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

OREGON COAST ALLIANCE,
Petitioner,

and

OREGON DEPARTMENT OF LAND CONSERVATION
AND DEVELOPMENT,
Intervenor-Petitioner,

vs.

TILLAMOOK COUNTY,
Respondent,

and

MICHAEL ROGERS, CHRISTINE ROGERS, BILL COGDALL,
LYNDA COGDALL, JON CREEDON, DAVID FARR, FRIEDA FARR,
DON ROBERTS, BARBARA ROBERTS, RACHEL HOLLAND,
JEFFREY KLEIN, TERRY KLEIN, DAVID HAYES, MICHAEL ELLIS,
MICHAEL MUNCH, ANGELA DOWLING, DAVID DOWLING,
MEGAN STECK BERG, EVAN DANNO, MARK KEMBALL,
ALICE KEMBALL, MARY ANN LOCKWOOD FAMILY TRUST,
and HEATHER STECK VON SEGGERN,
Intervenors-Respondents.

LUBA No. 2021-101

OREGON SHORES CONSERVATION COALITION
and SURFRIDER FOUNDATION,
Petitioners,

and

OREGON DEPARTMENT OF LAND CONSERVATION
AND DEVELOPMENT,
Intervenor-Petitioner,

vs.

TILLAMOOK COUNTY,
Respondent,

and

MICHAEL ROGERS, CHRISTINE ROGERS, BILL COGDALL, LYNDA COGDALL, JON CREEDON, DAVID FARR, FREIDA FARR, DON ROBERTS, BARBARA ROBERTS, RACHAEL HOLLAND, JEFFREY KLEIN, TERRY KLEIN, DAVID HAYES, MICHAEL ELLIS, MICHAEL MUNCH, ANGELA DOWLING, DAVID DOWLING, MEGAN STECK BERG, EVAN DANNO, MARK KEMBALL, ALICE KEMBALL, MARY ANN LOCKWOOD FAMILY TRUST, and HEATHER STECK VON SEGGERN,
Intervenors-Respondents.

LUBA No. 2021-104

FINAL OPINION
AND ORDER

Appeal from Tillamook County.

Sean T. Malone filed a petition for review and reply brief and argued on behalf of petitioner Oregon Coast Alliance.

Anuradha Sawkar filed a petition for review and reply brief and argued on behalf of petitioners Oregon Shores Conservation Coalition and Surfrider Foundation.

Steven E. Shipsey filed a petition for review and reply brief and argued on behalf of intervenor-petitioner Oregon Department of Land Conservation and Development.

No appearance by Tillamook County.

Wendie L. Kellington filed a response brief and argued on behalf of intervenors-respondents Michael Rogers, Christine Rogers, Bill Cogdall, Lynda Cogdall, Jon Creedon, David Farr, Frieda Farr, Don Roberts, Barbara Roberts, Rachel Holland, Jeffrey Klein, Terry Klein, David Hayes, Michael Ellis, and Michael Munch.

Andrew H. Stamp filed a response brief and argued on behalf of intervenors-respondents Angela Dowling, David Dowling, Megan Steck Berg, Evan Danno, Mark Kemball, Alice Kemball, Mary Ann Lockwood Family Trust, and Heather Steck Von Seggern.

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

REMANDED 09/30/2022

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

Opinion by Rudd.

NATURE OF THE DECISION

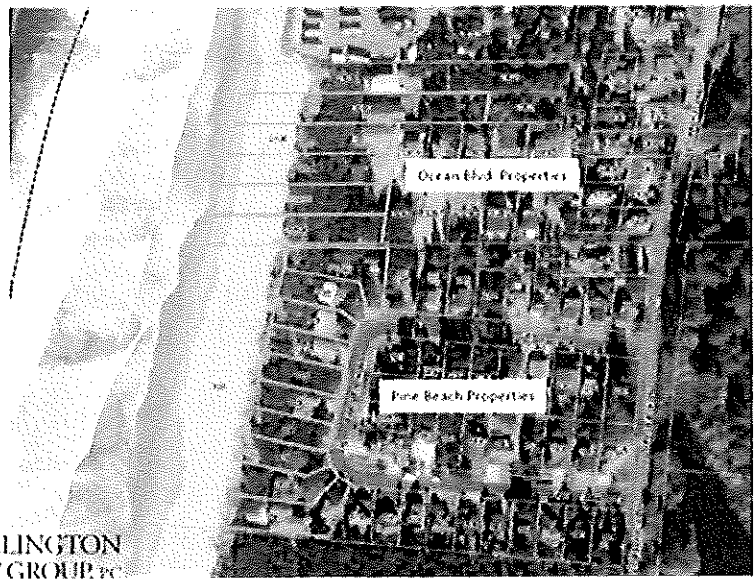
Petitioners appeal a county board of commissioners decision adopting a post-acknowledgment plan amendment (PAPA) that approves an exception to Statewide Planning Goal 18 (Beaches and Dunes), Implementation Requirement (IR) 5, and a related Floodplain Development Permit (FDP) for beachfront protective structures (BPS).

BACKGROUND

A. The Subject Properties

The subject properties include 15 oceanfront lots, 11 of which are developed with houses and four of which are vacant. Two of the vacant lots are at the southern end of the properties marked "Ocean Blvd. Properties" in the photo below. The Ocean Blvd. Properties are also referred to as the George Shand Tract properties. The other two vacant lots are located within the Pine Beach Subdivision, with each vacant lot bordered on both sides by developed property.[1]

[1] Intervenors-respondents Angela Dowling, David Dowling, Megan Steck Berg, Evan Danno, Mark Kemball, Alice Kemball, Mary Ann Lockwood Family Trust, and Heather Steck Von Seggern are owners of the George Shand Tract properties. The remaining intervenors-respondents own properties within the Pine Beach Subdivision.



Record 1951. The subject properties are

> "located within the acknowledged Barview/Twin Rocks/Watseco Urban Unincorporated Community Boundary, specifically within the Watesco region of the unincorporated community. The urban unincorporated community is nearby to the urban growth boundaries of the City of Garibaldi to the south and the City of Rockaway Beach to the north. Uses in the area are predominately residential with recreational facilities located to the north (Shorewood RV Park), to the south (Camp Magruder) and further to the east across Oregon State Highway 101 (Twin Rocks Friends Camp). The only inventoried Goal 5 resource identified in the area is Smith Lake, a coastal lake, which is approximately 625 feet east and south from the subject properties. The only other natural resource in the area is the beach and ocean." Record 18-19 (citations omitted).

B. Planning Context

The subject properties are zoned Community Medium Density Urban Residential and located within the county's Beach and Dune (BD) and Flood Hazard (FH) overlay zones. Tillamook County Land Use Ordinance (TCLUO) 3.530(1) provides that the purpose of the county's BD overlay zone

"is to establish criteria and performance standards to direct and manage development and other activities in beach and dune areas in a manner that:

"(a) Conserves, protects and, where appropriate, restores the resources and benefits of coastal beach and dune areas;

"(b) Reduces the risks to life and property from natural and man-induced actions on these inherently dynamic landforms; and

"(c) *Ensures that the siting and design of development in beach and dune areas is consistent with Statewide Planning Goals 7 and 18*, and the Hazards Element and Beaches and Dunes Element of the Tillamook County Comprehensive Plan." (Emphasis added.)

Statewide Planning Goal 7 (Areas Subject to Natural Hazards) is "[t]o protect people and property from natural hazards." Goal 7 identifies a variety of implementation requirements. For example, Goal 7, IR 4, provides, "Local governments will be deemed to comply with Goal 7 for coastal and riverine flood hazards by adopting and implementing local flood plain regulations that meet the minimum National Flood Insurance Program (NFIP) requirements."[2]

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[2] Goal 7 also identifies implementation guidelines, including but not limited to the following:

"3. Local governments should consider nonregulatory approaches to help implement this goal, including but not limited to:

"a. providing financial incentives and disincentives;

"b. providing public information and education materials;

Goal 18 is:

"To conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of coastal beach and dune areas; and

"To reduce the hazard to human life and property from natural or man-induced actions associated with these areas."

"c. establishing or making use of existing programs to retrofit, relocate, or acquire existing dwellings and structures at risk from natural disasters.

"4. When reviewing development requests in high hazard areas, local governments should require site-specific reports, appropriate for the level and type of hazard (e.g., hydrologic reports, geotechnical reports or other scientific or engineering reports) prepared by a licensed professional. Such reports should evaluate the risk to the site as well as the risk the proposed development may pose to other properties.

"5. Local governments should consider measures that exceed the National Flood Insurance Program (NFIP) such as:

"a. limiting placement of fill in floodplains;

"b. prohibiting the storage of hazardous materials in floodplains or providing for safe storage of such materials; and

"c. elevating structures to a level higher than that required by the NFIP and the state building code.

"Flood insurance policy holders may be eligible for reduced insurance rates through the NFIP's Community Rating System Program when local governments adopt these and other flood protection measures."

