

April 8, 2024

Kathleen George, Chair
Oregon Environmental Quality Commission
700 NE Multnomah St., Suite 600
Portland, OR 97232

Dear Chair George,

The Northwest Environmental Defense Center, Columbia Riverkeeper, Breach Collective, the Linnton Neighborhood Association, and Willamette Riverkeeper respectfully submit this Petition for Declaratory Ruling. We request that the Oregon Environmental Quality Commission fulfill its statutory oversight role to direct the Department of Environmental Quality to properly apply its own rules for issuing Air Contaminant Discharge Permits and determine that the City of Portland’s 2022 conditional Land Use Compatibility Statement (“LUCS”) for Zenith Energy is inadequate.

Zenith’s continued and consistent expansion of its throughput of dangerous liquid fuels—despite a 2018 promise to City and state officials that its oil throughput would not increase—is an issue of immense public interest and consequence. Despite this promise in a legally binding reporting document, Zenith’s crude oil throughput increased 129% since 2019, and its overall liquid fuel transport increased 151% during the same time period.¹ Notably, Zenith’s 2023 state reporting shows that it increased its total crude oil throughput 10.4% over its 2022 throughput, the first reporting year since Zenith promised in its 2022 conditional LUCS application that it would no longer transload crude oil in 2027.² From 2022 to 2023, Zenith’s oil throughput actually increased by a volume of *nearly 400% more* than the increase in renewable fuel throughput.³ Zenith’s facility and related fuel transport activities pose substantial risks to the people of Oregon: dangers to humans and the environment inherent in transporting hazardous liquid fuels by rail, enhanced dangers from Zenith’s storage of hazardous liquid fuels on liquefiable soils, public health risks to workers and nearby residents from the continued expansion of fossil fuel storage and transloading operations, and nearly identical risks from renewable fuel transport and storage operations.

¹ Zenith Energy 2023 Title V Annual Report (reporting 382,340,233 gallons of total crude oil throughput and 418,897,411 gallons of total liquid fuel throughput), available at DEQ: [Link](#); Zenith Energy 2019 Title V Annual Report (reporting 167,215,847 gallons of total crude oil throughput), available at DEQ: [Link](#)

² Zenith Energy 2023 Title V Annual Report (reporting 382,340,233 gallons of total crude oil throughput), available at DEQ: [Link](#); Zenith Energy 2022 Title V Annual Report (reporting 346,411,926 gallons of total crude oil throughput), available at DEQ: [Link](#)

³ Zenith Energy 2023 Title V Annual Report (reporting 382,340,233 gallons of total crude oil throughput and 36,557,178 gallons of diesel throughput), available at DEQ: [Link](#); Zenith Energy 2022 Title V Annual Report (reporting 346,411,926 gallons of total crude oil throughput and 27,540,011), available at DEQ: [Link](#)

The 2022 LUCS issued by the City of Portland for Zenith’s Air Contaminant Discharge Permit application was the result of flagrant efforts to evade public involvement and transparency that became apparent after advocates and journalists spent substantial time and effort obtaining public records. As journalist Nick Cunningham explained in his August 23, 2023 exposé, “[d]espite city claims that the approval of Zenith Energy’s controversial oil-by-rail facility was a routine administrative matter, internal documents suggest political staff laid the groundwork for a deal.”⁴ In finding that Zenith violated city lobbying laws for its activities in 2022, the Portland City Auditor found, “[d]uring our interviews with BDS Director Esau and BPS Director Oliveira, it was made clear that the communications involved in this specific LUCS went beyond what they considered the standard process.”⁵ Indeed, instead of a standard process, in its efforts to coordinate and process a new LUCS, the City ignored a ruling from the Land Use Board of Appeals that required it to treat the LUCS as a quasi-judicial decision; conducted undisclosed *ex parte* negotiations with Zenith regarding the LUCS application, while actively litigating against Zenith over the same matter; blatantly disregarded legislated procedures for quasi-judicial decisions, and its own rules and standards; exhibited prejudgment bias; attempted to withhold important information from the public; and otherwise acted in an arbitrary and capricious manner.

In response to Petitioners providing substantial evidence in support of these claims and asking DEQ to consider this evidence as a part of its review of the LUCS under OAR 340-018-0050(2)(a)(C), the agency refused to even consider the evidence. Instead, DEQ offered an unreasonably narrow interpretation of its authority and directed Petitioners, dozens of labor, environmental, and community organizations, and Multnomah County to appeal the LUCS to the Land Use Board of Appeals and comment on the forthcoming Air Contaminant Discharge Permit.

Through this petition, we seek immediate action to assess the evidence provided by Petitioners that the City’s LUCS review and determination may not be legally sufficient, and upon an affirmative finding, denial of Zenith’s Air Contaminant Discharge Permit application. In the alternative, we seek action to remand the LUCS to the City of Portland—provided the City and Zenith agree to disclose on the record all of their prior *ex parte* communications—so the public has full information, notice, and an opportunity to be heard when their safety is at issue.

We call on the Environmental Quality Commission to protect the integrity of the State Agency Coordination program by fulfilling its responsibilities to the people of Oregon and fully considering the evidence of legal insufficiencies in the City of Portland’s 2022 Land Use Compatibility review and determination for Zenith’s Air Contaminant Discharge Permit application. By considering this evidence and directing the Department of Environmental Quality to deny the Air Contaminant

⁴ Nick Cunningham, “Portland City Government Compromised with Oil Industry in Private, Documents Suggest,” *Desmog* (Aug. 23, 2023), [Link](#); Jeremiah Hayden, “Newly obtained records show Portland officials’ private interactions with Zenith Energy,” *Streetroots*, (Aug. 23, 2023), [Link](#).

⁵ Portland City Auditor, Notice of Final Determination on Zenith Lobbying Violations, Mar. 26, 2024, at 6. See Attachment A.9.

Discharge Permit application or remand the LUCS to the City, EQC has an opportunity to reaffirm its commitment to safe, healthy, and accountable communities.

Sincerely,



Jonah Sandford
Executive Director, Northwest Environmental
Defense Center



Nick Caleb
Climate and Energy Attorney, Breach Collective



Audrey Leonard
Staff Attorney, Columbia Riverkeeper



Edward Jones
Chair, Linnton Neighborhood Association



Lindsey Hutchison
Staff Attorney, Willamette Riverkeeper

BEFORE THE OREGON ENVIRONMENTAL QUALITY COMMISSION

Petition for Agency Declaratory Ruling to Correctly Apply OAR 340-018-0050(2)(a)(C) to the Facts Underlying the City of Portland’s 2022 Land Use Compatibility Review and Determination for Zenith Energy’s Air Contaminant Discharge Permit Application.

April 8, 2024

Pursuant to ORS 183.410 and OAR 137-002-0010, the Northwest Environmental Defense Center (“NEDC”), Columbia Riverkeeper, Breach Collective (“Breach”), the Linnton Neighborhood Association, and Willamette Riverkeeper hereby petition the Environmental Quality Commission (“EQC”) for a declaratory ruling requiring the Department of Environmental Quality (“DEQ”) to properly enforce its regulations concerning the criteria for accepting a Land Use Compatibility Statement (“LUCS”) for Zenith Energy Terminal Holdings, LLC’s (“Zenith”) Air Contaminant Discharge Permit (“ACDP”) application.

DEQ maintains rules for the issuance of ACDPs¹ requiring applicants to obtain an affirmative LUCS from a local government in accordance with DEQ’s state agency coordination regulations.² DEQ has an independent obligation to ensure that its actions adhere to state and local land use laws.³ Under OAR 340-018-0050(2)(a), DEQ generally relies on the LUCS as a determination of the action’s compatibility with an acknowledged comprehensive plan. However, OAR 340-018-0050(2)(a)(C) states that if DEQ concludes that a LUCS review and determination “may not be legally sufficient, DEQ may deny the permit application and provide notice to the applicant” or “hold the permit application in abeyance” until a reconsideration is made by the local government.

Among the many legal insufficiencies identified in this petition, the City of Portland (“the City”) ignored a ruling from the Land Use Board of Appeals (“LUBA”) that this LUCS must be issued using quasi-judicial procedures,⁴ and exhibited prejudgment bias even before Zenith formally submitted its conditional LUCS for consideration. Moreover, City Commissioners and staffers engaged in undisclosed communications with Zenith employees, including a closed-door meeting at the Zenith terminal where they discussed all of the major conditions in a subsequently issued 2022 conditional LUCS over a month before Zenith formally submitted that LUCS to the Bureau of Development Services (“BDS”). Not only did the City fail to disclose these communications on the record, there is evidence that City officials attempted to hide communications and notes, including the notes from the meeting at Zenith’s terminal. The evidence suggests that the City acted in this manner in order to prevent environmental organizations—including Columbia and Willamette Riverkeeper, who at the

¹ OAR 340-216 *et seq.*

² OAR 340-018-0050.

³ ORS 197.180(1).

⁴ *Zenith Energy Terminals Holdings LLC v. City of Portland*, __ Or LUBA __ (LUBA No. 2021-083, Feb. 3, 2022), *aff’d* 319 Or App 538, 509 P3d 120 (2022), *rev. den.* 370 Or 303, 518 P3d 128 (2022).

time were intervenors supporting the City in an ongoing lawsuit filed by Zenith over the City's 2021 LUCS denial—from interfering with the City's new plan. The full extent of the City's communications and subsequent legal insufficiencies only became apparent after sustained public records request efforts by advocates and journalists. It is likely that there are additional relevant communications and documents that have not been disclosed.

In an August 21, 2023 letter, Petitioners notified DEQ about these meetings and communications, offering substantial and clear evidence of legal insufficiencies (in addition to providing access to the full archive of records obtained through public records requests), and implored the agency to use its authority to reject the LUCS. In response, DEQ Director Leah Feldon asserted that the agency did not have authority to reject the air permit or remand the LUCS, and that the only remedy available was an appeal to LUBA. By refusing to even consider the substantial evidence presented by Petitioners, DEQ failed to satisfy its obligations and duties under Oregon law and legitimized the City's legally insufficient LUCS review and determination to the detriment of Petitioners, other interested parties, and Oregon's residents and environment.

The Northwest Environmental Defense Center is a nonprofit organization whose mission is to protect the environment and natural resources of the Pacific Northwest.

Columbia Riverkeeper is a nonprofit organization with a mission to protect and restore the water quality of the Columbia River and all life connected to it, from the headwaters to the Pacific Ocean.

Breach Collective is a nonprofit organization with the mission to partner with communities on the front lines of the climate crisis to advance justice through locally-driven campaigns rooted in the power of grassroots organizing, legal advocacy, and human stories.

Linnton Neighborhood Association is a Portland neighborhood association nested along the Willamette River and Forest Park and is directly impacted by Zenith's operations.

