

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

3
4 COLUMBIA RIVERKEEPER,
5 COLUMBIA RIVER BUSINESS ALLIANCE,
6 OREGON CHAPTER SIERRA CLUB,
7 COLUMBIA RIVER CLEAN ENERGY COALITION,
8 JACK MARINCOVICH and PETER HUHTALA,
9 *Petitioners,*

10
11 and

12
13 COLUMBIA RIVER INTER-TRIBAL
14 FISH COMMISSION and JOHN DUNZER,
15 *Intervenors-Petitioners,*

16
17 vs.

18
19 CLATSOP COUNTY,
20 *Respondent,*

21
22 and

23
24 NORTHERNSTAR ENERGY LLC and
25 BRADWOOD LANDING LLC,
26 *Intervenors-Respondents.*

27
28 LUBA No. 2008-052

29
30 FINAL OPINION
31 AND ORDER

32
33 Appeal from Clatsop County.

34
35 Jannett Wilson, Eugene and Brett VandenHeuvel, Hood River, filed a petition for
36 review and argued on behalf of petitioners. With them on the brief was Goal One Coalition.

37
38 Julie A. Carter, Portland, filed a petition for review and argued on behalf of
39 intervenor-petitioner Columbia River Inter-Tribal Fish Commission.

40
41 John Dunzer, Seaside, filed a petition for review and argued on his own behalf.

42
43 E. Andrew Jordan, Portland, filed a joint response brief on behalf of respondent.
44 With him on the brief were Jordan Schrader Ramis PC, Michelle Rudd, Elaine Albrich, Sarah
45 Stauffer Curtiss, Stoel Rives LLP, Edward J. Sullivan, Carrie A. Richter and Garvey

1 Schubert Barer PC.

2
3 Michelle Rudd, Portland, filed a joint response brief and argued on behalf of
4 intervenor-respondent NorthernStar Energy LLC. With her on the brief were Elaine Albrich,
5 Sarah Stauffer Curtiss, Stoel Rives LLP, E. Andrew Jordan and Jordan Schrader Ramis PC.

6
7 Edward J. Sullivan, Portland, filed a joint response brief and argued on behalf of
8 intervenor-respondent Bradwood Landing LLC. With them on the brief were Carrie A.
9 Richter, Garvey Schubert Barer PC, E. Andrew Jordan and Jordan Schrader Ramis PC.

10
11 BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

12
13 RYAN, Board Member, did not participate in the decision.

14
15 REMANDED

01/27/2008

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

NATURE OF THE DECISION

Petitioners appeal a county decision approving comprehensive plan amendments, zone changes, and development approvals to allow a liquefied natural gas marine terminal, natural gas pipeline, and related facilities.

FACTS

Intervenors-respondents (intervenors) propose to develop a liquefied natural gas (LNG) marine terminal, natural gas pipeline, and related facilities at Bradwood Landing on the Columbia River. The proposed site is located approximately 20 miles east of the City of Astoria at the former mill site and company town of Bradwood. The subject property consists of nine parcels totaling 411 acres with over a mile of frontage on the Columbia River. The subject property has upland forested areas and lowlands consisting mostly of estuarine shore lands and wetlands that adjoin the Columbia River where the proposed terminal would be located. The only structures currently on the property are an abandoned pole barn and a small concrete building.

The proposed terminal site is 38 river miles from the Pacific Ocean and lies at the junction of the main channel of the Columbia River and Clifton Channel, a large side channel navigable by small watercraft. The proposal calls for large, ocean-going vessels to transport LNG to the terminal, where the LNG will be temporarily stored and then re-gasified before being sent out by pipeline. The proposed underground pipeline would extend south and east from the terminal for 36 miles and thence under the Columbia River to connect with an interstate natural gas pipeline near Longview, Washington. The first six miles of underground pipeline would be in Clatsop County.

The proposed development involves a variety of land uses and activities and the county's decision includes numerous comprehensive plan amendments, zone changes, and development approvals that include: a bridge replacement, concrete batch plants, a

1 construction worker park-and-ride facility, dredging of the Columbia River and disposal of
2 the dredged materials, power lines, in-water facilities, storage and staging areas, LNG
3 storage tanks and gasification plant, underground pipeline, railroad realignment, and road
4 improvements.

5 The county planning commission recommended approval of the consolidated
6 applications for land use approvals and permits over petitioners' and intervenors-petitioners'
7 objections. The board of county commissioners subsequently approved the various
8 applications for the proposal. This appeal followed.

9 **MOTION TO STRIKE**

10 Intervenors move to strike Appendix D from petitioners' petition for review.
11 Appendix D is a letter to the Federal Energy Regulatory Commission (FERC) from the
12 Columbia River Estuary Study Taskforce (CREST) regarding the draft environmental impact
13 statement review for the proposed development. Petitioners cite Appendix D as evidentiary
14 support for one of their assignments of error.

15 Petitioners request that we take official notice of Appendix D. LUBA may take
16 judicial notice of “[p]ublic and private official acts of the legislative, executive and judicial
17 departments of this state * * *.” OEC 40.090(2). Petitioners contend that CREST is a
18 consultant of the board of county commissioners, and therefore the letter is an “official
19 publication” of the county. However, even if petitioners were correct that a letter from
20 CREST could be considered an “official act” of the county, LUBA does not take judicial
21 notice of documents that are otherwise subject to official notice, if cited for their evidentiary
22 value. *Friends of Deschutes County v. Deschutes County*, 49 Or LUBA 100, 103 (2005).
23 The portion of CREST letter that petitioners seek to rely on, that “the scale of this project is
24 unprecedented in the Lower Columbia” is cited for its evidentiary value with respect to a
25 disputed factual issue in this appeal, and therefore petitioners' request that we take official
26 notice of that document is denied.

1 Intervenors’ motion to strike Appendix D to petitioners’ petition for review is
2 granted.

3 **MOTION TO FILE REPLY BRIEF**

4 Petitioners and intervenor-petitioners move to file a reply brief. Intervenors object to
5 the motion on the grounds that it was not filed “as soon as possible after respondent’s brief is
6 filed” and that the reply brief is not “confined solely to new matters raised in the
7 respondent’s brief.”

8 LUBA will deny permission to file a reply brief that is not filed “as soon as possible”
9 after the response briefs only if a respondent’s substantial rights are prejudiced. *Shaffer v.*
10 *City of Salem*, 29 Or LUBA 592, 593-94 (1995). Where respondents do not have adequate
11 time to review the brief and prepare a response for oral argument, their substantial rights are
12 prejudiced, and a request to file a reply brief will be denied. *Sequoia Park Condo. Assoc. v.*
13 *City of Beaverton*, 36 Or LUBA 317, 322, *aff’d* 163 Or App 592, 988 P2d 422 (1999).
14 Whether respondents have adequate time to respond to the motion and prepare for oral
15 argument depends on the length of the reply brief and the timing of oral argument. *Id.*

16 The two response briefs were filed by first class mail on November 3 and 4, 2008,
17 and presumably were received by petitioners two or three days later. The reply brief was
18 filed by first class mail on Friday, November 14, 2008. Although it might have been prudent
19 to do so, petitioners did not send respondents a copy of the proposed reply brief by electronic
20 mail or facsimile on the date it was mailed. Intervenors (and LUBA) did not receive the
21 reply brief until Monday, November 17, 2008. Oral argument was held on Thursday,
22 November 20, 2008. Although it is a close question, we do not agree with intervenors that
23 the reply brief was not filed “as soon as possible.” Even if the reply brief was not filed as
24 soon as possible, intervenors had three days prior to oral argument to read and prepare
25 responses to a six-page reply brief. Intervenors have not demonstrated that any delay in

1 filing the reply brief prejudiced their substantial rights. We therefore will not strike the reply
2 brief as untimely filed.

3 Intervenor also move to strike the reply brief because it is not “confined solely to
4 new matters raised in the respondent’s brief.” “New matters” warranting a reply brief tend to
5 be “arguments that assignments of error should fail regardless of their stated merits, based on
6 facts or authority not involved in those assignments.” *Cove at Brookings Homeowners*
7 *Assoc. v. City of Brookings*, 47 Or LUBA 1, 4 (2004); *D.S. Parklane v. Metro*, 35 Or LUBA
8 516, 527-28 (1999), *aff’d* 165 Or App 1, 994 P2d 1205 (2000). Sections A through G of the
9 reply brief respond to seven alleged “new matters,” including arguments in the response
10 briefs that petitioners have waived certain issues. In our view, most of the arguments in
11 sections A through G of the reply brief appropriately respond to new matters raised in the
12 response briefs. We see little point in attempting to tease apart the few inappropriate
13 arguments from the appropriate portions of the reply brief.

14 Section H of the reply brief is not a response to a “new matter,” but actually a motion
15 to strike (or request that LUBA disregard) various statements in intervenors’ summary of
16 material facts that petitioner contends are not supported by the record. We will consider
17 Section H as a motion filed under OAR 661-010-0065, and disregard any factual allegation
18 in the response brief (or any brief for that matter) that is not supported by the record.

19 The reply brief is allowed.

20 **MOTION TO TAKE OFFICIAL NOTICE**

21 Intervenor move LUBA to take official notice of various provisions of Clatsop
22 County ordinances and plans. There is no objection to the motion, and it is granted.

1 **FIRST ASSIGNMENT OF ERROR (CRITFC)¹**

2 CRITFC argues that the county committed a procedural error that violated its
3 substantial rights by allowing intervenors the unilateral right to submit new evidence after
4 the public hearing had been closed. According to CRITFC, the county should have allowed
5 CRITFC to respond to intervenors' new evidence, and the county's denial of that opportunity
6 prejudiced its substantial rights.²

7 CRITFC's argument is based on ORS 197.763(6), which sets out minimum
8 requirements for proceedings following the initial evidentiary hearing.³ In particular,

¹ We follow the parties in using the acronym "CRITFC" for intervenor-petitioner Columbia River Inter-Tribal Fish Commission. In addition, we first address CRITFC's assignments of error rather than petitioners', because CRITFC's first two assignments of error allege that the county committed various procedural errors. Generally, LUBA addresses procedural assignments of error before substantive assignments of error, because, if sustained, procedural assignments of error often require remand for additional evidentiary proceedings and adoption of new or amended findings.

² Intervenors argue that CRITFC waived this argument because it did not object below to the procedure followed by the county. Although CRITFC did not object, other participants did, and that was sufficient to preserve the issue on appeal to LUBA. *Spiering v. Yamhill County*, 25 Or LUBA 695, 714-15 (1993).

³ ORS 197.763(6) provides:

- “(a) Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection or leaving the record open for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection.
- “(b) If the hearings authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence, arguments or testimony. If new written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence, arguments or testimony for the purpose of responding to the new written evidence.
- “(c) If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section.

1 CRITFC relies on ORS 197.763(6)(c), which provides that where the local government
2 leaves the record open for additional written evidence, arguments or testimony, any
3 participant may request in writing an opportunity to respond to that any new evidence
4 submitted during the period the record is open. If such a request is made, the local
5 government must reopen the record pursuant to ORS 197.763(7).⁴

6 The board of county commissioners held a public hearing on October 22, 2007, and
7 continued that hearing to November 19, 2007. At the conclusion of the November 19, 2007
8 hearing, the county established a post-hearing schedule that allowed all parties the
9 opportunity to submit additional evidence on or before November 26, 2007. The county
10 allowed intervenors—and only intervenors—an additional seven days, until December 3,
11 2007, to submit evidence to rebut the evidence submitted by November 26, 2007. Several
12 parties objected to limiting the opportunity to submit rebuttal evidence to intervenors. On
13 December 3, 2007, intervenors submitted several documents that petitioners allege included
14 new evidence: a letter from intervenors’ attorney, and a letter from intervenors’ senior vice
15 president, attached to which was an e-mail from a representative from NW Natural Gas and a
16 letter from the Director of the Oregon Department of Energy. The county rejected
17 petitioners’ request to re-open the record to allow petitioners an opportunity to respond to the
18 alleged new evidence submitted on December 3, 2007. The county concluded that

“* * * * *

“(e) Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant’s final submittal shall be considered part of the record, but shall not include any new evidence. This seven-day period shall not be subject to the limitations of ORS 215.427 or 227.178 and ORS 215.429 or 227.179.”

