

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

CONFEDERATED TRIBES OF COOS,  
LOWER UMPQUA and SIUSLAW INDIANS,  
*Petitioner,*

and

CITIZENS FOR RENEWABLES, ROGUE  
CLIMATE, JODY MCCAFFREE, and  
OREGON SHORES CONSERVATION  
COALITION,  
*Intervenors-Petitioners,*

vs.

CITY OF COOS BAY,  
*Respondent,*

and

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

LUBA No. 2020-012

FINAL OPINION  
AND ORDER

Appeal from City of Coos Bay.

Rick Eichstaedt filed a petition for review and reply brief and argued on behalf of petitioner.

Tonia Moro filed a petition for review and reply brief and argued on behalf of intervenors-petitioners Citizens for Renewables, Rogue Climate, and Jody McCaffree.

1  
2 Anuradha Sawkar filed a petition for review and reply brief and argued on  
3 behalf of intervenor-petitioner Oregon Shores Conservation Coalition. Also on  
4 the brief was Crag Law Center.

5  
6 No appearance by City of Coos Bay.

7  
8 Seth J. King and Steven L. Pfeiffer filed the response briefs. Also on the  
9 briefs were Nikesh J. Patel and Perkins Coie LLP. Seth J. King argued on behalf  
10 of intervenor-respondent.

11  
12 RUDD, Board Chair; RYAN, Board Member; ZAMUDIO, Board  
13 Member, participated in the decision.

14  
15 REVERSED 05/04/2021

16  
17 You are entitled to judicial review of this Order. Judicial review is  
18 governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals a city council decision approving (1) a plan map amendment and reasons exception to change the designation of 3.3 acres within the Coos Bay Estuary from a natural management unit to a development management unit and (2) uses and activities permits to allow new and maintenance dredging in the redesignated area and a temporary pipeline to transport dredge spoils to disposal sites.

**MOTIONS TO TAKE OFFICIAL NOTICE**

Intervenor-respondent Jordan Cove Energy Project L.P. (JCEP) and intervenors-petitioners Citizens for Renewables, Jody McCaffree, and Rogue Climate (collectively, Citizens) filed motions to take official notice. We address them below.

**A. NPS Decision**

In 2018, petitioner proposed the nomination of the Q'alya ta Kukwis Shichdii me Traditional Cultural Property Historic District to the National Register of Historic Places. JCEP requests that we take official notice of a July 2, 2019 letter from the National Park Service (NPS) returning petitioner's proposed nomination (NPS Decision).

1           We may take notice of the official acts of the executive departments of the  
2   United States. ORS 40.090(2);<sup>1</sup> *Blatt v. City of Portland*, 21 Or LUBA 337, 341,

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<sup>1</sup> ORS 40.090 defines “[l]aw judicially noticed” as:

- “(1) The decisional, constitutional and public statutory law of Oregon, the United States, any federally recognized American Indian tribal government and any state, territory or other jurisdiction of the United States.
- “(2) Public and private official acts of the legislative, executive and judicial departments of this state, the United States, any federally recognized American Indian tribal government and any other state, territory or other jurisdiction of the United States.
- “(3) Rules of professional conduct for members of the Oregon State Bar.
- “(4) Regulations, ordinances and similar legislative enactments issued by or under the authority of the United States, any federally recognized American Indian tribal government or any state, territory or possession of the United States.
- “(5) Rules of court of any court of this state or any court of record of the United States, of any federally recognized American Indian tribal government or of any state, territory or other jurisdiction of the United States.
- “(6) The law of an organization of nations and of foreign nations and public entities in foreign nations.
- “(7) An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom. As used in this subsection, ‘comprehensive plan’ has the meaning given that term by ORS 197.015.”

1 *aff'd*, 109 Or App 259, 819 P2d 309 (1991), *rev den*, 314 Or 727 (1992).  
2 However, the motion for official notice must explain the relevance of the  
3 document to an issue in the appeal. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA  
4 688 (2007). JCEP argues that the NPS Decision “is an official act of a federal  
5 agency because it determines the status of the proposed National Register  
6 nomination for the [historic district]” and asserts that it is “offering the item as  
7 an official act of an agency relevant to matters raised by petitioner.” JCEP’s  
8 Motion to Take Official Notice 2-3. We agree that the decision is an official act  
9 of a federal agency, but JCEP does not explain the decision’s relevance to any  
10 issue in the appeal, apart from its general assertion to that effect. Furthermore,  
11 JCEP’s description of the circumstances that it believes form the basis for the  
12 NPS Decision sets out adjudicative facts of which we have no authority to take  
13 official notice. *Tualatin Riverkeepers*, 55 Or LUBA at 692.

14 The motion is denied.<sup>2</sup>

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<sup>2</sup> In the event that we grant JCEP’s motion to take official notice, petitioner requests that we also take official notice of “(1) [an] excerpt of the Order Granting Authorizations under Section 3 and 7 of the Natural Gas Act, issued March 19, 2020 \* \* \*; (2) an excerpt of the November 2019 Final Environmental Impact Statement (‘FEIS’) issued by the Federal Energy Regulatory Commission (‘FERC’) \* \* \*[,] and (3) a July 19, 2019 letter from the Oregon State Historic Preservation Office to FERC.” Petitioner’s Response to JCEP’s Motion to Take Official Notice 3-4. Because we deny JCEP’s motion to take official notice, we do not reach petitioner’s contingent motion.

1           **B.     DLCD CZMA Decision**

2           Intervenor-petitioner Citizens for Renewables asks that we take official  
3   notice of the Department of Land Conservation and Development's (DLCD's)  
4   February 19, 2020 decision objecting to JCEP's certification of compliance with  
5   the federal Coastal Zone Management Act (CZMA). We take notice of the  
6   executive actions of the state pursuant to ORS 40.090(2) and the motion is  
7   granted.