Willamette Riverkeeper is a nonprofit organization with the mission to protect and restore the Willamette River and its tributaries.

Here, Petitioners seek the following:

- (1) A declaratory ruling correcting DEQ's unreasonably narrow interpretation of its authority under OAR 340-018-0050 and its assertion that LUBA is the exclusive recourse for Petitioners.
- (2) A declaratory ruling acknowledging that the facts available to DEQ and EQC exceed the low threshold needed to establish that the City's October 2022 LUCS review and determination "may not be legally sufficient" and directing DEQ to deny Zenith's ACDP. This relief is proper due to the extent of coordination between the City and Zenith in undermining the legal

sufficiency of the LUCS review and determination, and the improbability that the City will process a remanded LUCS in good faith.

- (3) In the alternative, a declaratory ruling acknowledging that the facts available to DEQ and now EQC are sufficient to establish that the City's LUCS review and determination "may not be legally sufficient" and remanding to the City to conduct a new LUCS review using required quasi-judicial procedures, including disclosure on the record of all prior *ex parte* communications between the City and Zenith.

Per OAR 137-002-0010(6), the petitioners and other interested persons include:

Petitioners

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Interested Persons

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Questions Presented

- (1) Is DEQ's proffered interpretation of its authority to review a local government's LUCS review and determination under OAR 340-018-0050 unreasonably narrow?
- (2) Does OAR 340-018-0050 require DEQ to consider evidence and make a conclusion that a LUCS review and determination may not be legally sufficient when the agency is presented with facially credible evidence that it was procedurally erroneous and unlawful?
- (3) Upon DEQ's refusal to do so, can the EQC independently assess facially credible evidence that a local government's LUCS review and determination may not be legally sufficient, and upon an affirmative finding, reject an air permit application or remand the LUCS?
- (4) Does the evidence presented by Petitioners to DEQ and EQC support the conclusion that the City of Portland's 2022 review and determination for Zenith's conditional LUCS may not be legally sufficient?

I. Relevant Background

Oregon's Air Contaminant Discharge Permit ("ACDP") program requires, under OAR 340-216-0040(1)(a)(M), that applicants must either (1) obtain an affirmative Land Use Compatibility Statement ("LUCS") signed by the local planning jurisdiction, or (2) submit studies to DEQ for the agency to determine the compatibility of the permit with statewide land use planning goals. As part of DEQ's obligation to coordinate with local governments, DEQ relies on the LUCS to determine the compatibility of the applicant's proposal with an acknowledged comprehensive plan.⁵ Under OAR 340-018-0050(2)(a)(C), DEQ is authorized to "conclude that a local government LUCS review and determination may not be legally sufficient" and upon an affirmative conclusion, reject or remand the underlying permit application.⁶ In the present situation, DEQ has construed this clear authority too narrowly, without a legally defensible textual or contextual rationale, and in a manner that leads to an absurd result.

In light of the deficiencies to be discussed below, Petitioners Columbia Riverkeeper, Willamette Riverkeeper, and Breach urged DEQ on August 21, 2023 to review the 2022 Conditional LUCS that accompanied Zenith's ACDP application. Director Leah Feldon rejected this request, offering a narrow interpretation of agency authority under OAR 340-018-0050(2)(a)(C), stating that the LUCS at issue passed its review for legal sufficiency because it "includes findings and a complete project description[.]"⁷ Director Feldon asserted that DEQ would not consider the substantial and facially

⁵ ORS 197.180; OAR 340-018-0050(2).

⁶ OAR 340-018-0050(2)(a)(C).

⁷ DEQ Letter October 6, 2023, Attachment A.2

credible evidence of legal insufficiencies because “DEQ does not use that provision to undertake its own review of whether a local government has properly applied its own ordinances in issuing a LUCS[.]”⁸ After a second letter from dozens of labor, community, and environmental organizations asked DEQ to reconsider its narrow interpretation of authority,⁹ Director Feldon once again refused to consider the evidence of legal insufficiencies.¹⁰ DEQ’s narrow interpretation of its authority and staunch refusal to consider substantial evidence only serves to protect City actors who appear to have flagrantly subverted the law in pursuit of a new LUCS for Zenith while litigation over the prior LUCS denial was still pending. In light of DEQ’s failure to extend its authority in October of 2023, Petitioners seek further review of materials which demonstrate that the LUCS is legally insufficient.

As we will demonstrate in this petition, there is no basis in statutory or administrative law for DEQ’s narrow interpretation of its authority under OAR 240-018-0050(2)(a)(C). The immediate consequence of this narrow interpretation of authority is that DEQ ratifies a legally insufficient local decision rooted in procedural and substantive flaws, failing to uphold its obligations under ORS 197.180(1), and leaving harmed parties and the general public without recourse or remedy. The broader consequence is the erosion of DEQ’s legitimacy as an agency charged with protecting the public trust and as a “leader in restoring, maintaining and enhancing the quality of Oregon’s air, land and water.”¹¹ If the EQC does not remedy this situation, DEQ has provided a roadmap to other localities who seek to evade public scrutiny over and involvement in important decisions within the agency’s jurisdiction.

⁸ *Id.*

⁹ See Community Response to DEQ November 14, 2023, Attachment A.3.

¹⁰ See DEQ Response to Community January 24, 2024, Attachment A.5.

¹¹ Oregon Department of Environmental Quality, “About Us.” [Link](#) (last accessed Mar. 22, 2024).

A. Applicable Law

i. Jurisdiction

Under the Oregon Administrative Procedures Act,¹² “any interested person” may petition an agency to, in its discretion, “issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by (the agency).”¹³ The procedures for declaratory ruling proceedings are governed by the Model Rules for Agency Declaratory Rulings found in the Department of Justice Manual, Chapter 137, Division 2.¹⁴

A petition must state: (1) the rule that may apply, (2) a detailed statement of relevant facts, including sufficient facts to show petitioner’s interest, (3) all propositions of law or contentions asserted, (4) questions presented, (5) specific relief requested, and (6) names and addresses of petitioners and any other person known to be interested in the ruling.¹⁵

If the agency refuses to act or make a decision on the petition, interested parties may file another petition to compel agency action.¹⁶ If the agency continues its inaction, petitioners may seek judicial relief under ORS 183.490 if an agency has unlawfully refused or unreasonably delayed action or decision. An action under ORS 183.490 is not a substitute for an appeal of an agency order.¹⁷

ii. ORS Chapter 197 and OAR 340-018-0050

ORS 197.180(1)(b) requires state agencies to take actions that are authorized by law with respect to programs affecting land use “[i]n a manner compatible with acknowledged comprehensive plans and land use regulations.” Under DEQ’s regulations, land use decisions requiring DEQ approval require LUCSs issued according to DEQ’s procedures contained in state agency coordination regulations.¹⁸ In relevant part, these regulations establish that:

(2) The Department shall rely on the compatibility procedures described in Section III, subsection (3), and Section IV, subsections (2), (3), and (4) of the SAC [State Agency Coordination] Program document to assure compatibility with an acknowledged

¹² ORS 183.310–183.750

¹³ ORS 183.410

¹⁴ OREGON DEPT. OF JUSTICE MANUAL 137-002, found on the [Secretary of State website](#) (hereinafter DOJ MANUAL).

¹⁵ DOJ MANUAL 137-002-0010

¹⁶ ORS 183.490.

¹⁷ *Mendieta v. State by & Through Division of State Lands*, 148 Or App 586, 595–599, 941 P2d 582 (1997) (“ORS 183.490 does not contemplate an appeal from an agency order, but rather from an agency’s failure to make an order on the merits.”).

¹⁸ OAR 340-018-0050.

comprehensive plan, *which include but may not be limited to* the procedures described below:

(a) An applicant's submittal of a LUCS which provides the affected local government's determination of compatibility:

(A) A LUCS shall be submitted with a Department application or required submittal information;

(B) The Department shall rely on an affirmative LUCS as a determination of compatibility with the acknowledged comprehensive plan unless otherwise obligated by statute;

(C) If the Department concludes a local government LUCS review and determination *may not be legally sufficient*, the Department may deny the permit application and provide notice to the applicant. In the alternative, when the applicant and local government express a willingness to reconsider the land use determination, the Department may hold the permit application in abeyance until the reconsideration is made (emphasis added).

Importantly, OAR 340-018-0050(2) establishes that this list of procedures is not exhaustive, and does not preclude reconsideration of or consideration of new evidence as to whether a LUCS process may not be legally sufficient. Neither "may not be legally sufficient" nor "legally sufficient" are defined in OAR 340-018-0050(2)(a)(C), other relevant statutes or administrative rules, nor is an evidentiary threshold established.

Municipal and county governments must adopt land use plans that are consistent with Statewide Land Use Planning Goals.¹⁹ The City of Portland adopted its current comprehensive plan (the "2035 Plan") in 2016 and it was acknowledged by the Land Conservation and Development Commission ("LCDC") in 2018.²⁰

Under OAR 340-216-0040, an applicant for an ACDP must obtain an affirmative LUCS from the relevant local land use planning authority to ensure that the activity is compatible with comprehensive plans and land use regulations.

¹⁹ ORS 197.175(2)(a).

²⁰ City of Portland, "2035 Comprehensive Plan (as amended, May 2023)", available online at City of Portland: [Link](#).

iii. Land Use Board of Appeals and State Agency Jurisdiction Regarding a “Land Use Decision”

LUBA has exclusive jurisdiction over “any land use decision or limited land use decision of a local government.”²¹ A land use decision includes both (A) “[a] final decision or determination made by a local government . . . that concerns the adoption, amendment or application of” the statewide planning goals or a comprehensive plan provision and (B) “[a] final decision or determination of a state agency other than the commission with respect to which the agency is required to apply the goals.”²² LUBA’s jurisdiction is limited to cases in which the petitioner has exhausted all local appeal opportunities.²³

Most LUCS approvals are specifically excluded from the definition of a land use decision and thereby outside of LUBA’s jurisdiction.²⁴ Also excluded from LUBA’s jurisdiction is the final state agency decision relying on a LUCS approval in most circumstances.²⁵

ORS 197.180(1) requires state agencies to “carry out their planning duties, powers and responsibilities and take actions that are authorized by law with respect to programs affecting land use.” Importantly, “land use decision” does not include “[a] state agency action subject to ORS 197.180(1), if[...] [t]he local government with land use jurisdiction over a use or activity that would be authorized, funded or undertaken by the state agency as a result of the state agency action has already made a land use decision approving the use or activity[.]”²⁶

²¹ ORS 197.825(1).

²² ORS 197.015(10)(a)(A), (B).

²³ ORS 197.825(2)(a).

