BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

COLUMBIA RIVERKEEPER, COLUMBIA RIVER BUSINESS ALLIANCE, OREGON CHAPTER SIERRA CLUB, COLUMBIA RIVER CLEAN ENERGY COALITION, JACK MARINCOVICH; and PETER HUHTALA,
Petitioners,

vs.

CLATSOP COUNTY,
Respondent,

and

BRADWOOD LANDING LLC, and NORTHERNSTAR ENERGY, LLC,
Intervenors-Respondents.

LUBA No. 2009-100

FINAL OPINION
AND ORDER

Appeal from Clatsop County.

Jannett Wilson, Eugene, filed the joint petition for review on behalf of petitioners. With her on the brief was Brett VandenHeuvel and the Western Environmental Law Center.

Brett VandenHeuvel, Hood River, filed the joint petition for review and argued on behalf of petitioners. With him on the brief was Jannett Wilson and the Western Environmental Law Center.

Jeffery J. Bennett, Portland, filed the joint response brief on behalf of Clatsop County. With him on the brief were Jordan Schrader Ramis PC, Carrie Richter and Michelle Rudd.

Michelle Rudd, Portland, filed the joint response brief and argued on behalf of Northernstar Energy LLC. With her on the brief were Stoel Rives, LLP, Carrie Richter and Jeffery J. Bennett.

Carrie Richter, Portland, filed the joint response brief and argued on behalf of Bradwood Landing LLC. With her on the brief were Garvey Schubert Barer, Jeffery J.

Bennett and Michelle Rudd.

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

HOLSTUN, Board Member, concurring in the decision.

REMANDED 04/12/2010

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a decision by the county approving various comprehensive plan amendments and zone changes to develop a liquefied natural gas (LNG) facility.

REPLY BRIEF

Petitioners move for permission to file a reply brief to respond to new matters raised in the response brief. The reply brief is allowed.

FACTS

The decision before us is the county's decision on remand from *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 190 (2009) (*Bradwood I*), which approved comprehensive plan and zoning map amendments to facilitate development of an LNG facility at the former Bradwood Mill site located within the county. We take the relevant facts from *Bradwood I*:

> "The proposed site is located approximately 20 miles east of the City of Astoria at the former mill site and company town of Bradwood. The subject property consists of nine parcels totaling 411 acres with over a mile of frontage on the Columbia River. The subject property has upland forested areas and lowlands consisting mostly of estuarine shore lands and wetlands that adjoin the Columbia River where the proposed terminal would be located. The only structures currently on the property are an abandoned pole barn and a small concrete building.
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> "The proposed terminal site is 38 river miles from the Pacific Ocean and lies at the junction of the main channel of the Columbia River and Clifton Channel, a large side channel navigable by small watercraft. The proposal calls for large, ocean-going vessels to transport LNG to the terminal, where the LNG will be temporarily stored and then re-gasified before being sent out by pipeline. The proposed underground pipeline would extend south and east from the terminal for 36 miles and thence under the Columbia River to connect with an interstate natural gas pipeline near Longview, Washington. The first six miles of underground pipeline would be in Clatsop County.
>
> "The proposed development involves a variety of land uses and activities and the county's decision includes numerous comprehensive plan amendments, zone changes, and development approvals that include: a bridge replacement, concrete batch plants, a construction worker park-and-ride facility, dredging

> of the Columbia River and disposal of the dredged materials, power lines, in-water facilities, storage and staging areas, LNG storage tanks and gasification plant, underground pipeline, railroad realignment, and road improvements." *Bradwood I* at 192-93.

On remand, the county held a hearing, and limited written and oral testimony prior to and at the hearing to preclude any new evidence. After the hearing was held, the county again approved the applications. This appeal followed.

FIRST ASSIGNMENT OF ERROR

The Goal 16/17 element of the Clatsop County Comprehensive Plan (CCCP) designates several Columbia River Estuary planning subareas and describes various elements of the subareas, which the CCCP explains are "designed to provide local government officials, planners and other plan users with the background needed to evaluate development proposals" within the subarea. "Bradwood" is designated as a Goal 16/17 planning subarea. That subarea is described in the CCCP as "the industrial area at Bradwood, a stretch of steep forested shoreline to the east and portions of the Columbia River." In addition, the CCCP also includes several "Community Plans" for different areas of the county, including the Northeast Community Plan, of which Bradwood is a part.

As we explained in *Bradwood I*:

> "The [NCP] provides that: '[d]evelopment activities at Bradwood shall be of small or moderate scale, not involving extensive filling to create new land areas.'
>
> "Similarly, the Bradwood Subarea Plan, another element of the CCCP, states:
>
> > "'The Bradwood industrial site offers limited potential for small to medium sized water-dependent industrial development. There is deep water close to shore, some available vacant land, and railroad access. There are constraints to development, however, including poor highway access and proximity to the wildlife refuge.
> >
> > "'Future development which would require excessive filling (impacting aquatic areas in excess of 20 acres) along the Columbia River shoreline for the purpose of creating additional industrial land is not appropriate. * * *'" *Bradwood I* at 229.

In *Bradwood I*, the county concluded that the proposed development was "small to moderate in scale" because it did not require more than 20 acres of fill and because the proposed development of the 40 acre former industrial site was less than 100 acres, an acreage amount over which the county concluded a development would be "large" in scale. *Bradwood I* at 231. In sustaining petitioners' assignment of error in *Bradwood I*, we rejected the county's equation of the amount of fill with the "small to moderate" requirement. However, we concluded:

> "The county is on stronger footing in citing the Goal 9 comprehensive plan element and the fact that the [Clatsop County Land and Water Development and Use Ordinance] LWDUO specifically exempts the Bradwood site from building size limitations otherwise applicable in the MI zone. The Goal 9 language does suggest that the needs of 'small' industrial users can be met by breaking up large industrial sites greater than one hundred acres in size, although that does not necessarily suggest that all industrial development less than 100 acres in size is 'small' or 'moderate' in scale. * * * The focus of the scale limitation is 'development activities,' which presumably encompasses more than construction of buildings. The county apparently viewed the scope of the proposed 'development' to include only the 40 upland acres covered by the LNG facility itself. The county declined to consider the area needed for accessory uses such as powerlines, gas pipelines, or the 58 acres of estuary that would be dredged for the ship turning basin.
>
> "The LWDUO defines 'development' as '[a]ny man-made change to improved or unimproved real estate, including but not limited to: construction, reconstruction, conversion, relocation or enlargement of any structure; any mining, excavation, landfill or land disturbance, any use or extension of the use of land.' *That term would clearly encompass construction of powerlines and gas pipelines.* It is less clear that it would encompass dredging of the estuary, although it would presumably include the pilings and other structures necessary to offload the LNG container ships.
>
> "Given that the county erred in its primary conclusion that the scale restriction is a mere restatement of the fill limitation, and because the county erred in limiting the scope of 'development activities' to the upland acres covered by the LNG facility itself, we conclude that remand is necessary for the county re-evaluate whether the proposed development activities, considered as a whole, comply with the 'small or moderate' scale limitation." *Id*. at 231-32 (emphasis added).

