

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

OREGON SHORES CONSERVATION COALITION,  
*Petitioner,*

and

CITIZENS FOR RENEWABLES,  
*Intervenor-Petitioner,*

vs.

COOS COUNTY,  
*Respondent,*

and

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

LUBA No. 2020-002

FINAL OPINION  
AND ORDER

Appeal from Coos County.

Anuradha Sawkar filed a petition for review and a reply brief and argued on behalf of petitioner. Also on the brief was Crag Law Center.

Tonia Moro filed a petition for review and a reply brief and argued on behalf of intervenor-petitioner.

No appearance by Coos County.

1       Seth J. King and Steven L. Pfeiffer filed the response briefs. Also on the  
2       briefs were Nikesh J. Patel and Perkins Coie LLP. Seth J. King argued on behalf  
3       of intervenor-respondent.  
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5       Rick Eichstaedt filed an Amicus Brief on behalf of the Confederated Tribes  
6       of Coos, Lower Umpqua and Siuslaw Indians.  
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8       RYAN, Board Member; RUDD, Board Chair; ZAMUDIO, Board  
9       Member, participated in the decision.  
10

11                   REVERSED                   05/04/2021  
12

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

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county board of commissioners decision approving  
4 reasons exceptions, zone changes, and conditional use permits to widen an  
5 existing navigation channel in the Coos Bay Estuary.

6 **FACTS**

7 The county and other local governments have approved various  
8 applications related to intervenor-respondent Jordan Cove Energy Project L.P.'s  
9 (JCEP's) proposal to construct a natural gas liquefaction facility and liquefied  
10 natural gas (LNG) export terminal (LNG terminal) at Jordan Cove, located within  
11 the Coos Bay Estuary.<sup>1</sup> See, e.g., *Oregon Shores Conservation Coalition v. City*  
12 *of North Bend*, \_\_\_ Or LUBA \_\_\_ (LUBA No 2019-118, July 17, 2020); *Oregon*  
13 *Shores Conservation Coalition v. Coos County*, \_\_\_ Or LUBA \_\_\_ (LUBA Nos  
14 2019-137/2020-006, Dec 22, 2020). Jordan Cove is located approximately seven  
15 miles inland from the mouth of the estuary. To export the LNG, JCEP proposes

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<sup>1</sup> Coos Bay is one of three deep-draft development estuaries in Oregon. OAR 660-017-0015(4). A "deep-draft development estuary" is defined as an estuary with a maintained jetty and a main channel maintained by dredging to deeper than 22 feet. OAR 660-017-0010(4). Deep-draft development estuaries "shall be managed to provide for navigation and other identified needs for public, commercial, and industrial water-dependent uses consistent with overall [Statewide Planning Goal 16 (Estuarine Resources)] requirements." OAR 660-017-0025(3)(a). Minor and major navigational improvements are allowed in deep-draft development estuaries where consistent with the requirements of Goal 16. *Id.*

1 to use large, deep-draft LNG tankers, which will access the terminal site via an  
2 existing federal navigation channel. The LNG tankers will transit the estuary via  
3 the navigation channel approximately 240 times per year (120 tankers per year  
4 going to and from the ocean, for a total of 240 transits).

5 State law generally requires that professional pilots direct the navigation  
6 of large commercial vessels entering or exiting the estuary, including the  
7 proposed LNG tankers. ORS 776.405(1)(a) (“[A] person may not pilot any vessel  
8 upon any of the pilotage grounds established under ORS 776.025 or 776.115  
9 without being a licensee under this chapter \* \* \*.”); ORS 776.025(3) (“The Coos  
10 Bay bar pilotage ground extends from the head of navigation on Coos Bay and  
11 its tributaries; then downstream to the open ocean at the entrance to Coos Bay  
12 \* \* \*.”). Pilots board an inbound or outbound vessel and then direct the vessel  
13 safely through the estuary via the navigation channel. However, as discussed  
14 below, in certain weather conditions, including fog and high winds, the pilots  
15 may deem it unsafe to pilot a vessel through the navigation channel due to  
16 existing constraints at several points along the channel.<sup>2</sup>

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<sup>2</sup> The county’s decision describes the current constraints on the existing channel as follows:

“The Coos Bay Channel serves a vital purpose because it provides the only safe vessel access to and from Coos Bay and the Pacific Ocean for marine terminals located along the Bayfront. The Channel was initially authorized in 1899, dredging began in 1908, and since then has undergone ten modifications. Most recently, the Channel

1       The existing navigation channel is 300 feet wide and dredged to a depth of  
2   37 feet. The undredged areas of the estuary average approximately 10 feet in  
3   depth. The channel enters the estuary between two jetties along a roughly east-  
4   west axis. Shortly after the entrance, at River Mile 2, the existing channel doglegs

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was expanded from -35 feet to -37 feet in 1997 to allow for the safe navigation and transit of Coos Bay for the size of ships prevalent during that time period. However, over the last 20 years the dimensions and tonnage of ships serving terminals in Coos Bay has increased. The size of vessels typically calling on Coos Bay terminals has increased from an average of 45,422 Metric Tonnes to an average of 52,894 Metric Tonnes with a projected near-term vessel size of 70,400 Metric Tonnes.

“Currently, environmental conditions, including wind, fog, and currents, coupled with the increasing ship size explained above, have caused the Coos Bay Pilots Association (‘Pilots’) to impose ever more limiting restrictions on when vessels may safely transit the Channel. These restrictions, in turn, cause significant delays and increased pressure on the Pilots to navigate ships through the Channel. Delays are measured in the total transit time, from the time the vessel arrives off the coast of Coos Bay until it returns offshore after calling at its local Coos Bay destination. These delays generally decrease the efficiency and competitiveness of maritime commerce on a global scale, thereby jeopardizing continued success for maritime commerce in Coos Bay. Minimizing delay is a pressing need because companies that utilize the port of Coos Bay have identified potential new customers in Asia that desire to export cargo using bulk carriers that are slightly larger than the ships typically calling today. Various marine terminal businesses within Coos Bay require assurances that terminals can efficiently accommodate larger dimension bulk carriers in the future. However, the stated primary purpose for the proposed channel modification is to reduce transit delays for existing vessels utilizing the Channel.” Record 15-16 (footnote omitted).

1 north, requiring inbound ships to make an approximately 95-degree turn,  
2 followed immediately by an approximately 21-degree turn in the opposite  
3 direction. Further north, the channel turns west in two places, at River Miles 4  
4 and 6. At each of these three turns, JCEP proposes to widen the existing channel  
5 by dredging the shallow areas adjacent to the channel from their existing depth  
6 to the same 37-foot depth as the channel. These three proposed channel  
7 expansions are known in the record and decision as Navigational Reliability  
8 Improvement (NRI) #1, #2, and #3.<sup>3</sup> According to testimony submitted by the

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<sup>3</sup> The county's decision describes how the NRIs are intended to improve navigation efficiency and reliability:

“Dredging to complete the NRI Sites will increase the available operational window to safely transit any vessel through the Channel. The NRIs, which are described in more detail below, are [designed] to increase the environmental operating windows for all ships entering Coos Bay by softening critical turns, relocat[ing] aids to navigation and reduc[ing] the required Channel directional changes. Specifically, the NRIs are designed to reduce entry and departure delays and allow for more efficient vessel transits through the Channel for the type and size of vessels entering the Port today.

“\* \* \* \* \*

“In addition to the primary purpose for the NRI[s] of reducing weather and environmental related transit delay for existing vessels currently using the Channel, for JCEP and its LNG terminal, the NRI enhancements will allow for transit of LNG vessels of similar overall dimensions to those listed in the July 1, 2008 United States Coast Guard (‘USCG’) Waterway Suitability Report and [USCG] letter confirmation dated November 7, 2018, but under a broader range of weather conditions, specifically higher wind speeds. As a

1 local pilots association, the NRIs would increase the operational window to safely  
2 transit any vessel by approximately 20 percent.

3 NRI #1 is approximately 10.51 acres in size and is located adjacent to the  
4 dogleg in the existing navigation channel near the mouth of the estuary, in an area  
5 zoned 59-Conservation Aquatic (59-CA).<sup>4</sup> The 59-CA zone is a conservation  
6 management unit.<sup>5</sup> The management objective for the 59-CA zone is to conserve

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result, JCEP estimates that, upon completion of the NRIs, JCEP will be able to export the full capacity of the optimized design production of the LNG Terminal on a consistent annual basis.” Record 16 (citation omitted).

