

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

3
4 OREGON COAST ALLIANCE,
5 *Petitioner,*

6
7 and

8
9 OREGON DEPARTMENT OF LAND CONSERVATION
10 AND DEVELOPMENT,
11 *Intervenor-Petitioner,*

12
13 vs.

14
15 TILLAMOOK COUNTY,
16 *Respondent,*

17
18 and

19
20 MICHAEL ROGERS, CHRISTINE ROGERS, BILL COGDALL,
21 LYNDA COGDALL, JON CREEDON, DAVID FARR, FRIEDA FARR,
22 DON ROBERTS, BARBARA ROBERTS, RACHEL HOLLAND,
23 JEFFREY KLEIN, TERRY KLEIN, DAVID HAYES, MICHAEL ELLIS,
24 MICHAEL MUNCH, ANGELA DOWLING, DAVID DOWLING,
25 MEGAN STECK BERG, EVAN DANNO, MARK KEMBALL,
26 ALICE KEMBALL, MARY ANN LOCKWOOD FAMILY TRUST,
27 and HEATHER STECK VON SEGGERN,
28 *Intervenors-Respondents.*

29
30 LUBA No. 2021-101

31
32 OREGON SHORES CONSERVATION COALITION
33 and SURFRIDER FOUNDATION,
34 *Petitioners,*

35
36 and

1 OREGON DEPARTMENT OF LAND CONSERVATION
2 AND DEVELOPMENT,
3 *Intervenor-Petitioner,*

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5 vs.

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18 ALICE KEMBALL, MARY ANN LOCKWOOD FAMILY TRUST,
19 and HEATHER STECK VON SEGGERN,
20 *Intervenors-Respondents.*

21
22 LUBA No. 2021-104

23
24 FINAL OPINION
25 AND ORDER

26
27 Appeal from Tillamook County.

28
29 Sean T. Malone filed a petition for review and reply brief and argued on
30 behalf of petitioner Oregon Coast Alliance.

31
32 Anuradha Sawkar filed a petition for review and reply brief and argued on
33 behalf of petitioners Oregon Shores Conservation Coalition and Surfriider
34 Foundation.

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

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No appearance by Tillamook County.

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

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

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

REMANDED 09/30/2022

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

NATURE OF THE DECISION

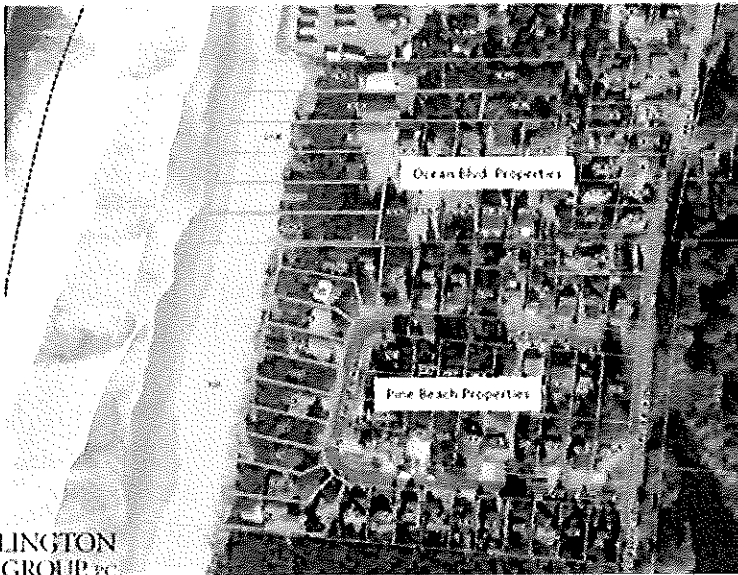
Petitioners appeal a county board of commissioners decision adopting a post-acknowledgment plan amendment (PAPA) that approves an exception to Statewide Planning Goal 18 (Beaches and Dunes), Implementation Requirement (IR) 5, and a related Floodplain Development Permit (FDP) for beachfront protective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

BACKGROUND

A. The Subject Properties

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

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



1 ILLINGTON
2 V GROUP, PC

2 Record 1951. The subject properties are

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

16 **B. Planning Context**

17 The subject properties are zoned Community Medium Density Urban
18 Residential and located within the county’s Beach and Dune (BD) and Flood
19 Hazard (FH) overlay zones. Tillamook County Land Use Ordinance (TCLUO)
20 3.530(1) provides that the purpose of the county’s BD overlay zone

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

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

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

8 “(c) *Ensures that the siting and design of development in beach*
9 *and dune areas is consistent with Statewide Planning Goals*
10 *7 and 18, and the Hazards Element and Beaches and Dunes*
11 *Element of the Tillamook County Comprehensive Plan.”*
12 (Emphasis added.)

