

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

3
4 COLUMBIA RIVERKEEPER, MIKE SEELY,
5 CANDY SEELY, and SEELY FAMILY FARM, INC.,
6 *Petitioners,*

7
8 vs.

9
10 COLUMBIA COUNTY,
11 *Respondent,*

12
13 and

14
15 PORT OF ST. HELENS and CITY OF CLATSKANIE,
16 *Intervenors-Respondents.*

17
18 LUBA No. 2014-017/018

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Columbia County.

24
25 Maura Fahey, Portland, filed a petition for review and argued on behalf
26 of petitioner Columbia Riverkeeper. With her on the brief was Courtney
27 Johnson and CRAG Law Center.

28
29 Carrie A. Richter, Portland, filed a petition for review and argued on
30 behalf of petitioners Seely et al. With her on the brief was Garvey Schubert
31 Barer.

32
33 No appearance by Columbia County.

34
35 Gary P. Shepherd, Portland, filed the response brief and argued on behalf
36 of intervenor-respondent, Port of St. Helens. With him on the brief was
37 Oregon Land Law.

38
39 John P. Salisbury, Clatskanie, represented intervenor-respondent City of

1 Clatskanie.

2

3 BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN, Board
4 Member, participated in the decision.

5

6 REMANDED 08/27/2014

7

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

NATURE OF THE DECISION

Petitioners appeal an ordinance that adopts a comprehensive plan amendment, zone change and a reasons exception to allow for expansion of a rural industrial park.

MOTIONS FOR REPLY BRIEFS

Petitioner Columbia Riverkeeper (Riverkeeper) and petitioners Mike Seely, *et al.* (Seely petitioners) move to file reply briefs to respond to new matters raised in the response brief. There is no opposition to the reply briefs, and they are allowed.

FACTS

Intervenor Port of St. Helens (the Port) owns the Port Westward Industrial Park (Port Westward), which is an existing 905-acre rural industrial exception area with 4,000 feet of deepwater frontage along the Columbia River. Port Westward is a former World War II-era military ammunition depot that was deeded to the Port in 1967. The site has its own on-site water-supply and sewage treatment system, and is served by existing fiber-optic, electrical and natural gas connections. In the 1970s, the county adopted an irrevocably committed exception to Statewide Planning Goal 3 (Agricultural Lands) for Port Westward, and planned and zoned it for rural industrial uses.

Port Westward currently includes a 1,250 foot long dock, two electrical generating plants, a 1.3 million-barrel tank farm, a biomass refinery facility, and internal roads and infrastructure. The site is served by a railroad spur, with road connections via county roads to nearby state and interstate highways.

The Port leases 43 acres within Port Westward to a biomass-refinery. Since 1973, the Port has leased the remaining 862 acres of the 905-acre Port

1 Westward site to Portland General Electric (PGE) on a 99-year lease. PGE
2 currently operates two power plants on 120 acres of its 862-acre leasehold, and
3 sub-leases much of the remainder of its leasehold to area farmers. Some of the
4 vacant Port Westward area includes wetlands.

5 In February 2013, the Port applied to the county for a comprehensive
6 plan amendment, zone change and Statewide Planning Goal 2 (Land Use
7 Planning) reasons exception for 957 acres adjacent to Port Westward on its
8 southern and western boundaries. The exception area is currently planned and
9 zoned for agricultural uses, and consists of high-value farm soils. As initially
10 proposed, the exception area included three tax lots bordering the Columbia
11 River. However, the county commissioners removed two of the riverfront lots
12 from the exception area due to concerns about impacts on riparian habitat. The
13 commissioners ultimately approved an exception area of 837 acres, and zoned
14 it Rural Industrial Planned Development (RIPD), as an expansion of Port
15 Westward, which is also zoned RIPD. The RIPD zone allows as *permitted* uses
16 only farm and forest use and forest product processing uses, but *conditionally*
17 allows industrial uses broadly described as “[p]roduction, processing,
18 assembling, packaging, or treatment of materials; research and development
19 laboratories; and storage and distribution of services and facilities,” subject to
20 standards and conditions.

21 The stated purpose of the 837-acre Port Westward expansion is to
22 accommodate “future maritime and large lot industrial users that will benefit
23 from the moorage and deep-water access, existing services, energy generation
24 facilities and rail/highway/water transportation facilities.” Record 47.
25 However, the Port did not propose any specific industrial uses for approval
26 through the reasons exception process.

1 The Seely petitioners farm property that is adjacent and directly south of
2 the exception area, growing heirloom peppermint and native spearmint, which
3 represents five percent of regional mint production. Petitioners and others
4 opposed the exception, citing water-quality impacts and potential impacts on
5 wildlife habitat and farm uses, from dust, noise, additional traffic and train
6 crossings delaying the movement of farm vehicles. Others from nearby cities
7 expressed concerns over potential adverse impacts on transportation facilities
8 caused by increased train traffic serving new industrial uses in the exception
9 area. A particular concern was coal trains and dust impacts from the storage,
10 loading or unloading of coal.

11 The county board of commissioners approved the 837-acre exception
12 area with conditions. Conditions include a requirement for site design review
13 for any new use in the exception area, a trip cap (i.e., a limit on the number of
14 trips) of 332 p.m. peak hour trips, submission of a rail plan for any new use that
15 includes rail transportation, and a prohibition on the storage, loading or
16 unloading of coal.

17 These appeals followed.

18 **INTRODUCTION**

19 Pursuant to ORS 197.732(2)(c), Statewide Planning Goal 2, Part II(c),
20 and OAR 661-004-0020(2)(a), a local government may take an exception to a
21 statewide planning goal to authorize uses of land not otherwise allowed under
22 the goal, if the local government identifies “reasons” that “justify why the state
23 policy embodied in the applicable goals should not apply[.]” Here, the
24 applicable goal is Goal 3 (Agricultural Land), which is generally to preserve
25 and maintain agricultural land for farm use.

1 OAR 660-004-0022(1) sets out a general standard for reasons exceptions
2 that are not addressed elsewhere in the rule. OAR 660-004-0022(3)
3 specifically addresses rural industrial development, and provides a non-
4 exclusive set of three reasons that can justify an exception to allow rural
5 industrial uses of resource land, including that (1) the use is significantly
6 dependent on a unique resource, including “river or ocean ports,” (2) the use
7 cannot be located within an urban growth boundary due to impacts that are
8 hazardous or incompatible with dense populations, and (3) the use would have
9 a significant comparative economic advantage due to its location near certain
10 activities or resources.¹

¹ OAR 660-004-0022(3) provides:

“Rural Industrial Development: For the siting of industrial development on resource land outside an urban growth boundary, appropriate reasons and facts may include, but are not limited to, the following:

- “(a) The use is significantly dependent upon a unique resource located on agricultural or forest land. Examples of such resources and resource sites include geothermal wells, mineral or aggregate deposits, water reservoirs, natural features, or river or ocean ports;
- “(b) The use cannot be located inside an urban growth boundary due to impacts that are hazardous or incompatible in densely populated areas; or
- “(c) The use would have a significant comparative advantage due to its location (e.g., near existing industrial activity, an energy facility, or products available from other rural activities), which would benefit the county economy and cause only minimal loss of productive resource lands. Reasons for such a decision should include a discussion of

1 In the present case, the county concluded that the exception was justified
2 under all three reasons set out in OAR 660-004-0022(3). Specifically, the
3 county concluded that the industrial uses allowed in the RIPD zone (1) will be
4 maritime related uses that will be significantly dependent on the river port and
5 docks to import or export materials or goods; (2) cannot be located within an
6 urban growth boundary due to impacts that are hazardous or incompatible with
7 dense populations, or (3) would have a significant comparative advantage due
8 to the location of the site, and its proximity to the deepwater access,
9 rail/highway connections, energy facilities and other amenities associated with
10 the existing the Port Westward site.

11 Once the local government has identified a sufficient “[r]easons” under
12 OAR 660-004-0020(2)(a), and in this case OAR 660-004-0022(3), to authorize
13 a use not allowed by the applicable goal, the next step is to demonstrate that
14 “[a]reas that do not require a new exception cannot reasonably accommodate
15 the use.” OAR 660-004-0020(2)(b) (the reasonable accommodation standard).
16 This step requires evaluation of alternative sites within existing exception
17 areas, irrevocably committed resource lands, and urban growth boundaries.

18 Once the local government has demonstrated that the proposed use
19 cannot be reasonably accommodated on lands that do not require a new
20 exception, the local government must demonstrate that the “long-term
21 environmental, economic, social and energy [ESEE] consequences resulting
22 from the use at the proposed site * * * are not significantly more adverse than

the lost resource productivity and values in relation to the
county’s gain from the industrial use, and the specific
transportation and resource advantages that support the
decision.”

1 would typically result from the same proposal being located in [other] areas
2 requiring a goal exception[.]” OAR 660-004-0020(2)(c) (the ESEE standard).
3 This step requires an evaluation of the ESEE consequences of developing the
4 exception area, compared with the typical ESEE consequences of developing
5 other resources lands.

6 Additionally, the local government must determine that the “proposed
7 uses are compatible with other adjacent uses or will be so rendered through
8 measures designed to reduce adverse impacts.” OAR 660-004-0020(2)(d) (the
9 compatibility standard).

10 Finally, at the end of the process, the local government must adopt plan
11 and zone designations that effectively “limit the uses, density, public facilities
12 and services, and activities to only those that are justified in the exception.”
13 OAR 660-004-0018(4)(a).²

14 The Seely petitioners’ four assignments of error challenge the county’s
15 determinations under each of the foregoing four steps. Riverkeeper’s first and
16 second assignments of error challenge the county’s determinations under the
17 second and fourth steps, respectively.

18 **FIRST ASSIGNMENT OF ERROR (Seely)**

19 In four sub-assignments of error, petitioners challenge the county’s
20 conclusions that three separate “reasons” justify taking an exception to Goal 3.

² OAR 660-004-0018(4)(a) provides:

“When a local government takes an exception under the ‘Reasons’
section of ORS 197.732(1)(c) and OAR 660-004-0020 through
660-004-0022, plan and zone designations must limit the uses,
density, public facilities and services, and activities to only those
that are justified in the exception.”

1 A persistent theme throughout the Seely petitioners’ first assignment of error,
2 and a theme with relevance to other assignments of error, is that the Port’s
3 approach in seeking a reasons exception for a very broad range of unspecified
4 industrial uses, based on three separate reasons, is either impermissible or
5 highly problematic. As explained below, we disagree with petitioners that
6 anything in the applicable administrative rules or elsewhere *requires* the Port to
7 propose specific industrial uses, or precludes the Port from seeking approval
8 for a reasons exception for a wide range of unspecified industrial uses, based
9 on multiple reasons. However, as discussed below, we generally agree with
10 petitioners that that approach makes it highly problematic for the Port to
11 demonstrate compliance with all exception standards and applicable goal
12 requirements. It may be that the Port and the county have bit off more than
13 they can chew, or more than can practicably be accomplished outside of
14 periodic review, and that a more limited reasons exception, justifying a
15 narrower subset of industrial uses under fewer reasons, may be easier to
16 achieve.

17 **A. First Sub-Assignment of Error: Proposed Use**

18 As a threshold matter, petitioners first contend that the county erred in
19 failing to sufficiently identify the proposed “use,” which petitioners believe is
20 necessary to determine if the reasons exception is justified under the exception
21 standards. According to petitioners, both the general reasons exception
22 standards at OAR 660-004-0022(1) and the three specific reasons that can
23 justify rural industrial uses on resource land under OAR 660-004-0022(3)
24 require the local government to identify the “use” or the “proposed use” with
25 sufficient specificity, so that the exceptions criteria (reasonably accommodate,
26 ESEE and compatibility standards) can be meaningfully applied, and so that

1 uses allowed in the exception area are limited to those justified in the
2 exception.

