BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SOUTHERN OREGON PIPELINE
INFORMATION PROJECT, INC.,
Petitioner,

and

RANDY PRINCE, STEVE JONES,
and JODY McCAFFREE,
Intervenors-Petitioners,

vs.

COOS COUNTY,
Respondent,

and

JORDAN COVE ENERGY PROJECT L.P.,
Intervenor-Respondent.

LUBA No. 2007-260

FINAL OPINION
AND ORDER

Appeal from Coos County.

Corinne C. Sherton, Salem, David H. Lohman, Medford, filed a petition for review. Corinne C. Sherton argued on behalf of petitioner. With her on the brief were David H. Lohman, Huycke, O'Connor, Jarvis & Lohman, LLP, and Johnson & Sherton PC.

James J. Nicita, Oregon City, filed a petition for review and argued on behalf of intervenor-petitioner Randy Prince.

Steve Jones, Coos Bay, Jody McCaffree, North Bend, represented themselves.

No appearance by Coos County.

Roger A. Alfred, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief were Seth J. King, Mark D. Whitlow and Perkins Coie LLP.

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

REMANDED 07/15/2008

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner Southern Oregon Pipeline Information Project (hereafter SOPIP) and intervenors-petitioners Randy Prince, Steve Jones and Jody McCaffree (collectively Prince) appeal a county decision that grants administrative conditional use approval for a liquefied natural gas (LNG) receiving terminal.[1]

FACTS

The SOPIP petition for review includes the following summary of facts:

> "Intervenor-respondent Jordan Cove Energy Project, L.P. (JCEP) proposes to develop an LNG facility on the North Spit of Coos Bay. The facility will include three main components: (1) a marine terminal (including docking slips, berthing facilities and access channel to the Coos Bay deep-draft navigation channel); (2) an LNG import terminal (including an unloading system, a storage system, energy generation and regasification facilities); and (3) a pipeline to convey the regasified natural gas to its destination. The challenged decision approves an application by JCEP for an LNG import terminal facility only.
>
> "The LNG import terminal facility is proposed to be located on a 170-acre site * * *. The entire LNG import terminal site is within the Coastal Shorelands Boundary and is designated and zoned Coastal Shorelands Segment 6 – Water Dependent (6-WD) by the Coos Bay Estuary Management Plan (CBEMP).
>
> "The terminal site is located on the south side of the North Spit[.] The western portion of the terminal site is a cleared area (Ingram Yard) at approximately 20 ft. elevation, created by filling and grading with dredge spoils removed from Coos Bay in the 1970s. The middle portion of the terminal site is a north-south running, forested younger stabilized dune that rises to an elevation of over 100 ft. Freshwater wetlands are located on the northern portions of the site. Portions of the proposed terminal site have been identified as a potentially significant archeological site.
>
> "Abutting the terminal site to the north are the North Spit Railroad and the Trans-Pacific Parkway. * * * To the east of the terminal site are Jordan Cove Road and Jordan Cove. To the southeast of the terminal site is the existing Roseburg Forest Products lumber/chip transportation facility. * * * The terminal facility will be abutted on the south by the proposed marine Gateway

[1] Of the intervenors-petitioners, only intervenor-petitioner Prince filed a petition for review.

> Terminal and the Coos Bay deep-draft navigation channel. Abutting the terminal site to the west is Henderson Marsh, a major salt-water marsh and significant wildlife habitat.
>
> "* * * As proposed * * * the terminal facility will include the LNG ship unloading facilities (including unloading arms, piping impoundments, control buildings and hazard detection and prevention systems) constructed on the dock and berthing structures to be provided by the Port as part of the marine terminal. The proposed terminal facility will also include an LNG storage system consisting of two 180-foot high full-containment LNG storage tanks, each with a capacity of 160,000 [cubic meters]. Additionally, the proposed terminal facility will include a boil-off gas recovery system, an LNG transfer system, and LNG regasification system, a 37 MW natural gas fired electricity generation system, and associated utilities, buildings and support facilities. * * *.
>
> "Road access to the proposed LNG terminal site will be provided by a new road accessing Jordan Cove Road to the east, which connects with Trans-Pacific Parkway to the north. A secondary emergency gated access will be provided by a north-south roadway along the western boundary of the site, connecting to the Trans-Pacific Parkway. The applicant proposes to excavate approximately 2.1 million cubic yards * * * from the younger stabilized dune running north-south through the site, reducing the height of the dune to approximately 55 ft. The excavated sand will be used to fill the Ingram Yard and the western edge of the dune to an approximate 55 ft. elevation, leveling the site around the proposed LNG storage tanks. Excess sand, together with 'other excavated material,' will be placed to create a ridge to the north of the Ingram Yard/LNG storage tanks * * *, in order to screen the site from persons traveling along the Trans-Pacific Parkway. Final site improvements will include 10.7 acres of paved roadways and 3.5 acres of structures." SOPIP Petition for Review 1-4.

REPLY BRIEF

SOPIP and intervenor-petitioner Prince (hereafter Prince) move for permission to file a reply brief. SOPIP's motion is unopposed and is granted. Intervenor-respondent JCEP (hereafter JCEP) objects that Prince's reply brief is not limited to responding "to new matters raised in the respondent's brief," as required by OAR 661-010-039. As we explain later in this opinion, in his petition for review, Prince argues that amendments to Statewide Planning Goal 7 (Areas Subject to Natural Hazards), which became effective on June 1, 2002, apply directly to the county pursuant to ORS 197.646(1) and (4). *See* n 15. In its response brief,

JCEP argues that those amendments do not apply directly to the county because the Department of Land Conservation and Development (DLCD) never gave the county notice that those amendments required the county to amend its comprehensive plan and land use regulations, as required by ORS 197.646(3). *Id.* We agree with Prince that this aspect of the reply brief responds to a new matter. The remaining part of Prince's reply brief responds to a waiver defense that JCEP raises. That aspect of the reply brief also responds to a "new matter," within the meaning of OAR 661-010-0030. *Caine v. Tillamook County*, 24 Or LUBA 627 (1993). Prince's motion to file a reply brief is allowed.

INTRODUCTION

The Coos County Comprehensive Plan is made up of three volumes. Volume I, which the parties refer to as the Coos County Comprehensive Plan or CCCP, applies to the unincorporated areas of the county that are not subject to Volumes II and III of the plan. Volume II is the Coos Bay Estuary Management Plan, which the parties refer to as the CBEMP. The CBEMP applies to the Coos Bay Estuary. The subject property is located within the Coos Bay Estuary and therefore is subject to the CBEMP. Volume III of the plan is the Coquille River Estuary Management Plan, which the parties refer to as the CREMP. The CREMP applies to the Coquille River estuary. The mouth of the Coquille River Estuary is approximately 20 miles south of the mouth of the Coos Bay Estuary.

The Coos County Zoning and Land Development Ordinance, which the parties refer to as the CCZLDO, was adopted to implement the three-volume comprehensive plan. In this opinion, we refer to that document simply as the LDO.[2]

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[2] We use a number of acronyms in this opinion. We set out some of the less common acronyms in alphabetical order below to provide a single point of reference.

CBEMP = Coos Bay Estuary Management Plan (Volume II of the Coos County Comprehensive Plan)

CCCP = Coos County Comprehensive Plan (Volume I of the Coos County Comprehensive Plan which applies outside the Coos Bay and Coquille River estuaries.

FIRST ASSIGNMENT OF ERROR (SOPIP)

A. Introduction

All parties agree that the proposed facility is subject to CBEMP Policy 17, which was adopted to protect certain estuarine resources, including major marshes and significant wildlife habitats. Under its first assignment of error, SOPIP argues the county erred in the way it applied CBEMP Policy 17 and in doing so failed to provide needed protection to Henderson Marsh, which lies to the west of the proposed facility and qualifies as a major marsh. SOPIP also argues that the county failed to protect certain onsite freshwater wetlands, as required by CBEMP Policy 17. Those freshwater wetlands are shown on the Shoreland Values Inventory map as significant wildlife habitats. CBEMP Policy 17 is set out below:

> "#17 **Protection of 'Major Marshes' and 'Significant Wildlife Habitat' in Coastal Shorelands**
>
> "Local governments shall protect from development *major marshes and significant wildlife habitat*, coastal headlands, and exceptional aesthetic resources located within the Coos Bay Coastal Shorelands Boundary, except where exceptions allow otherwise.
>
> "I. Local government shall protect:
>
> "a. 'Major marshes' to include areas identified in the Goal #17, 'Linkage Matrix', and the Shoreland Values Inventory map; and
>
> "b. 'Significant wildlife habitats' to include those areas identified on the 'Shoreland Values Inventory' map; and

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CREMP = Coquille River Estuary Management Plan (Volume III of the Coos County Comprehensive Plan).