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

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

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

“a. providing financial incentives and disincentives;

“b. providing public information and education materials;

1 Goal 18 is:

2 “To conserve, protect, where appropriate develop, and where
3 appropriate restore the resources and benefits of coastal beach and
4 dune areas; and

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

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

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

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

“a. limiting placement of fill in floodplains;

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

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

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

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

3 “Local governments and state and federal agencies shall base
4 decisions on plans, ordinances and land use actions in beach and
5 dune areas, other than older stabilized dunes, on specific findings
6 that shall include at least:

7 “(a) The type of use proposed and the adverse effects it might have
8 on the site and adjacent areas;

9 “(b) Temporary and permanent stabilization programs and the
10 planned maintenance of new and existing vegetation;

11 “(c) Methods for protecting the surrounding area from any adverse
12 effects of the development; and

13 “(d) Hazards to life, public and private property, and the natural
14 environment which may be caused by the proposed use.”

15 IR 2 limits development on Goal 18 lands, providing:

16 “Local governments and state and federal agencies shall prohibit
17 residential developments and commercial and industrial buildings
18 on beaches, active foredunes, on other foredunes which are
19 conditionally stable and that are subject to ocean undercutting or
20 wave overtopping, and on interdune areas (deflation plains) that are
21 subject to ocean flooding. Other development in these areas shall be
22 permitted only if the findings required in (1) above are presented
23 and it is demonstrated that the proposed development:

24 “(a) Is adequately protected from any geologic hazards, wind
25 erosion, undercutting, ocean flooding and storm waves; or is
26 of minimal value; and

27 “(b) Is designed to minimize adverse environmental effects.”

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

3 “Permits for [BPS] shall be issued only where development existed
4 on January 1, 1977. Local comprehensive plans shall identify areas
5 where development existed on January 1, 1977. For the purposes of
6 this requirement and [IR] 7 ‘development’ means houses,
7 commercial and industrial buildings, and vacant subdivision lots
8 which are physically improved through construction of streets and
9 provision of utilities to the lot and includes areas where an exception
10 to (2) above has been approved. The criteria for review of all [BPS]
11 shall provide that:

12 “(a) visual impacts are minimized;

13 “(b) necessary access to the beach is maintained;

14 “(c) negative impacts on adjacent property are minimized; and

15 “(d) long-term or recurring costs to the public are avoided.”³

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

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

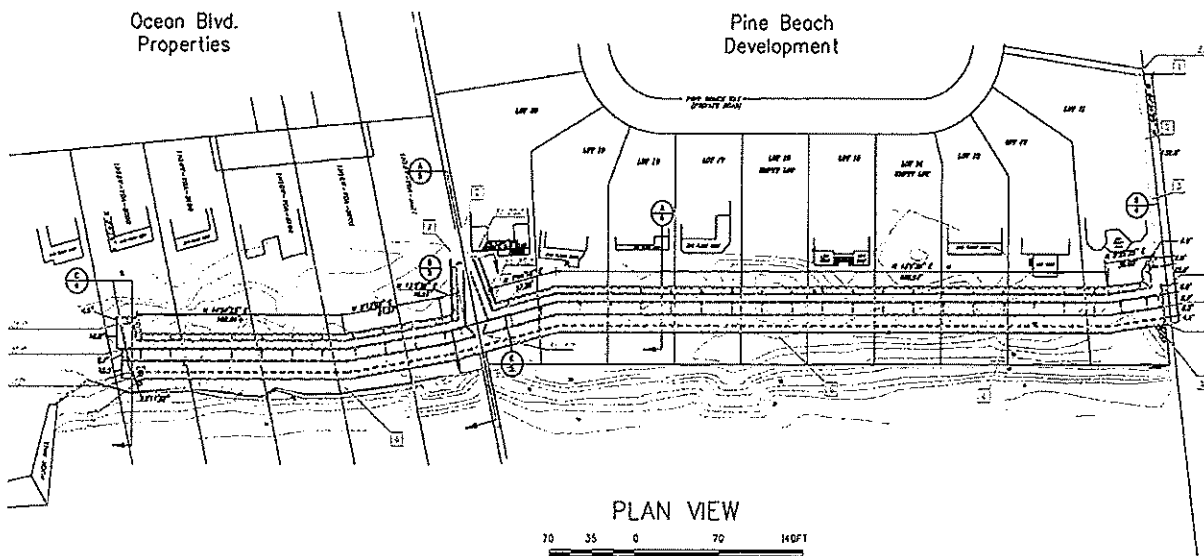
³ The county did not adopt an exception to Goal 18, IR 2, for the subject properties because residential development was not prohibited on the subject properties. Record 110.

