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

OREGON SHORES CONSERVATION COALITION,
Petitioner,

and

CITIZENS FOR RENEWABLES,
Intervenor-Petitioner,

vs.

CITY OF NORTH BEND,
Respondent,

and

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

LUBA No. 2019-118

FINAL OPINION
AND ORDER

Appeal from City of North Bend.

Ka'sha Bernard, Portland, filed a petition for review and argued on behalf of petitioner. With her on the brief was Crag Law Center.

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

No appearance by respondent.

Seth J. King, Portland, filed the response briefs and argued on behalf of intervenor-respondent. With him on the briefs were Steven L. Pfeiffer, Nikesh J.

1 Patel, and Perkins Coie LLP.

2

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

5

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REVERSED

07/17/2020

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

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city council decision approving a temporary dredge
4 material transport pipeline, a dredge offloading facility, a bridge crossing and
5 support structures in various city zones.

6 **FACTS**

7 Intervenor-respondent Jordan Cove Energy Project L.P. (Jordan Cove)
8 proposes to develop a 200-acre natural gas liquefaction facility and export
9 terminal (LNG Terminal project) on an embayment on the western side of the
10 outer bay known as Jordan Cove. Located on the North Spit of Coos Bay, the
11 southernmost end of the Coos Bay dune sheet, Jordan Cove is part of the Coos
12 Bay estuary and adjacent shoreline area.

13 The city has adopted the Coos Bay Estuary Management Plan (CBEMP)
14 (2003) as part of the city’s comprehensive plan and zoning ordinance.¹ North
15 Bend City Code (NBCC) 18.88. The CBEMP serves “as the basis of land, water
16 use and community development regulations for lands lying within the estuary
17 and its shorelands,” and implements Statewide Planning Goal 16 (Estuarine
18 Resources) and Goal 17 (Coastal Shorelands). Jordan Cove’s project is subject to
19 the CBEMP.

¹ The city asks that we take official notice of Ordinance 1653, adopted in 1982, that adopted the CBEMP into the city’s comprehensive plan. We will take official notice of official enactments of a local government. ORS 40.090(7). The motion is granted.

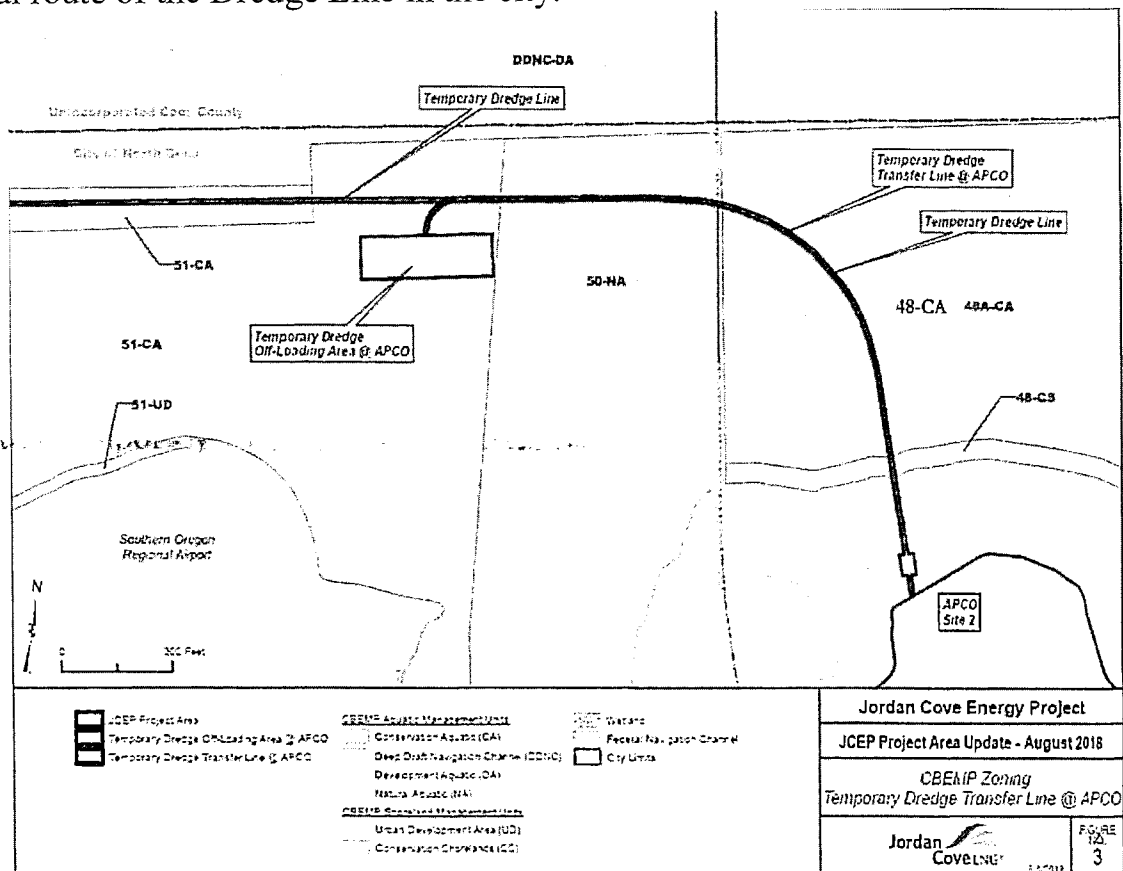
1 The CBEMP designates a number of estuarine resources in the Jordan
2 Cove area as either estuarine “aquatic” management units or “shoreland”
3 management units. Estuarine “management units” are discrete geographic areas
4 within which particular uses and activities are promoted, encouraged, protected,
5 or enhanced, and where others are discouraged, restricted, or prohibited.
6 CBEMP, section 3 – Management Framework (Definitions, Policies and
7 Standards, and Plan Provisions). Lands within these management units are then
8 designated as “Development” zones, “Natural” zones, or “Conservation” zones.
9 We discuss those zones as implemented within the city in detail later in this
10 opinion.

11 In connection with the LNG Terminal project, Jordan Cove proposes to
12 dredge portions of the federal navigation channel, the Coos Bay Deep Draft
13 Navigation Channel (DDNC), between river mile 2 and river mile 7. To dispose
14 of dredged material, Jordan Cove proposes to construct and operate a temporary
15 pipeline to transport dredged material from four dredging sites, where it will
16 discharge from the pipeline and be stored on two sites known as APCO Sites 1
17 and 2, located in the area of the estuary known as North Point.² We refer to the
18 pipeline in this opinion as the Dredge Line. The proposal includes construction
19 of a bridge over the estuary between the two APCO Sites, construction of a

² As we understand it, “APCO” is an acronym for “Al Pierce Company,” the former owner/operator of the sites. Record 6037.

1 dredge offloading facility, and construction of a berm from the disposal of
 2 dredged material on the APCO Sites.

3 The portion of the Dredge Line within the city limits is approximately 1.43
 4 miles long, 2 to 2 and ½ feet in diameter, and crosses five of the city's CBEMP
 5 zones: 52-NA, 51-CA, 50-NA, 48-CA, and 48-CS. The Dredge Line is also
 6 located close to the Southern Oregon Regional Airport and implicates the North
 7 Bend Airport Overlay Zone (Airport Overlay Zone). The map below shows the
 8 general route of the Dredge Line in the city.



9
 10 Record 28.

1 The planning commission held hearings on the applications on May 20,
2 2019, and at the conclusion, left the record open until June 10, 2019 for
3 submission of new evidence and testimony, and until July 1, 2019 for submission
4 of rebuttal evidence and testimony. At its next meeting, the planning commission
5 voted to approve the applications. Intervenor-petitioner Citizens for Renewables
6 (Citizens) appealed the planning commission’s decision to the city council. At a
7 meeting on October 4, 2019, the city council voted to dismiss the appeal and
8 adopt the planning commission’s decision, findings, and conditions of approval
9 as the city council’s final decision. This appeal followed.

