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

OREGON SHORES CONSERVATION COALITION
and SURFRIDER FOUNDATION,
Petitioners,

and

CITIZENS FOR RENEWABLES, JODY MCCAFFREE,
and ROGUE CLIMATE,
Intervenors-Petitioners,

vs.

COOS COUNTY,
Respondent,

and

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

LUBA No. 2019-137

OREGON SHORES CONSERVATION COALITION,
Petitioner,

and

CITIZENS FOR RENEWABLES and
JODY MCCAFFREE,
Intervenors-Petitioners,

vs.

COOS COUNTY,
Respondent,

and

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

LUBA No. 2020-006

FINAL OPINION
AND ORDER

Appeal from Coos County.

Courtney Johnson, Portland, filed a petition for review and reply brief and argued on behalf of petitioners. With her on the brief were Meriel Darzen and Crag Law Center.

Tonia Moro, Medford, filed a petition for review and reply brief and argued on behalf of intervenors-petitioners.

No appearance by Coos County.

Seth J. King, Portland, filed the response briefs and argued on behalf of intervenor-respondent. With him on the briefs were Steven L. Pfeiffer, Nikesh J. Patel, and Perkins Coie LLP.

ZAMUDIO, Board Member; RUDD, Board Chair; RYAN, Board Member, participated in the decision.

REMANDED 12/22/2020

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

Opinion by the Board.

NATURE OF THE DECISION

In LUBA No. 2019-137, petitioners appeal a November 26, 2019 county board of commissioners' decision re-approving, on remand, a liquefied natural gas (LNG) terminal and associated infrastructure. In LUBA No. 2020-006, petitioners appeal a December 31, 2019 decision approving a conditional use permit, floodplain development permit, additional elements of the LNG terminal, and modifications to some previously approved elements.

REPLY BRIEFS

OAR 661-010-0039 limits reply briefs to 1,000 words unless LUBA grants permission for a longer reply brief.[1] On August 31, 2020, intervenors-petitioners Citizens for Renewables, Jody McCaffree, and Rogue Climate (collectively, Citizens) filed a conforming reply brief; a proposed overlength, 2,394-word reply brief; and a motion requesting that we accept the overlength reply brief. However, Citizens have not established that accepting the overlength reply brief would

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[1] OAR 661-010-0039 provides, in part:

> "A reply brief shall be permitted. A reply brief shall be filed together with four copies within seven days of the date the respondent's brief is filed. A reply brief shall be confined to responses to arguments in the respondent's brief, state agency brief, or amicus brief, but shall not include new assignments of error or advance new bases for reversal or remand. A reply brief shall not exceed 1,000 words, exclusive of appendices, unless permission for a longer reply brief is given by [LUBA]."

materially aid resolution of the issues in these appeals. Therefore, the proposed reply brief is rejected. We will consider Citizens' conforming reply brief.

Petitioners Oregon Shores Conservation Coalition and Surfrider Foundation (collectively, petitioners) also filed a reply brief. Intervenor-respondent Jordan Cove Energy Project L.P. (Jordan Cove) moves to strike portions of petitioners' reply brief, arguing that those portions assert new bases for remand, contrary to OAR 661-010-0039. We agree with Jordan Cove.

In their petition for review, petitioners argue under the sixth and eighth assignments of error, in part, that one of the county's decisions should be reversed or remanded because it "misconstrues the applicable law" by failing to directly apply two statewide planning goals. In their reply brief, petitioners argue that the county erred in interpreting local land use regulations in a manner contrary to the statewide planning goals that those regulations implement.

Petitioners respond that the arguments made in their petition for review and reply brief both involve alleged "misconstructions of applicable law" and that there is very little difference between arguing that the county misconstrued the applicable law by (1) failing to directly apply a statewide planning goal as an approval criterion and (2) interpreting an acknowledged local code provision in a manner contrary to the goal that it implements.

We disagree with petitioners. Petitioners' reply brief offers what is essentially a new or different basis for reversal or remand. The two arguments invoke different responses, different standards of review and, if sustained, would

require different remedial actions on remand. Because that distinct argument for reversal or remand was not made in their petition for review, petitioners cannot advance it in their reply brief. OAR 661-010-0039.

Accordingly, we do not consider the last sentence of petitioners' reply to Jordan Cove's response to petitioners' sixth assignment of error, or the last two paragraphs of petitioners' reply to Jordan Cove's response to petitioners' eighth assignment of error. Otherwise, petitioners' reply brief is allowed.

MOTION TO TAKE OFFICIAL NOTICE

Citizens move us to take official notice of a February 19, 2020 decision by the Oregon Department of Land Conservation and Development (DLCD), objecting to Jordan Cove's application for a federal certification related to the proposed terminal. Jordan Cove does not oppose our taking official notice of the DLCD decision, pursuant to OEC 202(1) or (2).[2] However, Jordan Cove argues, and we agree, that we may not consider or apply any "adjudicative facts" from the DLCD decision in the present appeal. *Friends of Deschutes County v. Deschutes County*, 49 Or LUBA 100, 103 (2005). We will take official notice of the DLCD decision.

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[2] OEC 202 defines "[l]aw judicially noticed," in relevant part, to include:

> "(1) The decisional, constitutional and public statutory law of Oregon[.]
>
> "(2) Public and private official acts of the legislative, executive and judicial departments of this state[.]"

MOTIONS TO TAKE EVIDENCE

A. Citizens' First Motion to Take Evidence

Pursuant to OAR 661-010-0045(1), Citizens move us to take into evidence three documents which are not in the record: (1) the February 19, 2020 DLCD decision discussed above, (2) Jordan Cove's March 19, 2020 appeal of DLCD's decision to the United States Department of Commerce, and (3) Jordan Cove's April 21, 2020 petition for declaratory order, requesting that the Federal Energy Regulatory Commission (FERC) waive Federal Clean Water Act requirements.[3]

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[3] OAR 661-010-0045 provides, as relevant:

> "(1) Grounds for Motion to Take Evidence Not in the Record: [LUBA] may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. * * *
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> "(2) Motions to Take Evidence:
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> "(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding.
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> "(b) A motion to take evidence shall be accompanied by:

The asserted basis for Citizens' motion under OAR 661-010-0045(1) is "procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision." Citizens argue that Jordan Cove represented to the county that it would seek and obtain all required federal permits and approvals but that these three documents indicate that Jordan Cove is instead trying to avoid the necessity of obtaining federal permits and approvals. According to Citizens, this conduct constitutes a "procedural irregularity" warranting our consideration of the three documents as additional evidence supporting Citizens' arguments under the fourth assignment of error, which alleges in part that the county committed procedural error by failing to properly condition its approval on Jordan Cove's obtaining required federal permits and approvals.

Jordan Cove responds that, if the "facts" Citizens wish to "establish" for purposes of OAR 661-010-0045(2) are that (1) DLCD has objected to issuance of a federal certification for the project, (2) Jordan Cove has appealed the DLCD objection, and (3) Jordan Cove has petitioned for waiver of certain federal requirements, those facts are undisputed and therefore not an appropriate basis to

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> "(A) An affidavit or documentation that sets forth the facts the moving party seeks to establish; or
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> "(B) An affidavit establishing the need to take evidence not available to the moving party, in the form of depositions or documents as provided in subsection (2)(c) or (d) of this rule."

take evidence under OAR 661-010-0045(1), which operates only where there are "disputed factual allegations." In any case, Jordan Cove argues that Citizens have not identified any "procedural irregularities" within the meaning of OAR 661-010-0045(1) or explained with particularity how the facts Citizens seek to establish "pertain to the grounds to take evidence specified in [OAR 661-010-0045(1)], and how those facts will affect the outcome of the review proceeding." OAR 661-010-0045(2).

We agree with Jordan Cove. Though it is not entirely clear, we understand that Citizens seek to establish that Jordan Cove intends to obtain (1) a federal certification by overriding DLCD's objection and (2) a waiver of Federal Clean Water Act requirements. Because Jordan Cove does not dispute those bare facts, Citizens may cite them in aid of their fourth assignment of error, even in the absence of a successful motion to take evidence.

To the extent that Citizens wish us to consider the three documents for other evidentiary purposes, we agree with Jordan Cove that Citizens have not established a basis under OAR 661-010-0045(1) and (2) for us to do so. A fundamental problem is the absence of identified "procedural irregularities" within the meaning of OAR 661-010-0045(1). It is difficult to understand, and Citizens have not established, how the post-decision actions of an *applicant* in front of federal bodies can possibly involve, much less violate, the county's "procedures" governing land use decisions. Generally, only the local government whose decision is appealed is capable of making procedural errors that are

reviewable before LUBA. *See* ORS 197.835(9)(a)(B) (LUBA may remand where the "local government" "[f]ailed to follow the procedures applicable to the matter before it.").

Finally, we do not understand, and Citizens have not adequately demonstrated, how our consideration of these documents would affect the outcome of our review, specifically our resolution of Citizens' fourth assignment of error. As far as Citizens have established, nothing in the three documents has any bearing on the largely procedural issues raised in Citizens' fourth assignment of error.

Citizens' first motion to take evidence is denied.

B. Citizens' Second Motion to Take Evidence

On August 10, 2020, Citizens filed a renewed motion to take evidence regarding allegations of *ex parte* communications and bias relevant to the first subassignment of error under their third assignment of error. Specifically, Citizens seek to place before us a 202-page document that includes a number of emails between county commissioners and officials of Pembina, Jordan Cove's parent corporation. Citizens argue that the emails represent undisclosed *ex parte* communications and include evidence that the commissioners, particularly Commissioner Cribbens, was biased in favor of Jordan Cove's application. In addition, Citizens request that we order depositions of the commissioners,

pursuant to OAR 661-010-0045(2)(c), to obtain additional evidence that the commissioners were biased.[4]

A decision-maker who engages in *ex parte* communication must disclose that communication at the following hearing and provide parties an opportunity to respond. ORS 215.422(3).[5] An *ex parte* communication is a communication between a party and a decision-maker, made outside the hearing process, concerning a decision or action before the decision-maker. Not all contacts

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[4] OAR 661-010-0045(2)(c) provides:

> "Depositions: [LUBA] may order the testimony of any witness to be taken by deposition where a party establishes the relevancy and materiality of the anticipated testimony to the grounds for the motion, and the necessity of a deposition to obtain the testimony. Depositions under this rule shall be conducted in the same manner prescribed by law for depositions in civil actions (ORCP 38-40)."

[5] ORS 215.422(3) provides:

> "No decision or action of a planning commission or county governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:
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> "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
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> "(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related."

between a party (or representative of a party) to a pending decision and a local government decision-maker are *ex parte* contacts that require disclosure. Instead, *ex parte* contacts are those communications that concern the question at issue—*i.e.*, the challenged decision for which the alleged *ex parte* contacts occurred. As the Supreme Court explained in *1000 Friends of Oregon v. Wasco Co. Court*, "board members must maintain impartiality only toward the parties and issues 'in the matter,' not toward all individuals and all competing interests in the community generally, and similarly, * * * disqualifying contacts must be 'concerning the question at issue.'" 304 Or 76, 81, 742 P2d 39 (1987) (quoting *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973)). To demonstrate actual bias, a party must identify "explicit statements, pledges, or commitment that the local official has prejudged the specific matter before the tribunal." *Columbia Riverkeeper v. Clatsop County*, 267 Or App 578, 609-10 (2014).

Jordan Cove does not dispute the fact that the emails document communications between commissioners and Jordan Cove representatives. However, Jordan Cove argues that those emails do not constitute *ex parte* communications within the meaning of ORS 215.422(3) or demonstrate bias. Jordan Cove contends that Citizens have not demonstrated that any of the communications between its agents and the commissioners concerned approval or denial of the two land use applications or compliance with the applicable approval criteria. *See Link v. City of Florence*, 58 Or LUBA 348 (2009) (failure

to disclose communications that have no bearing on applicable approval criteria or issues material to approving or denying the application does not warrant remand). Further, Jordan Cove argues, Citizens have not identified any "explicit statements, pledges, or commitment" by any county commissioner to approve the applications that resulted in the challenged decisions.

In their renewed motion to take evidence, Citizens observe that the two decisions challenged in these appeals are 148 and 192 pages long, and Citizens incorporate by reference both decisions into the motion to take evidence. Citizens note that, within those decisions, "the county makes determinations related to the economic impacts of the project, the necessity of the applicant to obtain state and federal authorizations, whether the various aspects of the project will create negative environmental impacts, whether the project meets management objectives of the county's various zones, whether the project provides a substantial public benefit and whether the project does not unreasonably interfere with public trust rights, among the other hundreds of findings. See the Decisions, incorporated herein by this reference." Renewed Motion to Take Evidence 5. Citizens then divide the 202 pages of emails into five categories, citing dozens of pages for each category. Citizens do not quote any of the emails or explain which passages within the cited pages support their characterizations. *Id.* at 6-8.

It is the movant's burden to demonstrate a sufficient basis for LUBA to take evidence outside the record. Citizens have moved us to consider 202 pages of documents not in the record. We agree with Jordan Cove that Citizens' motion

to take evidence, and the substantive arguments in the first subassignment of error under their third assignment of error, fail to provide meaningful analysis. While we understand Citizens to assert that many of the emails subject to the motion contain *ex parte* communications and evidence of bias, Citizens do not connect the dots between their allegations of the documents' legal import and the substance of the documents themselves.

Without focused argument from Citizens, we cannot determine whether the email communications contain *ex parte* contacts or evidence of bias that would support a motion to take evidence and potentially warrant remand of the decision. LUBA will not review hundreds of pages of documents to make an independent determination whether each contact contains *ex parte* communication or evidence of bias. In other words, we will not supply legal argument for Citizens. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982) ("It is not our function to supply petitioner with legal theories or to make petitioner's case for petitioner.").

Citizens' second motion to take evidence and request for depositions is denied.

FACTS

In *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017), *aff'd*, 291 Or App 251, 416 P3d 1110, *rev den*, 363 Or 481 (2018) (*Oregon Shores I*), we described the then-pending proposal as follows:

> "In 2015, [Jordan Cove] applied to the county to construct an LNG export terminal at Jordan Cove, located on the North Spit at Coos Bay, located in Coos County. The proposed facility would receive approximately 1.04 billion cubic feet per day of natural gas via pipeline, liquefy the gas to produce approximately 6.8 million metric tons of LNG, and load the LNG on tanker ships for export to international or domestic markets in the non-contiguous United States.
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> "The LNG facility consists of a number of components, including (1) the LNG export terminal, (2) a marine slip and access channel, (3) a barge berth, (4) a gas processing center, and (5) a fire station and emergency training center, along with associated roads and utilities. The project would also require significant dredging, dredge disposal, shoreline stabilization, and wetland impact mitigation.
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> "The terminal, gas processing facility, and fire station and emergency training center will be located on upland areas zoned for industrial uses. Much of the port facilities (slip, barge berth, tugboat dock, etc.) will be located in coastal shoreland areas, which are generally zoned to allow for water dependent uses. The marine slip and access channel will require dredging in Jordan Cove, designated a natural estuary, and Henderson Marsh, a Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) inventoried wetland." *Oregon Shores I*, 76 Or LUBA at 350-51 (footnote omitted).