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

1 3.510(4). Intervenors-respondents (intervenors) sought to construct BPS in the
2 oceanside yards of their properties.

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

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



10

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

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

1 Intervenors applied to the county for a PAPA and an FDP for the proposed
2 BPS. The PAPA sought an exception to the Goal 18, IR 5, restriction on BPS on
3 properties that were not developed on January 1, 1977.⁶

4 Intervenors submitted materials in support of their assertions that the
5 George Shand Tract properties all meet the “development existed on January 1,
6 1977,” standard set out in IR 5 and do not require an exception but that the Pine
7 Beach Subdivision properties require and qualify for an exception to IR 5.
8 Intervenors argued that the George Shand Tract properties were developed on
9 January 1, 1977, for three reasons: (1) they were part of a subdivision on January
10 1, 1977, (2) Ocean Boulevard was constructed to serve the property on January
11 1, 1977, and (3) a property to the north and outside of the George Shand Tract
12 (tax lot 2900) had been approved for a septic system and obtained water from a
13 nearby water district on January 1, 1977. Record 26, 1954. Intervenors did not

⁶ OAR 660-004-0005(1) provides:

“An ‘Exception’ is a comprehensive plan provision, including an amendment to an acknowledged comprehensive plan that:

“(a) Is applicable to specific properties or situations and does not establish a planning or zoning policy of general applicability;

“(b) Does not comply with some or all goal requirements applicable to the subject properties or situations; and

“(c) Complies with ORS 197.732(2), the provisions of this division and, if applicable, the provisions of OAR 660-011-0060, 660-012-0070, 660-014-0030 or 660-014-0040.”

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

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

9 **MOTION TO STRIKE AND MOTION TO TAKE OFFICIAL NOTICE**

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

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

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

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

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

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

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

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

14 The motion to take official notice is denied.

15 The motion to strike is granted.

16 **OVERVIEW OF ASSIGNMENTS OF ERROR**

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

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

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

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

11 DLCD and OCA argue in their fourth assignments of error that the
12 county’s decision failed to comply with the exception criteria in OAR 660-004-
13 0022(2)(c).

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

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

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

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

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

6 **STANDARD OF REVIEW**

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

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

14 "It is well-established that findings must be in the local
15 government's decision, and that they must do more than merely state
16 a conclusion of compliance. The Supreme Court first articulated the
17 standard for evaluating the adequacy of local findings in *Sunnyside*
18 *Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 21, 569 P2d
19 1063 (1977):

20 "No particular form is required, and no magic words need be
21 employed. What is needed for adequate judicial review is a
22 clear statement of what, specifically, the decision-making
23 body believes, after hearing and considering all the evidence,
24 to be the relevant and important facts upon which its decision
25 is based. Conclusions are not sufficient.'

26 "In *Le Roux v. Malheur County*, 30 Or LUBA 268 (1995) we

1 explained the requirement for adequate findings as follows:

2 “The county’s * * * findings must (1) identify the relevant
3 approval standards, (2) set out the facts relied upon, and (3)
4 explain how the facts lead to the conclusion that the request
5 satisfies the approval standards. *Sunnyside*[, 280 Or at 20-21].
6 *See also Penland v. Josephine County*, 29 Or LUBA 213
7 (1995); *Reeves v. Yamhill County*, 28 Or LUBA 123 (1994);
8 *Hart v. Jefferson County*, 27 Or LUBA 612 (1994). In
9 addition, when, as here, a party raises issues regarding
10 compliance with any particular approval criteria, it is
11 incumbent upon the local government to address those issues.
12 *Hillcrest Vineyard v. Bd. of Comm. Douglas Co.*, 45 Or App
13 283, 293, 608 P2d 201 (1980); *Collier v. Marion County*, 29
14 Or LUBA 462 (1995). Moreover, when the evidence is
15 conflicting, the local government may choose which evidence
16 to accept, but must state the facts it relies on and explain why
17 those facts lead to the conclusion that the applicable standard
18 is satisfied. *Moore v. Clackamas County*, 29 Or LUBA 372
19 (1995).’ *Le Roux*, 30 Or LUBA at 271.” *Larvik v. City of La*
20 *Grande*, 39 Or LUBA 467, 470-71 (1998).