JCEP = Jordan Cove Energy Project, the applicant and the intervenor-respondent in this appeal.

LDO = The Coos County Zoning and Land Development Ordinance, which the parties refer to as the CCZLDO.

SOPIP = Southern Oregon Pipeline Information Project, the petitioner in this appeal.

"* * * * *

"II. *This strategy shall be implemented through*:

"a. Plan designations and use and activity matrices set forth elsewhere in this Plan that limit uses *in these special areas* to those that are consistent with protection of natural values; and

"b. Through use of the Special Considerations Map that identified such special areas and *restricts uses and activities therein* to uses that are consistent with the protection of natural values. Such uses may include propagation and selective harvesting of forest products consistent with the Oregon Forest Practices Act, grazing, harvesting wild crops, and low-intensity water-dependent recreation; and

c. Contacting Oregon Department of Fish and Wildlife for review and comment on the proposed development *within the area of the 5b or 5c bird sites*.

"This strategy recognizes that special protective consideration must be given to key resources in coastal shorelands over and above the protection afforded such resources elsewhere in this Plan." (Emphases added.)

B. Henderson Marsh

The county's findings concerning CBEMP Policy 17 with regard to Henderson Marsh are set out below:

"The Board finds that the proposed LNG terminal and associated fill activity will avoid Henderson Marsh, which is located to the west of the subject property * * *. The Board is adopting a condition of approval requiring a 50-foot setback from Henderson Marsh and all delineated wetlands." Record 17.[3]

Petitioners argued below that notwithstanding that the proposed LNG facility will be set back 50 feet from Henderson Marsh, the elevated LNG facility on nearby land could still have negative impacts on the marsh that should be addressed under CBEMP Policy 17. Record 789, 924. SOPIP contends the county erred by simply assuming "that the 50-foot setback for maintenance of riparian vegetation, required by [LDO] 4.5.180, including the six

[3] The challenged decision included two conditions regarding the 50-foot setback. Conditions 2 and 7. Those conditions are set out later in this opinion at n 9.

exceptions recognized in [LDO] 4.5.180(1)(a)-(f), will be sufficient to protect the shoreland values of Henderson Marsh." Petition for Review 9 (record citations omitted.)[4]

Unlike SOPIP, we do not understand the county to have interpreted CBEMP Policy 17 to be fully implemented by LDO 4.5.180. We understand the county to have found that CBEMP Policy 17 is satisfied in this case because there will be no LNG facility development or related fill in the major marsh itself. While somewhat unclear, the county apparently also found that the LDO 4.5.180(1)(a)-(f) would extend further protection to Henderson Marsh, because it will significantly limit any removal of riparian vegetation within 50 feet of the marsh.

CBEMP 17, which is quoted in part above, requires that "[l]ocal governments * * * protect from development major marshes and significant wildlife habitat * * *." If CBEMP Policy 17 stopped there, SOPIP's argument might have merit. But CBEMP Policy 17(II) goes further and expressly explains *how* this mandate to protect certain coastal resources is implemented. CBEMP Policy 17(II)(a) explains that the CBEMP "limit[s] uses *in these special areas* to those that are consistent with protection of natural values." (Emphasis added.) CBEMP Policy 17(II)(b) provides that CBEMP Policy 17 is implemented by "the Special Considerations Map, that identified * * * special areas and restricts uses and activities *therein* to uses that are consistent with the protection of natural values." (Emphasis added.). CBEMP Policy 17(II)(b) goes on to list some uses that are consistent with those values. With regard to bird sites, CBEMP Policy 17(II)(c) provides that CBEMP Policy 17 is implemented by contacting the Oregon Department of Fish and Wildlife so that it may "comment on the proposed development *within the area of the 5b or 5c bird sites*." There is

[4] LDO 4.5.180 requires that "Riparian vegetation within 50 feet of a wetland, stream, lake or river, as identified on the Coastal Shoreland and Fish and Wildlife habitat inventory maps, shall be maintained," with a number of exceptions. Those exceptions include exceptions for trees that present an erosion or safety hazard, and removal of riparian vegetation to (1) provide direct access to water dependent uses, (2) establish structural shoreline stabilization measures, (3) allow certain stream or stream bank clearance projects, (4) site or maintain public utilities or roads, and (5) conduct agricultural operations.

simply nothing in the text of CBEMP Policy 17 that suggests it is to be implemented by limiting uses on properties that adjoin or are located near inventoried major marshes or significant wildlife habitat to avoid possible impacts on such marshes and habitat.

While the county does not expressly interpret CBEMP Policy 17 to this effect, it implicitly does so. The county's implicit interpretation is consistent with the text of CBEMP Policy 17. Certainly there is nothing in the text of CBEMP Policy 17 that requires the more expansive interpretation that SOPIP favors.

SOPIP cites no text in CBEMP Policy 17 that requires that the policy be interpreted in the way it argues it should be interpreted. SOPIP offers two contextual arguments—one in the petition for review and one that was offered for the first time at oral argument. The contextual argument that is included in the petition for review is set out below:

> "Finally, to the extent it could possibly be argued that the County's decision interprets Policy #17 as being fully implemented by [LDO] 4.5.180, such an interpretation would be impermissible under ORS 197.829(1). Statewide Planning Goal 17 (Coastal Shoreland), Coastal Shoreland Uses 1, states that within the coastal shorelands, 'major marshes * * * shall be protected.' CBEMP Policy #17 and [LDO] Table 4.7(c)(6) implement this requirement and must be interpreted consistently with it. ORS 197.829(1)(d). [LDO] 4.5.180 implements Goal 17, Implementation Requirement 4, Goal 5 and OAR 660-023-0090, and applies to all riparian corridors within the CBEMP. Also, CBEMP Policy #17 specifically states that it 'recognizes that special protective consideration must be given to key resources in coastal shorelands over and above the protection afforded such resources elsewhere in the Plan.' It would be inconsistent with the language, purpose and policy underlying Policy #17 to interpret its 'protection' requirement as being satisfied by compliance with [LDO] 4.5.180. ORS 197.829(1)(a)-(c)." Petition for Review 9-10.

First, as we have already explained, we do not understand the county to have interpreted CBEMP Policy 17 to be fully implemented by LDO 4.5.180. The county interprets CBEMP Policy 17 to protect major marshes such as Henderson Marsh from development within the inventoried major marsh areas themselves. The applicant proposes no development within Henderson Marsh. LDO 4.5.180 simply adds to that protection by

protecting the riparian area within 50 feet of Henderson Marsh from most development. We see no contextual inconsistency.

The second contextual argument was presented by SOPIP at oral argument but was not included in the petition for review or reply brief. SOPIP took the position at oral argument that some bird nesting sites that are protected under CBEMP Policy 17 are only shown on maps with a dot or a triangle and SOPIP argued that interpreting CBEMP Policy 17 to protect only the nesting sites themselves clearly would be insufficient to avoid harm to the nesting site.

CBEMP protects "[s]ignificant wildlife habitats," and its protection is not expressly limited to nesting sites. However, if the county in fact only identified nesting sites in the CBEMP and failed to any identify needed surrounding property that together with the nesting site itself makes up a "significant wildlife habitat," that failure might be an inventorying error that should have been corrected at the time the CBEMP was acknowledged. However, any such failures do not provide a basis for requiring the county to interpret CBEMP Policy 17 to extend that policy's regulatory effect beyond the "significant wildlife habitat" that the county has inventoried.

For the reasons explained above, we defer to the county's implicit interpretation of CBEMP Policy 17. *Alliance for Responsible Land Use v. Deschutes County*, 149 Or App 259, 267-68, 942 P2d 836 (1997).

This subassignment of error is denied.

C. Wetlands

1. The Applicant's Wetlands Delineation

As we have already noted, CBEMP Policy 17 requires that the county protect "significant wildlife habitats." The "Special Considerations Map" that is referenced in CBEMP Policy 17 is actually a series of "Special Regulatory Considerations" maps. The "Special Regulatory Considerations" map that shows "Shoreland Values Requiring

Mandatory Protection" identifies a fairly large freshwater wetland in the northern part of the subject property as a "significant wildlife habitat." Record 1402. Another Special Regulatory Considerations Map shows "Beaches and Dunes." Record 1398. That map shows "Younger Stabilized Dunes," in the same area that the other Special Regulatory Considerations map shows the fresh water wetlands.