In 2016, the county approved Jordan Cove's application (the 2016 decision). On appeal, we remanded the 2016 decision for additional proceedings to address various procedural and substantive errors. In a letter dated March 14, 2019, Jordan Cove requested that the county initiate proceedings on remand (the remand proceedings).

In August 2019, while the remand proceedings were pending, Jordan Cove filed a different, consolidated application for a conditional use permit (CUP),

floodplain development permit, and associated approvals for several new components of the project, as well as modifications to components that were approved by the 2016 decision (collectively, the CUP application). The modifications include a 50 percent increase in the number of proposed LNG tanker trips, elimination of a proposed power plant, and relocation of the approved gas processing plant. The new components include an industrial wastewater treatment facility and pipeline, a temporary workforce housing complex, temporary barge berth, other temporary construction, and a helipad associated with the emergency training center.

The county assigned a hearings officer for the remand proceedings. The hearings officer held public hearings and, on November 4, 2019, adopted findings recommending approval of the application on remand, which were forwarded to the board of commissioners. On November 15, 2019, the board of commissioners held its own public hearing on the remand proceedings.

The county also assigned a hearings officer for the CUP application. The hearings officer held public hearings and, on December 24, 2019, adopted findings recommending approval of the CUP application, which were forwarded to the board of commissioners. On December 31, 2019, the board of commissioners held its own public hearing on the CUP application.

At each set of public hearings, individual commissioners disclosed the existence and content of a number of *ex parte* communications. At the conclusion of the two proceedings, the commissioners adopted two decisions: one addressing

the remand issues and re-approving the proposed LNG terminal (the remand decision) and one approving the new components and modifications (the CUP decision). These appeals followed.

INTRODUCTION

Petitioners' petition for review presents nine assignments of error. The first through fourth are directed at the remand decision. The remainder are directed at the modifications and additions approved in the CUP decision.

Citizens' petition for review includes four assignments of error. The first is directed at the remand decision. The second is directed at the CUP decision. The third alleges that the county committed various procedural errors during both the remand proceedings and the proceedings on the CUP application. The fourth includes a mix of substantive and procedural challenges to both decisions. We first address the procedural challenges in the third assignment of error because some of those challenges, if sustained, could require reversal or remand without the need to resolve some or all of the remaining assignments of error. Although we ultimately sustain one of the procedural subassignments of error and remand for remedial proceedings, in our view, the interests of the parties are best served by resolving the remaining assignments of error. *See* ORS 197.835(11)(a) ("Whenever the findings, order and record are sufficient to allow review, and to the extent possible consistent with the time requirements of ORS 197.830(14), [LUBA] shall decide all issues presented to it when reversing or remanding a land use decision * * *.").

CITIZENS' THIRD ASSIGNMENT OF ERROR

In three subassignments of error, Citizens argue that the county committed several procedural errors.

A. *Ex parte* Communications and Bias

Citizens' arguments in the first subassignment of error allege undisclosed *ex parte* contacts and bias. These arguments rely on the emails subject to Citizens' second motion to take evidence, which we deny above. Accordingly, we also deny this subassignment of error.

This subassignment of error is denied.

B. CCZLDO 5.0.500

Coos County Zoning and Land Development Ordinance (CCZLDO) 5.0.500 provides:

> "Submission of any application for a land use or land division under this Ordinance which is inconsistent with any previously submitted pending application shall constitute an automatic revocation of the previous pending application to the extent of the inconsistency. Such revocation shall not be cause for refund of any previously submitted application fees." (Footnote omitted.)

In a footnote, CCZLDO 5.0.500 also states, in part, "An application is no longer considered pending once the final decision has been issued and no appeals have been filed, or all appeals have been resolved and final judgments on appeal are effective."

As noted, while the remand proceedings were pending, Jordan Cove filed the CUP application, seeking modifications and additions to the original terminal

design approved by the 2016 decision. Citizens argued to the county that, under CCZLDO 5.0.500, the CUP application had the effect of automatically revoking all inconsistent aspects of the original terminal design. The county rejected that argument in the remand decision, finding that Citizens failed to specifically identify any inconsistency between the original and modified terminal designs and that Citizens' argument was thus "not adequately developed." Remand Record 21.[6] In the CUP decision, the county rejected similar arguments, finding that CCZLDO 5.0.500 is inapplicable because the application approved by the 2016 decision was no longer "pending" before the county within the meaning of CCZLDO 5.0.500, at least as to those matters not within the scope of the remand proceedings. CUP Record 16.

On appeal, Citizens challenge those findings, arguing that the county erred in placing the burden on Citizens to identify the specific inconsistencies between the two applications. Citizens argue that, by its terms, CCZLDO 5.0.500's operation is "automatic" and, therefore, does not depend upon whether opponents to an application meet some burden to identify specific inconsistencies. Citizens argue that the remand decision must be remanded for the county to perform its obligation to determine what elements of the original terminal design were modified by the CUP application and hence are now revoked.

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[6] We cite the record of the remand decision as "Remand Record" and the record of the CUP decision as "CUP Record."

Citizens may be correct that, because CCZLDO 5.0.500 operates to automatically revoke inconsistent proposals, the county erred in the remand decision by placing the burden on opponents to raise objections and identify inconsistencies between pending applications. However, even if that is the case, Citizens do not grapple with the commissioners' interpretation of CCZLDO 5.0.500 in the CUP decision. Under that unchallenged interpretation, CCZLDO 5.0.500 operates only when both applications are "pending." The county's determination that the application approved in the 2016 decision was not "pending" when Jordan Cove filed the CUP application seems consistent with the footnote in CCZLDO 5.0.500. Absent some challenge to the county's interpretation, Citizens have not established a basis for reversal or remand.

This subassignment of error is denied.

C. ORS 215.435

ORS 215.435 provides in relevant part that, if a county does not receive a written request from an applicant to proceed with an application on remand from LUBA within 180 days of "final resolution of the judicial review," the county must "deem the application terminated."[7]

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[7] ORS 215.435 provides, as relevant:

> "(1) Pursuant to a final order of [LUBA] under ORS 197.830 remanding a decision to a county, the governing body of the county or its designee shall take final action on an application for a permit, limited land use decision or zone change within 120 days of the effective date of the final order issued by

Our decision in *Oregon Shores I* was appealed to the Court of Appeals, which affirmed. *Oregon Shores Conservation Coalition v. Coos County*, 291 Or App 251, 416 P3d 1110 (2018). The Supreme Court denied review on August 9, 2018. *Oregon Shores Conservation Coalition v. Coos County*, 363 Or 481, 424 P3d 728 (2018). The Court of Appeals, in turn, issued its appellate judgment on September 20, 2018. On September 26, 2018, we issued a notice of appellate judgment. As noted, in a letter dated March 14, 2019, Jordan Cove requested that the county proceed with the application on remand. The county found that Jordan Cove's letter was "submitted" one day later, on March 15, 2019. Both dates are more than 180 days from August 9, 2018, the date the Supreme Court denied

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> [LUBA]. For purposes of this subsection, the effective date of the final order is the last day for filing a petition for judicial review of a final order of [LUBA] under ORS 197.850(3). If judicial review of a final order of [LUBA] is sought under ORS 197.830, the 120-day period established under this subsection shall not begin until final resolution of the judicial review.
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> "(2)
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> > "(a) In addition to the requirements of subsection (1) of this section, the 120-day period established under subsection (1) of this section shall not begin until the applicant requests in writing that the county proceed with the application on remand, but if the county does not receive the request within 180 days of the effective date of the final order or the final resolution of the judicial review, the county shall deem the application terminated."

review, and less than 180 days from September 21, 2018, the date the Court of Appeals issued its appellate judgment. The county concluded that "final resolution of the judicial review" occurred on either the date the Court of Appeals issued its appellate judgment or the date we issued our notice of appellate judgment and that, in either case, Jordan Cove's request was timely filed. Remand Record 20-21.

Citizens argue that neither the Court of Appeals' appellate judgment nor LUBA's notice of appellate judgment constitutes "final resolution of the judicial review." According to Citizens, both documents simply function to acknowledge that the judicial review has been resolved by a prior decision, namely the Supreme Court's August 9, 2018 decision denying review.

We agree with Citizens that LUBA's notice of appellate judgment is simply a *notice* of the Court of Appeals' appellate judgment and does not constitute a resolution or decision of any kind, much less "final resolution of the judicial review" within the meaning of ORS 215.435(2)(a). The sole purpose of LUBA's notice is to advise the parties that LUBA will play no further role in reviewing the underlying decision.

In *Rose v. City of Corvallis*, we stated in *dicta* that "final resolution of the judicial review" means the Court of Appeals' appellate judgment, under the statutory cognate of ORS 215.435 then applicable to cities. 49 Or LUBA 260, 270 (2005). For the following reasons, we believe that *dicta* to be correct in the present case, as applied to ORS 215.435.

The text of ORS 215.435 and its immediate context do not clarify what the legislature meant by "final resolution of the judicial review." That imprecise language suggests that there may be more than one type of event or document that qualifies. Nonetheless, in most if not all cases, including the present one, it is clear that issuance of the appellate judgment is the event that finally resolves the judicial review.

In response to Citizens' argument that the appellate judgment is not a "decision" capable of bringing final resolution to the judicial review, the county noted in the remand decision that ORS 19.450(1)(a) and (b) include definitions of "[d]ecision" and "[a]ppellate judgment."[8] The latter is defined in relevant part

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[8] ORS 19.450(1) provides, in relevant part:

"As used in this section:

"(a) 'Decision' means a memorandum opinion, an opinion indicating the author or an order denying or dismissing an appeal issued by the Court of Appeals or the Supreme Court. The decision shall state the court's disposition of the judgment being appealed, and may provide for final disposition of the cause. The decision shall designate the prevailing party or parties, state whether a party or parties will be allowed costs and disbursements, and if so, by whom the costs and disbursements will be paid.

"(b) 'Appellate judgment' means the decision of the Court of Appeals or Supreme Court, or such portion of the decision as may be specified by the rule of the Supreme Court, together with an award of attorney fees or allowance of costs and disbursements, if any."

as "the decision of the Court of Appeals or Supreme Court * * * together with an award of attorney fees or allowance of costs and disbursements, if any." As defined by ORS 19.450(1)(b), it is reasonably clear that the appellate judgment is more than an administrative or *pro forma* conclusion to judicial review, as Citizens argue. It renders effective the decision on the merits, awards attorney fees and costs and, most importantly, functions to formally end appellate jurisdiction and transfer authority over the matter back to trial courts or other bodies. Citizens dispute that ORS 19.450(1)(b) has any bearing on the meaning of "final resolution of the judicial review," but we agree with the county that ORS 19.450(1) provides some support for the view that, at least in typical cases, it is issuance of the appellate judgment, rather than the underlying decision on the merits, that brings "final resolution to the judicial review."

That view is also supported by the Oregon Rules of Appellate Procedure. ORAP 14.05(1)(a) defines "[a]ppellate judgment" as "a decision of the Court of Appeals or Supreme Court together with a final order and the seal of the court." Relatedly, ORAP 14.05(1)(d) defines "[f]inal order" as "that part of the appellate judgment ordering payment of costs or attorney fees in a sum certain by specified parties or directing entry of judgment * * *." Further, ORAP 14.05(3)(b) specifies that the Appellate Court Administrator will not issue an appellate judgment for a period of 21 days after the Supreme Court issues an order denying review, "to allow time for a petition for reconsideration under ORAP 9.25." In other words, the appellate judgment issues only after it is clear that there will be no further

judicial review, *i.e.*, that judicial review is over. In our view, that the Oregon Rules of Appellate Procedure allow for reconsideration of the decision on the merits, and hence further judicial review, does not support the view that the decision on the merits constitutes "final resolution of the judicial review."

Citizens note that review of LUBA decisions is subject to the expedited procedures at ORAP 4.60 to 4.74, which modify the otherwise-applicable rules by prohibiting continuances, reply briefs, and other procedural delays. While this is true, nothing in ORAP 4.60 to 4.74 modifies the usual process for bringing finality to judicial review. Appeals of LUBA decisions, like most other types of judicial review, are concluded by issuance of the appellate judgment.

Citizens also note that, under the Rules of the Supreme Court of the United States, a petition for writ of certiorari must be filed within 90 days of the date the Oregon Supreme Court issues an order denying review of a Court of Appeals decision, not 90 days from the date the appellate judgment is issued. Supreme Court Rule 13(1). While that is true, it seems unlikely that the legislature based its understanding of "final resolution of the judicial review," for purposes of ORS 215.435, on the rules governing appeal deadlines to the United States Supreme Court.

In sum, we conclude that the appellate judgment is by far the strongest candidate for the event or document that effects "final resolution of the judicial review," at least in most cases, including the present one.

Citizens go on to argue that, if the appellate judgment in the present case represents "final resolution of the judicial review," the county's conclusion that Jordan Cove's request to initiate remand proceedings was timely under ORS 215.435 is not supported by substantial evidence, for two reasons. First, Citizens argue that the county cannot rely on the appellate judgment to determine deadlines under ORS 215.435 because a copy of the appellate judgment is not in the Remand Record. However, we see no reason why a copy of the appellate judgment must be in the local record in order to determine deadlines under ORS 215.435. No party disputes the date the appellate judgment issued. Absent an actual dispute regarding the date the appellate judgment issued, we decline to remand the decision to the county so that it may place a copy of the judgment in the record.

Second, Citizens argue that the record does not include evidence regarding when the county received Jordan Cove's March 14, 2019 letter. The county found that the letter was "submitted" March 15, 2019, but Citizens argue that there is no date stamp or other evidence that the letter was actually received on that date or any other date within the 180-day period. The ORS 215.435(2)(a) deadlines are based in part on the date counties "receive" an applicant's request, so we agree with Citizens that the record must include some evidence regarding the date of receipt in order to support the county's determination under that statute. Jordan Cove argues that March 15, 2019, is almost certainly the date the county received the letter in the mail, and that may well be the case, but nothing cited to us in the

record supports that presumption. If the letter were actually received even a few days later, it might be untimely under ORS 215.435(2)(a). We conclude that remand is necessary for the county to adopt more adequate findings, supported by substantial evidence, regarding the date the county *received* Jordan Cove's letter.