²⁴ ORS 197.015(10)(b)(H): Land use decision does not include a decision by a local government “[t]hat a proposed state agency action subject to ORS 197.180 (State agency planning responsibilities) (1) is compatible with the acknowledged comprehensive plan and land use regulations implementing the plan, if: (i) The local government has already made a land use decision authorizing a use or activity that encompasses the proposed state agency action; (ii) The use or activity that would be authorized, funded or undertaken by the proposed state agency action is allowed without review under the acknowledged comprehensive plan and land use regulations implementing the plan; or (iii) The use or activity that would be authorized, funded or undertaken by the proposed state agency action requires a future land use review under the acknowledged comprehensive plan and land use regulations implementing the plan.”; *McPhillips Farm, Inc. v. Yamhill Cnty.*, 256 Or App 402, 408–09, 300 P3d 299 (2013) (“[T]he effect of ORS 197.015(10) and ORS 197.825(1) is to allow LUBA the authority to review the merits of a LUCS determination that a proposed state action is not compatible with local land use laws and to preclude such review of a LUCS determination of existing or potential compatibility, as described in ORS 197.015(10)(b)(H)(i), (ii).”); *Bend Research, Inc. v. Deschutes County*, ___ LUBA ___ (LUBA No. 2022-049, Dec. 1, 2022) (slip op. 7) (“ORS 197.015(10)(b)(H) excludes from the definition of “land use decision” most, if not nearly all, LUCS decisions.”).

²⁵ ORS 197.015(10)(e)(C).

²⁶ ORS 197.015(10)(e)(C)(i).

B. Factual and Procedural Background

Zenith's facility, located at 5501 NW Front Ave., has operated as a petroleum products storage terminal since 1947, originally as Willbridge Asphalt Refinery. The 39-acre site has 84 tanks with a total storage capacity of 1,518,200 barrels. The asphalt refinery ceased operations in November 2006 and officially closed in December 2008. Around 2014, Zenith's predecessor, Arc Logistics, started using the facility to handle crude oil. Zenith took over in December 2017 and within one month was importing tar sands and crude oil to the Portland Terminal on mile-long trains from Canada and North Dakota. In 2018, Zenith promised local and state officials that its activities would result in no new oil throughput.²⁷ However, Zenith's 2023 report to DEQ shows that it has increased its oil throughput for the fifth year straight since making that promise.²⁸ In 2019, Zenith actively misled city officials regarding its transport of crude oil, and failed to uphold its requirement with DEQ to conduct a proper oil spill preparedness drill.²⁹ Later in 2019, the City of Portland denied Zenith's request to amend its franchise agreement to build new pipes under NW Front Ave., citing Zenith's failure "to meet its existing Franchise Agreement commitments, including important requirements" and paying its franchise fees on time.³⁰ In August 2021, Zenith settled a violation of its Stormwater Construction permit—the result of an enforcement action brought by Columbia Riverkeeper and Willamette Riverkeeper—and paid \$115,000 to the Bird Alliance of Oregon (formerly, Portland Audubon).³¹ Most recently, the Portland City Auditor released the results of its investigations into Zenith's activities in 2022, finding that the company and its agents violated multiple city code provisions by failing to disclose their lobbying activities.³² Zenith's pattern of dishonesty and flagrant rule breaking continues to the present.

In January 2021, DEQ notified Zenith that it would have to obtain an affirmative LUCS in connection to the renewal of its Title V air permit renewal application. In May 2021, Zenith submitted its LUCS application to the City of Portland's Bureau of Development Services ("BDS"). In August 2021, BDS denied Zenith's LUCS stating that Zenith's activities were not compatible with provisions of the City's 2035 Comprehensive Land Use Plan ("2021 LUCS denial").³³ The 2021 LUCS denial made over a dozen specific findings regarding the incompatibility of Zenith's activities with Portland's Comprehensive Plan.³⁴ Zenith appealed the LUCS denial to the Land Use Board of Appeals ("LUBA").

²⁷ Zenith Off-Permit Change Notification, Permit 26-2025, July 27, 2018. Available from DEQ: [Link](#)

²⁸ "Zenith Energy Holdings 2023 Title V Annual Report," February 7, 2024. Available on Oregon DEQ website: [Link](#)

²⁹ Gordon R. Friedman, "Portland mayor's staff left believing false information after briefing by oil terminal execs, note indicate," *The Oregonian* (Sept. 5, 2019), [Link](#); Gordon R. Friedman, "Oregon exporter dodged crude oil spill preparedness drill," *The Oregonian* (May 7, 2019), [Link](#).

³⁰ Letter from City of Portland, Office for Community Technology to Zenith Energy Holdings. October 18, 2019. Available online here: [Link](#)

³¹ Zenith Off-Permit Change Notification, Permit 26-2025, July 27, 2018. Available from DEQ: [Link](#)

³² City Auditor Determination, Attachment A.9

³³ "Land Use Compatibility Statement," Attachment B.1, City of Portland, Bureau of Development Services, Land Use Services, City File No. PR 21-048534 LUCS, August 27, 2021. Available from City of Portland, Bureau of Development Services here: [Link](#). [Hereinafter "August 2021 LUCS Denial"]

³⁴ *Id.*

Parties, including Columbia Riverkeeper and Willamette Riverkeeper, successfully moved to intervene on behalf of the City. LUBA upheld the City of Portland's authority to deny a LUCS that is inconsistent with its acknowledged comprehensive plan, but it remanded to the City to make more detailed findings in support of its denial.³⁵ LUBA also characterized the decision to deny Zenith's LUCS as a quasi-judicial decision.³⁶ In response, Zenith appealed the decision to the Oregon Court of Appeals, but did not appeal the ruling that the LUCS was a quasi-judicial decision. The Oregon Court of Appeals affirmed LUBA's decision without opinion in May 2022, Zenith appealed again, and the Oregon Supreme Court denied review on October 6, 2022.³⁷

In early 2022, while the litigation was ongoing, Zenith and its lobbying agent, Pac-West Communications ("Pac/West"), began meeting with City of Portland officials.³⁸ After an in-person meeting at Zenith's oil terminal site on July 29, 2022,³⁹ City of Portland officials collaborated extensively with Zenith employees to develop a conditional LUCS.⁴⁰ On September 6, 2022, Zenith submitted a new LUCS application to BDS for an ACDP for much of the same activity covered by the denied LUCS. Three days before the Supreme Court denied review, and without consulting community members or party-intervenors (namely Columbia Riverkeeper and Willamette Riverkeeper), BDS abruptly issued an affirmative LUCS ("2022 LUCS") for the new ACDP.⁴¹ The 2022 conditional LUCS was supported using many of the same Comprehensive Plan sections as the 2021 LUCS denial, with these findings instead used to approve the LUCS.⁴²

³⁵ Zenith Energy Terminals Holdings LLC v. City of Portland, __ Or LUBA __ (LUBA No. 2021-083, Feb. 3, 2022), *aff'd* 319 Or App 538, 509 P3d 120 (2022), *rev. den.* 370 Or 303, 518 P3d 128 (2022).

³⁶ Zenith Energy Terminals Holdings LLC v. City of Portland, *supra* note 35, LUBA No. 2021-083 at 25-26.

³⁷ Zenith Energy Terminals Holdings LLC v. City of Portland, *supra* note 35, LUBA No. 2021-083, *aff'd* 319 Or App 538, 509 P3d 120 (2022), *rev. den.* 370 Or 303, 518 P3d 128 (2022).

³⁸ See DEQ Letter October 6, 2023, Attachment A.2, at 3-8 for a more detailed timeline of events.

³⁹ On July 29, 2022, Commissioners Rubio and Ryan, their senior staff members Schoene and Karen Guillen-Chapman, respectively, Patricia Diefenderfer from the Bureau of Planning and Sustainability ("BPS"), and Terry Whitehall from the Bureau of Development Services ("BDS") met with Zenith Vice President of U.S. Operations West Grady Reamer and Zenith's Portland Terminal Manager JT Hendrix, along with Paul Phillips and Chris West from Pac/West, at the Zenith oil terminal site where they discussed Zenith's operations, future plans, and "next steps." Representatives of Pac/West Communications, agents of Zenith Energy, appear to have organized the visit.

⁴⁰ This activity included a substantial degree of *ex parte* communication with Zenith well prior to the formal submission of the conditional LUCS, efforts to keep these communications out of the public record through actions designed to prevent transparency, publicly representing its process as being free of such communications while coordinating media strategy with Zenith, providing Zenith with line edits to a draft of its LUCS application prior to submission, telling Zenith to "hold off" on formal submission of its LUCS until agency alignment could be reached, and more. See Community ACDP Letter August 21, 2023, Attachment A.1.

⁴¹ "Notice of Decision on a Land Use Compatibility Statement," City of Portland, Bureau of Development Services, Office of Land Use Services, City File No. PR 22-182133 LUCS, October 3, 2022. See Attachment B.2. Available from City of Portland, Bureau of Development Services here: [Link](#). [Hereinafter "October 2022 LUCS Approval"]

⁴² The BDS' 2021 denial of Zenith's LUCS application cited over a dozen sections of the Comprehensive Plan as being incompatible with Zenith's "fossil fuel activity and potential adverse impact on the environment and historically marginalized groups." However, the BDS' 2022 approval of Zenith's LUCS application cited the same Plan sections, finding that the policies either "do not apply" or that they are, in fact, compatible with Zenith's "Repositioned Facility":

After Zenith received its 2022 LUCS, Portland City Commissioner Carmen Rubio claimed that “[t]he decision made regarding the Zenith storage facility . . . was processed in the same manner as every other Land Use Compatibility Statement.”⁴³ In reality, internal City communications obtained via public records requests revealed that City elected officials, political staff, BDS staff, and City attorneys engaged in substantial *ex parte* communications with Zenith and its agents that determined the form, timing, substance, and outcome of the 2022 LUCS approval.⁴⁴ On March 26, 2024, the Portland City Auditor released the results of an investigation into Zenith’s 2022 lobbying activities—based on these internal City communications—and found communications beyond those typically required to prepare to receive a permit or authorization from the City.⁴⁵ They characterized the significance of draft LUCS associated communications as such:

[I]t is more likely than not that Zenith sent this communication because they believed that Commissioners and their staff could influence the ultimate outcome of the LUCS, whether through feedback directly or through interactions with BDS staff. During our interviews with BDS Director Esau and BPS Director Oliveira, it was made clear that *the communications involved in this specific LUCS went beyond what they considered the standard process.*⁴⁶

Far from a standard process, internal and *ex parte* communications show that Zenith obtained the 2022 LUCS approval as a result of improper behind-closed-doors negotiations, such as the July 29, 2022 meeting at Zenith’s oil terminal site, where all of the major conditions in the 2022 LUCS approval were discussed.⁴⁷

Goal 3B. A climate and hazard resilient urban form; Policy 3.3. Equitable development; Policy 4.33. Off-site impacts; Policy 4.36. Air quality impacts; Policy 4.62. Seismic and energy retrofits; Policy 4.79. Natural hazards and climate change risks and impacts; Policy 4.80. Geological hazards; Policy 4.81. Disaster-resilient development; Policy 4.82. Portland harbor facilities [reduced natural hazard risks]; Policy 4.83. Urban heat islands; Policy 6.47. Clean, safe, and green [industrial development and freight corridors]; Policy 6.48. Fossil fuel distribution [limits industry to what is needed “to serve regional market”]; Policy 7.2. Environmental equity; Policy 7.14. Natural hazards; Policy 8.74. Pollution prevention; Policy 9.34. Sustainable freight system. See the City of Portland’s “Zenith Energy Oil Terminal” public records web page for access to both documents, [City of Portland Link](#). For further information on the inconsistent LUCS findings, see the Supplemental Record Attachment.