A 40-acre portion of the 411 acres owned by intervenor Bradwood Landing LLC and comprising the former Bradwood mill site where the facility is proposed is on the county's inventory of Goal 9 industrial sites.

On remand, the county adopted the below conclusion, based on language in the CCCP's Goal 9 element suggesting that large industrial parcels and acreages were more than 100 acres:

> "[L]arge scale industrial development is that where the developed industrial site occupies more than 100 acres of land." Record 49.

By that finding, we understand the county to have concluded that where the development activity at Bradwood encompasses less than 100 acres, such development is "small to moderate in scale" within the meaning of the CCCP Goal 16 provision. That conclusion in turn presents two questions that are integral to the county's decision: 1) what is "development activity" within the meaning of the "small to moderate" limitation? and 2) what is the geographic area meant by "at Bradwood" as used in the "small to moderate" limitation?

The county concluded that the proposed dredging of 46 acres of river channel adjacent to the former mill site is not "development activity" "at Bradwood" for purposes of the CCCP limitation and in any case is not "development" within the LWDUO definition, so that the 46 acres proposed to be dredged need not be included in the total acreage proposed for "development." Record 51. The county also concluded that "[a]reas occupied during construction of a facility such as temporary construction easements for pipelines are not permanently occupied and are not part of the 100 acres." Record 50. Based on those conclusions, the county concluded that the sum total of the acreage intervenors proposed to develop at Bradwood was just over 50 acres, which includes the 40 acres that will be permanently developed with the LNG facility at the former mill site, and "inwater structures," presumably referring to the pilings that must be installed in the Clifton Channel. The 40 acres used to calculate development activity at the former mill site apparently does

not include approximately 30 acres of land that will be temporarily disturbed during construction.

The county also made alternative calculations that took into account the 17.8 acres of powerline right of way within the entire county and the 6.2 miles of pipeline proposed to be developed within the entire county, albeit factoring in a 30-foot wide permanent easement rather than a 100-foot construction easement for pipeline construction, and concluded that even a conservative estimate of the total acreage of development yielded 80.4 acres, still less than the 100-acre threshold the county identified as exceeding "small to moderate" development.

Finally, the county calculated in the alternative that even considering the portion of the pipeline located on what the county termed "Bradwood Landing Controlled Property," and considering a 100-foot pipeline easement for construction, the total amount of acreage proposed for development activity was still less than 100 acres.[1]

A. 100-Acre Threshold

The phrase "small to moderate in scale" is not defined in the CCCP or any other county land use regulation. Petitioners challenge the county's reliance on a 100-acre threshold to determine whether the scale of development activities at Bradwood is "small to moderate." Petitioners argue that the county erred in relying on the Goal 9 element of the CCCP as context for determining the meaning of the "small to moderate" provision. According to petitioners, the "small to moderate" limitation is a part of the CCCP's Goal 16/17 element, which focuses on the impact that development at Bradwood will have on estuarine resources, so that statements in the CCCP Goal 9 element do not provide relevant context for interpreting a provision of the CCCP's Goal 16 element. Rather, petitioners argue, statements found in the CCCP Goal 16 element that limit the scale of development at

[1] The county's alternative calculations are found at Record 53-55.

Bradwood provide the only relevant context and require that development impacts must be considered based on impacts to the estuary.

Intervenors respond that under ORS 197.829(1), the county's interpretation of the meaning of the disputed CCCP provision must be affirmed. ORS 197.829(1) requires LUBA to affirm a local government's interpretation of a provision of its land use regulations unless LUBA determines that the interpretation:

> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

In *Siporen v. Medford*, 231 Or App 585, 220 P3d 427 (2009), *rev allowed* 348 Or 19 (2010), the Court of Appeals concluded that where the city chose to rely on one of two seemingly conflicting purpose statements as context for interpreting an ambiguous provision of its development ordinance, and where the city's interpretation of the meaning of the provision at issue was plausible, LUBA must affirm that interpretation under ORS 197.829(1). Here, the county's reliance on language in the CCCP Goal 9 element supports its reading of the "small to moderate in scale" language, where the Goal 9 language suggests that "large" industrial sites within the county are 100 acres or more. That language provides relevant context for interpreting the meaning of a Goal 16 limitation on development of an inventoried Goal 9 industrial site located in the Columbia River estuary. Petitioners cite to no other text or context that has some bearing on differentiating small, moderate and large scale industrial development. The county's view that the Goal 9 language illuminates the difference between small, moderate and large industrial development for purposes of the CCCP limitation to small and moderate scale industrial development at Bradwood is

plausible, certainly as plausible as any interpretation offered by petitioners or other parties. Accordingly, we agree with intervenors that the county's interpretation that development activity that is 100 acres or less may satisfy the "small to moderate in scale" requirement is entitled to deference under ORS 197.829(1).

B. Development Activity

In determining what constitutes "development activity" within the meaning of the "small to moderate" limitation, the county relied on the definition of "development" found in LWDUO 1.030. Petitioners argue that the county should have used the definition of "development" found in the definitions section of the Goal 16 element of the CCCP in determining what activities constitute "development activity."[2] Intervenors respond that the county properly relied on the LWDUO definition of "development" in accordance with LWDUO 1.035.[3]

The CCCP Goal 16 definition of "Development or Use" clearly would encompass dredging as a "development activity." *See n* 2. In *Bradwood I*, we quoted the LWDUO definition in resolving petitioners' challenge to the county's previous decision. *Bradwood I*

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[2] The Goal 16 element of the CCCP includes a definition for "Development or Use." That definition provides in relevant part that "Activity" is defined as "* * * any action taken either in conjunction with a use or to make a use possible. * * * Several activities – *dredging*, piling, fill – may be undertaken for a single use – a port facility. * * *" (Emphasis added.)