This subassignment of error is sustained, in part.

Citizens' third assignment of error is sustained, in part.

PETITIONERS' FIRST ASSIGNMENT OF ERROR

The county has adopted the Coos Bay Estuary Management Plan (CBEMP) as Volume II of the Coos County Comprehensive Plan. In *Oregon Shores I*, we remanded the 2016 decision, in part, for the county to adopt more adequate findings, supported by substantial evidence, regarding compliance with CBEMP Policy 5(I). CBEMP Policy 5(I) provides, in relevant part, that dredging, fill, and other alterations to the Coos Bay estuary are allowed only upon a demonstration that the "use or alteration does not unreasonably interfere with public trust rights."[9] As we explained in *Oregon Shores I*, the public trust doctrine

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[9] CBEMP Policy 5(I) provides, in part:

> "Local government shall support dredge and/or fill only if such activities are allowed in the respective management unit, and:
>
> "a. The activity is required for navigation or other water-dependent use that requires an estuarine location or, in the case of fill for non-water-dependent uses, is needed for a public use and would satisfy a public need that outweighs

protects public access to and use of navigable waters and submerged lands for navigation, recreation, fishing, and commercial uses. *See, e.g.*, *Weise v. Smith*, 3 Or 445, 450 (1869). As modified on remand, Jordan Cove's application proposes to conduct dredging necessary to allow approximately 120 LNG tanker trips (240 transits of the estuary) per year, or approximately four to five tanker trips per week, to access the Jordan Cove site. Some and perhaps all of the LNG tankers can cross the sand bar at the mouth of the estuary only at high tide. The Jordan Cove site is located approximately seven miles from the mouth of the estuary and is reachable via a dredged, deepwater shipping channel that is approximately 300 feet wide in most places with shallower, un-dredged areas on each side. Each transit of the estuary will require approximately 90 minutes.

To address security concerns, the United States Coast Guard (USCG) has declared that it will impose a mobile "security zone" around each tanker, extending 500 yards on each side, from which all other vessels are generally excluded. Including the tanker itself and tug vessels, the footprint of each security

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harm to navigation, fishing, and recreation, as per ORS 541.625(4) and an exception has been taken in this Plan to allow such fill.

"b. A need (i.e., a substantial public benefit) is demonstrated and the use or alteration does not unreasonably interfere with public trust rights.

"c. No feasible alternative upland locations exist[;] and

"d. Adverse impacts are minimized."

zone would be approximately 1,050 yards wide and 1,317 yards long. Most of the estuary is less than 1,000 yards wide, which means that, in most cases, it will not be possible for other commercial and recreational vessels to pass a tanker outside the security zone.

In the proceedings leading up to the 2016 decision, the USCG testified that it would allow other vessels to enter the security zone based "on a case-by-case assessment conducted on scene." *Oregon Shores I*, 76 Or LUBA at 357. Jordan Cove's consultant interpreted that statement to mean that the USCG would allow "known" vessels to transit the security zone with "minimal delay." Based on the consultant's testimony, the board of commissioners found that the proposal would not unreasonably interfere with public trust rights. As noted, we concluded in *Oregon Shores I* that the county's finding of compliance with the public trust component of CBEMP Policy 5(I) was not supported by substantial evidence.

On remand, the county adopted new findings that initially take the position that the public trust component of CBEMP Policy 5(I) is not an applicable approval criterion. Alternatively, the county again found that the proposal would not unreasonably interfere with public trust rights, based on additional testimony from Jordan Cove's consultants. Petitioners challenge both conclusions.

A. The Public Trust Standard Is an Applicable Approval Criterion

Petitioners argue that at no point in the proceedings leading up to or on appeal of the 2016 decision, or during the remand proceedings, did any party, including Jordan Cove, dispute that the public trust component of CBEMP Policy

5(I) applies as an approval criterion for the proposed terminal. Instead, petitioners assert that the county raised the policy's applicability for the first time in the remand decision. Briefly, the county's findings in the remand decision point to the existence of exceptions to Goal 16 that the county adopted in the early 1980s, which allowed dredging as a permitted use in several estuarine zones, and conclude that those exceptions subsume or obviate application of all or most components of CBEMP Policy 5(I) to development within those zones. Remand Record 53. For multiple reasons, petitioners argue, the county erred on remand.

Initially, petitioners argue that the "law of the case" doctrine articulated in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), precludes the county from revisiting issues that were, or that could have been but were not, resolved in *Oregon Shores I*. Jordan Cove responds that our remand in that case did not resolve the applicability of the public trust standard, but rather broadly returned the decision to the county for further action, which left the door open for the county to consider, in the first instance, whether the public trust standard is an applicable criterion. We disagree with Jordan Cove. We specifically remanded the 2016 decision for the county to adopt more adequate findings, supported by substantial evidence, demonstrating compliance with the public trust standard. *Oregon Shores I*, 76 Or LUBA at 356-59.

Although not for the exact reasons argued by petitioners, we agree that the applicability of the public trust component of CBEMP Policy 5(I) as an approval criterion is not an issue that the county may revisit on remand. In *Holland v. City*

of Cannon Beach, the court held that, once a local government has taken a position in the course of a permit proceeding that a land use regulation is not an applicable approval criterion, the local government cannot change that position on remand and apply the regulation to the permit application. 154 Or App 450, 962 P2d 701 (1998). The court explained that doing so is a de facto changing of the goal posts, contrary to ORS 227.178(3) (or its county analog at ORS 215.427(3)), because it effectively allows the local government to approve or deny a permit application based on standards that the local government deemed were not applicable at the time the permit application was filed. *See also Greer v. Josephine County*, 37 Or LUBA 261, 274-75 (1999) ("As construed in *Holland*, ORS 227.278(3) constrains a local government's ability to change interpretations regarding the *applicability* of its approval criteria.").

In the proceedings leading up to the 2016 decision, the county listed CBEMP Policy 5(I), including the public trust language, as an applicable approval criterion. The 2016 decision expressly found that the public trust standard is an applicable approval criterion, and the county adopted findings of compliance with that standard. On appeal of the 2016 decision, petitioners challenged the sufficiency and evidentiary support for those findings. In response, either the county or Jordan Cove could have argued that any deficiency in the findings was harmless error because, as a matter of law, CBEMP Policy 5(I), including the public trust component, is not an applicable approval criterion. Whatever the merits of that argument, had it been raised, the parties would have

had an opportunity to respond to it, and we would have had an opportunity resolve it. However, the issue was not raised, and our remand was based in part on the undisputed premise that the public trust component of CBEMP Policy 5(I) is an applicable approval criterion.

Nevertheless, even if the county were not prohibited under ORS 215.427(3) from determining that the public trust language is not an applicable approval criterion, we agree with petitioners that the county erred as a matter of law in concluding that its early-1980s exceptions to Goal 16 somehow obviate the public trust inquiry in CBEMP Policy 5(I), which implements Goal 16, Implementation Requirement 2. As the county's findings concede, those exceptions pre-date the adoption of the public trust language into Goal 16 and, later, into CBEMP Policy 5. In other words, the early-1980s exceptions to Goal 16 did not address the later-adopted public trust criterion. Neither the findings nor Jordan Cove explain how those exceptions apply to later-adopted requirements of Goal 16 and CBEMP Policy 5.

B. Compliance with the Public Trust Standard

The remand decision acknowledges that delays in the passage of commercial and recreational vessels due to the security zone around each LNG tanker could substantially interfere with public trust rights, "particularly if [the security zone] is in reality an 'exclusion zone.'" Remand Record 59. As we understand it, commercial and recreational vessels would be prohibited from entering the security zone without USCG authorization. Such authorization is

granted at the scene on a case-by-case basis, depending on a number of variables which are largely unstated but which include non-local factors such as the maritime security threat level that federal agencies apply to ports on a regional or national basis. The county found that, while "temporary closures" are permissible, "there comes a point where the level of closure or lack of access would effectuate a 'substantial interference' with the public's right of use." Remand Record 60. As framed by the county, the question of "substantial interference" turns on the extent to and circumstances under which the USCG will exercise its discretion to allow other vessels to enter the security zone. We understand the county to conclude that, as long as the security zone does not operate as an "exclusion zone," meaning apparently that commercial and recreational boats are regularly allowed to pass through the security zone with only temporary and occasional delays, operation of the security zone will not cause "substantial interference" with public trust rights.

Petitioners argue that the county misconstrued the public trust standard and adopted findings regarding impacts on navigation that are not supported by substantial evidence. We first address the alleged misconstruction of law.

1. Hierarchy of Vessels under the Public Trust Doctrine

Opponents argued below that LNG tankers and commercial and recreational vessels transiting the estuary enjoy the same navigation rights for purposes of the public trust doctrine. In response, the county found that "there is a further hierarchy recognized in both common law and statutory law between

large shipping vessels and small boats. The testimony of the [Coos Bay Pilots Association] makes clear that under admiralty law, smaller vessels and vessels engaged in fishing cannot impede the passage of a deep draft vessel that can safely navigate only within a narrow channel."[10] Remand Record 59.

Petitioners argue that the foregoing finding misconstrues the public trust doctrine, which is not based on or limited by statutes or admiralty law. According to petitioners, the public trust doctrine does not distinguish between the rights of two vessels navigating on the same body of water or create a hierarchy of rights based on the size of the vessels involved. Petitioners contend that the county erred in importing into the public trust analysis an interpretation of navigation rules that have no role under the public trust doctrine.

Whether the public trust doctrine itself entails some form of hierarchy is, at best, not clear. The policy essence of the common law public trust doctrine is to protect the public's right to use navigable waterways for traditional activities

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[10] The statement that "smaller vessels and vessels engaged in fishing cannot impede the passage of a deep draft vessel that can safely navigate only within a narrow channel" is an accurate paraphrase of the federal rules of inland navigation codified at 33 CFR subsections 83.09(b) and (c). 33 CFR subsection 83.09(b) provides, in relevant part, that vessels less than 60 meters in length shall not impede the passage of vessels that can safely navigate only within a narrow channel or fairway. 33 CFR subsection 83.09(c) provides that "[a] vessel engaged in fishing shall not impede the passage of any other vessel navigating within a narrow channel or fairway." These navigation rules embody what could be called a hierarchy of right-of-way, with deep draft vessels navigating within a narrow, deep water shipping channel generally taking precedence over other vessels.

(transportation, fishing, recreation, etc.). A classic example of a circumstance invoking the public trust doctrine is government activity impacting submerged lands that impairs public use of the water over those lands. *See Morse v. Oregon Division of State Lands*, 285 Or 197, 590 P2d 709 (1979) (upholding a state permit allowing the City of North Bend to fill and use part of the Coos Bay estuary to build a new runway for the local airport). However, there appear to be few public trust cases involving conflicts between vessels or waterway users.

The main case cited by petitioners and discussed in the remand decision, *Anderson v. Columbia Contract Co.*, holds that a vessel navigating within a shipping channel is not liable for damage caused to fishing nets placed within the channel. 94 Or 171, 184 P 240 (1919). The Supreme Court found that the public right to navigate within a channel is "paramount" to the public right to fish within the channel, though the Court also noted that that "paramountcy" is limited and that a navigating vessel could be held liable for damage to fishing nets if it could have avoided the conflict and negligently failed to do so. However, petitioners are correct that *Anderson* did not address the question of whether the public trust doctrine imposes some kind of hierarchy between two vessels which are *both* navigating the waterway.

That said, for purposes of evaluating whether the shipping associated with the proposed terminal would substantially interfere with the public trust rights of other waterway users, we tend to agree with petitioners that current navigation rules do not provide relevant context. Such navigation rules are merely part of

the background set of conditions governing vessel interactions on waterways like the dredged shipping channel. The county can reasonably assume that, for public trust purposes, there will be no *navigational* conflict between an LNG tanker in the shipping channel and, say, a boat that is fishing in the shipping channel. Pursuant to the navigation rules, the fishing boat would have to move out of the LNG tanker's course, and potentially out of the shipping channel, as necessary to prevent collision.

The problem, however, is that the security zone around each LNG tanker has nothing to do with navigational conflicts or the risk of collision. As far as the navigation rules are concerned, an LNG tanker and a commercial or recreational boat *could* pass in close proximity, side-by-side, within the shipping channel. By contrast, the security zone excludes all other vessels from entering its footprint. Accordingly, we agree with petitioners that the county's citation to the navigation rules does little to support its ultimate conclusion that *the security zone* will not substantially interfere with the public trust rights of other vessels.

Petitioners relatedly argue that the county's findings regarding the public trust doctrine are "tainted" by its erroneous incorporation of the navigation rules into the analysis. We agree.

This subassignment of error is sustained.

2. Substantial Interference Caused by the Security Zone

As noted, the 2016 decision's determination of compliance with the public trust standard turned on a finding that the USCG would not enforce the security

zone as an "exclusion zone," which we understand to mean a type of security zone that would substantially preclude or delay entry or transit by other vessels. That finding itself turned on a finding that the local USCG Captain of the Port has the authority to make on-scene determinations, on a case-by-case basis, to allow vessels to transit the security zone. Whether and the extent to which the USCG would allow vessels to transit the security zone is a key issue because, as noted, the security zone will almost always occupy the entire width of the estuary, making it difficult for other vessels to exit or avoid the security zone. If the USCG does not allow other vessels to transit the security zone, it is possible that the security zone will act as a temporary bottleneck, effectively preventing use or transit of the estuary by other vessels for significant periods of time, up to the 90 minutes it may take for the tanker to reach the terminal or the mouth of the estuary. Even if a vessel manages to find a place within the estuary that is wide enough to exit or avoid the security zone without running aground, evidence in the record indicates that it may take up to 30 minutes for the tanker and security zone to pass any particular location.

The county's findings in the 2016 decision speculated that the USCG would regularly exercise its discretion to allow vessels to transit the security zone, perhaps by recognizing "known" vessels, *e.g.*, local fishing boats, and allowing them to transit the security zone with only minimal delay, while precluding or significantly delaying transit only for "unknown" vessels.

However, as we noted in *Oregon Shores I*, the record included no evidence supporting that speculation, either from the USCG or Jordan Cove's consultant.