Goal 18 sets out several implementation requirements, including IR 1, which provides:

> "Local governments and state and federal agencies shall base decisions on plans, ordinances and land use actions in beach and dune areas, other than older stabilized dunes, on specific findings that shall include at least:
>
> "(a) The type of use proposed and the adverse effects it might have on the site and adjacent areas;
>
> "(b) Temporary and permanent stabilization programs and the planned maintenance of new and existing vegetation;
>
> "(c) Methods for protecting the surrounding area from any adverse effects of the development; and
>
> "(d) Hazards to life, public and private property, and the natural environment which may be caused by the proposed use."

IR 2 limits development on Goal 18 lands, providing:

> "Local governments and state and federal agencies shall prohibit residential developments and commercial and industrial buildings on beaches, active foredunes, on other foredunes which are conditionally stable and that are subject to ocean undercutting or wave overtopping, and on interdune areas (deflation plains) that are subject to ocean flooding. Other development in these areas shall be permitted only if the findings required in (1) above are presented and it is demonstrated that the proposed development:
>
> "(a) Is adequately protected from any geologic hazards, wind erosion, undercutting, ocean flooding and storm waves; or is of minimal value; and
>
> "(b) Is designed to minimize adverse environmental effects."

Development of BPS is allowed on Goal 18 lands consistent with IR 5, which provides:

> "Permits for [BPS] shall be issued only where development existed on January 1, 1977. Local comprehensive plans shall identify areas where development existed on January 1, 1977. For the purposes of this requirement and [IR] 7 'development' means houses, commercial and industrial buildings, and vacant subdivision lots which are physically improved through construction of streets and provision of utilities to the lot and includes areas where an exception to (2) above has been approved. The criteria for review of all [BPS] shall provide that:
>
> "(a) visual impacts are minimized;
>
> "(b) necessary access to the beach is maintained;
>
> "(c) negative impacts on adjacent property are minimized; and
>
> "(d) long-term or recurring costs to the public are avoided."[3]

C. Application for County Approval of BPS on the Subject Properties

The subject properties are within FEMA Flood Hazard Zone VE, a Coastal High Hazard Area for purposes of the county's FH overlay zone.[4] TCLUO

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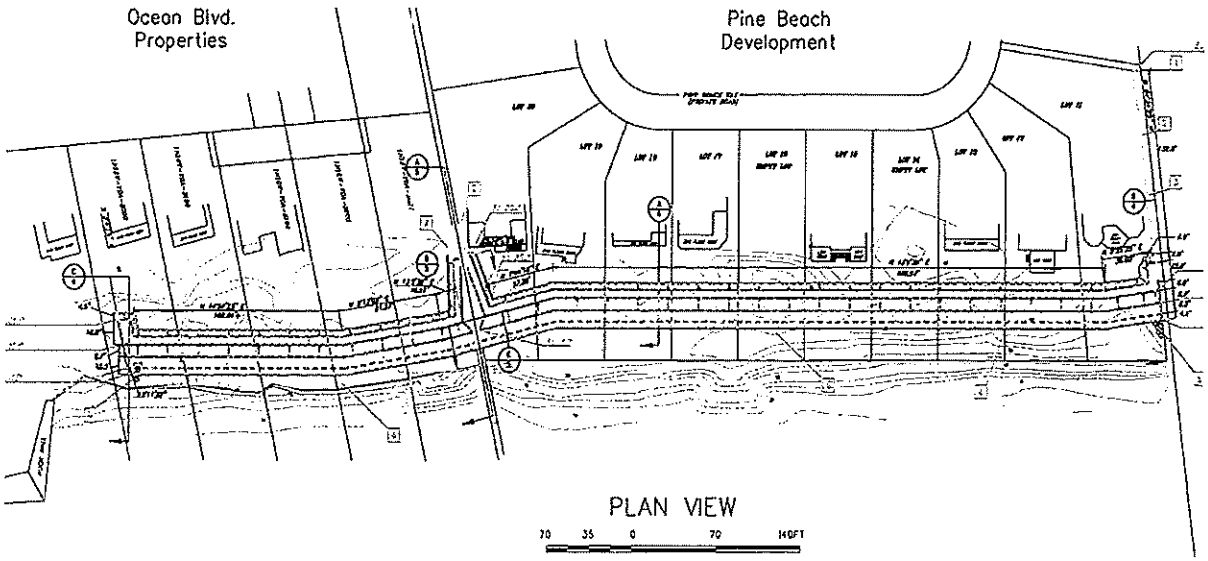
[3] The county did not adopt an exception to Goal 18, IR 2, for the subject properties because residential development was not prohibited on the subject properties. Record 110.

[4] "The Subject Properties are partially located within FEMA Flood Hazard Zone VE, which is assigned to coastal areas with a 1% or greater chance of flooding, and areas with an additional hazard associated with storm waves." Record 85.

3.510(4). Intervenors-respondents (intervenors) sought to construct BPS in the oceanside yards of their properties.

> "The size of the requested BPS is approximately 840' long x 30' wide, so the total amount of land to be used for the BPS is approximately 25,300 sq. ft. or 0.58 acres. However, the majority of the BPS will be buried within the foredune and replanted with native beach grasses, trees and shrubs that will reestablish natural shoreline vegetation."[5] Record 35.

The subject properties and the proposed BPS locations are show below.



Record 2012. The revetment is shown located within solid black lines in the oceanside yards of the properties, cutting inland with a V-shape access ramp between the George Shand Tract and the Pine Beach Subdivision.

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[5] BPS are also referred to as revetment. "The revetment design includes the rock size, cross section configuration, and plan view layout. The rock size is based on typical rock size for rock revetment structures along the Oregon Coast. They are comprised rocks ranging in diameter from 1 to 5 feet (well-graded gradation)." Record 1992-93.

Intervenors applied to the county for a PAPA and an FDP for the proposed BPS. The PAPA sought an exception to the Goal 18, IR 5, restriction on BPS on properties that were not developed on January 1, 1977.[6]

Intervenors submitted materials in support of their assertions that the George Shand Tract properties all meet the "development existed on January 1, 1977," standard set out in IR 5 and do not require an exception but that the Pine Beach Subdivision properties require and qualify for an exception to IR 5. Intervenors argued that the George Shand Tract properties were developed on January 1, 1977, for three reasons: (1) they were part of a subdivision on January 1, 1977, (2) Ocean Boulevard was constructed to serve the property on January 1, 1977, and (3) a property to the north and outside of the George Shand Tract (tax lot 2900) had been approved for a septic system and obtained water from a nearby water district on January 1, 1977. Record 26, 1954. Intervenors did not

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[6] OAR 660-004-0005(1) provides:

> "An 'Exception' is a comprehensive plan provision, including an amendment to an acknowledged comprehensive plan that:
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> "(a) Is applicable to specific properties or situations and does not establish a planning or zoning policy of general applicability;
>
> "(b) Does not comply with some or all goal requirements applicable to the subject properties or situations; and
>
> "(c) Complies with ORS 197.732(2), the provisions of this division and, if applicable, the provisions of OAR 660-011-0060, 660-012-0070, 660-014-0030 or 660-014-0040."

argue that any of the Pine Beach Subdivision properties were developed on January 1, 1977.

As explained further below, the board of commissioners agreed with intervenors that the George Shand Tract properties do not require a Goal 18 exception. In the alternative, the board found that those properties all quality for an exception. The board approved intervenors' requests for a Goal 18 reasons exception for those properties that were not developed on January 1, 1977, and an FDP for all of the properties. These appeals followed.

MOTION TO STRIKE AND MOTION TO TAKE OFFICIAL NOTICE

Intervenor-petitioner Oregon Department of Land Conservation and Development's (DLCD's) petition for review includes a quotation from a source not included in the record, DLCD's Guidebook on Erosion Control Practices of the Oregon Coast. Intervenors filed a motion to strike the quotation from DLCD's petition for review.[7]

DLCD attached a copy of the guidebook to its response to the motion to strike and requests that we take official notice of the guidebook. DLCD explains that the guidebook originated from a suggestion in the September 2019 final report of DLCD's Goal 18: Pre-1977 Development Focus Group and observes

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[7] A hyperlink to the guidebook is provided at page 24, note 10, of DLCD's petition for review. As intervenors note, we will not click on a hyperlink in a footnote to obtain a document. *See Oregon Shores Conservation Coalition v. Coos County*, 75 Or LUBA 534, 540-41 (2017).

that intervenors submitted that report into the record. Record 1955-88. We resolve both motions below.