<sup>4</sup> The county’s decision describes NRI #1 as follows:

“Reduce the constriction to vessel passage at the inbound entrance to the Coos Bay Inside Range for a ship[s] making the 95-degree turn from the Entrance Range through the Entrance Turn and Range while continuously carrying to the east side of the Channel. After making this 95-degree turn, the ship has the need to center itself in the Channel and prepare to make a 21-degree right turn into the Coos Bay Range within a distance of about 2.0 ship lengths, which is much less than the minimum of 5.0 ship lengths recommended by normal industry guidance (US Army Corps of Engineers Engineering and Design Hydraulic Design of Deep-Draft Navigation Projects (EM 1110-2-1613) Chapter 8-2). Address these challenges by widening the Coos Bay Inside Range Channel from the current 300 feet to 450 feet. Lengthen the total corner cutoff on the Coos Bay Range side of the 21-degree turn from the current 850 feet to about 1,400 feet from the turn’s apex.” Record 16-17.

<sup>5</sup> Pursuant to Goal 16, the Coos Bay Estuary Management Plan (CBEMP) designates areas within the estuary as natural, conservation, and development “management units.” Each management unit is subject to certain “management

1 the aquatic resources in the zone. Maintenance dredging of existing facilities is  
2 allowed as a conditional use in the 59-CA zone, but new dredging is not allowed  
3 absent an exception to Statewide Planning Goal 16 (Estuarine Resources). We  
4 discuss Goal 16 and associated regulations in more detail below.

5 NRI #2 is approximately 10.53 acres in size and is located adjacent to the  
6 channel at River Mile 4, in an area zoned 2-Natural Aquatic (2-NA).<sup>6</sup> The 2-NA  
7 zone is a natural management unit. The 2-NA zone does not allow any dredging,  
8 even maintenance dredging, absent an exception to Goal 16.

9 NRI #3 is approximately 2.18 acres in size and is located adjacent to the  
10 channel at River Mile 6, in an area zoned 3-Development Aquatic (3-DA).<sup>7</sup> The

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objectives.” The county has adopted the CBEMP into its comprehensive plan and zoning ordinance.

<sup>6</sup> The county’s decision describes NRI #2 as follows:

“The current corner cutoff distance from the apex of this turn of only 500 feet, which is much less than one ship length, is inadequate to allow deep draft vessels to start their turn early enough to safely make the turn and be positioned in the center of the next Channel. Widening the turn area from the Coos Bay Range to the Empire Range from the current 400 feet to about 600 feet at the apex of the turn. Lengthening the total corner cutoff area of the turn from the current 1000 feet to about 3500 feet, or about 4.0 ship lengths, will allow vessels to commence their turn much earlier and make this turn much safer.” Record 17.

<sup>7</sup> NRI #3 is described as follows:

“During inbound transits, it is very difficult to make this 16-degree left turn without crossing the boundary of the existing Channel on



1 3-DA zone is a development management unit. The 3-DA zone allows new and  
2 maintenance dredging as a conditional use. However, for reasons that are unclear  
3 to us, JCEP seeks to rezone NRI #3 from one development management unit to  
4 a different development management unit.

5 JCEP applied to the county to approve (1) post-acknowledgment plan map  
6 and text amendments based on proposed reasons exceptions to Goal 16 for NRI  
7 #1 and #2, (2) zoning map changes to Deep-Draft Navigation Channel (DDNC-  
8 DA) for all three NRI sites, and (3) conditional use permits (CUPs) to dredge all  
9 three NRI sites. The county hearings officer recommended approval. The county  
10 board of commissioners conducted hearings and, on December 18, 2019, adopted  
11 an ordinance approving the applications. This appeal followed.

## 12 **MOTIONS**

### 13 **A. Amicus Brief**

14 The Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians  
15 (Tribes) move to file an amicus brief supporting the petition for review and  
16 providing the Tribes' perspective on a comprehensive plan policy that requires  
17 coordination with the Tribes. OAR 661-010-0052. There is no opposition to the  
18 motion and it is granted.

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the west side. Adding a corner cut about 1150 feet in length on the west side to enhance inbound vessel navigational safety during the left turn from the Empire Range into the Lower Jarvis Range will provide the additional room necessary to safely make this turn with the slightly longer vessels.” *Id.*

1           **B.     Reply Briefs**

2           Petitioner and intervenor-petitioner Citizens for Renewables (Citizens)  
3           each filed reply briefs that conform to OAR 661-010-0039, which limits reply  
4           briefs to 1,000 words unless LUBA grants permission for a longer brief. Citizens  
5           also filed an overlength, 2,750-word reply brief and a motion requesting that we  
6           accept the overlength reply brief. We conclude that a longer reply brief would  
7           not materially aid resolution of the issues raised in this appeal. Accordingly,  
8           Citizens’ motion to file an overlength brief is denied. We will consider  
9           petitioner’s and Citizens’ conforming reply briefs.

10          **C.     JCEP’s Motion to Take Official Notice**

11          JCEP requests that we take official notice of a letter from the National Park  
12          Service (NPS) returning the Tribes’ proposed nomination of the Q’alya ta  
13          Kukwis shichdii me Traditional Cultural Property Historic District to the  
14          National Register of Historic Places. JCEP argues that the NPS letter is relevant  
15          to matters raised by the Tribes.

16          ORS 40.090(2) defines “[l]aw judicially noticed” to include “[p]ublic and  
17          private official acts of the legislative, executive and judicial departments of this  
18          state, the United States, any federally recognized American Indian tribal  
19          government and any other state, territory or other jurisdiction of the United  
20          States.” Petitioner opposes the motion, arguing that, even if the NPS letter is an  
21          “official act,” JCEP does not explain what relevance that action has to any issue  
22          in this appeal.

1           The Tribes' amicus brief mentions the Tribes' proposed nomination of the  
2 historic district only to establish that the Tribes have an interest in protecting  
3 cultural resources in the estuary, which in turn supports the Tribes' status as  
4 amicus. Because no party challenges the amicus brief or the Tribes' status as  
5 amicus, we agree with petitioner that the NPS letter has no apparent relevance to  
6 any issue in this appeal. Accordingly, JCEP's motion to take official notice is  
7 denied.

8           **D.   Citizens' Motion to Take Official Notice and Motion to Take**  
9           **Evidence (State and Federal Proceedings)**

10          Citizens requests that we take official notice of two state agency decisions:  
11 (1) a May 6, 2019 Oregon Department of Environmental Quality (DEQ) decision  
12 denying without prejudice JCEP's request for a water quality certification under  
13 the federal Clean Water Act (CWA) and (2) a February 19, 2020 decision by the  
14 Oregon Department of Land Conservation and Development (DLCD) objecting  
15 to JCEP's certification of consistency with the federal Coastal Zone Management  
16 Act (CZMA).

17          JCEP does not dispute that the DEQ and DLCD decisions are types of  
18 "official acts" subject to judicial notice under ORS 40.090(2). However, JCEP  
19 argues, and we agree, that judicially cognizable state agency actions cannot be  
20 cited to establish facts for the purpose of supporting or challenging findings of  
21 compliance with applicable land use approval criteria. *Tualatin Riverkeepers v.*

1    *ODEQ*, 55 Or LUBA 688 (2007). With that caveat, Citizens’ motion to take  
2    official notice is granted.

3            Citizens also requests that we take into evidence the DEQ and DLCD  
4    decisions plus two other documents: (1) JCEP’s notice of appeal of DLCD’s  
5    objection to the CZMA consistency certification to the United States Department  
6    of Commerce and (2) JCEP’s petition to the Federal Energy Regulatory  
7    Commission seeking a waiver of the requirement to obtain a CWA permit. OAR  
8    661-010-0045.<sup>8</sup> As grounds for the motion, Citizens argues that the four  
9    documents are evidence of “procedural irregularities not shown in the record and

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<sup>8</sup> OAR 661-010-0045 provides, in relevant part:

“(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. \* \* \*

“(2) Motions to Take Evidence:

“(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.”

1 which, if proved, would warrant reversal or remand of the decision.” OAR 661-  
2 010-0045(1). Citizens alleges that the documents indicate that JCEP  
3 misrepresented to the county its willingness to seek state and federal permits.