On remand, Jordan Cove submitted no new evidence from the USCG clarifying the circumstances under which it would exercise its discretion to allow vessels to transit the security zone on a case-by-case basis. Instead, Jordan Cove submitted additional testimony from its consultants, including Captain Frank Whipple, a retired USCG Captain with experience as Captain of the Port at other ports. Whipple explained how similar security zones work in other ports and testified how he would expect the security zone to be applied with respect to the LNG tankers. Remand Record 631-33. Specifically, Whipple described several measures that he anticipates the USCG would follow that could reduce delays or interference with vessel traffic caused by LNG tanker transits of the estuary.

The first measure is to conduct operations based on the maritime security level established for the local area, which is influenced by regional, national, and international considerations. Whipple stated that, except for the period following September 11, 2001, the maritime security level has typically remained at the least restrictive level. Remand Record 631-32.

Second, LNG tanker transits will be published via several media, including a Vessel Traffic Information System (VTIS) that the decision requires Jordan Cove to create, which will notify waterway users of an impending transit and allow them to avoid transit areas and times. Remand Record 632.

Third, prior to any tanker transit, Whipple stated that USCG personnel will visually and electronically scan the estuary for any unusual risks to the tanker. As part of this pre-transit process, any boats in or near the shipping channel will be warned away, and vessels will be assessed to determine whether they are engaged in typical pursuits such as fishing. Those vessels not engaged in typical activities or deemed to be "suspiciously hanging out" would be investigated further. *Id.* However, Whipple anticipated that any recreational or fishing boats not in the channel and not deemed to present a risk to the tanker would be allowed to remain and continue with their activities. *Id.*

Finally, security patrol forces would move along with the tanker and the mobile security zone to ensure that other vessels remain outside the shipping channel and do not threaten the tanker. Whipple stated that, during transit, other vessels may contact the patrol forces and request permission to enter or remain in the security zone via VHF radio or cell phone numbers that are published in advance. Whipple noted that, based on the USCG's earlier statements, it appeared that the USCG intends to exercise its discretion to allow other vessels to transit the security zone that are not deemed to present a threat, based on a case-by-case evaluation, presumably even if those vessels do not contact the patrol forces seeking permission. Finally, Whipple stated that the VTIS may help with case-by-case threat assessments by advising patrols of daily traffic patterns, fishing events, seasonal fishing times, marine parades or regattas, and other activities in the estuary. Remand Record 633.

The county relied heavily on Whipple's testimony to support its findings in the remand decision that the LNG tanker transits would not substantially interfere with the public trust rights of other vessels using the estuary. Petitioners argue that the county's findings are not supported by substantial evidence. Petitioners first cite the absence of "direct" or "affirmative" evidence, by which we understand petitioners to mean direct testimony from the USCG describing how it plans to conduct the case-by-case assessments and otherwise operate the security zone to avoid substantial interference with other vessels.

We disagree with petitioners that direct USCG testimony is essential to support findings addressing whether the proposed LNG tanker traffic will substantially interfere with public trust rights in the estuary. In the 2016 decision, the county's findings regarding whether and how the USCG would allow other vessels to transit the security zone were based on little more than speculation. Here, there is no dispute that Whipple is an expert in the conduct of USCG security operations. His explanations regarding how the USCG will likely operate the security zone with respect to other vessels, even in the absence of direct USCG testimony on that point, is the kind of testimony upon which a reasonable person could rely to draw conclusions about how the security zone would operate.[11]

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[11] We also note that, for reasons which are not difficult to understand, the USCG may be reluctant to provide specific details or commitments regarding how it will conduct threat assessments and administer the security zone.

Nonetheless, petitioners argue that the record, viewed as a whole, does not support the county's ultimate conclusion that the security zone would not substantially interfere with public trust rights in the estuary. Petitioners cite other evidence indicating that the security zone would cause delays to vessels encountering an LNG tanker in transit of the estuary. For example, petitioners cite a draft environmental impact statement stating that, during a tanker transit, fishing boats would be required to move out of the security zone, which would "result in delays." Remand Record 70. Petitioners also cite evidence that the security zone's operations depend, in part, on national or local maritime threat levels. Petitioners argue that, during a heightened threat level, the USCG may apply stricter standards under which few, if any, vessels may be allowed to enter or transit the security zone.

Petitioners contend that the county's findings erroneously ignore or reject evidence suggesting that the security zone may be operated to some extent as an "exclusion zone." The choice between conflicting evidence is generally left to the local government decision-maker, as long as the evidence relied upon, viewed against the evidence in the record as a whole, is substantial evidence—that is, evidence upon which a reasonable person could rely. *McConnell v. City of Grants Pass*, 55 Or LUBA 280, 285 (2007). With two possible exceptions discussed below, we cannot say that the evidence to which petitioners cite regarding delays caused by the security zone fatally undermines or renders insubstantial the

evidence upon which the county chose to rely, principally the testimony of Whipple.

Parties raised issues below regarding the impacts of the security zone on vessels transiting between two rock jetties and over a sand bar at the mouth of the estuary. As we understand the evidence cited by petitioners, the jetties form a relatively narrow channel between the open ocean and the calmer waters of the estuary. In addition, due to relatively shallow depths as well as wave and weather conditions influenced by the open ocean, the sand bar is most safely transited by fishing vessels at or near high tide, which occurs twice per day for a relatively narrow window of time. Petitioners cite evidence that, due to the timing of certain fishing seasons, large fleets of commercial and recreational fishing vessels may depart marinas and boat ramps within the estuary and cross the sand bar at the same time, at or near high tide, to reach fishing grounds. Similarly, petitioners argue, large fleets may return from sea at the same time, for example, to run from impending bad weather that could close the sand bar to small craft.

It is undisputed that loaded, outbound LNG tankers can only cross the sand bar at high tide due to the shallow depths and the tankers' deep draft. Petitioners cite evidence suggesting that even empty, inbound LNG tankers may, depending on conditions, find it necessary to transit at high tide. Petitioners also cite evidence that it may take up to 30 minutes for an LNG tanker, its tugs, and the half-mile wide security zone to pass any particular point in the estuary. Petitioners argue that the findings and the evidence fail to adequately explain how

the security zone can operate without substantial interference to public trust rights when large fleets of fishing vessels and LNG tankers may need to cross between the jetties and over the sand bar at the same time, at or near high tide. Petitioners cite testimony positing a worst-case scenario where a fishing fleet running from impending bad weather attempts to cross the sand bar during the safe and narrow window of a high tide but is prevented from doing so by the security zone, with the result that some vessels might have to risk crossing the sand bar during unsafe conditions or weather the storm at sea.

The county recognized that the testimony cited by petitioners regarding conflicts between the security zone and fishing vessels at the mouth of the estuary "is detailed and complex and is worth quoting in its entirety." Remand Record 78. After quoting some of that evidence, the county rejected it:

> "The Board finds a number of problems with this testimony. First, this analysis wrongly assumes that existing users have legal rights over proposed uses, and does not take in account the balancing of rights that pervades Oregon public trust doctrine case law. Second, it wrongly assumes, factually, that the commercial fishing boats will be 'excluded' from making a jetty crossing for a certain period of time.
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> "Cpt. Whipple of Amergent Techs counters this testimony by stating that '[t]he LNG carriers entering the channel entrance will be similar to all other deep draft vessels entering the harbor and should not impede[] fishing/crabbing vessels.' He goes on to note that the arrive and departure times of LNG vessels will be published weeks in advance, and that the [VTIS] will assist waterway users and deep draft ships in avoiding each other. The Board notes that the fishing vessels may have to modify their current practices to a certain

> extent, but that this does not constitute a substantial interference with the meaning of public trust law.
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> "Further, [Jordan Cove] notes that the Coos Bay Pilots [Association] testified that they anticipate that the effects of LNG carriers on fishing and other boats would closely track those of the other deep-draft ships that call on the Bay, including vessels that export wood chips and logs. In the Pilots' experience, the typical deep-draft ship encounters only six recreational boats and two commercial shipping boats during the typical transit into and out of the Port. Thus, the Board finds that this information supports the conclusion that the impacts from LNG carriers will be significantly less than the far-reaching allegations from opponents." Remand Record 79 (citations omitted).

The findings then note testimony that, on average, there are only a small number of fishing boats using the estuary on any given day. The findings admit that there will be times when large numbers of fishing boats are present but conclude that, even if "sport fishermen need to vacate the deepwater channel to let an LNG vessel pass by," that would not represent a substantial interference with public trust rights because the LNG vessel has a "paramount[]" right to navigate in the channel. Remand Record 80 (quoting *Anderson*, 94 Or at 182-83).

We agree with petitioners that the findings fail to adequately address the issues raised regarding conflicts between fishing vessels and LNG tankers transiting through the jetties and over sand bar. The issue is not, as the findings suggest, the fact that some boats fishing in the shipping channel may have to temporarily move out of the path of an incoming or outgoing tanker—responses that are required under the navigation rules and consistent with *Anderson*. As we understand it, the issue is that operation of the security zone potentially turns the

mouth of the estuary into a bottleneck that may prevent or substantially delay the transit of fishing vessels, particularly during the critical window of high tide that may be necessary to safely transit the sand bar. That is an issue about which neither the navigation rules nor *Anderson* say anything. The findings repeatedly equate the passage of an LNG tanker with that of other cargo vessels, such as those carrying wood chips or logs. However, such general cargo vessels are not subject to a security zone like the LNG tankers, and their transit through the mouth of the estuary would not preclude or delay fishing vessels from doing the same. The findings note testimony regarding the relatively small number of other vessels that deep draft vessels encounter within the estuary on an average day but do not address testimony regarding the large fleets of fishing vessels that, due to the timing of fishing seasons or other factors, may be attempting to transit or fish within the mouth of the estuary during the critical high tide period.

The findings also note testimony that the VTIS system may allow fishing boats to anticipate LNG tanker transits and "modify their current practices to a certain extent" in order to avoid conflicts with the security zone. Remand Record 79. It is not clear to what modifications the findings refer. If the county is suggesting that, due to the security zone, fishing fleets and individual boats will avoid transiting the sand bar during high tides or other times when an LNG tanker is present, the testimony cited to us suggests that that would constitute a major modification to current practices, one that may force fishing boats to transit the sand bar during sub-optimal and potentially unsafe conditions.

Finally, there is no focused testimony or explanation in the findings regarding how the USCG is likely to operate the security zone at the mouth of the estuary during peak conditions, when there may be large fleets of fishing boats trying to transit or fish in the area in order to take advantage of optimal or safer tidal conditions. Whipple's testimony suggests that the "case-by-case" threat evaluations by USCG patrol boats will occur on a boat-by-boat basis, which would likely be easier to accomplish in the northern reach of the estuary where, testimony indicates, fewer boats are encountered. However, Whipple does not address the testimony regarding large fleets of fishing boats attempting to transit the sand bar at high tide when a loaded LNG tanker is present or offer any view on how the USCG would conduct a case-by-case threat assessment under those circumstances.

In sum, we agree with petitioners that remand is necessary for the county to adopt more adequate findings, supported by substantial evidence, addressing the testimony regarding the impact of the security zone on fishing boats using or transiting the mouth of the estuary, particularly during the limited window of high tide.

This subassignment of error is sustained.

3. Evidence Regarding Nighttime Transits and High Tide Transits

The county relied on two key presumptions to support its conclusion that the security zone, particularly given the proposed increase from 80 LNG tanker

trips (160 transits) per year to 120 LNG tanker trips (240 transits) per year, will not cause substantial interference with the public trust rights of other vessels. Petitioners argue that both of those key presumptions are not supported by the record.

The first presumption is that the "majority" of the 240 LNG tanker transits per year will occur at night, when the county found it is less likely for there to be other commercial and recreational vessels using the waterway. Remand Record 75.[12] Petitioners note that, for the first six months, the USCG will require that all

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[12] In addition, the findings state, in relevant part:

> "As discussed in more detail below, [Jordan Cove's] current plan, which is to conduct a majority of its bay transit activity during periods of reduced visibility, is a critical and favorable change. It is that change that convinces the Board that the increasing of additional trips from 80 to 120 will not result in vastly different impacts, because the transition to night operations means that conflicts are reduced. The record makes clear that the majority of the current usage of the bay occurs during daylight hours, with commercial fishing vessels being the only significant night user of the bay for navigation.
>
> "* * * * *
>
> "* * * If the LNG ships are able to enter the estuary during the nightly high tide, it will greatly reduce conflicts with recreational crabbers, fisherman, and boaters. In addition, LNG vessels entering Coos Bay will be empty, and can therefore avoid high tide.
>
> "Before the Hearings Officer reopened the record on August 23, 2019, the then-existing record seemed to suggest that one possible way to reduce conflicts between LNG vessels and recreational

LNG tanker transits occur during daylight hours unless nighttime transits are approved in advance. Further, petitioners note that Jordan Cove rejected the county's request that it accept a condition which would require all nighttime transits after the initial six-month period. Instead, petitioners argue, Jordan Cove stated only that it would attempt to "prioritize[]" nighttime transits over daytime transits. Remand Record 67. Petitioners argue that the record does not support the county's finding that the "majority" of transits will occur at night.

Jordan Cove responds by citing testimony that the pilots who guide commercial shipping in and out of the estuary actually prefer nighttime transits because there is less wind and less traffic. Remand Record 616. However, the same testimony notes that "[t]he actual time and approval for transit are controlled 100% by the [USCG]," which does not suggest that the preference of pilots for nighttime transits is a determinative factor. *Id.* That testimony also indicates that the USCG initially wanted all daytime transits but was persuaded

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> crabbing was to formally limit, via a condition of approval, the majority of the LNG transits to periods of limited visibility. The Board suggested such as condition in his August 23, 2019 letter. [Jordan Cove] opposed the condition on the grounds that would severely limit operations, would not allow for exceptions due to weather or tidal conditions, and would further complicate coordination efforts by the [USCG]. This testimony convinced the Board that such a condition was unworkable. Nonetheless, the Board believes that [Jordan Cove's] commitment to prioritizing a majority of the egress trips to hours of limited visibility will go a long way towards deconflicting potential uses in the bay." Remand Record 61, 67 (citations omitted).

that it is reasonable to also allow nighttime transits after the initial six-month period. The testimony regarding pilot preferences provides no support for the finding that the "majority" of the LNG tanker transits will occur at night. Further, nothing in the record cited to us indicates how Jordan Cove would prioritize nighttime transits or how any prioritization would necessarily result in the "majority" of transits occurring at night. Because the finding that a "majority" of transits will occur at night provides key support for the county's conclusions regarding the public trust doctrine, we agree with petitioners that remand is necessary for the county to adopt more adequate findings, supported by substantial evidence, explaining the basis for that finding.