3 However, petitioners argue that the Port never identified any specific
4 proposed uses for the exception area, and the county’s analysis accordingly
5 treats the proposed use as a wide range of industrial uses that are allowed in the
6 RIPD zone under the broad provisions of that zone, *i.e.*, the “[p]roduction,
7 processing, assembling, packaging, or treatment of materials; research and
8 development laboratories; and storage and distribution of services and
9 facilities[.]” One problem with that approach, we understand petitioners to
10 argue, is that not all of the open-ended and undefined industrial uses potentially
11 allowed in the RIPD zone can be justified under any of the three reasons the
12 county identified. Petitioners contend that not all of the many industrial uses
13 potentially allowed under the RIPD zone will necessarily be water-dependent
14 uses, or will necessarily have impacts that are hazardous or incompatible with
15 dense population, or will necessarily benefit from a significant comparative
16 advantage due to the location near certain resources, or justify the loss of high-
17 value farmland. Petitioners argue that, without knowing what particular
18 industrial uses are intended for the site, or without limiting the allowed types of
19 industrial uses only to those uses allowed in the RIPD zone that qualify under
20 at least one of the three OAR 660-004-0022(3) reasons, the county’s reasons
21 exception fails at the starting gate.

22 Further, petitioners argue that without a specifically identified set of
23 industrial uses allowed in the exception area, the county is in no position to
24 demonstrate that the remainder of the OAR 660-004-0020(2) standards are met:
25 the reasonable accommodation standard, the ESEE standard, and the
26 compatibility standard. According to petitioners, each of these standards

1 contemplate a reasonably specific “use” or “proposed use,” and cannot be
2 meaningfully evaluated without a specific proposed use.

3 The Port argues, and we generally agree, that nothing cited to us in OAR
4 chapter 660, division 004 or elsewhere *requires* the county to identify a
5 specific proposed use, or precludes the county from identifying a relatively
6 wide range of industrial uses as the proposed “use” for purposes of applying
7 the reasons exception criteria at OAR 660-004-0020 and 660-004-0022. Nor
8 do we see anything in the rule that necessarily precludes the county from
9 justifying the exception based on multiple “reasons.” While OAR 660-004-
10 0020 and 660-004-0022 are more easily applied to a specific or narrowly
11 defined proposed use under a single reason, rather than the more abstract
12 general planning exercise the county engaged in here, we cannot say as a
13 matter of law that the reasons exception process and standards are not
14 potentially available vehicles to approve plan and zoning amendments that
15 authorize a wide range of uses, justified by multiple reasons.

16 However, there is no question that the approach the county took in its
17 decision—to approve a wide and open-ended range of industrial uses allowed
18 in the RIPD zone, pursuant to three distinct, but partially over-lapping
19 “reasons”—vastly complicates what is already a difficult process when the
20 analysis moves to determining whether the proposal complies with the
21 reasonably accommodate, ESEE and compatibility standards, and at the end of
22 the process when the county must limit uses allowed to those justified in the
23 reasons exception.

24 It is important to note that a reasons exception is in some ways a more
25 limited vehicle than its cousins, physically developed and irrevocably
26 committed exceptions. If a physically developed or irrevocably committed

1 exception to the resource goals is adopted based on pre-existing industrial
2 development, for example, the county can plan and zone the property for
3 virtually any kind of rural industrial use.³ However, a reasons exception
4 authorizes only those uses that fit the particular reasons advanced, and pursuant
5 to OAR 660-004-0018(4)(a) the local government must limit uses in reasons
6 exception areas to those justified in the reasons exception.

7 Consequently, under a reasons exception, there must be a close, direct
8 relationship between the “reason” that is advanced for the exception, the
9 corresponding “proposed uses” that fit within that reason and are analyzed
10 under the exception criteria, and the uses that are ultimately authorized in the
11 exception area. The county must ensure that its decision authorizes *only* those
12 industrial uses that (1) are justified by at least one sufficient reason, and (2)
13 satisfy all of the exception standards. That task is made all the more difficult in
14 the present case, because the county advanced three separate reasons that apply
15 to partially overlapping but distinct sets of uses. The decision does not claim
16 that *all* of the authorized uses are supported by a single reason, and that does
17 not appear to be the case. The categories of port-dependent uses, uses with
18 hazardous or incompatible impacts, and uses that benefit from a significant
19 comparative advantage due to location near certain resources may overlap
20 considerably, but nonetheless they are distinct sets of uses. For example, some

³ OAR 660-004-0018(2) imposes limits on residential uses in physically developed or irrevocably committed exception areas, but imposes no similar limits on industrial uses in such areas. Indeed, OAR 660-004-0018(2)(d) provides that industrial uses in physically developed and irrevocably committed exceptions areas planned and zoned prior to January 1, 2004, may occur in “buildings of any size and type,” subject to certain statutory limits at ORS 197.713 and 197.714.

1 of the uses described in OAR 660-004-0022(3)(b)—those with hazardous or
2 incompatible impacts—could overlap with the uses described under the other
3 two reasons, but could also include uses that are neither port-dependent nor
4 benefit from a comparative advantage due to location near certain resources.
5 And, as petitioners argue, some rural industrial uses broadly allowed in the
6 RIPD zone might not fit within *any* of the three reasons set out in OAR 660-
7 004-0022(3), a question we consider below.

8 Stated differently, under the county’s approach it has saddled itself with
9 the burden of adopting essentially three separate reasons exceptions, each of
10 which will require at least some separate analysis of the set or subsets of uses
11 covered by each reason. Because the three reasons apply to partially
12 overlapping sets of uses in the present case, the three reasons are *additive*, not
13 fungible alternatives or backstops for each other. Justification of one subset of
14 uses under one reason is not sufficient to justify other uses that do not fall
15 under that reason.

16 Similarly, that one subset of uses under one reason may satisfy all of the
17 exception criteria (reasonably accommodate, ESEE analysis, and compatibility
18 standards) does not mean that all uses authorized by the exception necessarily
19 satisfy those criteria. As one example, discussed in more detail below, in
20 applying the reasonably accommodate standard the county cannot disqualify an
21 alternative site solely because the site cannot reasonably accommodate port-
22 dependent industrial uses, if the site can reasonably accommodate other uses
23 that fit within one of the other two reasons. The county can totally disqualify
24 an alternative site only if the site cannot reasonably accommodate any of the
25 three subsets of uses described under each reason.

1 With those observations, we turn next to what we understand to be
2 petitioners’ second argument under the first sub-assignment of error, namely
3 that the uses authorized by the challenged decision are so broad and ill-defined,
4 that the county has not effectively limited authorized uses to those that are
5 justified under the three reasons advanced, as required by OAR 660-004-
6 0018(4)(a). *See* n 2. Petitioners argue that the decision authorizes all industrial
7 uses allowed in the RIPD zone, with the exception of a coal export facility, and
8 that the county has not effectively limited all industrial uses to those justified
9 by the reasons exception, *i.e.*, those uses that are port-dependent uses, have
10 hazardous or incompatible impacts, or benefit from a significant comparative
11 advantage due to location near certain uses or resources.

12 The Port responds that the county’s decision adequately identifies and
13 the conditions effectively limit the “proposed uses” to those justified in the
14 decision. The Port contends that the decision adequately characterizes the
15 proposed uses as “future maritime and large lot industrial users that will benefit
16 from the moorage and deepwater access, existing services, energy generation
17 facilities and rail/highway/water transportation facilities.” Record 47. The
18 Port argues that, consistent with OAR 660-004-0018(4)(a), the county imposed
19 condition E.5, which provides that “[t]he types of industrial uses for the subject
20 property shall be limited to the uses, density, public facilities & services and
21 activities to only those that are justified in the exception.” Record 19.
22 According to the Port, the county’s decision analyzes and purports to justify
23 only those industrial uses that fit within one or more of the three reasons set out
24 in OAR 660-004-0022(3). Combined with Condition E.5, the Port argues that
25 the uses allowed in the exception area are sufficiently limited to those justified
26 in the decision.

1 Further, the Port argues that the RIPD zone itself, in combination with
2 the county’s comprehensive plan, limits the industrial uses that may be
3 approved in the future to those that have been justified in the exception. The
4 Port notes that under Columbia County Zoning Ordinance (CCZO) 683.1(A) all
5 industrial uses in the RIPD zone are conditional uses that must satisfy approval
6 criteria requiring that the “requested use conforms with the goals and policies
7 of the Comprehensive Plan—specifically those policies regarding rural
8 industrial development and exceptions to the rural resource land goals and
9 policies.” The Columbia County Comprehensive Plan (CCCP) includes
10 general industrial development policies that, among other things, require that
11 industrial uses in exception areas be “consistent with the exception
12 statements[.]” CCCP Part XII, Policy 12. We understand the Port to argue that
13 CCZO 683.1(A) will require that any proposed use conform to the exception
14 decision itself, which will be added to the CCCP as part of or in addition to the
15 Port Westward exception statement, and which will effectively limit any
16 industrial use to those types of industrial uses justified in the exception
17 statement.

18 Further, the Port argues that the CCCP includes policies specific to
19 Resource Industrial Development that, when applied to proposed industrial
20 uses pursuant to CCZO 683.1(A), will effectively restrict industrial uses
21 allowed in the exception area to one or more of the three reasons the county
22 used to justify the exception. The Resource Industrial Development Policies
23 restrict rural industrial development to two categories of uses: (1) those uses
24 described in Policies 3(A) through (F), or those uses described in Policy 3(G).⁴

⁴ The CCCP Rural Industrial Lands Policies state, in relevant part:

1 We understand the Port to argue that Policies 3(A) through (F) effectively limit
2 industrial uses to those that correspond to the “port-dependent” or “significant
3 competitive advantage” reasons described in OAR 660-004-0022(3)(a) and (b),

“It shall be a policy of the County to:

- “1. Designate as Rural Industrial in the Plan those lands which are currently being utilized or which are recognized as being needed to accommodate rural and natural resource industries.
- “2. Implement the Rural Industrial plan designation through the use of a single Resource Industrial Planned Development zone.
- “3. Restrict industrial development on land zoned Resource Industrial Planned Development to those uses that:
 - “A. Are not generally labor intensive;
 - “B. Are land extensive;
 - “C. Are located with adequate rail and/or vehicle and/or deep water port and/or airstrip access;
 - “D. Complement the character and development of the surrounding area;
 - “E. Are consistent with the rural facilities and existing and/or planned for the area; *and,*
 - “F. Will not require facility and/or service improvements at public expense; *or,*
 - “G. Are not appropriate for location within Urban Growth Boundaries due to their hazardous nature.” (Italics added.)

1 while Policy 3(G) effectively limits industrial uses to those to correspond to the
2 “hazardous impacts” described in OAR 660-004-0022(3)(c).

3 Finally, the Port argues that the reasons exception also describes the
4 proposed uses as “large lot” uses, industrial uses that require larger lots for
5 structures, staging areas or buffers. The findings recite that the Port has been
6 approached by several different companies seeking sites between 50 to 300
7 acres. Record 77. The Port argues that, consistent with Policy 3(B)’s
8 requirement for “land extensive” sites, the RIPD zone includes minimum lot
9 size standards under CCZO 684.1 that will allow the planning commission to
10 require that any industrial uses approved in the exception area will be located
11 on large lots.⁵

12 Although it is a close question, we agree with the Port that the county
13 has sufficient measures in place to ensure that any industrial uses approved in
14 the exception area will be limited to those justified by one or more of the three
15 reasons advanced. Given the broad and ill-defined range of industrial uses
16 allowed in the RIPD zone and the breadth of the three independent reasons
17 advanced, there is no question that the challenged decision potentially
18 authorizes a very wide range of industrial uses. Petitioner’s concern that the
19 decision may, inadvertently, authorize uses not justified under one or more of
20 the three reasons advanced is a reasonable concern. However, we agree with
21 the Port that Condition E.5, CCZO 683.1(A) and CCCP Part XII, Policy 12,

⁵ The RIPD zone has no minimum lot size for rural industrial uses. Instead, under CCZO 684.2, the planning commission determines the minimum lot size on a case by case basis, based on the size that is sufficient to support the requested rural industrial use considering, among other things, the overall scope and phasing of the project, space required for parking, loading and open space, and setbacks needed to adequately protect adjacent properties.