4 We have rejected similar motions involving the same documents in  
5 multiple related appeals. *Oregon Shores Conservation Coalition v. Coos County*,  
6 \_\_\_ Or LUBA \_\_\_, \_\_\_ (LUBA Nos 2019-137/2020-006, Dec 22, 2020) (slip op  
7 at 6-9); *Citizens for Renewables v. City of North Bend*, \_\_\_ Or LUBA \_\_\_, \_\_\_  
8 (LUBA No 2019-120, Jan 5, 2021) (slip op at 5-8), *Citizens for Renewables v.*  
9 *Coos County*, \_\_\_ Or LUBA \_\_\_, \_\_\_ (LUBA No 2020-003, Feb 11, 2021) (slip  
10 op at 6-8). Citizens offers no new or more persuasive reason to conclude  
11 otherwise in the present appeal. Consistent with the foregoing cases, because no  
12 party disputes that JCEP has appealed the DLCD objection and filed a petition  
13 seeking waiver of the CWA permit requirement, the parties may cite those  
14 undisputed facts in support of or in response to the assignments of error.  
15 However, Citizens has not established a basis under OAR 661-010-0045(1) to  
16 cite the four documents for any evidentiary purpose in this appeal. Citizens’  
17 motion for LUBA to take the four documents into evidence is denied.

18 **E. Citizens’ Motion to Take Evidence (*Ex Parte* Communications**  
19 **and Bias)**

20 Citizens’ third assignment of error alleges that at least one county  
21 commissioner failed to disclose *ex parte* communications with JCEP’s  
22 representatives during the proceedings below, in contravention of ORS

1 215.422(3).<sup>9</sup> Citizens requests that we take into evidence nine emails between  
2 JCEP's representatives and county commissioners. Citizens contends that taking  
3 the emails into evidence is warranted because they reflect "disputed factual  
4 allegations in the parties' briefs" concerning "ex parte contacts" under OAR 661-  
5 010-0045(1). *See* n 8. Citizens argues that the substance of the undisclosed  
6 communications concerned matters that are arguably related to approval of the  
7 then-pending applications under the applicable approval criteria. For example,  
8 Citizens notes that one of the emails touts the economic benefits of JCEP's LNG  
9 terminal, a principal beneficiary of the expanded navigation channel. Citizens  
10 argues that the economic benefits of the navigation channel to the LNG terminal,  
11 as well as to the county, were a significant factor in the findings addressing the

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<sup>9</sup> 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:

- "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
- "(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."

1 reasons exception criteria that the county commissioners ultimately adopted to  
2 approve the expanded navigation channel.

3 Citizens' third assignment of error also alleges that at least some of the  
4 commissioners were biased in favor of JCEP's applications and cites the nine  
5 emails in support of that allegation. Citizens requests that we take the nine emails  
6 into evidence for the additional purpose of supporting its allegations of bias.

7 JCEP opposes the motion, arguing initially that there are no "disputed  
8 factual allegations" for purposes of OAR 661-010-0045(1) because JCEP does  
9 not dispute that the communications between JCEP and the commissioners  
10 occurred. According to JCEP, it disputes only the legal consequences of the  
11 communications, specifically whether the substance of the communications was  
12 related closely enough to the pending applications to constitute "ex parte  
13 communications" within the meaning of ORS 215.422(3) or whether the emails  
14 provide evidence of bias.

15 We disagree with JCEP that "disputed factual allegations" regarding "ex  
16 parte contacts" are limited to disputes over whether the contacts in fact occurred.  
17 In our view, whether a communication constitutes an "ex parte communication"  
18 for purposes of ORS 215.422(3) is a mixed question of fact and law that turns, in  
19 part, on the actual text and context of the communication. As discussed below,  
20 the parties dispute the meaning and significance of the text of the  
21 communications at issue. Accordingly, JCEP's concession that the  
22 communications occurred is not a sufficient basis to reject Citizens' motion for

1 LUBA to take the substance of the communications into evidence under OAR  
2 661-010-0045(1).

3 JCEP next argues that, under OAR 661-010-0045(2), Citizens has not  
4 demonstrated how LUBA's consideration of the emails will affect the outcome  
5 of the review proceeding. JCEP previews its responses on the merits of the third  
6 assignment of error, in which Citizens alleges that the emails are undisclosed *ex*  
7 *parte* communications, which JCEP disputes. JCEP argues, essentially, that  
8 Citizens' motion to take evidence can be granted only if Citizens demonstrates  
9 that it will prevail on the merits of its third assignment of error.

10 However, OAR 661-010-0045(2) does not require a movant to  
11 demonstrate that it will prevail on the merits of the associated assignments of  
12 error. OAR 661-010-0045(2) requires only that the motion be accompanied by a  
13 statement "explaining with particularity what facts the moving party seeks to  
14 establish, how those facts pertain to the grounds to take evidence specified in  
15 [OAR 661-010-0045(1)], and how those facts will affect the outcome of the  
16 review proceeding." A movant complies with OAR 661-010-0045(2) if the  
17 statement attached to the motion includes a coherent and reasonably detailed  
18 legal and factual explanation of how LUBA's consideration of the proffered  
19 evidence will affect the review proceeding. In our view, if the statement and  
20 proffered evidence persuade LUBA that it *could* resolve the legal and factual  
21 disputes in the movant's favor and ultimately sustain an assignment of error



1 requiring reversal or remand, then there are sufficient grounds to grant the motion  
2 to take evidence.

3 In the present case, the proffered emails reflect undisclosed  
4 communications between JCEP's representatives and county commissioners.  
5 Two of the nine emails include factual or legal statements that, in our view, could  
6 have had a bearing on the commissioners' approval or denial of the then-pending  
7 applications for the expanded navigation channel under the applicable criteria.<sup>10</sup>  
8 In one email, dated August 8, 2019, JCEP details the economic benefits of the  
9 LNG terminal for the county. In its applications, JCEP argued that the expanded  
10 channel is necessary to allow the LNG terminal to provide its full economic  
11 benefit. The economic benefits of the expanded channel to the county and to the  
12 LNG terminal were key factors in JCEP's rationale for approval and the county's  
13 findings regarding the approval criteria. Although the August 8, 2019 email does  
14 not mention the navigation channel or any approval criteria, a reasonable person  
15 could conclude that the email was intended to help persuade the commissioners  
16 to approve not only the LNG terminal but also related pending applications. *Ex*  
17 *parte* communications are not limited to communications that expressly argue  
18 that applications should be approved or denied based on compliance or  
19 noncompliance with applicable approval criteria. They also include legal or  
20 factual communications intended to persuade the land use decision-maker to

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<sup>10</sup> Motion to Take Evidence (Ex Parte Communications), Ex 1, 8.

1 approve or deny a pending application. *See, e.g., Horizon Construction, Inc. v.*  
2 *City of Newberg*, 25 Or LUBA 656, 663-66 (1993) (concluding that a newspaper  
3 editorial regarding a pending application constituted an *ex parte* communication).

4 A reasonable person could conclude that these two emails constitute  
5 undisclosed *ex parte* communications for purposes of ORS 215.422(3) and  
6 sustain Citizens' third assignment of error, which would require remand.<sup>11</sup>  
7 Citizens has sufficiently explained how LUBA's consideration of these emails  
8 will affect this review proceeding under OAR 661-010-0045(2).

9 As JCEP argues, seven of the nine emails between JCEP and the  
10 commissioners do not include any factual or legal assertions with arguable  
11 bearing on approval or denial of the applications for the NRIs (although they  
12 might constitute *ex parte* communications with respect to other applications  
13 related to the LNG terminal). We understand that Citizens proffers these seven  
14 emails to support its allegations of bias. We understand Citizens to argue that the  
15 emails, along with other evidence in the record, show that certain commissioners  
16 were very supportive of JCEP's LNG terminal, as evidenced by their willingness  
17 to engage in a number of *ex parte* communications with JCEP and then fail to  
18 disclose those communications at the public hearing, as required.

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<sup>11</sup> Remand for remedial action is the usual outcome if LUBA sustains an assignment of error under ORS 215.422(3). However, for reasons that we explain in detail below, we do not reach the merits of Citizens' third assignment of error.

1       Based on our preliminary review, Citizens has established that disputed  
2       factual allegations concerning bias on the part of an elected land use decision-  
3       maker exist which, if proved, would warrant reversal or remand of the decision.  
4       Accordingly, Citizens' motion for LUBA to take the nine emails into evidence is  
5       granted.