⁴ ORS 197.763(7) provides:

“When a local governing body, planning commission, hearings body or hearings officer reopens a record to admit new evidence, arguments or testimony, any person may raise new issues which relate to the new evidence, arguments, testimony or criteria for decision-making which apply to the matter at issue.”

1 intervenors' December 3, 2007 submittals did not include any new evidence, and appear to
2 have treated the December 3, 2007 submittals as the applicant's final written argument, for
3 purposes of ORS 197.763(6)(e).

4 Petitioners argue that the county erred in concluding that the December 3, 2007
5 submittal included no new evidence, and therefore the county erred in accepting the
6 submittals without offering petitioners an opportunity to respond to that new evidence. If the
7 December 3, 2007 submittal is considered final written argument under ORS 197.763(6)(e),
8 petitioners contend, it is clear that submitting new evidence as part of the applicant's final
9 written argument violates ORS 197.763(6)(e). If the December 3, 2007 submittal is instead
10 a continuation of the evidentiary open record period (a record erroneously left open only to
11 intervenors), petitioners argue that ORS 197.763(6)(c) requires the county to re-open the
12 record on receipt of a written request by any participant, to allow an opportunity to respond
13 to new evidence submitted during the open-record period.

14 Intervenors respond, initially, that the county's proceedings were not governed by
15 ORS 197.763(6)(c), and that the statute's directive to reopen the record in any event does not
16 provide endless opportunities for evidentiary rebuttal and surrebuttal. Although not entirely
17 clear, we do not believe any party disputes that the October 22, 2007 hearing was the "initial
18 evidentiary hearing" for purposes of ORS 197.763(6)(a). The county continued that hearing
19 to November 19, 2007, presumably pursuant to ORS 197.763(6)(b). *See Wetherell v.*
20 *Douglas County*, ___ Or LUBA ___ (LUBA No. 2007-133, February 12, 2008) (discussing
21 relationship between ORS 197.763(6)(a), (b) and (c)). At the November 19, 2007 hearing,
22 presumably in response to requests from the parties, the county chose to keep the evidentiary
23 record open to all participants for seven days, apparently pursuant to ORS 197.763(6)(c).
24 The county also allowed "rebuttal by applicant until December 3, 2007." Record 25. It is
25 not clear from the county's decision or the record whether (1) the county intended that the
26 applicant have until December 3, 2007, to provide final written argument pursuant to

1 ORS 197.763(6)(e), or (2) the county intended to re-open the record to allow intervenors the
2 opportunity to submit evidentiary rebuttal, as contemplated by the second sentence of
3 ORS 197.763(6)(c) and 197.763(7), followed by a subsequent opportunity for final written
4 argument, or (3) the county was pursuing some third option not contemplated by the statute
5 at all. Because the county’s decision appears to treat the December 3, 2007 submittal as the
6 applicant’s final written argument under ORS 197.763(6)(e), and intervenors did not
7 subsequently attempt to submit a final written argument, the most reasonable conclusion is
8 that both the county and intervenors intended the December 3, 2007 submittal to be the
9 applicant’s final written argument, not a separate evidentiary submittal.⁵

10 As petitioners note, ORS 197.763(6)(e) clearly prohibits including any “new
11 evidence” as part of the applicant’s final written argument. Intervenors dispute that the
12 December 3, 2007 submittals included any “new evidence” within the meaning of
13 ORS 197.763(6)(e). According to intervenors, all of the factual statements in the three
14 documents submitted on December 3, 2007, are reiterations of evidence already in the
15 record. In the alternative, intervenors argue that, to the extent any new facts or evidence not
16 already in the record was inadvertently included in the December 3, 2007 submittal,
17 petitioners have not demonstrated that any new evidence relates to any applicable approval
18 criteria, or that the county relied upon any such new evidence to determine whether
19 applicable approval criteria are met.

20 We agree with intervenors that petitioners have not established that any of the
21 statements in the documents submitted on December 3, 2007 constitutes “new evidence” for
22 purposes of ORS 197.763(6)(e). In addition, to the extent any factual statements might
23 constitute evidence not already in the record, petitioners have not demonstrated that such

⁵ The December 3, 2007 letter from intervenors’ attorney is labeled “Legal Argument and Commentary on Evidence” and states that “[w]e do not submit any new evidence in this letter[.]” Record 1651. Similarly, the December 3, 2007 letter from intervenor Bradwood’s senior vice president claims that it “does not include any evidence that is not already contained in the record of these proceedings.” Record 1675.

1 statements relate to any applicable approval criteria or that the county relied upon such
2 statements to determine whether applicable approval criteria are met. Rather than address
3 each of the parties' contentions regarding factual statements in the December 3, 2007
4 documents, we focus on what appears to be petitioners' strongest and most developed
5 argument that the county accepted new evidence after the close of the record, on which it
6 relied to determine compliance with applicable approval criteria.

7 As discussed under CRITFC's third assignment of error, an applicable comprehensive
8 plan policy requires a finding that proposed use of coastal shorelands satisfies a need that
9 cannot be accommodated on shorelands in urban and urbanizable areas. The debate below
10 regarding this plan policy centered on the suitability of a site within the City of Warrenton
11 that has been planned and zoned for a similar LNG terminal proposed by one of intervenors'
12 competitors. The December 3, 2007 letter from intervenors' attorney includes several
13 responses to arguments below that the existence of that alternative urban site means that the
14 Bradwood Landing site is not needed to satisfy any need for an LNG terminal. Intervenors'
15 attorney asserted that the proposed LNG terminal in the City of Warrenton could not serve
16 certain local markets, had not received all required permits, and faced various environmental
17 challenges. Record 1658, n 2. In the county's final decision, it recited those statements, in
18 partial support for its conclusion that the proposed LNG terminal at the Bradwood Landing
19 site satisfies a need that cannot be satisfied on urban shorelands. Record 141, 306-07.
20 Petitioners contend that the statements in the December 3, 2007 letter constitute "new
21 evidence," and the county erred in relying on that new evidence to find compliance with
22 applicable approval criteria.

23 Intervenors respond that the disputed statements regarding the City of Warrenton site
24 in the December 3, 2007 letter are not "new evidence," but simply recitations of testimony
25 already in the record. Record 3089, 3419-20. Intervenors are correct. Similarly, CRITFC's

1 remaining arguments under this assignment of error do not establish a basis for reversal or
2 remand.

3 CRITFC's first assignment of error is denied.

4 **SECOND ASSIGNMENT OF ERROR (CRITFC)**

5 CRITFC contends that the county erred in allowing intervenors to submit new
6 evidence and argument to the county in the course of submitting and resolving disputes over
7 the proposed findings and conditions of approval.

8 On December 13, 2007, the county tentatively approved the consolidated applications
9 and requested that intervenors draft proposed findings for the county's consideration. On
10 February 5, 2008, intervenors submitted proposed findings for the county's consideration.
11 On February 27, 2008, county staff submitted a 23-page memorandum to the board of
12 commissioners, taking issue with several proposed findings and conditions of approval, and
13 recommending modifications. On March 4, 2008, intervenors submitted to staff a 31-page
14 response, along with revised proposed findings. On March 5, 2008, county staff prepared a
15 four-page memorandum to the board of commissioners commenting on intervenors' response
16 to the earlier staff memorandum.

17 On March 5, 2008, the board of county commissioners held a meeting at which staff
18 testified regarding the outstanding issues between staff and intervenors regarding the
19 findings and conditions. On March 14, 2008, intervenors submitted to staff more revised
20 findings and a six-page document titled "Supplemental Safety Condition." On March 17,
21 2008, county staff submitted a memorandum to the board of commissioners commenting on
22 the revised findings and proposing certain modifications.

23 Finally, at the March 20, 2008 hearing, the board of county commissioners conducted
24 a meeting to consider the revised findings. Several parties objected to the county's
25 consideration of the additional documents from intervenors and staff, intervenors submitted a
26 letter responding to procedural objections, and the board of county commissioners eventually

1 rejected the procedural objections and adopted the revised findings in support of the
2 challenged decision.

3 CRITFC acknowledges that local governments may solicit proposed findings from
4 the parties to be used in the local government's decision. *Sunnyside Neighborhood v.*
5 *Clackamas Co. Comm.*, 280 Or 3, 21, 569 P2d 1063 (1977). Furthermore, staff advice
6 regarding differing conclusions that a final decision maker could draw from the evidence in
7 the record is also permissible. *Gooley v. City of Mt. Angel*, ___ Or LUBA ___ (LUBA No.
8 2007-206, March 18, 2008). However, CRITFC argues that the county went beyond these
9 allowable practices by accepting new testimony and evidence that the county improperly
10 relied upon in making the challenged decision. According to CRITFC, the county committed
11 procedural error that prejudiced its substantial rights by allowing intervenors to submit new
12 evidence and argument after the record had been closed, without allowing CRITFC an
13 opportunity to respond to the new evidence.

14 CRITFC's procedural arguments are based on ORS 197.763(6) and cases applying
15 that statute. However, nothing cited to us in ORS 197.763(6) governs submissions of
16 proposed findings or other communications with the decision maker regarding findings
17 during the period between the oral tentative decision and issuance of the final written
18 decision. Certainly nothing cited to us in the statute or cases interpreting the statute requires
19 that the local government re-open the evidentiary hearing to allow all participants an
20 opportunity to respond to proposed findings or supporting arguments submitted by the
21 prevailing applicant. The statute is simply silent on that point.

22 It is noteworthy, however, that ORS 197.763(6)(e) permits the applicant and the
23 applicant alone to submit final written argument. That final written argument certainly could
24 and often does include proposed findings and conditions, and arguments in support thereof.
25 By extension, it also seems consistent with the statutory scheme to allow the applicant to
26 submit *revised* findings or conditions and arguments in favor of those revised findings or

1 conditions, *after* the final decision maker's oral decision, in circumstances where planning
2 staff has objected to some findings or conditions, and proposed modified or alternative
3 findings and conditions. At that point in the process, the final decision maker has already
4 made the critical decision that the application complies with applicable approval criteria, and
5 the only remaining task is to adopt findings expressing the final decision maker's precise
6 rationale for that conclusion, and conditions of approval that the final decision maker deems
7 necessary. We do not see that the statute is offended by allowing the applicant and planning
8 staff to exchange views on how to resolve their differences regarding findings and conditions
9 of approval, or by allowing the applicant to submit revised findings and conditions in
10 response to that exchange of views. That planning staff subsequently presents such revised
11 findings and conditions to the final decision maker, along with a staff recommendation
12 informed by the exchange of views between staff and the applicant, does not violate any
13 statutory provision cited to us.

14 That said, we agree with CRITFC that proposed or revised findings and any
15 supporting argument submitted after the close of the evidentiary record must not include any
16 new evidence, at least no new evidence that the decision maker relies on to demonstrate
17 compliance with an approval criterion. It would clearly be reversible error for the final
18 decision maker to rely upon any new evidence submitted after the close of the evidentiary
19 record to conclude that the application satisfies or does not satisfy applicable approval
20 criteria. *Brome v. City of Corvallis*, 36 Or LUBA 225, 232-233 (1999), *aff'd sub nom*
21 *Schwerdt v. City of Corvallis*, 163 Or App 211, 987 P2d 1243 (1999).