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

28 **OS/SF’S AND OCA’S FIRST ASSIGNMENTS OF ERROR**

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

1 requirement * * * ‘development’ means * * * vacant subdivision lots which are
2 physically improved through construction of streets and provision of utilities to
3 the lot * * *.” The county found:

4 **“The oceanfront George Shand Tracts were ‘developed’ on**
5 **January 1, 1977 and so are eligible for [BPS] under Goal 18, [IR]**
6 **5 without the need to take an exception.**

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

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

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

3 **A. Interpretation**

4 When interpreting a law, the first level of analysis requires consideration
5 of the text, context, and, if useful, the legislative history. *State v. Gaines*, 346 Or
6 160, 171-72, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317
7 Or 606, 610-12, 859 P2d 1143 (1993). “[W]ords of common usage typically
8 should be given their plain, natural, and ordinary meaning.” *PGE*, 317 Or at 611.

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

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

13 We agree with OS/SF and OCA that Goal 18, IR 5, protects development
14 that existed on January 1, 1977.⁹ The county misconstrued IR 5 in finding that it
15 can be met if utilities could have been accessed but had not actually been
16 provided to the lot.

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

1 **B. Substantial Evidence**

2 Substantial evidence is evidence that a reasonable person would rely upon
3 to make a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608
4 (1993). As evidence that, on January 1, 1977, the George Shand Tract properties
5 were vacant subdivision lots physically improved through construction of streets
6 and provision of utilities to the lot, the county relied upon “the building permit
7 for tax lot 2900, directly north of the George Shand Tracts, approved in 1974 and
8 indicating that ‘Watseco Water’ would be used and a ‘septic tank.’” Record 26.
9 The county concluded, “Clearly, the predecessor to the Watseco-Barview Water
10 District’s infrastructure in Watseco was available to serve the George Shand
11 Tracts as early as 1974.” *Id.*

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

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

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

5 This assignment of error is sustained.

6 **DLCD'S AND OCA'S FIRST ASSIGNMENTS OF ERROR**

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

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

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

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

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

7 The county's alternative findings include:

8 **"In the alternative only, if a reviewing authority decides that the**
9 **George Shand Tracts were not 'developed' on January 1, 1977**
10 **and so are ineligible for [BPS], then as a precaution only and**
11 **only if such an appellate finding of ineligibility under Goal 18,**
12 **[IR] 5 unless an exception is taken, is made then the Board also**
13 **approves an exception to Goal 18, [IR] 5 for the specified George**
14 **Shand tracts.**

15 "Accordingly, it is only in the alternative and in the event that an
16 appellate authority reverses or remands our determination that the
17 George Shand Tracts were 'developed' on January 1, 1977, that the
18 Board approves, in the alternative, a Goal 18, [IR] 5 exception to the
19 date of eligibility for the George Shand Tracts." Record 26 (boldface
20 and underscoring in original).

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

1 We agree with intervenors that alternative findings are a common
2 occurrence in land use decisions. *See, e.g., 1000 Friends of Oregon v. Jackson*
3 *County*, 76 Or LUBA 270, 277 (2017), *rev'd on other grounds*, 292 Or App 173,
4 423 P3d 793 (2018), *rev dismissed*, 365 Or 557 (2019) (“[T]he county did not
5 commit reversible error in adopting alternative reasons exceptions under both
6 OAR 660-004-0022(1)(a) and 660-004-0022(3).”); *id.* at 278 (“Errors made
7 under one set of reasons standards may be harmless if the county adequately
8 justifies an exception under a different set of reason standards.”). The county did
9 not err in adopting alternative findings approving an exception.