⁴³ Abe Asher, “Despite New Leadership, Portland Officials Decline to Reconsider Zenith Energy Deal,” *The Portland Mercury* (Jan. 30, 2023), [Link](#).

⁴⁴ Records acquired by Petitioners through public records requests are available in a public Google Drive folder here: <https://shorturl.at/jEP02>. An annotated “Public Records Timeline” of relevant records is available here: <https://shorturl.at/dpCMZ>. These folders are updated as the City releases more records.

⁴⁵ City Auditor Determination, at 6. Attachment A.9

⁴⁶ *Id.*

⁴⁷ Handwritten notes of this meeting were eventually obtained through public records requests, after Commissioner Rubio’s Chief of Staff Jillian Schoene repeatedly asserted that notes did not exist. See “Public Records Request #C293791-072023 response” ([Link](#)) (“Please note, I spoke with the Chief of Staff for the Commissioner. She advised that they do not have any notes about there [sic] meetings. She also said during the tour no notes were taken either.”); See also “7.29.22 - Diefenderfer” ([Link](#)); see also “7.29.22 - Diefenderfer (transcription)” ([Link](#)).

Of particular relevance to EQC, as the oversight body for DEQ, are events from July 12, 2022. First, at 11:59 am, Jillian Schoene, Chief of Staff to Commissioner Rubio, had a phone call with Chris West from Pac-West Communications, Zenith’s lobbyists.⁴⁸ This call was scheduled at the request of West to strategize in advance of the July 29, 2022 meeting at Zenith’s oil terminal site.⁴⁹ In response to records requests, Schoene asserted that no notes exist from this call.⁵⁰ Shortly after this call, DEQ officials Nina DeConcini, Matt Davis, Kieran O’Donnell, and Becka Puskas held a meeting with City of Portland officials including Schoene—just over two weeks before City officials met with Zenith at their oil terminal.⁵¹ At present, the only publicly-available record of this meeting is from City employees⁵²; handwritten notes taken by Kimberly Tallant⁵³ and electronic notes from Tom Armstrong.⁵⁴ The handwritten notes describe an “info exchange” in which “LK”, presumably City Attorney Lauren King, describes the ongoing judicial proceedings with Zenith. Armstrong’s notes show that there was discussion of “Settlement talks” and “Zenith discussion—LUCS denial or agree to conditions” and that “Riverkeeper still may appeal.”⁵⁵ Armstrong’s notes also show that there was a discussion of “Can City issue LUCS with conditions?” followed by “Withdraw permit, resubmit with conditions/limits incorporated into application, issue LUCS, permit has limits incorporated.”⁵⁶

These notes show, at a minimum, that DEQ staff were well informed about the details of ongoing litigation, and that the City was already strategizing to approve a different LUCS for Zenith well before an application had ever been submitted. The suggestion of a “LUCS with conditions”—apparently unprecedented in Portland or anywhere else in Oregon—over two weeks before Zenith proposed one to the City in a private meeting at Zenith’s oil terminal site strongly suggests that the parties were already strategizing together. In fact, Schoene’s meeting with Chris West immediately prior to the DEQ meeting suggests the strong likelihood that the City was asking strategic questions of DEQ on behalf of Zenith. At this point in time, Commissioner Rubio’s office did not have BDS in their bureau portfolio, meaning that Schoene’s actions in strategizing directly with Zenith around a future LUCS were well out of bounds of City protocols where BDS is the point of contact for LUCS related issues, not to mention problematic given the ongoing litigation. The observation that “Riverkeeper still may appeal” suggests that the City and Zenith were likely already co-creating a strategy to hide crucial information from

⁴⁸ “7.13.22 - Schoene” ([Link](#)).

⁴⁹ “6.28.22 - Schoene” ([Link](#)) (“Meeting between Jillian Schoene, Chief of Staff to Commissioner Rubio, and Chris West ahead of Cmr. Rubio’s and Ryan’s tour of Zenith scheduled July 29. Chris had asked if we could schedule a meeting prior to the Commissioners’ tour - due to scheduling Jillian meeting on behalf of Cmr. Rubio.”)

⁵⁰ “Public Records Request #C293791-072023 response” ([Link](#)).

⁵¹ See “6.10.22 - King” ([Link](#))

⁵² Petitioners have a public records request pending DEQ legal review to obtain notes from this meeting and other communications with City and Zenith staff.

⁵³ “7.12.22 - Tallant” ([Link](#)).

⁵⁴ “7.12.22 - Armstrong” ([Link](#)).

⁵⁵ “7.12.22 - Tallant” ([Link](#)).

⁵⁶ “7.12.22 - Armstrong” ([Link](#)).

parties to its ongoing litigation and limit or eliminate opportunities for public or advocate involvement, which is exactly the strategy the City pursued. Determining DEQ’s level of knowledge of *ex parte* communications between Zenith and the City of Portland (which public records show likely began in February 2022⁵⁷) about a second conditional LUCS and details of the ongoing litigation is important for an accurate understanding of the agency’s level of participation in these events. At the very least, the information discussed in this meeting should have raised red flags within the agency.

Furthermore, notes from Armstrong entitled “Aug 30 Zenith meeting” taken on August 30, 2022 (when negotiations with Zenith were in a far more advanced state) contain the text “Attorney communication - City/DEQ/Zenith alignment before submittal.”⁵⁸ This indicates that the City Attorney had a plan to ensure that the City, Zenith, and DEQ were on the same page prior to Zenith’s formal submission of a second, conditional LUCS application. It is unclear based on available information how involved DEQ was in the City’s efforts to steward forward a legally insufficient process and EQC should request full disclosure from the agency.⁵⁹

In August of 2023, community organizations—including Columbia Riverkeeper and Breach—and journalists uncovered these communications.⁶⁰ On August 21, 2023, Columbia Riverkeeper, Willamette Riverkeeper, Portland Audubon, Breach, and Portland Harbor Community Coalition sent a letter to DEQ Director Leah Feldon urging the agency to use its statutory authority to reject the LUCS because it was not legally sufficient, and because Zenith’s activities pose serious danger to public health, safety, and the environment.⁶¹ The letter characterized the City’s 2022 LUCS process as follows:

In reaching its formal decision to approve the LUCS, the City ignored a ruling from LUBA that required it to treat the LUCS as a quasi-judicial decision; conducted undisclosed *ex parte* negotiations with Zenith regarding the LUCS application, while actively litigating against Zenith over the same matter; blatantly disregarded legislated procedures for quasi-judicial decisions, and its own rules and standards; attempted to withhold important information from the public; and otherwise acted arbitrarily and capriciously.⁶²

⁵⁷ See “2.3.22 - Gardner” ([Link](#)) (“Paul Phillips and Chris West of Pac/West along with our clients from Zenith would like to request a meeting with Commissioner Ryan and Mayor Wheeler.”); “Public Records Request #C297547-081423 response” ([Link](#)) (“[t]he only thing I could find that could be applicable was a calendar entry from the Mayor’s calendar on 4/26/2022 for a ‘Zenith Tour’. It was just a calendar event with no attached documents or notes.”); see also “5.2.22 - Weekly All Staff Meeting” ([Link](#)).

⁵⁸ “8.30.22 - Armstrong” ([Link](#)).

⁵⁹ Columbia Riverkeeper and Breach currently have public records requests pending with DEQ for this information.

⁶⁰ Nick Cunningham, “Portland City Government Compromised with Oil Industry in Private, Documents Suggest,” *Desmog* (Aug. 23, 2023), [Link](#); Jeremiah Hayden, “Newly obtained records show Portland officials’ private interactions with Zenith Energy,” *Streetworks*, (Aug. 23, 2023), [Link](#).

⁶¹ Community ACDP Letter August 21, 2023, Attachment A.1

⁶² *Id.* at 14.

The letter also offered a detailed argument that the City’s undisclosed *ex parte* communications with Zenith and general conduct regarding the second LUCS application exhibited prejudgment bias regarding a quasi-judicial decision.⁶³ The organizations presented substantial evidence obtained through public records requests in support of this characterization.⁶⁴ We incorporate this letter into the factual record in full and encourage the EQC to read the evidence closely.

DEQ responded to the community organizations in an October 6, 2023, letter stating that it would not conduct the requested review for legal sufficiency, writing, in part:

Where the LUCS includes findings and a complete project description, DEQ does not use that provision to undertake its own review of whether a local government has properly applied its own ordinances in issuing its LUCS, instead allowing such land use compliance questions to be determined within the standard land use planning process—by appeal to LUBA.⁶⁵

In response, 31 labor, community, and environmental organizations again urged DEQ to exercise its authority to review the legal sufficiency of the 2022 LUCS, rejecting the argument that their only recourse was to LUBA and pointing out that DEQ provided no legally defensible arguments in support of its narrow interpretation of OAR 340-018-0050(2)(a)(C).⁶⁶ On December 7, 2023, Multnomah County Chair Jessica Vega Pederson and three County Commissioners sent a letter to DEQ Director Leah Feldon writing “[y]ou have the authority to reject this permit and we ask you to do it.”⁶⁷ On January 24, 2024, Director Feldon wrote letters in response to the 31 community groups⁶⁸ and Multnomah County⁶⁹ refusing again to consider the evidence of the legal insufficiency of Zenith’s 2022 LUCS.

II. Arguments

Facts presented herein by petitioners make clear that the City of Portland’s 2022 Zenith LUCS review was not legally sufficient, and that these insufficiencies warrant denial of Zenith’s ACDP. As explained below, DEQ’s extremely narrow interpretation of its authority to deny a permit application is not supported by a plain language reading of the regulations. In circumstances like the present, where DEQ is presented with evidence of procedural violations of applicable procedures, OAR 340-018-0050 clearly authorizes the agency to deny the permit. Moreover, the City’s mischaracterization of the Zenith LUCS process unlawfully precluded the public from participating in the decision, providing further support

⁶³ *Id.* at 10-12.