1 together act to effectively require future conditional use applicants to
2 demonstrate that a particular proposed industrial use was justified in the
3 exception decision. Further, via CCZO 683.1(A), future conditional use
4 applicants will be required to demonstrate that the proposed use conforms to
5 either CCCP Resource Development Policies 3(A) through (F) or with Policy
6 3(G), the language of which echoes the themes of OAR 660-004-0022(3)(a),
7 (b) and (c). Petitioners do not attempt to describe or provide examples of any
8 industrial use that could be approved under the foregoing condition, code
9 standards, comprehensive plan policies and the text of the exception decision
10 itself, that is not justified in the exception decision. Accordingly, petitioners
11 arguments under the first sub-assignment of error do not provide a basis for
12 reversal or remand.

13 The first sub-assignment of error is denied.

14 **B. Second Sub-Assignment of Error: Significantly Dependent on**
15 **a Unique Resource**

16 As noted, OAR 660-004-0022(3)(a) authorizes a reason exception to site
17 rural industrial uses on resource land where the use is “significantly dependent
18 upon a unique resource,” including “river or ocean ports.” The county’s
19 findings conclude that many of the proposed uses will be significantly
20 dependent on a unique resource: deep-water access to the Columbia river.⁶

⁶ The findings state, in relevant part:

“The Columbia River is recognized as a Marine Highway Corridor—M-84, emphasizing the importance of the river corridor for serving local, regional and national transportation needs. * * * It is the County’s more valuable transportation resource, but this resource is currently underutilized.

“The river is a unique site-specific resource that is very important to the economy of Columbia County. Increasing use of the river route promotes transportation efficiency. Locating port dependent uses adjacent to the river further promotes that efficiency. By approving the application the County will recognize the importance of the river to the local and regional economy and promote the proper location of river dependent/port dependent industries. * * *

“Not only is the subject property adjacent to the Columbia River, but it is ideally located adjacent to a naturally deep section of the River and served by a 43 foot shipping channel. Port Westward is the only property owned by the Port of St. Helens that is able to receive deep sea ships at water depths of 45 to 75 feet. An additional positive attribute of the subject property is its proximity to the mouth of the Columbia which provides a direct trans-shipping link to the Pacific Ocean—a direct link to international trade.”

“* * * * *

“Applicant anticipates the property will be occupied by uses that are significantly dependent upon the Columbia River and port resources described above. Probable uses will be a combination of maritime and industrial users that will benefit from the existing services, the deepwater port, existing and future docks, the railroad, and energy facilities. Uses will focus on the river and rail for transportation of their inventory and products. The Port’s goal is to attract companies looking to export, import, process, or manufacture goods with the intent of using the combination of rail and maritime capabilities to receive and then deliver those goods via ships. For example, a natural resource export facility would utilize river barge and/or rail shipments to move material to Port Westward for loading onto ships. Such a facility would require hundreds of acres to locate. * * *

“The Port has been approached by several different companies representing several different industries ranging from renewables,

1 Petitioners challenge those findings, arguing first that some of the uses
2 allowed in the exception area will not be port-dependent uses, and that the
3 county failed to impose a condition limiting proposed uses to port-dependent
4 uses. However, as explained above, the county advanced three reasons to
5 justify the exception area, and the fact that not all uses allowed in the exception
6 area will be port-dependent uses for purposes of OAR 660-004-0022(3)(a) is
7 not erroneous, as long as all uses allowed fall within one or more of the three
8 reasons.

9 Petitioners next argue that the existing Port Westward dock facilities are
10 underutilized, suggesting that there is no need for additional lands or docking
11 facilities for port-dependent uses. However, as the Port argues, that argument
12 is more appropriately framed under the reasonably accommodate standard of
13 OAR 660-004-0020(2)(b). For purposes of identifying a reason under OAR
14 660-004-0022(3)(a), the county is not required to demonstrate that existing
15 port-related facilities are underutilized.

16 Finally, petitioners note that two of the three riverfront lots originally
17 proposed for the exception area were withdrawn from the application.
18 Petitioners argue that the findings fail to explain how the single remaining
19 riverfront lot will be adequate to serve the uses that are “significantly
20 dependent” on river access, when a majority of the lands in the exception area
21 are not adjacent to the river. If petitioners are suggesting that only uses on land
22 immediately adjacent to the river can be “significantly dependent” on river

such as biodiesel, biomass, and solar; petroleum based products; grain; wood chips; cement; power plants; automobiles; and natural resources including coal and other bulk commodities. The businesses on average have been requesting between 50-300 acres to support their intended uses.” Record 76-77.

1 access, we disagree. Petitioners cite to no evidence in the record suggesting
2 that dock facilities on the riverfront lot would be inadequate to serve industrial
3 uses in the landward remainder of the exception area.

4 The second sub-assignment of error is denied.

5 **C. Third Sub-Assignment of Error: Impacts that are Hazardous**
6 **or Incompatible in Densely Populated Areas**

7 As a second independent reason, the county relied on OAR 660-004-
8 0022(3)(b), which authorizes an exception for rural industrial uses on resource
9 land where “[t]he use cannot be located inside an urban growth boundary due
10 to impacts that are hazardous or incompatible in densely populated areas[.]”

11 The county’s brief findings under OAR 660-004-0022(3)(b) focus on the
12 attributes of the subject site, and do not identify or discuss any use that has
13 “impacts that are hazards or incompatible in densely populated areas.”⁷ The

⁷ The county’s findings addressing OAR 660-004-0022(3)(b) state, in full:

“A positive attribute of the subject property is its location away from an urban center and dense rural residential populations. The relatively isolated character of the site is a characteristic sought and needed by many of the users seeking large scale industrial sites. As provided for in the Comprehensive plan:

““There is a need within the state for large isolated sites for heavy industry. These sites must be isolated and separate from concentrations of population. Whiles these sites themselves need to be isolated, they also need to be relatively close to major sources of support industries, services, and be served by multimodel transportation. There are not many areas in the state where these sites exist.’

“Fortunately for the County, Port Westward and the subject property represent one of those unique and coveted sites. The

1 closest the findings come is to quote comprehensive plan language describing a
2 statewide need for “large isolated sites for heavy industry[.]” The findings also
3 incorporate by reference findings under OAR 660-004-0022(3)(c), the
4 “significant comparative advantage due to location” reason. However, nothing
5 cited to us in those incorporated findings address uses with impacts that are
6 hazardous or incompatible with dense populations.

7 Petitioners argue that without knowing what kind of use is proposed, and
8 without describing the “impacts” of such use, it is impossible to adopt a
9 reasons exception under OAR 660-004-0022(3)(b) based on a conclusion that
10 the impacts of the use “are hazardous or incompatible in densely populated
11 areas.”

12 We agree with petitioners that the county’s above-quoted findings are
13 inadequate to justify any uses under OAR 660-004-0022(3)(b), which requires
14 a description of the proposed uses and their impacts sufficiently to determine
15 that such impacts are either “hazardous” or “incompatible in densely populated
16 areas.” The county findings make no such attempt, other than to vaguely refer
17 to “large lot” and “heavy industrial” uses. But different heavy industrial uses

subject property has the location and attributes that makes it an
excellent example of ‘where to expand.’

“Additionally, as demonstrated below in response to OAR 660-
004-0020(2)(b)(B)(iii), there are no locations inside an urban
growth boundary upon which a large scale industrial user could
develop a facility away from dense urban populations. Those
findings are incorporated by reference.

“Applicant hereby incorporates by reference the findings provided
in response to OAR 660-004-0022(3)(c) below. Those findings,
together with the findings above, demonstrate compliance with
OAR 660-004-0022(3)(b).” Record 78.

1 may have very different impacts, and only some may be hazardous or
2 incompatible with dense populations. And industrial uses that require or prefer
3 large lots may do so due to impacts and the need for buffers, but may also
4 simply require large lots due to the nature of the use, regardless of impacts.

5 We agree with petitioners that to the extent the county relies solely on
6 the “hazardous/incompatible impacts” language of OAR 660-004-0022(3)(b) to
7 justify some of the allowed industrial uses, the county must more specifically
8 identify the proposed uses that fit within that reason, identify impacts that are
9 hazardous or incompatible with dense populations, and condition or otherwise
10 limit allowed uses to those justified under that reason.

11 The third sub-assignment of error is sustained.

12 **D. Fourth Sub-Assignment of Error: Significant Comparative**
13 **Advantage**

14 OAR 660-004-0022(3)(c) sets out the most general of the three reasons
15 listed in the rule and authorizes an exception where:

16 “The use would have a significant comparative advantage due to
17 its location (e.g., near existing industrial activity, an energy
18 facility, or products available from other rural activities), which
19 would benefit the county economy and cause only minimal loss of
20 productive resource lands. Reasons for such a decision should
21 include a discussion of the lost resource productivity and values in
22 relation to the county’s gain from the industrial use, and the
23 specific transportation and resource advantages that support the
24 decision.”

25 The county adopted 13 pages of findings under OAR 660-004-0022(3)(c).
26 Record 78-91. The gist of those findings is that the location has significant
27 comparative advantage due to its proximity to deep-water access, and the Port
28 Westward site itself, with its existing dock facilities, utilities, power generating
29 facilities, railroad and road connections, etc. The combination of those

1 qualities, the county found, are very rare in the county and around the state. To
2 address the “benefit to the county economy” language, the county adopted
3 extensive findings discussing a severe shortage of industrial lands in the
4 region, particularly large, development ready sites. The findings then discuss
5 low employment and wages in the county, which lags behind state averages,
6 and conclude that expanding the supply of prime industrial land would benefit
7 the county’s economy. Finally, the findings discuss lost agricultural
8 productivity compared to the county’s gain from the industrial use, and
9 conclude that the loss is small compared to the county’s gain from the
10 industrial use.

11 Petitioners first argue, again, that whether proximity to river access,
12 transportation, utilities, etc., will convey a significant comparative advantage
13 cannot be known until a particular use is identified and evaluated. We
14 disagree. The focus of OAR 660-004-0022(3)(c) is on the location of the
15 property in proximity to certain resources, three examples of which are given:
16 existing industrial activity, an energy facility, or products available from other
17 rural activities, and the comparative advantages derived from that proximity.
18 The county identified the proximate resources that provide the location a
19 comparative advantage, including deep-water access, existing dock facilities,
20 access to railroad, highways and interstates, and the presence of utilities and
21 power generating facilities. Petitioners do not dispute that the location provides
22 those advantages. Two of the advantages benefit river or port-dependent uses;
23 the remainder would benefit many other kinds of rural industrial use. Given
24 the breadth of the locational advantages identified by the county, we disagree
25 with petitioners that the county must identify a specific industrial use in order
26 to invoke OAR 660-004-0022(3)(c).

1 Petitioners next argue that the significant comparative advantages
2 represented by the existing docks, energy facilities, railroad spurs, roads and
3 utilities etc., all stem from Port Westward, and that the competitive advantage
4 must come from the exception area itself, not an adjoining exception area.
5 However, as explained above, OAR 660-004-0022(3)(c) is focused on the
6 comparative advantages of the location due to its *proximity* to certain
7 resources, and we see nothing in the rule suggesting that such proximate
8 resources need be located in the exception area.