8           **C.     CZMA Override Application and CWA Bypass Application**

9           Citizens for Renewables also asks that we take official notice of (1) JCEP's  
10   notice of appeal of the DLCD CZMA Decision to the United States Department  
11   of Commerce (CZMA Override Application) and (2) a petition that JCEP filed  
12   with the Federal Energy Regulatory Commission (FERC), seeking a waiver of  
13   the federal requirement to obtain a Clean Water Act (CWA) permit (CWA  
14   Bypass Application). JCEP's CZMA Override Application and CWA Bypass  
15   Application are documents created by a corporation and are not members of a  
16   class of documents identified as eligible for official notice in ORS 40.090. The  
17   motion is denied.

18          **MOTION TO TAKE EVIDENCE**

19          LUBA may "take evidence not in the record in the case of disputed  
20   allegations in the parties' briefs concerning \* \* \* procedural irregularities not  
21   shown in the record and which, if proved, would warrant reversal or remand of  
22   the decision." OAR 661-010-0045(1). Citizens for Renewables requests that we

1 take the (1) DLCD CZMA Decision, (2) CZMA Override Application, and (3)  
2 CWA Bypass Application as “evidence of procedural irregularities corroborating  
3 those disclosed in the record and others not disclosed by the record.” Citizens for  
4 Renewables’ Motion to Take Official Notice and Motion to Take Evidence 4.  
5 These are the same three documents of which Citizens for Renewables requested  
6 that we take official notice.

7 Citizens for Renewables argues that the DLCD CZMA Decision, of which  
8 we have taken official notice, corroborates evidence in the record. Providing  
9 additional evidentiary support to that already in the record is not a basis for  
10 granting a motion to take evidence. Citizens for Renewables also argues that the  
11 DLCD CZMA Decision supports its position that the city’s conditions of  
12 approval are inadequate but, even if that were true, the decision would not reflect  
13 a *procedural* irregularity requiring the consideration of additional facts. Citizens  
14 for Renewables has not established the existence of disputed facts related to  
15 procedural irregularities which, if proved, would warrant reversal or remand. The  
16 motion to take the DLCD CZMA Decision as extra-record evidence is denied.

17 Citizens for Renewables argues that the CZMA Override Application and  
18 CWA Bypass Application establish procedural irregularities because they show  
19 that JCEP failed to inform the city of its intent to file those documents. Only the  
20 local government is capable of committing “procedural irregularities” within the  
21 meaning of OAR 661-010-0045(1) and, accordingly, actions by an applicant  
22 cannot give rise to procedural irregularities supporting a motion to take evidence.

1    *ODOT v. Coos County*, 34 Or LUBA 805, 807 (1998). The motion to take the  
2    CZMA Override Application and CWA Bypass Application as extra-record  
3    evidence is denied.

4            We denied similar motions regarding the CZMA Override Application and  
5    the CWA Bypass Application in *Citizens for Renewables v. Coos County*, \_\_\_ Or  
6    LUBA \_\_\_, \_\_\_ (LUBA No 2020-003, Feb 11, 2021) (slip op at 6-8), and *Oregon*  
7    *Shores Conservation Coalition v. Coos County*, \_\_\_ Or LUBA \_\_\_, \_\_\_ (LUBA  
8    Nos 2019-137/2020-006, Dec 22, 2020) (slip op at 6-9). However, we concluded  
9    that, because no party disputed certain bare facts, the parties could cite those facts  
10   in support of their arguments, even in the absence of a successful motion to take  
11   evidence. The following facts are undisputed:

- 12            “•    [JCEP] withdrew its state-level wetland removal-fill permit  
13                   application and its applications for proprietary easements;
- 14            “•    The CZMA [Override Application] initiates proceedings at  
15                   the United States Department of Commerce by [JCEP] to  
16                   override the DLCD [CZMA D]ecision; and
- 17            “•    In the CWA [Bypass Application], [JCEP] seeks FERC’s  
18                   ruling that the State of Oregon waived the requirement that  
19                   [JCEP] obtain a CWA permit for the project.” JCEP’s  
20                   Response to Citizens for Renewables’ Motion to Take  
21                   Official Notice and Motion to Take Evidence 8-9.

22    Similarly, in this appeal, we will consider references to those undisputed  
23    circumstances in the parties’ arguments.



1   **FACTS**

2           The city and other local governments have approved various applications  
3 related to JCEP’s proposal to construct a natural gas liquefaction facility and  
4 liquefied natural gas (LNG) export terminal (LNG terminal) at Jordan Cove,  
5 located within the Coos Bay Estuary.<sup>3</sup> See, e.g., *Oregon Shores Conservation*  
6 *Coalition v. City of North Bend*, \_\_\_ Or LUBA \_\_\_ (LUBA No 2019-118, July  
7 17, 2020); *Oregon Shores Conservation Coalition v. Coos County*, \_\_\_ Or LUBA  
8 \_\_\_ (LUBA Nos 2019-137/2020-006, Dec 22, 2020). Jordan Cove is located  
9 approximately seven miles inland from the mouth of the estuary. To export the  
10 LNG, JCEP proposes to use large, deep-draft LNG tankers, which will access the  
11 terminal site via an existing federal navigation channel. The LNG tankers will  
12 transit the estuary via the navigation channel approximately 240 times per year  
13 (120 tankers per year going to and from the ocean, for a total of 240 transits).

14           State law generally requires that professional pilots direct the navigation  
15 of large commercial vessels entering or exiting the estuary, including the

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<sup>3</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 proposed LNG tankers. ORS 776.405(1)(a) (“[A] person may not pilot any vessel  
2 upon any of the pilotage grounds established under ORS 776.025 or 776.115  
3 without being a licensee under this chapter \* \* \*.”); ORS 776.025(3) (“The Coos  
4 Bay bar pilotage ground extends from the head of navigation on Coos Bay and  
5 its tributaries; then downstream to the open ocean at the entrance to Coos Bay  
6 \* \* \*.”). Pilots board an inbound or outbound vessel and then direct the vessel  
7 safely through the estuary via the navigation channel. However, as discussed  
8 below, in certain weather conditions, including fog and high winds, the pilots  
9 may deem it unsafe to pilot a vessel through the channel due to existing  
10 constraints at several points along the channel.<sup>4</sup>

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<sup>4</sup> The city’s decision describes the current constraints on the existing channel as follows:

“The Coos Bay Channel serves a vital purpose in providing the only safe vessel access to and from Coos Bay and the Pacific Ocean for marine terminals located in Coos Bay. The Channel was initially authorized in 1899 and since then has undergone ten modifications. Most recently, the Channel 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. 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 more limiting restrictions on when vessels may safely transit the Channel. These restrictions, in

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  
5   north, requiring inbound ships to make an approximately 95-degree turn,  
6   followed immediately by an approximately 21-degree turn in the opposite  
7   direction. Further north, the channel turns west in two places, at River Miles 4  
8   and 6. At each of these three turns, JCEP proposes to widen the existing channel

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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.