[3] LWDUO 1.035 provides:

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

at 231. While it is now not entirely clear to us that the LWDUO definition of "development" rather than the CCCP Goal 16 definition is the applicable definition, we need not resolve the issue because, as we explain below, we conclude that the LWDUO definition of "development" also would encompass the proposed dredging of the Clifton Channel.

C. Construction Activity

Petitioners argue that under either definition, the county erred in determining that "development" does not include areas occupied during construction, including an additional 30 acres of land proposed to be used during terminal construction, and including a 100 foot easement for construction of the pipeline. As noted above, the county concluded that "[a]reas occupied during construction of a facility such as temporary construction easements for pipelines are not permanently occupied and are not part of the 100 acres." Record 50.

We generally agree with petitioners that there is no textual or contextual support for the county's exclusion of construction activity from the acreage included in "development activity" at Bradwood. In *Bradwood I*, we held that the LWDUO definition of "development" would encompass construction of powerlines and gas pipelines. *Id*. at 231. Moreover, the LWDUO definition of "development" lists various actions and activities that "includ[e], without limitation: construction * * * [and] land disturbance." Therefore, we agree with petitioners that land that will be disturbed during construction of the terminal should be included in the county's consideration of "development activity" at Bradwood, and that land disturbed within the 100-foot construction easement for gas pipeline construction should be included as well.

We disagree with petitioners that the county must consider the entire 6.2 mile segment of the pipeline located within the county. However, we also disagree with intervenors that the county need only consider the segment of the pipeline located on the 40-acre site listed on the county's Goal 9 inventory of industrial sites. The "small to moderate" limitation is found in the Goal 16 element of the CCCP and the NCP, which identify and

discuss various attributes of the Bradwood subarea of the Columbia River estuary planning area. The planning subarea encompasses more land than just the former industrial site, and is described to include "the industrial area at Bradwood, a stretch of steep forested shoreline to the east and portions of the Columbia River." The "small to moderate" limitation is intended to apply to development activities "at Bradwood." That would seem to include consideration of pipeline construction activities occurring within the Bradwood subarea.

It appears from the record that the county's pipeline calculations considered only the 1000 feet of pipeline located on the 40 acres of the former mill site that will be permanently occupied by the LNG terminal facilities and used a 100-foot wide construction easement in its calculations. We cannot tell from the record whether that is the total amount of area that the pipeline will cross within the Bradwood subarea. If so, then the county's calculation is consistent with the definition of "development" and with the "small to moderate" limitation. If the pipeline is located in other areas within the Bradwood subarea, then the county must include that area in its calculation.

D. Dredging

Petitioners argue that under the LWDUO definition of development, the proposed dredging should be considered "development activity" "at Bradwood" and included in the county's acreage total. The county declined to include the area of the Clifton Channel proposed for dredging, based in part on repeated references in the CCCP's Goal 9 element regarding industrial land to "land, parcels and tracts" to support the county's conclusion that "development activities" at the Bradwood site do not include the proposed dredging in the Clifton Channel.[4]

[4] The county concluded:

> "This supports our conclusion that land is the concern in the scale of development provision and not the water area or river bottom since it is the industrial site which is identified as offering limited potential for small to medium sized industrial development."

We agree with petitioners that dredging should be considered "development activity" "at Bradwood." First, the Bradwood subarea explicitly includes portions of the Columbia River. Second, the CCCP provision at issue describes Bradwood as appropriate for "water-dependent" development. This at least suggests that some water development activities might occur at the Bradwood site. Moreover, the county counted the acreage needed for "inwater structures" in its calculation of the acreage being used for development activity. That was presumably based in part on language in *Bradwood I* that concluded that those inwater structures should be considered in the county's determination of what constituted "development activity" "as a whole" at Bradwood. The county's view that inwater structures that are to be anchored to submerged land within the Clifton Channel off the shore of the former Bradwood industrial site are part of the development activity "at Bradwood" is difficult to reconcile with the county's opposite view that dredging of submerged land in the same channel is not part of the development activity at Bradwood. If the geographic location of development activity "at Bradwood" includes the pilings within the channel, it is hard to see how the same geographic location should not include the submerged land to which those structures are to be anchored.

In addition, the county's attempt to exclude dredging of the submerged land located off of the shore of the former industrial site from the LWDUO definition of "development" is inconsistent with the text of the definition. ORS 197.829(1). LWDUO 1.030 defines "development" as:

In a footnote, the county concluded:

> "We conclude, based upon the statements in the subarea plans concerning limitations relating to development at Bradwood, the area at issue is the MI zoned industrial site, along with the mill pond and attached inwater structure area. Bradwood was the location of the first commercial sawmill in Oregon and relied upon a dock. We conclude that the turning basin * * * [is] not at Bradwood, as that term is used in the Comprehensive Plan policy." Record 50.

> "Any man-made change to improved or unimproved real estate, including but not limited to: construction, reconstruction, conversion, relocation or enlargement of any structure; any mining, excavation, landfill or land disturbance, any use or extension of the use of land."

The county found that the proposed dredging is not a "man made change to * * * real estate," relying on a definition of "real estate" found in the Oregon Administrative Rules governing real estate appraiser certification.[5] The county then concluded "the dredging is not * * * 'land disturbance' because it occurs in water as opposed to on land." Record 52.

The county relied on an Oregon Administrative Rule definition of "real estate" that does not seem particularly relevant or useful in answering the question of whether dredging is development under the county's comprehensive plan. Land that is submerged under water does not cease to be "land" merely because it is underwater. As petitioners point out, dredging will require a lease or easement from the Oregon Department of State Lands, the agency that manages the state-owned submerged lands within the state of Oregon. That strongly suggests that that dredging is a "land disturbance."