The applicant took the position below that the Shoreland Values Special Regulatory Considerations Map, which identified freshwater wetlands in the northern part of the property, is inaccurate. The applicant prepared and submitted to the Oregon Division of State Lands (DSL) a wetlands delineation that locates two fairly large wetlands in the northeast part of the subject property and two small wetlands in the northwest part of the property. Record 407-12. DSL approved that delineation as accurate. The applicant proposes no development within 50 feet of any of the wetlands shown on the DSL approved wetland delineation and the county's decision approving the proposal includes a condition to that effect. Record 31 (condition number 7).

2. CBEMP Policy 3

LDO 4.7.115 explains that it is the larger scale (more detailed) inventory maps that guided preparation of the County's comprehensive plan, not the Special Considerations Map that must be consulted in making land use decisions under the County's Comprehensive Plan.[5] For some reason LDO 4.7.115 specifically refers to the CCCP and the CREMP (Volumes I and III of the county's comprehensive plan), but does not specifically refer to the

[5] LDO 4.7.115 provides:

> "Relation to Plan Inventory. The Special Considerations Map is not a substitute for the detailed spatial information presented on the CCCP and CREMP inventory maps. The Special Considerations Map is merely an index guide designed as a zoning counter implementation tool that indicates when special policy considerations apply in general area, thereby requiring inspection of the detailed plan inventory maps. The Special Considerations Map must and shall at all times accurately reflect the detail presented on the inventory maps (but at a more general scale)."

CBEMP (volume II of the county's comprehensive plan). *See* Introduction. But despite the omission of an express cross-reference to the CBEMP in LDO 4.7.115, the CBEMP itself makes it clear that the CBEMP inventory maps are the controlling maps when it comes to implementing required protections of inventoried coastal resources in the area subject to the CBEMP. CBEMP Policy 3 makes it reasonably clear that the Special Considerations Maps, while they are official maps, are for administrative convenience, whereas the CBEMP inventory maps are the controlling regulatory maps:

> "Use of 'Coos Bay Estuary Special Considerations Map' as the Basis for Special Policies Implementation
>
> "Local governments shall use the 'Coos Bay Estuary Special Considerations Map' as the basis for implementing the special protection.
>
> "I. The 'Coos Bay Estuary Special Considerations Map' which is a series of color mylar overlays, shall delineate the general boundaries (plan inventory maps contain more precise boundary locations) of the following specific areas covered by the Coos Bay Estuary Management Plan:
>
> "* * * * *
>
> "h. Significant Wildlife Habitat and Major Marshes;
>
> "* * * * *.
>
> "The 'Special Considerations Map' is NOT a substitute for the detailed spatial information presented on the Coos Bay Estuary Management Plan's inventory maps. The 'Special Considerations Map' is merely an INDEX GUIDE designed as a zoning counter implementation tool that indicates when special policy considerations apply in a GENERAL area, thereby, requiring inspection of the DETAILED Plan Inventory maps. The 'Special Considerations Map' must and shall at all times accurately reflect the detail presented on the inventory maps (but at a more general scale).
>
> "* * * * *." CBEMP Policy 3 (capitalization emphasis in original).

As SOPIP notes, there is language at the end of CBEMP Policy 3(II) that seems to point in a different direction than the language quoted above, because it suggests the Special

Considerations Map is the site specific regulatory document.[6] We discuss below the changes the county was required to adopt to secure Land Conservation and Development Commission (LCDC) acknowledgment of the CBEMP. It is clear that the CBEMP was only acknowledged because it was clarified that the more detailed CBEMP inventory maps, rather than the Special Considerations maps, are the controlling regulatory maps under the CBEMP. The fact that there remains some language in the CBEMP that suggests the Special Considerations Maps are the controlling regulatory documents cannot overcome the other clear language in CBEMP Policy 3 to the contrary.

3. CBEMP Acknowledgment

Documents that were issued by LCDC during its acknowledgment of the CBEMP are attached as Appendix pages 89 through 104 of SOPIP's petition for review and we take official notice of those documents. *DLCD v. City of Warrenton*, 37 Or LUBA 933, 936 (2000). When the CBEMP was submitted for acknowledgment, LCDC was given copies of the detailed inventory maps but was not given copies the Special Considerations Maps. This was apparently due to the difficulty or expense of making copies of the color overlays that were used to identify resources on the Special Consideration Maps. To solve the difficulty LCDC faced with acknowledging a CBEMP that seemed to assign controlling regulatory authority to the Special Considerations Map when LCDC did not have a copy of the Special Considerations Map and only had before it the more detailed CBEMP inventory maps, LCDC entered an order in which the county was given the following choices:

> "1. Delete all reference in the plan and ordinances to the 'Special Considerations Map' as a policy or a component of the plan; but
>
> "2. Continue to use it as an implementing tool over the counter;

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[6] That language in CBEMP Policy 3(II) is set out below:

> "This strategy recognizes that the 'Special Considerations Map' is an official policy component of the plan, and it provides a mechanism for site-specific application of special management Policies."

> "3. Substitute the inventory maps for the 'Special Considerations Map' as the component of the plan which implements the policies listed in Policy 3; and
>
> "4. When any appeals or controversies occur during implementation, resolve them against the inventories." Petition for Review App 94.

The county ultimately took an approach that is consistent with the suggestion in items 3 and 4 above and adopted the CBEMP Policy 3(I) language that was quoted above in the text. In acknowledging the CBEMP, LCDC specifically noted the amendment to CBEMP Policy 3 and quoted the paragraph that we quoted earlier in this opinion, which begins "[t]he Special Considerations Map is not a substitute for the detailed spatial information presented on the CBEMP's inventory maps." Petition for Review Appendix 103. Given the language of CBEMP Policy 3 and this acknowledgment context, there can be no doubt that the CBEMP inventory maps are the controlling regulatory maps for purposes of the CBEMP. Specifically, if the accuracy of the Special Considerations Map is called into question, that question is to be resolved by consulting the CBEMP inventory maps.

4. The County's Decision

To respond to questions that were raised about the propriety of relying on the applicant's wetland delineation to identify the location of wetlands on the property, the county adopted the following findings:

> "One opponent has argued that the county's incorrect map must take precedence over the applicant's delineation. However, [LDO 4.7.115] expressly recognizes that the Special Considerations Maps are not to scale and are not intended to provide a definitive identification or inventory of the location of any particular resource. * * *
>
> "[LDO 4.7.115] references inventory maps for the Coos County Comprehensive Plan (CCCP) and the Coquille River Estuary Management Plan (CREMP), but not the CBEMP which applies to the subject property. *This is due to the fact that the county has not adopted any detailed resource inventory maps as part of the CBEMP*. Therefore, the only available maps are the not-to-scale Special Considerations Maps that are expressly identified as being 'merely an index guide,' and that do not take precedence over the applicant's current wetland delineation that has been reviewed and approved by DSL. The inherent non-binding nature of the Special Considerations Map

> is evidenced by the fact that those maps show the area in question as being both a dune area and a wetland area * * *. Instead, the purpose of the maps, as stated in [LDO] Section 4.7.115 * * * is merely to alert applicants of the possible existence of resources on the site. Accordingly, the Board finds that the applicant's proposal to achieve compliance with Policy #17 by avoiding the surveyed resources is consistent with that policy." Record 17-18 (emphasis added).

We note initially, as the county frames the issue it is addressing in the above findings, that issue is whether the Special Considerations Map should be the controlling map for purposes of locating wetlands on the subject property. In this subassignment of error, the issue we understand SOPIP to raise in this subassignment of error is whether the relevant CBEMP inventory map is the controlling map for purposes of locating wetlands on the subject property. That is not the same issue that the county said it was addressing in the above findings. However, JCEP does not argue that SOPIP failed to raise the issue that is presented in this subassignment of error, or that SOPIP waived that issue pursuant to ORS 197.835(3). We therefore consider the issue.

The county is correct that the fact that the Special Considerations Map shows a large wetland in the northern part of the property is not controlling, and the county correctly rejected the opponent's argument to the contrary. However, the county is wrong about whether, under the CBEMP, any perceived inaccuracy or inadequacy in the Special Considerations Map is to be resolved by referring to the applicant's wetland delineation. As we have already explained, CBEMP Policy 3(I) clearly dictates that the CBEMP inventory maps must be used to resolve any inaccuracy or inadequacy in the Special Considerations Map.

The county's finding that "the county has not adopted any detailed resource inventory maps as part of the CBEMP" does not lead to a different conclusion. Whether those maps were formerly "adopted" "as part of the CBEMP" is immaterial. CBEMP Policy 3(I) was amended to direct that those inventory maps are controlling regulatory maps and the CBEMP was acknowledged, partially on the strength of that amendment. Given the direction in

CBEMP Policy 3(I), the CBEMP inventory maps are the controlling maps whether the county formally adopted those maps as part of the CBEMP or not. The county erred by referring to the applicant's wetland delineation in place of the CBEMP inventory maps to determine the precise location of the wetlands on the subject property, for purposes applying the CBEMP. *See 1000 Friends of Oregon v. City of Dundee*, 203 Or App 207, 216, 124 P3d 1249 (2005) (city violates Goal 2 by relying on a more current planning study that has not been adopted as part of the city's comprehensive rather than an older planning study that has been adopted as part of the city's comprehensive plan); *D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 22, 994 P2d 1205 (2000) (reaching a similar conclusion regarding Metro's reliance on an unadopted buildable lands study to support an urban reserve designation).