22 With that framework in mind, we turn to CRITFC's specific arguments that
23 intervenors' post-decision submittals included new evidence that the county relied upon.
24 CRITFC cites to a number of responses that intervenors submitted to planning staff, in an
25 effort to resolve disagreements between staff and intervenors regarding specific proposed
26 findings or conditions, and argues that those responses include new argument and evidence.

1 The responses clearly include argument, but it is much less clear that they include any new
2 evidence. To the extent that they do, CRITFC makes no effort to demonstrate that the county
3 relied upon any new evidence in those responses to conclude that any applicable approval
4 criteria are met.

5 As one example of alleged new evidence, CRITFC cites to a table intervenors
6 prepared that lists in one column the staff comment on the original proposed findings and in
7 an adjoining column intervenors' response. The table at Record 877 includes a staff
8 comment on proposed condition 2, noting that staff had originally recommended a condition
9 of approval requiring a flagger for controlling traffic at a narrow point on the road to the
10 proposed park and ride, but that intervenors instead proposed a condition that the road simply
11 be widened. Staff commented that it had no objection to widening the road instead of using a
12 flagger, but that the board of commissioners should decide. The table at Record 877 also
13 lists intervenors' response, which agrees that board action is required and notes that
14 "Bradwood Landing discussed with staff allowing either use of a flagger or widening the
15 road as opposed to providing only for a flagger." *Id.* CRITFC argues that that response
16 constitutes "new evidence," because it suggests modifying condition 2 to allow intervenors
17 the option of either widening the road or using flaggers. However, that response appears to
18 us to be an argument regarding what condition 2 should require, and not "evidence" at all.
19 To the extent it is evidence, CRITFC makes no attempt to demonstrate that it is "new
20 evidence" that the county relied upon to determine compliance with an applicable approval
21 criterion. The rest of CRITFC's arguments under this assignment of error also demonstrate
22 no basis for reversal or remand.

23 CRITFC's second assignment of error is denied.

24 **THIRD ASSIGNMENT OF ERROR (CRITFC)**

25 Northeast Community Plan Policy (5)(e), an element of the Clatsop County
26 Comprehensive Plan (CCCP), provides in relevant part:

1 “Coastal shoreland in areas outside of urban or urbanizable areas shall only be
2 used as appropriate for * * * [w]ater-dependant commercial and industrial
3 uses and water-related uses only upon a finding by the governing body of the
4 County that such uses satisfy a need which cannot be accommodated on
5 shorelands in urban and urbanizable areas.”

6 CRITFC argues that the county erred in finding that the proposal complies with
7 Policy (5)(e), given that there are urban lands within the county that are planned and zoned to
8 allow for an LNG terminal. *See People for Responsible Prosperity v. City of Warrenton*, 52
9 Or LUBA 181 (2006) (affirming a city decision approving comprehensive plan and zoning
10 amendments to allow an LNG terminal similar to that proposed in the present case). The
11 county rejected that argument below, finding that (1) the proposed Bradwood Landing LNG
12 terminal satisfied a site-specific “need” to redesignate and rezone a small portion of the
13 Bradwood Landing site, (2) the Bradwood Landing project satisfied the “need” to fund
14 infrastructure improvements to Clifton Road, (3) there is insufficient evidence that the City
15 of Warrenton site is a viable location for an LNG terminal, and (4) in any case, there is a
16 need for additional sources of natural gas in the region, and it is not clear that the LNG
17 terminal proposed within at the City of Warrenton site can serve certain regional markets.
18 Record 140-142, n 88. CRITFC challenges each of these conclusions.

19 We tend to agree with CRITFC that the first two reasons, identifying a “need” to
20 rezone part of the Bradwood Landing site and a “need” to obtain funding to improve Clifton
21 Road, are specious reasons for concluding that Policy 5(e) is met. Policy 5(e) is clearly
22 focused on the need for the proposed “use,” here, an LNG terminal, not rezoning needed to
23 accommodate that use or public infrastructure needed to support the use. Under Policy 5(e),
24 the question is whether the proposed use of rural coastal shoreland satisfies a need that can
25 be accommodated on coastal shoreland sites on urban or urbanizable lands.

26 The county comes closer in finding that there is a regional need for additional sources
27 of natural gas, and in its alternative findings there is insufficient evidence that the City of
28 Warrenton site is a viable location for an LNG terminal, or that a terminal at that site can

1 serve all local markets. We understand the county to have found that even if a LNG terminal
2 is built at the City of Warrenton site, there will be an unmet regional need for additional
3 sources of natural gas, and thus that need cannot be accommodated by relying solely on the
4 Warrenton site, whether it is viable or not. CRITFC does not challenge that finding of unmet
5 regional need, and instead focuses its argument on the evidence supporting the findings
6 regarding the viability of the Warrenton site and whether a terminal at that site can serve all
7 local markets. However, the finding that there is a regional need for LNG that cannot be met
8 even if a competing LNG terminal is built at the Warrenton site seems a sufficient basis for
9 concluding that Policy 5(e) is met. In addition, other than questioning the sufficiency of the
10 testimony the county relied upon, CRITFC has not demonstrated that the county’s alternative
11 findings—regarding the viability of the Warrenton site and whether it can serve all local
12 markets—are not supported by substantial evidence. While the testimony the county cites is
13 not overwhelming, CRITFC cites to no countervailing evidence.

14 CRITFC’s third assignment of error is denied.

15 **FOURTH ASSIGNMENT OF ERROR (CRITFC)**

16 The proposed development consists of numerous individual applications that were
17 consolidated for review of the entire proposed development. As part of the overall LNG
18 terminal project, intervenors propose to dredge in the Columbia River to provide a turning
19 basin for large container ships. The portion of the river where intervenors plan to dredge
20 currently has a comprehensive plan designation of Conservation and is zoned Aquatic
21 Conservation-2 (AC-2). The AC-2 zone does not list dredging as a permitted or conditional
22 use. In order to allow dredging, intervenors also applied for, and the county approved, a
23 comprehensive plan amendment to redesignate the proposed dredging area to Development
24 and change the zoning to the corresponding zone Aquatic Development (AD). The AD zone
25 allows dredging as a permitted use.

26 The so-called “goal-post rule” at ORS 215.427(3)(a) provides in relevant part that:

1 “If * * * the county has a comprehensive plan and land use regulations
2 acknowledged under ORS 197.251, approval or denial of the application shall
3 be based upon the standards and criteria that were applicable at the time the
4 application was first submitted.”⁶

5 CRITFC argues that under ORS 215.427(3)(a), the proposed dredging in the area
6 redesignated to Development and rezoned to AD must be reviewed under the “standards and
7 criteria” applicable at the time the consolidated applications were deemed complete.

⁶ We set out the complete text of ORS 215.427(3)(a), and some of its immediate context, below:

“(1) [F]or land within an urban growth boundary and applications for mineral aggregate extraction, the governing body of a county or its designee shall take final action on an application for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 120 days after the application is deemed complete. The governing body of a county or its designee shall take final action on all other applications for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 150 days after the application is deemed complete * * *.

“* * * * *

“(3)(a) If the application was complete when first submitted or the applicant submits additional information, as described in subsection (2) of this section, within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted.

“(b) If the application is for industrial or traded sector development of a site identified under section 12, chapter 800, Oregon Laws 2003, and proposes an amendment to the comprehensive plan, approval or denial of the application must be based upon the standards and criteria that were applicable at the time the application was first submitted, provided the application complies with paragraph (a) of this subsection.

“* * * * *

“(7) [T]he period set in subsection (1) of this section does not apply to an amendment to an acknowledged comprehensive plan or land use regulation or adoption of a new land use regulation that was forwarded to the Director of the Department of Land Conservation and Development under ORS 197.610 (1).

“* * * * *

“(9) A county may not compel an applicant to waive the period set in subsection (1) of this section * * * as a condition for taking any action on an application for a permit, limited land use decision or zone change except when such applications are filed concurrently and considered jointly with a plan amendment.”

1 According to CRITFC, the “standards and criteria” that were in effect on the date the
2 applications were complete include the pre-existing Conservation plan designation, which
3 CRITFC contends does not authorize dredging. Therefore, CRITFC argues, the county erred
4 in approving the proposed dredging in the areas redesignated Development and rezoned AD,
5 because dredging is inconsistent with the Conservation plan designation. We understand
6 CRITFC to argue that, under the present circumstances, the applicant must first obtain a
7 comprehensive plan amendment (and a concurrent zone change, if necessary to avoid a
8 plan/zone conflict). Only when those decisions are final and effective, can the applicant file
9 permit applications for development consistent with the new comprehensive plan map
10 designation.

11 Intervenor respond that the effect of the goal-post rule is modified where the
12 applicant files a consolidated set of zoning change and permit applications to authorize a use
13 that is not allowed under the existing zoning designation, but is allowed under the proposed
14 zone. Intervenor rely on ORS 215.416(2), which requires counties to “establish a
15 consolidated procedure by which an applicant may apply at one time for all permits or zone
16 changes needed for a development project.” When such consolidated applications are filed,
17 intervenors argue that, notwithstanding the goal post rule, the “standards and criteria” that
18 apply to the proposed development are supplied by the *proposed* new zoning designation, not
19 the zoning designation that existed on the date the applications were filed. *See NE Medford*
20 *Neighborhood Coalition v. City of Medford*, 53 Or LUBA 277, 282, *aff’d* 214 Or App 46,
21 162 P3d 1059 (2007) (under ORS 215.416(2), a permit application is judged by the standards
22 and criteria applicable under the proposed new zone, not the preexisting zone, even if the
23 zone change application was not filed on the same date as the permit application and was
24 only later consolidated with the permit application).

25 Based on that premise, we understand intervenors to argue that when a proposed
26 development and zone change requires a concurrent comprehensive plan map amendment,

1 and the applicant files a consolidated set of applications for comprehensive plan map
2 amendment, zone change, and permit approval, such consolidated applications fall within the
3 implied ORS 215.416(2) exception to the goal post rule at ORS 215.427(3)(a). Where such
4 consolidated applications are filed, intervenors argue, the goal post rule does not require that
5 the permit application be evaluated against the comprehensive plan map designation in effect
6 on the date the consolidated applications are filed, just as the goal post rule does not require
7 that the permit application be reviewed against the zoning standards that applied on the date
8 the consolidated applications for permit approval and a zone change are filed.

9 We agree with intervenors, although for a somewhat different reason. The statutory
10 scheme in which the goal post rule is embedded distinguishes between permits, zone changes
11 and comprehensive plan amendments. Plan amendments, for example, are not subject to
12 timelines that otherwise govern applications for permits or zone changes. ORS 215.427(7).
13 Although the goal post rule at ORS 215.427(3)(a) uses the term “application,” the statutory
14 context makes it clear that the goal post rule applies only to “applications for a permit,
15 limited land use decision or zone change.” *Rutigliano v. Jackson County*, 42 Or LUBA 565,
16 571 (2002). The statutory scheme is largely silent, however, on whether and how the goal
17 post rule at ORS 215.427(3)(a) applies to permit and zone map change applications that are
18 filed contemporaneously with, and dependent upon, comprehensive plan map amendments.⁷

19 In *Rutigliano*, we held that an application to amend the county’s unified
20 comprehensive plan and zoning map is not an application for a permit or a zone change for

⁷ The statute is not entirely silent. In 2003, the legislature amended ORS 215.427(3) to add subsection (b), which as noted above provides that where an application for industrial or traded sector development on certain identified sites is combined with a comprehensive plan amendment, “approval or denial of the application must be based upon the standards and criteria that were applicable at the time the application was first submitted.” Although the intent and effect of ORS 215.427(3)(b) is not entirely clear to us, by specifying that the goal post rule applies in certain circumstances where proposed development is combined with a proposed comprehensive plan amendment, the statute suggests that in other circumstances not governed by ORS 215.427(3)(b) the effect of combining a development application with a comprehensive plan amendment is that the goal post rule does *not* apply to that proposed development.