## 6       **INTRODUCTION**

### 7       **A.     Summary of Assignments of Error**

8       Petitioner presents nine assignments of error. The first five assignments of  
9       error challenge the county's approval of reasons exceptions to Goal 16 for NRI  
10      #1 and #2 under the applicable administrative rules at OAR chapter 660, division  
11      4. The ninth assignment of error alleges that the county's approval of the reasons  
12      exceptions and the application to rezone the NRI sites to DDNC-DA is  
13      inconsistent with Goal 16. The sixth, seventh, and eighth assignments of error  
14      challenge the county's approval of CUPs for the dredging of the NRI sites and  
15      the placement of temporary dredging pipelines, which are premised on successful  
16      reasons exceptions and zone changes. Those CUPs required the county to apply  
17      provisions of its zoning ordinance and the Coos Bay Estuary Management Plan  
18      (CBEMP).

19      Citizens raises three assignments of error. The first assignment of error  
20      challenges compliance with the applicable county zone change standards in the  
21      development code and compliance with Statewide Planning Goals 6 (Air, Water  
22      and Land Resources Quality), 7 (Areas Subject to Natural Hazards), and 11

1 (Public Facilities and Services). The second assignment of error challenges the  
2 county's conditional use approval of the placement of temporary dredging  
3 pipelines as an "accessory" use to the proposed dredging. The third assignment  
4 of error alleges that the county committed several procedural errors.

5 As we explain in detail below, we sustain petitioner's challenges to the  
6 county's decision to approve reasons exceptions for NRI #1 and #2 and conclude  
7 that the county's decision to approve those exceptions to Goal 16 "based on"  
8 Statewide Planning Goals 9 (Economic Development), 12 (Transportation), and  
9 13 (Energy Conservation) improperly construes the administrative rules  
10 governing reasons exceptions.

11 NRI #1 and #2 cannot be rezoned to DDNC-DA without an effective  
12 exception to Goal 16. Although no exception is required for NRI #3 because that  
13 site is currently zoned 3-DA, which allows dredging as a conditional use, JCEP  
14 filed a consolidated application to rezone all three NRI sites to DDNC-DA, and  
15 JCEP did not take the position below that NRI #3 should be rezoned  
16 independently from NRI #1 and #2, that is to say, if NRI #1 and #2 are not  
17 effectively rezoned. Accordingly, none of the three NRI sites has been effectively  
18 rezoned.

19 Because new dredging is not allowed in the 59-CA and 2-NA zones, the  
20 CUPs for NRI #1 and #2 are dependent on successful zone changes to DDNC-  
21 DA. Although dredging is a conditional use in the 3-DA zone, the county  
22 analyzed the CUP application for NRI #3 assuming that NRI #3 was zoned

1 DDNC-DA. Accordingly, the CUP for NRI #3 is also dependent on a successful  
2 zone change. Because none of the three NRI sites has been successfully rezoned,  
3 we need not and do not address petitioner's and Citizens' challenges to the  
4 portion of the decision approving the CUPs. Similarly, we need not and do not  
5 address Citizens' procedural assignment of error.

6 **B. Reasons Exception Standards**

7 Because multiple assignments of error concern the standards for adopting  
8 reasons exceptions to Goal 16, we first provide an overview of those standards.

9 Goal 16 is, in part, to "protect, maintain, where appropriate develop, and  
10 where appropriate restore the long-term environmental, economic, and social  
11 values, diversity and benefits of Oregon's estuaries." To achieve that goal with  
12 respect to long-term environmental values, Goal 16 generally restricts or  
13 prohibits dredging within estuarine waters that are designated as natural or  
14 conservation management units, while generally allowing dredging in areas  
15 designated as development management units.<sup>12</sup> As discussed below, Goal 16 and  
16 associated administrative rules distinguish between "water-dependent" uses and

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<sup>12</sup> Under Goal 16, permissible uses in natural and conservation management units include "dredging necessary for on-site maintenance of existing functional tidegates and associated drainage channels and bridge support structures." In conservation management units, where consistent with the resource capabilities of the area and the purposes of the management unit, dredging may also be allowed for boat ramps and marinas, as necessary for mineral extraction, and as required for aquaculture.

1 “non-water-dependent” uses.<sup>13</sup> Generally, Goal 16 favors appropriate water-  
2 dependent uses of estuarine waters, while discouraging (if not prohibiting) most  
3 non-water-dependent uses. Under Goal 16, navigation is regarded as a water-  
4 dependent use:

5 “Dredging and/or filling shall be allowed only:

6 “a. If required *for navigation or other water-dependent uses* that  
7 require an estuarine location or if specifically allowed by the  
8 applicable management unit requirements of [Goal 16]; and,

9 “b. If a need (i.e., a substantial public benefit) is demonstrated  
10 and the use or alteration does not unreasonably interfere with  
11 public trust rights; and

12 “c. If no feasible alternative upland locations exist; and,

13 “d. If adverse impacts are minimized.” Goal 16, Implementation  
14 Requirement 2 (emphasis added).

15 The county found that the use proposed here, expansion of the existing navigation  
16 channel, is a water-dependent use. Record 75.

17 To approve dredging for the expansion of the existing navigation channel  
18 in natural and conservation management units, the county must approve one of  
19 three types of “exceptions” to Goal 16. Here, the county approved “reasons”

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<sup>13</sup> The Land Conservation and Development Commission, promulgator of the statewide planning goals, has adopted general definitions that apply across multiple goals, including “water-dependent,” which is defined as “[a] use or activity which can be carried out only on, in, or adjacent to water areas because the use requires access to the water body for waterborne transportation, recreation, energy production, or source of water.”

1 exceptions. Under Statewide Planning Goal 2 (Land Use Planning) and ORS  
2 197.732(2)(c), a county may approve a “reasons” exception to a goal requirement  
3 if four standards are met:

4 “(1) Reasons justify why the state policy embodied in the  
5 applicable goals should not apply;

6 “(2) Areas which do not require a new exception cannot  
7 reasonably accommodate the use;

8 “(3) The long-term environmental, economic, social and energy  
9 consequences resulting from the use of the proposed site with  
10 measures designed to reduce adverse impacts are not  
11 significantly more adverse than would typically result from  
12 the same proposal being located in areas requiring a goal  
13 exception other than the proposed site; and

14 “(4) The proposed uses are compatible with other adjacent uses or  
15 will be so rendered through measures designed to reduce  
16 adverse impacts.” Goal 2, Part II(c).

17 OAR 660-004-0020 elaborates on these four standards. In addition, OAR 660-  
18 004-0022 provides a set of standards for evaluating whether the first of the above  
19 standards is met, that is, whether “reasons” justify why the state policy embodied  
20 in the applicable goals should not apply.

21 OAR 660-004-0022(1) is a generic, “catch-all” provision that provides  
22 standards for reasons exceptions in the absence of other, goal-specific rules.<sup>14</sup>

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<sup>14</sup> OAR 660-004-0022 provides, in relevant part:

“An exception under Goal 2, Part II(c) may be taken for any use not allowed by the applicable goal(s) or for a use authorized by a statewide planning goal that cannot comply with the approval

1 One of those standards is that there must be a “demonstrated need for the  
2 proposed use or activity, based on one or more of the requirements of Goals 3 to  
3 19.” OAR 660-004-0022(1)(a). Subsequent subsections of OAR 660-004-0022  
4 set out a number of goal-specific rules. Two of those subsections are specific to  
5 Goal 16. OAR 660-004-0022(7) provides standards for reasons exceptions to

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standards for that type of use. The types of reasons that may or may not be used to justify certain types of uses not allowed on resource lands are set forth in the following sections of this rule. \* \* \*

“(1) For uses not specifically provided for in this division, or in OAR 660-011-0060, 660-012-0070, 660-014-0030 or 660-014-0040, the reasons shall justify why the state policy embodied in the applicable goals should not apply. Such reasons include but are not limited to the following:

“(a) There is a demonstrated need for the proposed use or activity, based on one or more of the requirements of Goals 3 to 19; and either

“(A) A resource upon which the proposed use or activity is dependent can be reasonably obtained only at the proposed exception site and the use or activity requires a location near the resource. An exception based on this paragraph must include an analysis of the market area to be served by the proposed use or activity. That analysis must demonstrate that the proposed exception site is the only one within that market area at which the resource depended upon can reasonably be obtained; or

“(B) The proposed use or activity has special features or qualities that necessitate its location on or near the proposed exception site.”