Approving the Application will improve navigability for vessels transiting Coos Bay by dredging one of the turning areas (NRI #4) of the Channel that has historically limited vessel transit during various weather and environmental conditions. This will improve the efficiency of the level of vessel transit for all current and future vessels using the Channel and the Oregon International Port of Coos Bay ('Port')." Record 20-21.

1 by dredging the shallow areas adjacent to the channel from their existing depth  
2 to the same 37-foot depth as the channel. At River Mile 7, the channel turns east.  
3 In addition to the three expansions just mentioned, and as particularly relevant to  
4 this appeal, JCEP proposes to widen the existing channel between River Miles 6  
5 and 7 to allow vessels to begin their turn east earlier.

6 The four proposed channel expansions are known in the record and  
7 decision as Navigational Reliability Improvement (NRI) #1, #2, #3, and #4.<sup>5</sup> NRI

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<sup>5</sup> The city's decision describes JCEP's explanation of the role of dredging:

“Dredging, or [NRIs], could increase the operational window to safely transit any vessel through the Channel. [JCEP] notes that 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, relocating aids to navigation and reducing the required Channel directional changes. The NRIs are designed to reduce entry and departure delays and allow for more efficient vessel transits through the Channel for the size of vessels entering the Port today.” Record 106-07.

The city agreed with JCEP that

“the proposed [NRIs] will allow for transit of [LNG] vessels of similar overall dimensions to those listed in the July 1, 2008 US Coast Guard (USCG) Waterway Suitability Report, the USCG Letter of Recommendation dated May 20, 2018 and USCG letter confirmation dated November 7, 2018, but under a broader range of weather conditions, specifically higher wind speeds. As a result, JCEP estimates that upon completion of the proposed [NRI], JCEP will be able to export the full capacity of the optimized design production of the LNG terminal on a consistent basis. For these reasons, [JCEP] advances that the dredging associated with the

1 #1, #2, and #3 are the subject of a related appeal of a county decision approving  
2 reasons exceptions, zone changes, and conditional use permits (CUPs) for those  
3 sites.<sup>6</sup> Only NRI #4 is at issue in this appeal.

4 NRI #4 is approximately 3.3 acres in size and is located adjacent to the  
5 channel between River Miles 6 and 7, in the 52-Natural Aquatic (52-NA)  
6 management unit. As the city explained in its findings,

7 “Goal 16 \* \* \* divides areas into ‘Natural,’ ‘Conservation’ and  
8 ‘Development’ management units and provides permissible uses  
9 within each area. While all three units allow some form of dredging  
10 (i.e., ‘Natural’ allows ‘*Dredging necessary for on-site maintenance*  
11 *of existing functional tide gates and associated drainage channels*  
12 *and bridge crossing support structures*; ‘Conservation’ allows ‘*new*  
13 *dredging for boat ramps and marinas*,’ ‘*minor navigational*  
14 *improvements*,’ ‘*dredging necessary for mineral extraction*,’ and  
15 ‘*Aquaculture requiring dredge or fill or together alteration of the*  
16 *estuary*’; and ‘Development[’] allows ‘*Dredge or fill, as allowed*  
17 *elsewhere in the goal*,’ ‘*Water transport channels where dredging*  
18 *may be necessary*’), \* \* \* the City Council finds that the degree and  
19 type of dredging allowed in the 52-NA (‘Natural’) management unit  
20 requires an exception to Goal 16 to complete NRI #4.” Record 34  
21 (emphasis in original).

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[NRI] will maintain adequate depth to permit continuation of the  
presently allowed level of navigation, and allow that navigation to  
occur more efficiently, safely and reliably.” Record 84.

<sup>6</sup> In an opinion issued this date in *Oregon Shores Conservation Coalition v. Coos County*, \_\_\_ Or LUBA \_\_\_ (LUBA No 2020-002, May 4, 2021), we reversed the county’s decision to (1) approve reasons exceptions for NRI #1 and #2, (2) rezone NRI #1, #2, and #3 to DDNC-DA, and (3) grant CUPs for uses and activities on those sites.

1 The Coos Bay Estuary Management Plan (CBEMP), which the city has adopted  
2 into its comprehensive plan, provides that, in the 52-NA management unit,  
3 “[n]ew dredging shall be allowed only to dredge a small channel on the north side  
4 of the proposed airport fill as necessary to maintain tidal currents.” An exception  
5 to Goal 16 and a plan map amendment are therefore required in order to dredge  
6 for a different purpose. We discuss Goal 16 and associated regulations in more  
7 detail below.

8 JCEP applied to the city to approve (1) a post-acknowledgment plan text  
9 amendment to take a proposed reasons exception to Goal 16 for NRI #4, (2) a  
10 plan map amendment to redesignate NRI #4 from the 52-NA management unit  
11 to the Deep-Draft Navigation Channel (DDNC-DA) management unit, and (3)  
12 use and activity permits to dredge NRI #4 and to place a temporary dredge  
13 material disposal pipeline. The city planning commission conducted hearings on  
14 the applications and recommended approval of the applications to the city  
15 council. The city council conducted a hearing on the applications and, on January  
16 7, 2020, adopted an ordinance approving the applications. This appeal followed.