1 purposes of the goal post rule. *Id.* at 575. In other words, we held in that case the county
2 was required to apply to that map amendment applicable standards and criteria in effect on
3 the date of the decision, and could not apply superseded standards and criteria in effect when
4 the map amendment application was filed.

5 In *Friends of the Applegate v. Josephine County*, 44 Or LUBA 786, 790 (2003), we
6 extended the reasoning in *Rutigliano* to circumstances where the county has a separate
7 comprehensive plan map and zoning map. We held that the goal post rule does not apply to a
8 zoning map amendment application that is filed contemporaneously with a comprehensive
9 plan map amendment, where the zoning map amendment is dependent on the plan map
10 amendment.⁸ In that circumstance, the standards and criteria that apply to the zoning map
11 amendment are those that are otherwise applicable at the time the county makes its decision,
12 and the goal post statute does not operate to “freeze” the standards and criteria for zone
13 changes that were in effect on the date the applications were filed.

14 In the present case, it requires only a short extension of the reasoning in *Friends of*
15 *the Applegate* to conclude that, where the applicant files and the county approves a
16 consolidated set of applications for (1) a comprehensive plan map amendment, (2) a zone
17 change that is dependent on that plan map amendment, and (3) a development permit that is
18 dependent on that zone change, the goal post rule at ORS 215.427(3)(a) does not apply to
19 “freeze” in place the standards and criteria that applied to that development permit as of the

⁸ We stated in *Friends of the Applegate*:

“* * * [A]s the concurring opinion in *Rutigliano* pointed out, our reasoning in that case logically applies equally to cases where ‘the plan amendment is necessary to effect the zone change.’ 42 Or LUBA at 578 (Board Member Bassham concurring). That is the situation that we have here. We conclude that the fixed goal post rule established by ORS 215.427(3) does not apply to an application for a zone change where (1) that application for a zone change is part of, or submitted contemporaneously with, an application for a comprehensive plan amendment, and (2) the zone change is requested to implement the requested comprehensive plan amendment rather than as a separate request that could be approved independently of the requested comprehensive plan map amendment request.” (Footnote omitted.)

1 date the applications were filed. In that circumstance, all three sets of applications are
2 evaluated under the standards and criteria that are applicable at the time the county makes its
3 decision. That is, for the permit application, the governing standards and criteria are those
4 supplied by the new zoning designation, not the old zoning designation. Similarly, it is
5 irrelevant that the old comprehensive plan designation in effect on the date the consolidated
6 applications were filed does not authorize the proposed development activity allowed under
7 the permit. That old comprehensive plan designation is not part of “standards and criteria”
8 that apply to that permit application.

9 Consequently, we reject CRITFC’s argument that the county must deny the proposed
10 dredging permit because it is inconsistent with the Conservation plan map designation that
11 was in effect on the date the consolidated applications were filed.

12 CRITFC’s fourth assignment of error is denied.

13 **FIFTH ASSIGNMENT OF ERROR (CRITFC)**

14 The site of the proposed LNG terminal is accessed from Clifton Road via Bradwood
15 Road, a private road that includes a bridge crossing of Hunt Creek. As part of the
16 consolidated applications, the county approved replacing the existing Hunt Creek Bridge
17 with a new bridge that will be able to sustain the heavier vehicles and more frequent trips
18 anticipated by the development. The current bridge span rests on pilings in the creek, while
19 the replacement bridge will have a “clear span” that reaches across the creek. CRITFC
20 argues that the county improperly approved the replacement bridge.

21 Clatsop County Land and Water Development and Use Ordinance (LWDUO)
22 3.035(1) provides with respect to each of the applicable zones:

23 “Except where otherwise specifically regulated by this ordinance, the
24 following improvements are permitted outright uses and activities:

25 “(A) Normal operation, maintenance, repair, and preservation activities of
26 existing transportation facilities.”

1 The county found that the proposed bridge was allowed as “maintenance and repair of
2 an existing transportation facility.” LWDUO 1.030 defines “maintenance and repair” as:

3 “Routine upkeep of an existing structure or remedial restoration of a damaged
4 structure in current use or operation. Maintenance and repair may involve
5 changes in the structure’s location, configuration, orientation, or alignment if
6 these changes are limited to the minimum amount necessary to retain or
7 restore its operation or function to meet current building, engineering or safety
8 standards.”

9 In addition to LWDUO 3.035, the county also relied on County Road Standard S4.210(2)
10 which provides that maintenance and replacement of bridges are permitted, and any
11 increased width is necessary to meet current safety and engineering standards.⁹

12 CRITFC argues first that “maintenance and repair” of a bridge does not include
13 complete replacement of that bridge. CRITFC contends that while LWDUO 3.035 would
14 permit intervenors to repair the existing bridge, it does not authorize construction of an
15 entirely new bridge.

16 LWDUO 1.030 defines “maintenance and repair” to include changes in the
17 structure’s “location, configuration, orientation, or alignment,” under certain circumstances,
18 which does not suggest that “maintenance and repair” is limited to repairing an existing
19 structure. Changing the “location” or “alignment” of a structure like a bridge would in most
20 cases entail a new structure at a new location. In addition, LWDUO 3.035 must be read in
21 context with S4.210(2), which clearly provides that bridge replacement is a permitted use in

⁹ S4.210(2) provides:

“Maintenance and repair of roads and railroads and maintenance and replacement of bridges shall be permitted regardless of the plan designation through which the road or railroad passes, provided:

“(A) The same alignment is maintained; and

“(B) The same width is maintained, except that necessary enlargements to meet current safety and engineering standards may be permitted; and

“(C) The number of travel lanes is not increased.”

1 all zones. The county was within its discretion under ORS 197.829(1) to interpret
2 “maintenance and repair” to authorize replacing a deteriorating bridge with a new bridge.

3 CRITFC next challenges the county’s finding that bridge replacement is necessary to
4 meet current building, engineering or safety standards. According to CRITFC, the county’s
5 finding is not supported by substantial evidence, and therefore the county erred in finding
6 that the new bridge qualifies as “maintenance and repair” for purposes of the LWDUO 1.030
7 definition.¹⁰

8 The county found that the existing bridge would not support anticipated vehicle loads
9 during construction of the proposed LNG facility. CRITFC cites to testimony that the
10 existing bridge is “fine for car traffic,” and argues that simply because the existing bridge
11 cannot handle the large construction vehicles necessary to build the LNG terminal does not
12 mean that the existing bridge does not comply with current building, engineering or safety
13 standards. CRITFC argues that the record and decision do not identify a single current
14 building, engineering or safety standard that the existing bridge does not meet.

15 The county found that the existing bridge is deteriorated and no longer capable of
16 carrying heavy loads.¹¹ CRITFC does not dispute that finding. The existing bridge provides

¹⁰ As a review body, we are authorized to reverse or remand the challenged decision if it is “not supported by substantial evidence in the whole record.” ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes County*, 21 Or LUBA 188, *aff’d* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must consider and weigh all the evidence in the record to which we are directed, and determine whether, based on the evidence, the local decision maker’s conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

¹¹ The county’s findings state:

“The age of the existing span is unknown, but it certainly is several decades old. Pictures of the bridge illustrate its severely worn condition. The applicant states that the bridge ‘has deteriorated due to age and is no longer able to carry heavy construction loads.’ A November 13, 2007 letter from [intervenors’ engineering expert] was placed in the record indicating that the new bridge has been designed to meet engineering standards service to an industrial site. A September 5, 2007 memo from [another expert] was also submitted noting the lack of

1 access to the industrially-zoned Bradwood Landing site, and presumably was intended to
2 handle truck traffic generated by the timber mill that formerly existed on that site. While the
3 county’s decision does not identify any particular current engineering or safety standard that
4 the existing structure no longer meets, a reasonable person could conclude from the record
5 that the existing deteriorated structure no longer is capable of carrying the heavy loads it was
6 originally designed for. The fact that the existing bridge is still “fine for car traffic” does not
7 mean that it complies with current engineering standards for its intended use, providing
8 access to an existing industrial-zoned site. While it would have been clearer if the county or
9 intervenors’ engineering experts had specifically referenced safety or engineering standards
10 that require a stronger bridge, CRITFC has not demonstrated that the county’s finding that
11 the new bridge qualifies as “maintenance and repair” under the LWDUO 1.030 definition is
12 not supported by substantial evidence.

13 CRITFC’s fifth assignment of error is denied.

14 **SIXTH ASSIGNMENT OF ERROR (CRITFC)**

15 Intervenor propose a 1.6-mile electrical power line supported on poles to provide
16 power for the LNG terminal. The poles will range in height from 55 to 105 feet. Most of the
17 poles will be located in an F-80 zone. CRITFC argues that the poles will violate the 45-foot
18 height restriction in the F-80 zone.

19 LWDUO 3.557 provides that the F-80 zone has a “maximum building height” of 45
20 feet. The county found that wooden poles supporting electrical power lines are not
21 “buildings” under the LWDUO and are therefore not subject to the 45-foot height limit.
22 CRITFC argues that the county did not adequately explain its interpretation and that
23 whatever interpretation the county made was wrong.

certification of the existing bridge and its inability to handle anticipated loads. * * *” Record
45 (footnotes omitted).

1 LWDUO 1.030 defines “building” as a “structure built for the support, shelter, or
2 enclosure of persons, animals, chattels, or property of any kind.” A “structure” is defined as
3 “[a]nything constructed, erected, portable, or located on the ground or water, or attached to
4 the ground or to an existing structure, including but not limited to, residences, apartments,
5 barns, stores, offices, factories, sheds, cabins, mobile and floating homes, and other
6 buildings.” The county found that although the power poles are structures, they are not
7 buildings, so the 45-foot height limit does not apply.

8 “As staff indicated in the initial staff report, the building height limitation
9 applies to buildings enclosing space and is not applicable to the power lines.
10 The building height limitations are intended to apply to enclosed structures
11 and not powerlines.” Record 97.

12 CRITFC argues that the county’s findings explaining its interpretation are inadequate.
13 While the findings are brief, they are sufficient to explain the county’s reasoning that the 45-
14 foot height limit applies only to buildings, and buildings are structures that in some manner
15 enclose space. CRITFC also argues that the county’s interpretation is inconsistent with the
16 express language of the LWDUO. According to CRITFC, the definition of building
17 demonstrates that it applies to all structures, not just enclosed structures. We do not agree.
18 The definition of building clearly states that buildings are structures that, in addition to
19 merely being structures, also support, shelter, or enclose something. If the height
20 requirement applies to all structures there would be no need to define buildings as a subset of
21 structures. CRITFC finally argues that because the poles hold up powerlines that they
22 “support * * * property[.]” We agree with the county, however, that read in context it is
23 reasonably clear that the term “support” means more than simply holding something up, and
24 that the term has more in common with the contextual terms “shelter” and “enclosure.”
25 Under CRITFC’s proposed interpretation, a flag pole or a fence is a “building.” We cannot
26 say that the county’s interpretation is contrary to the express language, purpose, or
27 underlying policy of the LWDUO.