1 Goal 16 to allow water-dependent industrial, commercial, or recreational uses in  
2 development and conservation management units and is based generally on an  
3 economic analysis.<sup>15</sup> OAR 660-004-0022(8) sets out five circumstances where  
4 reasons exceptions to Goal 16 may be justified for “other alterations and uses,”

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<sup>15</sup> OAR 660-004-0022(7) provides:

“Goal 16 — Water-Dependent Development: To allow water-dependent industrial, commercial, or recreational uses that require an exception in development and conservation estuaries, an economic analysis must show that there is a reasonable probability that the proposed use will locate in the planning area during the planning period, considering the following:

- “(a) Goal 9 or, for recreational uses, the Goal 8 Recreation Planning provisions;
- “(b) The generally predicted level of market demand for the proposed use;
- “(c) The siting and operational requirements of the proposed use including land needs, and as applicable, moorage, water frontage, draft, or similar requirements;
- “(d) Whether the site and surrounding area are able to provide for the siting and operational requirements of the proposed use; and
- “(e) The economic analysis must be based on the Goal 9 element of the County Comprehensive Plan and must consider and respond to all economic needs information available or supplied to the jurisdiction. The scope of this analysis will depend on the type of use proposed, the regional extent of the market and the ability of other areas to provide for the proposed use.”

1 including dredge and fill.<sup>16</sup> One of those circumstances is “[d]redging to maintain  
2 adequate depth to permit continuation of the present level of navigation in the  
3 area to be dredged.” OAR 660-004-0022(8)(b).

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<sup>16</sup> OAR 660-004-0022(8) provides, as relevant:

“Goal 16 – Other Alterations or Uses: An exception to the requirement limiting dredge and fill or other reductions or degradations of natural values to water-dependent uses or to the natural and conservation management unit requirements limiting alterations and uses is justified, where consistent with ORS chapter 196, in any of the circumstances specified in subsections (a) through (e) of this section:

- “(a) Dredging to obtain fill for maintenance of an existing functioning dike where an analysis of alternatives demonstrates that other sources of fill material, including adjacent upland soils or stockpiling of material from approved dredging projects, cannot reasonably be utilized for the proposed project or that land access by necessary construction machinery is not feasible;
- “(b) Dredging to maintain adequate depth to permit continuation of the present level of navigation in the area to be dredged;
- “(c) Fill or other alteration for a new navigational structure where both the structure and the alteration are shown to be necessary for the continued functioning of an existing federally authorized navigation project such as a jetty or a channel;
- “(d) An exception to allow minor fill, dredging, or other minor alteration of a natural management unit for a boat ramp or to allow piling and shoreline stabilization for a public fishing pier;

1        In the present case, the county primarily justified the Goal 16 exceptions  
2        for NRI #1 and #2 based on the catch-all provision at OAR 660-004-0022(1). The  
3        county concluded that there is a “demonstrated need” for the proposed channel  
4        expansions, based on the requirements of Goals 9, 12, and 13. In the alternative,  
5        the county relied upon the Goal 16-specific standard at OAR 660-004-  
6        0022(8)(b). The findings take the position that the proposed expansions of the

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“ (e) Dredge or fill or other alteration for expansion of an existing public non-water-dependent use or a nonsubstantial fill for a private non-water-dependent use (as provided for in ORS 196.825) where:

“ (A) A Countywide Economic Analysis based on Goal 9 demonstrates that additional land is required to accommodate the proposed use;

“ (B) An analysis of the operational characteristics of the existing use and proposed expansion demonstrates that the entire operation or the proposed expansion cannot be reasonably relocated; and

“ (C) The size and design of the proposed use and the extent of the proposed activity are the minimum amount necessary to provide for the use.

“ (f) In each of the situations set forth in subsections (7)[sic](a) to (e) of this rule, the exception must demonstrate that the proposed use and alteration (including, where applicable, disposal of dredged materials) will be carried out in a manner that minimizes adverse impacts upon the affected aquatic and shoreland areas and habitats.”

1 existing navigation channel are intended to “permit continuation of the present  
2 level of navigation in the area to be dredged.”<sup>17</sup>

3 **C. LUBA’s Standard of Review**

4 ORS 197.835(6) provides that LUBA “shall reverse or remand an  
5 amendment to a comprehensive plan if the amendment is not in compliance with

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<sup>17</sup> Notably, JCEP did not attempt to justify the reasons exceptions under OAR 660-004-0022(7), which provides standards for reasons exceptions to allow certain water-dependent development. In the decision, the county rejected Citizens’ arguments that OAR 660-004-0022(7) supplies the controlling standards for reasons exceptions to allow the proposed expansions of the navigation channel:

“[Citizens’] analysis falls short, because OAR 660-0[04]-0022(7) by its own terms only applies to ‘Water-Dependent Development.’ The rules further define that term as ‘water-dependent industrial, commercial, or recreational uses that require an exception in development and conservation estuaries.’ Under Goal 16, Navigation is not an industrial, commercial, or recreational use, but is listed as a separate use apart from water dependent commercial and industrial uses: ‘Permissible uses in areas managed for water-dependent uses shall be navigation and water dependent commercial and industrial uses.’” Record 71.

Accordingly, the county concluded that OAR 660-004-0022(7) is inapplicable and, therefore, JCEP is not required to conduct the economic analysis set out in that rule. *Id.*

On appeal, neither petitioner nor Citizens assign error to that conclusion, and JCEP did not file a cross petition for review assigning error to that conclusion. Thus, we proceed under the assumption that OAR 660-004-0022(7) does not supply appropriate standards for reasons exceptions to establish or expand a navigation channel in development or conservation management units.

1 the goals.” In addition, ORS 197.835(9)(a)(D) provides that LUBA shall reverse  
2 or remand a land use decision if LUBA finds that the local government  
3 “[i]mproperly construed the applicable law.” A reasons exception to a statewide  
4 planning goal must be consistent with ORS 197.732 and the administrative rules  
5 governing exceptions.

6 With that overview, we turn to the assignments of error.

## 7 **PETITIONER’S FIRST ASSIGNMENT OF ERROR**

8 Petitioner challenges the county’s conclusion under OAR 660-004-  
9 0022(1)(a) that there is a “demonstrated need” for the proposed channel  
10 expansions, based on one or more of the requirements of Goals 9, 12, and 13.  
11 Citing *VinCEP v. Yamhill County*, 55 Or LUBA 433 (2007), petitioner argues  
12 that the county failed to demonstrate that the proposed exceptions to Goal 16 are  
13 necessary for the county to satisfy any of its obligations under Goals 9, 12, or 13.

### 14 **A. Goal 9**

15 Goal 9 is to “provide adequate opportunities throughout the state for a  
16 variety of economic activities vital to the health, welfare, and prosperity of  
17 Oregon’s citizens.” Under the goal, comprehensive plans for *urban areas* must  
18 “[p]rovide for at least an adequate supply of sites of suitable sizes, types,  
19 locations, and service levels for a variety of industrial and commercial uses  
20 consistent with plan policies.” Goal 9, Guideline A(1), states that a “principal  
21 determinant in planning for major industrial and commercial developments  
22 should be the comparative advantage of the region within which the

1 developments would be located. Comparative advantage industries are those  
2 economic activities which represent the most efficient use of resources, relative  
3 to other geographic areas.” The county’s findings identify these provisions of  
4 Goal 9 and conclude that, given the critical nature of shipping to the Coos County  
5 economy, the county is “unable to fully satisfy its planning obligations under  
6 Goal 9 absent the planning for these NRI[s].” Record 63.<sup>18</sup>

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

“Oregon only has three deep water ports, and Coos Bay happens to be one of them. It is the only deep-water port in the Southern portion of the state. While the County has zoned various lands to serve as industrial port facilities, those facilities are only as good as the navigation Channel that serves those facilities. Keeping the Port of Coos Bay properties and other port sites competitive on a global scale by enhancing the safety and reliability [of the] navigation Channel for larger vessels is a service level enhancement within the meaning of Goal 9. The [Board] finds that the County has a planning mandate under Goal 9 to ensure that its port facilities stay competitive. It is critical for the County to ensure that the zoning for the Deep Draft Channel will allow the Channel to be designed, built, and maintained in a manner that maximizes the efficiencies of shipping operations, while at the same time protecting the natural resources of the bay for the economic benefit of resource extraction industries and tourism industries, as well as for its citizens for recreation.