⁶⁴ *Id.* at 2-14.

⁶⁵ See DEQ Letter October 6, 2023, Attachment A.2.

⁶⁶ See Community Response to DEQ November 14, 2023, Attachment A.3.

⁶⁷ See Multnomah County Letter to DEQ December 7, 2023, Attachment A.4.

⁶⁸ See DEQ Response to Community January 24, 2024, Attachment A.5.

⁶⁹ See DEQ Response to Multnomah County January 24, 2024, Attachment A.6.

for denial of the ACDP unless and until the City follows required quasi-judicial procedures. And contrary to DEQ's assertions, an appeal to LUBA is not the public's only recourse to challenge an unlawful LUCS: DEQ is clearly empowered to assess the legal sufficiency of the City's decision, and it should do so in this case. Given the overwhelming evidence of the City's failure to comply with required procedures in issuing the 2022 LUCS, DEQ should deny Zenith's ACDP.

A. DEQ Erred in Narrowly Interpreting its Authority Under OAR 340-018-0050

i. Petitioners Presented DEQ with Substantial Facial Evidence that the City of Portland's 2022 LUCS Review "May Not Be Legally Sufficient" Because the City Did Not Follow State Law for Quasi-Judicial Procedures nor Its Own Standard Procedures

In the proceedings surrounding the 2021 LUCS denial, LUBA ruled that the issuance of a LUCS is a quasi-judicial proceeding under Oregon law:

In *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, the Supreme Court established a three-factor test to determine whether a land use matter is quasi-judicial or legislative:

1. Is the process bound to result in a decision?
2. Is the making of the decision bound to apply pre-existing criteria to concrete facts?
3. Is the matter directed at a closely circumscribed factual situation or a small number of persons? 287 Or 591, 602-03, 601 P2d 769 (1979).

No factor is determinative, but answering two or three of those questions in the affirmative suggests that the matter is quasi-judicial in nature. *See id.* Here, there is no dispute that the city could not decline to reach a decision on the LUCS application or that the city applied existing criteria to the specific facts regarding petitioner's operation (though it is disputed which criteria the city was allowed to apply). It is also clear that the LUCS is directed only at the petitioner's operation. Accordingly, we conclude that, under state law, the city's decision must be viewed as a quasi-judicial decision.⁷⁰

Neither the City nor Zenith appealed LUBA's finding on this issue to the Court of Appeals and it was Zenith's position that argued that the LUCS was a quasi-judicial decision. The LUBA ruling, which remains valid, establishes this decision as a quasi-judicial proceeding.

The 2022 LUCS review was legally insufficient because it failed to follow required quasi-judicial procedures in at least three ways. First, the City failed to provide notice to the Linnton Neighborhood Association and other neighbors, which is explicitly contrary to LUBA's ruling and the Portland City Code. Second, the City improperly withheld *ex parte* communications from the 2022 LUCS record.

⁷⁰ Zenith Energy Terminal Holdings LLC v. City of Portland, *supra* note 35, LUBA No. 2021-083 at pages 25-26.

And third, the circumstances and substance of these *ex parte* communications provides clear evidence of improper prejudgment bias, which invalidates a quasi-judicial decision.

Failure to Provide Notice to Necessary Parties

Despite LUBA’s clear directive to follow quasi-judicial procedures,⁷¹ the City ignored its own ordinances to issue the 2022 LUCS approval without giving notice to required parties. Portland City Code requires that all neighborhood associations and neighbors near the proposed development be notified of quasi-judicial land use decisions.⁷² The City did not provide notice of the application to those entities, and instead asserted that “[t]here is not required notice or hearing on a LUCS.”⁷³ The Linnton Neighborhood Association, whose boundaries include the subject property and surrounding impacted area, confirmed it did not receive any notice from the City. This failure to provide notice to required parties is a clear violation of the Portland City Code, demonstrating that the 2022 LUCS approval was legally insufficient.

Ex Parte Communications

Despite the City’s failure to follow necessary notice procedures, Oregon administrative law also imposes particular obligations for disclosures. In city land use planning proceedings, for which LUBA requires quasi-judicial procedures, *ex parte* communications are governed by ORS 215.422(3):

No decision or action of a planning commission or city governing body shall be invalid due to *ex parte* contact or bias resulting from *ex parte* contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:

- (a) Places on the record the substance of any written or oral *ex parte* communications concerning the decision or action; and
- (b) Has a public announcement of the content of the communication and of the parties’ right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related.

Under ORS 215.422 (and related land use permit section ORS 227.180), parties to the proceeding must be given the greatest possible opportunity to rebut the *ex parte* communications.⁷⁴ In *Horizon Constr. v.*

⁷¹ Id. (“Accordingly, we conclude that, under state law the city’s decision must be viewed as a quasi-judicial decision.”)

⁷² Portland City Code §33.730.014 et seq. All quasi-judicial land use decisions require notice to neighborhood associations and neighbors within a certain distance of the subject property. While it is unclear which procedure type was necessary, it is clear that one should have been used.

⁷³ Community ACDP Letter, August 21, 2022, at 8, Attachment A.1,

⁷⁴ *Horizon Constr. v. City of Newberg*, 114 Or App 249, 253–254, 834 P2d 523 (1992) (waiting two months and holding a meeting before disclosing *ex parte* communication violated substantive rights of parties).

City of Newberg, the city was acting in a quasi-judicial proceeding and delayed disclosure of *ex parte* communications.⁷⁵ The Court of Appeals found that this delay in disclosure was a substantive violation of the party's rights and stated unequivocally that “[f]ailure to comply with ORS 227.180 requires a remand to the city and a plenary rehearing on the application.”⁷⁶

a. Ex Parte Communications After Formal Submission of Zenith’s LUCS

Between Zenith’s submission of the LUCS application on September 6, 2022, and the City’s approval on October 3, 2022, City officials engaged in a number of *ex parte* communications with Zenith representatives that were only later revealed via public records requests.

On September 7, 2022, Zenith VP Grady Reamer and BDS Director Esau exchanged text messages.⁷⁷ On September 19, Reamer and Esau texted about scheduling a Teams meeting between Reamer, Esau, and City Attorney Lauren King.⁷⁸ Based on these text messages, this meeting occurred on September 21, 2022, but the substance of any written or oral communications from this meeting were not placed in the record of decision.⁷⁹ On September 23, 2022, Reamer texted Esau to schedule a follow up meeting with her and Lauren King on September 26, 2022.⁸⁰ Again, this meeting was confirmed and presumably happened, but the substance of any written or oral communications from this meeting were not placed in the record of decision. On September 29, Esau texted Reamer to discuss coordinated communications strategy.⁸¹ Importantly in this communication, Esau mentions that “Lauren and Andy are still working on the findings” but confirmed that despite important analysis not being completed, the LUCS will be approved the following week.⁸² On October 3, 2022, Reamer texted Esau and asked,

⁷⁵ *Horizon Constr.*, 114 Or App at 252.

⁷⁶ *Id.* at 253.

⁷⁷ See “Combined Files - Records requests re: texts to and from Grady Reamer” ([Link](#)) (7135041105 is Grady Reamer’s number and 5038238474 is Rebecca Esau’s number); see also “Combined Files - records requests re: text string “Grady”” ([Link](#)).

⁷⁸ See “Combined Files - Records requests re: texts to and from Grady Reamer” ([Link](#)).

⁷⁹ *Id.* (Reamer: “Good morning Rebecca. 100-130 tomorrow works for us. Assuming that’s pst? I’ll send out a Teams invite.” Esau: ““Yes pst. Thx!” Reamer: “I sent out the invite. Thanks.”).

⁸⁰ *Id.* (Reamer: ““Hi Rebecca- are you and Lauren available for a follow up on Monday? Our team is available 10-11, 1-2 and after 3:30 (all pst). Thanks!” Esau: ““Hi Grady, I’m checking with Lauren and will get back to you as soon as I hear back. Rebecca” Esau: “Hi Grady, 10 AM pst works for Lauren and me. See you then!” Reamer: “Thanks. I’ll send invite. I don’t have Andy’s email so please forward to him.” Esau: “Will do, thx!”)

⁸¹ *Id.* (“Hi Grady, late this afternoon Lauren, Donnie and I met with my bureau’s Public Information Officer and Commissioner Ryan’s communications person to discuss communications strategy, and they’ve asked us for an additional day to get their talking points ready for the media, and to draft a statement we can post on the bureau’s website regarding the LUCS approval. Lauren and Andy are still working on the findings. All headed in the direction we discussed. I know we were shooting for Friday as the day to issue the LUCS, but knowing they are the ones who will be dealing with the media calls, I want them to feel prepared and to be able to speak in a coordinated, consistent way about the decision, so we’re going to give them one extra business day to prep, and issue the LUCS on Monday. Please call if you have any concerns with this. I’m sorry we couldn’t quite make our Friday target, but hoping Monday is okay. Rebecca”).

⁸² *Id.*

“Are we still on plan for LUCS issuance today?” to which Esau replied that they were and added “We’re going to give DEQ Comms folks a heads up and then get it out to you and then post it on our website and go public with it.”⁸³

Under ORS 215.422 (and related land use permit section ORS 227.180), the substance of these written and oral *ex parte* communications should have been placed on the record, and the City should have publicly announced the content of the communication and parties’ rights to rebut their substance at a hearing. The failure to do so clearly violates state law.

b. Ex Parte Communications Prior to Formal Submission of Zenith’s LUCS Application

In the Summer and Fall of 2022, City of Portland officials responsible for issuing the LUCS engaged in undisclosed *ex parte* meetings and contacts with Zenith employees—well prior to Zenith’s formal LUCS submission and while litigation was ongoing—for the purposes of brokering an agreement.⁸⁴ These communications were done without the input of party-intervenors, disclosure in the record, or public announcement. Although the formal LUCS submission occurred on September 6, 2022, these undisclosed *ex parte* communications show that all of the important negotiations, agreements, and decisions about the LUCS happened in a *de facto* LUCS review and determination that was intentionally and unlawfully designed to avoid transparency and eliminate public involvement.