The second presumption that petitioners challenge is that only loaded, outbound LNG tankers will be limited to transiting the mouth of the estuary at high tide. As noted, high tide transits of the mouth of the estuary present a particularly problematic potential for congestion and conflict between fishing boats and LNG tankers. Petitioners argue that there is no evidence supporting that presumption and argue that, on the contrary, the most authoritative USCG testimony in the record, the 2008 Suitability Report, includes a navigational risk mitigation measure providing that "vessels are limited to transiting during periods of high tide." Remand Record 796.[13]

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[13] Petitioners also cite the following statement by the Oregon Department of State Lands:

Jordan Cove responds that the 2008 Suitability Report is outdated because it is based on loaded draft and channel depth figures that have changed as the project has evolved. Jordan Cove cites testimony indicating that it now intends to schedule at least some empty tanker transits for times other than the highest high tide. Jordan Cove argues that a reasonable person could rely on the more recent statements from Jordan Cove rather than the outdated 2008 Suitability Report.

As we understand matters, the 2008 Suitability Report is more than one evidentiary item to be weighed against other evidentiary items, but rather a document that sets forth measures and limitations to which Jordan Cove must adhere. The 2008 Suitability Report describes a navigational risk mitigation measure that includes at least the presumption that *all* LNG tanker transits will occur during one of the two high tides per day, not just *loaded* tanker transits. Jordan Cove neither cites evidence that the USCG has modified the 2008 Suitability Report nor explains why it is reasonable for the county to presume,

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> "[A]n LNG ship can only safely navigate the current channel at a high tide advantage, above 6ft tides to get through the channel to the slip before the tide recedes which would strand the vessel if it is not safely docked in the slip. Any LNG ship, 148,000 cubic meter class ship, would not be able to transit Coos Bay except periods of high tide, there would be no way for a ship to exit the slip at any lower tidal elevation as the ship[']s draft would exceed [the] navigational depth of the channel which could pose huge safety concern in the event of a tsunami." Remand Record 8880.

contrary to the report, that only loaded tankers will transit during high tide. We conclude that remand is necessary for the county to adopt more adequate findings, supported by substantial evidence, clarifying the extent to which all tanker transits, loaded and unloaded, are limited by the tides.

This subassignment of error is sustained.

Petitioners' first assignment of error is sustained.

CITIZENS' FIRST ASSIGNMENT OF ERROR

CBEMP Policy 5(I)(b) provides that, in order to approve dredge or fill in the applicable estuarine zones, the county must find that "[a] need (i.e., a substantial public benefit) is demonstrated." This is referred to as the "need/substantial public benefit" standard. In *Oregon Shores I*, we explained that this standard is focused solely on the anticipated benefits of the proposal, rejected arguments that the standard impliedly requires a balancing of benefits against adverse impacts, and remanded for the county to adopt more adequate findings addressing the standard. 76 Or LUBA at 355.

On remand, the county adopted extensive findings addressing CBEMP Policy 5(I)(b) and interpreting the terms "need," "public," "substantial," and "benefit" to mean, in context:

> "[P]rovi[di]ng considerable and important advantages or gains to the people, as a whole, within a nation, state or community, as opposed to a particular class of persons within that nation, state or community." Remand Record 36.

Applying that interpretation, the county identified a number of benefits from the proposed terminal, beginning with local economic gains and extending to national, geopolitical, and international benefits. Citizens raise a number of challenges to those findings.

A. The Terminal is a Water-Dependent Use

Citizens first argue that the proposed terminal is not a water-dependent use allowed on coastal shorelands under OAR 660-037-0040(6), which implements Statewide Planning Goal 17 (Coastal Shorelands), or CCZLDO 2.1.200, which implements OAR 660-037-0040(6). However, this issue was conclusively resolved in *Oregon Shores I*, where we rejected a similar argument and held that the proposed terminal is properly viewed as a water-dependent use under these definitions, which expressly include a "terminal." 76 Or LUBA at 383. Citizens are precluded from arguing for a contrary interpretation in this appeal. *Beck*, 313 Or 148.

B. Benefits of the Terminal

Citizens contend that the county's findings regarding the anticipated benefits of the terminal are not supported by substantial evidence. Citizens do not dispute that the county properly considered local economic gains, *i.e.*, jobs and increased tax revenue, but argue that, as a matter of law, local economic gains are an insufficient basis by themselves for finding "public need," citing federal eminent domain cases. Further, Citizens argue that the findings regarding national, geopolitical, and international benefits are not supported by substantial

evidence and, therefore, cannot contribute to the ultimate determination that the proposed terminal satisfies the "need/substantial public benefit" test.

Jordan Cove responds, and we agree, that the federal eminent domain cases cited by Citizens have no apparent bearing on the differently worded "need/substantial public benefit" test. Nothing cited to us in the text of CBEMP Policy 5(I)(b) or Goal 16 suggests that the "need/substantial public benefit" standard is borrowed from an eminent domain context or subject to such limitations. We disagree with Citizens that local economic benefits, no matter how substantial, are insufficient as a matter of law to establish compliance with CBEMP Policy 5(I)(b).

In any case, we note that the county's findings identify more than local economic benefits. The findings also cite improvements to local public infrastructure, including creation of the VTIS, channel widening and deepening, and improvements to local highway intersections. Remand Record 43. Even if something more than local economic benefits are required to establish compliance with CBEMP Policy 5(I)(b), the county's findings are not based solely on local economic benefits.

With respect to the findings regarding the terminal's purported national, geopolitical, and international benefits, Citizens argue that those findings are not based on substantial evidence and, even if they were, they ignore evidence in the record of countervailing adverse impacts. For example, Citizens argue that the purported climate benefits of making natural gas available to Asian markets to

replace coal-burning plants are undercut by the climate impacts of producing, transporting, and burning natural gas. However, as we held in *Oregon Shores I*, CBEMP Policy 5(I)(b) does not require an evaluation of adverse impacts or a weighing of benefits against them. While we tend to agree with Citizens that the evidence regarding the terminal's purported national and international benefits is not robust, we cannot say that that evidence is insubstantial. In addition, the findings regarding purported national and international benefits are not particularly developed and appear to be little more than makeweights in the county's CBEMP Policy 5(I)(b) analysis. *See, e.g.*, Remand Record 50 ("[G]eopolitical and national security ramifications of LNG export are further evidence of an adequate 'public need (*i.e.* substantial public benefit)' within the meaning of Goal 16 and CBEMP Policy 5."). Citizens have not demonstrated that reversal or remand is warranted based on the county's findings regarding purported national and international benefits.

Finally, we understand Citizens to challenge findings regarding the possibility that the identified benefits from jobs and tax revenue will disappear if, for some reason, the terminal is never built or is abandoned due to changing energy or economic circumstances. The county generally rejected arguments regarding the long-term economic viability of the project as beyond the scope of CBEMP Policy 5(I)(b). Remand Record 45. In addition, the county found that, "even if LNG exports end up not being the economic boon that was hoped, the County will benefit from all of the infrastructure that would still be in place, such

as the marine slip and the pipeline." Remand Record 52. On appeal, Citizens argue that "stranded assets" can be a detriment, not a benefit, and fault the county for failing to adopt findings addressing the long-term economic viability of the proposal and determining the use to which the terminal infrastructure can be put if LNG exports become economically unsustainable.

Jordan Cove responds, and we agree, that CBEMP Policy 5(I)(b) does not require the county to adopt findings regarding the long-term economic viability of the project or to identify alternative uses of the terminal and associated infrastructure in the event that the terminal is no longer used for LNG exports.

Citizens' first assignment of error is denied.

PETITIONERS' SECOND ASSIGNMENT OF ERROR

In *Oregon Shores I*, we remanded the 2016 decision for the county to apply the approval standards in CBEMP Policy 4. CBEMP Policy 4(I) provides, in relevant part, that dredging and fill in development management units must be supported by findings demonstrating "the public's need and gain which would warrant any modification or loss to the estuarine ecosystem, based upon a clear presentation of the impacts of the proposed alternation, as implemented in Policy #4a." CBEMP Policy 4(II) sets out four standards for an impacts assessment. Importantly, CBEMP Policy 4 also provides the standards for evaluating compliance with CBEMP Policy 5(I)(d), which implements Goal 16, Implementation Requirements 2(d), and allows dredging in development management units only if "[a]dverse impacts are minimized."

On remand, the county adopted findings of compliance with CBEMP Policy 4 and, relatedly, the "[a]dverse impacts are minimized" standard in CBEMP Policy 5(I)(d). Petitioners challenge those findings, arguing that the county misinterpreted the relevant language and adopted inadequate findings not supported by substantial evidence.

A. Minimize Adverse Impacts

The remand decision explains:

> "In areas subject to CBEMP Policy #5, an Applicant must minimize the adverse impacts of dredging activities. Note that this criterion uses the terms 'minimize' and 'mitigate,' which make it clear an Applicant does not have to *eliminate* all impacts. This standard means something less strict than the word 'protect,' which means inhibiting development that causes significant adverse impacts on the protected resource." Remand Record 93 (emphasis in original; citations omitted).

The findings then articulate the county's understanding of "minimize":

> "The Board construes the term 'minimize' to mean, generally speaking, that an applicant will not remove or significantly adversely affect more of the identified estuary than necessary to develop the site as approved, and that best management practices are used to prevent the dredging from affecting adjacent resources outside the actual dredging area, to the extent possible. To the extent an Applicant must significantly adversely affect the estuary in any way, the Applicant must mitigate those impacts." *Id.*

Petitioners argue that this interpretation is inconsistent with the Goal 16 language that the policy implements because it erroneously limits the minimization requirement to resources that are located outside the dredging area and, thus, fails to minimize any adverse impacts *within* the dredging area.

Jordan Cove responds, and we agree, that petitioners have not demonstrated that the county construed CBEMP Policy 5 to the effect that no minimization of impacts is required within dredged areas. It is clear from both the findings quoted above and associated findings that the county applied its understanding of "minimize" to both the dredged area and adjacent areas, although the county applied an additional measure of protection to the latter. With respect to the estuary as a whole, including the dredged area, we understand the county to have required Jordan Cove to (1) affect no more of the estuary than needed to conduct the approved dredging and (2) mitigate significant adverse impacts. Petitioners offer no focused challenge to that understanding of "minimize."

With respect to adjacent areas, the county also required Jordan Cove to apply best management practices in order to prevent the dredging from affecting those areas to the extent possible. While the county applied the "minimize" standard somewhat differently in the dredged area and adjacent areas, it does not appear, as petitioners argue, that the county failed to require minimization at all within the dredged area or limited its application of the minimization standard only to adjacent areas.

This subassignment of error is denied.

B. Identification of Potential Adverse Impacts

CBEMP Policy 4(II)(c) requires that the evaluation of adverse impacts include information on

> "the expected extent of impacts of the proposed alteration on water quality and other physical characteristics of the estuary, living resources, recreation and aesthetic use, navigation, and other existing and potential uses of the estuary."

Petitioners argue that the county's alternative findings addressing CBEMP Policy 4 fail to identify or evaluate impacts on three of the listed considerations: living resources, recreation and aesthetic use, and other existing and potential uses of the estuary.

The county adopted two pages of findings regarding living resources. Remand Record 99-101. Petitioners do not acknowledge those findings or attempt to substantiate their claim that the county failed to identify and evaluate impacts on living resources.

With respect to recreation and aesthetic use, the county found:

> "[D]redging will have no impact on recreational use of the bay. Nor will it have any aesthetic impacts. In this regard, the dredging will not even be visible to persons boating in the waterway or walking along the bank. In any event[,] such impacts would be directly dependent on effects such as sediment transport, sediment deposition, flow velocities, erosion, and turbidity. [Jordan Cove] addresses all of these potential impacts in the [David Evans and Associates, Inc. (DEA)] memo and concludes that none of these impacts are significant, widespread, or permanent. There is no credible evidence that suggests otherwise." Remand Record 101.

Petitioners fault this finding for failing to acknowledge testimony regarding the impacts of dredging on recreational fishing and clamming. However, as Jordan Cove points out, the county adopted a number of findings, based on the cited

DEA memo, that address the impacts of dredging on fishing and clamming, both commercial and recreational. Remand Record 98, 101-03, 105.

Finally, with respect to "other existing and potential uses of the estuary," the county adopted a brief finding that dredging will not impact any of the other existing or potential uses of the estuary. Remand Record 101.[14] Petitioners also fault this finding for failing to address impacts to recreational fishing and clamming but, as noted, such impacts are addressed by other findings. Petitioners' arguments under this subassignment of error do not provide a basis for reversal or remand.

This subassignment of error is denied.

C. Public Need and Gain

CBEMP Policy 4 states:

> "Where the impacts assessment requirement (of Goal #16 Implementation Requirement[] #1) has not been satisfied in this Plan for certain uses or activities (i.e., those identified above), then such uses or activities shall not be permitted until findings demonstrate the public's need and gain which would warrant any modification or loss to the estuarine ecosystem, based upon a clear

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[14] The finding states:

> "Regarding other existing and potential uses of the estuary: the dredging project will not have any impact beyond the immediate boundaries of the dredging activity. All other uses of the estuary will still be able to proceed as previously allowed. No party has provided facts which fairly suggests that any other *use* of the estuary will be precluded." Remand Record 101 (emphasis in original).

> presentation of the impacts of the proposed alteration, as implemented in Policy #4a."

In *Oregon Shores I*, we noted that CBEMP Policy 4's "public[] need and gain" standard, unlike CBEMP Policy 5(I)'s somewhat similar "need/substantial public benefit" language, requires an evaluation of both benefits and adverse impacts in order to determine whether the proposed dredging is "warrant[ed]." 76 Or LUBA at 359-61. We remanded for the county to evaluate adverse impacts and conduct the balancing inquiry required by CBEMP Policy 4.

On remand, the county adopted findings addressing compliance with CBEMP Policy 4. On appeal, petitioners argue that those findings fail either to adequately evaluate some adverse impacts or to evaluate both benefits and impacts to determine if the proposal is warranted.

Jordan Cove responds that the county's findings, taken as a whole, (1) adequately evaluate the benefits, or public gains, of the project, (2) adequately evaluate the potential adverse impacts of the proposed dredging and, (3) based on that evaluation, determine that the benefits, or public gains, warrant the potential adverse impacts. The county's evaluation of adverse impacts refers back to the previous evaluation of public gains:

> "The Board has already addressed 'the public's need and gain' from the project, *supra, wherein* the Board finds that such public need and gain does warrant some modification and loss to the estuarine ecosystem. The Board has provided a 'clear presentation of the impacts of the proposed alteration, as implemented in Policy #4a,' as set forth above." Remand Record 104.