## 17 **INTRODUCTION**

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

19 Petitioner presents five assignments of error. The first three assignments  
20 of error challenge the city’s approval of a reasons exception to Goal 16 for NRI  
21 #4 under the applicable administrative rules at OAR chapter 660, division 4. The  
22 fourth assignment of error challenges the city’s approval of a CUP for the

1 dredging of NRI #4, which is premised on a successful reasons exception and  
2 redesignation to DDNC-DA. That CUP required the city to apply provisions of  
3 the Coos Bay Municipal Code (CBMC) and the CBEMP. The fifth assignment  
4 of error challenges the city's redesignation of NRI #4 from 52-NA to DDNC-NA  
5 under CBMC criteria that apply to plan amendment applications.

6 Intervenor-petitioner Oregon Shores Conservation Coalition (Oregon  
7 Shores) presents five assignments of error. The first four assignments of error  
8 challenge the city's approval of a reasons exception to Goal 16. The fifth  
9 assignment of error alleges that the city's approval of a reasons exception and  
10 redesignation of NRI #4 to DDNC-DA is inconsistent with Goal 16.

11 Citizens raise three assignments of error. Citizens' first assignment of error  
12 challenges compliance with the applicable plan amendment standards in the  
13 CBMC. The second assignment of error challenges the city's conditional use  
14 approval of dredging and the placement of a temporary dredge material disposal  
15 pipeline as an "accessory" use to the proposed dredging. We understand the third  
16 assignment of error to allege that the city committed a procedural error.

17 As we explain in detail below, we sustain petitioner's and Oregon Shores'  
18 challenges to the reasons exception for NRI #4 and conclude that the city's  
19 decision to approve that exception to Goal 16 "based on" Statewide Planning  
20 Goals 9 (Economic Development), 12 (Transportation), and 13 (Energy  
21 Conservation) improperly construes the administrative rules governing reasons  
22 exceptions. Because NRI #4 cannot be redesignated to DDNC-DA without an

1 effective exception to Goal 16, we need not and do not consider petitioner's,  
2 Oregon Shores', and Citizens' challenges to the city's application of the plan  
3 amendment criteria in the CBMC. Similarly, because the CUP is dependent on a  
4 successful redesignation of NRI #4 to DDNC-DA, and because NRI #4 has not  
5 been redesignated, we need not and do not address petitioner's, Oregon Shores',  
6 and Citizens' challenges to the portion of the decision approving the CUP. We  
7 also need not and do not address Citizens' procedural assignment of error.

8 **B. Reasons Exception Standards**

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

11 Goal 16 is, in part, to “protect, maintain, where appropriate develop, and  
12 where appropriate restore the long-term environmental, economic, and social  
13 values, diversity and benefits of Oregon's estuaries.” To achieve that goal with  
14 respect to long-term environmental values, Goal 16 generally restricts or  
15 prohibits dredging within estuarine waters that are designated as natural or  
16 conservation management units, while generally allowing dredging in areas  
17 designated as development management units.

18 As discussed below, Goal 16 and associated administrative rules  
19 distinguish between “water-dependent” uses and “non-water-dependent” uses.<sup>7</sup>

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<sup>7</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



1 Generally, Goal 16 favors appropriate water-dependent uses of estuarine waters,  
2 while discouraging (if not prohibiting) most non-water-dependent uses. Under  
3 Goal 16, navigation is regarded as a water-dependent use. *See* Goal 16,  
4 Implementation Requirement 2(a) (providing that dredging and/or filling shall be  
5 allowed only “[i]f required *for navigation or other water-dependent uses* that  
6 require an estuarine location” (emphasis added)).

7 As noted, to approve dredging for the expansion of the existing navigation  
8 channel in natural management units, the city must approve one of three types of  
9 “exceptions” to Goal 16. Here, the county approved a “reasons” exception. Under  
10 Statewide Planning Goal 2 (Land Use Planning) and ORS 197.732(2)(c), a city  
11 may approve a “reasons” exception to a goal requirement if four standards are  
12 met:

- 13 “(1) Reasons justify why the state policy embodied in the  
14 applicable goals should not apply;
- 15 “(2) Areas which do not require a new exception cannot  
16 reasonably accommodate the use;
- 17 “(3) The long-term environmental, economic, social and energy  
18 consequences resulting from the use of the proposed site with  
19 measures designed to reduce adverse impacts are not  
20 significantly more adverse than would typically result from  
21 the same proposal being located in areas requiring a goal  
22 exception other than the proposed site; and

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

4    OAR 660-004-0020 elaborates on these four standards. In addition, OAR 660-  
5    004-0022 provides a set of standards for evaluating whether the first of the above  
6    standards is met, that is, whether “reasons” justify why the state policy embodied  
7    in the applicable goals should not apply.

8           OAR 660-004-0022(1) sets out a generic, “catch-all” provision that  
9    provides standards for reasons exceptions in the absence of other, goal-specific  
10   rules.<sup>8</sup> One of those standards is that there must be a “demonstrated need for the

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<sup>8</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 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

1 proposed use or activity, based on one or more of the requirements of Goals 3 to  
2 19.” OAR 660-004-0022(1)(a). Subsequent subsections of OAR 660-004-0022  
3 set out a number of goal-specific rules. Two of those subsections are specific to  
4 Goal 16. OAR 660-004-0022(7) provides standards for reasons exceptions to  
5 Goal 16 to allow water-dependent industrial, commercial, or recreational uses in  
6 development and conservation management units and is based generally on an  
7 economic analysis.<sup>9</sup> OAR 660-004-0022(8) sets out five circumstances where

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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.”

<sup>9</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;

1 reasons exceptions to Goal 16 may be justified for “other alterations and uses,”  
2 including dredge and fill.<sup>10</sup> One of those circumstances is “[d]redging to maintain

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“(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.”

<sup>10</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

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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;
- “(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

1 adequate depth to permit continuation of the present level of navigation in the  
2 area to be dredged.” OAR 660-004-0022(8)(b).

3 In the present case, the city primarily justified the Goal 16 exception for  
4 NRI #4 based on the catch-all provision at OAR 660-004-0022(1). The city  
5 concluded that there is a “demonstrated need” for the proposed channel  
6 expansion, based on the requirements of Goals 9, 12, and 13. In the alternative,  
7 the city relied upon the Goal 16-specific standard at OAR 660-004-0022(8)(b).  
8 The findings take the position that the proposed expansion of the existing  
9 navigation channel is intended to “permit continuation of the present level of  
10 navigation in the area to be dredged.”