Our review is generally limited to the record. ORS 197.835(2)(a). We may, however, take official notice of documents that (1) constitute officially cognizable law under ORS 40.090 and (2) have some relevance to the issues on appeal. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 688, 692 (2007). We may not "take official notice of facts within documents that are subject to notice under [ORS 40.090], if notice of those facts is requested for an adjudicative purpose (*i.e.*, to provide evidentiary support or countervailing evidence with respect to an applicable approval criterion that is at issue in the challenged decision)." *Id.*

ORS 40.090(2) provides that items subject to judicial notice include the public official acts of the executive department of the state. We understand intervenors to argue that the guidebook is not a "public official act" because there is no evidence that the guidebook has been adopted by the Land Conservation and Development Commission (LCDC). Motion to Strike 3-4. We have previously taken official notice of DLCD publications. In *Foland v. Jackson County*, 18 Or LUBA 731, 739-40, *aff'd*, 101 Or App 632, 792 P2d 1228 (1990), *aff'd*, 311 Or 167, 807 P2d 801 (1991), we took official notice of a DLCD destination resort handbook under ORS 40.090(2). We explained that there is a distinction between whether we may take official notice of a DLCD publication and whether we may rely on that publication in resolving the assignments of error. *Foland*, 18 Or LUBA at 740 n 5; *see also Shaff v. City of Medford*, 79 Or

LUBA 317, 321 (2019) (noting that LUBA may take official notice of an Oregon Department of Transportation (ODOT) manual as an official act of a state agency but that the manual may not be relied upon to establish any fact). It is undisputed that the guidebook is a DLCD publication. Thus, the guidebook may be subject to official notice.

DLCD contends that the guidebook "provides a recent articulation of the Goal 18 policy at issue in this appeal." Response to Motion to Strike and Motion to Take Official Notice 4. Intervenors argue, and we agree, that any statewide land use policy is required to be adopted by LCDC as an administrative rule or a goal. ORS 197.040(1)(c)(A); *Foland*, 18 Or LUBA at 757 n 25 (noting that a DLCD handbook does not represent official policy positions, which must be adopted as administrative rules or goals). Accordingly, the guidebook may not be used for the purpose for which DLCD requests official notice.

The motion to take official notice is denied.

The motion to strike is granted.

OVERVIEW OF ASSIGNMENTS OF ERROR

Petitioners Oregon Shores Conservation Coalition and Surfrider Foundation (together, OS/SF) and Oregon Coast Alliance (OCA) argue in their first assignments of error that the county erred in finding that the George Shand Tract properties do not require an exception. DLCD and OCA argue in their first assignments of error that the county erred in adopting alternative findings

approving an exception for the George Shand Tract properties after determining that they do not require an exception.[8]

DLCD argues in its second assignment of error and OS/SF and OCA argue in their third assignments of error that the county erred in approving a "catch-all" exception to Goal 18, IR 5. Relatedly, OCA argues in its seventh assignment of error that the county failed to adequately address the four vacant lots in its analysis of reasons justifying the exception.

OS/SF and OCA argue in their second assignments of error and DLCD argues in its third assignment of error that the county erred in approving a "demonstrated need" exception to Goal 18, IR 5.

DLCD and OCA argue in their fourth assignments of error that the county's decision failed to comply with the exception criteria in OAR 660-004-0022(2)(c).

OS/SF argues in its fourth assignment of error that the county's decision failed to comply with the exception criteria in OAR 660-004-0022(2)(d).

DLCD and OCA argue in their fifth assignments of error that the county committed error in approving the FDP.

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[8] These consolidated appeals involve substantial briefing. In our order consolidating these appeals, we encouraged the parties to coordinate their briefing to the extent possible. We appreciate their efforts to do so and address related assignments of error together.

OCA argues in its sixth assignment of error that the PAPA does not comply with Statewide Planning Goal 6 (Air, Water and Land Resources Quality) and Goal 7.

Intervenors have coordinated their briefing and adopt each other's responses to the assignments of error.

STANDARD OF REVIEW

We will reverse or remand a comprehensive plan amendment that is not consistent with the goals. ORS 197.835(6). We will reverse or remand a decision that misconstrues the applicable law or is not supported by substantial evidence. ORS 197.835(9)(a)(C), (D).

Adequate findings identify the applicable criteria, identify the evidence relied upon, and explain why the evidence leads to the conclusion that the criteria are or are not met.

> "It is well-established that findings must be in the local government's decision, and that they must do more than merely state a conclusion of compliance. The Supreme Court first articulated the standard for evaluating the adequacy of local findings in *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 21, 569 P2d 1063 (1977):
>
> > "'No particular form is required, and no magic words need be employed. What is needed for adequate judicial review is a clear statement of what, specifically, the decision-making body believes, after hearing and considering all the evidence, to be the relevant and important facts upon which its decision is based. Conclusions are not sufficient.'
>
> "In *Le Roux v. Malheur County*, 30 Or LUBA 268 (1995) we

explained the requirement for adequate findings as follows:

> "'The county's * * * findings must (1) identify the relevant approval standards, (2) set out the facts relied upon, and (3) explain how the facts lead to the conclusion that the request satisfies the approval standards. *Sunnyside*[, 280 Or at 20-21]. *See also Penland v. Josephine County*, 29 Or LUBA 213 (1995); *Reeves v. Yamhill County*, 28 Or LUBA 123 (1994); *Hart v. Jefferson County*, 27 Or LUBA 612 (1994). In addition, when, as here, a party raises issues regarding compliance with any particular approval criteria, it is incumbent upon the local government to address those issues. *Hillcrest Vineyard v. Bd. of Comm. Douglas Co.*, 45 Or App 283, 293, 608 P2d 201 (1980); *Collier v. Marion County*, 29 Or LUBA 462 (1995). Moreover, when the evidence is conflicting, the local government may choose which evidence to accept, but must state the facts it relies on and explain why those facts lead to the conclusion that the applicable standard is satisfied. *Moore v. Clackamas County*, 29 Or LUBA 372 (1995).' *Le Roux*, 30 Or LUBA at 271." *Larvik v. City of La Grande*, 39 Or LUBA 467, 470-71 (1998).

"[A] passing reference to the general subject matter of the goals is insufficient to establish compliance with them." *Id.* at 472-73. The findings must substantively address how the proposed comprehensive plan amendment assures continued compliance with the goals. *Id.* at 473. Findings must respond to specific issues relevant to compliance with applicable approval standards that were raised in the proceedings below. *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979).

OS/SF'S AND OCA'S FIRST ASSIGNMENTS OF ERROR

Goal 18, IR 5, provides, in part, that permits for BPS "shall be issued only where development existed on January 1, 1977. * * * For the purposes of this

requirement * * * 'development' means * * * vacant subdivision lots which are physically improved through construction of streets and provision of utilities to the lot * * *." The county found:

> **"The oceanfront George Shand Tracts were 'developed' on January 1, 1977 and so are eligible for [BPS] under Goal 18, [IR] 5 without the need to take an exception.**
>
> "Goal 18, [IR] 5 provides that permits for [BPS] may only be issued where 'development' existed on January 1, 1977. 'Development' is defined by Goal 18, [IR] 5 to mean 'houses, commercial and industrial buildings, and vacant subdivision lots which are physically improved through construction of streets and provision of utilities to the lot[.]' The Board finds that 'development' existed on January 1, 1977, within the meaning of Goal 18, [IR] 5, for Tax Lots 3000, 3100, 3104, 3203 and 3204 of map 01N10W07DA (the oceanfront 'George Shand Tracts'). The evidence in the record demonstrates that [o]n January 1, 1977, the George Shand Tracts were lots in the George Shand Tracts Subdivision, platted in 1950, Ocean Boulevard had been constructed to serve them, and water was provided by Watseco Water District and individual septic systems. An example of this is Application, Exhibit D in the record, which is the building permit for tax lot 2900, directly north of the George Shand Tracts, approved in 1974 and indicating that 'Watseco Water' would be used and a 'septic tank.' Clearly, the predecessor to the Watseco-Barview Water District's infrastructure in Watseco was available to serve the George Shand Tracts as early as 1974. Moreover, DLCD has confirmed that it is that agency's position that these lots were developed on January 1, 1977 under Goal 18, [IR] 5. Accordingly, the Board finds that the George Shand tracts may be issued a permit for BPS without the need to take an exception to Goal 18, [IR] 5." Record 26 (boldface in original).

OS/SF argues that the county misconstrued the law and adopted findings unsupported by substantial evidence that the George Shand Tract properties were

developed on January 1, 1977, and do not require an exception. OCA joins in this assignment of error.

A. Interpretation

When interpreting a law, the first level of analysis requires consideration of the text, context, and, if useful, the legislative history. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). "[W]ords of common usage typically should be given their plain, natural, and ordinary meaning." *PGE*, 317 Or at 611.

IR 5 describes development as being evidenced by physical improvements to vacant subdivision lots "through construction of streets and *provision of utilities to the lot*" on January 1, 1977. (Emphasis added.) The county construed IR 5 to mean that a vacant subdivision lot is developed on January 1, 1977, if it is served by a road and if it is possible for the land to obtain water and treat waste with an on-site septic system. The dictionary defines "provision" as "the act or process of providing" and "provide" as "to supply what is needed for sustenance or support." *Webster's Third New Int'l Dictionary* 1827 (unabridged ed 2002). The county's interpretation of "provision of utilities to the lot" requires not that water be supplied to the lot but, rather, that water be available if requested. Intervenors argue that that interpretation is correct because the requirement refers to "construction of streets" and "provision of utilities," and "provision" of utilities must mean something different than "construction" of utilities.