“Goal 9’s Planning Guideline 1 states that ‘[A] principal determinant in planning for major industrial and commercial developments should be the comparative advantage of the region within which the developments would be located.’ Goal 9 clarifies that ‘[c]omparative advantage industries are those economic activities which represent the most efficient use of resources,

1           In *VinCEP*, we interpreted the “demonstrated need \* \* \* based on one or  
2 more of the requirements of Goals 3 to 19” standard at OAR 660-004-0022(1)(a)  
3 to require that the county demonstrate that it is at risk of failing to satisfy one or  
4 more obligations imposed by a statewide planning goal and that the proposed  
5 exception is a necessary step toward maintaining compliance with its goal  
6 obligations. 55 Or LUBA at 449. That is, the county must (1) identify one or more  
7 obligations under Goals 3 to 19, (2) explain why the county is at risk of failing to  
8 meet those obligations, and (3) explain why the proposed exception to the  
9 requirements of one goal (here, Goal 16) will help the county maintain  
10 compliance with its other goal obligations.

11           *VinCEP* involved proposed exceptions to Statewide Planning Goals 3  
12 (Agricultural Lands) and 14 (Urbanization) in order to develop a luxury hotel on  
13 agricultural land outside urban growth boundaries. The county claimed that,

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relative to other geographic areas.’ The Board finds that although the Goal’s planning guidelines are not mandatory, Coos County has an opportunity under Goal 9 to maximize the comparative advantage of the region’s only deep-water port by adding selective widening improvements to the existing Channel. Even more importantly, the County has a rare opportunity to capitalize on the availability of a willing private party to construct the needed NRI[s]. The Pilots noted that these [NRIs] have been needed for years, but have been outside of the financial reach of [the United States Army Corps of Engineers], the Port [of Coos Bay], and other stake holders. Given the critical nature of shipping to the lifeblood of the Coos County economy, the County is unable to fully satisfy its planning obligations under Goal 9 absent the planning for these NRI[s].” Record 63.

1 without providing for a luxury hotel on agricultural land to attract wine country  
2 tourists who would otherwise stay at luxury hotels in nearby cities, the county  
3 would be at risk of violating its obligation under Goal 9 to provide “adequate  
4 opportunities \* \* \* for a variety of economic activities.” We held that a desire to  
5 diversify or boost the local economy was an insufficient basis to take an  
6 exception to Goal 3, in part because such a broad rationale would make it  
7 relatively easy to justify an exception for many economic uses of resource lands  
8 prohibited by the resource goals. We noted that a sufficient basis for an exception  
9 to a resource goal based on the general obligations of Goal 9 must be  
10 “exceptional,” in the sense that the rationale is self-limiting, justified by an  
11 exceptional circumstance, and not so broadly framed that it can be applied to  
12 establish other exceptions across a broad range of circumstances. *VinCEP*, 55 Or  
13 LUBA at 449.

14       Petitioner first argues that, to the extent that Goal 9 imposes any obligation  
15 on the county in these circumstances, it is only a *planning* obligation. As the  
16 findings acknowledge, the obligation to actually *provide* for adequate “service  
17 levels” applies only to comprehensive plans for urban areas. We agree with  
18 petitioner on that point. Goal 9, as applied to lands outside of urban areas (*i.e.*,  
19 lands within county planning authority), does not obligate the county to provide  
20 any particular quantity or quality of “sites of suitable sizes, types, locations, and  
21 service levels for a variety of industrial and commercial uses.” There is no dispute



1 that NRI #1 and #2 are not located within urban areas. Goal 9's planning  
2 obligation therefore cannot serve as a reason for an exception to Goal 16.

3 Petitioner next argues that Goal 9, Guideline A(1), is not a "requirement"  
4 for purposes of OAR 660-004-0022(1)(a), and it is therefore an insufficient basis  
5 to justify an exception to a resource goal. We agree. The guidelines  
6 accompanying the goals are guidelines, not mandates. *Reading v. Douglas*  
7 *County*, 70 Or LUBA 458, 464-65 (2014) (citing ORS 197.015(9); *Downtown*  
8 *Comm. Assoc. v. City of Portland*, 80 Or App 336, 772 P2d 1258 (1986)).

9 Citing *VinCEP* and earlier LUBA cases, *Morgan v. Douglas County*, 42  
10 Or LUBA 46 (2002), and *Middleton v. Josephine County*, 31 Or LUBA 423  
11 (1996), petitioner further argues that a general desire to diversify or boost the  
12 local economy is also an insufficient basis to justify an exception to a resource  
13 goal. We agree with petitioner. As we explained in *VinCEP*, a general desire to  
14 diversify or boost the local economy is an insufficient basis for an exception  
15 under OAR 660-004-0022(1)(a), in large part because that rationale knows no  
16 boundaries. If an exception for a luxury wine country hotel on agricultural land  
17 can be justified based on a general desire for a bigger and more diverse local  
18 economy, why not a dozen hotels? Why not any other urban commercial use? A  
19 rationale for an exception that is easily extended to a wide range of circumstances  
20 is antithetical to OAR 660-004-0022(1)(a) and the overall statewide land use  
21 planning scheme.

22 This subassignment of error is sustained.

1           **B.     Goal 12**

2           Goal 12 is to “provide and encourage a safe, convenient and economic  
3   transportation system.” Goal 12 requires local governments to adopt  
4   transportation plans that, among other things,

5           “(1) consider all modes of transportation including mass transit, air,  
6           water, pipeline, rail, highway, bicycle and pedestrian; (2) be based  
7           upon an inventory of local, regional and state transportation needs;  
8           \* \* \* (6) conserve energy; \* \* \* (8) facilitate the flow of goods and  
9           services so as to strengthen the local and regional economy; and (9)  
10          conform with local and regional comprehensive land use plans.”

11          Goal 12 is implemented by OAR chapter 660, division 12, the  
12   Transportation Planning Rule (TPR).<sup>19</sup> As petitioner correctly observes, Goal 12  
13   and the TPR largely impose planning obligations for the content of required  
14   transportation system plans (TSPs) and, outside those planning obligations,  
15   impose few specific “requirements” on the design or availability of particular  
16   transportation facilities, including navigation channels.

17          In its decision, the county focused on the Goal 12 requirement that  
18   transportation plans “facilitate the flow of goods and services” and cited to  
19   evidence that the NRIs are necessary to facilitate the efficient flow of goods and  
20   services because they would allow deep-draft vessels to transit the estuary in a  
21   broader range of weather conditions and would improve transit efficiency up to

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<sup>19</sup> We note that OAR 660-012-0065(3)(1) identifies “navigation channels” among the transportation improvements that are deemed to be consistent with Goals 3, 4, 11, and 14 and that require no exception to those goals in order to be sited in rural areas.

1 20 percent. Petitioner argues, however, that the county has already established  
2 full compliance with Goal 12 and the TPR by adopting a TSP that is intended to  
3 “facilitate the flow of goods and services.” Petitioner argues that, while the NRIs  
4 might be *consistent* with Goal 12, the county has not (1) identified anything in  
5 Goal 12, the TPR, or its TSP that *requires* that the navigation channel be  
6 improved in order to facilitate the flow of goods and services or (2) demonstrated  
7 that the county is unable to satisfy its obligations under Goal 12 absent an  
8 exception to Goal 16.

9       We disagree with petitioner to the extent that it argues that the county must  
10 demonstrate that its TSP is currently out of compliance with Goal 12 or the TPR  
11 in order to support an exception to Goal 16 under the “demonstrated need”  
12 standard at OAR 660-004-0022(1)(a). *See VinCEP*, 55 Or LUBA at 448 (OAR  
13 660-004-0022(1)(a) does not require the county to demonstrate that it is “between  
14 the devil and the deep blue sea” with respect to its planning responsibilities or  
15 that it is forced to choose which goal obligation to violate). OAR 660-004-  
16 0022(1)(a) provides that the demonstrated need must be “based on” the  
17 requirements of Goals 3 to 19, which is a much less onerous standard than  
18 requiring that the need arise from current noncompliance with a goal requirement.

19       The present case appears to be the first occasion that LUBA has had to  
20 address a goal exception under OAR 660-004-0022(1)(a) based on the  
21 requirements of Goal 12. As explained, Goal 12 largely imposes planning  
22 obligations, specifically the obligation that local governments adopt TSPs

1 designed to satisfy Goal 12's mandate for safe, convenient, and economic  
2 transportation systems that, among other things, facilitate the flow of goods and  
3 services over the relevant planning period.<sup>20</sup>

4 The county's Goal 12 findings are found at Record 63-70 and 136-42.<sup>21</sup>  
5 The findings at Record 136-42 evaluate the evidence regarding the limitations of  
6 the existing navigation channel and how the NRIs would improve safety and  
7 efficiency. Based on the testimony of the Pilots and others whom the county  
8 recognized as experts on the navigational challenges of the estuary, the county

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<sup>20</sup> We note that it is at least possible that a county could demonstrate a requirement for a proposed transportation improvement if it is listed or identified in the local government's acknowledged TSP as a planned transportation improvement to be constructed within the relevant planning period. However, there is no dispute in the present appeal that the county's TSP, adopted in 2011, does not identify or list NRI #1 or #2 as planned transportation improvements.