10 **PETITIONER’S FIRST ASSIGNMENT OF ERROR**

11 Petitioner’s first assignment of error relates to the section of the Dredge
12 Line proposed in the CBEMP 48-CA zone and includes two subassignments of
13 error. The CBEMP describes the CA management units as:

14 “areas managed for low to moderate intensities of uses and
15 activities. Emphasize maintaining the integrity and continuity of
16 aquatic resources and recreational benefits. Minor alterations may
17 be allowed in conjunction with approved uses as specified in each
18 unit. Conservation aquatic areas include open water portions of the
19 estuary and valuable salt marshes and mud-sand flats of lesser
20 biological significance than those in the Natural Aquatic category.”
21 CBEMP 3.5.1.b.

22 Dredged Material Disposal (DMD) is a prohibited activity in the 48-CA zone.
23 City of North Bend Coos Bay Estuary Zoning Units, at 23-24. However, the 48-
24 CA zone allows “minor navigational improvements” that are consistent with (1)
25 the resource capabilities of the area and (2) the purposes of the 48-CA unit.

1 CBEMP Management Objective. As we explain in more detail below, the city
2 council concluded that the Dredge Line is a “minor navigational improvement”
3 and therefore allowed in the 48-CA zone. Record 28.

4 In the first subassignment of error, petitioner argues that the city
5 improperly construed the term “minor navigational improvement.” In the second
6 subassignment, petitioner argues that the city’s findings are inadequate to
7 demonstrate that the Dredge Line will “conserve the aquatic resources of the
8 estuary,” and that there is not substantial evidence in the record to support the
9 city’s conclusion.

10 **A. Minor Navigational Improvement**

11 CBEMP Chapter 3.1 defines “minor navigational improvement” as

12 “[a]lterations necessary to provide water access to existing or
13 permitted uses in conservation management units, including
14 dredging for access channels and for maintaining existing
15 navigation, but excluding fill and in-water navigational structures
16 other than floating breakwaters or similar permeable wave barriers.”

17 The city council concluded that the Dredge Line is allowed in the 48-CA zone as
18 a minor navigational improvement:

19 “In CBEMP Unit 48-CA, the temporary dredge transport pipeline
20 constitutes ‘minor navigational improvements,’ which are defined
21 in CBEMP 3.1 as follows: ‘[a]lterations necessary to provide water
22 access to existing or permitted uses in conservation management
23 units, including dredging for access channels and for maintaining
24 existing navigation but excluding fill and in-water navigational
25 structures other than floating breakwaters or similar permeable wave
26 barriers.’ The temporary dredge transport pipeline proposed herein
27 is an ‘alteration’ to the estuary because it is a facility that will be

1 placed within the estuary, and it is ‘necessary to provide water
2 access to existing or permitted uses in conservation management
3 units’ because [Jordan Cove] is proposing dredging in conservation
4 management units to improve navigation in the DDNC. The
5 definition of ‘minor navigational improvements’ explicitly
6 contemplates ‘dredging for access channels and for maintaining
7 existing navigation,’ and the temporary dredge line that [Jordan
8 Cove] proposes is one—albeit less intrusive—component of
9 dredging with precisely that purpose. **The temporary dredge
10 transport pipeline is allowed in CBEMP Unit 48-CA as a ‘minor
11 navigational improvement.’ The criterion set forth in CBEMP
12 Unit 48-CA is met.**” Record 28 (boldface in original).

13 LUBA is required to reverse or remand a decision that “[i]mproperly
14 construe[s] the applicable law.” ORS 197.835(9)(a)(D). ORS 197.829(1) requires
15 LUBA to affirm the city council’s interpretation of the CBEMP if the
16 interpretation is not inconsistent with the express language, purpose, or policy of
17 the city’s comprehensive plan or land use regulations.³ Although petitioner

³ ORS 197.829(1) provides:

“The Land Use Board of Appeals shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

“(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

“(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

“(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

1 argues that the city council’s interpretation of the CBEMP is not entitled to
2 deference under ORS 197.829(1) because, petitioner argues, the CBEMP was
3 adopted by Coos County, that argument fails to acknowledge that the city has
4 adopted the CBEMP as part of the city’s comprehensive plan and the NBCC. See
5 n 1. Accordingly, the city council’s interpretation of the CBEMP is entitled to
6 review under the deferential standard in ORS 197.829(1), as described in *Siporen*
7 *v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). *Mintz v. City of Beaverton*,
8 67 Or LUBA 374, 384 (2013) (where a city has adopted a standard from an urban
9 area planning agreement between the city and the county into its comprehensive
10 plan and its land use regulations, the city council’s interpretation of the standard
11 is entitled to deference under ORS 197.829(1) and *Siporen*).

12 In the first subassignment of error, petitioner argues that the city
13 improperly construed the plain language of the term “minor navigational
14 improvement[s],” which allows an alteration (1) “to provide water access” (2) “to
15 existing or permitted uses in conservation management units.” CBEMP 3.1.
16 Petitioner argues that the city’s interpretation is inconsistent with the requirement
17 that a minor navigational improvement “provide water access” because the
18 Dredge Line does not provide water access. Petitioner also argues that the city
19 improperly relied on dredging that will occur outside of the 48-CA zone.

“(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

1 Petitioner also argues that the city’s interpretation of the provision is inconsistent
2 with the purpose of the 48-CA zone because the Dredge Line will not conserve
3 aquatic resources. For those reasons, petitioner argues, the Dredge Line is not
4 allowed in the 48-CA zone.

5 Jordan Cove does not respond to petitioner’s argument that the city’s
6 interpretation is inconsistent with the requirement that a minor navigational
7 improvement “provide water access” and that the Dredge Line cannot be
8 approved in the 48-CA zone because it does not “provide water access.” Jordan
9 Cove responds that the city council’s interpretation of the defined term “minor
10 navigational improvement” as allowing the Dredge Line is not inconsistent with
11 the plain language of the definition that allows a necessary alteration for “existing
12 or permitted uses in conservation management units, including dredging for
13 access channels * * *.” CBEMP 3.1.⁴ According to Jordan Cove, nothing in the
14 plain language of the term “minor navigational improvement” restricts the
15 dredging for access channels to the specific 48-CA zone in which approval of the
16 minor navigational improvement is sought. Jordan Cove’s Response to
17 Petitioner’s Brief 9. Jordan Cove argues that LUBA should affirm the city

⁴ The city council’s decision does not expressly interpret the term “minor navigational improvement” or any of the operative terms of that definition. An implied interpretation can be fairly easily understood from the findings in support of the decision and is adequate for review. *Alliance for Responsible Land Use v. Deschutes County*, 149 Or App 259, 266-67, 942 P2d 836 (1997), *rev dismissed*, 326 Or 464 (1998).

1 council’s interpretation of the definition “minor navigational improvements” as
2 allowing it to rely on “dredging for the access channel” that is occurring outside
3 of the 48-CA zone. *Id.*

4 For the reasons explained below, we agree with petitioner that the city
5 council’s interpretation of the term “minor navigational improvement” as
6 allowing the Dredge Line is inconsistent with the express language of the
7 definition. First, the city council’s interpretation does not address or explain at
8 all the requirement that the alteration “provide water access,” or otherwise
9 explain whether or how the Dredge Line “provide[s] water access.”⁵ As noted,
10 Jordan Cove also does not respond to petitioner’s argument that the Dredge Line
11 does not “provide water access.”⁶ Absent any explanation from either the city or
12 Jordan Cove regarding why the Dredge Line provides water access, we have no
13 basis to conclude that it does.

14 Second, although we reject petitioner’s argument that the definition
15 requires that dredging that occurs in connection with the minor navigational
16 improvement must occur in the subject 48-CA zone, the city council’s
17 interpretation of the phrase “existing or permitted uses in conservation

⁵ Although the CBEMP does not define the phrase “water access,” the CBEMP does define the term “access” as used in connection with the term “water dependent” to “mean[] physical contact with or use of the water.” CBEMP 3.2.

⁶ The Dredge Line is partially submerged and partially elevated in the 48-CA zone. Record 7287-88.