We disagree. "As a general rule, we construe a statute in a manner that gives effect, if possible, to all its provisions." *Crystal Communications, Inc. v. Dept. of Rev.*, 353 Or 300, 311, 297 P3d 1256 (2013). IR 5 provides that considering a vacant subdivision lot to be developed requires *physical improvements* to the lot. These physical improvements to the lot are to be reflected through both the construction of streets and the provision of utilities to the lot. The board of commissioners' interpretation requires that we insert language into the requirement, changing the requirement from "physical improvements to subdivision lots through construction of streets and provision of utilities to the lot" to "physical improvements to subdivision lots through construction of streets and **feasibility of utility service** to the lot." We will not insert what has been omitted. ORS 174.010.

We agree with OS/SF and OCA that Goal 18, IR 5, protects development that existed on January 1, 1977.[9] The county misconstrued IR 5 in finding that it can be met if utilities could have been accessed but had not actually been provided to the lot.

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[9] "The purpose of a [provision protecting historic uses] is to prevent hardship to individuals who have existing uses. [Such a clause] is enacted to preserve rights, not to grant additional rights." *Spaght v. Dept. of Transportation*, 29 Or App 681, 686, 564 P2d 1092 (1977).

B. Substantial Evidence

Substantial evidence is evidence that a reasonable person would rely upon to make a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). As evidence that, on January 1, 1977, the George Shand Tract properties were vacant subdivision lots physically improved through construction of streets and provision of utilities to the lot, the county relied upon "the building permit for tax lot 2900, directly north of the George Shand Tracts, approved in 1974 and indicating that 'Watseco Water' would be used and a 'septic tank.'" Record 26. The county concluded, "Clearly, the predecessor to the Watseco-Barview Water District's infrastructure in Watseco was available to serve the George Shand Tracts as early as 1974." *Id.*

The county's finding that the George Shand Tract properties were developed on January 1, 1977, is not supported by substantial evidence. The county's finding does not reference physical improvement to the George Shand Tract properties by provision of utilities but, rather, concludes that utilities existed in the general area and, we assume, would have been feasible if pursued.[10]

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[10] The county's findings state, "Moreover, DLCD has confirmed that it is that agency's position that these lots were developed on January 1, 1977 under Goal 18, [IR] 5." Record 26. DLCD disputes that statement, explaining that it did not confirm to the county that it considered the lots developed but, rather, that it observed, in a letter to the county, that county staff had reached that conclusion. DLCD's Petition for Review 16 n 7. It is not clear from the findings what weight the county placed on its perception that DLCD concluded that the properties were developed, but we understand that these properties are not identified as having been developed on January 1, 1977, in DLCD's Coastal Atlas. Record 41 n 4

Absent substantial evidence in the record that utilities were provided to the George Shand Tract properties on January 1, 1977, the George Shand Tract properties require an exception to Goal 18 in order to construct BPS. The county's conclusion to the contrary is not supported by substantial evidence.

This assignment of error is sustained.

DLCD'S AND OCA'S FIRST ASSIGNMENTS OF ERROR

OAR 660-004-0000(2) provides that exceptions may be possible for (1) a use not allowed by the applicable goal or (2) a use authorized by a goal that cannot comply with the standards for the use. DLCD's first assignment of error is that the county erred in adopting alternative findings approving an exception for the George Shand Tract properties because BPS are a use allowed by the goal and because the county found that the properties meet the applicable standards. OCA joins in this assignment of error.

The county found that the George Shand Tract properties meet the standards for BPS (developed on January 1, 1977) and do not require an exception. However, for the reasons set out in our resolution of OS/SF's and OCA's first assignments of error, the county's determination that these properties were developed on January 1, 1977, misconstrued the law and is not supported by substantial evidence. Accordingly, DLCD's argument that the county may not

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(stating that the number of oceanfront ownerships in the littoral cell subregion that are entitled to be armored with BPS "includes the five (5) George Shand Tracts that the County and DLCD agree are entitled to the proposed BPS, contrary to DLCD's online 'atlas'").

approve the exception because it is for a use allowed by the goal does not provide a basis for remand or reversal.

Anticipating that a reviewing body might find fault with its determination that the George Shand Tract properties do not require an exception, the county adopted alternative findings approving an exception. DLCD makes a variety of arguments that the county erred in adopting those alternative findings.

The county's alternative findings include:

> "**In the alternative only, if a reviewing authority decides that the George Shand Tracts were not 'developed' on January 1, 1977 and so are ineligible for [BPS], then as a precaution only and only if such an appellate finding of ineligibility under Goal 18, [IR] 5 unless an exception is taken, is made then the Board also approves an exception to Goal 18, [IR] 5 for the specified George Shand tracts.**
>
> "Accordingly, it is only in the alternative and in the event that an appellate authority reverses or remands our determination that the George Shand Tracts were 'developed' on January 1, 1977, that the Board approves, in the alternative, a Goal 18, [IR] 5 exception to the date of eligibility for the George Shand Tracts." Record 26 (boldface and underscoring in original).

The alternative nature of these findings is reiterated in a footnote that provides, in part, "If the Board's findings that the George Shand Tracts were developed on January 1, 1977 become final without appeal or are sustained on appeal, there is no justification to take a Goal 18, [IR] 5 exception for those properties and none is taken in that case, as explained herein." Record 29 n 1.

We agree with intervenors that alternative findings are a common occurrence in land use decisions. *See, e.g.*, *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA 270, 277 (2017), *rev'd on other grounds*, 292 Or App 173, 423 P3d 793 (2018), *rev dismissed*, 365 Or 557 (2019) ("[T]he county did not commit reversible error in adopting alternative reasons exceptions under both OAR 660-004-0022(1)(a) and 660-004-0022(3)."); *id.* at 278 ("Errors made under one set of reasons standards may be harmless if the county adequately justifies an exception under a different set of reason standards."). The county did not err in adopting alternative findings approving an exception.

This assignment of error is denied.

DLCD, OS/SF, AND OCA'S SECOND AND THIRD ASSIGNMENTS OF ERROR AND OCA'S SEVENTH ASSIGNMENT OF ERROR

A. Introduction

ORS 197.732(2)(c) provides that a local government may approve an exception to a statewide planning goal where the following standards are met:

> "(A) Reasons justify why the state policy embodied in the applicable goals should not apply;
>
> "(B) Areas that do not require a new exception cannot reasonably accommodate the use;
>
> "(C) The long term environmental, economic, social and energy [(ESEE)] consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and

> "(D) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts."

OAR 660-004-0022 sets out criteria applicable to reasons exceptions. OAR 660-004-0022(1) provides:

> "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, reasons include but are not limited to the following: 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 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 analysis 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 be reasonably obtained.
>
> "(b) The proposed use or activity has special features or qualities that necessitate its location on or near the proposed exception site."

"OAR 660-004-0022(1) is a generic, 'catch-all' provision that provides standards for reasons exceptions in the absence of other, goal-specific rules." *Oregon Shores Conservation Coalition v. Coos County*, ___ Or LUBA ___, ___ (LUBA No 2020-002, May 4, 2021) (slip op at 23). The rule recognizes a "demonstrated need" as one reason that may be used to justify an exception, but reasons that are not identified in OAR 660-004-0022(1) may also be used to justify an exception. *Morgan v. Douglas County*, 42 Or LUBA 46, 52 (2002). OS/SF, OCA, and DLCD (collectively, petitioners) allege that the county erred in finding that

adequate reasons justify a Goal 18, IR 5, exception under both the "catch-all" and "demonstrated need" reasons.

B. DLCD's Second Assignment of Error, OS/SF's and OCA's Third Assignments of Error, and OCA's Seventh Assignment of Error

The county approved a general, "catch-all" reasons exception to Goal 18, IR 5, for those properties that were not developed on January 1, 1977, based upon what the county determined were unique circumstances. Record 22. OS/SF argues in its third assignment of error and DLCD argues in its second assignment of error that the county's "catch-all" exception is not supported by sufficient reasons. OCA joins in these assignments of error.

1. Interpretation

First, OS/SF argues that the county misconstrued the law in identifying the reasons that it concluded supported the "catch-all" exception. OS/SF argues that interpreting OAR 660-004-0022(1) requires use of the canon of construction referred to as "*noscitur a sociis*." OS/SF explains:

> "The Oregon Supreme Court recently explained that *noscitur a sociis* is the 'relevant rule for interpreting a word or phrase' when a statute provides 'a nonexclusive list of examples.' *Capital One Auto Fin. Inc. v. Dep't of Revenue*, 363 Or 441, 453, 423 P3d 80 (2018). *Noscitur a sociis* is '[a] canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it.' *Black's Law Dictionary* 1160-61 (9th ed 2009). Under this interpretative rule, the court asked whether any of the specifically enumerated examples in a non-exclusive list provided by a statute shared 'a common characteristic.' *Capital One*, 363 Or at 453. This common

> characteristic is then used as context for understanding the meaning of the unclear phrase. *Id.*" OS/SF's Petition for Review 40.

