance of a transportation facility “below the minimum

¹⁹ Both parties cite to OAR 660-012-0005(25) which defines “transportation facilities as that term is used in OAR Chapter 660, Division 12 to mean “any physical facility that moves or assist in the movement of people or goods including facilities identified in OAR 660-012-0020 but excluding electricity, sewage and water systems.” OAR 660-012-0020(2)(e) in turn states that a TSP must include “[a]n air, rail, water and pipeline transportation plan which identifies where * * * port facilities, and major regional pipelines and terminals are located or planned within the planning area.”

1 acceptable performance standard identified in the TSP or comprehensive plan[.]” However,
2 we agree with intervenor that WCP 8.350(4) is simply not a “minimum acceptable
3 performance standard” of any kind. WCP 8.350(4) encourages the city to expand local
4 maritime activities in the subject area, through actions such as dredging, etc., but nothing in
5 WCP 8.350(4) constitutes a standard against which the performance of the Columbia or
6 Skipanon Rivers can be measured. Absent argument based on a “minimum acceptable
7 performance standard,” petitioners’ arguments under OAR 660-012-0060 do not provide a
8 basis to reverse or remand the challenged decision.

9 The seventh assignment of error is denied.

10 The city’s decision is affirmed.