1 CRITFC's sixth assignment of error is denied.

2 **SEVENTH ASSIGNMENT OF ERROR (CRITFC)**

3 CRITFC argues that the county improperly deferred evaluating compliance with five
4 sets of approval criteria through conditions of approval that require future plans or
5 information to be submitted and evaluated at a subsequent hearing.

6 Intervenors first argue that this issue was not preserved below, and therefore cannot
7 be raised on appeal. ORS 197.763(1); ORS 197.835(3). CRITFC's assignment of error,
8 however, challenges the findings that were adopted after the public hearings had ended and
9 the record had been closed. Issues regarding compliance with the five sets of approval
10 criteria were raised below, and therefore CRITFC may challenge the findings and conditions
11 of approval adopted to ensure compliance with those approval criteria. *See Lucier v. City of*
12 *Medford*, 26 Or LUBA 213, 216 (1993) (petitioners need not raise issues below regarding the
13 adequacy of findings, as long as issues were raised below regarding compliance with
14 approval criteria).

15 Intervenors also argue that CRITFC's arguments are not sufficiently developed for
16 review. CRITFC identifies five sets of approval criteria it believes were improperly
17 deferred, and provides record citations for the challenged findings and conditions. CRITFC
18 argues that the county failed to adopt findings that it is "feasible" to comply with the
19 conditions, and further argues that the subsequent proceedings in which the county will
20 evaluate compliance with those conditions are inadequate. While relatively brief, CRITFC's
21 arguments are sufficiently developed for review.

22 CRITFC identifies five sets of standards for which the county imposed conditions of
23 approval requiring intervenors to present a plan or further information to the county for

1 subsequent approval, prior to receiving building permits.¹² According to CRITFC, the
2 county erred in two respects: (1) by failing to adopt adequate findings that it is “feasible” to
3 comply with each approval criterion, and (2) by deferring consideration of each approval
4 criterion to a “Type IIa” proceeding that does not offer the same notice and opportunity for
5 public participation as the Type IV process the county employed in making the present
6 decision.

7 In *Rhyne v. Multnomah County*, 23 Or LUBA 442,447-48 (1992), we set out the
8 options involved in multi-stage land use approvals:

9 “Where the evidence presented during the first stage approval proceedings
10 raises questions concerning whether a particular approval criterion is satisfied,
11 a local government essentially has three options potentially available. First, it
12 may find that although the evidence is conflicting, the evidence nevertheless
13 is sufficient to support a finding that the standard is satisfied or that feasible
14 solutions to identified problems exist, and impose conditions if necessary.
15 Second, if the local government determines there is insufficient evidence to
16 determine the feasibility of compliance with the standard, it could on that
17 basis deny the application. Third, if the local government determines that
18 there is insufficient evidence to determine the feasibility of compliance with
19 the standard, instead of finding the standard is not met, it may defer a
20 determination concerning compliance with the standard to the second stage.
21 In selecting this third option, the local government is not finding all applicable
22 approval standards are complied with, or that it is feasible to do so, as part of
23 the first stage approval (as it does under the first option described above).
24 Therefore, the local government must assure that the second stage approval
25 process to which the decision making is deferred provides the statutorily
26 required notice and hearing, even though the local code may not require such
27 notice and hearing for second stage decisions in other circumstances.” 23 Or
28 LUBA at 447-48 (citation and footnotes omitted).

29 It is not entirely clear under each approval criterion whether the county is proceeding
30 under the first option (finding of compliance or feasibility of compliance, combined with
31 conditions of approval to ensure compliance), or the third option (deferral to a subsequent

¹² The conditions require intervenors to submit a shoreland erosion monitoring plan, a final environmental mitigation plan, a decommission plan, an agreement with local emergency providers, and a final erosion control plan.

1 public review process).¹³ If the county is proceeding under the third option, it is not required
2 to adopt a finding that it is feasible to comply with the approval criterion. *Gould v.*
3 *Deschutes County*, ___ Or LUBA ___ (LUBA No. 2008-068, September 11, 2008), *appeal*
4 *pending* (A140139).

5 We assume for purposes of this opinion that the county pursued the third option.
6 CRITFC’s only argument directed at deferral is that the Type IIa process the county required
7 does not provide the identical level of notice and opportunity for public participation as the
8 Type IV process the county employed in the present case. According to CRITFC, (1) the
9 Type IIa process requires notice only to those nearby the property, while the Type IV process
10 requires notice to the general public; (2) the Type IIa process requires a hearing before the
11 hearings officer with a potential appeal to the board of county commissioners, who may hear
12 the appeal on the record, while the Type IV process requires hearings before the planning
13 commission and the board of county commissioners; and (3) the Type IIa process involves a
14 different decision maker—the hearings officer—who had no participation in the first-stage
15 decision.

16 CRITFC provides no authority for the proposition that the public process called for
17 when a local government proceeds under the third *Rhyne* option must be the identical process
18 that was provided during the first stage. The Type IIa process provides for notice and a
19 hearing, which is all that is required under *Rhyne*. CRITFC has not established that the Type
20 IIa process is insufficient to provide an appropriate level of notice and opportunity for public
21 participation.

22 CRITFC’s seventh assignment of error is denied.

¹³ With respect to three of the five sets of standards, the standards do not require any particular plan to be submitted or evaluated, but the county appeared to find compliance with each standard, and simply required submission of a plan or information not required by each standard, to ensure compliance with the standard. With respect to the two standards that require a plan, intervenors submitted draft plans that the county evaluated and approved conceptually, but imposed a condition requiring intervenor submit and obtain county approval of the final plan, prior to proceeding with construction.

1 **EIGHTH ASSIGNMENT OF ERROR (CRITFC)**

2 As part of the proposed LNG terminal, intervenors propose to establish a park and
3 ride facility approximately three miles east of the Clifton Road and Highway 30 intersection,
4 on parcels zoned General Commercial (GC). The park and ride is proposed as a short term
5 use as its purpose is solely to provide parking for construction workers during construction of
6 the terminal. “Bus stations” are conditional uses in the GC zone. The county approved the
7 park and ride as a “bus station.”

8 CRITFC argues that the county misconstrued the applicable law in determining that
9 the proposed park and ride facility is a “bus station.”¹⁴ According to CRITFC, merely
10 because the construction workers will take a bus to the construction site does not make the
11 park and ride facility a “bus station.”

12 The county’s findings state:

13 “* * * the applicant has submitted detailed findings which conclude that the
14 proposed park and ride facility does not conflict with any provision, goal, or
15 policy of the Comprehensive Plan. We agree. We see no provision, goal or
16 policy in the Comprehensive Plan that deals with the matter of bus stations or
17 park and ride facilities in a GC zone. We therefore find that the proposed use
18 does not conflict with any policies or provisions in the Comprehensive Plan
19 * * *.

20 “* * * [W]e understand compliance with the LWDUO to be a matter of
21 consistency with the applicable zoning, approval criteria, and development
22 standards. The chief question here is whether the proposed park and ride
23 facility may properly be considered a ‘bus station.’ The answer to that is
24 ‘Yes.’ The LWDUO provides no definition of ‘bus station,’ ‘park and ride,’
25 or even ‘parking lot.’ The proposed use will consist of a parking area to
26 which Bradwood Landing’s construction workers will drive and park their
27 cars. The workers then would board shuttle buses to take them to the
28 construction site at Bradwood.

29 “The key elements of the proposed land use are thus parking and buses. The
30 GC zone provides for a wide range of commercial uses that typically involve

¹⁴ CRITFC does not challenge any of the findings that the conditional use approval criteria are met, so this assignment of error is resolved by whether the county properly interpreted “bus station” to include park and ride facilities.

1 large parking lots, and the phrase ‘bus station’ is broad enough to include a
2 park and ride facility where the ‘ride’ is provided by buses.” Record 103
3 (emphasis omitted).

4 Under *Church* and ORS 197.829(1), we must affirm a local government’s
5 interpretation of a local ordinance that is consistent with the express language, purpose, or
6 policy of the ordinance. CRITFC argues that the primary purpose of the park and ride
7 facility is to park cars, and that the facility is not a “bus station” simply because workers will
8 ride in a bus to the terminal site, as opposed to a carpool or some other form of
9 transportation. However, the county’s code offers no definitions that might limit the scope of
10 “bus station,” and we cannot say that interpreting the term “bus station” to encompass a
11 facility where drivers park their cars and board a bus is inconsistent with the express
12 language of the LWDUO.¹⁵

13 CRITFC’s eighth assignment of error is denied.

14 **FIRST ASSIGNMENT OF ERROR (PETITIONERS)**

15 In order to allow dredging of the Columbia River, the county approved a zone change
16 for 46 acres of the river from AC-2 to AD, pursuant to the eight criteria applicable to zone
17 changes at LWDUO 5.412.¹⁶ Petitioners argue that the county’s decision does not comply
18 with various provisions of LWDUO 5.412. We address those allegations in turn.

¹⁵ CRITFC also argues that the county improperly deferred final approval of the park and ride bus station to a later Type IIa approval process. As we held in the seventh assignment of error, the county committed no error by deferring complying with certain approval criteria to a later Type IIa proceeding.

¹⁶ LWDUO 5.412 requires findings with respect to zone changes that:

- “(1) The proposed change is consistent with the policies of the Clatsop County Comprehensive Plan.
- “(2) The proposed change is consistent with the statewide planning goals (ORS 197).
- “(3) The property in the affected area will be provided with adequate public facilities and services * * *

1 **A. Applicable Policies of the Comprehensive Plan**

2 **1. CCCP Policy 20.2(1) and Policy 20.8**

3 LWDUO 5.412(1) requires that the proposed zone change be consistent with
4 comprehensive plan policies. Petitioners argue that the proposed zone change is inconsistent
5 with two policies from the comprehensive plan elements that implement Statewide Planning
6 Goals 16 (Estuarine Resources) and 17 (Coastal Shorelands). CCCP Policy 20.2(1) provides
7 that “[t]raditional fishing areas shall be protected when dredging, filling, pile driving or when
8 other potentially disruptive activities occur.” CCCP Policy 20.8 provides that “[e]ndangered
9 or threatened species habitat shall be protected from incompatible development.” Thus, the
10 plan requires that both traditional fishing areas and the habitat of endangered or threatened
11 species be “protected.” The parties disagree as to what “protect” means in this context.

12 Although the term “protect” or “protection” is not defined in the LWDUO, the code
13 does provide a specific hierarchical framework to use when terms are not defined. LWDUO
14 1.035 provides:

15 “The definition of any word or phrase not listed in this chapter which is in
16 question when administering this Ordinance shall be defined from one of the
17 following sources. The sources shall be consulted in the order listed.

18 “(1) Clatsop County Comprehensive Plan.

“(4) The proposed change will insure that an adequate and safe transportation network exists to support the proposed zoning and will not cause undue traffic congestion or hazards.

“(5) The proposed change will not result in over-intensive use of the land, will give reasonable consideration to the character of the area, and will be compatible with the overall zoning pattern.

“(6) The proposed change gives reasonable consideration to peculiar suitability of the property for particular uses.

“(7) The proposed change will encourage the most appropriate use of land throughout Clatsop County.

“(8) The proposed change will not be detrimental to the health, safety and general welfare of Clatsop County.”

- 1 “(2) Any other Clatsop County resolution, Ordinance, codes, or regulation.
- 2 “(3) Any statute or regulation of the State of Oregon (including the
- 3 Uniform Building Code and LCDC Goals and Guidelines).
- 4 “(4) Legal definition from case law or law dictionary.”