10 This assignment of error is denied.

11 **DLCD, OS/SF, AND OCA’S SECOND AND THIRD ASSIGNMENTS OF**
12 **ERROR AND OCA’S SEVENTH ASSIGNMENT OF ERROR**

13 **A. Introduction**

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

16 “(A) Reasons justify why the state policy embodied in the
17 applicable goals should not apply;

18 “(B) Areas that do not require a new exception cannot reasonably
19 accommodate the use;

20 “(C) The long term environmental, economic, social and energy
21 [(ESEE)] consequences resulting from the use at the proposed
22 site with measures designed to reduce adverse impacts are not
23 significantly more adverse than would typically result from
24 the same proposal being located in areas requiring a goal
25 exception other than the proposed site; and

1 “(D) The proposed uses are compatible with other adjacent uses or
2 will be so rendered through measures designed to reduce
3 adverse impacts.”

4 OAR 660-004-0022 sets out criteria applicable to reasons exceptions.

5 OAR 660-004-0022(1) provides:

6 “For uses not specifically provided for in this division, or in OAR
7 660-011-0060, 660-012-0070, 660-014-0030 or 660-014-0040,
8 reasons include but are not limited to the following: There is a
9 demonstrated need for the proposed use or activity, based on one or
10 more of the requirements of Goals 3 to 19; and either:

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

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

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

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

3 **B. DLCD’s Second Assignment of Error, OS/SF’s and OCA’s**
4 **Third Assignments of Error, and OCA’s Seventh Assignment of**
5 **Error**

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

12 **1. Interpretation**

13 First, OS/SF argues that the county misconstrued the law in identifying the
14 reasons that it concluded supported the “catch-all” exception. OS/SF argues that
15 interpreting OAR 660-004-0021 requires use of the canon of construction
16 referred to as “*noscitur a sociis*.” OS/SF explains:

17 “The Oregon Supreme Court recently explained that *noscitur a*
18 *sociis* is the ‘relevant rule for interpreting a word or phrase’ when a
19 statute provides ‘a nonexclusive list of examples.’ *Capital One Auto*
20 *Fin. Inc. v. Dep’t of Revenue*, 363 Or 441, 453, 423 P3d 80 (2018).
21 *Noscitur a sociis* is ‘[a] canon of construction holding that the
22 meaning of an unclear word or phrase should be determined by the
23 words immediately surrounding it.’ *Black’s Law Dictionary* 1160-
24 61 (9th ed 2009). Under this interpretative rule, the court asked
25 whether any of the specifically enumerated examples in a non-
26 exclusive list provided by a statute shared ‘a common
27 characteristic.’ *Capital One*, 363 Or at 453. This common

1 characteristic is then used as context for understanding the meaning
2 of the unclear phrase. *Id.*” OS/SF’s Petition for Review 40.

3 The statute at issue in *Capital One* stated that “[i]ncome from sources within this
4 state” included (1) “income from tangible or intangible property located * * * in
5 this state,” (2) “income from tangible or intangible property * * * having a situs
6 in this state,” and (3) “income from any activities carried on in this state,
7 regardless of whether carried on in intrastate, interstate or foreign commerce.”
8 363 Or at 451. The court concluded that the common characteristic was income
9 from sources within the state. *Id.* at 453.

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

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

22 Nothing in the rule suggests to us that LCDC intended to so limit
23 permissible reasons for an exception. OAR 660-004-0020(1) provides, in part,
24 that, “[if] a jurisdiction determines that there are reasons consistent with OAR
25 660-004-0022 to use resource lands for uses not allowed by the applicable Goal

1 ***, the justification shall be set forth in the comprehensive plan as an
2 exception.”

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

8 We have previously said that “LCDC probably intended that *** reasons
9 sufficient to justify an exception [other than a ‘demonstrated need’] cross some
10 minimal threshold to ensure that the reasons are not makeweights that render the
11 goal requirement meaningless.” *Todd v. City of Florence*, 52 Or LUBA 445, 463
12 (2006). We conclude that the unique circumstances here, explained below, rise
13 to a level that is not “makeweight” and provide sufficient reasons for why Goal
14 18 should yield to the use of a set amount of resource land for a particular use.
15 We reject OS/SF’s interpretation of the rule and proceed to the findings.