11 **C. LUBA’s Standard of Review**

12 ORS 197.835(6) provides that LUBA “shall reverse or remand an  
13 amendment to a comprehensive plan if the amendment is not in compliance with  
14 the goals.” In addition, ORS 197.835(9)(a)(D) provides that LUBA shall reverse  
15 or remand a land use decision if LUBA finds that the local government  
16 “[i]mproperly construed the applicable law.” A reasons exception to a statewide  
17 planning goal must be consistent with ORS 197.732 and the administrative rules  
18 governing exceptions.

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

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that minimizes adverse impacts upon the affected aquatic and  
shoreland areas and habitats.”

1     **PETITIONER’S AND OREGON SHORES’ FIRST ASSIGNMENTS OF**  
2     **ERROR**

3             OAR 660-004-0022 provides, in part:

4             “An exception under Goal 2, Part II(c) may be taken for any use not  
5             allowed by the applicable goal(s) \* \* \*. \* \* \*

6             “(1) For uses not specifically provided for in this division, \* \* \*  
7             the reasons shall justify why the state policy embodied in the  
8             applicable goals should not apply. Such reasons include but  
9             are not limited to the following:

10            “(a) There is a demonstrated need for the proposed use or  
11            activity, based on one or more of the requirements of  
12            Goals 3 to 19[.]”

13     Citing *VinCEP v. Yamhill County*, 55 Or LUBA 433 (2007), petitioner and  
14     Oregon Shores argue that the city failed to demonstrate that the proposed  
15     exception to Goal 16 is necessary for the city to satisfy any of its obligations  
16     under Goals 9, 12, or 13. The city found:

17            “Applying the above criteria, the ‘demonstrated need’ for the NRI  
18            under the Goals is found in Goal 9 \* \* \* to provide ‘*opportunities*  
19            \* \* \* *for a variety of economic activities vital to the health, welfare,*  
20            *and prosperity of Oregon’s citizens,*’ Goal 12 \* \* \* ‘[t]o provide and  
21            *encourage a safe, convenient and economic transportation system*’  
22            in Coos Bay, and Goal 13 \* \* \* ‘*to conserve energy*’ through  
23            avoiding ship transit delay, and thus more efficient transit  
24            opportunities. NRI #4 has ‘special features’ because the location is  
25            based on physical restrictions at a fixed vessel turning area in the  
26            Channel (identified by the [Pilots]) which currently restricts  
27            navigation during various weather conditions. Accordingly, the  
28            proposed dredging activities requiring an exception can only occur  
29            at the specific NRI location identified in the Application.

1 “[JCEP] has designed the extent of dredging at NRI #4 at the  
2 minimum possible area to achieve the needed increase in  
3 navigational efficiency. The City Council gives substantial weight  
4 to the written testimony of Captain George Wales, [Pilots], who  
5 provides evidence that NRI #4 is currently a restrictive turning area  
6 that is preventing safe and efficient transit in the Channel and  
7 forcing ships to idle offshore burning fuel until transit conditions  
8 improve which, in turn, is limiting both economic opportunities and  
9 safe and efficient vessel transportation. Captain Wales further  
10 provides evidence that, if approved, the NRIs will increase  
11 economic opportunities for vessel traffic by 20%. While there are  
12 other comments in the record questioning whether the NRIs will  
13 promote economic growth (under Goal 9) or provide safe,  
14 convenient and economic transportation (Goal 12), or energy  
15 efficiency (Goal 13), no substantive evidence was submitted  
16 contradicting Captain Wales’ testimony regarding the activities of  
17 this location for [NRI #4], or testimony is offered to channel transit  
18 efficiency and no evidence demonstrated that widening another  
19 location within the City of Coos Bay will provide the transportation  
20 and economic benefits obtained at NRI #4.

21 “The City Council finds that the Channel, as currently configured,  
22 is hindering the City’s Goal 9, Goal 12 and Goal 13 goals by limiting  
23 transit of all large vessels currently entering the Channel, causing  
24 unnecessary idling and loss of energy and limiting economic growth  
25 opportunities. Correspondingly, the City Council finds that  
26 approving the Application will provide a net social benefit under  
27 Goal 9, Goal 12 and Goal 13.” Record 40-41 (emphasis in original;  
28 citation and footnotes omitted).

29 We agree with petitioner and Oregon Shores and conclude that the city failed to  
30 demonstrate that there is a need for the Goal 16 exception.

31 **A. Goal 9**

32 Goal 9 is to “provide *adequate* opportunities throughout the state for a  
33 variety of economic activities vital to the health, welfare, and prosperity of



1 Oregon’s citizens.” (Emphasis added.) Under the goal, comprehensive plans for  
2 urban areas must “provide for at least an *adequate supply* of sites of suitable sizes,  
3 types, locations, and service levels for a variety of industrial and commercial uses  
4 consistent with plan policies.” (Emphasis added.)

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

15 The city council found that the exception to allow NRI #4 is consistent  
16 with the direction in Goal 9 to provide adequate economic opportunities:

17 “[JCEP] has provided evidence that the purpose of the Application  
18 is to complete NRI #4 which, in turn, will facilitate a broader  
19 operational window and increase safety and efficiency of vessel  
20 transit in the Channel, which will result in increased economic  
21 opportunities for the City and the region by making the Channel  
22 more efficient for vessel traffic that will bring more cargo calls (and  
23 related revenue) to the International Port of Coos Bay and the  
24 region.

25 “While several commenters asserted that [NRI #4] would not bring

1 economic benefits, these comments were not supported by  
2 substantial evidence in the record. Accordingly, the City Council  
3 finds that the Application complies with Goal 9.” Record 33  
4 (citations omitted).

5 As noted, based on the testimony of Captain Wales, the city council also found  
6 that the NRIs, if approved, “will increase economic opportunities for vessel  
7 traffic by 20%.” Record 41. These findings do not demonstrate that, absent an  
8 exception, the city will fail to provide the “adequate” economic opportunities  
9 required by Goal 9 or otherwise explain why denying the exception, and  
10 continuing to allow for vessel traffic at 80% of that projected by Captain Wales,  
11 would result in inadequate economic opportunities under Goal 9.