5 The county noted that the Statewide Planning Goals provide a definition of “protect,”
6 but also went on to consider and rely upon a law dictionary definition:

7 “State regulation defines ‘protect’ as to save or shield from loss, destruction,
8 or injury or to save for future intended use. Oregon Statewide Planning Goals
9 – Definitions. Barron’s Law Dictionary defines ‘protect’ as

10 “to preserve in safety; to keep intact; to take care of and to keep safe.
11 * * * ‘Protection’ is any measure which attempts to preserve that
12 which already exists. For instance, trade protection attempts to
13 preserve domestic tariffs and custom duties on imported goods.’

14 “* * * The mitigation actions planned are measures that attempt to preserve
15 the resource and shield it from loss through avoidance and, when necessary,
16 by minimizing impacts, and these measures are appropriate. The appropriate
17 interpretation of ‘protect’ is to ‘shield and attempt to preserve,’ and we adopt
18 this interpretation and find that the policies concerning protection and
19 mitigation of impacts on resources are met.” Record 63.

20 As the decision notes, the definitions to Statewide Planning Goals define the term
21 “protect” to mean “[s]ave or shield from loss, destruction, or injury or for future intended
22 use.” The term “protect” is used in both Goal 16 and Goal 17, and it is reasonable to assume
23 that the term “protect” as used in CCCP Policy 20.2(1) and CCCP Policy 20.8, which
24 implement Goal 16 and 17, is intended to have the same meaning. Under the hierarchy
25 established by LWDUO 1.035, the county’s definitional search should have ended there.
26 Nonetheless, the county proceeded to the fourth source of definitions listed LWDUO 1.035, a
27 legal dictionary, and chose a different definition of “protect” that introduces an element of
28 intent. Under the county’s interpretation, as long as intervenors “attempt” to preserve a
29 resource it has “protected” that resource. It is not entirely clear what the county means by
30 “attempt,” but the county apparently understands it to mean using measures that are intended
31 to “minimize” impacts, even if those measures fail to shield the resource from loss and

1 significant adverse impacts on the resource still occur. That view may be consistent with the
2 law dictionary definition the county relies upon, but it is not at all clear to us that it is
3 consistent with the statewide planning goal definition.

4 The county does not explain why it is permissible under the explicit terms of
5 LWDUO 1.035 to apply the law dictionary definition instead of or in addition to the
6 definition from the statewide planning goals. Not only is the statewide planning goal
7 definition obviously more germane to the meaning of CCCP Policy 20.2(1) and CCCP Policy
8 20.8, but LWDUO 1.035 explicitly requires the county to apply that definition before turning
9 to a law dictionary definition. We conclude that remand is necessary for the county to apply
10 the statewide planning goal definition of “protect.” This sub-assignment of error is
11 sustained.

12 **2. Policy 20.5(1)(b)**

13 In this sub-assignment of error, petitioners also argue that the zone change to AD is
14 not consistent with Policy 20.5(1)(b), which mandates that dredging be allowed only if “a
15 need * * * is demonstrated and the use or alteration does not unreasonably interfere with the
16 public trust rights.” Petitioners argue that the county’s findings fail to adequately
17 demonstrate that there is a need for the project and that the project will not interfere with the
18 public trust rights.

19 The county found that there is a need for additional natural gas supplies and various
20 public benefits will flow from the project. Petitioners dispute those findings, arguing that
21 there is no demonstrated need for additional gas supplies and arguing that adverse
22 environmental impacts will outweigh any public benefits.

23 Although the county’s findings addressing Policy 20.5(1)(b) are not detailed, it
24 adopted extensive findings addressing a similar “need” criterion in S4.207(8), S4.209(2), and
25 S4.209(3). The county set out evidence submitted by the applicant and then agreed that the
26 evidence was sufficient to demonstrate need:

1 “‘The need for the Project and the substantial public benefits that it will
2 provide (in addition to substantial local tax revenue) are described in section
3 3.1 of this narrative. The pilings and dolphins and the dredging for the
4 turning basin are essential for the Project because they form the marine berth.
5 If the berth were constructed on or within the existing shoreline, much more
6 dredging would be required and much more environmental harm would result.
7 The pilings and dolphins will occupy less than an acre of the river and will not
8 substantially interfere with the public’s right to use the river for fishing,
9 boating, commerce, or other uses. The proposed dredging of 700,000 cubic
10 yards is more substantial, but, as discussed in the Alternative Analysis, the
11 Biological Assessment, and sections 3.3.5, 3.4, 3.5, and 6.1.5 of this narrative,
12 Bradwood Landing has minimized the extent and potential harm of the
13 dredging and has proposed very substantial compensatory mitigation and
14 other initiatives to assist the estuarine ecosystem.’

15 “‘We agree with applicant’s findings in response to criteria (A)-(E) above as
16 they pertain to the in-water structures, dredging and subsequent use of turning
17 basin and moorage by LNG carriers. We also agree with applicant’s
18 conclusion that the pilings and dolphins ‘will not substantially interfere with
19 the public’s right to use the river for fishing, boating, commerce, or other
20 uses.’ We find that the proposed in-water structures comply with S4.207(8),
21 S4.209(2), and S4.209(3).” Record 114 (emphases omitted; footnote
22 omitted).

23 In the omitted footnote the findings state:

24 “‘Substantial additional evidence on public need/benefit of the Project, such as
25 the ability to address natural gas needs in the region, the ability to utilize an
26 existing port site and fund improvements to the public infrastructure was
27 submitted into the record during the hearing and deliberation process. After
28 considering all the evidence in the record, we are persuaded by that evidence
29 of the public need for and benefit of the Project.” Record 114.

30 While there is certainly evidence the county could have relied upon to find that there
31 is not a need for the project, there is also evidence the county could rely on to find that there
32 is a need for natural gas in the region, additional users for the existing port site, and funding
33 for public improvements. While the evidence the county relied upon in the findings is not
34 overwhelming and intervenors do not direct us to other evidence in the record, the “need”
35 standard is subjective and we cannot say that the county’s interpretation of need and the
36 evidence relied upon to demonstrate that need is in error.

1 As to interference with public trust rights, petitioners' entire argument is that there
2 are no findings regarding public trust rights. Intervenors respond that the county addressed
3 interference with public trust rights under another section of the findings, with respect to a
4 virtually identical standard that requires a finding that "[t]he proposed use does not
5 unreasonably interfere with public trust rights." Record 114. While the findings at Record
6 114 are not particularly compelling, there is no challenge to those findings and we agree with
7 intervenors that those findings appear adequate to address the identical language in Policy
8 20.5(1)(b) with respect to public trust rights, as well as the standard they were adopted to
9 address.

10 This sub-assignment of error is denied.

11 **B. Adequate and Safe Transportation Network**

12 LWDUO 5.412(4) requires a finding that "[t]he proposed change will insure that that
13 an adequate and safe transportation network exists to support the proposed zoning and will
14 not cause undue traffic congestion or hazards." Petitioner argues that an "adequate and safe
15 transportation network" includes the Columbia River and any traffic congestion and hazards
16 on the river. According to petitioners, the dredging of the river and the interference with
17 other river activities caused by LNG tankers will cause undue traffic congestion and hazards.

18 The county disagreed that the Columbia River is part of the county's "transportation
19 network" for purposes of LWDUO 5.412(4):

20 "[N]one of the eight criteria in L5.412 mentions marine commerce or river
21 travel. The criteria do mention 'use of the land' and 'suitability of the
22 property' in several places, and they are quite specific about the public
23 facilities and services that must be considered. We thus infer that the zone
24 change criteria are intended to address matters of land use.

25 "[W]e understand L5.412(4) to deal with man-made transportation facilities
26 such as highways, not with rivers or air. This view is supported by a reading
27 of the Transportation Element of the County Plan. It mentions the importance
28 of the Columbia River with respect to 'water transportation activities,' but its
29 only policies regarding such transportation have to do with development of
30 port facilities. * * *

1 “[O]bjectives listed for the County Comprehensive Plan’s Transportation
2 Element strongly emphasize land transportation while omitting any mention
3 of water or air travel. * * *

4 “[W]e understand the ‘traffic’ referred to in L5.412(4) to be the volume of
5 land vehicles such as cars or trucks on public roads, not vessel traffic on
6 rivers, air traffic in the skies over the County or rail traffic. We find no
7 definition of traffic’ in the LWDUO, the Standards Document, the
8 Transportation Element of the County Comprehensive Plan, or the County’s
9 TSP. But all four documents clearly speak of traffic only in the limited
10 context of motor vehicles on streets and roads.” Record 181-82.

11 Petitioners do not challenge these findings or the county’s explicit interpretation of
12 “transportation network.” Petitioners merely argue that because OAR 660-012-0005(30)
13 defines “Transportation Facilities” to include the Columbia River, the county must
14 necessarily treat the river as part of the county’s “transportation network” for purposes of
15 LWDUO 5.412(4). However, OAR 660-012-0005(30) defines transportation facilities, not
16 transportation network, and petitioners have not established that the county is required by the
17 OAR 660-012-0005(30) definition to treat the Columbia River as part of its transportation
18 network for purposes of LWDUO 5.412(4).

19 This subassignment of error is denied.

20 **C. Dredging’s Effect on Health, Safety, and General Welfare**

21 LWDUO 5.412(8) requires a finding that “[t]he proposed change will not be
22 detrimental to the health, safety and general welfare of Clatsop County.” Petitioners argue
23 that the dredging allowed by the zone change from AC-2 to AD will lead to the construction
24 of the LNG terminal and that the LNG terminal is extremely dangerous because of the danger
25 of explosion or fire. Petitioners also argue that the LNG tankers that will supply the LNG
26 terminal pose a danger of explosion. According to petitioners, the county did not properly
27 analyze the danger proposed by the LNG terminal and tankers.

28 The county concluded that LWDUO 5.412(8) focuses on the zone change itself and
29 not any future development that might follow the zone change.

1 “For reasons stated here and in the preceding sections, we decline to address
2 matters such as ‘decrease in quality of life due to fear of explosion of LNG
3 tankers.’ We limit ourselves here to public health and safety concerns
4 expressly mentioned in the Comprehensive Plan and land-use regulations.
5 Those have mainly to do with road access and provision of emergency
6 services. The County and other local, state, and federal agencies will deal in
7 other forums with other health and safety issues arising from the Bradwood
8 proposal.” Record 202.

9 “* * * L5.412(8) focuses on ‘the change’ (i.e., the proposed rezoning). It
10 doesn’t say ‘and all subsequent events that might conceivably happen after
11 such a change.’ * * * If L5.412(8) were to be interpreted as broadly as
12 [opponent] suggests, then the County could never approve another zone
13 change, because every zone change allows development for which one can
14 imagine a scenario involving some danger, injury, or death.” Record 203-04.

15 We agree with the county that LWDUO 5.412(8) focuses on the zone change, and
16 specifically whether uses allowed by the zone change will affect general health and safety.
17 The zone change at issue rezones a portion of the river from AC-2 to AD. The only direct
18 result of that zone change is that dredging would be permitted. The zone change from AC-2
19 to AD does not authorize an LNG terminal or river tanker traffic. Dredging in and of itself
20 does not raise dangers to the general health and safety of exploding LNG terminals or
21 tankers, and we agree with the county that LWDUO 5.412(8) does not require the county to
22 consider hypothetical dangers that might arise from ships that transit that dredged area in
23 approving the zone change.

24 This sub-assignment of error is denied.

25 **D. Consistency With Statewide Planning Goals**

26 LWDUO 5.412(2) requires that zone changes be consistent with the statewide
27 planning goals. Petitioners incorporate their arguments made under the second assignment
28 of error where they argue that the decision violates Goals 16 and 17. We later deny
29 petitioners’ second assignment of error. For the same reasons, this subassignment of error is
30 denied.