9 Next, petitioners challenge the county’s findings that locating rural
10 industrial uses in the exception area would benefit the county economy.
11 Petitioners argue that the county concluded, essentially, that there is a general
12 need or market demand for prime industrial land in the county. According to
13 petitioners, LUBA has held that for purposes of a different reasons exception
14 standard, at OAR 660-004-0022(1)(a), that mere market demand for a use not
15 allowed by a resource goal is an insufficient “reason.” *Morgan v. Douglas*
16 *County*, 42 Or LUBA 46, 53 (2002); *Middleton v. Josephine County*, 31 Or
17 LUBA 423, 430 (1996).

18 However, OAR 660-004-0022(1)(a) is inapplicable in the present case,
19 and provides as one general “reason” for an exception a “demonstrated need for
20 the proposed use or activity, based on one or more of the requirements of Goals
21 3 to 19.”⁸ The cited cases interpreted OAR 660-004-0022(1)(a) to the effect

⁸ OAR 660-004-0022(1) provides, in relevant part:

“For uses not specifically provided for in this division * * * the reasons shall justify why the state policy embodied in the applicable goals should not apply. Such reasons include but are not limited to the following:

1 that the local government must also show that the exception is necessary to
2 help the local government satisfy its obligations under other goals. In the
3 present case, petitioners argue for a similar understanding of OAR 660-004-
4 0022(3)(c), to the effect that the county cannot find that the proposed uses
5 would “benefit the county economy” based merely on market demand for prime
6 industrial land, but must also identify a goal obligation that the exception helps
7 satisfy.

8 The Port argues, and we agree, that the “benefit the county economy”
9 language of OAR 660-004-0022(3)(c) is not analogous to the “demonstrated
10 need” based on one or more goal requirements language of OAR 660-004-
11 0022(1)(a). To “benefit the county economy” is a more generous standard than
12 “demonstrated need” based on goal requirements. Petitioners have not shown
13 that, given the identified shortage of prime industrial land in the county, and
14 the significant comparative advantage due to location, the county erred in
15 concluding that allowing the proposed rural industrial uses would benefit the
16 county economy.

17 Finally, petitioners challenge the county’s findings that the proposed
18 uses would “cause only minimal loss of productive resources.” OAR 660-004-
19 0022(3)(c) also requires the county to consider the “lost resource productivity
20 and values in relation to the county’s gain from the industrial use.” The county
21 concluded that the eventual loss of 857 acres of agricultural land is small when
22 compared to the economic gains from rural industrial use of the exception area,
23 given the comparative economic advantages. The county noted that the

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

1 portions of the exception area currently used for a tree farm would continue
2 until industrial uses are approved, that the exception area is a small fraction of
3 the resource lands in the area, and that tax revenues and income from industrial
4 uses will far exceed revenues and income from continued farming of the
5 exception area. Based on these considerations, the county concluded that
6 economic gain from industrial use significantly outweighed the lost resource
7 productivity. Record 90-91.

8 Petitioners contend that the findings fail to demonstrate that there is only
9 “minimal loss” of productive resources. According to petitioners, adequate
10 findings on that point would address the farming activities currently occurring
11 in the exception area, and the actual revenue and employment generated by
12 those activities. Further, petitioners argue that the findings should also
13 consider adverse economic impacts on adjoining lands in agricultural use.

14 We disagree with petitioners that findings addressing the “minimal loss
15 of productive resources” language must address adverse impacts on *adjoining*
16 resource uses. The focus of OAR 660-004-0022(3)(c) is on weighing the
17 comparative cost/benefits of replacing resource use of the exception area with
18 rural industrial uses, and “loss of productive resources” refers to resources
19 within the exception area. Other exception standards, specifically the
20 compatibility standard at OAR 660-004-0020(2)(d), address adverse impacts
21 on adjoining uses.

22 We also disagree that findings addressing the “minimal loss of
23 productive resources” language must necessarily evaluate the revenues and
24 employment generated by the current resource uses within the exception area.
25 For one thing, such information may not be readily available from the current
26 farm operator. Further, the *current* uses, revenues and employment of the

1 exception area are ephemeral, easily manipulated considerations. If the owner
2 of the exception area is the applicant, as will typically be the case, the applicant
3 could simply cease resource use for a period of time and thus attempt to skew
4 the comparative economic costs/benefits. Here, the county compared current
5 and potential future tax revenue, and average farm income versus anticipated
6 industrial revenues based on Oregon State University Extension Service
7 figures, among other sources. Petitioners have not demonstrated that that
8 approach is insufficient for purposes of OAR 660-004-0022(3)(c).

9 The fourth sub-assignment of error is denied.

10 The first assignment of error (Seely) is sustained in part.

11 **SECOND ASSIGNMENT OF ERROR (Seely)**

12 **FIRST ASSIGNMENT OF ERROR (Riverkeeper)**

13 OAR 660-004-0020(2)(b) is the reasonable accommodation standard and
14 one prong of that standard requires a finding that “areas that do not require a
15 new exception cannot reasonably accommodate the use,” and sets out four
16 questions to answer.⁹ Both sets of petitioners challenge the county’s findings

⁹ OAR 660-004-0020(2)(b)(B) provides, as relevant:

“To show why the particular site is justified, it is necessary to discuss why other areas that do not require a new exception cannot reasonably accommodate the proposed use. Economic factors may be considered along with other relevant factors in determining that the use cannot reasonably be accommodated in other areas. Under this test the following questions shall be addressed:

- “(i) Can the proposed use be reasonably accommodated on nonresource land that would not require an exception, including increasing the density of uses on nonresource land? If not, why not?”

1 under OAR 660-004-0020(2)(b). Riverkeeper challenges the county’s findings
2 that Port Westward cannot reasonably accommodate the proposed uses, while
3 the Seely petitioners challenge the county’s findings regarding other alternative
4 sites.

5 **A. Vacant Port Westward Lands**

6 As noted, much of the adjoining 905-acre Port Westward site is vacant
7 exception land that is already zoned RIPD. PGE has a 99-year lease for 862
8 acres of the Port Westward site, and has developed 147 acres of that leasehold
9 with two power plants. The Port leases 43 acres within Port Westward to a
10 biomass-refinery. Of the remainder, approximately 80 acres consist of
11 mitigation areas, 60 acres are within the floodplain, 30 acres are developed
12 with a security gate and other infrastructure, and 100 acres are subject to utility
13 easements and roads, leaving approximately 445 vacant acres within PGE’s
14 leasehold. PGE subleases 300 acres to the Seely petitioners for farming. PGE
15 has future plans to construct a third power plant in its leasehold.

“(ii) Can the proposed use be reasonably accommodated on resource land that is already irrevocably committed to nonresource uses not allowed by the applicable Goal, including resource land in existing unincorporated communities, or by increasing the density of uses on committed lands? If not, why not?”

“(iii) Can the proposed use be reasonably accommodated inside an urban growth boundary? If not, why not?”

“(iv) Can the proposed use be reasonably accommodated without the provision of a proposed public facility or service? If not, why not?”

1 The county concluded that, notwithstanding that much of Port Westward
2 is seemingly vacant and available for development, in actuality there is only
3 “minimum” property within Port Westward that is available for development.
4 To reach that conclusion, the county removed from the calculus (1) all lands
5 within PGE’s leasehold, and (2) all lands designated as wetlands on county
6 records, which apparently consists of almost all of the undeveloped land within
7 Port Westward.¹⁰ The county concluded that the few remaining acres under
8 direct Port control are insufficient in size to attract large lot/traded sector
9 industries.

10 Riverkeeper challenges those findings, arguing that all of the cited
11 limitations were present at the time the county adopted an exception for Port
12 Westward in the 1970s and that there have been very few changes since then.
13 According to Riverkeeper, the comprehensive plan exception statement for Port
14 Westward states that PGE uses approximately 120 acres for its power plants,

¹⁰ The county’s findings state:

“While areas of [Port Westward] appear vacant and ‘available’ for additional development, they are not in fact so. Nearly the entirety of the area inside the existing [Port Westward] and not currently developed is identified by the County as wetlands. * * * Additionally, PGE, the leaseholder, controls which uses, if any it may allow on the leased property pursuant to the terms of its 99 year lease. Besides the two existing generating plant and tanks already on the site, PGE—through an Integrated Resource Plan (IRP) issued in 2010—is proposing to construct an additional 200 MW [megawatt power plant] at the site. Given the buffer required by PGE to protect its facilities, the fact that some property is located within the flood zone, extensive wetlands, existing easements and rail tracks throughout the site, there is minimum property remaining within the current already zoned RIPD area.” Record 92-93.

1 and that the “remainder of the land [is] available for sublease to large-scale rail,
2 barge, and/or ship users.” CCCP at 120. Riverkeeper also notes that in 1999,
3 the Port and PGE signed a joint marketing agreement intended to “intensify the
4 use of the Property thus furthering economic development activity in the area.”
5 Record 2063. Riverkeeper cites to evidence that PGE has “actively
6 participated” in marketing efforts to sublease land from its leasehold. Record
7 2056. Riverkeeper contends that the county erred in concluding that vacant
8 lands within the PGE leasehold cannot “reasonably accommodate” proposed
9 industrial uses, simply because of the PGE lease.

10 With respect to wetlands, Riverkeeper argues that any wetlands were
11 presumably present at the time the exception for Port Westward was adopted,
12 and that the findings do not explain what has changed, or why areas identified
13 as having wetlands cannot be developed with appropriate permits and
14 mitigation.

15 The Port provides no response to Riverkeeper’s argument that the county
16 erred in concluding for purposes of the reasonably accommodate standard that
17 the 445 vacant acres within PGE’s leasehold are unavailable for industrial
18 development, due to the leasehold. We agree with Riverkeeper that absent
19 evidence that PGE is categorically unwilling to sublease part or all of its
20 leasehold to other industrial users, or that the leased lands cannot otherwise be
21 reasonably made available for development through acquisition or termination
22 of the leasehold interest, the fact that 445 vacant acres is subject to PGE’s
23 leasehold does not mean that such lands are unavailable or cannot reasonably
24 accommodate proposed rural industrial uses. In conducting the alternative sites
25 analysis required by OAR 660-004-0020(2)(b), the county cannot limit its
26 analysis to lands controlled by the applicant, or conclude that an alternative site

1 controlled by others is not available for industrial development simply due to
2 different ownership or control.

3 With respect to wetlands, the Port cites to a finding from the county's
4 ESEE analysis under OAR 660-004-0020(2)(c) that development of the
5 wetland areas within Port Westward would adversely impact the environmental
6 value of those wetlands, while development of the proposed exception area
7 would impact few wetlands. Record 109. Based on that finding and others, the
8 county concluded that the ESEE consequences of developing the proposed
9 exception area would not be significantly more adverse than developing other
10 resource lands that also require an exception. We understand the Port to argue
11 that, for similar reasons, the county may disqualify the vacant Port Westward
12 acreage that is designated as wetlands, for purposes of the OAR 660-004-
13 0020(2)(b) reasonably accommodate standard.

14 We disagree with the Port. The reasonably accommodate standard at
15 OAR 660-004-0020(2)(b) asks a very different question from the question
16 posed by the ESEE analysis required by OAR 660-004-0020(2)(c). The latter
17 assumes that an exception is justified for the proposed use, and asks essentially
18 whether some other resource land that would also require an exception is better
19 suited for the proposed use, considering the ESEE consequences of developing
20 the two resource areas. The reasonably accommodate standard is more difficult
21 to satisfy than the ESEE standard. The relevant question under OAR 660-004-
22 0020(2)(b) is not which site is better suited, but whether an alternative site that
23 does not require a new exception can "reasonably accommodate" the proposed
24 use. If so, an exception is not warranted for the preferred site, even if the
25 preferred site is better suited for the proposed use than the alternative site.