1 management units” is inconsistent with the plain language of the provision, which
2 does require the proposed alteration to provide water access to permitted uses “*in*
3 *conservation management units.*” The city’s interpretation, as explained in the
4 response brief, that dredging that is occurring in other zones and jurisdictions in
5 connection with deepening the DDNC is sufficient to qualify the Dredge Line as
6 a minor navigational improvement, is inconsistent with the requirement that the
7 existing or permitted use (*i.e.*, dredging) for which the alteration is needed be “*in*
8 *conservation management units.*” We do not understand Jordan Cove to dispute
9 that dredging in connection with the LNG Terminal project will occur in the
10 DDNC, which is not a conservation management unit at all.

11 The first subassignment of error is sustained.

12 **B. Conserve the Aquatic Resources of the Area**

13 In the second subassignment, petitioner argues that the city’s findings are
14 inadequate to demonstrate that the Dredge Line will “conserve the aquatic
15 resources of the estuary” and that there is not substantial evidence in the record
16 to support the city’s conclusion. We conclude above that the city council erred in
17 concluding that the Dredge Line is allowed in the 48—CA zone as a minor
18 navigational improvement. Accordingly, the Dredge Line is not allowed in the
19 48-CA, and the city’s finding that the 48-CA zone management objective is met
20 does not provide an independent basis for approving the Dredge Line. We need
21 not address petitioner’s challenges to the city council’s findings regarding the

1 management objective to conserve aquatic resources. We do not address the
2 second subassignment of error.

3 The first assignment of error is sustained.

4 **PETITIONER’S SECOND ASSIGNMENT OF ERROR**

5 The second assignment of error is that the city’s findings that CBEMP
6 Policy 5 is satisfied are inadequate. Briefly, CBEMP Policy 5 governs removal
7 and fill activities within the estuary. The city adopted findings that the proposal
8 is consistent with CBEMP Policy 5, and specifically incorporated Jordan Cove’s
9 responses to CBEMP Policy 5 found in “Exhibit 5 of Attachment A[.]” Record
10 36-37. In spite of that language, no documents were attached to the city council’s
11 decision. Citing *Gonzalez v. Lane County*, 24 Or LUBA 251, 259 (1992),
12 petitioner argues that the city’s attempt to incorporate the applicant’s findings
13 failed because the incorporated findings are not attached to the decision.

14 Jordan Cove responds that the city’s incorporation of Attachment A,
15 Exhibit 5 was effective because the relevant test under *Gonzalez* is whether a
16 reasonable person reading the decision would realize that another document is
17 incorporated, and would be able to request the opportunity to review it. We agree.
18 First, a reasonable person reading the decision would recognize that the city’s use
19 of the phrase “incorporated by reference” meant that the city incorporated another
20 document. Second, Attachment A, Exhibit 5 is easily identifiable in the record
21 beginning at Record 7174, and Record 7177-7186 includes findings addressing
22 CBEMP Policy 5.

1 Petitioner’s second assignment of error is denied.

2 **PETITIONER’S THIRD AND FOURTH ASSIGNMENTS OF ERROR**

3 Petitioner’s third and fourth assignments of error relate to CBEMP Policies
4 4 and 4a and the 52-NA zone.

5 **A. Third Assignment of Error**

6 CBEMP Policy 4 and 4a are exceedingly complicated and we discuss them
7 here only to the extent necessary to understand and deny this assignment of error.
8 Briefly, CBEMP Policy 4 and 4a work together to require a resources capability
9 assessment at the time of an application for a permit where a proposed action
10 would alter the estuarine ecosystem. One sentence in the city’s findings
11 incorrectly states that an impact assessment pursuant to CBEMP Policy 4 is not
12 required. Record 35. Jordan Cove does not dispute that the sentence is incorrect.
13 However, the next sentences note that “[t]he application includes an impact
14 assessment for the project proposal. See Attachment A, Exhibit 5. The proposal
15 is consistent with CBEMP Policy No. 4.” *Id.* We understand petitioner to argue
16 in the third assignment of error that the inconsistency in these findings requires
17 remand. Jordan Cove responds, and we agree, that the final conclusion that “[t]he
18 proposal is consistent with CBEMP Policy No. 4” is the ultimate conclusion of
19 the city, and petitioner does not challenge that conclusion. *Id.* Moreover, the city
20 concluded, and petitioner does not dispute, that Jordan Cove submitted an impact
21 assessment as required by CBEMP Policy 4a. Record 36. Petitioner does not
22 challenge or otherwise acknowledge that finding. Accordingly, the findings are

1 adequate to explain why CBEMP Policy 4a is met. *See Protect Grand Island*
2 *Farms v. Yamhill County*, 66 Or LUBA 291, 295 (2012) (rejecting argument that
3 the county misconstrued applicable law where the petitioner relied on isolated
4 findings “without citing to or acknowledging other findings in the decision that
5 address the same approval criteria”).

6 The third assignment of error is denied.

7 **B. Fourth Assignment of Error**

8 The Dredge Line is proposed to cross the 52-NA zone. The NA
9 management unit allows “temporary alterations subject to the making of
10 resources capability findings and impact assessments (see Policy #4a).” The
11 CBEMP describes the Natural Aquatic management unit as:

12 “areas managed for resource protection, preservation and
13 restoration. Severe restrictions are placed on the intensity and types
14 of uses and activities allowed. Natural Aquatic areas include all
15 major tracts of salt marshes, mud-sand flats, seagrass and algae beds
16 that, because of a combination of factors such as size; biological
17 productivity; and habitat value, play a major role in the functioning
18 of the estuarine ecosystem. Natural Aquatic areas also include
19 ecologically important subtidal areas.” CBEMP 3.5.1.a.

20 The Management Objective for the 52-NA zone provides:

21 “The supporting documentation for the CBEMP acknowledges the
22 importance of the Southwest Regional Airport (formerly North
23 Bend Municipal Airport) and allows for its continued operation
24 through adoption of Exception 21 in the Plan. This aquatic unit
25 contains extensive eelgrass beds with associated fish and waterfowl
26 habitat, and shall be managed to maintain these resources in their
27 natural condition to protect their productivity, while allowing
28 alteration, including fill for airport use, in accordance with FAA

1 requirements for safety.

2 “Dredging of a small channel on the north side of the proposed
3 airport fill shall be necessary as a form of mitigation to maintain
4 tidal currents.

5 “Maintenance only of the existing sewage treatment plant and storm
6 water outfalls shall be permitted.” Record 33.

7 The city council found:

8 “Applicant proposes to operate a temporary dredge transport
9 pipeline in CBEMP Unit 52-NA. CBEMP Unit 52-NA was
10 inadvertently left out of those CBEMP Units listed on the public
11 notice and in the staff report as applicable in this case. The
12 application does address CBEMP Unit 52-NA, which application is
13 made part to the staff report dated May 9th, 2019 and was available
14 to the public for review in advance of Planning Commission’s public
15 hearing on May 20th, 2019. Per the application, the temporary
16 dredge transport pipeline satisfies the management objective and
17 conditions CBEMP Unit 52-NA, as follows:

18 “The temporary dredge transport pipeline will not prejudice the
19 natural condition or productivity of eelgrass beds or waterfowl
20 habitat in CBEMP Unit 52-NA because this line will not encounter
21 eelgrass beds or waterfowl habitat in this area. Where the line is
22 located on the channel bottom, there will be temporary impacts to
23 0.306 acres of deep subtidal estuarine habitat in this area. The
24 temporary dredge transport pipeline does not affect a small dredged
25 channel on the north side of the airport fill, as is described in the
26 management objective, and does not involve sewage treatment or
27 storm water outfalls.

28 “The temporary dredge transport line is necessary to facilitate a
29 federally authorized navigation project and is a temporary alteration
30 because it will occur only over three consecutive in-water work
31 windows (October 1 to February 15). Temporary alterations are
32 allowed in CBEMP Unit 52-NA subject to one special condition,
33 which is compliance with Policy No. 4a. **The criterion set forth in**

1 **CBEMP Unit 52-NA can be met subject to compliance with**
2 **Policy No. 4a, addressed below in the Polices section.**” Record 34
3 (boldface in original).