At oral argument, JCEP's attorney and SOPIP's attorney suggested that the CBEMP inventory maps may no longer exist because they have been lost or destroyed. The challenged decision is less than clear on this point, but the text quoted above does not take that position, at least it does not clearly take that position. If the CBEMP inventory maps have been lost or destroyed, it might be that the county could rely on the applicant's wetland delineation without first adopting that delineation as a CBEMP inventory map. CBEMP Policy 3(I) clearly anticipates that the CBEMP inventory maps rather than the Special Considerations Maps will be relied on in applying the CBEMPs regulatory protections, but it just as clearly anticipates that the CBEMP inventory maps will be available for that purpose. If they in fact are not available, it may be that other detailed maps could be used in their place. However, given the Court of Appeals' consistent rejection under Goal 2 of attempts to rely on studies that have not been adopted as part of the comprehensive plan in place of studies that have been adopted as part of the comprehensive plan, any attempt by the county to rely on a wetland delineation in place of the CBEMP inventory maps that were relied upon to secure acknowledgment, without first amending the CBEMP to allow such reliance, seems

questionable. While the CBEMP inventory maps may not have been adopted as part of the CBEMP, the CBEMP expressly requires that those inventory maps be used to precisely locate resources.

On remand, if the CBEMP inventory maps exist, the county must use them. If the CBEMP inventory maps have been lost or destroyed, the county can assess its legal options for responding to that reality. As it stands, the county's explanation for relying on JCEP's wetland delineation is not adequately explained.

Finally, JCEP argues that because the challenged approval includes a condition that wetlands may not be developed, it does not matter that the county relied on the applicant's wetland delineation. Facially that might seem to be both a practical and complete response. However, CBEMP Policies 3 and 17 dictate that any wetlands that might be shown on the relevant CBEMP inventory map must be protected. If that CBEMP inventory map exists and identifies a wetland in a location where the applicant's wetland delineation does not, that area would nevertheless be subject to protection under CBEMP Policy 17 unless and until the CBEMP inventory map is amended to no longer identify a wetland in that location. Just as the CBEMP inventory map controls in the event of any conflict with the Special Considerations Maps, for purposes of application of the CBEMP it would control in the event of any conflict with the applicant's wetland delineation. The CBEMP inventory maps must be consulted to ensure that there is no such conflict. Even if the CBEMP inventory map is found to be inaccurate, for example if it identifies a wetland in a location where there is no wetland, for purposes of applying the CBEMP, the county would have to first amend the CBEMP inventory map before allowing development that would otherwise be prohibited by CBEMP Policy 17.

5. Protection of Wetlands

SOPIP repeats the argument it made with regard to Henderson Marsh. Specifically, SOPIP argues that even if the wetlands on the subject property were properly identified

under CBEMP Policy 17, the county erroneously assumed that by not developing the wetlands and by imposing the 50-foot setback that is required by LDO 4.5.180 it necessarily follows that the proposal does not violate CBEMP Policy 17 with regard to wetlands. On remand, the county will be required to locate wetlands on the subject property in the manner dictated by CBEMP Policy 17. However, once the county does that, we reject SOPIP's contention that barring development from the wetlands and imposing the setback required by LDO 4.5.180 is not sufficient to ensure compliance with CBEMP Policy 17 with regard to wetlands.

Subassignment of error B is sustained, in part.

The first assignment of error is denied in part and sustained in part.

SECOND ASSIGNMENT OF ERROR (SOPIP)

SOPIP's second assignment of error concerns CBEMP Policy 18, which is entitled "Protection of Historical, Cultural and Archaeological Sites." We describe the main features of CBEMP Policy 18 and set out the complete text of CBEMP Policy 18 in the margin.[7]

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[7] CBEMP Policy 18 provides:

> "Local government shall provide protection to historical, cultural and archaeological sites and shall continue to refrain from widespread dissemination of site-specific information about identified archaeological sites.
>
> "I. This strategy shall be implemented by requiring review of all development proposals involving a cultural, archaeological or historical site, to determine whether the project as proposed would protect the cultural, archaeological and historical values of the site.
>
> "II. The development proposal, when submitted shall include a *Site Plan Application*, showing, at a minimum, all areas proposed for excavation, clearing and construction. Within three (3) working days of receipt of the development proposal, the local government shall notify the Coquille Indian Tribe and Coos, Siuslaw, Lower Umpqua Tribe(s) in writing, together with a copy of the *Site Plan Application*. The Tribe(s) shall have the right to submit a written statement to the local government within thirty (30) days of receipt of such notification, stating whether the project as proposed would protect the cultural, historical and archaeological values of the site, or if not, whether the project could be modified by appropriate measures to protect those values.
>
> "'Appropriate measures' may include, but shall not be limited to the following:

CBEMP Policy 18 requires that the county protect "historical, cultural and archaeological sites" and "refrain from widespread dissemination of site-specific information about identified archaeological sites." Under paragraph I of CBEMP Policy 18, those requirements are implemented by "review of all development proposals" to ensure they meet those requirements. Paragraphs II and III set out a multi-step process that dictates several

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> "a. Retaining the prehistoric and/or historic structure in situ or moving it intact to another site; or
>
> "b. Paving over the site without disturbance of any human remains or cultural objects upon the written consent of the Tribe(s); or
>
> "c. Clustering development so as to avoid disturbing the site; or
>
> "d. Setting the site aside for non-impacting activities, such as storage; or
>
> "e. If permitted pursuant to the substantive and procedural requirements of ORS 97.750, contracting with a qualified archaeologist to excavate the site and remove any cultural objects and human remains, reinterring the human remains at the developer's expense; or
>
> "f. Using civil means to ensure adequate protection of the resources, such as acquisition of easements, public dedications, or transfer of title. If a previously unknown or unrecorded archaeological site is encountered in the development process, the above measures shall still apply. Land development activities, which violate the intent of this strategy shall be subject to penalties prescribed in ORS 97.990.
>
> "III. Upon receipt of the statement by the Tribe(s), or upon expiration of the Tribe(s) thirty day response period, the local government shall conduct an administrative review of the *Site Plan Application* and shall:
>
> "a. Approve the development proposal if no adverse impacts have been identified, as long as consistent with other portions of this plan, or
>
> "b. Approve the development proposal subject to appropriate measures agreed upon by the landowner and the Tribe(s), as well as any additional measures deemed necessary by the local government to protect the cultural, historical and archaeological values of the site. If the property owner and the Tribe(s) can not agree on the appropriate measures, then the governing body shall hold a quasi-judicial hearing to resolve the dispute. The hearing shall be a public hearing at which the governing body shall determine by preponderance of evidence whether the development project may be allowed to proceed, subject to any modifications deemed necessary by the governing body to protect the cultural, historical and archaeological values of the site.
>
> "* * * * *." (Emphases added.)

requirements of the applicant and calls for certain specified actions by the county. The requirements of Paragraphs II and III are summarized below:

1. The applicant submits a site plan application that shows "areas proposed for excavation, clearing, and construction."

2. The county gives written notice of the proposal to several tribes and the tribes have 30 days to comment.

3. After the tribes comment or fail to comment, the county "conduct[s] an administrative review." That administrative review must include a public hearing and at the conclusion of that administrative review the county must:

    a. Approve the development if there are no adverse impacts to identified cultural, historical or archaeological resources on the site,

    b. Approve the development subject to "appropriate measures" that are agreed to by the tribes and land owner or imposed by the county to protect identified resources,

    c. Resolve any dispute between the tribes and landowner, if they fail to reach agreement.

The guiding substantive standards for the county's action under 3(a), 3(b) or 3(c) are set out in the first paragraph of CBEMP Policy 18. The county's action must (1) protect "historical, cultural and archaeological sites" and (2) "refrain from widespread dissemination of site-specific information about identified archaeological sites."

In addressing its obligations under CBEMP Policy 18, the county adopted the following findings:

> "* * * As explained in the hearings officer's decision, several tribal representatives also appeared at the public hearing and expressed concerns regarding the county's ability to ensure that the applicant will adequately identify and protect historical, cultural and archeological sites. The applicant's submittal of the resource survey to SHPO [State Historic Preservation Office] and coordination with the Tribes was undertaken as part of FERC's [Federal Energy Regulatory Commission's] requirement to comply with the federal Historic Preservation Act.
>
> "Correspondence in the record from JCEP's archeological consultant Scott Byram documents the coordination and communication that has occurred to

date with the Tribes regarding the application, and explains the steps that have already been taken and the additional steps that will be required in the event that culturally significant sites are identified in the project area. * * *.