<sup>21</sup> The findings at Record 63-70 focus, almost exclusively, on a different inquiry under OAR 660-004-0022(1)(a)(B), that is, whether the "proposed use or activity has special features or qualities that necessitate its location on or near the proposed exception site." As petitioner points out, the findings inaccurately state that "OAR 660-004-0022(1)(a)(B) provides that a sufficient 'reason' is that the 'proposed use or activity has special features or qualities that necessitate its location on or near the proposed exception site.'" Record 64. That is not quite correct. The "demonstrated need" standard at OAR 660-004-0022(1)(a) is a different and independent standard than the two alternative standards set out at OAR 660-004-0022(1)(a)(A) and (B). Showing that a proposed use has "special features or qualities that necessitate its location on or near the proposed exception site" does not suffice in itself to also demonstrate either that (1) reasons justify why the state policy embodied in the applicable goal should not apply or (2) there is a demonstrated need for the proposed use, based on the requirements of Goals 3 to 19.

1 concluded that the NRIs are “necessary” to improve safety, efficiency, and  
2 navigability for vessels transiting the estuary. Record 139. However, although we  
3 understand the county to have concluded that the NRIs are necessary “based on”  
4 Goal 12, the findings do not identify any affirmative obligations under Goal 12  
5 that could constitute a “requirement” supporting a finding of demonstrated need  
6 under OAR 660-004-0022(1)(a).

7 This subassignment of error is sustained.

8 **C. Goal 13**

9 Goal 13 is to “conserve energy.” Goal 13 further provides that “[l]and uses  
10 developed on the land shall be managed and controlled so as to maximize the  
11 conservation of all forms of energy, based upon sound economic principles.”

12 The county concluded that the proposed channel expansions would  
13 “conserve energy” because they would reduce energy consumption by large ships  
14 that must currently idle offshore while they wait for a weather window to open  
15 up in order to safely enter and transit the estuary. Record 142-44. In the findings  
16 addressing OAR 660-004-0022(1)(a), the county listed Goal 13 among the goals  
17 whose requirements demonstrate a “need” for the proposed exceptions. Record  
18 49, 62. However, while the findings addressing OAR 660-004-0022(1)(a) discuss  
19 Goals 9 and 12 at length, they do not discuss Goal 13 at all.

20 Petitioner argues that the county erred to the extent that it attempted to  
21 justify the reasons exceptions under OAR 660-004-0022(1)(a) “based on the  
22 requirements” of Goal 13. Petitioner argues that neither LUBA nor the courts

1 have identified any affirmative obligations under Goal 13 that could constitute a  
2 “requirement” supporting a finding of demonstrated need or that could justify a  
3 reasons exception under OAR 660-004-0022(1)(a). *See 1000 Friends of Oregon*  
4 *v. Jackson County*, 292 Or App 173, 423 P3d 793 (2018), *rev dismissed*, 365 Or  
5 657 (2019) (Goal 13’s mandate to “manage and control” land use and  
6 development in order to conserve energy is not the type of goal requirement that  
7 would support a reasons exception under OAR 660-004-0022(1)(a) to develop  
8 agricultural land with a large solar power generation facility).

9 JCEP argues that the county did indeed intend to cite Goal 13 as an  
10 independent basis for the exceptions to Goal 16 under OAR 660-004-0022(1)(a),  
11 despite the lack of focused findings on that point. JCEP also argues that *1000*  
12 *Friends of Oregon* is distinguishable on the grounds that, here, the county is not  
13 citing Goal 13’s requirement to “manage and control” land to “conserve energy”  
14 to support the proposed *development* itself (there, a solar power facility, here, an  
15 expanded navigation channel) but is instead citing the energy conservation that  
16 would result from more efficient *management and control* of the navigation  
17 channel.

18 We disagree with JCEP that incidental energy savings that result from  
19 proposed development are sufficient to demonstrate a “need” for a reasons  
20 exception to a resource goal, based on the “requirements” of Goal 13. Given the  
21 nature of technological advances, new development is often more energy-  
22 efficient than pre-existing development or can be managed and controlled to

1 produce energy savings compared to pre-existing circumstances. That proposed  
2 development is more energy-efficient than pre-existing development or  
3 circumstances is certainly consistent with Goal 13, but it is not a “requirement”  
4 of Goal 13 that would provide an independent basis or justification for a reasons  
5 exception. If it were, then reasons exceptions based on Goal 13 would be  
6 commonplace. As noted earlier, a sufficient basis for a reasons exception under  
7 OAR 660-004-0022(1)(a) must be “exceptional.” *VinCEP*, 55 Or LUBA at 449.

8 This subassignment of error is sustained.

9 Petitioner’s first assignment of error is sustained.

#### 10 **PETITIONER’S SECOND ASSIGNMENT OF ERROR**

11 As an alternative to OAR 660-004-0022(1)(a), the county justified the  
12 exception to Goal 16 under OAR 660-004-0022(8). As noted above, OAR 660-  
13 004-0022(8) is specific to Goal 16 and, further, is specific to reasons exceptions  
14 to allow dredge and fill in five limited circumstances. If one of those five  
15 circumstances is present, OAR 660-004-0022(8) appears to offer an easier path  
16 to an exception compared to the catch-all provision at OAR 660-004-0022(1)(a)  
17 or the other Goal 16-specific rule, OAR 660-004-0022(7), for water-dependent  
18 commercial and industrial development.

19 OAR 660-004-0022(8)(b) allows exceptions to Goal 16 for “[d]redging to  
20 maintain adequate depth to permit continuation of the present level of navigation  
21 in the area to be dredged.” The county consulted dictionary definitions of the  
22 terms “continuation,” “present,” and “level” and concluded that the proposed

1 dredging at the three NRI sites to expand the width of the existing navigation  
2 channel qualifies for an exception under OAR 660-004-0022(8)(b) because the  
3 proposed dredging will not increase the quantity or frequency of navigation  
4 supported by the existing navigation channel. Instead, the county found, it will  
5 simply allow the same level of navigation in the (expanded) channel to continue  
6 throughout a broader range of weather conditions. Record 72-73.

7         Petitioner argues, and we agree, that the county misconstrued OAR 660-  
8 004-0022(8)(b). The dredging permitted under that rule is to maintain adequate  
9 depth to permit the present level of navigation to continue “in the area to be  
10 dredged.” The county may be correct that there will be no absolute increase in  
11 the number or frequency of deep-draft vessels transiting the *expanded navigation*  
12 *channel*, but the focus of the analysis under OAR 660-004-0022(8)(b) is the  
13 present level of navigation in the “*area to be dredged*.” (Emphasis added.) There  
14 is no dispute that the “present level of navigation” that occurs in the shallower  
15 areas proposed for dredging includes no navigation by deep-draft vessels.  
16 Presumably, the navigation that currently occurs in those areas is limited to  
17 shallow-draft vessels, such as recreational or fishing boats. Dredging these  
18 shallow areas to allow navigation by deep-draft, ocean-going vessels is not  
19 “continuation of the present level of navigation” under any definition.

20         JCEP argues that, as the county found, limiting the applicability of OAR  
21 660-004-0022(8)(b) to maintenance dredging of existing navigation channels  
22 would render that provision “meaningless,” since existing navigation channels



1 are already zoned to allow for dredging without an exception to Goal 16. Record  
2 73. However, that argument ignores the fact that navigation in the estuary is not  
3 limited to the existing deep-draft navigation channel. Much of the estuary  
4 consists of shallower but still navigable areas outside the navigation channel. If  
5 an area in a natural or conservation management unit is used for navigation by  
6 shallow-draft vessels and that area later silts up, then the county could approve  
7 dredging under OAR 660-004-0022(8)(b) to restore that area to depths necessary  
8 to allow continuation of the former level of navigation. OAR 660-004-0022(8)(b)  
9 is not rendered meaningless by giving effect to its plain language and limiting its  
10 scope to “the area to be dredged.” The county improperly construed OAR 660-  
11 004-0022(8)(b) to apply to the circumstances presented in JCEP’s applications  
12 when it does not.