4 In its fourth assignment of error, petitioner argues that the city’s findings
5 regarding 52-NA are inadequate and are not supported by substantial evidence in
6 the whole record. Petitioner argues that the findings do not address the potential
7 for displacement of wintering waterfowl by the equipment for the Dredge Line,
8 and do not address the possibility that the submerged Dredge Line could interfere
9 with benthic communities.⁷ Petitioner also argues that the evidence in the record
10 does not support a conclusion that the Dredge Line will be a “temporary
11 alteration” due to the necessity of ongoing maintenance dredging operations, and
12 points to evidence in the record from Jordan Cove that refers to a 4-year duration
13 for dredging activity. *Id.*

14 Jordan Cove responds that the city’s findings are adequate to explain why
15 it concluded that the Dredge Line in the 52-NA zone satisfies the management
16 objective and that the city’s decision is supported by substantial evidence. We
17 agree. Generally, findings must “(1) identify the relevant approval standards, (2)
18 set out the facts which are believed and relied upon, and (3) explain how those
19 facts lead to the decision on compliance with the approval standards.” *Heiller v.*
20 *Josephine County*, 23 Or LUBA 551, 556 (1992).The city’s findings state the

⁷ *Webster’s Third New Int’l Dictionary* 204 (unabridged ed 2002) defines “benthic” to mean “**1** : of, relating to, or occurring on the bottom underlying a body of water.”

1 management objective, summarize the facts it relied on, and explain how those
2 facts lead to the conclusion it reached. Moreover, Jordan Cove points to evidence
3 in the record that supports the city's decision, at Record 438 and 4307. Finally,
4 we agree with Jordan Cove that the city council reasonably relied on evidence in
5 the record that the Dredge Line use in the 52-NA zone is only authorized for a
6 three-year period, which consistent with Condition 4 supports its conclusion that
7 the Dredge Line is "temporary." Record 34.

8 Petitioner's fourth assignment of error is denied.

9 **PETITIONER'S FIFTH ASSIGNMENT OF ERROR**

10 Petitioner's fifth assignment of error relates to the portion of the Dredge
11 Line in the 51-CA zone. Jordan Cove proposes to locate a portion of the Dredge
12 Line and a "temporary dredge offloading facility" in the 51-CA zone. Petitioner's
13 Petition for Review 37. The dredge offloading facility will float on pilings on
14 the surface of the water and offload dredge material.

15 The management objective for the 51-CA zone provides:

16 "This aquatic segment shall be managed to maintain any aquatic
17 resources in the area as consistent with the needs of the airport
18 flyover area and the navigation channel. It shall also be managed to
19 allow continued public access to the water at the present location
20 and to allow rebuilding of the existing boat ramp. There may also be
21 a need for a *limited boat dock* for transient recreation craft tie-up in
22 association with the boat ramp and possible hotel development on
23 nearby uplands. Minor maintenance dredging for the boat ramp and
24 minor new dredging for the *boat dock* shall also be allowed." Record
25 32 (emphases added).

1 The city found that the dredge offloading facility is allowed in the 51-CA
2 zone as a “dock,” and that adverse impacts have been minimized and mitigated.
3 Record 32-33. Petitioner challenges the city’s finding that the “dredge offloading
4 facility” is properly characterized as a “dock,” which is listed as a permitted use
5 in the 51-CA zone. Petitioner’s Petition for Review 38-39. Petitioner argues that
6 even if the offloading facility is a “dock,” it is not the type of dock authorized in
7 the 51-CA zone, and points to the plain language of the 51-CA zone management
8 objective that limits the allowance for a dock to a “boat dock for transient
9 recreation craft tie-up in association with the boat ramp and possible hotel
10 development on nearby uplands.” *Id.* Jordan Cove responds that the dock
11 described in the 51-CA management objective is not an exclusive description,
12 and that the uses and activities matrix for the 51-CA zone authorizes “docks”
13 without any limiting language.

14 We agree with petitioner that the city council’s conclusion that the dredge
15 offloading facility is a dock that is allowed consistent with the 51-CA
16 management unit objective is not supported by the plain language of the
17 management objective. The management unit objective authorizes docks that are
18 limited to the description in the management objective: “a *limited boat dock* for
19 transient recreation craft tie-up in association with the boat ramp and possible
20 hotel development on nearby uplands.” Record 32 (emphasis added). In addition,

1 the CBEMP requires that the 51-CA zone’s authorization of “docks” must be
2 interpreted consistently with the 51-CA management unit objective.⁸

3 Petitioner also argues that the city’s findings are inadequate to explain how
4 the adverse impacts from the Dredge Line and dredge offloading facility have
5 been minimized. In response, Jordan Cove first points to Condition 4, which
6 requires all work to be completed during the in water work window to minimize
7 adverse impacts. Jordan Cove also points to findings at Record 33 that cross-
8 reference to the city’s findings in response to CBEMP Policies 5 and 8, found at
9 Record 36-37. The findings at Record 36-37 explain how the Dredge Line would
10 minimize adverse impacts and incorporate Attachment A, Exhibit 5, the

⁸ Section 3.8 of the CBEMP describes the relationship between Management Objectives and the Uses and Activities Matrix, and provides as relevant here:

“A detailed ‘Uses and Activities Matrix’ follows the ‘Management Objective’ statement presented for each aquatic and shoreland unit in (Volume II, Part 1, Section 5). The matrix describes specific uses and activities deemed appropriate and inappropriate for each unit. The matrix further refines the ‘Management Objective’ and Management Classification for each unit by stipulating exactly what will and will not be allowed.

“As policy, use, and activity matrix requirements for each unit are subordinate to the ‘Management Objectives’ for the units in that allowed uses and activities must be consistent with the units’ ‘Management Objective’ statements (which must in turn, be consistent with the policies set forth in Volume II, Part 1, Section 3.3).”

1 applicant's statement. We agree with Jordan Cove that the city's findings are
2 adequate to explain how the adverse impacts from the Dredge Line and dredge
3 offloading facility will be minimized. However, Jordan Cove has not established
4 that the dredge offloading facility is a use allowed in the 51-CA zone, and
5 accordingly, the adequacy of the findings related to the minimization of adverse
6 impacts from the Dredge Line and the dredge offloading facility does not provide
7 an independent basis to deny the assignment of error.

8 Petitioner's fifth assignment of error is sustained, in part.

9 **PETITIONER'S SIXTH ASSIGNMENT OF ERROR**

10 Petitioner's sixth assignment of error relates to the 48-CS zone. Jordan
11 Cove proposes to construct a bridge that will cross an inlet of the estuary between
12 APCO Sites 1 and 2, and the bridge crossing support structures will be located in
13 the 48-CS zone. Dredged Material Disposal and bridge support structures are
14 allowed uses in the 48-CS zone, subject to CBEMP Policy 23. CBEMP Policy
15 23 provides:

16 "Local government shall strive to maintain riparian vegetation
17 within the shorelands of the estuary and, when appropriate, restore
18 or enhance it, as consistent with water-dependent uses. Local
19 government shall also encourage use of tax incentives to encourage
20 maintenance of riparian vegetation, pursuant to ORS 308.792 -
21 308.803."

22 The city council found Policy 23 was met with respect to the Dredge Line, but
23 that the application failed to address Policy 23 in connection with the bridge
24 support structures. The city council imposed a condition of approval requiring

1 restoration of areas in the 48-CS zone that are disturbed for temporary
2 construction activities “to the extent possible.” Record 40 (underscoring in
3 original).

4 In its sixth assignment of error, first and second sub-assignments of error,
5 we understand petitioner to argue that the city council’s findings are inadequate
6 to explain why the bridge support structures satisfy Policy 23, and that there is
7 not substantial evidence in the record to support a conclusion that the bridge
8 support structures satisfy the policy. Jordan Cove first responds that CBEMP
9 Policy 23 is not a mandatory approval criterion because it contains purely
10 aspirational language. We reject that argument, because it is not reflected in the
11 city’s decision, which treats CBEMP Policy 23 as an applicable approval
12 criterion that the application must satisfy.