"As identified in the letter from Mr. Byram, significant coordination has occurred regarding potential cultural resources on the site, and a Cultural Resources Survey Report was prepared and submitted to the Tribes, SHPO and FERC on June 26, 2006. As * * * explained by Mr. Byram, the archeological survey and historic records indicate that the project area may contain one or more site that could be eligible for listing on the National Register of Historic Places (NRHP). If a site is determined to be eligible for NRHP nomination, then avoidance or mitigation alternatives will be addressed. If Native American remains or other culturally significant sites are identified, then treatment of such sites will be determined in consultation with the Tribes. Any excavation that occurs on recorded sites in the project area will require application for a SHPO archeological permit that requires tribal consultation.

"The Board finds that the applicant has complied with the Policy #18 requirements regarding coordination with tribes and protection of archeological sites. In order to ensure ongoing compliance, the Board is adopting Condition of Approval No. 4 requiring the applicant to adopt a resource identification and protection plan to address historic, cultural and archeological resources on the site, and to coordinate those plans with the affected tribes and the state Office of Historic Preservation." Record 18-19.[8]

SOPIP challenges the above findings on several grounds, and we address each of those grounds below.

A. Design and Site Plan Review Under LDO Article 5.6

SOPIP contends that the required "Site Plan Application" that is referenced in paragraph II of CBEMP Policy 18 must be submitted under LDO Article 5.6 which sets out a specific process for "Design and Site Plan Review." SOPIP contends the county erred by not

[8] Condition number 4 provides:

"The applicant shall adopt a resource identification and protection plan to address historic, cultural and archeological resources on the site. Those plans shall be coordinated with the affected tribes * * *. Copies of the adopted plans (and any updates) shall be provided to the county. The applicant must coordinate with the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians by providing notice 72 hours prior to ground disturbing activity." Record 31.

requiring the applicant to submit the kind of application that is described in LDO 5.6.500 and by not conducting the type of review that is required under LDO Article 5.6.[9]

Under ORS 197.835(3), LUBA's scope of review is limited to issues that were "raised by any participant before the local hearings body as provided by ORS * * * 197.763." JCEP contends that no issue was raised below that the site plan required by CBEMP Policy 18 must be processed under the requirements of LDO Article 5.6. SOPIP responds in its reply brief that this issue may be raised on appeal to LUBA because (1) its general arguments concerning CBEMP Policy 18 were sufficient to preserve the LDO Article 5.6 issue and (2) the county failed to include LDO Article 5.6 on its list of "applicable criteria" in its notice of hearing in this matter. ORS 197.835(4).[10]

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[9] It is clear from the conditions of approval that the site plan review the county is requiring to comply with CBEMP Policy 18 is not the "Design and Site Plan Review" envisioned by LDO Article 5.6.

> "2. "Prior to commencement of construction, the applicant must provide a plot plan showing the location of the proposed development relative to the boundary of the floodplain overlay zone established under Article 4.6, the areas subject to the 50-foot riparian protection standard of [LDO] 4.5.180, and the minimum setback standards of the WD District in Table 4.5. *The plot plan referenced in this condition shall not be interpreted to require site plan review under Article 5.6.*" Record 31 (emphasis added).
>
> "7. Prior to commencement of construction, the applicant must provide a plot plan to identify the location of a 50-foot setback from Henderson Marsh and from all on-site delineated wetlands to be preserved. Except for riparian vegetation associated with the wetlands to be filled in accordance with DSL/ACOE permits, no riparian vegetation may be removed from the setback except as allowed by [LDO] Section 4.5.180. *The plot plan referenced in this condition shall not be interpreted to require site plan review under Article 5.6.*" *Id.* (Emphasis added.)

[10] As relevant, ORS 197.835(4) provides:

> "A petitioner may raise new issues to the board if:
>
> "(a) The local government failed to list the applicable criteria for a decision under ORS 197.195 (3)(c) or 197.763 (3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, the board may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government[.]"

As SOPIP suggests, LUBA distinguishes between "issues" and "arguments" in applying ORS 197.835(3) and has held that while issues must be raised, once an issue has been raised each individual argument that may be raised under that issue need not have been raised below to preserve the right to assert that argument at LUBA. *Hale v. City of Beaverton*, 21 Or LUBA 249, 254 (1991); *Boldt v. Clackamas County*, 21 Or LUBA 40, 46, *aff'd* 107 Or App 619, 813 P2d 1078 (1991). While that distinction is somewhat imprecise, the issue that SOPIP attempts to raise in this subassignment of error (whether the Site Plan Application referred to in CBEMP Policy 18 is the same kind of design or site plan that is required by LDO Article 5.6) is a different issue than the issue the opponents raised below, whether the application complied with the substantive requirements of CBEMP Policy 18.

As far as we can tell no party argued below that the Site Plan Application that is required by CBEMP Policy 18 necessitated the kind of "Design and Site Plan Review" that is set out at LDO Article 5.6. Turning to SOPIP's second theory for why this issue may be raised for the first time at LUBA, it is correct that LDO Article 5.6 is not listed on the county's notice that preceded the hearings officer's public hearing in this matter. Record 1356. However, ORS 197.835(4) only excuses a party's failure to raise an issue below if the criteria the county failed to list are "*applicable* criteria." (Emphasis added.) SOPIP makes no attempt to identify any text in CBEMP Policy 18, LDO Article 5.6 or elsewhere that it believes makes LDO Article 5.6 an *applicable* criterion. SOPIP apparently is relying on the requirement for a "Site Plan Application" in paragraphs II and III of CBEMP Policy 18 to impose all of the requirements for "Design and Site Plan Review" under LDO Article 5.6. JCEP offers considerable argument to the effect that the LDO Article 5.6 "Design and Site Plan Review" requirements are not implicated by that language in CBEMP Policy 18. Absent a better developed argument by SOPIP, we agree with JCEP that SOPIP has not established that LDO Article 5.6 is among the "applicable criteria" in this matter. The issue

concerning LDO 5.6 that SOPIP raises under this assignment of error was waived because no participant raised that issue below.

B. Failure to Resolve Disputes Regarding the Measures Needed to Archaeological and Historical Resources on the Site

The county's findings that were quoted earlier never clearly say that the site plan required by CBEMP Policy 18 has been received, although they seem to say that the notice to the tribes that is required by CBEMP Policy 18 has been given. The findings state that attempts to coordinate with tribes have been made and will continue to be made in the future. Condition 4 seems to say that the plan required by CBEMP Policy 18 is yet to be developed and will be developed by the applicant in the future in coordination with the tribes and then presented to the county as an accomplished fact. *See* n 8.

SOPIP argues that condition 4 gives "the applicant virtually unfettered discretion to adopt its own 'resource identification and protection plan' sometime in the future." Petition for Review 18. According to SOPIP, "[t]he County cannot, consistent with Policy #18, by condition, simply delegate to the applicant the responsibility of adopting a protection plan at some future date." *Id.* SOPIP contends "the challenged decision fails to comply with CBEMP Policy #18 because it (1) does not resolve the disagreement between JCEP and the Confederated Tribes regarding appropriate measures to protect the site, and (2) fails to adopt measures necessary to protect the historic, cultural and archaeological values of the site." SOPIP's Reply Brief 3. We agree with SOPIP.

As we indicated earlier in summarizing the main features of CBEMP Policy 18, once a site plan has been submitted and the tribes have commented or failed to timely comment, the county has three options. First, the county can approve the application if "no adverse impacts to identified cultural, historical or archaeological resources on the site." Second, if the tribes and the applicant have reached agreement regarding the measures needed to protect identified resources, the development can be approved with any additional measures the county believes are necessary to protect those resources. The factual predicates for the first

two options under paragraph III of CBEMP Policy 18 do not appear to be present in this case. The county has not found that there will be no adverse impacts to identified CBEMP Policy 18 resources on the site and the applicant and the tribes have not reached agreement.[11] That leaves the county with only the third option specified in paragraph III of CBEMP Policy 18. The county must conduct an administrative review that includes a public hearing and resolve the dispute between the tribes and the applicant. The challenged decision does not do that. Instead, the decision appears to do what SOPIP claims it does. The decision essentially tells the applicant and the tribes to go forward and attempt to come up with a plan that resolves their differences and present it to the county. That is not one of the available options under CBEMP Policy 18.