1 **E. Future Water Dependent Uses**

2 LWDUO 3.754(7) is a development standard for uses in the AD zone and provides
3 that “[u]ses that are water-dependent shall not preclude or conflict with existing or probable
4 future water dependent uses on the site or in the vicinity.” Petitioners argue that the
5 dredging, construction and tanker traffic that will be allowed in the AD zone will conflict
6 with fishing and navigation. The county’s findings state:

7 “‘We find no evidence that the proposed dredging would preclude or conflict
8 with existing or probable water-dependent uses ‘on the site’ (Bradwood, in
9 this case). On the contrary, the dredging would facilitate water-dependent
10 development there. We also find no evidence that the proposed dredging, in
11 and of itself, would preclude or conflict with water-dependent uses ‘in the
12 vicinity.’ We did find some evidence that the combination of dredging,
13 construction, placement of in-water structures, and the berthing of large LNG-
14 carrying ships might on occasion conflict with fish, fishing, and fish habitat if
15 unmitigated or uncoordinated. Fishing is a water-dependent use. Avoidance
16 and mitigation measures will be a condition of Project approval. We thus
17 conclude that the proposed dredging and construction will not preclude or
18 conflict with water-dependent uses on site or in the vicinity.” Record 76.

19 Petitioners’ argument is essentially that the proposed mitigation does not satisfy
20 LWDUO 3.754(7) because even with mitigation the dredging will “conflict with” fishing and
21 navigation. It is clear that the county does not agree with petitioners that LWDUO 3.754(7)
22 prohibits any possibility of damage whatsoever to “existing or probable future water
23 dependent uses.” Although the county decision does not express its rejection of that
24 argument in precisely these terms, we agree with the county that if the mitigation measures
25 are sufficient to avoid material adverse effects to navigation, fish habitat, fish or fishing, the
26 county could find that LWDUO 3.754(7) is satisfied. We do not agree with petitioners that
27 LWDUO 3.754(7) prohibits any use that has our could have any adverse effect whatsoever
28 on existing or future water-dependent uses. The LWDUO clearly anticipates development
29 within the AD zone. Almost any development could have some potential adverse effect on
30 other water-dependent uses. As long as those water-dependent uses are not precluded or
31 materially adversely affected, we believe the county may properly find the proposal complies

1 with LWDUO 3.754(7). In petitioners’ eighth assignment of error, we address the proposed
2 mitigation program. In that assignment of error, we reject petitioners’ arguments that the
3 mitigation program is inadequate. For the same reasons, the proposed dredging does not
4 violate LWDUO 3.754(7).

5 This subassignment of error is denied.

6 Petitioners’ first assignment of error is sustained, in part.

7 **SECOND ASSIGNMENT OF ERROR (PETITIONERS)**

8 In addition to the zone change from AC-2 to AD to allow the proposed dredging, the
9 county also approved a comprehensive plan amendment for 46 acres of the river from
10 Conservation to Development. In order to allow disposal of the dredged material and
11 construction of a rail line, storage tanks, and other development for the LNG terminal, the
12 county also approved a comprehensive plan amendment for 5.35 acres of shoreland from
13 Natural to Development. Petitioners argue these comprehensive plan amendments violate
14 Statewide Planning Goal 16.

15 **A. Public Need**

16 Implementation Requirement 2 for Goal 16 is identical to Policy 20.5 in the Goal 16
17 and 17 element of the county’s comprehensive plan, requiring that dredging shall be allowed
18 only if a need is demonstrated and the use or alteration does not unreasonably interfere with
19 public trust rights. Petitioners argue that the county improperly found a public need for the
20 project and that the project did not violate the public trust rights. We previously addressed
21 these issues under petitioners’ first subassignment of error under their first assignment of
22 error. We deny this subassignment of error for the same reasons.

23 **B. Cumulative Impact Analysis Requirement**

24 Goal 16 requires counties to “[c]onsider and describe in the plan the potential and
25 cumulative impacts of the alterations and development activities envisioned.” Policy 15 of
26 the Goal 16 and 17 element of the county’s comprehensive plan also includes the

1 requirement to analyze the cumulative impacts of development activities in certain areas.
2 Petitioners argue that the county erred in finding that it did not have to address cumulative
3 impacts of the proposed comprehensive plan amendment and that even if the county tried to
4 address those cumulative impacts the attempt was inadequate.

5 The county initially found that the cumulative impacts analysis was not necessary:

6 “This is a requirement * * * for local plans to contain a description of the
7 likely cumulative impacts for certain activities. It is not a requirement for
8 local governments to review each development application for cumulative
9 effects.

10 “Policy 15 is the County’s response to that provision of Goal 16. * * * The
11 first few sentences of Policy 15 make clear that it is not intended for use in the
12 review of individual permit applications:

13 ““This section addresses the potential combined effects of certain
14 activities on the estuary. The primary reason for addressing
15 cumulative impacts is that they cannot be adequately considered
16 during most permit reviews, yet under certain conditions can become
17 significant planning issues. The Columbia River Estuary Regional
18 Management Plan recognizes that development activities generate
19 cumulative impacts that cannot be readily addressed on a permit-by-
20 permit basis.”” Record 303-04 (emphasis and footnote omitted).

21 Intervenor’s argue that the cumulative impacts analysis is not required at the
22 comprehensive plan amendment stage but rather will be applied at a later permit approval
23 stage. In *Oregon Shores Cons. Coalition v. Lane County*, 52 Or LUBA 471, 479-80 (2006),
24 however, we held that Goal 16 requires that in adopting a comprehensive plan amendment
25 affecting Goal 16 resources, the local government must adopt plan language that evaluates
26 the potential cumulative impacts, if any. Contrary to the county’s finding, the county must
27 therefore consider cumulative impacts as part of this plan amendment. Contrary to
28 intervenor’s argument, intervenor’s identify no later permit approval stage at which such
29 cumulative impacts must be addressed, and the county’s above-quoted finding suggests that
30 such impacts are not typically addressed during permit reviews.

1 Intervenors also argue, however, that the county did conduct a cumulative impacts
2 analysis and found that Goal 16 is satisfied. While there seems to be some confusion as to
3 where in the record the cumulative impacts analysis is located or how the analysis was
4 incorporated into the decision, we agree with intervenors that the analysis is found in
5 Attachment 6, Record 333-354, and was adopted and incorporated into the decision. Record
6 8, 303.

7 Petitioners argue that Attachment 6 fails to address the cumulative impacts of the
8 LNG facility and existing uses of the river with respect to fishing, navigation, recreation,
9 tourism, habitat loss to dredging, etc. However, intervenors cite to passages in Attachment 6
10 that appear to address these impacts. Petitioners have not demonstrated that the analysis of
11 cumulative impacts in Attachment 6 is inadequate.

12 Finally, petitioners argue that the county failed to properly process adoption of
13 Attachment 6 as a comprehensive plan text amendment under the procedures required by
14 ORS 197.610. As noted, the county apparently adopted Attachment 6 as a text amendment
15 to CCCP Policy 15, Cumulative Impacts. Record 8. We understand petitioners to contend
16 that Attachment 6 was not described or attached to the notice required by ORS 197.610 for a
17 post-acknowledgement plan amendment, and appeared only late in the county's proceedings.
18 Intervenors respond that the county's notice to the Department of Land Conservation and
19 Development indicates that the county intends to adopt both map and text amendments to the
20 CCCP. Record 15505. Intervenors argue that ORS 197.615(1) contemplates that
21 amendments ultimately adopted may differ from those initially proposed, and petitioners
22 have failed to demonstrate that the county procedures were inconsistent with ORS 197.610 or
23 errors provide a basis for reversal or remand. We agree with intervenors.

24 This subassignment of error is denied.

25 Petitioners' second assignment of error is denied.

1 **THIRD ASSIGNMENT OF ERROR (PETITIONERS)**

2 The county’s decision also rezones an upland portion of the Bradwood Landing site,
3 under the same zoning change criteria at LWDUO 5.412 applied to the aquatic zone changes.
4 However, petitioners do not advance any specific challenges to the findings that apply the
5 criteria to rezone portions of the upland site. Instead, petitioners simply incorporate their
6 arguments under their first and eighth assignments of error, and argue that for the same
7 reasons the rezoning of the upland portions of the site also was error. Because we reject
8 petitioners’ first and eighth assignments of error, those incorporated arguments do not
9 provide a basis to reverse or remand the rezoning of the upland portion of the site.

10 The third assignment of error is denied.

11 **FOURTH ASSIGNMENT OF ERROR (PETITIONERS)**

12 The CCCP designates a portion of the Bradwood site as a Priority I dredge material
13 disposal (DMD) site. Such DMD sites are intended to be reserved for stockpiling dredged
14 material.¹⁷ LWDUO 4.168 provides that “[o]nly those development uses and activities * * *
15 which are determined not to preempt the site’s future use for dredged material disposal are
16 allowed, subject to the policies and procedural requirements of the underlying zone.”
17 Petitioners argue that the proposed LNG terminal is a preemptive use that is not allowed.
18 LWDUO 4.178 defines preemptive uses as:

- 19 “(1) Uses requiring substantial structural or capital improvements (e.g.
20 construction of permanent buildings);
- 21 “(2) Uses that require extensive alteration of the topography of the site,
22 thereby reducing the potential usable volume of the dredged material
23 disposal area * * *; or

¹⁷ LDWUO 4.116 provides:

“The purpose of Priority I site designations is to protect important dredge material disposal sites from incompatible and preemptive uses that may limit their ultimate use for the deposition of dredged material, and to ensure that an adequate number of sites will be reserved in order to accommodate dredge material disposal needs resulting from five years of existing and expected water-dependent development and navigation projects.”

1 “(3) Uses that include changes made to the site that would prevent
2 expeditious use of the site for dredged material disposal * * *.”

3 Intervenors originally requested that the DMD overlay be removed, but the county
4 determined that it was not necessary to remove the DMD overlay in order to approve the
5 LNG terminal because the dredge site would be filled prior to construction of the terminal.
6 The county’s findings state:

7 “The applicant is concerned that the LNG facilities would be regarded as a
8 ‘preemptive use’ and that L4.166 and 4.172 thus would prohibit construction
9 of the LNG facility. We believe that concern to be unwarranted for two
10 reasons.

11 “First, a use is ‘preemptive’ only if it would limit use of the site for the
12 deposition of dredged material. But if the site has been filled to capacity, no
13 further dredged material is necessarily deposited there. Hence, it cannot be
14 argued that the LNG facility would limit DMD as envisioned in the code and
15 plan.

16 “Second, the [CCCP] clearly anticipates construction such as that proposed by
17 the applicant at DMD sites after they reach their capacity. Policy P20.5 * * *
18 says, ‘The use of shoreland water dependent development sites for dredged
19 material disposal shall occur only when the project sponsor can demonstrate
20 that the dredged material placed on the site will be compatible with the
21 current or future water dependent development’ Bradwood is a ‘shoreland
22 water dependent development site.’ In this case, the ‘project sponsor’
23 (Bradwood Landing) has demonstrated that disposal of dredged material * * *
24 will serve as foundation soils to support the LNG tanks and other structures,
25 and it also will be used to construct a berm around the facility.” Record 84.

26 The proposal contemplates continued disposal of dredged material at the DMD site
27 until that site is filled, which will occur prior to construction of the LNG facility. The
28 purpose of the DMD overlay is to preserve such sites from preemptive use until the sites are
29 filled to capacity, at which point the overlay is removed and development may occur. The
30 total capacity for the Bradwood DMD overlay is 420,000 cubic yards, and the proposal will
31 deposit at least that much dredged material on the site before any construction will occur.
32 Record 82. Given that the DMD overlay site will be fully utilized and will fulfill its purpose

1 before any use that could be considered a preemptive use will be constructed, we do not see
2 that the county erred in allowing the proposal to proceed.