13 Jordan Cove next points to the findings at Record 30 that explain how the
14 bridge support structures will not significantly negatively affect riparian values,
15 explaining that the bridge support structures “will be placed above the Highest
16 Measured Tide [HMT] and mechanically stabilized earth walls extending
17 landward from the abutments will eliminate the need for fill material to extend
18 below the HMT or wetlands.” The findings conclude that the design will protect
19 natural riparian resources in the area of the bridge support structures. Absent any
20 argument or challenge from petitioner to those findings, we agree with Jordan
21 Cove that the findings are adequate to explain why CBEMP Policy 23 is met with

1 respect to the bridge support structures. The first and second sub-assignments of
2 error are denied.

3 The sixth assignment of error is denied.

4 **PETITIONER’S SEVENTH ASSIGNMENT OF ERROR/CITIZENS’**
5 **SECOND ASSIGNMENT OF ERROR**

6 As noted, the Dredge Line and the dredge offloading facility, as well as a
7 berm that will be created when dredged material is disposed on APCO Site 2, are
8 proposed to be located within the Airport Overlay Zone. The Airport Overlay
9 Zone criteria include limits on locating structures within airport imaginary
10 surfaces and on noise, lighting, industrial emissions, and landfill facilities.
11 Petitioner’s seventh assignment of error and Citizens’ second assignment of error
12 challenge the city’s decision that the provisions of the Airport Overlay Zone are
13 met.

14 **A. Airport Imaginary Surfaces**

15 NBCC 18.56.060 imposes height limitations on structures within an
16 imaginary airport surface:

17 “All uses permitted by the underlying zone shall comply with the
18 height limitations in this section. When height limitations of the
19 underlying zone are more restrictive than those of this overlay zone,
20 the underlying zone height limitations shall control.

21 “(1) Except as provided in subsections (2) and (3) of this section,
22 no structure or tree, plant or other object of natural growth
23 shall penetrate an airport imaginary surface.

1 “(2) For areas within airport imaginary surfaces but outside the
2 approach and transition surfaces, where the terrain is at higher
3 elevations than the airport runway surfaces such that existing
4 structures and permitted development penetrate or would
5 penetrate the airport imaginary surfaces, a local government
6 may authorize structures up to 35 feet in height.”

7 NBCC 18.56.030(4) defines “airport imaginary surfaces” to mean

8 “imaginary areas in space and on the ground that are established in
9 relation to the airport and its runways. Imaginary areas are defined
10 by the primary surface, runway protection zone, approach surface,
11 horizontal surface, conical surface and transitional surface.”

12 The city found that the Dredge Line, the dredge offloading facility, and the
13 eventual dredged disposal berm are located within the approach and transition
14 surfaces. Record 21.

15 The city found that NBCC 18.56.060 was met. In petitioner’s seventh
16 assignment of error, and in the first and second subassignments of error under
17 Citizens’ second assignment of error, petitioner and Citizens argue that the city’s
18 findings regarding NBCC 18.56.060 are internally inconsistent and are
19 inadequate to explain why NBCC 18.56.060(1) is met. We agree. As noted, the
20 city found that the Dredge Line, the dredge offloading facility, and the eventual
21 dredged disposal berm are located within the approach and transition surfaces.
22 Record 21. The city also found that the disposed dredge material berm is a
23 “structure” as defined in NBCC 18.56.030(24).⁹ Record 22.

⁹ NBCC 18.56.030(24) defines “structure” to mean:

1 However, the city also incorporated as findings Jordan Cove’s statement
2 at Record 372-73. Record 22. That statement takes the position that no structures,
3 uses, or activities are proposed in the approach and transition surfaces, and
4 therefore NBCC 18.56.060 does not apply. *Id.* The incorporated findings are
5 inconsistent with the city’s other findings at Record 21-22, and are inadequate to
6 explain why NBCC 18.56.060 is met.

7 These subassignments of error are sustained.¹⁰

8 **B. Noise**

9 NBCC 18.56.080 provides:

10 “Applications for land use or building permits for properties within
11 the boundaries of this overlay zone shall comply with the
12 requirements of this section as provided herein:

13 “(1) Noise. Within airport noise impact boundaries, land uses shall
14 be established consistent with the levels identified in OAR

“any constructed or erected object which requires location on the ground or is attached to something located on the ground. Structures include but are not limited to buildings, decks, fences, signs, towers, cranes, flagpoles, antennas, smokestacks, *earth formations* and overhead transmission lines. Structures do not include paved areas.” (Emphasis added).

Citizens also points to Jordan Cove’s site plan that shows the dredged material berm is 12 feet wide and “+44 NAVD88” and argues that the berm fails to meet the height limits in NBCC 18.56.060(1) or (2). Record 7168.

¹⁰ Given the inadequacy and inconsistencies in the findings, we do not address petitioner’s and Citizens’ arguments that the city’s decision that NBCC 18.56.060 is met is not supported by substantial evidence in the record.

1 660, Division 13, Exhibit 5.¹¹ A declaration of anticipated
2 noise levels shall be attached to any subdivision or partition
3 approval or other land use approval or building permit
4 affecting land within airport noise impact boundaries. In areas
5 where the noise level is anticipated to be at or above 55 Ldn,
6 prior to issuance of a building permit for construction of a
7 noise-sensitive land use (real property normally used for
8 sleeping or as a school, church, hospital, public library or
9 similar use), the permit applicant shall be required to
10 demonstrate that a noise abatement strategy will be
11 incorporated into the building design that will achieve an
12 indoor noise level equal to or less than 55 Ldn.”¹²

13 In its third subassignment of error, Citizens argues that the city’s decision that
14 the anticipated noise levels would be below 65Ldn and that no noise abatement
15 strategy was therefore required is not supported by substantial evidence in the
16 record, and that its findings are inadequate to explain the conclusion that NBCC
17 18.56.080(1) is met.¹³ Citizens argues that Jordan Cove’s statement in its

¹¹ OAR 660, Division 13, Exhibit 5 assigns maximum noise levels of 55-65 Ldn to certain uses.

¹² As we understand it, “Ldn” means “day night average sound level” and is a method of measuring sound.

¹³ In its application, Jordan Cove stated:

“None of the proposals that [Jordan Cove] makes in this Application are within the ‘airport noise impact boundary,’ which NBMC 18.56.030(5) defines as ‘areas located within 1,500 feet of an airport runway or within the most current, established noise contour boundaries exceeding 55 Ldn.’ While most of the uses and activities proposed in the Application lie within this boundary, none of the uses are subject to regulation for noise impacts under OAR 660,

1 application materials that the Dredge Line will not produce noise in excess of
2 65Ldn fails to satisfy the requirement in NBCC 18.56.080(1) that an application
3 for a land use decision provide “[a] declaration of anticipated noise levels.”
4 Citizens also argues that the evidence in the record fails to support a conclusion
5 that noise from either the Dredge Line or other proposed uses on the property will
6 not exceed 65Ldn. Jordan Cove responds that the city properly relied on Jordan
7 Cove’s application and supplemental statement to satisfy the requirement to
8 provide a “declaration” regarding anticipated noise levels, and that the record
9 includes substantial evidence that noise levels from other proposed uses on the
10 property are not anticipated to exceed 65Ldn.

Division 13, Exhibit 5. Therefore, this criterion does not apply to the Application.” Record 373.

The city found:

“No noise sensitive land use is proposed. The applicant provides that the temporary dredge transport line will not produce noise at or in excess of 55 to 65 Ldn. The subject property is implicated by airport noise contours representing 65 Ldn to 55 Ldn as shown on the NBMA Master Plan, Land Use Plan. See, Figure 7. The project proposal is most similar to the listed manufacturing and production land uses in Exhibit 5 of OAR 660, Division 13, which finds such uses acceptable without condition where sound levels are expected to be below 65 Ldn. **The criterion set forth in NBCC 18.56.080(1) is met.**” Record 23-24 (boldface in original).