16 **2. Adequacy of Findings**

17 Stated again, Goal 18 is:

18 “To conserve, protect, where appropriate develop and where
19 appropriate restore the resources and benefits of coastal beach and
20 dune areas; and

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

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

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

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

10 “The proposed revetment will be located within the Rockaway
11 Beach littoral cell. This littoral cell extends from Cape Falcon on the
12 north to Cape Madreas on the south, a distance of about 20 miles.
13 This littoral cell has three subregions: (1) Nehalem, which is the area
14 north of the Nehalem Bay jetties; (2) Rockaway, which is the area
15 between Nehalem Bay and Tillamook Bay; and (3) Bayocean, which
16 is the area south of the Tillamook Bay jetties. The proposed project
17 would be located in the Rockaway subregion (between Nehalem
18 Bay and Tillamook Bay).

19 “* * * * *

20 “There are two inlets with coastal jetties that have had a significant
21 influence on the sediment longshore transport and beach
22 geomorphology (DOGAMI, 2014) within the Rockaway Beach
23 littoral cell: (1) Tillamook Bay, which is about 5 miles north of Cape
24 Madreas (north jetty was constructed in 1914 while the south jetty
25 was constructed in 1974); and (2) Nehalem Bay, which is about 6
26 miles north of Tillamook Bay (south jetty was constructed in 1916
27 while the north jetty was constructed in 1918).” Record 1253.

28 The county found:

1 “The record supports the conclusion that the Subject Properties are
2 faced with unique and exceptional circumstances. The Subject
3 Properties represent ‘appropriate development’ as defined by Goal
4 18—the residential subdivisions and most of the development was
5 approved to be limited to the areas Goal 18, [IR] 2 allows; was
6 setback more than 200 feet from the statutory vegetation line, more
7 than 200 yards from the ocean and were separated from the ocean
8 by a coastal forest—all of which was appropriate under Goal 18 and
9 was designed to protect the properties from coastal hazards. *In spite*
10 *of these protective measures and contrary to the expert analyses at*
11 *the time, the Subject Properties are now threatened with destruction*
12 *by unanticipated coastal erosion and flooding. Analysis from the*
13 *[intervenors’] expert in the record demonstrates that the natural*
14 *processes in the littoral subregion in which the Subject Properties*
15 *are located have been uniquely disrupted by the combined effects of*
16 *the two manmade jetties, which are unusually close in proximity and*
17 *cabin the littoral subregion like nowhere else on the Oregon Coast,*
18 *and the lasting effects of the El Niño/La Niña events of the late*
19 *1990s. Accordingly, the requested exception is supported by unique*
20 *and exceptional circumstances and is consistent with the*
21 *overarching purpose and intent of Goal 18 and the exceptions*
22 *process.”*¹¹ Record 23 (emphasis added).

23 The county concluded:

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

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

1 **a. Appropriate Development**

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

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

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

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

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

18 **b. Potential Future Extent of Coastal Hardening**

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

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

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

10 The county concluded that

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

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

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

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

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

"According to the experts consulted by the applicants, the proliferation of [BPS] on Gleneden Beach is causing and will continue to cause significant harm to the few properties left unprotected. The [BPS] along this stretch of beach have resulted in a disruption to littoral cell processes and movement of sand, increasing erosion at unprotected sites. In addition to the harm caused by the general proliferation of protective structures, specific protective structures adjacent to the ineligible properties may also be causing direct, local erosion to their bluffs, further aggravating the problem.

"The Staff Report identifies that the core purpose of Goal 18, [IR] 5 is to stop the proliferation of [BPS] in order to preserve beaches and littoral cell functionality. The department agrees with staff that, in this instance, the case can be made that the state policy cannot be achieved in the Gleneden-Lincoln Beach area.

*** **

"The addition of three [BPS] on this stretch of beach will be compatible with other adjacent uses because this littoral cell is already almost entirely armored. As submitted in the application materials, Gleneden Beach 'has the longest stretch and highest density of [BPS] along the Oregon coast.' Approximately 75 percent of the coastline is already armored in this littoral cell." Record 1348-49, 1415-16.

1 1977 are not simply ‘entitled’ to BPS, but required to comply with
2 permitting processes meant to support Goal 18’s purpose.” OS/SF’s
3 Petition for Review 44.

4 In these proceedings, DLCD commented:

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

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

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

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

3 **c. Change in Erosion Patterns**

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

11 "The record demonstrates that the Subject Properties have seen a
12 loss of 142 feet of beachfront property since 1994, with the Pine
13 Beach 'common area' that was densely vegetated when the Pine
14 Beach Replat was approved and recorded, now dry sand beach.