The statute at issue in *Capital One* stated that "[i]ncome from sources within this state" included (1) "income from tangible or intangible property located * * * in this state," (2) "income from tangible or intangible property * * * having a situs in this state," and (3) "income from any activities carried on in this state, regardless of whether carried on in intrastate, interstate or foreign commerce." 363 Or at 451. The court concluded that the common characteristic was income from sources within the state. *Id.* at 453.

OS/SF contends that the characteristics of the "demonstrated need" reason necessarily cabin the permissible reasons for a "catch-all" exception:

> "The 'requirements of Goals 3 to 19' share the common characteristic of being legal obligations (i.e., goals, regulations, or statutes) that a local government would be unable to meet absent the proposed exception to allow the proposed use, whereas subsections (1)(a)-(b) share the common characteristic of being locational factors. Therefore, * * * any other unenumerated reasons that could justify a Goal 18, IR 5 exception should be similarly grounded in a legal obligation in conjunction with a locational factor that the local government would be unable to meet absent an exception for the proposed use." OS/SF's Petition for Review 41.

Nothing in the rule suggests to us that LCDC intended to so limit permissible reasons for an exception. OAR 660-004-0020(1) provides, in part, that, "[if] a jurisdiction determines that there are reasons consistent with OAR 660-004-0022 to use resource lands for uses not allowed by the applicable Goal

* * *, the justification shall be set forth in the comprehensive plan as an exception."

> "The exception shall set forth the facts and assumptions used as the basis for determining that a state policy embodied in a goal should not apply to specific properties or situations, including the amount of land for the use being planned and why the use requires a location on resource land[.]" OAR 660-004-0020(2)(a).

We have previously said that "LCDC probably intended that * * * reasons sufficient to justify an exception [other than a 'demonstrated need'] cross some minimal threshold to ensure that the reasons are not makeweights that render the goal requirement meaningless." *Todd v. City of Florence*, 52 Or LUBA 445, 463 (2006). We conclude that the unique circumstances here, explained below, rise to a level that is not "makeweight" and provide sufficient reasons for why Goal 18 should yield to the use of a set amount of resource land for a particular use. We reject OS/SF's interpretation of the rule and proceed to the findings.

2. Adequacy of Findings

Stated again, Goal 18 is:

> "To conserve, protect, where appropriate develop and where appropriate restore the resources and benefits of coastal beach and dune areas; and
>
> "To reduce the hazard to human life and property from natural or man-induced actions associated with these areas."

The state policy embodied in IR 5 is one of balancing conservation and protection of beach and dune areas by limiting permits for BPS to those properties where development existed on January 1, 1977, and ensuring that all BPS are reviewed

to minimize visual impacts, maintain necessary access to the beach, minimize negative impacts on adjacent property, and avoid long-term or recurring costs to the public.

The county concluded that the "development existed on January 1, 1977," limitation on construction of BPS should not apply to the subject properties because the properties were approved for residential development consistent with the applicable land use provisions and are subject to unique coastal conditions. The county incorporated intervenors' expert's reports as findings. Record 14. The reports explain:

> "The proposed revetment will be located within the Rockaway Beach littoral cell. This littoral cell extends from Cape Falcon on the north to Cape Madreas on the south, a distance of about 20 miles. This littoral cell has three subregions: (1) Nehalem, which is the area north of the Nehalem Bay jetties; (2) Rockaway, which is the area between Nehalem Bay and Tillamook Bay; and (3) Bayocean, which is the area south of the Tillamook Bay jetties. The proposed project would be located in the Rockaway subregion (between Nehalem Bay and Tillamook Bay).
>
> "* * * * *
>
> "There are two inlets with coastal jetties that have had a significant influence on the sediment longshore transport and beach geomorphology (DOGAMI, 2014) within the Rockaway Beach littoral cell: (1) Tillamook Bay, which is about 5 miles north of Cape Madreas (north jetty was constructed in 1914 while the south jetty was constructed in 1974); and (2) Nehalem Bay, which is about 6 miles north of Tillamook Bay (south jetty was constructed in 1916 while the north jetty was constructed in 1918)." Record 1253.

The county found:

> "The record supports the conclusion that the Subject Properties are faced with unique and exceptional circumstances. The Subject Properties represent 'appropriate development' as defined by Goal 18—the residential subdivisions and most of the development was approved to be limited to the areas Goal 18, [IR] 2 allows; was setback more than 200 feet from the statutory vegetation line, more than 200 yards from the ocean and were separated from the ocean by a coastal forest—all of which was appropriate under Goal 18 and was designed to protect the properties from coastal hazards. *In spite of these protective measures and contrary to the expert analyses at the time, the Subject Properties are now threatened with destruction by unanticipated coastal erosion and flooding. Analysis from the [intervenors'] expert in the record demonstrates that the natural processes in the littoral subregion in which the Subject Properties are located have been uniquely disrupted by the combined effects of the two manmade jetties, which are unusually close in proximity and cabin the littoral subregion like nowhere else on the Oregon Coast, and the lasting effects of the El Niño/La Niña events of the late 1990s. Accordingly, the requested exception is supported by unique and exceptional circumstances and is consistent with the overarching purpose and intent of Goal 18 and the exceptions process.*"[11] Record 23 (emphasis added).

The county concluded:

> "[N]o legitimate purpose is served by punishing [intervenors] with large losses of their property and perhaps lives, by refusing to allow them to protect their residential properties in an acknowledged residential zone, in an acknowledged urban unincorporated community, under a planning program approved in complete conformity with Goal 18, because an unanticipated natural disaster has stricken." Record 33.

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[11] Five expert reports are listed in the decision as being "adopted and incorporated by reference as additional findings of fact." Record 27.

a. Appropriate Development

OAR 660-004-0000(2) provides, in part, that "[t]he exceptions process is not to be used to indicate that a jurisdiction disagrees with a goal." DLCD argues that the county's approval of the exception improperly reflects a policy disagreement with Goal 18. DLCD's Petition for Review 25. The county found that the subject properties were zoned and platted as residential lots because, at the time, the dunes were not subject to wave overtopping. DLCD contends that the county misconstrued Goal 18 when it found that the subject properties were identified as appropriate for residential development:

> "[F]or [BPS], Goal 18 requires a county to conduct an inventory utilizing criteria provided in Goal 18, with the sole purpose of identifying which properties on the oceanfront in their jurisdiction are eligible for such structures. This includes the provision limiting permits for [BPS] to development that existed on January 1, 1977, in [IR] 5. One would expect that all post-1977 residential development in areas identified and inventoried as beach and dune areas by a local government would be authorized in conformance with Goal 18. The county erred when they assert that any such 'appropriate' development should then, categorically be eligible for beachfront protection." *Id.* at 26.

OS/SF also argues that the county failed to recognize that the text of IR 5 served as public notice that BPS would not be allowed, consistent with Goal 18, on properties developed after January 1, 1977. OS/SF further argues that "[e]conomic arguments (e.g., property value at risk) as put forth in the findings, are not reason enough to justify an exception decision, as similar economic

arguments could be made for other locations along the Oregon coast that are ineligible for beachfront protection." OS/SF's Petition for Review 42-43.

We agree with petitioners that zoning that allows the development of a residence on property and the risk of property loss are not unique circumstances sufficient to justify an exception to Goal 18, IR 5. IR 5 includes a provision such that people who acquired property that was not developed on January 1, 1977, were on notice that the goal did not allow BPS. The county found that the development on the subject properties is in a location that "Goal 18 expressly states is * * * safe and 'appropriate' for residential development." Record 35. We agree with petitioners that Goal 18 does not identify specific locations as safe and appropriate for development such that the use is thereafter entitled to protection. Standing alone, the risk to development in an area developed with residential uses in compliance with then-applicable law does not justify an exception and must be considered in connection with the unique erosion patterns identified by the county. First, however, we address the county's conclusions concerning the potential for future hardening and its implications for whether the IR 5 conservation goal is unachievable in this location.

b. Potential Future Extent of Coastal Hardening

The county also based its decision on the potential for additional hardening in the area. In evaluating the impact of the BPS on the broader area, the county found:

"Approximately 5.6% (5,930 ft of 106,200 ft) of the entire

> Rockaway Beach littoral cell has some riprap or concrete wall revetment. * * * This does not count the four jetties in the cell. The proposed 880-foot-long riprap revetment for the Subject Properties will increase the total revetment length in the entire Rockaway Beach littoral cell to 6,810 feet, an increase of 0.8%. When considering the Rockaway subregion, the proposed revetment will increase the percentage already comprised of rock/wall revetments from 18.6% to 21.4% (a 2.8% increase), again not counting the jetties." Record 1253.

The county concluded that

> "nearly 90% of the ownerships within the Rockaway subregion are already protected by BPS *or are entitled to be protected by BPS when the time comes*. Thus, when necessary, the already unhealthy ocean/beach interface will be further hardened. There is no 'natural' beach/ocean process that can be saved on this beach/ocean by refusing to allow the BPS/rip rap requested here in this unique Rockaway subregion." Record 25 (emphasis added).