1 As we understand it, all of the existing industrial development and
2 infrastructure in Port Westward is located on approximately 300 acres of fill
3 previously placed in the wetlands on the site. Generally, the mere presence of
4 wetlands on a site does not make the site unbuildable; it usually means only
5 that the applicant must obtain a fill permit from the Department of State Lands,
6 and provide any mitigation, on-site or off-site, that is required. The Port cites
7 to no evidence in the record that wetlands areas within Port Westward are
8 unbuildable or any reason to believe that appropriate permits and mitigation are
9 not available options. Under OAR 660-004-0020(2)(b)(B), “[e]conomic
10 factors may be considered along with other relevant factors in determining that
11 the use cannot reasonably be accommodated in other areas.” It may be that the
12 cost of filling and providing mitigation for wetland areas would be so
13 prohibitive that the cost alone or in combination with other factors could allow
14 the county to conclude that vacant lands within Port Westward site cannot
15 reasonably accommodate any industrial use. However, the findings do not
16 discuss the cost of wetland fill and mitigation, and any finding that vacant
17 lands within Port Westward are unbuildable for industrial uses due to wetlands
18 would seem to be belied by the evidence that PGE is planning to construct a
19 third power plant on the property, which presumably will require some fill and
20 mitigation. We conclude that the county has not demonstrated that the
21 approximately 445 acres of vacant lands within the Port Westward site can be
22 rejected under the reasonable accommodate standard, based on the mere
23 presence of wetlands.

24 The first assignment of error (Riverkeeper) is sustained.

1 **B. Other Alternative Sites**

2 The Seely petitioners challenge the county’s findings that other
3 industrially zoned properties in the region cannot “reasonably accommodate”
4 the proposed industrial uses.¹¹

5 The county considered a number of alternative sites, some owned by the
6 Port or other ports, and some industrially zoned lands owned by cities or other
7 entities along the river. The county disqualified each alternative site for a
8 variety of reasons. The county concluded that almost all alternative sites could
9 not “reasonably accommodate” the proposed uses because they lack deep water
10 access or in some cases any port facilities at all. The county rejected other sites
11 because the vacant available acreage was too small to accommodate in one
12 location all of the multiple large lot industrial uses that the 837-acre proposed
13 exception area could accommodate. The county rejected other sites because
14 they lacked rail access or would require additional expense to extend rail.
15 Other sites were rejected because vacant lands included wetlands, or were
16 environmentally contaminated and would require expensive environmental
17 remediation.

18 The county rejected a site near the City of Rainier, with 450 vacant acres
19 zoned for heavy industrial use, for several reasons, including that ownership of
20 the site is parcelized, increasing the cost to consolidate parcels to accommodate

¹¹ The Port argues initially that, while challenges to the alternative sites analysis were raised below, no argument was made that the county misconstrued OAR 660-004-0020(2)(b) in applying the alternative site analysis, and thus petitioners’ arguments under their second assignment of error are waived. ORS 197.763(1). Petitioners reply, and we agree, that the challenges raised below to the alternative sites analysis were sufficient to allow petitioners to argue that the county’s misconstrued OAR 660-004-0020(2)(b).

1 a large lot user. The same site was also rejected in part because it is planned
2 for “labor intensive uses.” In addition, the Rainier site was also rejected
3 because it is located in close proximity to the City of Rainier, and the county
4 deemed it inappropriate for the proposed rural industrial uses, which the county
5 seeks to locate away from populated areas, a finding that apparently invokes
6 the reason set out at OAR 660-004-0022(3)(b).

7 Petitioners argue, and we agree, that the county’s analysis of alternative
8 sites under OAR 660-004-0020(2)(b) is flawed in several particulars. The main
9 problem, as discussed above, is the sheer breadth of the industrial uses that the
10 county purports to take an exception for, combined with the fact that the county
11 advances three separate non-overlapping “reasons” to justify the exception.
12 That approach vastly complicates the alternative sites analysis. Stated simply,
13 under that approach a site cannot be rejected solely because it cannot
14 reasonably accommodate one sub-set of proposed industrial use, if it can
15 reasonably accommodate other sub-sets of proposed industrial uses. Further, a
16 site cannot be rejected solely because it cannot accommodate certain types of
17 industrial uses justified under one “reason,” if the site can reasonably
18 accommodate other types of industrial uses that are justified under a different
19 “reason.” In essence, if the county seeks to justify the exception based on three
20 separate “reasons” that cover a broad array of overlapping but distinct sets of
21 uses, it has placed itself into a position where it must conduct three separate
22 alternatives analyses, and can completely reject an alternative site only if the
23 site cannot reasonably accommodate the proposed uses under any of the
24 separate reasons.

25 For example, if the county had limited the proposed uses to port-
26 dependent uses that require deep-water access, then the county could easily

1 reject alternative sites that do not provide deep-water access. However, the
2 county also seeks to authorize a large array of other unspecified industrial uses
3 that are not port-dependent and that do not rely on deep-water access or any
4 port facilities at all. For such uses, the county cannot disqualify an alternative
5 site simply because it does not provide deep water access. Similarly, the
6 county rejected some sites due to lack of rail access. But the extremely broad
7 array of industrial uses that the county seeks to authorize presumably includes
8 uses that do not require or benefit from rail access.

9 In addition, the county has not established that alternative sites cannot
10 reasonably accommodate the proposed uses because no individual site is large
11 enough to accommodate in the same place all of the large-lot industrial uses
12 that the proposed 837-acre exception area could accommodate. As far as the
13 findings establish, there is no magic number about the size of the exception
14 area; it simply happens to match the size of the property that the Port has
15 acquired. Relatedly, the findings also do not establish that multiple large lot
16 industrial uses must be located together at a single site. We agree with
17 petitioners that if one or more alternative sites can reasonably accommodate
18 one or more of the proposed large lot industrial uses, then the county cannot
19 reject such sites solely on the basis that they cannot provide 837 acres for
20 multiple large lot industrial uses at a single location.

21 Some industrially zoned sites were rejected due to the presence of
22 wetlands. As discussed above with respect to the Port Westward site, the mere
23 presence of wetlands is not a sufficient basis to reject an alternative site, absent
24 findings and evidence that due to regulatory, cost or other relevant factors it is
25 unreasonable to expect that the site can be developed with any of the broad

1 array of industrial uses proposed here. The county identified no such evidence
2 and made no such findings.

3 One site was rejected in part to due to unspecified environmental
4 contamination. The cost of environmental remediation is certainly a relevant
5 factor in determining whether an alternative site can reasonably accommodate
6 the proposed use. However, the findings do not discuss the cost of
7 environmental remediation at all.

8 Finally, we agree with petitioners that some of the factors the county
9 considered to reject the 450 vacant acres at the Rainier site require more
10 explanation or supporting evidence. That the Rainier site is more parcelized,
11 which might increase the negotiation costs of acquiring a large site, represents
12 an economic cost that can be considered along with other factors, but the
13 findings brief reference to parcelization is insufficient to explain why
14 unspecified economic costs associated with assembling parcels, combined with
15 other factors, means that the Rainier site cannot reasonable accommodate the
16 proposed uses. Similarly, the findings do not explain why the fact that the
17 Rainier site is planned for “labor intensive uses” means that some of the
18 proposed industrial uses cannot be accommodated at the Rainier site. The
19 broad array of proposed industrial uses does not necessarily exclude labor
20 intensive uses. *See* n 4 (CCCP Policies restricting RIPD uses to those that are
21 “not *generally* labor intensive”) (emphasis added.) Finally, the county rejected
22 the Rainier site because it is too close to the City of Rainier and the county
23 seeks to locate industrial uses away from dense populations. That rationale
24 presumably is based on the OAR 660-004-0022(3)(b) “reason” to locate on
25 resource land rural industrial uses that are hazardous or incompatible with
26 dense populations. However, we held above that the county had failed to

1 establish a sufficient reason under OAR 660-004-0022(3)(b). In addition, even
2 if that reason were available, the broad array of industrial uses proposed for the
3 exception area presumably include many uses that are non-hazardous or not
4 incompatible with dense populations.

5 In sum, the reasonable accommodation standard at OAR 660-004-
6 0020(2)(b) is not an easy standard to satisfy even in more typical circumstances
7 that involve a single proposed use and a single “reason.” Under the approach
8 approved by the county, with an open-ended and extremely broad array of
9 proposed industrial uses, and three separate “reasons” with distinct, partially
10 overlapping sets of uses, rejecting *all* alternative sites under the reasonable
11 accommodation standard becomes highly problematic. Remand is warranted
12 for the county to re-evaluate its alternative sites analysis in light of the
13 foregoing.

14 The first assignment of error (Riverkeeper) is sustained.

15 The second assignment of error (Seely) is sustained.

16 **THIRD ASSIGNMENT OF ERROR (Seely)**

17 OAR 660-004-0020(2)(c) requires a finding that the long-term ESEE
18 consequences that would result from allowing the use at the proposed
19 exception site with measures designed to reduce adverse impacts are not
20 significantly more adverse than would typically result from the same proposal
21 being located in other areas requiring a goal exception.¹²

¹² OAR 660-004-0020(2)(c) also provides, in relevant part:

“* * * The exception shall describe: the characteristics of each
alternative area considered by the jurisdiction in which an
exception might be taken, the typical advantages and
disadvantages of using the area for a use not allowed by the Goal,

1 The county’s findings generally conclude that there would be few long-
2 term adverse ESEE consequences from locating industrial uses in the exception
3 area, and that such location would not have significantly more adverse ESEE
4 consequences than would typically result from the same proposal being located
5 on other resource lands. In discussing environmental consequences, the county
6 concluded that industrial use in the exception area would have no significant
7 adverse consequences for nearby resource uses:

8 “Additionally, no significant adverse consequences to nearby users
9 are anticipated. In analyzing those environmental consequences,
10 the County is benefited by a 25 plus year history of large scale
11 industrial development adjacent to resources uses at this property.
12 There is no evidence that those industrial uses have significantly
13 impacted or altered adjacent farming and tree farming operations.
14 The evidence is that tree farms and mint farms have operated
15 during that time adjacent to and within the [Port Westward]
16 facilities, including on buffer lands around the industrial facilities.
17 Their existence supports the ability to sustain resource uses near
18 rural industrial uses. * * *.” Record 109.

and the typical positive and negative consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts. A detailed evaluation of specific alternative sites is not required unless such sites are specifically described with facts to support the assertion that the sites have significantly fewer adverse impacts during the local exceptions proceeding. The exception shall include the reasons why the consequences of the use at the chosen site are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site. Such reasons shall include but are not limited to a description of: the facts used to determine which resource land is least productive, the ability to sustain resource uses near the proposed use, and the long-term economic impact on the general area caused by irreversible removal of the land from the resource base. * * *”

1 Petitioners argue that the foregoing findings are inadequate, because they
2 fail to discuss the agricultural uses on adjoining property, including petitioners’
3 mint and berry operations. According to petitioners, testimony was submitted
4 below that the adjoining lands are some of the most productive in the county, in
5 terms of contribution to employment and overall mint production. Petitioners
6 testified that some “dirty” industrial uses allowed in the exception area could
7 have significant adverse impacts on sensitive mint and berry operations. For
8 that reason, petitioners argue, the county’s reliance on the 25-year history of
9 compatibility between area farms and the existing energy facilities at the Port
10 Westward site does not assist the county, because the PGE facilities are not
11 hazardous or “dirty” industrial uses. Petitioners argue that, given the high
12 productivity and sensitivity of adjoining farm uses, the county failed to
13 adequately demonstrate that the ESEE consequences of industrial use in the
14 exception area would not be significantly more adverse than industrial use on
15 other resource lands, where soils may be less productive or neighboring
16 agricultural uses less sensitive and economically significant.