In its brief, JCEP contends that CBEMP Policy 18 is fully implemented by LDO 3.2.700.[12] JCEP argues that so long as the four steps set out in LDO 3.2.700 are followed

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[11] We do not mean to foreclose the possibility that the facts necessary to select options one or two could not be established. But as the decision stands, it does not find that there are no CBEMP Policy 18 protected resources on the site, or that there will not be any "adverse impacts" to such resources, or that the tribes and the applicant have agreed on necessary measures to protect identified resources.

[12] LDO 3.2.700 provides as follows:

> "Process for Tribe(s) Review and Response of Proposed Development within Acknowledged Archaeological Sites. Properties which have been determined to have an 'archaeological site' location must comply with the following steps prior to issuance of a 'Zoning compliance Letter' for building and/or septic permits.
>
> "1. The County Planning Department shall make initial contact with the Tribe(s) for determination of an archaeological site(s). The following information shall be provided by the property owner/agent:
>
> "a. plot plan showing exact location of excavation, clearing, and development, and where the access to the property is located; and
>
> "b. township, range, section and tax lot(s) numbers; and
>
> "c. specific directions to the property.
>
> "2. The Planning Department will forward the above information including a request for response to the appropriate tribe(s).

before a building permit is issued, the county need not be concerned about CBEMP Policy 18 at the time it grants administrative conditional use approval for the disputed LNG facility:

> "[T]he above-quoted provisions of [LDO] 3.2.700 require [the applicant] to demonstrate compliance with the 'site plan application' and related Tribe coordination elements of CBEMP Policy #18, not at the time of conditional use permit approval, but prior to the issuance of a building permit, by submitting a 'plot plan' showing the location of excavation, clearing and development that could impact cultural or archaeological resources." Intervenor-Respondent's Brief 15.

There are a number of problems with JCEP's argument. First, the county's decision does not mention LDO 3.2.700, let alone take the position that LDO 3.2.700 fully implements CBEMP Policy 18. If the county indeed takes that position, it needs to take that position in its decision and explain that position. Second, CBEMP Policy 18 makes no reference to LDO 3.2.700, and LDO 3.2.700 makes no reference to CBEMP Policy 18. Third, the challenged decision purports to apply CBEMP Policy 18, and finds that the requirements of that policy have been met by the applicant's initial coordination efforts and the condition that those efforts continue in the future in an attempt to reach agreement with the tribes. As we have already explained, a promise or a condition that the applicant and tribes coordinate and attempt to come up with a plan that works out their differences is part of the obligation imposed by CBEMP Policy 18, but those efforts alone are not sufficient to comply with CBEMP Policy 18. Finally, and perhaps most importantly, there is nothing in the text of LDO 3.2.700 that eliminates or obviates the requirement in paragraph III of CBEMP Policy 18 that the county must conduct an administrative review that includes a quasi-judicial hearing to resolve any dispute between the tribes and the applicant. We leave

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> "3. The Tribe(s) will review the proposal and respond in writing within 30 days to the Planning Department with a copy to the property owner/agent.
>
> "4. It is the responsibility of the property owner/agent to contact the Planning Department in order to proceed in obtaining a 'Zoning Compliance Letter' (ZCL) or to obtain further instruction on other issues pertaining to their request."

open the possibility that the county might interpret LDO 3.2.700 to fully implement CBEMP Policy 18 because all development subject to CBEMP Policy 18 will require a zoning compliance letter and the decision making required by Paragraph III of CBEMP Policy 18, including any required "administrative review" and "quasi-judicial hearing" will occur under LDO 3.2.700(4).[13] But any attempt to defer the quasi-judicial hearing and necessary decision making that may be required to resolve disputes between the tribes and the applicant to a point in time after the conditional use approval is granted, must ensure that the required decision making and quasi-judicial hearing will be provided later before the proposed development can commence. The challenged decision does not ensure that will be the case.

This subassignment of error is sustained.

The second assignment of error is sustained in part and denied in part.

THIRD ASSIGNMENT OF ERROR (SOPIP)

SOPIP's third assignment of error is quoted below:

> "The challenged decision misconstrues the applicable law because it approves the proposed LNG import terminal as an 'Industrial & Port facility' without providing that the approval will take effect only if the other elements integral to the function of the proposed LNG facility, namely a marine terminal and a natural gas pipeline or other means of distributing the regasified natural gas product, are approved as well. * * *" Petition for Review 18.

LDO 2.1.200 provides the following definition:

> "INDUSTRIAL (USES) AND PORT FACILITIES: Public or private use of land or structures for manufacturing, processing, port development, and energy generating facilities. Industrial and Port Facilities include large commercial and industrial docks."

The challenged decision adopts the following unchallenged findings:

> "The Board finds that the proposed LNG terminal is a water-dependent Industrial and Port Facilities use within the meaning of the [LDO 2.1.200]

[13] The wording of LDO 3.2.700(4) is exceedingly ambiguous. It is not clear what the applicant must do to "proceed in obtaining a 'Zoning Compliance Letter,'" and it is not clear what is required to "obtain further instruction on other issues pertaining to[the] request." *See* n 12.

> definition. The terminal includes LNG handling and processing components that make up the industrial use that is associated with the Port facility as a combined Industrial and Port Facilities use. All elements of proposed industrial use are essential components (e.g., holding tanks, re-gasification facilities, energy generating facilities) of the proposed water-dependent industrial use." Record 6.

The challenged decision includes the following condition of approval:

> "1. Because the proposed LNG facility will need to utilize a deep-draft dock and moorage facility, this permit is subject to the applicant developing or obtaining the right to use [an] approved ship berth suitable for handling LNG vessels." Record 31.

SOPIP argues that approval of the LNG facility must be conditioned on approval of the marine dock facility to constitute an Industrial and Port Facility, within the meaning of LDO 2.1.200. SOPIP contends that the above quoted condition is insufficient to perform that function, but we agree with JCEP that no particular magic words are required and condition 1 is sufficient to condition the county's approval of the LNG facility on approval of the marine dock facility.

SOPIP also argues that the challenged decision must be conditioned on approval of the pipe line that will be needed to transmit natural gas from the LNG facility to market. JCEP responds:

> "Practicalities aside, SOPIP makes no meaningful attempt to explain why the lack of a condition requiring approval of a natural gas pipeline renders the LNG terminal something other than an 'Industrial and Port Facility' under the definition of that use category. * * *" Intervenor-Respondent's Brief 20.

We agree with JCEP.

The third assignment of error is denied.

FIRST ASSIGNMENT OF ERROR (PRINCE)

Under the first assignment of error, Prince argues that the subject property is located in a tsunami inundation zone and that the county erred by failing to adequately address the tsunami danger. Prince advances two legal theories for his position that the county was

required to address tsunami danger in the challenged decision. We address those legal theories separately below.

A. CBEMP Policy 27 and CCCP 5.11(1)

CBEMP Policy 27 is set out below:

> "#27 Floodplain Protection within Coastal Shorelands
>
> "The respective flood regulations of local government set forth requirements for uses and activities in identified flood areas; these shall be recognized as implementing ordinances of this Plan.
>
> "This strategy recognizes the potential for property damage that could result from flooding of the estuary."

According to Prince, CBEMP Policy 27 "incorporates CCCP Section 5.11(1)." Petition for Review 6. As we explained in the introduction, the CCCP is the part of the volume of the county's comprehensive plan that applies outside the Coos Bay Estuary and the Coquille River Estuary. CCCP Section 5.11 is entitled "Natural Hazards." It begins with a "Problem/Opportunity Statement" and an "Issue" statement and then adopts the following "Goal":

> "Coos County shall strive to protect life and property from natural disasters and hazards, based on an inventory of areas potentially subject to such problems."

CCCP Section 5.11 then sets out eight "Plan Implementation Strategies." One of those Plan Implementation Strategies is CCCP Section 5.11(1), which is set out below:

> "Coos County shall regulate development in known areas potentially subject to natural disasters and hazards, so as to minimize possible risks to life and property. Coos County considers natural disasters and hazards to include stream and *ocean flooding*, wind hazards, wind erosion and disposition, critical streambank erosion, coastal erosion and deposition, mass movement (earthflow and slump topography), earthquakes, and weak foundation soils.
>
> "*This strategy shall be implemented by enacting special protective measures through zoning and other implementing devices, designed to minimize risks to life and property*.

> "This strategy recognizes that it is Coos County's responsibility (1) to inform its citizens of potential risks associated with development in known hazard areas, and (2) to provide appropriate safeguards to minimize such potential risks." (Emphases added; footnote omitted.)