On July 12, 2022, immediately prior to a City meeting with DEQ,⁸⁵ Jillian Schoene had a phone call with Chris West from Pac/West about an upcoming visit to Zenith’s physical site in NW Portland.⁸⁶ On July 29, 2022, Commissioners Rubio and Ryan, their senior staff members Schoene and Karen Guillen-Chapman, respectively, Patricia Diefenderfer from the Bureau of Planning and Sustainability (“BPS”), and Terry Whitehall from the Bureau of Development Services (“BDS”) met with Zenith Vice President of U.S. Operations West Grady Reamer and Zenith’s Portland Terminal Manager JT Hendrix, along with Paul Phillips and Chris West from Pac/West, at the Zenith oil terminal site where they discussed Zenith’s operations, future plans, and “next steps.”⁸⁷ Notes from the July 2022 meeting—which were not disclosed on the record—at the Zenith facility show that all the major conditions in the 2022 LUCS approval were discussed at this meeting, over a month before Zenith formally submitted its LUCS application to BDS.⁸⁸ On August 3, 2022, a substantial number of City officials—including

⁸³ *Id.*

⁸⁴ It is important to acknowledge that the City’s *ex parte* rules for LUCS issuance, PCC 33.730.110B, permits *ex parte* communications between an applicant and BDS Director or Staff. However, the communications we are concerned with are those between Zenith officials and members of City Council staff and potentially DEQ staff, the body responsible for ensuring BDS acts appropriately.

⁸⁵ See “7.12.22 - Armstrong” ([Link](#)); see also “7.12.22 - Tallant” ([Link](#)).

⁸⁶ “7.13.22 - Schoene” ([Link](#)).

⁸⁷ See “7.22.22 - West” ([Link](#)); “8.2.22 Rubio” ([Link](#)); “8.4.22 - Reamer (Zenith VP)” ([Link](#)).

⁸⁸ See also “7.29.22 - Diefenderfer” ([Link](#)); see also “7.29.22 - Diefenderfer (transcription)” ([Link](#)).

Ryan, Rubio, their staffers, BPS staff, BDS staff, and City attorney Lauren King—met on Zoom for a “[f]ollow up from 7/29 Zenith Tour.”⁸⁹ Notes from this meeting have not been disclosed in response to records requests because of claimed attorney client privilege, but “Commissioner Ryan’s Office informed [public records staff] this was set up by Commissioner Rubio’s Office[.]”⁹⁰ The next day, August 4, 2022, Zenith’s Vice President of U.S. Operations West Grady Reamer emailed Commissioners Rubio and Ryan and staff members about the July 29 site visit, writing:

Zenith’s intent [is] to submit a new LUCS application and apply for a new lower-tiered air permit with DEQ that would replace the Title V permit that has governed the facility for over two decades. There are a lot of things that need to fall into place for this plan to happen and we hope we can continue to have an open dialog and a shared vision to meet our mutual goals.⁹¹

This email’s content and timing are strong evidence that the City and Zenith brokered an *ex parte* resolution to the existing LUCS dispute at Zenith’s physical site on July 29, 2022, or in the days immediately thereafter, without the involvement or notice to Columbia Riverkeeper or Willamette Riverkeeper. Given that the City and Zenith were still litigating the 2021 LUCS denial, it is highly unlikely that Zenith would submit a second LUCS covering much of the same content as the first if City officials had not signaled their support for Zenith’s plans. Although we are being denied full information about the site visit and the City’s follow up meeting, it is clear that the July 29, 2022 meeting at Zenith was a major turning point, after which the City worked diligently on Zenith’s behalf toward a LUCS approval even while litigation over the 2021 LUCS denial was ongoing, including collaboration on drafts of Zenith’s LUCS application with Zenith employees.⁹² In its March 2024 finding that Zenith violated the City’s lobbying rules, the Portland City Auditor specifically noted that extensive communications about a LUCS application prior to formal submission are not required and that BDS

⁸⁹ “8.2.22 - Rubio” ([Link](#)).

⁹⁰ “Public Records Request #C296770-080823 response” ([Link](#)). Again, this is highly significant because Commissioner Rubio and her staff were outside of the BDS chain of command under the City’s commission form of government. Additionally, a Commissioner and her staff who do not oversee the relevant bureau (BDS) coordinating with the agents of a party with whom the City is litigating against on a substantially similar matter is highly irregular. The records make it clear that Jillian Schoene was a main point of contact for Zenith in the City and a facilitator of the negotiated second LUCS.

⁹¹ “8.4.22 - Reamer (Zenith VP)” ([Link](#)).

⁹² See “8.4.22 - Reamer (Zenith VP)” ([Link](#)) (“[I]t is Zenith’s intent to submit a new LUCS application and apply for a new lower-tiered permit[.] There are a lot of things that need to fall into place for this plan to happen and we hope we can continue to have an open dialog and a shared vision to meet our mutual goals.”); see also “8.9.22 - West” ([Link](#)) (Pac/West discussing coordination with Jillian Schoene); see also “8.23.22 - Torres” ([Link](#)) (Grady Reamer from Zenith sends a draft LUCS application and adds “I will be participating in the Working Waterfront Coalition boat tour this Friday and can happily address any questions Commissioner Ryan might have.”); see also “9.1.22 - Schoene” ([Link](#)) (Schoene sent an email to City Attorney Lauren King asking “[s]o who tells Zenith to hold off until we give them the green light to send us officially the new LUCS?”); see also Attachment A.1, Breach Collective August 2022 Letter, 6-8.

Director Esau and BPS Director Oliveira “made clear that the communications involved in approving this specific LUCS went beyond what they considered the standard process.”⁹³

None of these communications were disclosed, and because LUCS applications are decisions requiring quasi-judicial procedures, these non-disclosures violated ORS 215.422(3). The available evidence also shows clearly that the formal LUCS review and determination that began on September 6, 2022, after Zenith’s submission of a second LUCS, was merely a formality for an intensely coordinated and prejudged outcome.

Prejudgment Bias

Oregon law—both common law and statutory schemas—is clear in its aim to ensure impartiality in local government decision making. The purpose of the impartiality requirement is to “counteract the ‘dangers of the almost irresistible pressures that can be asserted by private economic interests on local government.’”⁹⁴ Quasi-judicial decisions require “a tribunal which is impartial in the matter—i.e. having had no pre-hearing or *ex parte* contacts concerning the question at issue[.]”⁹⁵ “Impartiality can be destroyed in several ways, including acts of self-dealing, bias, and pre-hearing or *ex parte* contacts.”⁹⁶

There are two recognized categories of bias: prejudgment and personal interest.⁹⁷ Prejudgment bias invalidates quasi-judicial decisions where “actual bias” is established, which requires “explicit statements, pledges, or commitments that the local official has prejudged the specific matter before the tribunal.”⁹⁸ *Ex parte* contacts, similarly, may destroy impartiality, but not if those contacts “(1) were with disinterested persons, (2) amounted to an investigation of the merits of the proposed change, and ‘most importantly,’ (3) were made a matter of record so that the applicants had an opportunity to respond.”⁹⁹

As demonstrated in the August 21, 2022, letter to DEQ, the City engaged in a substantial degree of *ex parte* communication with Zenith well prior to and after the submission of the conditional LUCS, actively sought to keep these communications out of the public record through actions designed to prevent transparency, and publicly represented its process as being free of such communications while

⁹³ City Auditor Determination at 6, Attachment A.9

⁹⁴ *Columbia Riverkeeper v. Clatsop Cnty.*, 341 P3d at 803, citing *Eastgate Theatre v. Bd. of County Comm’rs*, 37 Or App 745 at 754 (1978).

⁹⁵ *Fasano v. Washington Co. Comm*, 264 Or 574, 588 (Or. 1973).

⁹⁶ *Columbia Riverkeeper v. Clatsop Cnty.*, 341 P3d 790, 800 n.11 (Or Ct App 2014) (emphasis added), citing 1000 *Friends of Oregon v. Wasco Co. Court*, 304 Or. 76, 81, 742 P2d 39 (1987), cert. den., 486 US 1007, 108 S Ct 1733, 100 LEd2d 197 (1988).

⁹⁷ 1000 *Friends of Oregon v. Wasco Co. Court*, 304 Or 76, 83 (Or 1987).

⁹⁸ *Columbia Riverkeeper v. Clatsop Cnty.*, 341 P3d at 808.

⁹⁹ *Columbia Riverkeeper v. Clatsop Cnty.*, 341 P3d at 802 (citing *Tierney v. Duris, Pay Less Properties*, 21 Or App 613, 629 (1975)). *See also*, ORS 215.422(3).

coordinating media strategy with Zenith. The record demonstrates that City officials functionally reached a decision to approve the new LUCS well before the formal LUCS submission; most likely on or immediately after the July 29, 2022, Zenith site visit. Subsequent *ex parte* communications and conduct by City officials, including providing Zenith with line edits to a draft of its LUCS application prior to submission,¹⁰⁰ telling Zenith to “hold off” on formal submission until agency alignment could be reached,¹⁰¹ and the City Attorney attempting to obtain “City/DEQ/Zenith alignment before submittal” of the formal LUCS¹⁰² further exhibit actual bias to approve the LUCS.

Willamette Riverkeeper and Columbia Riverkeeper’s intervention in the litigation to support the City’s 2021 LUCS denial provides a potential explanation for why City officials and Zenith pursued *ex parte* communications about the submission of a second LUCS application while litigation over the 2021 LUCS denial was still pending. That is, even though entering into settlement negotiations could have yielded a similar outcome, Columbia Riverkeeper and Willamette Riverkeeper would have been aware of and able to participate in those negotiations. Instead, by conducting and failing to disclose *ex parte* negotiations with Zenith, the conditions of the 2022 LUCS approval could be negotiated without the input or knowledge of either intervenor, and then submitted and approved expediently, preventing proper scrutiny from the public and interested parties.

The City’s *ex parte* communications with Zenith were not with a disinterested party, were not placed on the record of decision, and no other interested party was given notice of, or an opportunity to respond to, those communications. On the contrary, City officials frustrated disclosure of and transparency around these communications in multiple ways. As mentioned above, Jillian Schoene responded to public records requests by asserting that there were no notes from the July 29, 2022 tour of Zenith.¹⁰³ After the existence of written notes was discovered, Schoene’s name was apparently physically redacted then re-entered into the notes, without explanation.¹⁰⁴ At least one member of City staff gave instructions to leave Zenith out of subject headings in intra-City communications.¹⁰⁵ The City has refused, on the basis of attorney-client privilege, to disclose records of communications between City Attorney Lauren King and Zenith’s counsel and/or representatives, indicating that further *ex parte* communication between the City and Zenith exists beyond what has been disclosed in response to records requests.¹⁰⁶ The City was also asked directly by a journalist whether they were “aware of Zenith’s

¹⁰⁰ See “9.1.22 - Esau” ([Link](#)) (text of edits redacted by the City).

¹⁰¹ “9.1.22 - Schoene” ([Link](#)) (“So who tells Zenith to hold off until we give them the green light to send to us officially the new LUCS?”).

¹⁰² “8.30.22 - Armstrong” ([Link](#)).

¹⁰³ See “Public Records Request #C293791-072023 response” ([Link](#)).

¹⁰⁴ See “7.29.22 - Diefenderfer” ([Link](#)); see also “7.29.22 - Diefenderfer (transcription)” ([Link](#)); “8.8.23 - Caleb physical inspection of Diefenderfer notes from 7.29.22” ([Link](#)).