13         Petitioner’s second assignment of error is sustained.

14 **PETITIONER’S THIRD, FOURTH, FIFTH, AND NINTH**  
15 **ASSIGNMENTS OF ERROR/CITIZENS’ FIRST ASSIGNMENT OF**  
16 **ERROR**

17         In petitioner’s third, fourth, fifth, and ninth assignments of error and in the  
18 third subassignment of error under Citizens’ first assignment of error, petitioner  
19 and Citizens challenge other aspects of the decision under OAR 660-004-0020,

1 Goal 16, Goal 6, Goal 7, and Goal 11.<sup>22</sup> Because we sustain petitioner’s first and  
2 second assignments of error that challenge the reasons exceptions, we need not  
3 address petitioner’s and Citizens’ alternative bases for reversing or remanding

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<sup>22</sup> ORS 197.732(2)(c)(B) and Goal 2, Part II(c)(2), require findings that “[a]reas that do not require a new exception cannot reasonably accommodate the use.” OAR 660-004-0020(2)(b) elaborates on this standard. In its third assignment of error, petitioner argues that the existing navigation channel itself is an “alternative site” for purposes of OAR 660-004-0020(2)(b). ORS 197.732(2)(c)(D) and Goal 2, Part II(c)(4), require findings that the “proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.” OAR 660-004-0020(2)(d) elaborates on this standard. In its fourth assignment of error, petitioner argues that the county misconstrued OAR 660-004-0020(2)(d) and failed to adopt adequate findings addressing the compatibility standard. In its fifth assignment of error, petitioner argues that the county failed to adopt findings establishing that the circumstances for each of the three NRI sites are the same, in violation of OAR 660-004-0020(3). In its ninth assignment of error, petitioner argues that the county failed to consider the “potential cumulative impacts” of the proposed dredging combined with other development activities authorized within the estuary, in violation of Goal 16.

In the third subassignment of error under its first assignment of error, Citizens argues that the amendments to the county’s comprehensive plan are inconsistent with Goal 6. Citizens also argues that the applications fail to comply with Goal 7 because testimony in the record demonstrates that the dredging allowed by the exceptions, zone changes, and CUPs might change the hydrodynamic characteristics of the navigation channel in a way that could increase tidal and tsunami wave energy in the estuary. In addition, Citizens argues that, while the county recently amended the DDNC-DA zone to allow “low-intensity utilities” as a permitted use, it did not discuss any need for such utilities in that zone in the present decision, in violation of Goal 11.

1 the decision for failure to comply with various administrative rules and statewide  
2 planning goals.

3 We do not reach petitioner's third, fourth, fifth, or ninth assignments of  
4 error, or the third subassignment of error under Citizens' first assignment of error.

5 **PETITIONER'S SIXTH, SEVENTH AND EIGHTH ASSIGNMENTS OF**  
6 **ERROR/CITIZENS' SECOND ASSIGNMENT OF ERROR**

7 In petitioner's sixth, seventh, and eighth assignments of error and in  
8 Citizens' second assignment of error, petitioner and Citizens challenge the  
9 portion of the county's decision that approves the CUPs to allow dredging and  
10 the temporary dredging pipelines.<sup>23</sup> As we explained above, the county's  
11 approval of CUPs is dependent on its successful approval of zone changes for all  
12 three NRI sites. Because we sustain petitioner's first and second assignments of  
13 error that challenge the reasons exceptions, because the zone changes for NRI #1  
14 and #2 are dependent on those reasons exceptions, and because JCEP submitted  
15 one application to rezone all three NRI sites, we need not address petitioner's and  
16 Citizens' challenges to the CUPs that depend entirely on those zone changes.

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<sup>23</sup> Petitioner's sixth assignment of error alleges that the county improperly construed CBEMP Policy 18, which the county was required to apply to the CUP applications. Petitioner's seventh assignment of error and Citizens' second assignment of error challenge the county's conditional use approval of the temporary dredging pipelines for numerous reasons. Petitioner's eighth assignment of error challenges the county's interpretation and application of CBEMP Policy 4 to the CUP applications.

1           We do not reach petitioner’s sixth, seventh, or eighth assignments of error  
2 or Citizens’ second assignment of error.

3       **CITIZENS’ FIRST ASSIGNMENT OF ERROR**

4           In the first and second subassignments of error under its first assignment  
5 of error, Citizens advances a miscellany of arguments challenging the county’s  
6 approval of the zone changes. As noted, NRI #1 and #2 require both reasons  
7 exceptions and zone changes in order to widen the existing navigation channel.  
8 As also noted, JCEP filed a consolidated application to rezone all three NRI sites  
9 to DDNC-DA. JCEP did not take the position below that NRI #3 should be  
10 rezoned independently from NRI #1 and #2—that is to say, if NRI #1 and #2 are  
11 not rezoned—or provide any independent analysis of NRI #3’s compliance with  
12 the zone change criteria. With our disposition of petitioner’s first and second  
13 assignments of error, the zone changes for NRI #1 and #2 are not effective.  
14 Accordingly, we need not address Citizens’ challenges to the county’s approval  
15 of the zone change application.

16           We do not reach the first and second subassignments of error under  
17 Citizens’ first assignment of error.

18       **CITIZENS’ THIRD ASSIGNMENT OF ERROR**

19           In its third assignment of error, Citizens alleges that the county committed  
20 several procedural errors. A procedural assignment of error, if sustained, would  
21 generally warrant remand of the decision. However, because we reverse the  
22 decision based on the county’s misconstruction of the administrative rules

1 governing reasons exceptions, we need not address Citizens' third assignment of  
2 error.

3 We do not reach Citizens' third assignment of error.

4 **DISPOSITION**

5 ORS 197.835(9)(a)(D) allows LUBA to reverse or remand a decision  
6 where the local government "[i]mproperly construed the applicable law." OAR  
7 661-010-0071(1)(c) provides that LUBA will reverse a decision that violates a  
8 provision of applicable law and is prohibited as a matter of law. OAR 661-010-  
9 0071(2)(a) and (d) provide that LUBA will remand a decision where "[t]he  
10 findings are insufficient to support the decision" or where "[t]he decision  
11 improperly construes the applicable law, but is not prohibited as a matter of law."  
12 We sustain petitioner's first and second assignments of error and conclude that  
13 the county's decision to approve the reasons exceptions to Goal 16 improperly  
14 construed OAR 660-004-0022(1) and OAR 660-004-0022(8).

15 Petitioner argues that, if we sustain its first or second assignments of error,  
16 reversal is the appropriate remedy because the county's decision approving  
17 reasons exceptions is prohibited as a matter of law. JCEP argues that, in the event  
18 that we sustain petitioner's or Citizens' assignments of error, remand is the  
19 appropriate remedy because (1) none of the errors would require more than  
20 insignificant changes to the applications and (2) any errors related to the county's

1 findings can be addressed on remand.<sup>24</sup> We agree with petitioner that reversal is  
2 the appropriate remedy because neither Goals 9, 12, or 13 nor OAR 660-004-  
3 0022(8) provide a basis for the county to approve the reasons exceptions. Absent  
4 any permissible basis to approve the reasons exceptions, they are prohibited as a  
5 matter of law.

6 The county's decision is reversed.

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<sup>24</sup> As explained above, we do not reach Citizens' assignments of error that challenge the portion of the county's decision approving the zone changes for all three NRI sites. However, JCEP does not argue that we should affirm the county's decision with respect to NRI #3, which does not require a reasons exception in order to be rezoned to DDNC-DA, and we do not believe we could grant such relief if it were requested. As noted, JCEP submitted an omnibus application that sought to rezone all three NRI sites to DDNC-DA and that did not request a segregated analysis or decision on a site-by-site basis, and the county did not issue a decision on a site-by-site basis. More importantly, LUBA almost certainly lacks authority to reverse in part and affirm in part a land use decision. *7th Street Station LLC v. City of Corvallis*, 55 Or LUBA 321, 327-28 (2007) (declining the petitioner's invitation to affirm in part and reverse in part in light of decisions questioning LUBA's authority to grant such relief); *City of Damascus v. City of Happy Valley*, 51 Or LUBA 150, 164-65 (2006) ("[T]he Court of Appeals has strongly suggested LUBA lacks authority to affirm an ordinance in part and remand in part.").