In addition, the definition includes the phrase "including but not limited to," prior to a list of specific activities that constitute "a man-made change to * * * real estate," or development. Use of such a phrase means that the list that follows is not an exhaustive or complete list of the types of activities that can be considered to fall within the definition,

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[5] The county found:

> "* * * [W]e look to an Appraiser Certification and Licensing Board regulation OAR 161-002-0000(30) where 'real estate' is defined as:
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> > "[A]n identified parcel or tract of land, together with any improvements, that includes easements, rights-of-way, undivided or future interests or similar rights in a tract of land, but does not include mineral rights, timber rights, growing crops, water rights or similar interests severable from the land when the transaction does not involve the associated parcel or tract of land."
>
> " * * * * *
>
> "[This definition] suggest[s] that 'real estate' does not include activities or man-made changes occurring under water. * * *" Record 51.

although the types of activities that could be viewed as "development" must share common characteristics that help to determine what activities the enacting body intended to include in the definition of development, under the principle of *ejusdem generis*. *Friends of Yamhill County v. Yamhill County*, 229 Or App 188, 193, 211 P3d 297 (2009); *Schmidt v. Archdiocese of Portland in Oregon*, 347 Or 389, 223 P3d 399 (2009)). "Dredging" is defined in the LWDUO as "[t]he extraction or displacement of aquatic sediment or other material for the purpose of maintaining or deepening a navigation channel, mooring basin or other navigational areas, obtaining fill material or mining and mineral extraction." The act of dredging certainly appears to share some common characteristics with activities that are specifically identified as development, such as "mining, excavation, landfill or land disturbance * * *."

Based on the above, we agree with petitioners that the county should count the 46 acres proposed to be dredged as "development activity" "at Bradwood" that is subject to the "small to moderate" restriction on development activity. We will not attempt to calculate the exact amount of acreage that is proposed to be included within the "development activity" at Bradwood for purposes of the "small to moderate" limitation, although it appears that the amount of acreage that should be included for purposes of calculating the total acreage subject to "development activity" at Bradwood exceeds 100 acres. On remand, the county should calculate that acreage based on our conclusions set forth above about the types of activities that constitute "development activity" "at Bradwood."

E. Development Impacts

In addition to concluding that development activity at Bradwood did not encompass more than 100 acres, and thus by the county's definition was not "large," the county adopted additional findings that the proposed scale of the development activities at Bradwood was moderate in comparison to the impacts of other industrial and marine activities within the county, in comparison to the impact of other dredging projects in the area, and in comparison

to other developments that generate heavier traffic. Record 56-60. However, given the county's finding that "large scale industrial development is that where the developed industrial site occupies more than 100 acres of land," and given the likelihood that on remand, the total acreage that will be considered to be part of the "developed industrial site" under that definition may exceed 100 acres, we need not at this point consider the county's additional findings that the proposed LNG facility will produce impacts that meet the "small to moderate in scale" limitation on development.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

As described above, a portion of the site consists of estuarine shoreland adjacent to the Columbia River and the site is part of the Columbia River Estuary planning area identified in the CCCP. One aspect of the development proposal is a zone change for an approximately 46-acre submerged portion of land from Aquatic Conservation-2 (AC-2) to Aquatic Development (AD), in order to allow dredging of the river in that location. Clatsop LWDUO 5.412(1) requires that the proposed zone change must be consistent with comprehensive plan policies. Those policies include a requirement that "[t]raditional fishing areas shall be *protected* when dredging, filling, pile driving or when other potentially disruptive activities occur" (CCCP Policy 20.2(1)) and a requirement that "[e]ndangered or threatened species habitat shall be *protected* from incompatible development" (CCCP Policy 20.8). (Emphases added.) The county found, and there is no dispute, that the area sought to be rezoned to AD to be dredged for a channel, turning basin and docking facility is located in a "traditional fishing area," the Clifton Channel of the Columbia River.

In *Bradwood I*, we remanded the decision to the county in part because we agreed with petitioners that the county erred in using a dictionary definition of the word "protect" in determining whether the proposed zone change to AD was consistent with CCCP Policy 20.2(1) and Policy 20.8. We held that LWDUO 5.412(1) required that the county apply the

definition of "protect" found in the Statewide Planning Goals. "Protect" is defined in the Goals as "save or shield from loss, destruction, or injury or for future intended use." We suggested that the county's view of "protect" as being satisfied by *attempts* to protect, an *intent* to protect, or measures that merely reduce harm to the resources was not consistent with the Goal definition:

> "* * * [T]he county proceeded to the fourth source of definitions listed LWDUO 1.035, a legal dictionary, and chose a different definition of 'protect' that introduces an element of intent. Under the county's interpretation, as long as intervenors 'attempt' to preserve a resource it has 'protected' that resource. It is not entirely clear what the county means by 'attempt,' but the county apparently understands it to mean using measures that are intended to 'minimize' impacts, even if those measures fail to shield the resource from loss and significant adverse impacts on the resource still occur. That view may be consistent with the law dictionary definition the county relies upon, but it is not at all clear to us that it is consistent with the statewide planning goal definition." *Id.* at 219.

A. Meaning of "Protect"

The county interpreted the meaning of "protect" as defined in the Goals as:

> "'Protect' as defined by LCDC and as used by the County and acknowledged by LCDC in the County planning documents does not require that absolutely no disturbance occurs. Protection is provided by avoiding those areas to the extent possible and making development sensitive to the environment where it does in fact occur, so that estuarine and coastal shoreline values are maintained." Record 25.

As noted in *Bradwood I*, CCCP Policy 20.2(1) and Policy 20.8 implement Goal 16, and it is reasonable to conclude that the word "protect" in those CCCP policies is used in the same way as the word "protect" is used in Statewide Planning Goal 16 (Estuarine Resources). The county's interpretation of the word "protect" as defined in the Goals is an interpretation of state law and, as such, is not entitled to any particular deference on appeal. *Kenagy v. Benton County*, 115 Or App 131, 838 P2d 1076 (1992). The county's interpretation of the meaning of "protect" appears to conclude that protection of specific resources can be accomplished through use of some measures that either reduce harm to general estuarine

values or attempt to reduce harm to the specified resources.[6] However, we do not see much of a distinction between the county's interpretation of "protect" as defined in the dictionary, which in *Bradwood I* we found improperly imported the concepts of "attempts" to protect or an "intent" to protect into the definition, and the county's interpretation of the Goal definition of "protect" in the present appeal as satisfied through measures that merely reduce harm.

The definition of "protect" contains stringent language: "save or shield from loss, destruction, or injury * * *." "Save" has many definitions, including "**1:f:** to preserve or guard from injury, destruction or loss." *Webster's Third New International Dictionary* 2019 (1981). "Shield" is defined as "to protect with or as if with a shield." *Id*. at 2094.