Prince argues that CCCP Section 5.11(1) obligates the county to adopt land use regulations to protect development from ocean flooding, which includes tsunamis. The county's floodmaps do not identify the subject property as subject to tsunami risks, but Oregon Department of Geology and Mineral Industries maps do indicate that the subject property is in a tsunami inundation zone. It is undisputed that while the county has adopted land use regulations regarding some types of ocean flooding, the county has not adopted regulations that specifically address tsunami dangers. Prince argues that this failure on the county's part results in a plan/land use regulation conflict such that the disputed conditional use application must be denied to avoid approving a development that conflicts with the comprehensive plan by allowing development in an area that is subject to tsunami inundation.

There are two problems with Prince's argument under this subassignment of error. Under ORS 197.835(3), LUBA's scope of review is limited to issues that were "raised by any participant before the local hearings body as provided by ORS * * * 197.763." JCEP argues that Prince did not raise any issue concerning CCCP Section 5.11(1) and for that reason the issue presented in the first subassignment of error has been waived. Prince's only response to JCEP's waiver argument appears at pages four and five of the reply brief. We reject that argument in our resolution of Prince's second assignment of error. The issue presented in this subassignment of error was waived when Prince failed to raise any issue concerning CCCP Section 5.11(1) below.

Even if the issue had not been waived, this subassignment of error fails on the merits because it relies on CCCP Section 5.11(1), which does not apply within the Coos Bay Estuary. As we explained in the Introduction, the Coos Bay Comprehensive Plan is made up of three volumes that apply in different geographic parts of Coos County. The CBEMP

applies within the Coos Bay Estuary. The CREMP applies within the Coquille River Estuary. The CCCP applies in all other parts of the county outside those two estuaries. Apparently, the CBEMP does incorporate some parts of the CCCP into the CBEMP. CBEMP Policy 70.[14] As Prince recognizes, CCCP Section 5.11(1) pertains to Statewide Planning Goal 7, not Goals 8, 9, 10 or 13. Because CCCP Section 5.11(1) does not apply to the subject property, Prince's argument under the first assignment of error provides no basis for reversal or remand.

Subassignment of error A is denied.

B. Goal 7

Prince next argues the challenged decision must be remanded, because it violates amendments to Goal 7 that took effect on June 1, 2002. Goal 7 was first adopted in 1975 and the original text of Goal 7 was not amended until 2002. Statewide Planning Goals include mandatory provisions (the Goal) and nonmandatory provisions (the Guidelines). As amended in 2002, the Goal portion of Goal 7 is expanded and broken into four sections, A through D. Section D requires "Coordination," and does not bear directly on the question presented in this subassignment of error. Sections A through C do have a bearing on the question presented by this assignment of error. We set out the original text of Goal 7 and the text of Sections A through C of the amended Goal below.

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[14] CBEMP Policy 70 provides:

> **"#70 Miscellaneous Provisions of Goals #8, #9, #10 and #13**
>
> "Coos County hereby adopts by reference all language in Coos County Comprehensive Plan, Volume I, Part 1 (Plan Provisions) and Part 2 (Inventories & Factual Base) pertaining to LCDC Goals #8, #9, #10 and #13.
>
> "This policy recognizes that certain provisions and inventory information prepared for the 'Balance of County' Comprehensive Plan is applicable to the Coos Bay Estuary and Shorelands and that the information and provisions are necessary and sufficient to comply with the requirements of LCDC Goals #8, #9, #10 and #13."

1. Original Goal 7

The original text of Goal 7 is set out below:

"**To protect life and property from natural disasters and hazards**.

> "Developments subject to damage or that could result in loss of life shall not be planned nor located in known areas of natural disasters and hazards without appropriate safeguards. *Plans shall be based on an inventory of known areas of natural disaster and hazards***.**
>
> "Areas of Natural Disasters and Hazards – are areas that are subject to natural events that are known to result in death or endanger the works of man, such as stream flooding, *ocean flooding*, ground water, erosion and deposition, landslides, earthquakes, weak foundation soils and other hazards unique to local or regional areas." (Emphases added.)

The planning required by original Goal 7 was to be based on inventories "of known areas of natural disasters and hazards." While original Goal 7 did not specifically list tsunamis as a natural disaster or hazard, it did list "ocean flooding" as a natural disaster or hazard that must be planned for under Goal 7.

2. Section A of the 2002 Version of Goal 7

Section A of the 2002 Version of Goal 7 is entitled "Natural Hazard Planning" and is set out below:

"**To protect people and property from natural hazards**.

"**A. NATURAL HAZARD PLANNING**

> "1. Local governments shall adopt comprehensive plans (*inventories, policies and implementing measures*) to reduce risk to people and property from natural hazards.
>
> "2. Natural hazards for purposes of this goal are: floods (coastal and riverine), landslides, earthquakes and related hazards, *tsunamis*, coastal erosion, and wildfires. Local governments may identify and plan for other natural hazards." (Emphases added.)

The above text is similar to the text of Goal 7 before the 2002 amendments. As potentially relevant here, the 2002 text expressly requires that local governments adopt "inventories, policies and implementing measures" to address risks associated with tsunamis.

3. Section B of the 2002 Version of Goal 7

Section B of the 2002 Version of Goal 7 imposes a new obligation on DLCD to review new inventory information as it becomes available. The text of that section is set out below:

"B. RESPONSE TO NEW HAZARD INFORMATION

"1. New hazard inventory information provided by federal and state agencies shall be reviewed by the Department in consultation with affected state and local government representatives.

"2. After such consultation, the Department shall notify local governments if the new hazard information requires a local response.

"3. Local governments shall respond to new inventory information on natural hazards within 36 months after being notified by the Department of Land Conservation and Development, unless extended by the Department.

4. Section C of the 2002 Version of Goal 7

Section C of the 2002 version adopts a new "Implementation" section for Goal 7 and is set out below:

"C. IMPLEMENTATION

"*Upon receiving notice from the Department*, a local government shall:

"1. Evaluate the risk to people and property based on the new inventory information and an assessment of:

"a. the frequency, severity and location of the hazard;

"b. the effects of the hazard on existing and future development;

"c. the potential for development in the hazard area to increase the frequency and severity of the hazard; and

"d. the types and intensities of land uses to be allowed in the hazard area.

"2. Allow an opportunity for citizen review and comment on the new inventory information and the results of the evaluation and incorporate such information into the comprehensive plan, as necessary.

"3. Adopt or amend, as necessary, based on the evaluation of risk, plan policies and implementing measures consistent with the following principles:

"a. avoiding development in hazard areas where the risk to people and property cannot be mitigated; and

"b. prohibiting the siting of essential facilities, major structures, hazardous facilities and special occupancy structures, as defined in the state building code (ORS 455.447(1) (a)(b)(c) and (e)), in identified hazard areas, where the risk to public safety cannot be mitigated, unless an essential facility is needed within a hazard area in order to provide essential emergency response services in a timely manner.

"4. Local governments will be deemed to comply with Goal 7 for coastal and riverine flood hazards by adopting and implementing local floodplain regulations that meet the minimum National Flood Insurance Program (NFIP) requirements." (Footnote omitted.)

We understand Prince to argue that under ORS 197.646(4), Goal 7 applies directly to the county and the county was obligated to address tsunami risk in the challenged decision or to deny the application until the county proceeds to amend its comprehensive plan to comply with the 2002 version of Goal 7.[15] Specifically, we understand Prince to argue that the

[15] As relevant, ORS 197.646 provides:

"(1) A local government shall amend its acknowledged comprehensive plan * * * and land use regulations implementing [the] plan by a self-initiated post-acknowledgment process under ORS 197.610 to 197.625 to comply with:

county has not amended its comprehensive plan to respond to the 2002 Goal 7 amendments, as required by ORS 197.646(1). According to Prince, the consequence for this failure is specified in ORS 197.646(4) and the 2002 Goal 7 amendments apply directly to the county. JCEP responds that DLCD has not given the notice that is required by subsection (3) of ORS 197.646 and that the 2002 version of Goal 7 therefore does not apply directly to the county under ORS 197.646(4). The parties therefore disagree about whether notice from DLCD is a legal requirement for changes in law to apply directly to local governments under ORS 197.646(4).