¹⁰⁵ See “9.26.22 - Guillen-Chapman” ([Link](#)) (“Topic, communication for Zenith’s revised LUCS, but for the subject heading only use “LUCS Communication.”).

¹⁰⁶ On Aug. 14, 2023, the City responded to a request of City attorney communications with Zenith’s attorneys by asserting exemptions to disclosure under ORS 192.355(9)(a) and incorporating ORS 40.225 (OEC 503(2)). For records

proposal prior to public announcement on September 15[, 2022],” and refused to respond directly.¹⁰⁷ Instead, the City responded on September 27 that “[t]he City is reviewing the submittal and will consider whether the proposal is consistent with the 2035 Plan.”¹⁰⁸ This response was communicated less than one week before the LUCS was issued, and after records show City officials were already discussing approval of the LUCS as a *fait accompli*. The extent to which City officials attempted to avoid transparency and withhold disclosure of *ex parte* communications regarding Zenith during the LUCS review and determination that began well before formal submission undermines any semblance that the 2022 LUCS approval was made impartially and is further evidence of prejudgment bias.

Evidence of Legal Error Exceeds the Low Threshold of 340-018-0050(2)(a)(C)

Petitioners need not provide DEQ with definitive proof of legal insufficiency because OAR 340-018-0050(2)(a)(C) authorizes the agency to act when a LUCS review and determination “may not be legally sufficient.” Regardless, Petitioners presented DEQ with substantial evidence that in its process to approve the LUCS—which functionally began well before Zenith’s formal submission—the City ignored a ruling from LUBA that required it to treat the LUCS as a quasi-judicial decision; conducted undisclosed *ex parte* negotiations with Zenith regarding the LUCS application, while actively litigating against Zenith over the same matter; blatantly disregarded legislated procedures for quasi-judicial decisions, and its own rules and standards; exhibited pre-judgment bias; attempted to withhold important information from the public; and otherwise acted arbitrarily and capriciously.¹⁰⁹ Given this pattern of behavior, it is reasonable to infer that there are likely additional *ex parte* communications that should have been disclosed on the record. Because the LUCS process and determination were legally insufficient, DEQ clearly has authority under OAR 340-018-0050(2)(a)(C) to deny Zenith’s permit application or remand the LUCS back to the City.

Again, these communications—including communications that occurred after Zenith’s submission of its LUCS application—were improperly withheld from the record, which is inherently contrary to quasi-judicial obligations required by ORS 215.422(3). Going further, these *ex parte* communications are indicative of a level of prejudgment bias that is not proper in quasi-judicial proceedings. Given that LUBA held that this LUCS determination requires compliance with quasi-judicial obligations, the lack of proper notice, the failure to include *ex parte* communications in the record, and the communications’

that suggest the content of these communications may not fall under attorney-client privilege, see, i.e., “9.1.22 - Esau” ([Link](#)) (labeling communications about *ex parte* Zenith negotiations as “Attorney-Client Communication”); “9.26.22 - BDS Update to Ryan” ([Link](#)) (acknowledging that negotiations with Zenith have been taking place outside of the context of settlement negotiations); “9.27.22 - King” ([Link](#)) (city attorney communicating directly with Zenith about a second LUCS outside of the context of settlement negotiations while litigation is ongoing). On Aug. 14, 2023, the City responded to a request of City Attorney communications with Zenith’s attorneys by asserting exemptions to disclosure under ORS 192.355(9)(a) and incorporating ORS 40.225 (OEC 503(2)).

¹⁰⁷ “9.27.22 - Weeke” ([Link](#)).

¹⁰⁸ *Id.*

¹⁰⁹ Community ACDP Letter August 21, 2023, Attachment A.1

demonstration of impermissible prejudgment bias, all weigh heavily in favor of a determination that the 2022 LUCS was legally insufficient.

ii. The Findings of a March 2024 Portland City Auditor’s Investigation Supports Petitioners’ Arguments that the City Failed to Adhere to its Own LUCS Precedent and Processes

A March 2024 investigation by the Portland City Auditor found that the draft LUCS and its accompanying letter were not required, likely intended to influence the outcome of the LUCS review and determination, and that interviews with BDS Director Esau BPS Director Oliveira “made [it] clear that the communications involved in approving this specific LUCS went beyond what they considered the standard process.”¹¹⁰ The results of this investigation are consistent with Petitioners’ arguments that the LUCS approval was not processed in the same manner as every other LUCS, and specifically, highlight how the extensive coordination prior to the submission of a formal LUCS is highly irregular. By recent admission of City bureau directors, the extensive coordination and communication between Zenith and the City fell well outside of a typical LUCS review and determination. Through its violation determination, the City Auditor becomes the second government body to call attention to the procedural abnormalities of the second LUCS review and determination, following a letter from the Multnomah County Commissioners to DEQ.¹¹¹ EQC should come to the same conclusion considering the evidence now before it.

iii. DEQ’s Narrow Interpretation of OAR 340-018-0050(2)(a) Is Not Supported By a Plain Language Reading of the Rule

Under DEQ’s acknowledged state agency coordination rule, requiring a LUCS is the primary method DEQ has chosen to ensure that permits are in compliance with statewide planning goals.¹¹² As part of the implementing regulations, DEQ maintains the authority to reject or remand applications that “may not be legally sufficient.”¹¹³

When interpreting administrative rules, the same analysis regarding statutory interpretation applies.¹¹⁴ At the first level of analysis, rules are examined for the agency’s intent in light of text and context and are given their plain language and meaning.¹¹⁵ “As is true with respect to a statute, terms of common usage

¹¹⁰ City Auditor Determination at 6, Attachment A.9

¹¹¹ See Multnomah County Letter to DEQ December 7, 2023, Attachment A.4 (“We agree with advocates that the Oregon Administrative Procedure, 340-018-0050(2)(a)(C), and the circumstances surrounding this facility warrant a rejection of the permit.”).

¹¹² Tualatin Riverkeeper v. Dep’t Environmental Quality, 55 Or LUBA 569, 582 (2008); OAR 340-18-0040(1) and (2).

¹¹³ OAR 340-018-0050(2)(a).

¹¹⁴ Haskins v. Palmateer, 186 Or App. 159, 166, 63 P3d 31 (2003).

¹¹⁵ State v. Hogevoll, 348 Or 104, 109, 228 P3d 569 (2010).

within the text of a rule generally should be given their plain, natural, and ordinary meaning unless specifically defined or used in some other way.”¹¹⁶ An agency is entitled to deference in interpreting its own rules if the interpretation is plausible.¹¹⁷ However, DEQ is not entitled to deference for its interpretation of OAR 340-18-0050 because the proffered explanation is not plausible based on the text and context of the rule.

Turning to the text of the rule, subsection (2)(a)(B) requires DEQ to “rely on an affirmative LUCS as a determination of compatibility.”¹¹⁸ This text supports DEQ’s position that they cannot independently review whether a local government has properly applied their *substantive* ordinances and land use planning goals when issuing the LUCS. However, under subsection (2)(a)(C), DEQ clearly has independent authority to review whether the LUCS review and determination may not be legally sufficient.¹¹⁹ While subsection (2)(a)(B) suggests that DEQ may not review the substantive determinations of a local government, subsection (2)(a)(C) grants DEQ the authority to review and deny LUCS determinations that are procedurally defective. Throughout their communications with Petitioners, DEQ appears to agree with this reading, but unreasonably and arbitrarily narrows its scope of procedural review beyond what the rule demands.

In its October 6, 2023 letter, DEQ cites two examples of when it considers whether a LUCS is “on its face legally insufficient”: (1) where there is a land use process that is incomplete or (2) where the activity described in the LUCS does not fully include the activity DEQ is permitting.¹²⁰ These examples show that DEQ uses its (2)(a)(C) authority to review LUCS determinations only for certain procedural defects. DEQ does not explain why these examples are the only possible scenarios in which the rule can apply, nor does it articulate any limiting principle or rationale why this authority does not apply in the present situation. Petitioners presented undisputed facial evidence of legal error during the LUCS approval, and DEQ refused to confront it.

A plain language understanding of “legally sufficient” suggests that the procedure used should, at the very minimum, be able to withstand a challenge to its compliance with local and state administrative law.¹²¹ The plain meaning of “legally sufficient” cannot support DEQ’s position that legal sufficiency review includes only a passive review of whether a LUCS “includes findings and a complete project description.”¹²² Under DEQ’s reading, the word “legally” is rendered meaningless, which does not

¹¹⁶ *Id.*

¹¹⁷ *Don’t Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142, 881 P2d 119 (1994).

¹¹⁸ OAR 340-018-0050(2)(a).

¹¹⁹ The term “legally sufficient” is not defined in OAR, nor is it defined in the enabling statute or in ORS 197.015, the definition section for Comprehensive Land Use Planning.

¹²⁰ DEQ Letter October 6, 2023, Attachment A.2.

¹²¹ In the evidentiary context, the term “legally sufficient” stands to mean that the outcome is more likely than not to be true, such as under Oregon Rule of Evidence 901, where proponents must make a *prima facie* showing asserting the authenticity of evidence before introducing it into the record.

¹²² DEQ Letter October 6, 2023, Attachment A.2.

comport with general maxims of statutory construction that dictate that a legislature (or in this case, an agency) presumptively does not intend language to be meaningless.¹²³ By using the modifier of “legally,” the rule implies that LUCS determinations shall be reviewed for errors as a matter of law, and as such, any decision should be subjected to some level of legal scrutiny. Where a court is reviewing for errors as a matter of law, it “view[s] the evidence, as supplemented and buttressed by permissible derivative inferences . . . [and] assesses whether, when so viewed, the record was legally sufficient to permit that outcome.”¹²⁴

Even if DEQ is entitled to conduct only a superficial review under normal circumstances, this interpretation is untenable in the present circumstance where Petitioners have presented DEQ with substantial evidence that the underlying LUCS determination was procedurally unlawful. In light of the present circumstances—where Petitioners have presented DEQ with substantial evidence that undermine the integrity of the LUCS review and determination—it is inappropriate for DEQ to limit its authority to review.

iv. DEQ’s October 2022 LUCS Evaluation Did Not Consider Full and Accurate Information

Evaluation of an incomplete record cannot serve as the basis for deciding whether a LUCS review and determination may not be legally sufficient. DEQ could not have conducted a proper evaluation of the 2022 LUCS because DEQ did not receive full information from the City of Portland. As described in Section II.B. and in more detail in the August 21, 2023, letter to DEQ, City officials suppressed evidence of legal insufficiencies, including failing to disclose *ex parte* communications. Internal communications between City officials and communications between City officials and Zenith were only made available after a sustained and costly public records request effort by journalists and advocates. Without this information, DEQ could not have properly considered full and accurate information of the City’s October 2022 LUCS process and determination. It was only after Petitioners sent evidence of legal insufficiency to DEQ that the agency could have conducted a proper review. DEQ’s unwillingness to reconsider the legal sufficiency of the LUCS now that it has been presented with new evidence is unreasonable under the circumstances.