Context for interpreting the goal definition of "protect" is provided by considering its use within the text of Goal 16. The goal itself provides that its purpose is:

> "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." (Emphases added.)

Goal 16 requires protection of the environmental, economic, and social values, diversity and benefits of estuaries, and allows estuarine development and restoration only "where appropriate." The goal sets out a hierarchy of priorities for management and use of estuarine resources, placing in first priority "[u]ses which maintain the integrity of the estuarine ecosystem." Within the remaining text of Goal 16, the word "protect" appears almost exclusively in the Goal text describing the "natural management unit" designation. That designation is the most protective classification of Goal 16 resources, and includes "areas

[6] The county's generalized findings regarding the meaning of "protect" contain various examples of these types of measures. For example, the county concluded that intervenors have designed the dredge footprint to "maximize efficient use of the current basin, *minimize* the amount of dredging and *reduce impacts* to fisheries, thereby reducing the area impacted and *protecting the habitat as a whole*." Record 25 (emphases added).

* * * designated to assure the *protection* of significant fish and wildlife habitats * * *." The natural management unit allows uses and activities that allow the resources of the estuary to "continue to function in a manner to *protect* significant wildlife habitats, natural biological productivity, and values for scientific research and education." Thus, the most protective classification in Goal 16, the natural management unit designation, allows only activities that are sufficient to protect the identified resources.

The Goal language describing the other designations also provides context for the meaning of "protect." The description of the "conservation management unit," which is the current management designation of the subject property, does not include the word "protect."[7] The description of the "development management unit," the proposed designation of the property, also does not use the word "protect." Taken together, the uses of the word "protect" within Goal 16 itself indicate that the definition is not equivocal in requiring that identified resources are "saved" or "shielded" from more than *de minimis* damaging impacts.

Although we agree with the county that the Goal definition of "protect" does not require that estuarine resources identified for protection be completely or absolutely protected from any "loss, destruction, or injury" whatsoever, the county has made a planning decision under the CCCP policies at issue that implement Goal 16 and the scheme set forth in the second paragraph of Goal 16, quoted above, to "protect" as opposed to a decision to "maintain," "develop," or "restore" traditional fishing areas and endangered or threatened species habitat. Having made that "protect" planning decision, the local program to protect those estuarine resources must not allow "loss, destruction, or injury" beyond a *de minimis* level. Thus, the development that is to be allowed by the disputed rezone is not consistent

[7] The conservation management unit includes references to management of estuarine resources in order to "conserve" those resources. "Conserve" is defined in the Statewide Planning Goals as "[t]o manage in a manner which avoids wasteful or destructive uses and provides for future availability."

with the Goal definition of "protect" unless the measures proposed in seeking to rezone the property are sufficient to reduce harm to such a degree that there is at most a *de minimis* or insignificant impact on the resources that those policies require to be protected.

B. Measures that Reduce Harm ("Shielding Mechanisms")

The county also concluded that because the provisions of the CCCP, LWDUO, and other development regulations found in the "County Standards Document" have been acknowledged as being in compliance with Goal 16, the use of the word "protect" in those documents and the measures that are specified in connection with actions taken in the estuary are consistent with the Goal definition of protect. Based on that conclusion, the county reviewed what it describes as "shielding mechanisms" in those regulations and concluded that:

> "[T]he LCDC definition of protect is met by compliance with acknowledged county zoning and standard regulations stating that implementation of particular measures accomplishes protection and by construction of the development and imposition of conditions that will either save or shield the protected resource from the potential harm identified in [Policy 20.2(1) and 20.8.]" Record 24.

The county appears to perceive a distinction between the word "save" and the word "shield" as used in the definition of "protect," and to take the position that "shielding" a resource from loss, destruction, or injury requires protection to a lesser extent than "saving" that resource from the same effects. However, the definition of "shield" is synonymous with "protect" and therefore does not support the county in reading the word "shield" to allow measures that do less than protect the resource.

We also do not think the county's reliance on CCCP, LWDUO and other county land use and development regulations and standards that use the word "protect" or incorporate what the county terms "shielding mechanisms" has much bearing on the meaning of "protect" as defined in the Goals. Many of those regulations include the word "protect," but describe measures that allow attempts to protect, an intent to protect, mitigation of harm, or

other measures that merely reduce harm to the resource. For example, the county's Dredging and Dredged Material Disposal development standards provide that "[w]hen dredging is permitted, the dredging shall be *the minimum necessary to accomplish the proposed use*." Intervenors-Respondents' Joint Response Brief App 2 page 8 (emphasis added.) That policy also provides that the timing of dredging shall be coordinated to "* * * minimize interference with commercial and recreational fishing * * *" and that "[a]dverse short term effects of dredging and aquatic area disposal such as increased turbidity, release of organic and inorganic materials or toxic substances, depletion of dissolved oxygen, disruption of the food chain, loss of benthic productivity, and disturbance of fish runs and important localized biological communities shall be minimized." *Id*. To the extent those measures allow greater than *de minimis* impacts to the traditional fishing areas protected by CCCP Policy 20.2(1) and the endangered or threatened species habitat that must be protected from incompatible development under CCCP Policy 20.8, those measures do not "protect" the resources, within the meaning of that word in those policies and Goal 16.

C. Protection of Estuarine Values as a Whole

As noted above, the county concluded that the required protection could be accomplished by protecting estuarine values as a whole, in some cases through off-site mitigation to compensate for development that will damage or destroy estuarine resources. Petitioners argue that the county erred in determining that protection of estuarine values as a whole is sufficient to protect "traditional fishing areas," as required by CCCP 20.2(1), and "endangered and threatened species habitat," as required by CCCP 20.8. According to petitioners, in determining that those policies are necessarily satisfied by protection of general estuarine values and the "habitat as a whole," the county impermissibly broadened the subject of the protection. As petitioners explain it, "[t]rading one traditional fishing area for improved habitat elsewhere does not 'protect the traditional fishing area' at Bradwood." Petition for Review 37.

Again, as a general matter, we agree with the county that the term "protect" as defined in the Goals does not require absolutely no adverse impacts to estuarine resources as a whole or to specific estuarine resources for which the county has made a "protect' decision. Goal 16 envisions development of estuarine resources "where appropriate." The problem with the county's general analysis of whether the resources identified in Policy 20.2(1) and 20.8 are "protected" is that while Goal 16 may be concerned with the general goal of protecting estuarine values, the CCCP requires the county to protect "traditional fishing areas" and "endangered and threatened species habitat." A determination that generalized "estuarine values" are protected is not sufficient to establish that those two specific resources are protected.