The foregoing quote reads as if the findings addressing the "public's need and gain" include a section expressly evaluating the benefits against the adverse impacts and concluding that the former outweigh the latter. However, as petitioners point out, the findings addressing the "public's need and gain" include no express evaluation of benefits compared to adverse impacts. Remand Record 42-52. At that point in the decision, the findings had not yet identified and evaluated any adverse impacts at all. The county's evaluation of adverse impacts did not occur until later in the decision. Remand Record 95-112. Typically, a decision-maker would not reach an ultimate conclusion that a project's benefits outweigh its adverse impacts until first evaluating both. However, the exact sequence of that multi-step evaluation is not critical. More problematic is the fact that the finding quoted above is conclusory, relying entirely on earlier findings that purportedly weigh benefits against adverse impacts. However, as noted, the findings addressing the "public's need and gain" include neither a discussion of adverse impacts nor any weighing of benefits against them. As far as Jordan Cove has established, those referenced findings do not exist.

We understand Jordan Cove to argue that findings need not take any particular form or shape and that it is obvious from reading the findings, as a whole, (1) that the commissioners ultimately concluded that the identified benefits of dredging far outweigh the identified adverse impacts and (2) why they reached that conclusion. It is clear that the county reached the bare conclusion that the public gain warrants dredging, considering the adverse impacts. But it is

less clear, absent some explanatory findings, exactly why and how the county reached that conclusion. The county's failure to explain *why* it concluded that the "public's need and gain" warrants the proposed dredging, considering the adverse impacts, requires remand for the county to adopt more adequate findings.

This subassignment of error is sustained.

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

PETITIONERS' THIRD ASSIGNMENT OF ERROR

Jordan Cove's application proposes to place fill in "Wetland J," which is located in the 7-Development Shorelands (7-D) zone. Under CCZLDO 3.2.286, fill is permitted in the 7-D zone, subject to special and general conditions. One of the special conditions under CCZLDO 3.2.286 provides that wetlands in the 7-D zone can be filled only "upon satisfaction of the prescribed mitigation described in Shoreland District #5." In *Oregon Shores I*, we remanded the 2016 decision for the county to adopt more adequate findings addressing what mitigation is required pursuant to CCZLDO 3.2.286.

Under CCZLDO 3.2.261, mitigation and restoration activities are permitted in the 5-Water-Dependent Development Shorelands (5-WD) zone "as per the Henderson Marsh Mitigation Plan [(HMMP)]." On remand, the county concluded that the HMMP supplies the "prescribed mitigation described in Shoreland District #5" for purposes of CCZLDO 3.2.286. Petitioners do not dispute that conclusion. However, the county agreed with Jordan Cove that Wetland J is located outside the area evaluated under the HMMP and that the

HMMP therefore does not specify any mitigation for filling Wetland J. Accordingly, the county concluded that the CCZLDO does not require any particular mitigation for filling Wetland J, though the county noted that mitigation may be required under the CBEMP and state and federal law.

Petitioners challenge the conclusion that the HMMP does not supply mitigation requirements for filling Wetland J. According to petitioners, it is not clear that Wetland J is located outside the area subject to the HMMP because its boundaries are depicted on a map, referred to in the HMMP as "Figure 1," that is not included in the record. Even if the county is correct on that point, petitioners argue that HMMP Condition 16 nonetheless requires that "[e]stuarine intertidal losses not already provided for in this plan will be handled on a project basis through the appropriate permit processes." Petitioners contend that HMMP Condition 16 is a catch-all provision that applies to Wetland J. Finally, petitioners argue that, unless the HMMP is interpreted to supply mitigation requirements for Wetland J, the county will effectively render CCZLDO 3.2.286 meaningless.

Jordan Cove responds that the record includes a map depicting the wetland sites evaluated under the HMMP. Remand Record 2823. That map shows a number of sites west of Wetland J. However, it appears to be the cover page for the HMMP. It is not clear to us that that map is the same as the missing Figure 1 or, if so, a complete copy. However, we need not resolve that issue, because petitioners do not dispute that the text of the HMMP includes no specific mitigation requirements for Wetland J. Even if petitioners are correct that HMMP

Condition 16 applies to Wetland J, that provision simply states that the required mitigation will be determined on a project basis through the appropriate permitting processes. The county reached essentially the same conclusion, noting that filling and mitigation for Wetland J will be determined pursuant to the ordinary process, subject to standards in the CBEMP and state and federal law. Because it is undisputed that the HMMP provides the only site-specific mitigation requirements for filling wetlands in the area, and because the text of the HMMP includes no specific mitigation requirements for Wetland J, even if the county erred in concluding that Wetland J is outside the area subject to the HMMP, that error appears to be harmless. Petitioners have not demonstrated that the county's findings on remand regarding Wetland J warrant further review or remedial action.

Petitioners' third assignment of error is denied.

PETITIONERS' FOURTH ASSIGNMENT OF ERROR

Petitioners contend that the county erred in failing to adopt findings evaluating written and oral expert testimony submitted by Dr. Christine Moffitt, a professor of fish and wildlife sciences, regarding scientific evidence relevant to compliance with the public trust doctrine, CBEMP Policy 4, and CBEMP Policy 30. Remand Record 8274-93, 8627-29.

The local land use decision-maker is generally entitled to choose between conflicting expert testimony, and that choice will be upheld as long as it is supported by substantial evidence—that is, evidence upon which a reasonable

person could rely. *Tonquin Holdings LLC v. Clackamas County*, 64 Or LUBA 68, 80 (2011) (citing *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993)). Where the findings and record permit LUBA to determine that a reasonable person could rely on the evidence upon which the decision-maker chose to rely, the absence of findings specifically addressing conflicting evidence is not a basis for remand. *Tallman v. Clatsop County*, 47 Or LUBA 240, 246 (2004). However, where LUBA cannot tell from the findings and record that the decision-maker was even aware of conflicting expert testimony, remand may be necessary for the decision-maker to adopt findings addressing that testimony. *See Gould v. Deschutes County*, 59 Or LUBA 435, 457-58 (2009) (remanding where a hearings officer did not recognize a conflict between experts regarding the effect of water withdrawals on in-stream water temperatures and fish habitat).

Here, petitioners argue that Moffitt testified at length, orally and in writing, regarding a number of issues relevant to the remand but that the county's findings mention her testimony only once, regarding the "need/substantial public benefit" criterion. Remand Record 37. Petitioners argue that the findings do not include any indication that the county was even aware of her detailed expert testimony on other issues, such as the public trust doctrine, CBEMP Policy 4, and CBEMP Policy 30.

Jordan Cove initially responds that Moffitt's oral testimony does not mention the public trust doctrine, CBEMP Policy 4, or CBEMP Policy 30 or provide scientific testimony directed at those provisions. Remand Record 9121-

22. While that is true, Jordan Cove does not acknowledge her written testimony, which arguably does. Remand Record 8274-93, 8627-29.

Jordan Cove next argues that petitioners have failed to lay the groundwork necessary to warrant remand for the county to adopt findings addressing Moffitt's testimony. We generally agree with Jordan Cove. In our view, petitioners must do more than identify conflicting expert testimony in the record and point out that the findings do not address one side of that conflict. *Gould*, cited by petitioners, suggests that more is required. In *Gould*, the petitioners (1) identified the specific issue that was the focus of conflicting expert testimony, (2) identified the expert testimony upon which the decision-maker relied and the conflicting expert testimony that the decision-maker allegedly failed to recognize, and (3) demonstrated that we could not adequately resolve challenges to the decision-maker's findings of compliance with certain approval criteria in the absence of findings addressing the conflicting expert testimony.

Here, petitioners' arguments fall short with respect to all three showings. Petitioners have not identified with specificity any scientific dispute between opposing experts or shown how particular scientific disputes relate to approval criteria. Because the findings refer to at least one of Moffitt's written submissions, there is no reason to suspect that the county was unaware of her testimony. Most importantly, petitioners have not attempted to show that we cannot adequately resolve any evidentiary or other challenges in this appeal

absent findings addressing the conflicting expert testimony. Petitioners' arguments do not provide a basis for reversal or remand.

Petitioners' fourth assignment of error is denied.

PETITIONERS' FIFTH ASSIGNMENT OF ERROR

In the CUP decision, the county approved several new components of the terminal—construction laydown (*i.e.*, storage) areas, a temporary barge berth, and temporary dredge transfer lines—as "special temporary uses" under CCZLDO 3.1.450(4). The county explained:

> "CCZLDO §3.1.450.4 provides that '[t]he special temporary uses and their accessory structures and uses may be temporarily permitted by the Planning Director as set forth in the Zoning Districts.' No CBEMP zone explicitly references 'special temporary use.' However, CCZLDO §3.1.450 is entitled '[s]upplemental provisions that apply to all zoning listed in Article 3.' Therefore, the reasonable interpretation of CCZLDO §3.1.450.4 is that 'special temporary uses' are allowed in all CBEMP zones unless explicitly prohibited. Neither the 3-WD, 3-NWD, nor the 6-WD zone explicitly prohibit 'special temporary uses.' Therefore, such uses are allowed in all three zones." CUP Record 37.

Petitioners argue that the county misconstrued CCZLDO 3.1.450(4) in concluding that "special temporary uses" are allowed in all county zones, including the zones at issue in this appeal. According to petitioners, CCZLDO 3.1.450(4) expressly addresses only "[t]he special temporary uses" that are "set forth in the Zoning Districts." Petitioners contend that the use of the definitive article "[t]he" and the reference to uses "set forth in the Zoning Districts" plainly indicate that CCZLDO 3.1.450(4) is referring only to temporary uses listed as

permissible uses in each zoning district. Petitioners note that some county zones list specific "temporary uses" as permitted uses but that none of the zones at issue in this appeal expressly provides for any of the "temporary uses" that the county approved. In addition, petitioners argue that the county's interpretation that a broad category of unlisted and unidentified "special temporary uses" are allowed in all county zones is inconsistent with CCZLDO 3.1.400, which provides that, "[u]nless an exception is specifically listed in the Ordinance, any use not listed or specifically identified as not permitted [is] prohibited." For all these reasons, petitioners argue, the county's interpretation is inconsistent with the text and context of CCZLDO 3.1.450(4).

Under ORS 197.829(1), LUBA must affirm a governing body's interpretation of its land use regulations unless the interpretation is inconsistent with the express language, purpose, or policy underlying the regulation—that is, LUBA must affirm a governing body's interpretation if it is plausible. *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). Jordan Cove responds, and we agree, that the commissioners' interpretation of CCZLDO 3.1.450(4) is not reversible under that deferential standard of review. As the findings note, CCZLDO 3.1.450(4) by its plain terms authorizes temporary uses in all county zoning districts, not just those that list temporary uses as permitted uses. The phrase "uses * * * as set forth in the Zoning Districts" cannot refer to the temporary uses listed in some zoning districts, as petitioners argue, because that would render CCZLDO 3.1.450(4) redundant and without independent effect. To

give effect to CCZLDO 3.1.450(4), that code provision must refer to temporary uses not already authorized in the county's zoning districts. Nor do we see that the commissioners' interpretation is inconsistent with the context provided by CCZLDO 3.1.400. Under the commissioners' interpretation, temporary uses are expressly permitted in all county zones, which is entirely consistent with CCZLDO 3.1.400.

Petitioners' fifth assignment of error is denied.

PETITIONERS' SIXTH ASSIGNMENT OF ERROR

One of the new uses proposed and approved in the CUP decision is a wastewater treatment facility, located on a portion of the project site in the industrial (IND) zone. The facility will accept and treat wastewater from a variety of sources related to the terminal, including oil-water separators, heat recovery steam generators, and sanitary waste from workforce housing and administrative offices. The facility will discharge 2,842 gallons per minute of treated wastewater, via a pipeline, to an ocean outfall. The county approved the facility as an accessory use to the approved industrial and workforce housing uses.[15]

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

> "CCZLDO §4.3.200 permits in the IND zone subject to a Compliance Determination 'Accessory Uses' to residential and industrial uses. * * *
>
> "[Jordan Cove] proposes to construct wastewater treatment facilities in the IND zone to serve the LNG Terminal and related facilities. The wastewater treatment facilities qualify as either an integral

CCZLDO 4.3.210(76)(f) prohibits the establishment of a "sewer system" outside an urban growth boundary (UGB) unless an exception is taken to Statewide Planning Goal 11 (Public Facilities and Services).[16] Petitioners

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> component of the primary use or as accessory uses to residential (temporary workforce housing) and industrial uses (*i.e.*, [emergency training center], LNG Terminal), which accessory uses are allowed in the IND zone subject to a CD process. CCZLDO §4.3.210.1 explains that accessory uses are 'subordinate to any authorized primary use.' CCZLDO §2.1.200 defines 'accessory use' as 'A use, building or structure that is (1) customarily incidental and subordinate to the principal use, main building or structure, and (2) subordinate in extent, area and purpose to the principal use.' The wastewater treatment facilities will serve the LNG Terminal and related facilities, including temporary workforce housing and the [emergency training center], and their location is contingent upon the same in order to serve those uses. Thus, the wastewater treatment facilities are subordinate and incidental to the LNG Terminal and related facilities that they will serve." CUP Record 34-35.

[16] CCZLDO 4.3.210(76)(f) defines "UTILITY FACILITY - SEWER PLANT/PUMP STATION (Waste Water Treatment)" as "[a] facility engaged in a process to which sewage is subjected in order to remove or alter its objectionable constituents so as to render it less dangerous or offensive," including but not limited to "reservoirs, mains, laterals, trunk lines, pumping equipment, and treatment facilities." CCZLDO 4.3.210(76)(f) further provides, in relevant part:

> "Local Governments shall not allow the establishment or extension of sewer systems outside [UGBs] or unincorporated community boundaries, or allow extensions of sewer lines from within [UGBs] or urban Unincorporated Community Boundaries to serve land outside those boundaries, unless an exception to * * * Goal 11 has been approved. New or extended system may be permitted without an exception only if it is the only practicable alternative to mitigate

contend that the approved wastewater treatment facility constitutes a "sewer system" and, because the subject property is located outside a UGB, the county erred in failing to adopt an exception to Goal 11 to approve the wastewater treatment facility.