15 "Evidence in the record demonstrates that more than \$10 million in
16 property value is at risk of being lost, in addition to public
17 infrastructure to include public water and sewer, utilities and roads.
18 The lives of the Subject Properties' occupants are also at risk from
19 unpredictable and dangerous wave runup. The proposed [BPS] will
20 responsibly mitigate this significant threat in a manner that is
21 consistent with the County's development standards. The threat to
22 [intervenors'] properties is present and very real. Any avoidable
23 delay in issuing the requested development permit for the BPS,
24 unjustifiably places lives and property in serious jeopardy." Record
25 24.

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

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

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

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

1 “The findings do not explain how ‘appropriate development,’ under
2 Goal 18, includes vacant lots that have not been developed. Merely
3 because some public infrastructure is available does not mean that
4 those vacant lots have been developed to any degree that warrants a
5 goal exception. * * * The findings repeat that ‘the proposed
6 exception is necessary for the protection of the structures and
7 associated infrastructure,’ but that analysis does not apply to the
8 vacant lots.” OCA’s Petition for Review 32-33.

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

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

19 These assignments of error are sustained, in part.

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

1 **C. OS/SF’s and OCA’s Second Assignments of Error and DLCD’s**
2 **Third Assignment of Error**

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

5 *“There is a demonstrated need for the proposed use or activity,*
6 *based on one or more of the requirements of Goals 3 to 19; and*
7 *either:*

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

16 “(b) *The proposed use or activity has special features or qualities*
17 *that necessitate its location on or near the proposed exception*
18 *site.” (Emphases added.)*

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

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

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

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

9 “[T]he county must (1) identify one or more obligations under Goals
10 3 to 19, (2) explain why the county is at risk of failing to meet those
11 obligations, and (3) explain why the proposed exception to the
12 requirements of one goal * * * will help the county maintain
13 compliance with its other goal obligations.” *Oregon Shores*, ___ Or
14 LUBA at ___ (slip op at 31).

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

19 1. Overview of the Goals

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

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

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

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

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

30 2. Goal 7

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

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

7 We have concluded that, “[w]hile development of renewable energy is
8 certainly consistent with the Goal 13 requirement to ‘conserve’ energy, the goal
9 includes no express mandates regarding the development of renewable energy
10 sources” and, therefore, did not establish a demonstrated need for an exception
11 to Goal 3 to site a solar power facility on 80 acres of high-value farmland. *1000*
12 *Friends*, 76 Or LUBA at 279. We have also concluded that a county’s findings
13 that a proposal to develop a racetrack was consistent with Goals 8 and 9 did not
14 demonstrate that the county was incapable of satisfying its obligations under the
15 goals without an exception. *Middleton v. Josephine County*, 31 Or LUBA 423,
16 430 (1996). Similarly, here, consistency with Goal 7 or comprehensive plan
17 provisions implementing Goal 7 does not establish that an exception is needed.
18 We agree with petitioners that Goal 7 does not *require* the installation of hazard
19 mitigation measures after development has occurred. DLCD’s Petition for
20 Review 35-36. Similarly, the comprehensive plan does not require the county to
21 allow BPS where development has occurred. The county’s interpretation of its
22 comprehensive plan as authorizing BPS under the unique circumstances here is

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

3 **3. Goals 10, 11, and 14**

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

6 **a. Goals 10 and 14**

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

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

21 “would be at risk of not meeting its Goal 14 obligations reflected in
22 the County plan, if it refused to protect this acknowledged
23 ‘demonstrated need’; but rather to demand instead that the

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

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

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

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

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

4 **b. Goal 11**

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

15 **c. Goal 18**

16 Goal 18 relates to the conservation of land for resource uses. *1000 Friends*,
17 292 Or App at 192. The county found that Goal 18 has two competing
18 components:

19 “The first states that beaches and dunes shall allow appropriate
20 development as well as conserving, protecting and, if appropriate,
21 restoring coastal beach and dune areas. It directs comprehensive
22 plans to ‘provide for diverse and appropriate use of beach and dune
23 areas consistent with their * * * recreational and * * * economic
24 values.’ The second purpose is to reduce the hazard to human life

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

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

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

11 These assignments of error are sustained.

12 **OCA’S, OS/SF’S, AND DLCDC’S FOURTH ASSIGNMENTS OF ERROR**

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

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

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

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

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

16 “[t]he proposed uses are compatible with other adjacent uses or will
17 be so rendered through measures designed to reduce adverse
18 impacts.’ The exception shall describe how the proposed use will be
19 rendered compatible with adjacent land uses. The exception shall
20 demonstrate that the proposed use is situated in such a manner as to
21 be compatible with surrounding natural resources and resource
22 management or production practices. ‘Compatible’ is not intended
23 as an absolute term meaning no interference or adverse impacts of
24 any type with adjacent uses.”