In support of its findings, the county purported to rely on comments by a representative from the Department of Land Conservation and Development (DLCD) who indicated that an exception to Goal 16 would not be required for the proposed dredging "unless the proposed dredging will adversely affect the integrity of the estuarine ecosystem, requiring application of a natural or conservation management unit." *Bradwood I* Record 8754. We do not see that the comments of DLCD staff regarding whether an exception to Goal 16 is required have any bearing on whether the proposed activities "protect" the identified resources within the meaning of the Goal definition. The DLCD representative's comments included a caveat that an exception would not be required "unless dredging would adversely affect the estuarine area." That caveat warned that if the proposed dredging adversely affected the estuarine area, a natural management unit designation would need to be applied, or a conservation management unit must continue to apply, thus precluding dredging for the purposes that intervenors propose, unless a goal exception was sought and approved. That comment does not answer the question of whether traditional fishing areas and endangered and threatened species habitat will be protected.

In conclusion, we agree with petitioners that to the extent the county concludes that the proposed development activities "protect" the specified resources, where the proposed activities include attempts to protect, an intent to protect, or proposals that reduce impacts to the protected resources but still allow significant adverse impacts to the resources to occur, the county's interpretation misconstrues the term "protect" as defined in the Goals.

D. Policy 20.2(1) – Protection of Traditional Fishing Areas

CCCP Policy 20.2(1) requires that "traditional fishing areas shall be protected when dredging, filling, pile driving or when other potentially disruptive activities occur." Policy 20.2(1) is part of the CCCP's Goal 16/17 section. In implementing Goal 16 and adopting the policy, the county appeared to recognize and anticipate that dredging and other disruptive activities will occur within the Columbia River Estuary planning area under limited circumstances, but chose to limit or prohibit those activities when they result in greater than a *de minimis* impact to the traditional fishing areas, presumably due to the importance of those fishing areas and the fishing industry to the county.[8] That presumption is consistent

[8] The Landscape Unit section of the Northeast Community Plan of the CCCP contains a policy for "Estuary Wetlands, Coastal Shorelands and Water Bodies" that provides in relevant part:

> "1. Recognizing the contribution of shallow water area, fresh water marshes, and wetlands to the biological productivity of the Columbia River Estuary, the indiscriminate filling of such areas is discouraged. It is also recognized that to develop areas adjacent to the river, some dredging and filling will be necessary. Therefore, potential water oriented sites that require the least amount of fill shall be preferred for development.
>
> "2. Fishing is a traditional industry and lifestyle of the Northeast County. The fishing industry shall be preserved and promoted:
>
> " * * * * *
>
> "c. through discouragement of oil tanker traffic on the Columbia River,
>
> "* * * * *
>
> "f. through close evaluation of industrial development and other activities to ensure compatibility and maintenance of water quality."

with the current zoning designation of the property as AC-2, a zone which allows dredging under limited circumstances. LWDUO 3.780.

The Clifton Channel of the Columbia River, where dredging is proposed, is a traditional fishing area. The project proposes to dredge approximately 57 acres of the channel at a depth between 35 and 43 feet. Record 36. In addition to the general findings discussed above, the county adopted 9 pages of single-spaced findings regarding Policy 20.2(1). In a portion of those findings, the county concluded that "some disturbance [of Clifton Channel] is allowed so long as the disturbance does not have *a substantial adverse effect* on the resource." Record 30 (emphasis added). Petitioners argue that the county's finding misconstrues the meaning of "protect" where it allows harm to traditional fishing areas as long as the harm does not rise to the level of a "substantial adverse effect." We agree. As explained above, the Goal definition of "protect" requires that any impacts to the specified resource that cannot be avoided or eliminated entirely must be reduced to a *de minimis* or legally insignificant level. The county does not describe what it means by a "substantial" adverse effect, but judging from the findings discussed below addressing various impacts it is clear that the county views a resource to be "protected" notwithstanding adverse impacts that are more than *de minimis* impacts.

1. Construction Activities – Dredging, Filling, Piling

Initial dredging is proposed to occur 24 hours per day over a 3 to 4 month period during construction of the facility, during months when low fish populations are present in the river. Record 28-29. The county reasoned that because the dredging months (November through February) and the commercial fishing months of August through October do not overlap, dredging will not impact traditional fishing areas. The county also relied on intervenors' expert's opinion that the dredging depth of between 35 and 43 feet, which occurs below habitat for juvenile salmon, will not impact those fish. The county also concluded that because Clifton Channel will remain open to fishing during dredging, the

channel will be protected. Record 31. The county further concluded that compliance with the county's Dredging and Dredged Material Disposal policies regarding the timing of dredging, to occur when low fish populations are present in the channel, would "shield the traditional fishing areas from injury when disruptive inwater activities occur. Dredging will be performed to create a safe and sufficient turning basin for ships while minimizing ecological impacts and avoiding significant adverse impacts." Record 28.

As explained above, the county cannot assume that compliance with county standards that regulate dredging necessarily means that the traditional fishing areas are "protected" within the meaning of the Goal definition. Compliance with policies that require minimization of harm to the resource does not necessarily demonstrate that the proposal "protects" the traditional fishing area within the meaning of the Goal definition of that term, unless those policies require that harm is minimized to a level where no more than *de minimis* harm can be expected occur. In addition, the county's findings focus on impacts to commercial fishing from the dredging activities, but evidence in the record indicates that recreational fishing occurs year round in the channel. The county's findings do not address impacts to other users of the traditional fishing area during the time that dredging is occurring.

The county also concluded that using fewer but larger vertical piles will minimize acoustic effects on fish, establishing safety zones around pile driving will protect marine mammals, and using vibratory drivers "to the extent possible" will produce lower noise and vibration levels. Record 29. The county also concluded that allowing pile driving to occur between 7 a.m. and 10 p.m. will reduce the number of construction days needed so that the project may be completed faster and presumably will result in fewer days that traditional fishing areas are affected by those activities. As above, the county's findings seem to rely on "minimization" of harm but do not establish that the harm to the protected resources will be *de minimis*. In addition, a minimization measure that will be used "to the extent possible" is

similar to a measure that "attempts" to protect the resource. As we explained in *Bradwood I*, attempts to protect the resource are not sufficient to "protect" the resource, within the Goal definition of that term.