1 The city’s decision does not include an interpretation of the word
2 “declaration,” and the term is not defined in the NBCC.¹⁴ Accordingly, without
3 such an interpretation, we cannot tell whether or why the city concluded that
4 Jordan Cove’s statement in the application regarding anticipated noise levels
5 satisfies the requirement to provide a “declaration[.]” However, at a minimum, it
6 seems to us that the requirement anticipates something more than a statement
7 from Jordan Cove’s attorney regarding anticipated noise levels, without any
8 documents or studies to support the statement. On remand, the city should explain
9 why Jordan Cove’s statement regarding anticipated noise levels is a “declaration”
10 as that term is used in NBCC 18.56.080(1).

11 In addition, while it is a close call, we agree with Citizens that there is not
12 substantial evidence in the record to support the city’s conclusion that anticipated
13 noise levels from the proposed uses will not exceed the levels set out in OAR
14 660, Division 13, Exhibit 5. Jordan Cove’s statement in its application takes the
15 position that noise from the Dredge Line will not exceed 65Ldn. But the
16 application does not address any other proposed uses on the property. Jordan
17 Cove’s statement in its supplemental material is that “none of the uses are subject
18 to regulation for noise impacts under OAR 660, Division 13, Exhibit 5.” Record
19 373. Those statements are insufficient to allow the city to conclude that the

¹⁴ NBCC 18.04.030 provides “If a term is not defined in this title, then it shall have the definition provided in the building code which is enforced within the city at the time that the definition becomes applicable.”

1 Dredge Line and uses other than the Dredge Line are not anticipated to exceed
2 65Ldn.

3 This subassignment of error is sustained.

4 **C. Outdoor Lighting**

5 NBCC 18.56.080(2) provides that for properties subject to the Airport
6 Overlay Zone:

7 “No new or expanded industrial, commercial or recreational use
8 shall project lighting directly onto an existing runway or taxiway or
9 into existing airport approach surfaces except where necessary for
10 safe and convenient air travel. Lighting for these uses shall
11 incorporate shielding in their designs to reflect light away from
12 airport approach surfaces. No use shall imitate airport lighting or
13 impede the ability of pilots to distinguish between airport lighting
14 and other lighting.”

15 The city concluded:

16 “Regarding outdoor lighting, the applicant provides that the
17 temporary dredge transport pipeline will not project lighting in
18 violation of NBCC 18.56.080(2) and will incorporate shielding to
19 reflect away any unanticipated light that could project into the
20 airport approach surface (see, Applicant’s July 1, 2019 open record
21 submittal). **The criterion set forth in NBCC 18.56.080(2) is met.**

22 “ * * * * *

23 “Regarding glare, the applicant provides that no glare-producing
24 material will be used on the temporary dredge transport pipeline and
25 that, generally, the exterior of structures including LNG tanks will
26 be painted with flat colors; dredge material disposal will appear as
27 vegetated ground surface. **The criterion set forth in NBCC**
28 **18.56.080(3) is met.**” Record 24 (boldface in original).

1 Citizens argues that the findings are inadequate and conclusory. However,
2 Citizens does not explain why the city’s explanation that the shielding
3 incorporated into the project and the use of non-glare producing materials is
4 inadequate to explain why NBCC 18.56.080(2) and (3) are met.

5 This subassignment of error is denied.

6 **D. Emissions**

7 NBCC 18.56.080(4) provides that in the Airport Overlay Zone:

8 “No new industrial, mining or similar use, or expansion of an
9 existing industrial, mining or similar use, shall, as part of its regular
10 operations, cause emissions of smoke, dust or steam that could
11 obscure visibility within airport approach surfaces, except upon
12 demonstration, supported by substantial evidence, that mitigation
13 measures imposed as approval conditions will reduce the potential
14 for safety risk or incompatibility with airport operations to an
15 insignificant level. The review authority shall impose such
16 conditions as necessary to ensure that the use does not obscure
17 visibility.”

18 The city relied on Jordan Cove’s dust management plan to conclude that NBCC
19 18.56.080(4) was met. Record 25. Citizens argues that the findings are inadequate
20 to explain why NBCC 18.56.080(4) is met, and that NBCC 18.56.080(4) required
21 the city to impose a condition of approval that requires compliance with the dust
22 management plan. Jordan Cove responds that the city’s findings are adequate to
23 explain why it concluded, based on Jordan Cove’s application materials, that
24 Jordan Cove’s regular operations will not emit smoke, dust or steam that will
25 obscure visibility within airport approach areas, and that construction activities
26 will be subject to a dust management plan.

1 NBCC 18.56.080(4) requires the city to find that “mitigation measures
2 imposed as approval conditions will reduce the potential for safety risk or
3 incompatibility with airport operations to an insignificant level.” The city’s
4 findings do not include any analysis of the emissions from the proposed uses or
5 construction activities, and do not determine that any emissions are significant or
6 that they “will [be] reduce[d] * * * to an insignificant level.” NBCC 18.56.080(4)
7 also appears to us to require any *mitigation measures* that reduce otherwise
8 significant emissions to an insignificant level to be “imposed as approval
9 conditions,” although the provision also allows the city to impose “such
10 conditions as necessary to ensure that the use does not obscure visibility.”
11 Accordingly, we agree with Citizens that the city’s findings are inadequate to
12 explain why NBCC 18.56.080(4) is met.

13 This subassignment of error is sustained.

14 **E. Landfills**

15 NBCC 18.56.080(5) provides that in the Airport Overlay Zone:

16 “No new sanitary landfills shall be permitted within 10,000 feet of
17 any airport runway. Expansions of existing landfill facilities within
18 these distances shall be permitted only upon demonstration that the
19 landfills are designed and will operate so as not to increase the
20 likelihood of bird/aircraft collisions. Timely notice of any proposed
21 expansion shall be provided to the airport sponsor, the Department
22 of Aviation and the FAA, and any approval shall be accompanied
23 by such conditions as are necessary to ensure that an increase in
24 bird/aircraft collisions is not likely to result.”

1 The city interpreted NBCC 18.56.080(5) to prohibit only new and expanded
2 “sanitary landfills,” and concluded that the proposed uses are not a new or
3 expansion of an existing “sanitary landfill.”

4 “Regarding landfills, the proposal does not involve a sanitary
5 landfill. The intent of this regulation is to ensure that there is not an
6 increase in the likelihood of bird/aircraft collisions. Southwest
7 Oregon Regional Airport and Oregon Department of Aviation have
8 been notified of the proposal. **The proposal is consistent with**
9 **NBCC 18.56.080(5).**” Record 25 (boldface in original).

10 Citizens argues that the city’s interpretation is inconsistent with OAR 660-
11 013-0080. OAR 660-013-0080(1)(g) prohibits “the establishment of new
12 landfills near airports, consistent with Department of Environmental Quality
13 (DEQ) rules.” Citizens argues that the city’s interpretation of NBCC
14 18.56.080(5) as only limiting new and expansion of “*sanitary* landfills” is
15 inconsistent with the meaning of the word “landfill” as defined in ORS
16 459.005(14).¹⁵ As we understand Citizens’ argument, it is that NBCC
17 18.56.080(5) does not apply only to “sanitary landfills,” the APCO sites are
18 “existing landfill facilities” within the meaning of NBCC 18.56.080(5), the
19 APCO sites are landfills of the type regulated by OAR 660-013-0000 et seq, and
20 therefore expansion of those existing facilities to accept dredged material is

¹⁵ ORS 459.005(14) defines “landfill” to mean “a facility for the disposal of solid waste involving the placement of solid waste on or beneath the land surface.”

1 allowed only if they are designed and operate to not increase the likelihood of
2 bird and aircraft collisions.

3 In the alternative, Citizens also argues that the dredged material disposal
4 site is a “sanitary landfill” because it is a site for disposal of “solid waste” as
5 defined in ORS 459.005(24).¹⁶ Citizens argues that the definition of “solid waste”
6 includes dredged material, or “sludge.”