Initially, Jordan Cove argues that petitioners raised no issues below under CCZLDO 4.3.210(76)(f) and that, pursuant to ORS 197.763(1), they have therefore waived the issue of whether the proposed facility is subject to that code provision.[17] Petitioners reply that they argued below that the proposed wastewater treatment facility cannot be approved as an accessory to the approved industrial and residential uses, in part, because the facility is prohibited under CCZLDO 4.3.210(76)(f) absent a Goal 11 exception. CUP Record 10941-42. We agree with petitioners that the issues raised in this assignment of error were raised below and are properly before us. *Id.*

> a public health hazard and will not adversely affect farm or forest land."

[17] ORS 197.835(3) limits LUBA's scope of review to issues raised during the local proceedings, pursuant in relevant part to ORS 197.763(1), which provides:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

On the merits, Jordan Cove disputes that the proposed wastewater facility constitutes a "sewer system" as that term is used in CCZLDO 4.3.210(76)(f). The county code does not include a definition of "sewer system," but Jordan Cove argues, and we agree, that the CCZLDO 4.3.210(76)(f) prohibition on "sewer systems" outside UGBs directly implements Goal 11. OAR 660-011-0060(1)(f), which also implements Goal 11, defines "sewer system" in relevant part as a sanitary system "that serves more than one lot or parcel."[18] Jordan Cove argues that there is no evidence in the record that the proposed facility serves more than one lot or parcel and, therefore, the facility cannot constitute a "sewer system" as that term is used in OAR 660-011-0060(1)(f) and CCZLDO 4.3.210(76)(f). If the facility is located on the same parcel as the industrial and residential uses it serves, we understand Jordan Cove to argue, the county correctly concluded that the facility is properly viewed as either integral or accessory to those industrial and residential uses.[19]

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[18] OAR 660-011-0060(1)(f) provides, in part:

> "'Sewer system' means a system that serves more than one lot or parcel, or more than one condominium unit or more than one unit within a planned unit development, and includes pipelines or conduits, pump stations, force mains, and all other structures, devices, appurtenances and facilities used for treating or disposing of sewage or for collecting or conducting sewage to an ultimate point for treatment and disposal."

[19] We note that CCZLDO 2.1.200 defines the term "INDUSTRIAL DEVELOPMENT" as "[a]ny development for the purpose of accommodating an

Petitioners reply by citing evidence which suggests that the uses served by the proposed facility are located on at least two noncontiguous parcels, known as the Ingram Yard and South Dunes sites, which are connected by an access corridor. CUP Record 1777-78. Because the proposed sewer facility appears to serve industrial and residential development located on more than one parcel, petitioners argue, it is prohibited by CCZLDO 4.3.210(76)(f) unless the county adopts an exception to Goal 11.

We agree with petitioners that remand is necessary for the county to address, in the first instance, the issues raised below regarding whether the proposed sewer facility is prohibited by CCZLDO 4.3.210(76)(f) absent an exception to Goal 11. On remand, the county must either demonstrate that the facility is not a "sewer system" within the meaning of CCZLDO 4.3.210(76)(f) and OAR 660-011-0060(1)(f), adopt an exception to Goal 11, or take other remedial actions consistent with CCZLDO 4.3.210(76)(f).

Petitioners' sixth assignment of error is sustained.

Industrial Use, which also includes accessory uses subordinate to the industrial development, and on-site sewer facilities to serve such an industrial development." Thus, the county and Jordan Cove may be correct that, under the CCZLDO, sewer facilities serving industrial development are properly viewed as integral or accessory to that development as long as the sewer facility is "on-site." It is not clear what "on-site" means but, to be consistent with CCZLDO 4.3.210(76)(f) and OAR 660-011-0060(1)(f), "on-site" would presumably have to mean something like "located on the same lot or parcel" as the industrial use the facility serves.

PETITIONERS' SEVENTH ASSIGNMENT OF ERROR

As noted, the proposed wastewater treatment facility includes a pipeline which will carry 2,842 gallons per minute of treated wastewater to an ocean outfall. The pipeline crosses a rural area zoned 7-D. Under CCZLDO 3.2.286, both "[l]ow-intensity" and "[h]igh-intensity" utilities are permitted in the 7-D zone, subject to general conditions. One of the general conditions under CCZLDO 3.2.286 provides that, "[i]n rural areas (outside UGBs) utilities, public facilities, and services shall only be provided subject to Policies #49, #50, and #51." In turn, CBEMP Policy 50 provides that appropriate rural public services include "low-intensity facilities and services traditionally enjoyed by rural property owners."[20] The county found that the pipeline is a "low-intensity facility for supplying wastewater services at a level no greater than that traditionally enjoyed by rural property owners, and is therefore appropriate" for the rural location, as required under CBEMP Policy 50. CUP Record 165.

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[20] CBEMP Policy 50 states, in relevant part:

> "Coos County shall consider the following facilities and services appropriate for all rural parcels: fire districts, school districts, road districts, telephone lines, electrical and gas lines, and similar, low-intensity facilities and services traditionally enjoyed by rural property owners.
>
> "This strategy recognizes that * * * Goal #11 requires the County to limit rural facilities and services."

Petitioners argue that the county erred in characterizing the pipeline as a "low-intensity" facility for purposes of CBEMP Policy 50. Petitioners note that CCZLDO 2.1.200 defines two categories of utility facilities, high- and low-intensity, and includes "treated waste water outfalls (including industrial waste water)" in the "high-intensity" category. Further, petitioners note that the CUP decision relies on that definition to conclude that the proposed pipeline is a "high-intensity" utility facility for purposes of CCZLDO 3.2.286 and is therefore allowed in the 7-D zone.[21] However, petitioners argue, the CUP decision never reconciles its conclusions that, for purposes of CBEMP Policy 50, the pipeline is a "low-intensity" facility appropriate for a rural location yet, for purposes of CCZLDO 3.2.286, it is a "high-intensity" facility. In addition, petitioners dispute the conclusion that the proposed pipeline provides services "at a level no greater than that traditionally enjoyed by rural property owners" since it carries wastewater at a rate of nearly 3,000 gallons *per minute*, which petitioners argue

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[21] The county's findings addressing the 7-D zone requirements state, in relevant part:

> "The 7-D zone permits, subject to general conditions, 'high-intensity utilities.' * * *
>
> "CCZLDO §2.1.200 defines "high-intensity utility" as storm water and treated wastewater outfalls (including industrial wastewater). The * * * pipeline * * * transports industrial waste from the LNG facility to its ocean outfall. Therefore, the [pipeline] is permitted in the 7-D zone as a "high-intensity utility[.]" CUP Record 19.

is far greater than the discharge rates of traditional, "low-intensity" rural uses such as residences.

Jordan Cove responds that petitioners' interpretation—that CBEMP Policy 50 prohibits "high-intensity" utility facilities in the 7-D zone—creates a conflict with CCZLDO 3.2.286, which expressly allows "high-intensity" utility facilities in the 7-D zone. According to Jordan Cove, the 7-D zone applies only to rural land outside UGBs; therefore, if CBEMP Policy 50 applies as petitioners argue, then no "high-intensity" utility facilities could ever be located in the 7-D zone, contrary to CCZLDO 3.2.286. Jordan Cove argues that the county commissioners adopted an implicit interpretation which gives effect to both CBEMP Policy 50 and CCZLDO 3.2.286. Further, Jordan Cove disputes that there is any connection between discharge rates and whether a facility is low- or high-intensity. According to Jordan Cove, CBEMP Policy 50 does not characterize "low-intensity" facilities based on volume or capacity.

We disagree with Jordan Cove that the CUP decision includes an implicit interpretation that resolves the apparent tension in this case between CBEMP Policy 50, which limits facilities in rural areas to "low-intensity facilities and services traditionally enjoyed by rural property owners," and CCZLDO 3.2.286, which authorizes "high-intensity" utility facilities in the 7-D zone. As the Court of Appeals explained in *Green v. Douglas County*:

> "An implicit interpretation of an ordinance provision that is eligible for ORS 197.829(1) deference is one where '[t]he practical effect of the findings is to give definition to the term' and where the 'county's

> understanding of [the term] is inherent in the way that it applied the standard.' That is, a local government's implicit interpretation of an ordinance must carry with it only one possible meaning of the ordinance provision and an easily inferred explanation of that meaning." 245 Or App 430, 439, 263 P3d 355 (2011) (quoting *Alliance for Responsible Land Use v. Deschutes Cty.*, 149 Or App 259, 267, 942 P2d 836 (1997)).

Nothing cited to us in the findings indicates that the county recognized, much less attempted to resolve, the tension between CBEMP Policy 50 and CCZLDO 3.2.286. Similarly, the county adopted findings that the proposed pipeline constitutes both a "high-intensity" facility *and* a "low-intensity" facility, without recognizing the seeming contradiction. CUP Record 19, 165. Finally, the findings do not recognize the apparent conflict between the county's reliance on CCZLDO 2.1.200, which categorizes wastewater outfalls as "high-intensity" facilities, and its conclusion that the proposed pipeline is nonetheless a "low-intensity" facility.

Absent an interpretation of ambiguous local land use legislation that is adequate for review, LUBA may interpret the local legislation in the first instance. ORS 197.829(2). However, where the decision must be remanded in any event for further proceedings, the better course is to allow the governing body to supply the interpretation on remand. *Green*, 245 Or App at 441-42. We sustain petitioners' sixth assignment of error above, which requires remand of the CUP decision. Accordingly, the appropriate disposition is to also remand under this assignment of error to allow the commissioners to interpret the relevant local legislation in the first instance, as necessary to resolve any conflicts between applicable local legislation and between the county's findings.

On remand, if the county again concludes that the proposed pipeline is a "low-intensity" facility for purposes of CBEMP Policy 50, the county should adopt additional findings and interpretations, supported by substantial evidence, to address petitioners' legal and evidentiary challenge to the county's finding that the proposed pipeline, which carries nearly 3,000 gallons of treated wastewater per minute, provides services "at a level no greater than that traditionally enjoyed by rural property owners." Although Jordan Cove argues that a comparison of volume or capacity is not a relevant consideration for purposes of determining whether a facility is "low-intensity" under CBEMP Policy 50, the above-quoted finding suggests that the commissioners believe some comparison is required between the "level" of facilities and services proposed and that "traditionally enjoyed by rural property owners." Under the above-quoted finding, the former must not be "greater" than the latter in order to comply with CBEMP Policy 50. With respect to a proposed wastewater treatment facility and pipeline, the county might well choose to consider volume or capacity as one of the bases for comparison. However, that is a question for the county to consider and resolve, as necessary, on remand.

Petitioners' seventh assignment of error is sustained.

PETITIONERS' EIGHTH ASSIGNMENT OF ERROR

In the CUP decision, the county approved a temporary workforce housing complex at the South Dunes site, near an administrative building, emergency training center, and other structures. That site is zoned IND, which allows as a

conditional use a "Temporary Dwelling During Construction" for up to one year, subject to renewal if construction is not complete. CCZLDO 4.3.200.[22] The housing complex is intended to house up to 700 workers for the four-plus years that it will take to construct the terminal and will consist of a kitchen and dining facility, recreation complex, living quarters, laundry facilities, and other amenities.

Petitioners argue that the workforce housing complex constitutes an "urban" use of rural land and, therefore, can be approved only pursuant to an exception to Statewide Planning Goal 14 (Urbanization), which generally prohibits the urban use of rural land.

Petitioners concede that they did not argue below that the workforce housing complex is an urban use or that its approval requires a Goal 14 exception. However, petitioners argue that, because the county's notice of hearing failed to list Goal 14 as an applicable approval criterion, petitioners may raise new issues

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[22] CCZLDO Table 4.3.200 lists "Temporary Dwelling During Construction" as a conditional use in the IND zone, subject to standards at CCZLDO 4.3.210(27)(m)(i), which provides:

> "Temporary Residences or Structures –
>
> "(i) During Construction - * * * [T]emporary habitation shall be permitted during the construction of a permitted or conditional permitted use. Such authorization shall not * * * exceed one (1) year, subject to renewal by authorization of the Planning Director or designee upon showing that such construction has not been completed and applicable development permits are valid."

regarding Goal 14 on appeal, notwithstanding ORS 197.763(1). In support of this proposition, petitioners cite *Murray v. Marion County*, 23 Or LUBA 268, 283 (1992).

Jordan Cove responds that the county was not obligated by any statute or regulation to list any statewide planning goal, including Goal 14, as an applicable approval criterion for the CUP application. Jordan Cove argues that no statewide planning goal, including Goal 14, is a directly applicable approval criterion for a permit application under the county's acknowledged land use regulations. Jordan Cove argues that ORS 197.835(4) provides a qualified right for petitioners to raise new issues before LUBA in two limited circumstances, neither of which is met in the present case.[23]

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[23] ORS 197.835 provides, in relevant part:

> "(3) Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.
>
> "(4) A petitioner may raise new issues to [LUBA] 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, [LUBA] may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government; or
> >
> > "(b) The local government made a land use decision or limited land use decision which is different from the

We agree with Jordan Cove that *Murray* does not assist petitioners and that petitioners can raise new issues on appeal regarding compliance with Goal 14 only pursuant to ORS 197.835(4). Because petitioners have not cited ORS 197.835(4) or attempted to invoke any element of that statute as authority to raise new issues, the issue raised in this assignment of error is waived and, therefore, not within our scope of review.

Murray holds that, where a statewide planning goal is an applicable approval criterion for a post-acknowledgment plan amendment (PAPA), failure to list the goal in the notice of hearing allows the petitioner to raise new issues on appeal regarding compliance with that goal, notwithstanding failure to raise such issues during the proceedings below. However, the present case does not involve a PAPA, but rather a CUP under the county's acknowledged comprehensive plan and land use regulations. The statewide planning goals do not apply as approval criteria to a permit decision made under acknowledged plans and land use regulations. ORS 197.175(2)(d); *Byrd v. Stringer*, 295 Or 311, 666 P2d 1332 (1983); *Friends of Neabeck Hill v. City of Philomath*, 139 Or App 39, 911 P2d 350 (1996).[24] For that reason alone, *Murray* is distinguishable.

> proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final action."

[24] One important caveat to the general rule that the statewide planning goals do not apply as approval criteria to permit decisions made under acknowledged comprehensive plan and land use regulations is that an appellant may raise an

In addition, *Murray* was decided under statutes that granted LUBA an arguably broader scope of review than those in effect today. ORS 197.835(2) (1991) provided, in relevant part, that a petitioner could raise new issues to LUBA if the local government "failed to follow the requirements of ORS 197.763." That statute's present incarnation, ORS 197.835(4), limits the right to raise new issues, in relevant part, to circumstances where the local government "failed to list the applicable criteria for a decision under ORS 197.195(3)(c) or 197.763(3)(b)." *See* ___ Or LUBA at ___ n 23 (slip op at 79 n 23). ORS 197.763(3)(b) requires the local notice of appeal to list only "the applicable criteria from the ordinance and the plan that apply to the application at issue." Because ORS 197.763(3)(b) does not require the local government to list statewide planning goals at all, much less goals that are not applicable approval criteria, ORS 197.835(4)(a) does not allow a petitioner to raise new issues on appeal regarding compliance with statewide planning goals. The issues under Goal 14 raised in this assignment of error are waived and not within our scope of review.