2. Other Potentially Disruptive In-Water Activities

The expected frequency of LNG tanker passage into the channel and berth at the LNG facility is one passage every 1.5 days. Record 31. When a ship is traversing the channel and maneuvering at berth, safety and security zones from 500 yards to 300 yards, respectively, are in effect, and most fishing boats will be precluded from entering the safety zone that surrounds the ship as it moves into port. The county recognized that passage of LNG tankers approximately every other day, with their accompanying safety and security zones when the tankers maneuver and berth, might disrupt commercial fishing. Record 31. However, the county reasoned that the disruption did not result in a failure to protect the traditional fishing area, in part because the major *commercial* fishing season only occurs from August through October. The county also concluded that because the channel will remain open except when LNG tankers are maneuvering at berth, the Clifton Channel will be protected. We do not think those findings explain how disruption of the traditional fishing area every day and one-half, especially during the prime fishing season already shortened by low fish populations, will mean the channel is "save[d] or shield[ed] from loss, destruction or injury" that is no more than a *de minimis* level, considering evidence in the record that the channel is used year round by both commercial and recreational fishermen.

The county also noted that thousands of ships pass along the Columbia River and past the Bradwood site each year, and that 8 to 11 ships pass Bradwood each day. However, as far as we can tell, those ships use the main stem navigation channel and do not enter the traditional fishing area of the Clifton Channel, but instead bypass the mouth of the channel. The fact that other ships use the main stem of the Columbia River does not explain how the

Clifton Channel is protected when LNG tankers traverse the channel and berth at Bradwood every day and one-half.

E. Policy 20.8 – Protection of Endangered or Threatened Species Habitat

CCCP Policy 20.8 provides that "[e]ndangered or threatened species habitat shall be protected from incompatible development." Policy 20.8 appears to reflect a policy choice the county made in adopting the Goal 16 element of its comprehensive plan that the identified habitat deserves special consideration and treatment when development proposals in the estuarine area are considered. Habitat for threatened and endangered species of salmonids, Columbia white tailed deer, stellar sea lions, marbled murrelet and northern spotted owl is present in the area of the project. Record 37. A wildlife refuge is located approximately one-half mile from the industrial site.

The county adopted several pages of single-spaced findings in support of its conclusion that the identified habitat would be protected from incompatible development. Petitioners challenge those findings, arguing that the findings suffer from the same flaws described above in determining that measures to "minimize" impacts to the habitat are sufficient to "protect" that habitat within the Goal definition. As explained above, we generally agree with petitioners that the county erred in relying on measures which merely reduce impacts to the habitat without finding that impacts will be reduced to a *de minimis* level, or where they equivocate in actually requiring those minimization measures versus allowing attempts to protect the resource to suffice (i.e. "to the extent possible").

As with its findings regarding Policy 20.2(1), the county cited intervenors' compliance with county development standards that require "avoidance of impacts where possible." Record 37. As explained above, compliance with county standards that allow impacts to habitat where it is not "possible" to avoid them does not mean that the habitat is protected within the meaning of the Goal definition, without a determination that the allowed impacts are at or below a *de minimis* level. However, those county standards also allow and

in some cases require off-site mitigation and restoration of habitat to such an extent that, after restoration, more habitat is available than before the development. As we discuss in greater detail below, such off-site mitigation and restoration of threatened and endangered species habitat could support a finding that habitat is protected within the meaning of the Goal definition.

The county relied on off-site mitigation of other habitat within the estuary to conclude that habitat will be protected. Record 39. The county concluded:

> "[Intervenors] submitted a revised mitigation plan detailing [their] environmental and mitigation process approach. The mitigation plan outlines how [intervenors have] worked [their] way through the mitigation process to date by first describing the footprint and facility changes that took place to avoid and minimize impacts wherever possible during the design process. * * * Avoidance and minimization includes preservation of the most sensitive and highly functional natural resources at the Bradwood site, as well as preservation of existing high quality habitat adjacent to the Svensen Island mitigation area and use of horizontal drilling in identified sensitive areas to avoid surface disturbance. * * *
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> " * * * * *
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> "Upon review of the record, we conclude that as both mitigated and regulated, *significant adverse impacts* will not occur and policy identified resources are protected." Record 40 (emphasis added.)

Many of the proposed protection measures include off-site mitigation in the form of restoration and enhancement of other protected habitat within the estuary. Petitioners challenge those off-site mitigation measures as failing to satisfy Policy 20.8. Unlike traditional fishing areas, however, which are a site-specific, uniquely located resource, and thus do not lend themselves easily to "off-site" mitigation and/or restoration, protected habitat is present throughout the estuary in places other than the project location. In addition, Goal 16 specifically requires mitigation of impacts from dredging or filling through "creation, restoration or enhancement of another area to ensure that the integrity of the ecosystem is maintained." Therefore, mitigation through off-site restoration and enhancement may protect "endangered or threatened species habitat" within the meaning of

the Goal definition, if such mitigation results in no net loss to the protected habitat within the estuary.

In general, we think that it is reasonable for the county to rely on off-site mitigation and restoration measures that result in no net or *de minimis* loss to protected habitat in the estuary, in determining that that habitat is "protected" within the meaning of the Goal definition. The findings quoted above conclude that "significant adverse impacts will not occur." We understand that finding to conclude that based on the proposed off-site mitigation and restoration, the habitat will be "protected" within the meaning of the goal. To the extent those measures rely on measures that merely reduce harm to the protected habitat, the finding misconstrues applicable law for the reasons explained above. However, where the proposed measures rely on off-site mitigation and restoration to reduce adverse impacts to the habitat to no greater than a *de minimis* level, the county's findings are consistent with the meaning of "protect" as defined in the goal.