17 The Port responds by citing to the county’s findings regarding OAR 660-
18 004-0020(2)(d), the compatibility standard, to the effect that the county
19 considered petitioners’ testimony regarding adverse impacts on its mint and
20 berry operations, and concluded that, with conditions imposed, the proposed
21 industrial uses can be made compatible with petitioners’ adjacent farm uses.
22 Among the conditions imposed was a prohibition on coal export uses, which
23 was the primary “dirty” industry discussed below, due to dust impacts on
24 sensitive mint and berry operations. The Port contends that the findings
25 addressing the compatibility standard at OAR 660-004-0020(2)(d) are

1 sufficient to address petitioners’ concerns with the findings addressing the
2 ESEE standard at OAR 660-004-0020(2)(c).

3 OAR 660-004-0020(2)(c) and (d) address different policy
4 considerations, and findings addressing one standard are not necessarily also
5 sufficient to satisfy the other. However, the compatibility findings discuss
6 adjoining mint and berry operations at some length, and it is reasonably clear
7 that the county was well aware of the testimony regarding the nature, value and
8 sensitivity of adjoining farm uses. Record 112-114. The compatibility
9 findings also demonstrate that the county was aware of petitioners’ concerns
10 regarding “dirty” industrial uses, and the county adopted several conditions to
11 address those concerns.

12 Given the related compatibility findings, in our view the only potentially
13 significant flaw that petitioners identify in the ESEE findings is that the
14 findings focus on the subject property and environs, and do not directly
15 confront the question posed by OAR 660-004-0020(2)(c): whether adverse
16 ESEE consequences of developing the exception area would be significantly
17 greater than the typical ESEE consequences of developing *other* resource
18 lands. As petitioners suggest, the typical ESEE consequences of developing
19 other alternative resource lands *may* be less adverse than developing the
20 subject property, *if* such alternative resource lands happen not to be adjacent to
21 especially productive, high sensitivity agricultural lands. However, we
22 conclude that petitioners have not demonstrated that remand is warranted for
23 more adequate findings on this point. OAR 660-004-0020(2)(c) does not
24 require a detailed evaluation of specific alternative sites “unless such sites are
25 specifically described with facts to support the assertion that the sites have
26 significantly fewer adverse impacts during the local exceptions proceeding.”

1 Petitioners do not contend that any specific alternative resource sites were
2 identified below, or that any alternative sites exist that adjoin other resource
3 lands with less productive soils or less sensitive crops than the proposed
4 exception area. Absent identification of specific alternatives, the county’s
5 generic comparison of ESEE consequences is adequate to demonstrate
6 compliance with OAR 660-004-0020(2)(c).

7 The third assignment of error (Seely) is denied.

8 **FOURTH ASSIGNMENT OF ERROR (Seely)**
9 **SECOND ASSIGNMENT OF ERROR (Riverkeeper)**

10 ORS 197.732(2)(c)(D), Goal 2, Part II(c), and OAR 660-004-0020(2)(d)
11 require findings that “proposed uses are compatible with other adjacent uses or
12 will be so rendered through measures designed to reduce adverse impacts.”

13 The rule elaborates as follows:

14 “The exception shall describe how the proposed use will be
15 rendered compatible with adjacent land uses. The exception shall
16 demonstrate that the proposed use is situated in such a manner as
17 to be compatible with surrounding natural resources and resource
18 management or production practices. ‘Compatible’ is not intended
19 as an absolute term meaning no interference or adverse impacts of
20 any type with adjacent uses.”

21 In their fourth assignment of error, the Seely petitioners argue that the
22 county admitted that it is “impossible” to show how every potential industrial
23 use allowed in the exception area under the RIPD zone is or can be made
24 compatible with adjacent uses.¹³ Petitioners agree, and argue that that means

¹³ The county’s findings state, as relevant:

“* * * Any proposed uses in this new industrial zone will need to
be compatible with both adjoining uses, industrial and farming.
These criteria will be reviewed at site design review prior to

1 that the compatibility standard cannot be meaningfully evaluated unless a
2 reasonably specific industrial use is proposed.

3 The Port agrees that the findings do not attempt to describe how
4 proposed uses are compatible with adjacent uses, but argues that the findings
5 adequately describe how proposed uses will be rendered compatible through
6 measures designed to reduce adverse impacts, consistent with that prong of

releasing a building permit. There has been a substantial amount of testimony received from the farm community pertaining to whether this new industrial zone would allow uses that are incompatible with crops in nearby fields. Most testimony expressed a fear that the most despicable industrial uses may site next to them. The farm community does not have problems with the uses already in existence at Port Westward. As such, some lands that are zoned for industrial use at Port Westward are leased for agricultural purposes and can remain so. *It is impossible for the applicant to show how every possible industrial use could or would be considered compatible with adjoining farm uses, even with an exhaustive list of mitigating measures.* For this reason and to be in compliance with this criteri[on], staff believes that before a development permit is issued each new use should be reviewed for compatibility with adjacent farm uses. The applicant has proposed that the following conditions be imposed to ensure measures are in place to reduce adverse impacts:

“* * * * *

“9) Development applications shall include an agricultural impact assessment report that shall analyze adjacent agricultural uses and practices and demonstrate that impacts from the proposed uses are mitigated. The reports shall include a description of the type and nature of the agricultural uses and farming practices, if any, which presently occur on adjacent lands zoned for farm use, type of agricultural equipment customarily used on the property, and wind pattern information. The report shall include a mitigation plan.” Record 64-65 (italics added).

1 OAR 660-004-0020(2)(d). According to the Port, the county “imposed
2 conditions necessary to ensure that the compatibility criterion will be satisfied
3 and that compatibility will in fact be ensured before permitting future uses, as
4 permitted by applicable rules.” Response Brief 83.

5 We generally agree with petitioners that because the compatibility
6 standard focuses on “adverse impacts,” it cannot be meaningfully addressed
7 unless the “proposed use” is described sufficiently to identify and evaluate its
8 likely adverse impacts. The county could possibly apply the compatibility
9 standard to multiple categories of uses with similar adverse impacts, but the
10 county cannot possibly apply the compatibility standard to a large, open-ended
11 range of unspecified and unknown industrial uses, and it is telling that the
12 county in the present case did not even try.

13 Instead, as the Port argues, the county attempted to ensure, via a
14 condition and reliance on site design and conditional use standards applied to
15 future development proposals, that the compatibility determination will be
16 addressed at the time of development. Contrary to the Port’s argument, that
17 approach is not consistent with the language of OAR 660-004-0020(2)(d) that
18 allows a county to determine compliance with the rule based on findings that
19 the proposed use will be rendered compatible with adjacent uses through
20 “measures designed to reduce adverse impacts.” That language contemplates
21 that the county has identified the proposed use, has determined that the use has
22 adverse impacts incompatible with adjacent uses, but has identified and
23 imposed specific measures *in the exception decision* to reduce impacts and thus
24 render the proposed use compatible. Identifying a *process* that in the future
25 will identify the proposed use, identify the adverse impacts of that use, and

1 then identify and impose any specific measures needed to reduce impacts and
2 render the proposed use compatible, is something quite different.

3 The most accurate characterization of the county's approach is, as
4 petitioners and Riverkeeper argue, that the county completely deferred a
5 determination of compliance with OAR 660-004-0020(2)(d) to the time of
6 future development applications. Riverkeeper argues that the county erred in
7 so deferring that determination. In the alternative, Riverkeeper argues that the
8 conditions imposed to ensure compliance with the compatibility requirement
9 are inadequate.

10 The Port responds, initially, that Riverkeeper's argument that it is
11 impermissible to defer a determination of compliance with OAR 660-004-
12 0020(2)(d) is waived, because the argument was not raised below. ORS
13 197.763(1). Riverkeeper replies that it raised issues below regarding the
14 conditions intended to defer the compatibility determination to subsequent
15 permit proceedings. Record 716. While it is a reasonably close question, we
16 agree with Riverkeeper that the challenges raised below regarding compliance
17 with the compatibility standard and the challenges to the conditions imposed to
18 ensure that the standard is met are sufficient to allow Riverkeeper to argue on
19 appeal that the findings and conditions imposed regarding the compatibility
20 standard represent an impermissible deferral.

21 On the merits, the parties discuss several cases involving multi-stage
22 development or permit approvals generally holding that, where there is
23 insufficient information to find compliance with a development standard the
24 local government may defer that finding to a later stage of review, as long as
25 the later stage offers or is "infused" with the same participatory rights as the
26 initial proceeding. *See Gould v. Deschutes County*, 216 Or App 150, 162, 171

1 P3d 1017 (2007) (multi-stage planned unit development); *Butte Conservancy v.*
2 *City of Gresham*, 51 Or LUBA 194, 205 (2005) (tentative subdivision
3 approval); *Rhyne v. Multnomah County*, 23 OR LUBA 442, 447 (1992) (multi-
4 stage planned development). Among other disputes, the parties disagree
5 whether the subsequent development approvals for uses allowed or
6 conditionally allowed in the new exception area under the RIPD zoning will
7 offer the same participatory rights as the county’s goal exception proceeding.

8 Although we need not resolve this dispute, we tend to agree with
9 Riverkeeper that a simple permit proceeding under the RPID zoning would not
10 offer or be infused with the same level of notice and participatory rights that a
11 post-acknowledgment plan amendment taking a goal exception would provide.
12 In particular, such a permit proceeding would not guarantee a hearing and
13 would likely provide notice only to nearby property owners of a decision, with
14 a right of local appeal, and would not provide notice to the Department of Land
15 Conservation and Development (DLCD) and other non-local agencies and
16 entities that rely on obtaining notice of post-acknowledgment plan amendments
17 via DLCD.

18 However, there is a fundamental point here that the Port and the county
19 overlook. No party cites any cases, and we are aware of none, holding that a
20 local government may approve a *goal exception* subject to a complete deferral
21 of findings of compliance with a Goal 2 exception standard, where the only
22 determination regarding whether that Goal 2 exception standard is met is made
23 after the goal exception is approved at the time a subsequent development
24 application for a specific use that is allowed under the zoning that the
25 exception decision applies to the exception area. *Gould, Butte Conservancy,*

1 *Rhyne*, and other similar cases all involved multi-stage development approvals
2 or permit decisions, not goal exceptions.

3 Generally, whether a comprehensive plan amendment complies with an
4 applicable statewide planning goal or an administrative rule implementing the
5 goal must be determined before the plan amendment is adopted, and cannot be
6 deferred to a subsequent permit proceeding after the plan amendment is
7 adopted. *See Willamette Oaks v. City of Eugene*, 232 Or App 29, 36, 200 P3d
8 445 (2009) (compliance with Goal 12 and the Transportation Planning Rule
9 cannot be deferred to a permit proceeding); *Root v. Klamath County*, 63 Or
10 LUBA 230, 252 (2011) (same).

11 In *Friends of Yamhill County v. Yamhill County*, 47 Or LUBA 160, 169
12 (2004), we stated the “general principle” that Goal 14 compliance issues raised
13 by a post-acknowledgment plan amendment must be addressed and resolved at
14 the time the plan amendment is adopted. While we did not foreclose the
15 possibility, we questioned whether a goal compliance issue raised by the plan
16 and zoning amendment could be “deferred” to a subsequent development
17 approval under the zoning scheme adopted in the amendment decision.