12 As additional support, JCEP points to the city’s findings of compliance  
13 with Coos Bay Comprehensive Plan (CBCP) Economic Development Goal 6,  
14 Policies 6.1 and 6.2. Policy 6.1 requires the city to “[m]aximize the potential uses  
15 and benefits the waterfront and deep-water port offers to the city and the region  
16 as a whole,” and Policy 6.2 calls for the city to “[s]upport the Port of Coos Bay  
17 in its development efforts for transportation linkage and to develop a deep-draft  
18 navigation channel to accommodate large cargo vessels and increase shipping  
19 activities and water-dependent uses.” The city found that NRI #4 complies with  
20 these policies:

21 “The Application meets the central purpose of Goal 6, Policy 6.1  
22 and 6.2 (maximizing the potential uses and benefits of the  
23 International Port of Coos Bay) by providing more efficient transit  
24 for cargo vessels. Construction of NRI #4 will widen a currently  
25 constrictive turning area, thereby facilitating vessel navigation  
26 during a wider weather-window. For current shipping, this will

1       reduce off-shore idling time, enhance maneuverability of vessels,  
2       and also promote increased future cargo traffic into the International  
3       Port of Coos Bay. The City Council finds that the Application  
4       complies with Goal 6, Policy 6.1 and 6.2.” Record 26 (citations  
5       omitted).

6       We agree with petitioner and Oregon Shores that the city’s findings that these  
7       policies are met address different considerations and are not sufficient to satisfy  
8       the city’s obligation under OAR 660-004-0022(1)(a), as construed in *VinCEP*, to  
9       demonstrate that, absent the exception, it will fail to satisfy a requirement under  
10      Goal 9.

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,  
14      without providing for a luxury hotel on agricultural land to attract wine country  
15      tourists who would otherwise stay at luxury hotels in nearby cities, the county  
16      would be at risk of violating its obligation under Goal 9 to provide “adequate  
17      opportunities \* \* \* for a variety of economic activities.” We held that a desire to  
18      diversify or boost the local economy was an insufficient basis to take an  
19      exception to Goal 3, in part because such a broad rationale would make it  
20      relatively easy to justify an exception for many economic uses of resource lands  
21      prohibited by the resource goals. We noted that a sufficient basis for an exception  
22      to a resource goal based on the general obligations of Goal 9 must be  
23      “exceptional,” in the sense that the rationale is self-limiting, justified by an  
24      exceptional circumstance, and not so broadly framed that it can be applied to

1 establish other exceptions across a broad range of circumstances. *VinCEP*, 55 Or  
2 LUBA at 449.

3 As we explained in *VinCEP*, a general desire to diversify or boost the local  
4 economy is an insufficient basis for an exception under OAR 660-004-  
5 0022(1)(a), in large part because that rationale knows no boundaries. If an  
6 exception for a luxury wine country hotel on agricultural land can be justified  
7 based on a general desire for a bigger and more diverse local economy, why not  
8 a dozen hotels? Why not any other urban commercial use? A rationale for an  
9 exception that is easily extended to a wide range of circumstances is antithetical  
10 to OAR 660-004-0022(1)(a) and the overall statewide land use planning scheme.

11 These subassignments of error are sustained.

12 **B. Goal 12**

13 The city council found that NRI #4 met Goal 12, which is to “provide and  
14 encourage a safe, convenient and economic transportation system.” As Oregon  
15 Shores and petitioner point out, Goal 12 requires local governments to adopt  
16 transportation plans that, among other things,

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

1 Goal 12 is implemented by OAR chapter 660, division 12, the Transportation  
2 Planning Rule (TPR).<sup>11</sup> As petitioner and Oregon Shores correctly observe, Goal  
3 12 and the TPR largely impose planning obligations for the content of required  
4 transportation system plans (TSPs) and, outside those planning obligations,  
5 impose few specific “requirements” on the design or availability of particular  
6 transportation facilities, including navigation channels. We agree with Oregon  
7 Shores and petitioner that, in this case, nothing in Goal 12 requires the city to  
8 approve an exception for NRI #4.

9 This opinion and our decision in *Oregon Shores Conservation Coalition v.*  
10 *Coos County*, \_\_\_ Or LUBA \_\_\_ (LUBA No 2020-002, May 3, 2021), issued this  
11 date, appear to be the first occasions that LUBA has had to address a goal  
12 exception under OAR 660-004-0022(1)(a) based on the requirements of Goal 12.  
13 Goal 12 largely imposes planning obligations, specifically the obligation that  
14 local governments adopt TSPs designed to satisfy Goal 12’s mandate for safe,  
15 convenient, and economic transportation systems that, among other things,  
16 facilitate the flow of goods and services over the relevant planning period.<sup>12</sup> The  
17 city’s Goal 12 findings explain:

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<sup>11</sup> OAR 660-012-0065(3)(l) 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.

<sup>12</sup> We note that it is at least possible that a city could demonstrate a requirement for a proposed transportation improvement if it is listed or identified

1 “[JCEP] notes that Goal 12 directs local governments to plan  
2 transportation systems that consider all modes of transportation,  
3 including water, [and] that facilitate the flow of goods and services  
4 in an economic manner. The evidence establishes that the  
5 Application furthers these goals by supporting safer and more  
6 efficient use of the Channel for water transportation via improved  
7 vessel transit at NRI #4. Further, approval of the Application will  
8 conserve energy that is currently wasted when, outside the  
9 Channel’s operational window, vessels wait outside the Channel,  
10 using fuel and additional time and expense to transit. The City  
11 Council finds that the Application meets Goal 12.” Record 33-34  
12 (citations omitted).

13 Although we understand the city to have concluded that the exception is  
14 necessary to satisfy a requirement under Goal 12, the findings do not identify any  
15 affirmative obligations under Goal 12 that could constitute a “requirement”  
16 supporting a finding of demonstrated need under OAR 660-004-0022(1)(a).