7 Jordan Cove responds that the city’s finding that the proposal does not
8 involve a sanitary landfill is supported by the evidence in the record that the
9 placement of the dredge material will facilitate future development of the dredge
10 disposal site for open space, recreational and other development uses and because
11 the dredge material is useful material, the disposal site is not a landfill. Jordan
12 Cove’s Response to Citizens Brief 29. Absent, however, any more detailed
13 explanation from the city as to why the proposed dredged material disposal site
14 is not the “expansion[] of existing landfill facilities,” we agree with Citizens that
15 the city’s findings are inadequate to explain why the proposed landfill “[is]

¹⁶ ORS 459.005(24) in turn defines “solid waste” to mean:

“all useless or discarded putrescible and nonputrescible materials, including but not limited to garbage, rubbish, refuse, ashes, paper and cardboard, sewage sludge, septic tank and cesspool pumpings or other sludge, useless or discarded commercial, industrial, demolition and construction materials, discarded or abandoned vehicles or parts thereof, discarded home and industrial appliances, manure, vegetable or animal solid and semisolid materials, dead animals and infectious waste as defined in ORS 459.386.”

1 designed and will operate so as not to increase the likelihood of bird/aircraft
2 collisions.” This subassignment of error is sustained.

3 Petitioner’s seventh assignment of error is sustained. Citizens’ second
4 assignment of error is sustained, in part.

5 **CITIZENS’ FIRST ASSIGNMENT OF ERROR**

6 The bridge crossing, bridge support structures and portions of the Dredge
7 Line are located in areas of special flood hazard identified on the city’s overlay
8 map as “Zone AE.” No regulatory floodway has been designated. NBCC
9 18.48.140 provides that:

10 “In areas within Zones A1-30 and AE on the community’s FIRM
11 with a base flood elevation (BFE) but where no regulatory floodway
12 has been designated, new construction, substantial improvements,
13 or other development, including fill, shall be prohibited, unless it is
14 demonstrated that the cumulative effect of the proposed
15 development, when combined with all other existing and anticipated
16 development, will not increase the water surface elevation of the
17 BFE more than one foot at any point within the community.”

18 The city found:

19 “As evidenced on FIRM 41011C0186E revised March 17, 2014
20 (see, Figure 2), the proposed development is located within a Zone
21 AE with an established BFE where no regulatory floodway has been
22 designated; therefore, the applicant must demonstrate that the
23 cumulative effect of the proposed development, when combined
24 with all other existing and anticipated development, will not
25 increase the water surface elevation of the BFE more than one foot
26 at any point within the community. In ‘GeoEngineers Letter Report’
27 dated July 1, 2019, [GeoEngineers Letter] submitted by the
28 applicant, a professional engineer provides ‘* * * that the minimal
29 amounts of fill placed below the BFE will have no measurable effect

1 on flood elevations within the estuary * * *’ because “* * * the
2 estuary BFE is impacted by astronomical tide elevations and storm
3 surge due to wind stress and low atmospheric pressure at the inlet of
4 Coos Bay as well as inputs from major streams that drain into Coos
5 Bay * * *’; this analysis is based on the ‘Effective Flood Insurance
6 Study for Coos County, Oregon and Incorporated Areas’ effective
7 date December 7, 2018. **The proposal is consistent with NBCC**
8 **18.48.140.**” Record 19 (boldface in original).

9 In its first assignment of error, Citizens argues that the city’s finding is not based
10 on substantial evidence in the record, because the GeoEngineers Letter that the
11 findings cite and rely on does not include any evidence regarding the cumulative
12 effects of the project. Citizens also argues that the GeoEngineers Letter does not
13 discuss or quantify the total amount of fill or the hydrological effects of removing
14 6.3 million cubic yards of dredged material from the estuary.

15 We agree with Citizens that the city’s finding is not supported by
16 substantial evidence. First, the GeoEngineers Letter includes only a general
17 description of the “minimal amounts of fill placed below the BFE” and the
18 amount of fill is not quantified at all. Second, the GeoEngineers Letter does not
19 address at all whether “the cumulative effect of the proposed development, when
20 combined with all other existing and anticipated development, will not increase
21 the water surface elevation of the BFE more than one foot at any point within the
22 community,” or discuss any other existing and anticipated development. Given
23 those deficiencies, a reasonable person would not rely on the GeoEngineers
24 Letter to conclude that NBCC 18.48.140 is met. *Del Rio Vineyards v. Jackson*
25 *County*, 73 Or LUBA 301, 318 (2016) (a conclusory statement from the county

1 engineer that adequate transportation facilities existed, based on a traffic impact
2 statement that did not assess the capacity of any transportation facilities and on
3 an unexplained conclusion that no trips would be added to the road was not
4 evidence that adequate transportation facilities were available to serve the
5 proposed use).

6 Citizens' first assignment of error is sustained.

7 **CITIZENS'S THIRD ASSIGNMENT OF ERROR**

8 Citizens' third assignment of error includes two subassignments of error.

9 **1. NBCC Chapter 15**

10 In its first subassignment of error under third assignment of error, Citizens
11 argues that NBCC 15.16.080 required Jordan Cove to obtain approval to alter the
12 APCO sites because alteration of those sites will negatively impact the view from
13 the McCullough Memorial Bridge, which is on the National Historic Registry.
14 Jordan Cove responds that the issue raised in this subassignment of error was not
15 raised prior to the close of the record, and therefore Citizens is precluded from
16 raising it for the first time at LUBA. We have reviewed the record pages cited in
17 Citizens' petition for review, and we agree with Jordan Cove that the issue raised
18 in the first subassignment of error was not raised with the specificity required by
19 ORS 197.763(1).¹⁷ It is therefore waived. ORS 197.835(3).

¹⁷ Citizens cites several record pages where Citizens alleges the issue was raised. At one of the cited record pages, Record 6812, a participant's testimony is summarized as stating that "the project will impact historical sites, including

1 This subassignment of error is denied.

2 **2. North Point Area Master Plan**

3 In its second subassignment of error, Citizens argues that the city was
4 required but failed to apply the North Point Area Master Plan (NPAMP),
5 Statewide Planning Goal 1 (Citizen Involvement) and Goal 2 (Land Use
6 Planning) to the decision. Citizens concedes that the NPAMP has not been
7 adopted into the NBCC or the city’s comprehensive plan, but argues that Goal 2
8 required the city to condition its approval on Jordan Cove’s compliance with the
9 NPAMP.

10 Jordan Cove responds, and we agree, that the NPAMP has not been
11 adopted into the NBCC and is a “vision document.” Jordan Cove’s Response to
12 Citizens’ Brief 35. Accordingly, the NPAMP is not an approval criterion and the
13 city was not required to apply it or to condition approval of the applications on
14 compliance with the NMAMP.

15 This subassignment of error is denied.

16 Citizens’ third assignment of error is denied.

the bridge, the viewsapes * * *.” That statement is not sufficient to raise the issue that is raised in the first subassignment of error, which is that the city was required and failed to apply NBCC Chapter 15 to the applications, with enough specificity to afford the decision maker the opportunity to respond to the issue. *Boldt v. Clackamas County*, 107 Or App 619, 622-23, 813 P2d 1078 (1991); ORS 197.763(1).

1 **CITIZENS’ FOURTH ASSIGNMENT OF ERROR**

2 In its fourth assignment of error, Citizens argues that the city committed a
3 procedural error by concluding that the application was complete and then
4 allowing Jordan Cove to submit several thousand pages of additional documents
5 and testimony during the approximately three week open record period after the
6 public hearing was closed. Jordan Cove’s application was submitted on April 9,
7 2019 and the city deemed it complete on May 9, 2019. A public hearing was held
8 on May 20, 2019 and at the conclusion, the planning commission left the record
9 open until June 10, 2019 for submission of additional evidence and testimony by
10 any party (First Open Record period), and for a subsequent 20 day period until
11 July 1, 2019 for rebuttal evidence and testimony (Rebuttal Period). On the final
12 day of the First Open Record period, Jordan Cove submitted more than 5,000
13 pages of additional evidence. Citizens argues that the city’s deeming of Jordan
14 Cove’s initial application as complete and its subsequent acceptance of
15 voluminous submissions during the First Open Record period was a procedural
16 error that violated Goal 1.