We agree with petitioners that the county erred in concluding that the impact on the coast was acceptable based on potential additional hardening. The county concluded that, although many of the properties that are eligible for BPS without an exception have not yet installed BPS, an exception is appropriate. The county relied, in part, on DLCD's position in a 2021 Goal 18, IR 5, exception case in Lincoln County, where the county concluded that the ESEE impacts of additional hardening would not be significant due to the amount of existing and potential BPS.

Both OS/SF and DLCD dispute the county's reliance on DLCD's position on the Lincoln County Goal 18 exception.[12] OS/SF broadly argues:

> "Less than 6% of the entire littoral cell, and particularly the area of the subject properties, is currently armored. Rec. 452, 1253. DLCD raised the concern that an increase of 2.8% 'is committing to a high level of shoreline armoring in this sublittoral cell.' Rec. 452. Further, even properties that were developed prior to January 1,

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[12] DLCD's testimony in the Lincoln County case was:

> "According to the experts consulted by the applicants, the proliferation of [BPS] on Gleneden Beach is causing and will continue to cause significant harm to the few properties left unprotected. The [BPS] along this stretch of beach have resulted in a disruption to littoral cell processes and movement of sand, increasing erosion at unprotected sites. In addition to the harm caused by the general proliferation of protective structures, specific protective structures adjacent to the ineligible properties may also be causing direct, local erosion to their bluffs, further aggravating the problem.
>
> "The Staff Report identifies that the core purpose of Goal 18, [IR] 5 is to stop the proliferation of [BPS] in order to preserve beaches and littoral cell functionality. The department agrees with staff that, in this instance, the case can be made that the state policy cannot be achieved in the Gleneden-Lincoln Beach area.
>
> "* * * * *
>
> "The addition of three [BPS] on this stretch of beach will be compatible with other adjacent uses because this littoral cell is already almost entirely armored. As submitted in the application materials, Gleneden Beach 'has the longest stretch and highest density of [BPS] along the Oregon coast.' Approximately 75 percent of the coastline is already armored in this littoral cell." Record 1348-49, 1415-16.

> 1977 are not simply 'entitled' to BPS, but required to comply with permitting processes meant to support Goal 18's purpose." OS/SF's Petition for Review 44.

In these proceedings, DLCD commented:

> "[Intervenors] have identified that nearly 90% of the Rockaway Subregion of the Rockaway littoral cell is eligible for BPS. While many of those homeowners may choose to armor their properties over the coming years and decades, many of those lots are not yet armored and those permitting decisions have not yet been made. Much of this sublittoral cell, and particularly the area of the subject properties, is not currently armored. If the County decides to approve this exception request and application for a BPS, the County is committing to a high level of shoreline armoring in this sublittoral cell. As has been observed in other beach systems, particularly in Lincoln Beach in Lincoln County, the proliferation of shoreline armoring has been detrimental to the natural functioning of the beach system. By approving additional armoring, the County is committing to a preference for private development protection over protection of the beach and dune resource." Record 451.

The focus in the Lincoln County case appears to have been on the extent of BPS already in place that "ha[d] resulted" in disruption. Here, differently, the county reasoned that the mere potential for additional hardening was important.

Moreover, Lincoln County's decision and DLCD's position in the Lincoln County case is not controlling or even particularly relevant here. We agree with petitioners that the county's conclusion that additional armoring is inevitable is speculative and not a basis for an exception. IR 5 provides that all BPS are to be reviewed to minimize visual impacts, maintain necessary access to the beach, minimize negative impacts on adjacent property, and avoid long-term or recurring costs to the public. The findings do not provide a basis to assume that,

because properties may be eligible to apply for BPS, those BPS will be sought and approved.

c. Change in Erosion Patterns

According to intervenors' expert, the subject properties are exposed to new, unanticipated conditions due the lasting effects of the El Niño and La Niña events of the late 1990s combined with long-existing, closely located jetties. The county concluded that this is a unique and exceptional circumstance and that approving the exception is consistent with what the county identified as the overarching purpose and intent of Goal 18, *which includes reducing the hazard to human life and property*. Record 22-23. The findings include:

> "The record demonstrates that the Subject Properties have seen a loss of 142 feet of beachfront property since 1994, with the Pine Beach 'common area' that was densely vegetated when the Pine Beach Replat was approved and recorded, now dry sand beach.
>
> "Evidence in the record demonstrates that more than $10 million in property value is at risk of being lost, in addition to public infrastructure to include public water and sewer, utilities and roads. The lives of the Subject Properties' occupants are also at risk from unpredictable and dangerous wave runup. The proposed [BPS] will responsibly mitigate this significant threat in a manner that is consistent with the County's development standards. The threat to [intervenors'] properties is present and very real. Any avoidable delay in issuing the requested development permit for the BPS, unjustifiably places lives and property in serious jeopardy." Record 24.

The county found that "nothing hinted at the unanticipated and extensive retrograding that occurred in recent years, triggered by two successive El Niño/La

Niña events in the area of the subject properties and their influence on the Rockaway littoral cell subregion due to the presence of two unusually closely placed jetties." Record 25.

OS/SF argues that "[r]easons pertaining to wave runup, ocean flooding, and erosion (i.e., ongoing coastal hazards) that are experienced at the Subject Properties are not any different than can be argued elsewhere on the Oregon coast in other areas that are also ineligible for beachfront protection." OS/SF's Petition for Review 42. Petitioners cite and refer to general, non-site-specific evidence regarding coastal hazards. This is not evidence that undermines the site-specific evidence relied upon by the county to conclude that the situation at the subject properties is unique because of the presence of two close jetties that increase wave undercutting. We agree with intervenors that the county adopted sufficient findings that a "catch-all" reasons exception is appropriate for the residentially developed properties in both the George Shand Tract and the Pine Beach Subdivision, and those findings are supported by the evidence in intervenors' expert's reports.

We do, however, agree with petitioners that the county's evaluation is inadequate with respect to the vacant lots in both areas. The county did not explain the role of the vacant lots and the relative location of any infrastructure in its analysis. Furthermore, OCA argues in its seventh assignment of error that the county did not adopt findings relating its rationale to the four vacant lots. OCA argues:

> "The findings do not explain how 'appropriate development,' under Goal 18, includes vacant lots that have not been developed. Merely because some public infrastructure is available does not mean that those vacant lots have been developed to any degree that warrants a goal exception. * * * The findings repeat that 'the proposed exception is necessary for the protection of the structures and associated infrastructure,' but that analysis does not apply to the vacant lots." OCA's Petition for Review 32-33.

OCA observes that the vacant lots do not contain the people and property that the county states the exception serves to protect. We agree with OCA that the county failed to address why a reasons exception is appropriate to allow BPS on properties that have not been developed with residential uses.[13]

The county failed to evaluate the relationship between the unique circumstances it identified, the vacant parcels and any related infrastructure, and the proposed BPS. The findings fail to adequately explain why the conservation goal of IR 5 cannot be met on the vacant lots and/or why the conservation goal (no BPS) should yield to development of the BPS, as proposed, on the vacant lots.

These assignments of error are sustained, in part.

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[13] We observe that the TCLUO 3.530(4)(A)(4)(c)(2) and (3) standards for BPS require showings that "[n]on-structural solutions cannot provide adequate protection" and "[t]he [BPS are] placed as far landward as possible." The findings state that the proposed BPS placement "is as close to the *existing* residential dwellings as is possible." Record 93 (emphasis added). The vacant lots do not contain residential dwellings.

C. OS/SF's and OCA's Second Assignments of Error and DLCD's Third Assignment of Error

As discussed above, OAR 660-004-0022(1) provides that an exception may be justified for the following reason:

> "*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 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 analysis 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 be reasonably obtained.
>
> "(b) *The proposed use or activity has special features or qualities that necessitate its location on or near the proposed exception site*." (Emphases added.)

The county adopted findings that a "demonstrated need" was shown based upon the requirements of Goals 7 and 18 as well as Statewide Planning Goals 10 (Housing), 11 (Public Facilities and Services), and 14 (Urbanization). The county concluded:

> "[T]he proposed BPS is necessary to protect life and property in an acknowledged urban community of Tillamook County. That means without the proposed BPS, the 15 Subject Properties will be exposed to periodic wave runup and ocean flooding and the existing residential development to include related infrastructure and public facilities, will be subject to natural hazard risks to life and to property and, eventually, the properties will become uninhabitable or will be destroyed." Record 51.

OS/SF argues in its second assignment of error and DLCD argues in its third assignment of error that the county misconstrued the law and adopted findings not supported by substantial evidence. OCA joins in these assignments of error.

We explained in *VinCEP v. Yamhill County*, 55 Or LUBA 433, 449 (2008), that the "demonstrated need" standard requires that the county demonstrate that it is at risk of failing to satisfy one or more obligations imposed by Goals 3 to 19 and that the proposed exception is a necessary step toward maintaining compliance with goal obligations.