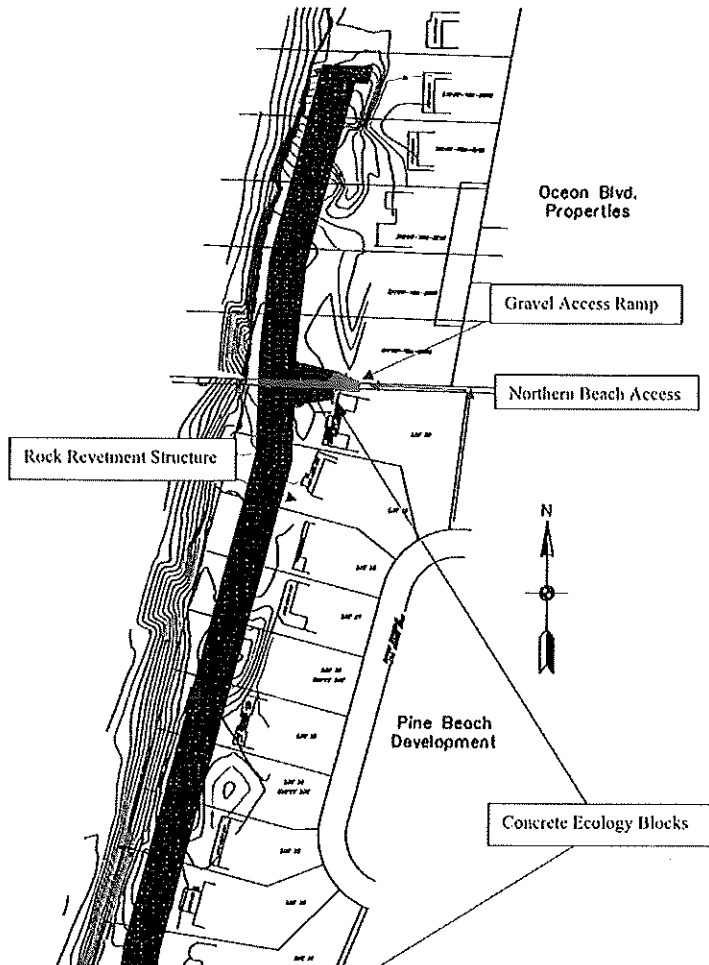
25 OS/SF argues in its fourth assignment of error that the county misconstrued OAR
26 660-004-0020(2)(d) and made inadequate findings.

27 For the vacant lots, as we explained above, the county’s reasons for
28 adopting the exception are deficient and require additional analysis and evidence.

29 Given that additional analysis of whether reasons support the exception for the

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

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



5
6 Record 1995. Because intervenors requested approval of an integrated design, we
7 understand the evidence in the record and the county's findings concerning the
8 long-term ESEE consequences and compatibility with adjacent uses to reflect the
9 inclusion of the vacant lots. For example, the county found, with respect to
10 environmental impacts, that

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

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

11 **OCA’S SIXTH ASSIGNMENT OF ERROR**

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

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

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

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

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

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

9 OCA does not develop an argument identifying what is required to show
10 consistency with Goals 6 and 7 or explaining why that showing is not made in
11 this case.¹⁴ *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220
12 (1982).

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

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

1 This assignment of error is denied.

2 **DLCD’S AND OCA’S FIFTH ASSIGNMENTS OF ERROR**

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

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

“Goal 7 prohibits development in natural hazard areas ‘without appropriate safeguards.’ Petitioners’ arguments under this assignment of error boil down to an assertion that the safeguards the county imposed here are insufficient. * * *

“The county considered and rejected petitioners’ arguments regarding the consequences of changes to the floodplain/floodway and the fill that was placed on the subject property. Petitioners do not challenge or identify any error in those findings, and we do not consider petitioners’ arguments on those matters further.” *Smith*, 37 Or LUBA at 806 (citations omitted).

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

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

12 The county's decision is remanded.