17 LUBA will reverse or remand a land use decision if “[t]he local
18 government committed a procedural error which prejudiced the substantial rights
19 of the petitioner.” ORS 197.835(9)(a)(B). In order to establish a procedural error,
20 a petitioner must identify the procedure allegedly violated. *Stoloff v. City of*
21 *Portland*, 51 Or LUBA 560, 563 (2006). In order to demonstrate prejudice to the
22 petitioner, “a petitioner must explain with some specificity what would have been

1 different or more complete” had the local government followed the correct
2 procedures. *Concerned Citizens of the Upper Rogue v. Jackson County*, 33 Or
3 LUBA 70, 83 (1997). Citizens has failed to establish that the city committed a
4 procedural error that prejudiced its substantial rights.

5 Goal 1 does not apply to a proceeding on a permit and an allegation of a
6 violation of Goal 1 accordingly provides no basis for reversal or remand of a
7 decision on a permit. Jordan Cove responds, and we agree, that Citizens has failed
8 to allege what applicable procedure the city violated by deeming the application
9 complete and subsequently accepting materials from Jordan Cove during the First
10 Open Record period. We also agree with Jordan Cove that Citizens has failed to
11 demonstrate that its substantial rights were prejudiced by the city’s acceptance of
12 those materials. Citizens has not explained why the three-week Rebuttal Period
13 between June 10 and July 1 was insufficient to respond to new evidence that may
14 have been submitted by Jordan Cove.

15 Citizens’ fourth assignment of error is denied.

16 **CITIZENS’ FIFTH ASSIGNMENT OF ERROR**

17 The LNG Terminal project requires other local, state and federal
18 approvals, including approvals from the Oregon Department of Environmental
19 Quality (DEQ). DEQ denied Jordan Cove’s permit application in May 2019
20 “without prejudice.” Record 6856. Condition 1 of the challenged decision
21 provides:

22 “Applicant shall obtain and maintain compliance with all other

1 necessary federal, state, and local permits required for the dredge
2 material disposal project proposal including associated storage and
3 pre-construction activities; and, the applicant shall provide copy of
4 all required permits to the City Planning Department prior to start of
5 any associated development activity.” Record 10.

6 In its fifth assignment of error, citing *Wal-Mart Stores, Inc. v. City of Bend*,
7 52 Or LUBA 261, 286 (2006), Citizens argues that the city was required and
8 failed to adopt findings that it is “feasible” for Jordan Cove to obtain a permit
9 from DEQ. In *Wal-Mart*, we held that where a local government finds that a local
10 approval standard will be met by imposing conditions of approval that the local
11 government itself will ultimately enforce, the record must demonstrate that it is
12 feasible for the proposed use to satisfy that condition. Otherwise, the record need
13 only demonstrate that the state agency permit is not precluded as a matter of
14 law.¹⁸ We do not understand Citizens to argue that the DEQ permit is precluded
15 as a matter of law.

16 Jordan Cove responds initially that Citizens failed to raise the issue that
17 the city was required to adopt feasibility findings prior to the close of the record.

¹⁸ In *Bouman v. Jackson County*, 23 Or LUBA 628 (1992), a conceptual plan approval criterion required that the proposed development have an adequate water supply. The county found the approval criterion could be met if required state agency permits were obtained, and the county imposed a condition of approval requiring that the state agency permit be secured. We held that such a condition of approval was an appropriate way to ensure compliance with the water supply criterion, unless it was shown that obtaining the required permits is “precluded * * * as a matter of law.” *Id.* at 646-47.

1 Although Citizens does not respond to Jordan Cove’s waiver argument, we
2 conclude that Citizens was not required to anticipate the content of the city’s
3 ultimate findings in the final decision and accordingly, the issue was not waived.
4 *Lucier v. City of Medford*, 26 Or LUBA 213, 216 (1993) (“In order to preserve
5 the right to challenge at LUBA the adequacy of the adopted findings to address a
6 relevant criterion or the evidentiary support for such findings, a petitioner must
7 challenge the proposal’s compliance with that criterion during the local
8 proceedings. Once that is done, the petitioner may challenge the adequacy of the
9 findings and the supporting evidence to demonstrate the proposal complies with
10 the criterion. The particular findings ultimately adopted or evidence ultimately
11 relied on by the decision maker need not be anticipated and specifically
12 challenged during the local proceedings.”)

13 Jordan Cove also responds, and we agree, that the city was not required to
14 find that it was feasible for Jordan Cove to secure the necessary DEQ permit,
15 because Condition 1 was not imposed to demonstrate compliance with any
16 applicable approval criteria in the NBCC or the CBEMP, and Citizens has not
17 identified any approval criterion that depends on a DEQ permit for a
18 demonstration of compliance.

19 Citizens’ fifth assignment of error is denied.

20 **DISPOSITION**

21 Petitioner and Citizens each generally seek “revers[al] or remand” of the
22 decision. Petitioner’s Petition for Review 7, 51: Citizens’ Petition for Review 2,

1 31-32. Jordan Cove argues that in the event we sustain any assignments of error,
2 remand is the appropriate remedy. Jordan Cove’s Response to Petitioner’s Brief
3 45-47; Jordan Cove’s Response to Citizens’ Brief 45.

4 We will reverse a land use decision when the decision “violates a provision
5 of applicable law and is prohibited as a matter of law.” OAR 661-010-0071(1)(c).
6 When compliance with an applicable approval criterion would require more than
7 insignificant changes to the application, if not a new application, reversal is the
8 appropriate remedy. *Richmond Neighbors for Responsible Growth v. City of*
9 *Portland*, 67 Or LUBA 115, 129 (2013). We will remand a decision when, as
10 relevant here: “(a) [t]he findings are insufficient to support the decision, except
11 as provided in ORS 197.835(11)(b); (b) [t]he decision is not supported by
12 substantial evidence in the whole record;” and “(d) [t]he decision improperly
13 construes the applicable law, but is not prohibited as a matter of law.” OAR 661-
14 010-0071(2)(a), (b) and (d). If identified errors can be remedied by modifying the
15 decision, remand is appropriate.

16 Almost all of the assignments of error that we sustain can be remedied on
17 remand by modifying the decision, through more adequate findings or the
18 introduction of new evidence or both. However, the bases for our sustaining two
19 of the assignments of error do not appear to us to be able to be remedied without
20 significant changes to the application, or a new application. Those two
21 assignments of error are petitioner’s first assignment of error, and petitioner’s
22 fifth assignment of error.

1 The city approved the portion of the Dredge Line in the 48-CA zone as a
2 “minor navigational improvement,” an allowed use in the zone subject to
3 compliance with the CBEMP. We sustained petitioner’s first assignment of error
4 and agreed with petitioner that the city’s interpretation of the term “minor
5 navigational improvement” is inconsistent with the express language of the
6 relevant provision, and that the Dredge Line is not a minor navigational
7 improvement. It does not appear to us that the portion of the Dredge Line in the
8 48-CA zone is currently allowed in that zone.

9 The city also approved the “temporary dredge offloading facility” as a
10 “dock” in the 51-CA zone. We sustained petitioner’s fifth assignment of error
11 that argued that the dredge offloading facility is not authorized as a dock in that
12 zone because it is not the type of limited boat dock that the management objective
13 allows. It does not appear to us that the dredge offloading facility proposed in the
14 51-CA zone is currently allowed in that zone.

15 Accordingly, without the ability to approve two key components of the
16 project (the portion of the Dredge Line in the 48-CA zone and the dredge
17 offloading facility in the 51-CA zone), the application will need to be
18 significantly modified, if not a new application filed. Reversal is the appropriate
19 remedy in that circumstance.

20 The city’s decision is reversed.