18 There may be some circumstances where it is permissible to defer to a
19 later proceeding consideration of goal compliance issues that tangentially arise
20 in processing a post-acknowledgment plan amendment that does not require a
21 goal exception. But even if so, we believe that it is clearly impermissible to
22 defer to a subsequent permit proceeding a determination that a *Goal 2*
23 *exception standard* is met. ORS 197.732(2)(c), Goal 2, Part II(c), and OAR
24 660-004-0020(2) set out four core goal exception standards: the reasons,
25 reasonably accommodate, ESEE analysis and compatibility standards.
26 Compliance with these four Goal 2 exception standards is the *sine qua non* of a

1 reasons exception. We think it is highly unlikely the Land Conservation and
2 Development Commission (LCDC), the agency responsible for implementing
3 the statewide planning program, including the goal exception standards, would
4 agree that the Port and county’s deferral approach to the compatibility standard
5 could be extended to the required finding that “reasons justify why the state
6 policy embodied in the applicable goals should not apply” Similarly, we think
7 it is highly unlikely LCDC would agree that a local government could defer to
8 a subsequent proceeding the alternative sites analyses required under the
9 reasonably accommodate and ESEE standards. It is only somewhat less likely
10 that LCDC would agree that a local government could approve a reasons
11 exception, along with associated comprehensive plan text and map
12 amendments and zone changes, for a use or range of uses, without knowing
13 whether that use or those uses are compatible or can be made compatible with
14 adjacent uses. The time to discover whether the proposed use is compatible or
15 can be made compatible with adjacent uses, and therefore qualifies for a goal
16 exception under OAR 660-004-0020(2)(d), is before the local government
17 adopts the comprehensive plan text, map and zoning changes that authorize the
18 proposed use.

19 Accordingly, we conclude that findings of compliance with the Goal 2
20 compatibility standard cannot be deferred to a subsequent permit proceeding.
21 In our view, this conclusion underscores the main theme discussed above, that
22 the Port’s fundamental approach in this proceeding to request a reasons
23 exception to authorize a very broad and open-ended range of unspecified
24 industrial uses is highly problematic, even if it is not prohibited by LCDC’s
25 exception rule. Even more so than other exception standards, the compatibility

1 standard is written in a manner that makes it very difficult to apply to a broad
2 range of diverse industrial uses.

3 The fourth assignment of error (Seely) and the second assignment of
4 error (Riverkeeper) are sustained.

5 **THIRD ASSIGNMENT OF ERROR (Riverkeeper)**

6 In Riverkeeper’s third assignment of error, Riverkeeper argues that the
7 county failed to adequately consider whether the proposed zone change would
8 significantly affect transportation facilities within the meaning of OAR 660-
9 012-0060, part of the Transportation Planning Rule (TPR).

10 As relevant here, OAR 660-012-0060 requires local governments to
11 determine whether proposed plan amendments and zone changes will
12 “significantly affect” a transportation facility in one of the ways described in
13 the rule.¹⁴

¹⁴ OAR 660-012-0060 provides, in relevant part:

“If an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation (including a zoning map) would significantly affect an existing or planned transportation facility, then the local government must put in place measures as provided in section (2) of this rule * * *. A plan or land use regulation amendment significantly affects a transportation facility if it would:

“(a) Change the functional classification of an existing or planned transportation facility (exclusive of correction of map errors in an adopted plan);

“(b) Change standards implementing a functional classification system; or

“(c) Result in any of the effects listed in paragraphs (A) through (C) of this subsection based on projected conditions

1 Riverkeeper argues that the county failed to address whether the zone
2 change would “significantly affect” rail traffic by increasing the number of
3 trains on the railroad system that connects to Port Westward, as expanded.
4 Instead, Riverkeeper argues, the County impermissibly deferred considering
5 whether proposed uses will “significantly affect” the rail system to the
6 conditional use process when specific industrial uses are considered. In
7 response to concerns raised regarding increased rail traffic, the county imposed
8 Condition 4(h), which requires that any proposed use that includes transport to
9 or from the property by rail must submit a rail plan that identifies “the number
10 and frequency of trains to the subject property, the impact on the County’s
11 transportation system, and proposed mitigation.” Record 19. However,
12 Riverkeeper argues, a local government cannot defer a finding of compliance
13 with OAR 660-012-0060 to subsequent development approvals, but must
14 address the TPR when approving plan and zoning changes that allow
15 development. *See Willamette Oaks LLC v. City of Eugene*, 232 Or App 29, 33,

measured at the end of the planning period identified in the
adopted TSP. * * *

- “(A) Types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;
- “(B) Degrade the performance of an existing or planned transportation facility such that it would not meet the performance standards identified in the TSP or comprehensive plan; or
- “(C) Degrade the performance of an existing or planned transportation facility that is otherwise projected to not meet the performance standards identified in the TSP or comprehensive plan.”

1 220 P3d 445 (2009) (findings of compliance with TPR requirements for
2 comprehensive plan and land use regulation amendments cannot be deferred to
3 future permit approval stage).

4 The Port responds that OAR 660-012-0060 does not require the county
5 evaluate whether the proposed amendments will “significantly affect” the rail
6 system, because none of the six tests for “significantly affect” listed in OAR
7 660-012-0060(1)(a) through (c) apply to rail systems.

8 A railroad is a “transportation facility” as defined at OAR 660-012-
9 0005(3) and pursuant to OAR 660-012-0020 a local government transportation
10 system plan (TSP) must include a planning element for railroads. However,
11 nothing in OAR 660-012-0020 or elsewhere cited to our attention requires
12 local governments to adopt either functional classifications or performance
13 standards for railroads. OAR 660-012-0060(1)(a)-(c) defines “significantly
14 affect” in six different ways. Each of the six ways to “significantly affect” a
15 transportation facility under OAR 660-012-0060(a)-(c) relates to either a
16 change or inconsistency with a functional classification, or a degradation of a
17 performance standard.

18 In the present case, Riverkeeper does not identify any functional
19 classification or performance standard in the county’s TSP or elsewhere that
20 applies to railroads within the county. Therefore, Riverkeeper’s arguments
21 under OAR 660-012-0060 do not provide a basis for reversal or remand. *See*
22 *People for Responsible Prosperity v. City of Warrenton*, 52 Or LUBA 181
23 (2006) (arguments that an amendment “significantly affects” the Columbia
24 River as a “transportation facility” fail under OAR 660-012-0060(1) where the
25 petitioner identifies no functional classification or performance standard in the
26 TSP that is applicable to the river); *Gunderson LLC v. City of Portland*, 62 Or

1 LUBA 403, 414, *aff'd in part, rev'd in part on other grounds*, 243 Or App 612,
2 259 P3d 1007 (2011), *aff'd* 352 Or 648, 290 P3d 803 (2012) (city's Freight
3 Master Plan does not provide performance measures for the Willamette River
4 for purposes of OAR 660-012-0060(1)).

5 We do not understand this assignment of error to concern the possible
6 impacts of increased rail traffic on county or city roads at railroad crossings. If
7 that argument is intended, it is not sufficiently developed for review.

8 The third assignment of error (Riverkeeper) is denied.

9 **FOURTH ASSIGNMENT OF ERROR (Riverkeeper)**

10 Statewide Planning Goal 14 (Urbanization) generally prohibits
11 establishment of urban uses outside urban growth boundaries. The county's
12 findings regarding Goal 14 state simply that "Goal 14 is not applicable. The
13 proposed amendments do not authorize urban uses on rural lands or otherwise
14 convert rural land to urban uses." Record 68.

15 In supplemental findings, the county adopted what appear to be two
16 alternative findings. First, the county concluded that to the extent the
17 amendments authorize urban uses on rural land, OAR 660-004-0022(3)
18 provides an "exemption" to Goal 14. Second, the county concluded that the
19 same reasons and findings supporting the exception to Goal 3 also support an
20 exception to Goal 14.¹⁵ Riverkeeper challenges the county's primary
21 conclusion and its two alternative conclusions.

¹⁵ The county's supplemental findings state, in relevant part:

"* * * Because Part IX [of the CCCP] and Goal 14 prohibit urban development outside of acknowledged urban growth boundaries (UGBs), objectors argue that industrial development is therefore prohibited on the subject property, which is outside of a UGB,

1 **A. Goal 14 Potentially Applies to Industrial Use of Rural Land**

2 Riverkeeper argues that the decision authorizes a wide range of
3 industrial uses in the exception area, including many that could be “urban”
4 rather than “rural” in character, given the nature and intensity of those uses and

without an exception to Goal 14. The Port, on the other hand, argues that such an exception is not required because rural industrial development receives a special exemption from Goal 14 pursuant to OAR 660-004-0022(3), which provides specific criteria for a Goal 2 exception for Rural Industrial Development.

“The Board agrees with the Port and adopts and incorporates [its argument as the county’s own]. In the alternative, the Board also finds that even if a separate exception to Goal 14 were required, sufficient facts and analysis in the record support such an exception. Specifically, OAR 660-014-0040(2) provides that a county can justify an exception to Goal 14 to allow urban development of rural land if urban development is ‘necessary to support an economic activity that is dependent upon an adjacent or nearby natural resource.’ The [CCCP] recognizes the need for large, isolated sites for heavy industry that are supported by services, including multi-modal transportation. The application here is for the expansion of an industrial park adjacent to a deep water port on the Columbia River to promote the shipment of goods and thus meets the criterion.

“* * * * *

To the extent that the objectors argue that the Port did not address the above[-quoted OAR 660-014-0040(3)] criteria, the Board finds that the application addressed all of the above criteria in its exception statement and supporting testimony. In conclusion, the Board finds that the Exception to Goal 14 was not required, but if it were, the application meets the criteria under OAR 660-014-0040(3) for the same reasons that it meets the criteria under OAR 660-004-0020 and 660-004-0022(3) for a reasons exception to allow industrial use of resource land.” Record 41-42.

1 the range of facilities and services (natural gas lines, electrical lines, sewage,
2 water, fiber optic, rail and road connections, etc.) that would likely be extended
3 from the Port Westward site to support them. Riverkeeper cites to language in
4 *1000 Friends of Oregon v. LCDC (Umatilla Co.)*, 85 Or App 88, 92, 735 P2d
5 1295 (1987), for the proposition that “the very nature of industrialization
6 suggest that industrial uses are urban uses.”¹⁶

7 In *Shaffer v. Jackson County*, 17 Or LUBA 922, 931 (1989), we rejected
8 an argument that industrial uses are inherently urban in nature. Absent rule-
9 making on the part of LCDC, we concluded that whether a particular industrial
10 use of rural land is urban or rural requires a case-by-case determination, based

¹⁶ *1000 Friends of Oregon v. LCDC (Umatilla Co.)* involved LCDC approval of a county decision planning and zoning 1400 acres of land for heavy industrial use on rural lands, without an exception to Goal 14. The Court of Appeals remanded the decision to LCDC to determine if the authorized industrial uses are “urban” uses and thus require an exception to Goal 14:

“Both LCDC and LUBA have previously suggested that rural industrial or commercial use is a violation of Goal 14. *See 1000 Friends v. LCDC (Curry Co.)* [301 Or 447 at 507 n. 37, 724 P2d 268 (1986)]. The rule which LCDC adopted to explain the reasons exception states criteria which the county must address before it may approve an exception to the goals for rural industrial development. OAR 660-04-022(3). The rule applies to industrial use on rural resource lands; it does not specifically require the county to take an exception to Goal 14 to permit industrial use of rural non-resource land. However, the rule, previous LCDC policy and the very nature of industrialization suggest that industrial uses are urban uses. Because LCDC has not explicitly construed Goal 14 to the contrary, we cannot say whether such a construction would be sustainable. LCDC should explain whether heavy industry is an urban use. Because it has not done so, it has not explained why the facts lead it to the conclusion that industrial use of this land would not violate Goal 14.”

1 on factors identified in case law. *Id.* To our knowledge, LCDC has not
2 adopted any rule-making that clarifies how to answer the highly problematic
3 question of whether an industrial use is urban or rural in nature.