> "[T]he county must (1) identify one or more obligations under Goals 3 to 19, (2) explain why the county is at risk of failing to meet those obligations, and (3) explain why the proposed exception to the requirements of one goal * * * will help the county maintain compliance with its other goal obligations." *Oregon Shores*, ___ Or LUBA at ___ (slip op at 31).

With respect to OAR 660-004-0022(1) and "demonstrated need," the county found that a "demonstrated need" was established based on the requirements of Goals 7, 10, 11, 14, and 18, and related provisions in the county's comprehensive plan. We address each goal below.

1. Overview of the Goals

In *1000 Friends of Oregon v. Jackson County*, the court placed the 19 statewide planning goals into four categories:

> "[Statewide Planning Goals 9 (Economic Development) and 12 (Transportation) and Goals 10, 11, and 14] require the designation and development of land for various uses. [Statewide Planning Goals 3 (Agricultural Lands), 4 (Forest Lands), 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces), 8

(Recreational Needs), 15 (Willamette River Greenway), 16 (Estuarine Resources), 17 (Coastal Shorelands), 18 (Beaches and Dunes), and 19 (Ocean Resources)] pertain to the conservation of land for resource, scenic, historical, and recreational uses. [Statewide Planning Goals 1 (Citizen Involvement) and 2 (Land Use Planning)] pertain to the process for adopting plans and implementing measures.

"The remaining goals regulate the manner by which land is developed. [Goal 6] requires planning entities 'to maintain and improve the quality of the air, water and land resources of the state.' [Goal 7] require[s] localities to 'protect people and property from natural hazards' by regulating, among other things, 'the types and intensities of uses to be allowed in the hazard area.'

"[Statewide Planning Goal 13 (Energy Conservation)] falls within this category of policies affecting the manner by which property is developed. The goal expressly states that it regulates the way land uses are 'managed and controlled.' The planning and implementation guidelines for the goal pertain to 'land use planning' and 'techniques and implementation devices' in a comprehensive plan and map and its implementing development code and zoning map. Neither the text of the goal nor its guidelines 'require' the county to develop or facilitate the development of any particular land use, much less large solar power generation facilities. Instead, Goal 13 requires that *all* development on land be 'managed and controlled' to conserve energy. The text of the goal and its guidelines do not directly or indirectly require the development of energy facilities." 292 Or App 173, 192-93, 423 P3d 793 (2018), *rev dismissed*, 365 Or 557 (2019) (emphasis in original; footnotes omitted).

2. Goal 7

As the court explained in *1000 Friends*, Goal 7's "protect people and property from natural hazards" language relates to the manner in which land is developed. Here, the county found, "The proposal [is consistent with Goal 7 and]

is also consistent with and required by the County Comprehensive Plan's Goal 7 Element that implements Goal 7 * * *." Record 49. The county found that, because it imposed mitigation measures at the time the property was developed, the property owners reasonably developed the property and the current property owners should be granted an exception and allowed to protect their property and lives using BPS. Record 21.

We have concluded that, "[w]hile development of renewable energy is certainly consistent with the Goal 13 requirement to 'conserve' energy, the goal includes no express mandates regarding the development of renewable energy sources" and, therefore, did not establish a demonstrated need for an exception to Goal 3 to site a solar power facility on 80 acres of high-value farmland. *1000 Friends*, 76 Or LUBA at 279. We have also concluded that a county's findings that a proposal to develop a racetrack was consistent with Goals 8 and 9 did not demonstrate that the county was incapable of satisfying its obligations under the goals without an exception. *Middleton v. Josephine County*, 31 Or LUBA 423, 430 (1996). Similarly, here, consistency with Goal 7 or comprehensive plan provisions implementing Goal 7 does not establish that an exception is needed. We agree with petitioners that Goal 7 does not *require* the installation of hazard mitigation measures after development has occurred. DLCD's Petition for Review 35-36. Similarly, the comprehensive plan does not require the county to allow BPS where development has occurred. The county's interpretation of its comprehensive plan as authorizing BPS under the unique circumstances here is

not a finding that a comprehensive plan provision implementing the goals requires BPS.

3. Goals 10, 11, and 14

Goals 10, 11, and 14 require the designation and development of land for certain uses. *1000 Friends*, 292 Or App at 192.

a. Goals 10 and 14

Goal 10 is "[t]o provide for the housing needs of the citizens of the state." Goal 10 requires that local governments inventory buildable lands for residential use, and the county found that it relies on the subject properties to meet its housing obligations. The county found that it "would be at risk of failing to meet its Goal 10 obligations expressed in its Goal 10 implementing regulations to refuse to protect the very residential lands it is required to protect to deliver housing in the County." Record 50. The county found that "[t]he loss of 15 dwelling units would represent losing almost 5% of the needed housing the County has identified as necessary" for the land within the unincorporated community. Record 52.

Goal 14 is "[t]o provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land, and to provide for livable communities." The county found that it

> "would be at risk of not meeting its Goal 14 obligations reflected in the County plan, if it refused to protect this acknowledged 'demonstrated need'; but rather to demand instead that the

> community for which there is a demonstrated need be wiped out by a natural hazard with a BPS that the evidence in the record demonstrates harms no one." Record 51.

In *Pacific Rivers Council, Inc. v. Lane County*, 26 Or LUBA 323 (1993), the county adopted an exception to Goals 4 and 5 to construct a new road. We concluded that the county's findings were

> "essentially conclusory statements that, due to the dimensional and weight restrictions of the existing Goodpasture Bridge, there is a demand by the timber industry for a new river crossing to transport logs and equipment in and out of the affected area south of the river. The findings do not set forth facts establishing the nature and magnitude of the impediment to forest operations posed by the current situation, as required OAR 660-04-020(2)(a). The findings do not explain why the county cannot satisfy its obligations under one or more of Goals 3-19, or the requirements of its acknowledged comprehensive plan, without providing the proposed use, as required by OAR 660-04-022(1)(a)." *Pacific Rivers*, 26 Or LUBA at 337.

We concluded that the county "must show the magnitude of the present impediment to forest management is such that without the proposed use the county cannot satisfy its obligations under one or more of Goals 3-19 or the requirements of its acknowledged comprehensive plan." *Id.* at 337-38. Similarly, here, the county's findings that providing housing and accommodating the population rely on planning choices the county has made that are *consistent* with Goals 10 and 14 are conclusory and do not establish that loss of the subject properties for residential use will result in failure to comply with Goals 10 or 14. Provisions in the comprehensive plan stating that the unincorporated community will accommodate a given number of dwellings and a finding that there is a

"demonstrated need" for a given amount of housing in the community do not establish that there is a "demonstrated need" to provide it on the subject properties. Record 52.

b. Goal 11

Goal 11 is "[t]o plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development." The county found that it "would be at risk of failing to meet its Goal 11 obligation for orderly and efficient arrangement of public facilities and services if it refused to approve BPS to protect such public facilities and services and insisting that they be destroyed by wave action." Record 50-51. The county found that, if public facilities are harmed by coastal erosion, the county's existing services may be compromised, which would be inefficient. Record 52. Neither Goal 11 nor the county's comprehensive plan require any action with respect to providing BPS for existing facilities in hazardous areas.

c. Goal 18

Goal 18 relates to the conservation of land for resource uses. *1000 Friends*, 292 Or App at 192. The county found that Goal 18 has two competing components:

> "The first states that beaches and dunes shall allow appropriate development as well as conserving, protecting and, if appropriate, restoring coastal beach and dune areas. It directs comprehensive plans to 'provide for diverse and appropriate sue of beach and dune areas consistent with their * * * recreational and * * * economic values.' The second purpose is to reduce the hazard to human life

and property from natural or man-induced actions." Record 51.

The county found that "Goal 18 puts a mandatory obligation on the County to reduce hazards to human life and property from natural or man-induced actions. Approval of the proposed BPS is necessary to enable the County to comply with this Goal 18 obligation." Record 53. Goal 18 does not require that property be protected, and, indeed, IR 5 illustrates the balancing between the protection of property and the protection of the resource that is the subject of the goal.

The goals and comprehensive plan provisions relied upon by the county do not support a finding of "demonstrated need" for a reasons exception.

These assignments of error are sustained.

OCA'S, OS/SF'S, AND DLCD'S FOURTH ASSIGNMENTS OF ERROR

OAR 660-004-0020(2)(c) provides that the county's reasons exception must include an analysis of

> "'[t]he long-term [ESEE] consequences resulting from the use at the proposed site with measures designed to reduce, adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site.' The exception shall describe: the characteristics of each alternative area considered by the jurisdiction in which an exception might be taken, the typical positive and negative consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts. A detailed evaluation of specific alternative sites is not required unless such sites are specifically described with facts to support the assertion that the sites have significantly fewer adverse impacts during the local exceptions proceeding. The exception shall include the reasons why the consequences of the use at the chosen site are not

> significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site. Such reasons shall include but are not limited to a description of the facts used to determine which resource land is least productive, the ability to sustain resource uses near the proposed use, and the long-term economic impact on the general area caused by irreversible removal of the land from the resource base. Other possible impacts to be addressed include the effects of the proposed use on the water table, on the costs of improving roads and on the cost to special service districts[.]"