We conclude that it is unnecessary to determine whether Prince's or JCEP's reading of ORS 197.646 is correct. That is because we conclude that the 2002 version of Goal 7

> "(a) A new statutory requirement; or
>
> "(b) A new land use planning goal or rule requirement adopted by the Land Conservation and Development Commission.
>
> "* * * * *
>
> "(3) (a)The Department of Land Conservation and Development shall notify local governments when a new statutory requirement or a new land use planning goal or rule requirement adopted by the commission requires changes to an acknowledged comprehensive plan, a regional framework plan and land use regulations implementing either plan.
>
> "(b) The commission shall establish, by rule, the time period within which an acknowledged comprehensive plan, a regional framework plan and land use regulations implementing either plan must be in compliance with:
>
> "(A) A new statutory requirement, if the legislation does not specify a time period for compliance; and
>
> "(B) A new land use planning goal or rule requirement adopted by the commission.
>
> "(4) When a local government does not adopt amendments to a comprehensive plan, a regional framework plan and land use regulations implementing either plan as required by subsection (1) of this section, the new statutory, land use planning goal or rule requirements apply directly to the local government's land use decisions. The failure to adopt amendments to a comprehensive plan, a regional framework plan and land use regulations implementing either plan required by subsection (1) of this section is a basis for initiation of enforcement action [by DLCD]."

itself requires notice from DLCD before the county is required to engage in the planning that is dictated by the 2002 version of Goal 7. It is undisputed that DLCD has not given Coos County notice under Section C of the 2002 version of Goal 7. Prince assumes that LCDC intended local governments to proceed on their own to attempt to determine how their comprehensive plans should be revised to respond to the 2002 Goal 7 amendments, without notice from DLCD to do so, and that the notice required by Section C of the 2002 version of Goal 7 is only required where there is new inventory information. However, the "Implementation" Section C of the 2002 version of Goal 7 does not by its terms apply only to circumstances where new hazard inventory information becomes available. We reject Prince's argument to the contrary. While part C(1) seems to focus on new inventory information, part C(3) is not so limited and applies equally to the "Natural Hazard Planning" required by Section A of the 2002 version of Goal 7. To the extent the text of the 2002 version of Goal 7 does not resolve the question, the legislative history that Prince attaches to his petition for review points out the key role that inventories play in Goal 7 planning. That legislative history also explains that the notice required by Section C would only be given when new hazard inventory information becomes available. In a November 16, 2000 memorandum to LCDC the director explained:

> "Costs to local governments will be limited because the revised goal will only apply when the department notifies local governments that new hazard inventory information is available. It is anticipated that such notice will occur once a year. The amount of hazard information that is generated in a year by state and federal agencies is limited." Petition for Review Appendix 83.

Given that there is no dispute that DLCD has not provided the notice to the county that is required by Section C of the 2002 version of Goal 7, the 2002 version of Goal 7 does not yet apply to the county and Prince's arguments under this subassignment of error provide no basis for reversal or remand.

Subassignment of error B is denied.

Prince's first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR (PRINCE)

Under his second assignment of error, Prince argues the county should have considered comprehensive plan criteria in addition to those it identified in its notice of hearing. Record 1354. Specifically, Prince again argues the county should have applied CCCP Section 5.11 and addressed earthquake dangers. Prince also argues the county should have applied two CBEMP Policies. One of those policies is CBEMP Policy 25, which concerns "Waste/Storm Water Discharge."[16] The other policy is CBEMP Policy 48, which concerns "Weak Foundation Soils."[17] The proposed facility will discharge storm water into

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[16] CBEMP Policy 25 is set out below:

> "**#25 Waste/Storm Water Discharge**
>
> "Local government recognizes that waste/storm water discharge must meet state and federal water quality standards prior to issuance of any permits by the county.
>
> "I. Local government shall support waste/storm water discharge, if such activity is allowed in the respective management unit and:
>
> "a. The activity is required for waste/storm water discharge; and,
>
> "b. The activity is consistent with the resource capabilities of the area (see Policy #4); and,
>
> "c. Findings must be made satisfying the impact minimization criterion of Policy #5.
>
> "This policy shall be implemented through the conditional use process and through local review and comment on state and federal permit applications.
>
> "This strategy recognizes that Goal #16 provides for waste/storm water discharge and recognizes the technical expertise of Department of Environmental Quality regarding resource capabilities.

[17] CBEMP Policy 48 is set out below:

> "**#48 Weak Foundation Soils**
>
> "The State Department of Commerce, Building Codes Division (pursuant to the authority vested in it by Section 2905 of the State Structural Specialty Code) shall require an engineered foundation or other appropriate safeguard deemed necessary to protect life and property in areas of weak foundation soils.

Coos Bay and will be located in part on a younger stabilized sand dune. Although Prince urges LUBA to "reverse or remand this case with instructions to apply all applicable provisions," Prince identifies only the three provisions noted above. We therefore limit our consideration to the three criteria that Prince argues the county erroneously failed to address in the challenged decision.

We have already determined that CCCP Section 5.11 does not apply and that Prince waived his right to assign error based on CCCP Section 5.11 by failing to raise any issue regarding CCCP 5.11 below. Prince offers an additional argument under this assignment of error in support of his position that CCCP 5.11 must be applied in this case. Prince argues that to the extent each volume of the county's comprehensive plan is interpreted to apply to a discrete portion of the county and not to apply outside that discrete portion of the county, such an interpretation conflicts with the ORS 215.416(4) requirement that a land use permit be denied if it is "in conflict with a comprehensive plan," and the ORS 215.416(8)(a) requirement that a decision on a land use permit must be related to the "comprehensive plan for the county as a whole."[18] We understand Prince to argue that the statutory reference to

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> "This strategy recognizes it is the responsibility of the State of Oregon Department of Commerce, Building Codes Division to determine, based on field investigations, whether safeguards are necessary to minimize potential risks. The general level of detail used in mapping areas known as weak foundation soils is not of sufficient scale to mandate specific safeguards prior to a field investigation by the Building Codes Division."

[18] As relevant, ORS 215.416 provides:

> "* * * * *
>
> "(4) The application shall not be approved if the proposed use of land is found to be *in conflict with the comprehensive plan of the county* and other applicable land use regulation or ordinance provisions. * * *
>
> "* * * * *
>
> "(8)(a) Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the

"comprehensive plan for the county as a whole" means a county cannot adopt a multi-volume comprehensive plan with individual volumes applying only within identified sub-regions of the county. We reject the argument.

Turning to CBEMP Policies 25 and 48, Prince first advances the same argument we just rejected. We reject that argument here for the same reason we rejected it before. JCEP contends that LDO 4.5.276 renders those CBEMP Policies inapplicable in this case. LDO 4.5.276 sets out the "Uses, Activities and Special Conditions" that apply within the 6-WD zoning district. A number of CBEMP Policies are mentioned in the portion of LDO 4.5.276 that sets out "General Conditions" and "Special Conditions." We understand JCEP to take the position that LDO 4.5.276 makes it clear that CBEMP Policies that are not mentioned in "General Conditions" and "Special Conditions" are inapplicable. JCEP also cites LDO 4.5.150 in support of its position that only those CBEMP Policies that are mentioned in the LDO 4.5.276 "General Conditions" and "Special Conditions" apply within the 6-WD zoning district.

We have not been able to locate language in LDO 4.5.276 that clearly states that all CBEMP Policies that are not listed in the applicable CBEMP zoning district "General Conditions" and "Special Conditions" necessarily are inapplicable within those zoning districts, and JCEP does not identify the language in LDO 4.5.276 that it relies on. JCEP similarly does not identify the particular language in LDO 4.5.150 that it is relying on to support its position. LDO 4.5.150 does state that "'General Conditions' provide a convenient cross-reference to applicable Baywide Policies which may further limit or condition the uses and activities." We question whether that single reference is sufficient to support JCEP's interpretation. In its decision, the Board of County Commissioners simply states "[c]ertain CBEMP policies are made applicable through the special and general conditions required for

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proposed use of land would occur and to the zoning ordinance and *comprehensive plan for the county as a whole*." (Emphases added.)

the proposed use and activity in the 6-WD zoning district under ZLDO 4.5.276." Record 15. That is not an adequate explanation for why other CBEMP Policies that are not specifically mentioned in the special and general conditions could not apply if the substance of those policies warrants application. Given the lack of a more adequate interpretation on the part of the county, based on the arguments that have been presented in this appeal, we are unable to agree with JCEP that LDO 4.5.276 and 4.5.150, in and of themselves, render any CBEMP Policies that are not mentioned in the 6-WD zoning district inapplicable to development within that zoning district. The county may take up this question on remand if it interprets LDO 4.5.276 and 4.5.150 in the same way that JCEP interprets LDO 4.5.276 and 4.5.150, and more adequately explain that interpretation

JCEP also argues Prince waived his right to raise these matters at LUBA because he failed to raise CBEMP Policies 25 and 48 below. We are unable at this point to agree with JCEP that CBEMP Policies 25 and 48 are not "applicable criteria," within the meaning of ORS 197.835(4)(a). *See* n 10. It is undisputed that the county's notice of hearing in this matter does not list CBEMP Policies 25 and 48. Under ORS 197.835(4)(a), Prince may therefore raise issues in this appeal concerning CBEMP Policies 25 and 48.

The second assignment of error is sustained in part.

The county's decision is remanded.