Petitioners' eighth assignment of error is denied.

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issue regarding consistency with the statewide planning goals where a local government interprets its acknowledged plan and land use regulations in a manner that is contrary to the statewide planning goals and administrative rules that those plan provisions and regulations implement. ORS 197.829(1)(d); *White v. Lane County*, 68 Or LUBA 423 (2013). In this limited circumstance, statewide planning goals and administrative rules can be at issue in an appeal of a permit decision, albeit not as approval criteria.

PETITIONERS' NINTH ASSIGNMENT OF ERROR

In the CUP decision, the county approved a helipad as an accessory use to the emergency training center that was re-approved in the remand decision. Both the emergency training center and the helipad will be located in the IND zone. Petitioners do not appear to dispute on appeal that the helipad can be approved as an accessory use to the emergency training center but argue that the county erred in failing to adopt findings addressing (1) state and local laws governing airports and (2) applicable criteria in the IND zone.

A. Airports

Petitioners contend that the helipad constitutes an "airport" for purposes of state and local laws governing airports and that the county is therefore required to apply ORS 836.600 to 836.630; OAR chapter 660, division 13; and the county's Airport Operations (AO) zone.

Jordan Cove responds initially that petitioners never argued that the proposed helipad constitutes an "airport" or raised any issues under these sources of law during the proceedings below and, therefore, any such issues are waived on appeal. ORS 197.763(1). Petitioners reply that Citizens objected to the helipad during the proceedings below, commenting that it is "unclear as to whether this Helipad complies with the zoning requirements for being located in the airport overlay of the Southwest Oregon Regional Airport. There is no indication that the Oregon Aeronautics Division has approved the Helipad." CUP Record

10158.[25] Citizens then quoted portions of CCZLDO 4.3.210(7), which provides standards for the "Airport/Helipad (Personal and Public)" use category, and in particular emphasized language concerning "personal-use airport[s]."[26]

We agree with Jordan Cove that the issue of whether the helipad constitutes an "airport" for purposes of state and local law was, at best, only obliquely presented during the proceedings below. ORS 197.763(1) requires that

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[25] Petitioners also cite their own testimony, but we agree with Jordan Cove that that testimony does not raise any issue regarding whether the helipad constitutes an "airport" under state and local law. CUP Record 10938-39.

[26] CCZLDO 4.3.210(7) provides:

> "Airport/Heliport (Personal and Public)
>
> "(a) Public Airports need to be either located in the Airport Operations (AO) zone or show a need to be located in an area to serve the community.
>
> "(b) Personal-use airports for airplanes and helicopter pads, including associated hangar, maintenance and service facilities. A personal use airport as used in this section means an airstrip restricted, except for aircraft emergencies, to use by the owner, and on an infrequent and occasional basis, by invited guests, and by commercial aviation activities in connection with agricultural operations. No aircraft may be based on a personal-use airport other than those owned or controlled by the owner of the airstrip. Exceptions to the activities permitted under this definition may be granted through waiver action by the Oregon Aeronautics Division in specific instances. A personal-use airport lawfully existing as of September 13, 1975, shall continue to be permitted subject to any applicable rules of the Oregon Aeronautics Division."

cognizable issues be "raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue." Citizens' testimony raised two cognizable issues: (1) the helipad is within the Southwest Oregon Regional Airport (SORA) overlay zone, and therefore must meet the requirements of that overlay zone, and (2) the Oregon Aeronautics Division must approve the helipad. The quoted and emphasized language of CCZLDO 4.3.210(7)(b) can perhaps be read to suggest that the Citizens believed, without explaining why, the helipad is a "personal use" airport and that its operation might, for unknown reasons, require a waiver action by the Oregon Aeronautics Division.

However, in the petition for review, petitioners disavow any suggestion that the helipad could be viewed as a "personal use" airport under CCZLDO 4.3.210(7)(b). Petitioners' Petition for Review 60 n 18. Instead, petitioners argue that the helipad is a privately owned, "public use" airport for purposes of state law, a use category that, under CCZLDO 4.3.210(7)(a), is typically subject to the county AO zone. Petitioners assign error to the county's failure to adopt "findings regarding the helipad's compliance with the AO zone." Petitioners' Petition for Review 60. However, no cognizable issue was raised below regarding whether

the helipad is a "public use" airport subject to the AO zone or otherwise subject to the cited state and local law. We conclude that this issue is waived.[27]

This subassignment of error is denied.

B. IND Zone Requirements

CCZLDO 4.3.210(1) provides that accessory structures and uses shall be subordinate to any authorized primary use and must "meet the applicable Development and Siting Criteria or Special Development Considerations and Overlays for the zoning district in which the structure will be sited." Petitioners do not dispute that the helipad can be characterized as an accessory use to the emergency training center. However, petitioners argue that, as an accessory, the helipad must comply with all applicable IND zone requirements. Petitioners note that the IND zone allows helipads, subject to CCZLDO 4.3.210(7) which, as described above, provides in relevant part that "public use" airports must be located in the AO zone or show a need to be located in an area to serve the community. Petitioners argue that the county violated CCZLDO 4.3.210(1) by failing to demonstrate that the accessory helipad meets applicable IND zone requirements, *i.e.*, CCZLDO 4.3.210(7)(a) and the AO zone.

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[27] On the merits, Jordan Cove disputes that the helipad is a "public use" facility of any kind, because there would be no public access to the helipad. We agree with Jordan Cove that petitioners have not attempted to explain why the helipad would operate as a "public use" airport of any kind.

The flaw in that argument is that, as explained above, no issue was raised below regarding whether the helipad is a "public use" airport subject to either CCZLDO 4.3.210(7)(a) or the AO zone. Although issues were raised below regarding whether the helipad is an accessory use and whether it complies with all IND zone requirements, raising such issues did not provide "fair notice" to the county and other parties that petitioners intended to raise issues of compliance with the CCZLDO 4.3.210(7)(a) or AO zone standards governing "public use" airports. *Boldt v. Clackamas County*, 107 Or App 619, 813 P2d 1078 (1991). This issue is also waived.

This subassignment of error is denied.

Petitioners' ninth assignment of error is denied.

CITIZENS' SECOND ASSIGNMENT OF ERROR

One of the proposed modifications in the CUP application is to move the gas processing plant from the South Dunes site, which is zoned IND, to a different site zoned 6-Water-Dependent Development Shorelands (6-WD). The county found that the gas processing plant is a "water-dependent industrial use" allowed in the 6-WD zone because it is essential to the LNG terminal, which is also a "water-dependent industrial use."[28] The CUP decision also states that the

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[28] The findings state, in relevant part:

> "The gas processing is a 'water-dependent industrial use' because it is an essential part of the LNG Terminal to develop on the North Spit, which will receive natural gas from the Pacific Connector Gas

proposed location for the plant will not affect any wetlands. Citizens challenge both findings. Citizens also argue that the findings fail to adequately address the impacts of the plant's thermal plumes on the nearby airport.

A. Water-Dependent Industrial Use

Citizens repeat their arguments that the LNG terminal is not a water-dependent use and argue that the gas processing plant is therefore also not a water-dependent use. However, we have already rejected Citizens' premise that the LNG terminal is not a water-dependent use. The county found that the gas processing plant is an essential and integral component of the terminal, without any independent function—essentially a type of accessory use to the terminal. Citizens have not demonstrated that the county erred in so finding.

This subassignment of error is denied.

B. Wetlands

In discussing the management objective of the 6-WD zone, which states in relevant part that "use of wetlands in the district must be consistent with state and federal wetland permit requirements," the county found that "the gas processing

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> Pipeline, condition it, convert it to [LNG], and place it on vessels for transport through the Coos Bay Deep Draft Navigation Channel. As noted, the gas processing is the 'conditioning' phase of this process, which is integral and essential to the purposes and operation of the LNG Terminal, and which has no independent purpose work unless a component of the LNG Terminal. The LNG Terminal is a water-dependent industrial use and thus, so is its essential components, including the gas processing." CUP Record 149.

is not located within and will not affect wetlands." CUP Record 60. Citizens cite two maps in an appendix to their petition for review, "C App 6" and "C App 9." C App 9 is a map from Remand Record 4628 that shows the location of wetlands in the general area but does not show the location of the gas processing plant. "C App 6" is a blank piece of paper. We can only presume that Citizens intended to attach at C App 6 a copy of a map from the record depicting the new location of the gas processing plant. If so, Citizens apparently invite us to compare the two maps and determine, without any help from the parties, that the two maps together show that the gas processing facility is located within a wetland. We decline the invitation.

Citizens also fault the findings for failure to address the impacts of the plant's thermal plumes on wetland wildlife. However, Citizens cite no approval criterion that requires such findings. Citizens' arguments under this subassignment of error provide no basis for reversal or remand.

This subassignment of error is denied.

C. SORA Overlay Zone

CCZLDO 4.11.445 sets out land use compatibility requirements for the SORA overlay zone. CCZLDO 4.11.445(4) provides, in relevant part, that no industrial use shall "cause emissions of smoke, dust or steam that could obscure visibility within airport approach surfaces." Citizens contend that the new location of the gas processing plant is closer to the glide-slope of the airport than the original location but that the only study in the record considering the impact

of the plant's thermal plumes on airport operations is based on the original location. Citizens therefore argue that the county erred in relying on that study to conclude that the new location would not impact airport operations.

Jordan Cove responds that no issue was raised below, with the specificity required by ORS 197.763(1), regarding the impact of thermal plumes from the new location. However, the findings addressing CCZLDO 4.11.445(4) quote Citizens' testimony that "[t]here has been no thermal plume study provided nor drawings of project components detailed enough to be able to make * * * determinations [regarding CCZLDO 4.11.445(4)]." CUP Record 678 (boldface omitted). The findings dismiss that testimony, noting that, the same day it was received, Jordan Cove submitted additional information that discusses thermal plumes. CUP Record 171.[29] We agree with Citizens that the issue was sufficiently raised below.

On the merits, Jordan Cove does not argue that the record includes a new thermal plume study at the new location or cite any evidence that would provide equivalent information. In fact, Jordan Cove cites no evidence regarding thermal plumes at the new location which supports the county's finding of compliance

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[29] It is not clear to what additional information the findings refer. The findings go on to list several exhibits, two of which refer to thermal plumes. However, one is dated January 11, 2016, and presumably evaluates thermal plumes at the original location. The other appears to be the thermal plume study which Citizens argue, and Jordan Cove does not dispute, addresses emissions only at the original location. CUP Record 171-72.

with CCZLDO 4.11.445(4). We agree with Citizens that remand is necessary for the county to adopt more adequate findings, supported by substantial evidence, regarding whether thermal plumes at the new location affect compliance with CCZLDO 4.11.445(4).

Citizens also argue that the county failed to condition its approval on Jordan Cove obtaining a "7460 authorization," a federal permit which Citizens argue is necessary to operate the gas processing plant within an airport overlay zone, and that there is no evidence in the record that obtaining a 7460 authorization is feasible. Jordan Cove responds that this argument does not provide a basis for reversal or remand because Citizens do not argue that obtaining a 7460 authorization is necessary to satisfy any applicable approval criteria. We agree with Jordan Cove. Citizens do not identify any findings that rely on Jordan Cove obtaining a 7460 authorization to demonstrate compliance with any applicable approval criteria. Absent a more developed argument, this subassignment of error does not provide a basis for reversal or remand.

This subassignment of error is sustained, in part.

Citizens' second assignment of error is sustained, in part.

CITIZENS' FOURTH ASSIGNMENT OF ERROR

Citizens argue that the county erred in (1) failing to apply conditions of approval requiring Jordan Cove to obtain all necessary state and federal permits or (2) finding that obtaining such permits is not precluded as a matter of law.

Citizens first argue that the remand decision includes a general condition that Jordan Cove obtain all necessary state and federal permits but that such a general condition is missing from the CUP decision. According to Citizens, the county's failure to impose a similar general condition in the CUP decision is "procedural error." However, Citizens do not identify the source of any requirement for the county to impose such a general condition in the CUP decision. Absent a more developed argument, the fact that the county imposed such a general condition in the remand decision but not in the CUP decision does not provide a basis for reversal or remand.

Citizens next argue that, during the remand proceedings, the Oregon Department of Environmental Quality (DEQ) denied Jordan Cove's application for a required permit. Citizens contend that, given this circumstance, the county was required to adopt findings that it is nonetheless "feasible" for Jordan Cove to obtain the DEQ permit, *i.e.*, that Jordan Cove is not precluded as a matter of law from obtaining the permit. Jordan Cove responds that the county adopted findings that Jordan Cove is not precluded from obtaining the DEQ permit because that permit was denied without prejudice and Jordan Cove is free to re-apply. Remand Record 125-26. Citizens do not acknowledge or challenge those findings.

Further, Citizens contend that, shortly after issuance of the two decisions challenged in these appeals, Jordan Cove (1) withdrew its application for a state removal-fill permit, (2) filed a petition to "override" DLCD's objection to its

application for a consistency certification under the Federal Coastal Zone Management Act, and (3) filed an application with FERC to "bypass" Federal Clean Water Act requirements. Citizens argue that the county's decisions rely on Jordan Cove's "implicit promise" that it will obtain all required permits and that Jordan Cove's post-decision actions to avoid the necessity of obtaining those permits both are inconsistent with the county's decisions and undermine the county's reliance on state and federal permits.

Jordan Cove responds that its post-decision actions are entirely consistent with the condition imposed in the remand decision, which requires Jordan Cove to obtain all "necessary" state and federal permits. Jordan Cove argues that its post-decision actions are strategies available under federal law that, if successful, will simply mean that certain state and federal permits are no longer "necessary" for purposes of the condition. We agree with Jordan Cove that Citizens have not demonstrated that Jordan Cove's post-decision actions provide a basis to reverse or remand the county's decisions.

Citizens' fourth assignment of error is denied.

DISPOSITION

For the reasons stated under petitioners' first, second, sixth, and seventh assignments of error, and Citizens' second and third assignments of error, remand is required. OAR 661-010-0071(2).

The county's decisions are remanded.