DLCD's and OCA's fourth assignments of error are that the county's findings of compliance with OAR 660-004-0020(2)(c) are not supported by substantial evidence.

OAR 660-004-0020(2)(d) provides that the county's reasons exception must include an analysis of whether

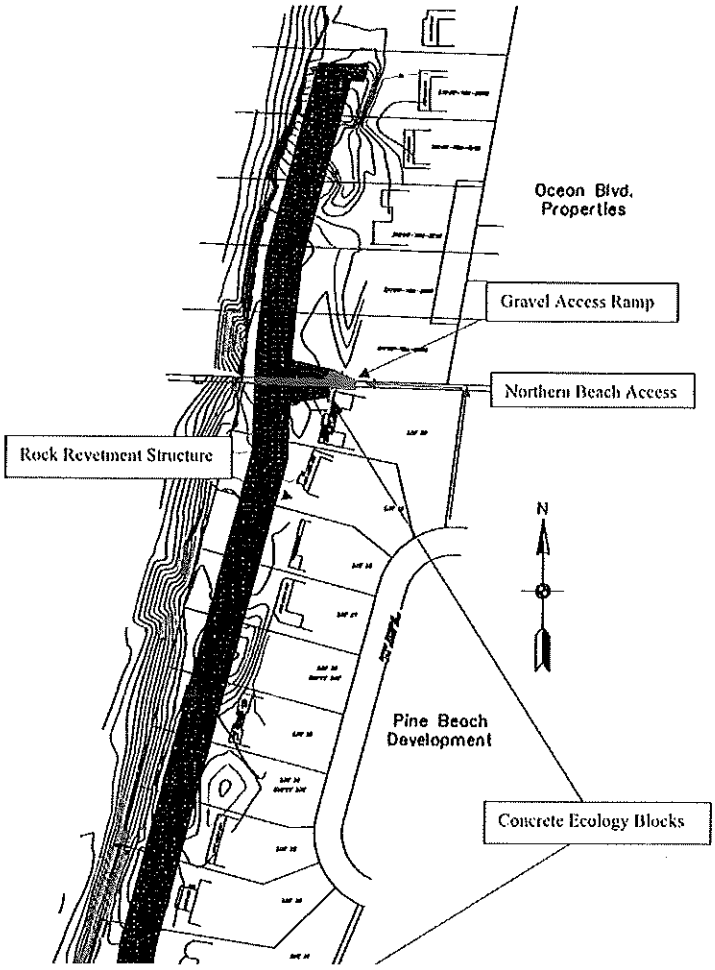
> "'[t]he proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.' The exception shall describe how the proposed use will be rendered compatible with adjacent land uses. The exception shall demonstrate that the proposed use is situated in such a manner as to be compatible with surrounding natural resources and resource management or production practices. 'Compatible' is not intended as an absolute term meaning no interference or adverse impacts of any type with adjacent uses."

OS/SF argues in its fourth assignment of error that the county misconstrued OAR 660-004-0020(2)(d) and made inadequate findings.

For the vacant lots, as we explained above, the county's reasons for adopting the exception are deficient and require additional analysis and evidence. Given that additional analysis of whether reasons support the exception for the

vacant lots is required, we will not address the assignments of error as they relate to the vacant lots.

As shown in the picture below, intervenors' BPS design assumes the presence of BPS on both the vacant lots and the developed properties.



Record 1995. Because intervenors requested approval of an integrated design, we understand the evidence in the record and the county's findings concerning the long-term ESEE consequences and compatibility with adjacent uses to reflect the inclusion of the vacant lots. For example, the county found, with respect to environmental impacts, that

> "[t]he evidence in the record demonstrates that the impacts resulting from *the proposed BPS* on the Subject Properties will be neutral or positive. *The BPS's design* is a measure designed to reduce adverse impacts of *the proposed BPS* on other properties and on the environment in general, namely additional erosion of the shoreline and loss of shoreland vegetation." Record 41 (emphases added).

We are unable to ascertain how much of a role the vacant lots play in the county's analysis, and, because the county will have to address the vacant lots on remand with better findings and more evidence, it would be premature to address these assignments of error as they relate to the developed properties.

OCA'S SIXTH ASSIGNMENT OF ERROR

ORS 197.175(2)(a) requires that PAPAs comply with the statewide planning goals. OCA's sixth assignment of error is that the county misconstrued the law and made findings of consistency with Goals 6 and 7 that are unsupported by substantial evidence.

Goals 6 and 7 concern how land is developed. *1000 Friends*, 292 Or App at 192. Goal 6 is "[t]o maintain and improve the quality of the air, water and land resources of the state" and, as discussed above, Goal 7 is "[t]o protect people and property from natural hazards."

With respect to Goal 6, OCA argues that the findings fail to adequately address the impacts of BPS:

> "In the absence of such findings, the findings cannot demonstrate compliance with Goal 6 and the findings are inadequate because the findings conclusorily [*sic*] allege that there will be no impacts, despite overwhelming information that adverse impacts historically occur with the placement of such shoreline structures, including the

'most detrimental effect of seawalls': 'passive erosion.'" OCA's Petition for Review 29.

OCA argues that the findings of compliance with Goal 7 are inadequate because they do not address long-term hazard impacts to the beach and public safety. Like the findings of compliance with Goal 6, OCA maintains that the findings of compliance with Goal 7 are inadequate "because the[y] conclusorily [*sic*] allege that there will be no impacts, despite overwhelming information that adverse impacts historically occur with the placement of such structures." *Id.* at 30.

OCA does not develop an argument identifying what is required to show consistency with Goals 6 and 7 or explaining why that showing is not made in this case.[14] *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

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[14] We explained in *Salem Golf Club v. City of Salem*, 28 Or LUBA 561, 583 (1995), that, where a comprehensive plan is amended to allow a particular use, Goal 6 requires that the local government adopt findings explaining why it is reasonable to expect that applicable state and federal environmental quality standards can be met by the use. *See also Nicita v. City of Oregon City*, ___ Or LUBA ___ (LUBA Nos 2020-037/039, Sept 21, 2021), *aff'd*, 317 Or App 709, 507 P3d 804 (2022). Here, the county found that "[t]he proposed use will be developed consistent with the adopted and acknowledged land use regulations and will comply with any development requirements intended to protect air, water and land resource qualities. The proposal is consistent with Goal 6." Record 59. Petitioners do not develop an argument that that finding is inadequate.

In *Smith v. Douglas County*, 37 Or LUBA 801 (2000), the petitioners argued that a comprehensive plan amendment to allow development of an RV park on property that was split-zoned Exclusive Farm Use and Community Commercial and located within the 100-year floodplain did not comply with Goal 7 and was not supported by adequate findings and substantial evidence. We explained:

This assignment of error is denied.

DLCD'S AND OCA'S FIFTH ASSIGNMENTS OF ERROR

DLCD's fifth assignment of error is that the county's findings approving the FDP are inadequate. OCA's fifth assignment of error is that the county misconstrued the law and adopted findings not supported by substantial evidence when it concluded that certain flood hazard area criteria were met. OCA also restates its prior assignment of error that "the findings and ESEE analysis do not respond to the well-known and publicly-available information about the impacts of BPS o[n] shoreline structures, including passive erosion." OCA's Petition for Review 27. This element of the assignment of error is derivative of the prior assignment of error, and we do not address it again.

We do not reach the assignments of error challenging the adequacy of the FDP findings and supporting evidence because they are premature. The county

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> "Goal 7 prohibits development in natural hazard areas 'without appropriate safeguards.' Petitioners' arguments under this assignment of error boil down to an assertion that the safeguards the county imposed here are insufficient. * * *
>
> "The county considered and rejected petitioners' arguments regarding the consequences of changes to the floodplain/floodway and the fill that was placed on the subject property. Petitioners do not challenge or identify any error in those findings, and we do not consider petitioners' arguments on those matters further." *Smith*, 37 Or LUBA at 806 (citations omitted).

Petitioners do not develop an argument that the county failed to identify appropriate flooding safeguards or otherwise explain what is required by Goal 7.

approved a unitary BPS design protecting both developed and vacant lots. We have concluded that the county has identified a sufficient reason for an exception for the developed lots under the catch all provision, but has not done so for the vacant lots. We have also concluded that because the vacant lots were included in the county's ESEE and alternatives analysis, it is premature for us to address the assignments of error challenging the county's related findings. Similarly, it is premature for us to consider the FDP assignment of error. First, the FDP requires an approved exception and we are remanding the decision approving the exception. Second, the BPS design may change as a result of the county's decision as to whether reasons justify an exception on the vacant properties and the county's ESEE and alternatives analysis.

The county's decision is remanded.