3 Petitioners' fourth assignment of error is denied.

4 **FIFTH ASSIGNMENT OF ERROR (PETITIONERS)**

5 Petitioners challenge the county's finding that the proposed LNG facility is "small or
6 moderate" in scale.

7 The Northeast Community Plan, an element of the CCCP, provides that
8 "[d]evelopment activities at Bradwood shall be of small or moderate scale, not involving
9 extensive filling to create new land areas."

10 Similarly, the Bradwood Subarea Plan, another element of the CCCP, states:

11 "The Bradwood industrial site offers limited potential for small to medium
12 sized water-dependent industrial development. There is deep water close to
13 shore, some available vacant land, and railroad access. There are constraints
14 to development, however, including poor highway access and proximity to the
15 wildlife refuge.

16 "Future development which would require excessive filling (impacting
17 aquatic areas in excess of 20 acres) along the Columbia River shoreline for
18 the purpose of creating additional industrial land is not appropriate. * * *"

19 The county interpreted the Northeast Community Plan language regarding "small to
20 moderate" in context to mean essentially development that does not require more than 20
21 acres of fill to create new lands.¹⁸ In addition, the county noted that Bradwood site is

¹⁸ The county's findings state, in relevant part:

"One of the central questions in this review is this: What scale industrial use is appropriate at Bradwood? The MI zone is quite precise regarding the type of uses allowed there: it says water-dependent industrial uses are appropriate. The Bradwood site is specifically exempted from the building size limitations in the MI development standards. L3.634(16)(A). Reading the [Northeast Community Plan provisions], we conclude that development activities at Bradwood shall be of a scale not requiring fill of more than 20 acres. The Project will result in the fill of 13 acres. This is well below the 20 acres in the policies (read together) and therefore not extensive fill. Further, even if the 5.35 acres proposed for rezoning to MI is considered, the total remains below 20 acres. If the corresponding creation of a perpetual conservation easement of 4.7 acres of wetlands is included in the new land area, this represents a change of .6 acres, and the aggregate total remains substantially less than 20

1 exempted from building size limitations that would otherwise apply to MI-zoned properties,
2 from which the county inferred that the “small to moderate scale” limitation is not a limit on
3 the size of the industrial facility itself. The county also cited contextual language in the
4 CCCP Goal 9 element suggesting that “large” industrial sites are those more than 100 acres
5 in size, from which the county inferred that development sites smaller than 100 acres must
6 not be large, *i.e.* must be either small or moderate in scale.

7 Petitioners argue that the nature and scale of the LNG terminal is clearly not “small
8 or moderate.” According to petitioners, the “LNG terminal is stunning in its size, scope, and
9 level of impact, one of the largest Clatsop County developments in over 20 years.” Petition
10 for Review 32. Petitioners cited to evidence that in addition to the LNG facility itself, the
11 project will require dredging and maintaining over 58 acres of estuary for the turning basin,
12 and over 30 miles of new gas pipelines.

13 The county’s view that the “small or moderate” scale limitation is directed solely at
14 development that requires large amounts of fill is not consistent with the language of the

acres. We impose as a condition of approval that applicant will not object to the County rezoning the 4.7 MI acres to AN.

“The relationship of amount of fill and non-creation of new land areas (and therefore site size) to the scale of development is also evident in the County’s Goal 9 narrative. The Clatsop County Industrial Lands Inventory discusses the size of industrial sites and notes that large industrial users need large sites and the lack of smaller industrial sites (less than 100+ acres) limits the ability of the jurisdiction to attract users that are not large. The corollary of this is that industrial sites smaller than 100 acres in size accommodate small to medium industrial users.

“* * * * *

“[Goal 9 provisions] illustrate that large scale industrial developments require at least 100 acres. Bradwood Landing is acquiring 411.6 acres at Bradwood. Only 10% of the site will be used for the development of the terminal. The majority of the terminal site is zoned Marine Industrial. Bradwood Landing seeks to have an additional 5.35 acres zoned MI and will place a perpetual conservation easement prohibiting development on 4.7 acres currently zoned MI but containing rare wetland habitat. The total developed area will be less than 40 acres. Bradwood Landing, which will occupy less than 40 acres and has substantially less than 100 acres zoned industrial is therefore small to medium in scale. This is consistent with the policy restricting large scale fills at the site. Once again, the Plan is clearly relating scale of development to the size of the site.” Record 128-29.

1 relevant plan provisions. The Northeast Community Plan language is ambiguous, and can be
2 read to link the scale limitation and the fill limitation, as the county read it, or it can be read
3 to embody two requirements: that the development be small or moderate in scale, and that it
4 not involve extensive fill to create new land areas. However, the Bradwood Subarea Plan
5 language makes it clear that they are two separate requirements. The Bradwood Subarea
6 Plan discusses the “limited potential for small to medium sized” industrial use of the site, but
7 relates that limited potential to the site’s development constraints, including “poor highway
8 access and proximity to the wildlife refuge.” It is only in the second paragraph that the
9 Subarea Plan states that future development that would require excessive filling in excess of
10 20 acres along the shoreline is inappropriate. Accordingly, we reject the county’s
11 interpretation that the “small to moderate” scale limitation is essentially a restatement of the
12 fill limitation, as inconsistent with the text and context of the relevant plan provisions.
13 ORS 197.829(1)(a).

14 The county is on stronger footing in citing the Goal 9 comprehensive plan element
15 and the fact that the LWDUO specifically exempts the Bradwood site from building size
16 limitations otherwise applicable in the MI zone. The Goal 9 language does suggest that the
17 needs of “small” industrial users can be met by breaking up large industrial sites greater than
18 one hundred acres in size, although that does not necessarily suggest that all industrial
19 development less than 100 acres in size is “small” or “moderate” in scale. The code
20 exemption from building size limitations for the Bradwood site suggests that the county is
21 not concerned with the size of buildings constructed at the Bradwood site. However, the
22 “small to moderate” scale limitation presumably has some meaning independent of the
23 building size limitation. The focus of the scale limitation is “development activities,” which
24 presumably encompasses more than construction of buildings. The county apparently
25 viewed the scope of the proposed “development” to include only the 40 upland acres covered
26 by the LNG facility itself. The county declined to consider the area needed for accessory

1 uses such as powerlines, gas pipelines, or the 58 acres of estuary that would be dredged for
2 the ship turning basin.

3 The LWDUO defines “development” as “[a]ny man-made change to improved or
4 unimproved real estate, including but not limited to: construction, reconstruction, conversion,
5 relocation or enlargement of any structure; any mining, excavation, landfill or land
6 disturbance, any use or extension of the use of land.” That term would clearly encompass
7 construction of powerlines and gas pipelines. It is less clear that it would encompass
8 dredging of the estuary, although it would presumably include the pilings and other
9 structures necessary to offload the LNG container ships.

10 Given that the county erred in its primary conclusion that the scale restriction is a
11 mere restatement of the fill limitation, and because the county erred in limiting the scope of
12 “development activities” to the upland acres covered by the LNG facility itself, we conclude
13 that remand is necessary for the county re-evaluate whether the proposed development
14 activities, considered as a whole, comply with the “small or moderate” scale limitation.

15 Petitioners’ fifth assignment of error is sustained.

16 **SIXTH ASSIGNMENT OF ERROR (PETITIONERS)**

17 Petitioners argue that the county failed to adequately respond to evidence and issues
18 raised by the State of Oregon. Various state agencies’ comments found their way into the
19 record.¹⁹ The county found that the comments were draft comments that appear to be
20 directed at the FERC proceedings on this project, rather than comments directed at the
21 county proceedings or applicable county land use approval criteria. Accordingly, the county
22 gave the agency comments “little weight in these proceedings.” Record 155.

¹⁹ There is some dispute as to whether the state agencies actually submitted the comments to the county as their official position or whether draft comments were obtained by other parties who then submitted them to the county. Due to our resolution of this assignment of error, we need not resolve that dispute.

1 Petitioners argue that the county erred in failing to adopt findings addressing the
2 issues raised in the agency comments, concerning impacts on aquatic life, the geologic
3 hazards of the site, the need for the facility, safety hazards, and the effect on access to
4 traditional fishing areas. Petition for Review 39. According to petitioners, the county is
5 obligated to adopt findings addressing issues raised in the agency comments.

6 Generally, local governments must adopt findings responding to specific issues raised
7 below in quasi-judicial land use proceedings concerning compliance with approval criteria.
8 *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979); *Heiller v.*
9 *Josephine County*, 23 Or LUBA 551, 556 (1992). Here, as far as petitioners have
10 established, the draft agency comments were not directed at the county proceedings, and do
11 not raise any specific issues with regard to approval criteria applicable to the county land use
12 proceedings. As far as we can tell, the state agency comments are directed at the adequacy of
13 the draft environmental impact statement that was filed with FERC, as part of the FERC
14 proceedings. Petitioners make no attempt to relate any of the state agency critiques of that
15 draft environmental impact statement to any specific approval criterion that was applicable in
16 the county land use proceeding. Accordingly, petitioners have not established that the
17 county was obligated to adopt findings addressing any issues raised in the state agency
18 comments.

19 Petitioners' sixth assignment of error is denied.

20 **SEVENTH ASSIGNMENT OF ERROR (PETITIONERS)**

21 Petitioners argue that the county improperly deferred compliance with certain
22 approval criteria through the imposition of conditions that do not properly allow for public
23 participation at later stages. The same arguments were made by CRITFC under their seventh
24 assignment of error. For the same reasons expressed under our resolution of CRITFC's
25 seventh assignment of error, this assignment of error is also denied.

1 **EIGHTH ASSIGNMENT OF ERROR (PETITIONERS)**

2 Petitioners argue that the county erred in relying on mitigation measures without
3 substantial evidence in the record to indicate that the mitigation measures would adequately
4 protect fish and estuarine habitat. As discussed in CRITFC’s seventh assignment of error,
5 although the county found it feasible that the mitigation plan would provide the required
6 protections, the county also imposed a condition of approval that in addition to securing all
7 required state and federal permits intervenors must submit a mitigation plan that would be
8 reviewed under the county’s Type IIa procedure. We previously held that deferring a
9 determination of compliance with approval criteria to a later stage that affords public
10 participation is permissible under the third *Rhyme* option. Therefore, petitioners’ arguments
11 that the mitigation plan is insufficient are premature.

12 Petitioners’ eighth assignment of error is denied.

13 **ASSIGNMENT OF ERROR (DUNZER)**

14 Dunzer’s petition for review does not include assignments of error followed by
15 supporting argument, as required by OAR 661-010-0030(4)(d), and the arguments are
16 generally difficult to follow. Dunzer appears to argue that intervenors’ method for re-
17 gasification is not energy efficient and therefore violates Statewide Planning Goal 13
18 (Energy Conservation), unspecified portions of the county’s comprehensive plan, and HB
19 3543 (which calls for reducing the state’s greenhouse gasses emissions).

20 However, Dunzer does not explain how Goal 13 is applicable to the challenged
21 decisions, and we do not see that it is. Dunzer does not identify what comprehensive plan
22 provisions he believes the decision violates. Dunzer does not explain how HB 3543 is
23 applicable as approval criteria to the challenged decisions. Dunzer’s arguments do not
24 provide a basis for reversal or remand.

25 Dunzer’s assignment of error is denied.

26 The county’s decision is remanded.