17 These subassignments of error are sustained.

### 18 **C. Goal 13**

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

22 The city concluded that the proposed channel expansion would “conserve  
23 energy” because it would reduce energy consumption by large ships that must  
24 currently idle offshore while they wait for a weather window to open up in order

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in the local government’s acknowledged TSP as a planned transportation improvement to be constructed within the relevant planning period. However, JCEP does not argue that the city’s TSP identifies or lists NRI #4 as a planned transportation improvement.

1 to safely enter and transit the estuary. Record 34.<sup>13</sup> In the findings addressing  
2 OAR 660-004-0022(1)(a), the city concluded that “[t]here is a demonstrated  
3 need” for NRI #4, in conjunction with NRI #1, #2, and #3, because the current  
4 configuration of the channel limits the transit of all large vessels, causing  
5 unnecessary idling and loss of energy. Record 41.

6 Petitioner and Oregon Shores argue that the city erred to the extent that it  
7 attempted to justify the reasons exception under OAR 660-004-0022(1)(a) “based  
8 on the requirements” of Goal 13. Petitioner and Oregon Shores argue that neither  
9 LUBA nor the courts have identified any affirmative obligations under Goal 13  
10 that could constitute a “requirement” supporting a finding of demonstrated need  
11 or that could justify a reasons exception under OAR 660-004-0022(1)(a). *See*  
12 *1000 Friends of Oregon v. Jackson County*, 292 Or App 173, 423 P3d 793 (2018),  
13 *rev dismissed*, 365 Or 657 (2019) (Goal 13’s mandate to “manage and control”  
14 land use and development in order to conserve energy is not the type of goal

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<sup>13</sup> The city council found:

“Goal 13 directs local governments to manage land use so as to maximize the conservation of all forms of energy. The Application will facilitate energy conservation by increasing the safety and efficiency of vessel transit of the Channel, and by increasing the Channel’s operational window, which will reduce the amount of time vessels spend waiting to enter and navigate the Channel, due to environmental conditions that exceed those required by the Pilots for a safe vessel transit. The City Council finds that the Application meets Goal 13.” Record 34 (citation omitted).

1 requirement that would support a reasons exception under OAR 660-004-  
2 0022(1)(a) to develop agricultural land with a large solar power generation  
3 facility).

4 JCEP argues that *1000 Friends of Oregon* is distinguishable on the grounds  
5 that, here, the city is not citing Goal 13's requirement to "manage and control"  
6 land to "conserve energy" to support the proposed *development* itself (there, a  
7 solar power facility, here, an expanded navigation channel) but is instead citing  
8 the energy conservation that would result from more efficient *management and*  
9 *control* of the navigation channel.

10 We disagree with JCEP that incidental energy savings that result from  
11 proposed development are sufficient to demonstrate a "need" for a reasons  
12 exception to a resource goal, based on the "requirements" of Goal 13. Given the  
13 nature of technological advances, new development is often more energy-  
14 efficient than pre-existing development or can be managed and controlled to  
15 produce energy savings compared to pre-existing circumstances. That proposed  
16 development is more energy-efficient than pre-existing development or  
17 circumstances is certainly consistent with Goal 13, but it is not a "requirement"  
18 of Goal 13 that would provide an independent basis or justification for a reasons  
19 exception. If it were, then reasons exceptions based on Goal 13 would be  
20 commonplace. As noted earlier, a sufficient basis for a reasons exception under  
21 OAR 660-004-0022(1)(a) must be "exceptional." *VinCEP*, 55 Or LUBA at 449.

22 These subassignments of error are sustained.



1           Petitioner’s and Oregon Shores’ first assignments of error are sustained.

2   **PETITIONER’S AND OREGON SHORES’ SECOND ASSIGNMENTS OF**  
3   **ERROR**

4           As an alternative to OAR 660-004-0022(1)(a), the city justified the  
5   exception to Goal 16 under OAR 660-004-0022(8). As noted above, OAR 660-  
6   004-0022(8) is specific to Goal 16 and, further, is specific to reasons exceptions  
7   to allow dredge and fill in five limited circumstances. If one of those five  
8   circumstances is present, OAR 660-004-0022(8) appears to offer an easier path  
9   to an exception compared to the catch-all provision at OAR 660-004-0022(1)(a)  
10   or the other Goal 16-specific rule, OAR 660-004-0022(7), for water-dependent  
11   commercial and industrial development.

12           OAR 660-004-0022(8)(b) allows exceptions to Goal 16 for “[d]redging to  
13   maintain adequate depth to permit continuation of the present level of navigation  
14   in the area to be dredged.” The city consulted dictionary definitions of the terms  
15   “continuation,” “present,” and “level” and concluded that NRI #4 qualifies for an  
16   exception under OAR 660-004-0022(8)(b) because the proposed dredging will  
17   not increase the quantity or frequency of navigation supported by the existing  
18   navigation channel. Instead, the city found, it will simply allow the same level of  
19   navigation in the (expanded) channel to continue throughout a broader range of  
20   weather conditions. Record 37-39.

21           Petitioner argues, and we agree, that the city misconstrued OAR 660-004-  
22   0022(8)(b). The dredging permitted under that rule is to maintain adequate depth

1 to permit the present level of navigation to continue “in the area to be dredged.”  
2 The city may be correct that there will be no absolute increase in the number or  
3 frequency of deep-draft vessels transiting the *expanded navigation channel*, but  
4 the focus of the analysis under OAR 660-004-0022(8)(b) is the present level of  
5 navigation in the “*area to be dredged*.” (Emphasis added.) There is no dispute  
6 that the “present level of navigation” that occurs in the shallower area proposed  
7 for dredging includes no navigation by deep-draft vessels. Presumably, the  
8 navigation that currently occurs in that area is limited to shallow-draft vessels,  
9 such as recreational or fishing boats. Dredging that shallow area to allow  
10 navigation by deep-draft, ocean-going vessels is not “continuation of the present  
11 level of navigation” under any definition.