Finally, petitioners also challenge the county's conclusion that because the Bradwood site is zoned for industrial port development, the proposed LNG facility is by definition not "incompatible development" as used in Policy 20.8: "[h]abitat is protected from incompatible development through selection of a terminal site that has undergone industrial development since the 1840s rather than a more pristine site." Record 38. We fail to see how the fact that the Bradwood site is zoned for industrial development automatically leads to the conclusion that the identified habitat is protected from "incompatible" development. The zoning of the site does not mean than any and all industrial development at the Bradwood site is compatible development. As petitioners point out, other industrial development might have considerably less impact on protected habitat such that it could satisfy Policy 20.8.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Prior to the public hearing on remand, the board of commissioners adopted a remand procedure that limited oral and written testimony to the two issues remanded, which are the subject of the first and second assignments of error. The board of commissioners also limited new testimony to legal "argument," and prohibited new evidence. The hearing on remand was scheduled for July 8, 2009, and the board of commissioners instructed that written testimony should be submitted to the planning department not later than two days prior to the July 8 hearing. Prior to the July 8, hearing, planning staff reviewed the written testimony that had been submitted and redacted certain portions of the submitted written material that planning staff determined was either not directed at the remand issues and/or included new evidence in contravention of the board of commissioners' instructions. At the July 8 hearing, planning staff presented the board of commissioners with the redacted submissions.

In the third assignment of error, petitioners argue that the county committed a procedural error in redacting written testimony during the remand proceedings. Citing *Siporen v. City of Medford*, 55 Or LUBA 29 (2007), petitioners maintain that the county in effect excluded parties who were entitled to participate in the remand proceedings from participation, because some people who could not attend the July 8 hearing submitted their written testimony to the planning department, only to have it later redacted as described above, without any public notice that the redaction would occur. Petitioners argue that those same people could have testified at the hearing on July 8 and not had their oral testimony redacted by planning staff. Thus, petitioners argue, "having two different standards for oral and written testimony was also arbitrary." Petition for Review 48.

Petitioners argue that the county's procedure prejudiced the substantial rights of some parties to the proceeding. Petitioners do not allege that they were excluded from participating in the remand proceedings under their theory set out above, and they in fact

participated both orally and in writing in the remand proceedings. In order to allege procedural error, a party must demonstrate that it was prejudiced; prejudice to another party is not a sufficient basis to warrant remand of the decision. *Fraley v. Deschutes County*, 32 Or LUBA 27, 37-38 (1996).

Petitioners also argue that planning staff improperly redacted portions of their written testimony, because that testimony contained argument on the two remand issues and did not contain any new evidence. We understand petitioners to argue that the county's redaction procedure prejudiced their substantial rights because the planning staff improperly redacted argument that petitioners were entitled to submit to the board of commissioners, which the board of commissioners did not receive or consider. According to petitioners, the redacted material included arguments that the county should calculate the acreage total for the proposed terminal using a 100-foot construction easement for the pipeline. Record Appendix A 40, 55. However, even if the portions of the record that petitioners cite indicate that the county improperly redacted petitioners' testimony, the county's findings demonstrate that the county did consider a 100-foot construction easement for the 1000 feet of pipeline located on the former mill site. Record 52. Moreover, petitioners' testimony to the same effect was already in the record at Record 774. Accordingly, petitioners' arguments fail to demonstrate they were prejudiced by the redactions and therefore provide no basis for reversal or remand of the decision.[9]

The third assignment of error is denied.

The county's decision is remanded.

Holstun, Board Member, concurring.

[9] Intervenors argue that the issues presented in the third assignment of error were not raised during the proceedings below and thus petitioners are precluded from raising them for the first time at LUBA. ORS 197.835(3). Because we deny the assignment of error, we need not address intervenors' waiver challenge.

I agree with the result under the second assignment of error, but I write separately because I believe the county has largely succeeded in making the meaning of the term "protect" far more complicated than it really is. CCCP Policy 20.2(1) requires that "traditional fishing areas shall be protected when dredging, filling, pile driving or when other potentially disruptive activities occur." CCCP Policy 20.8 requires that "[e]ndangered or threatened species habitat shall be protected from incompatible development." As we explained in *Bradwood I*, the Statewide Planning Goal definition of "protect" applies in this case. That definition is set out below:

"Save or shield from loss, destruction, or injury or for future intended use."

The question presented under the second assignment of error is whether the county has established that the development that will be allowed by the disputed rezoning will "save or shield" traditional fishing areas and endangered or threatened species habitat from "loss, destruction, or injury," *i.e.*, damage. The county's decision spends a good bit of time trying to reformulate its legal obligation under CCCP Policies 20.2(1) and 20.8 to "protect" those resources as necessarily being satisfied by (1) simply applying existing acknowledged regulations that the county has adopted to protect estuarine resources, (2) showing that the estuary will be protected if the estuary is viewed as a whole, (3) mitigating any damage to those protected resources, (4) attempting to avoid damage to those protected resources, or (5) intending to avoid damage to those protected resources. I agree with the majority that those reformulations represent a misunderstanding of the county's legal obligation to protect the identified resources under Policies 20.2(1) and 20.8.[10]

If any further reformulation of or elaboration on the Statewide Planning Goal definition of "protect" is necessary to provide a working understanding of what it means to

[10] I also agree with the majority that off-site mitigation alone is not sufficient to protect a site specific resource like a specific traditional fishing area, whereas off-site mitigation may be sufficient, in whole or in part, to protect a resource such as threatened or endangered species habitat, which may not be site-specific.

"protect" the specific estuarine resources that the CCCP policies require the county to protect, I agree with the majority that as defined by the Statewide Planning Goals the rezoning need not include protection that will perfectly or absolutely shield those estuarine resources from any damage whatsoever. However, while the duty to protect does not demand perfection neither can it be diluted into a mere obligation to avoid significant injury. That is what the county attempts to do in this case. I agree with the majority that the county must ensure that any damage to those resources will be no more than *de minimis*.[11] In other words, any such damage must be "trivial."[12] As defined by the Statewide Planning Goals, the legal obligation to "protect" an estuarine resource that the county has determined must be protected is not satisfied by merely taking steps to avoid significant damage. Finally, I agree with the majority that the findings and record in this matter do not establish that the likely damage to the Clifton Channel traditional fishing area and to endangered or threatened species habitat that can be expected from the proposed development will be no more than *de minimis* or trivial. For that reason, I agree that the second assignment of error must be sustained.

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[11] As defined by Blacks Law Dictionary, "*de minimis*" means:

> "Trifling; minimal. 2. (Of a fact or thing) so insignificant that a court may overlook it in deciding an issue or case." Blacks Law Dictionary 464 (8th ed 2004).

[12] There may be other ways to reformulate the Statewide Planning Goal definition of "protect." But any such reformulation must be consistent with the text of that definition.