4 *Shaffer* involved a decision that rezoned resource land to the county’s
5 Rural Limited Industrial (RLI) zone to allow development of an asphalt batch
6 plant. The relevant factors discussed in *Shaffer* that point toward a rural rather
7 than an urban industrial use include whether the industrial use (1) employs a
8 small number of workers, (2) is significantly dependent on a site-specific
9 resource and there is a practical necessity to site the use near the resource, (3) is
10 a type of use typically located in rural areas, and (4) does not require public
11 facilities or services. *Id.* at 933-40. None of the *Shaffer* factors are conclusive
12 in isolation, but must be considered together. Under the analysis described in
13 *Shaffer*, if each of these factors is answered in the affirmative, then it is
14 relatively straightforward to conclude, without more, that the proposed
15 industrial use is rural in nature. However, if at least one factor is answered in
16 the negative, then further analysis or steps are necessary. In that circumstance,
17 the county will either have to (1) limit allowed uses to effectively prevent
18 urban use of rural land, (2) take an exception to Goal 14, or (3) adequately
19 explain why the proposed use, notwithstanding the presence of one or more
20 factors pointing toward an urban nature, should be viewed as a rural use.

21 In the present case, the county’s primary conclusion is that “proposed
22 amendments do not authorize urban uses on rural lands[.]” Record 68.
23 However, the county did not expressly consider any of the factors cited in
24 *Shaffer*, or indeed offer any explanation at all for its bare conclusion that the
25 amendments authorize no urban uses. Given the sheer breadth and the ill-

1 defined parameters of the uses authorized under the amendments, that is an
2 exceedingly inadequate and conclusory finding.

3 **B. OAR 660-004-0022(3) does not exempt industrial uses from**
4 **Goal 14.**

5 As noted, the county adopted two alternative conclusions. The first is
6 that a reasons exception under OAR 660-023-0022(3) “exempts” the county
7 from the requirement to take an exception to Goal 14 in order to approve urban
8 use of rural land. Riverkeeper argues, and we agree, that OAR 660-004-
9 0022(3) is expressly concerned with *rural* industrial development, and provides
10 a non-exclusive list of reasons that can be used to justify an exception to use
11 resource land for rural uses not allowed under the resource goals. Nothing in
12 OAR 660-004-0022(3) purports to exempt industrial uses from otherwise
13 applicable goals such as Goal 14. *See also* OAR 660-004-0018(1) (exceptions
14 to one goal does not relieve a jurisdiction from remaining goal requirements).

15 In *Shaffer*, we reached a similar conclusion. Jackson County’s RLI zone,
16 like the county’s RPID zone in the present case, is intended to implement OAR
17 660-004-0022(3) and allow industrial uses that are justified under reasons
18 exceptions to the *resource* goals, for example for the reason described at OAR
19 660-004-0022(3)(c) for uses that benefit from a “significant comparative
20 advantage” due to location near certain resources. 17 Or LUBA at 944-45. We
21 concluded that application of the RLI zone under a reasons exception to a
22 resource goal pursuant to OAR 660-004-0022(3) does not mean that the
23 proposed industrial uses justified under OAR 660-004-0022(3)(c) may not also
24 require an exception to Goal 14, if the proposed use is an urban industrial use
25 rather than a rural industrial use (although we commented that such a reason
26 could also provide a reason for a Goal 14 exception). *Id.* Accordingly, the

1 county's first alternative reason for concluding that Goal 14 need not be
2 addressed is simply erroneous.

3 **C. Exception to Goal 14**

4 The county's second alternative was to perfunctorily adopt an exception
5 to Goal 14, for the same reasons and under the same set of findings and criteria
6 used to take an exception to Goal 3. Riverkeeper argues, and we agree, that
7 this second alternative is deeply flawed. Initially, we note that it is problematic
8 for a local government to adopt a reasons exception to Goal 14 on *contingent*
9 or *alternative* basis, at least in circumstances, such as the present one, where
10 the exception is for a broad range of unspecified uses. OAR 660-004-0015(1)
11 requires that the findings and statement of reasons supporting an exception be
12 adopted as part of the local government's comprehensive plan. One important
13 purpose of that requirement is to ensure that the county, applicants and the
14 public know with reasonable certainty exactly which goal(s) or goal
15 requirements no longer apply to the subject property. If the county's
16 comprehensive plan exception statement for the exception area states both that
17 an exception to Goal 14 is not required because no urban uses are allowed, but
18 that an exception to Goal 14 was taken to allow urban uses, without more, it is
19 not at all clear which uses are arguably urban or what urban levels of intensity
20 are allowed in the exception area. That problem is exacerbated here by the
21 broad, open-ended range of uses that the county seeks to justify under the
22 reasons exception.

23 That problem aside, we agree with Riverkeeper that the county erred in
24 purporting to take an exception to Goal 14 based solely on the record and
25 findings directing at satisfying the general Goal 2 exception standards in OAR
26 660-004-0020 for a Goal 3 exception. As discussed in *Shaffer*, the same reason

1 that justifies an exception to Goal 3 under OAR 660-004-0022(3) may (or may
2 not) also constitute a sufficient reason to justify an exception to Goal 14.
3 However, the Goal 14 rule, at OAR 660-014-0040, has its own set of specific
4 standards for reasons exceptions to Goal 14. While the Goal 14 exception
5 standards are similar to the general Goal 2 exception standards, there are
6 important differences and it includes additional requirements not found in the
7 Goal 2 standards. To cite only one example, the OAR 660-014-0040(3)(a)
8 alternative sites standard has a different focus than the OAR 660-004-
9 0020(2)(b) alternative sites analysis, and requires additional consideration of
10 whether the proposed use can be accommodated through *expansion* of an urban
11 growth boundary or intensification of development in existing rural
12 communities. The two analyses are not fungible and cannot substitute for each
13 other. *VinCEP v. Yamhill County*, 215 Or App 414, 426, 171 P3d 368 (2007).
14 Indeed, pursuant to OAR 660-004-0000(1)(c), the specific standards at OAR
15 660-014-0040 control over the general standards at OAR 660-004-0020. The
16 county's findings do not address the standards for a Goal 14 exception, and the
17 county's findings directed at the general Goal 2 exception standards are not
18 adequate to remedy that deficiency.

19 For the foregoing reasons, the county's primary conclusion that none of
20 the proposed uses are urban uses is inadequate, and the county's two alternate
21 conclusions are either erroneous or not based on adequate findings and
22 substantial evidence. Remand is necessary for the county to address whether
23 any of the proposed uses allowed in the exception area under the *Shaffer*
24 factors or other applicable considerations constitute the urban use of rural land.
25 If so, the county must either limit allowed uses to rural uses or take an
26 exception to Goal 14, addressing the criteria at OAR 660-012-0040.

1 On remand, that task may continue to be complicated by the Port’s
2 approach in seeking to authorize the broad universe of industrial uses
3 potentially allowed under the RPID zone. The Port’s burden would be
4 considerably simplified if it chose to narrow that universe of potential
5 industrial uses to a more manageable size, and proposed a smaller sub-set of
6 uses, particularly if that subset of uses is justified by a single “reason” rather
7 than each of the three reasons set forth in OAR 660-004-0022(3). Our decision
8 in *Shaffer* indicates that such an approach would also simplify the Goal 14
9 analysis.

10 As noted above, in *Shaffer* the county attempted to base its conclusion
11 that the asphalt batch plant was a rural use in part on a finding under OAR 660-
12 004-0022(3)(c) that the proposed use would have a “significant comparative
13 advantage due to its location near” certain resources. We rejected that attempt,
14 concluding that the existence of a “significant comparative advantage” is not a
15 relevant “factor” used to determine whether the proposed use is rural rather
16 than urban, although it may provide a sufficient reason to take an exception to
17 Goal 14. 17 Or LUBA at 944.

18 Similarly, in *Shaffer* we held that whether a proposed industrial use will
19 create offsite impacts “incompatible with an urban area” is irrelevant to
20 whether the use is urban or rural, and hence whether an exception to Goal 14 is
21 required, although such impacts may provide a reason to support an exception
22 to Goal 14. *Id.* at 943-44 (citing *Hammack & Associates, Inc. v. Washington*
23 *County*, 16 Or LUBA 75, 100, n 7, *aff’d* 89 Or App 40, 747 P2d 373 (1987)).

24 These two holdings are important in the present case, because as
25 explained above the county relied on three separate reasons listed at OAR 660-
26 004-0022(3)(a) to (c), with overlapping but distinct sets of associated uses, to

1 support the reasons exception. The first reason at OAR 660-004-0022(3)(a)—
2 significantly dependent on a site-specific resource—is closely related to one of
3 the “factors” we held must be considered to determine whether an proposed
4 industrial use is urban or rural in nature. The second and third reasons, at OAR
5 660-004-0022(3)(b) and (c)—for uses that have hazardous or incompatible
6 impacts, or uses that benefit from a significant comparative advantage due to
7 location near certain resources—are considerations that we held are *not* factors
8 to be considered in determining whether a proposed use is urban or rural in
9 nature (although they might provide reasons for taking a Goal 14 exception).

10 Consequently, in the present case whether a particular use is an urban or
11 rural use under the *Shaffer* factors may depend in part on the *reason* under
12 which it was justified. Because the “significantly dependent” on a unique
13 resource language of OAR 660-004-0022(3)(a) closely parallels one of the
14 relevant factors the county can apply to determine whether proposed uses are
15 urban or rural, it may be somewhat easier for the county to conclude that none
16 of the proposed uses allowed in the exception area are urban uses, if the
17 proposed uses are narrowed to those that are justified solely under OAR 660-
18 004-0022(3)(a) rather than the broader universe of uses justified under OAR
19 660-004-0022(3)(b) and (c).

20 The fourth assignment of error (Riverkeeper) is sustained.

21 **FIFTH ASSIGNMENT OF ERROR (Riverkeeper)**

22 Statewide Planning Goal 11 (Public Facilities and Services) provides in
23 relevant part that “[u]rban and rural development shall be guided and supported
24 by types and levels of urban and rural public facilities and services appropriate
25 for, but limited to, the needs and requirements of the urban, urbanizable, and
26 rural areas to be served.” The Goal 11 rule, at OAR 660-011-0060(2)

1 prohibits, among other things, the establishment of a new sewer system serving
2 multiple lots on rural lands, or the extension of existing sewer lines on rural
3 lands to serve other properties, absent an exception to Goal 11.

4 Under the fifth assignment of error, Riverkeeper argues that because the
5 county approved urban uses on rural land, requiring a Goal 14 exception, the
6 county is also required to adopt an exception to Goal 11, because the “proposed
7 urban level uses will necessarily require extension of public facilities and
8 services at a level to support the use.” Riverkeeper Petition for Review 50.

9 Riverkeeper’s argument is premature. As discussed under the fourth
10 assignment of error, remand is necessary for the county to determine if the
11 proposed uses include urban uses of rural land, and either limit the exception to
12 exclude such uses or adopt an exception to Goal 14. Even if the county
13 ultimately determines that an exception to Goal 14 is required, it does not
14 *automatically* follow that the county must also adopt an exception to Goal 11.
15 Not all urban uses of rural land will necessarily require public facilities and
16 services, or require the establishment of sewer systems or the extension of
17 sewer lines under circumstances that require an exception to Goal 11.
18 However, if on remand the county chooses to take an exception to Goal 14 to
19 allow urban uses within the exception area, the county should then consider
20 what facilities and services will be necessary to support those uses, and
21 whether an exception to Goal 11 is necessary to provide those facilities and
22 services.¹⁷ In the meantime, Riverkeeper’s argument that the county erred in

¹⁷ We note that the county concluded that “when sewer systems are proposed in the future for the subject property, an exception to Goal 11 may be required at that time,” because the “RIPD zone is a rural zone, and any proposed sewer facilities will be subject to the requirements of Goal 11.”

1 failing to adopt a Goal 11 exception as part of the present decision is
2 premature, and does not provide a basis for reversal or remand.

3 The fifth assignment of error (Riverkeeper) is denied.

4 The county's decision is remanded.

Record 40. We understand the county to conclude that if *rural* industrial uses proposed for development in the exception area require the establishment or extension of a sewer system, the county will adopt an appropriate exception to Goal 11 at that time.