12 JCEP argues that, as the city found, limiting the applicability of OAR 660-  
13 004-0022(8)(b) to maintenance dredging of existing navigation channels would  
14 render that provision “meaningless,” since existing navigation channels are  
15 already designated to allow for dredging without an exception to Goal 16. Record  
16 38. However, that argument ignores the fact that navigation in the estuary is not  
17 limited to the existing deep-draft navigation channel. Much of the estuary  
18 consists of shallower but still navigable areas outside the navigation channel. If  
19 an area in a natural or conservation management unit is used for navigation by  
20 shallow-draft vessels and that area later silts up, then the city could approve  
21 dredging under OAR 660-004-0022(8)(b) to restore that area to depths necessary  
22 to allow continuation of the former level of navigation. OAR 660-004-0022(8)(b)

1 is not rendered meaningless by giving effect to its plain language and limiting its  
2 scope to “the area to be dredged.” The city improperly construed OAR 660-004-  
3 0022(8)(b) to apply to the circumstances presented in JCEP’s applications when  
4 it does not.

5 Petitioner’s and Oregon Shores’ second assignments of error are sustained.

6 **PETITIONER’S THIRD ASSIGNMENT OF ERROR AND OREGON**  
7 **SHORES’ THIRD, FOURTH, AND FIFTH ASSIGNMENTS OF ERROR**

8 Petitioner’s third assignment of error is that the city misconstrued the law  
9 and made inadequate findings under OAR 660-004-0022(8)(f).<sup>14</sup> OAR 660-004-  
10 0022(8)(f) only applies if the required findings are made under OAR 660-004-  
11 0022(7)(a) to (e). Because the city did not make findings concerning OAR 660-  
12 004-0022(7)(b) we need not address petitioner’s third assignment of error.

13 Oregon Shores’ third and fourth assignments of error are that the city  
14 misconstrued the law and made inadequate findings under OAR 660-004-  
15 0020(2)(b) and OAR 660-004-0020(2)(d). Findings under OAR 660-004-  
16 0020(2)(b) and OAR 660-004-0020(2)(d) will not justify a reasons exception

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<sup>14</sup> OAR 660-004-0022(8)(f) provides:

“In each of the situations set forth in subsections (7)(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 where the city has not made the required findings under OAR 660-004-  
2 0020(2)(a), for which a more detailed set of standards is provided in OAR 660-  
3 004-0022. As explained above, we sustain petitioner's and Oregon Shores' first  
4 assignments of error concerning OAR 660-004-0022(1)(a) and conclude that the  
5 city has not met the requirements to approve a reasons exception. We therefore  
6 need not address Oregon Shores' third and fourth assignments of error.

7 Oregon Shores' fifth assignment of error is that, even if the city properly  
8 approved a Goal 16 exception, the city was still required to perform a cumulative  
9 impacts analysis as part of its Goal 16 analysis. Because we sustain petitioner's  
10 and Oregon Shores' first and second assignments of error and conclude that the  
11 city did not properly approve a Goal 16 exception, we need not address Oregon  
12 Shores' fifth assignment of error.

13 We do not reach petitioner's third assignment of error or Oregon Shores'  
14 third, fourth, or fifth assignments of error.

15 **PETITIONER'S FOURTH ASSIGNMENT OF ERROR AND CITIZENS'**  
16 **SECOND ASSIGNMENT OF ERROR**

17 Petitioner's fourth assignment of error and Citizens' second assignment of  
18 error challenge the portion of the city's decision that addresses and approves the  
19 CUP to allow dredging and the temporary dredge material disposal pipeline. As  
20 we explained above, the city's approval of a CUP is dependent on its successful  
21 redesignation of NRI #4 to DDNC-DA. Because we sustain petitioner's and  
22 Oregon Shores' assignments of error that challenge the reasons exception, and

1 because the redesignation of NRI #4 is dependent on that reasons exception, we  
2 need not address petitioner's and Citizens' challenges to the CUP that depends  
3 entirely on that redesignation.

4 We do not reach petitioner's fourth assignment of error or Citizens' second  
5 assignment of error.

6 **PETITIONER'S FIFTH ASSIGNMENT OF ERROR AND CITIZENS'**  
7 **FIRST ASSIGNMENT OF ERROR**

8 Petitioner's fifth assignment of error and Citizens' first assignment of error  
9 challenge the portion of the city's decision that redesignates NRI #4. As we  
10 explained above, the city's approval of the redesignation is dependent on its  
11 successful approval of a reasons exception for NRI #4. Because we sustain  
12 petitioner's and Oregon Shores' assignments of error that challenge the reasons  
13 exception, we need not address petitioner's fifth assignment of error or Citizens'  
14 first assignment of error.

15 We do not reach petitioner's fifth assignment of error or Citizens' first  
16 assignment of error.

17 **CITIZENS' THIRD ASSIGNMENT OF ERROR**

18 In its third assignment of error, Citizens allege that the city committed a  
19 procedural error. A procedural assignment of error, if sustained, would generally  
20 warrant remand of the decision. However, because we reverse the decision based  
21 on the city's misconstruction of the administrative rules governing reasons  
22 exceptions, we need not address Citizens' third assignment of error.

1           We do not reach Citizens’ third assignment of error.

2   **DISPOSTION**

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

13           Petitioner and Oregon Shores argue that, in the event that we sustain their  
14   first or second assignments of error, reversal is the appropriate remedy because  
15   the city’s decision approving the reasons exception is prohibited as a matter of  
16   law. JCEP argues that, in the event that we sustain any of the assignments of  
17   error, remand is the appropriate remedy because (1) none of the errors would  
18   require more than insignificant changes to the applications and (2) any errors  
19   related to the city’s findings can be addressed on remand.<sup>15</sup> We agree with

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<sup>15</sup> 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, 327-38 (2007) (declining the petitioner’s invitation to affirm in part and reverse

1 petitioner and Oregon Shores that reversal is the appropriate remedy because  
2 neither Goals 9, 12, or 13 nor OAR 660-004-0022(8) provide a basis for the city  
3 to approve the reasons exception. Absent any permissible basis to approve the  
4 reasons exception, the city's decision is prohibited as a matter of law.

5 The city's decision is reversed.

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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.”).