Alternatively, if DEQ had information from July 12, 2022, regarding *ex parte* communications pertaining to the second LUCS *or* ongoing litigation, DEQ cannot arbitrarily refuse to consider the information because that record speaks directly to the legal sufficiency of the local government’s LUCS review and determination.

¹²³ ORS 174.010 & 174.020.

¹²⁴ Dept. of Human Servs. v. N.P., 257 Or App 633, 307 P3d 444 (2013).

v. **Exceptional Circumstances Warrant a Broader Interpretation of DEQ’s Authority Under OAR 340–018-0050(2)(a)(C)**

It is not unprecedented in Oregon’s recent history for state enforcement authorities to invoke previously overlooked or underutilized authority in novel ways when faced with exceptional circumstances. For example, in 2016, DEQ and the Oregon Health Authority asked Governor Kate Brown to invoke ORS 468.115 to issue a cease and desist order against Bullseye Glass.¹²⁵ To our knowledge, this section had never previously been invoked, but circumstances called for the novel use of existing authority to protect public health.

In another relevant example, DEQ took unprecedented action in regard to Zenith’s activities in 2021. In a 2021 letter from DEQ to Stoel Rives, the agency explained its rationale for requiring a new LUCS for Zenith’s Title V renewal permit:

DEQ acknowledges that, to the recollection of current DEQ staff, it has not required prior Title V permit holders to present a LUCS with applications for renewal of Title V permits. To the extent that DEQ’s present action differs from its past treatment of Title V permit renewals, *that change is the result of the specific facts of this case* which include significant changes to the volume of product passing through the facility, a change in the nature of the use of the facility, and changes and additions to the physical structures at the facility.¹²⁶

Like DEQ’s decision in 2021, the specific facts surrounding the City’s 2022 LUCS approval are exceptional and unprecedented, and call for a re-assessment of DEQ’s existing administrative authority in order to protect the public trust. The actions by the City and DEQ to this point have left the public with no opportunity to object to the LUCS and are clear attempts to avoid accountability.

Based on the evidence obtained through public records requests, the City of Portland devised a strategy with Zenith with the intent of avoiding transparency and public involvement to issue a second LUCS while the denial of a prior LUCS was being litigated. This included the City brazenly ignoring LUBA’s ruling that issuing a LUCS is a quasi-judicial decision imposing a number of procedural requirements,¹²⁷ and systematically avoiding disclosure of repeated *ex parte* communications, including to Columbia Riverkeeper and Willamette Riverkeeper, who were party-intervenors in support of the City in a lawsuit filed by Zenith. Both the City and DEQ have disclaimed any authority to ensure public oversight, pointing fingers at one another to be the accountable public body; the City refuses to hold a new LUCS

¹²⁵ Governor Brown did direct DEQ to issue a cease and desist order against Bullseye Glass. See <https://www.oregon.gov/deq/FilterDocs/DEQ-Bullseye-Letter.pdf>; see also “Gov. Kate Brown directs cease and desist order to Bullseye Glass,” *The Oregonian* (May 20, 2016), https://www.oregonlive.com/portland/2016/05/gov_kate_brown_directs_cease_a.html.

¹²⁶ Letter Re: Zenith Title V Renewal Permit from Nina DeConcini to Tom Wood (January 11, 2021) (emphasis added), Attachment A.8.

¹²⁷ *Zenith Energy Terminal Holdings LLC v. City of Portland*, *supra* note 35, LUBA No. 2021-083 at pages 25-26.

process, telling advocates to appeal to DEQ, and DEQ tells community groups to appeal the decision to LUBA, where a remedy is not available to Petitioners. Ultimately, the public deserves at least one institutional advocate who is transparent and accountable.

It does not take a legal professional to understand the seriousness of public officials—alongside their attorney—coordinating to undermine the law in this way.¹²⁸ The evidence shows that city officials were well aware of the significance of what they were doing, and specific officials engaged in clear efforts to hide the evidence of their involvement. This includes evidence that someone removed and then reinserted, without any claim of lawful authority to do so, Jillian Schoene’s name from written notes about a behind-closed-doors meeting at Zenith’s oil terminal, where all of the major conditions in the 2022 LUCS approval were discussed, over a month before Zenith formally submitted its LUCS application to BDS.¹²⁹ This was after Schoene responded to a public records inquiry by asserting that her office did not have any notes about Zenith related meetings, and that “no notes were taken” during the Zenith site visit.¹³⁰ It is likely that there is additional evidence of legal insufficiencies that City officials successfully suppressed. Regardless, the evidence uncovered through public records requests is an overwhelming demonstration of legal insufficiency and bad faith. The receipt of evidence of apparent public records tampering should be more than enough for DEQ to look more closely at the legal sufficiency of the City’s LUCS review and determination. It is very troubling that a state agency charged with protecting the public trust could be presented with this evidence and simply refuse to inquire further.

Given these specific facts, presented in great detail to the agency, DEQ’s complete unwillingness to look into this issue is striking. Considering the evidence that DEQ officials knew at least some of these specific facts through meetings with City officials, DEQ’s position appears insincere because it appeared to be working in concert with City and Zenith officials to avoid scrutiny. Petitioners currently have outstanding and twice-delayed public records requests to uncover what role DEQ played in negotiating this outcome between the City and Zenith. That request is currently pending legal review by DEQ. Public records obtained from City of Portland staff suggest that DEQ was at the very least informed

¹²⁸ This includes ignoring statutory mandates, as well as mandates stemming from judicial proceedings.

¹²⁹ See Community ACDP Letter August 21, 2023, at 4-5, Attachment A.1. After refusing to respond to initial inquiries about why this record was tampered with, the City responded to a Feb. 28, 2024 records request for an explanation for the redaction and reinsertion of “Jillian” with “[i]n an effort to fulfill your current request, we do have a response from the staff member: I crossed out/redacted a name because I don’t typically attribute notes to the person presenting or speaking in a a meeting. When the requestor came to see the original notes, I wrote the name I redacted back in (under the redaction), in response to the question about what was redacted.” Unfortunately, this response raises some concerns of City employee recordkeeping. Either City employees are actively obscuring who is participating in important City meetings, or bureau policy is empowering them to intentionally evade transparency. Either there is a systemic preference against transparency or there is something unique about the strategy of not attributing notes to a speaker. In either case, it is additional evidence of a concerted effort to evade transparency.

¹³⁰ Public Records Request #C293791-072023 response ([Link](#)) (“Please note, I spoke with the Chief of Staff for the Commissioner. She advised that they do not have any notes about there [sic] meetings. She also said during the tour no notes were taken either.”).

about meetings between City officials and Zenith staff, or was giving consultation directly before or after those meetings. Notes from the August 30, 2022 City-Zenith meeting explicitly state that the resubmission was due for September 1 and indicate that attorneys for Zenith, City, and DEQ should ensure alignment prior to the resubmission.¹³¹ It is unclear what “attorney alignment” means here, but it is certainly concerning if DEQ was playing a direct role in an application submission.

Zenith, faced with the very real possibility that its Title V air permit renewal application would be denied if the Oregon Supreme Court upheld the City’s denial of its 2021 LUCS, offered a path forward for City officials—to negotiate a second, conditional LUCS as a way of avoiding this outcome. Apparently motivated by the opportunity to claim credit for escorting a crude oil transloader into “renewable” fuels transloading, the City decided to ignore a LUBA decision and its own code—while conducting *ex parte* communications with a party it was litigating against—and failed to provide notice required by the LUCS process. These incredible facts are unprecedented in the City’s history of handling of LUCS applications, and clearly demonstrate why the residual protections of OAR 340-018-0050(2)(a)(C) exist and must apply in this circumstance.

B. The City’s Legal Insufficiencies Precluded Review at LUBA

By presenting its 2022 LUCS approval decision as a purely administrative matter with no right to public participation, the City precluded the public from participating in the manner required by its own Code, Comprehensive Plan, state statute, and Statewide Land Use Planning Goal 1. These procedural issues were exacerbated by extensive influence from *ex parte* contacts, which were only revealed via public records requests after the appeal window for the decision. These legal insufficiencies prevented public participation in the approval decision and warrant a DEQ denial or remand of the LUCS.

i. The City Failed to Follow the Appropriate Procedure or Provide the Required Notice, Prejudicing the Public’s Ability to Participate

The City erroneously chose to treat the LUCS as an administrative matter, failing to provide notice to nearby neighborhood associations or notifying the public of the procedure and any rights to appeal. When confronted about the failure to engage in the correct public process, the City misled interested parties by indicating that there was no right to appeal and that the correct venue for bringing complaints

¹³¹ 8.30.22 - Armstrong Meeting Notes ([Link](#)).

was DEQ.¹³² This prevented any potential petitioners from participating in the LUCS approval process or exhausting local appeal rights, requirements for LUBA to hold jurisdiction.¹³³

LUBA’s decision on Zenith’s first LUCS application and Portland City Code unequivocally require notice and the opportunity to participate in the LUCS process. In *Zenith v. City of Portland*, LUBA No. 2021-083, LUBA classified a LUCS decision as “quasi-judicial.”¹³⁴ The City was thus required to follow its own quasi-judicial procedures in processing the LUCS.

The City has four tiers of quasi-judicial decisions, ranging from Type I to Type IV. All of these tiers require some level of notice of an application request and of the decision.¹³⁵ State law also requires notice for quasi-judicial land use decisions.¹³⁶ Among other requirements, the notice of decision for all of these decision types must contain information on the local decision-making process and appeals process.¹³⁷

Despite these requirements, and despite undertaking a novel conditional LUCS (which was unprecedented), the City did not specify what procedure it was utilizing for processing Zenith’s LUCS.¹³⁸ The decision described the procedure simply as an “administrative decision” with no reference to city code or applicable procedures.¹³⁹ The City’s Comprehensive Plan describes administrative decisions as “those made under clear and objective standards without exercise of discretion Administrative decisions are typically made by City staff and are not individually reviewed against the goals and policies of the Comprehensive Plan.”¹⁴⁰ Typically, administrative decisions, like the application of clear and objective standards, describe the approval process for building

¹³² Statement by TJ McHugh, Representative of Commissioner Dan Ryan, [Email Record](#). (“Consistent with Oregon law and the Zoning Code, Zenith’s LUCS application was reviewed in the same manner as every other such application the City receives. There is no required notice or hearing on a LUCS application. The City does not establish new processes and procedures based on individual applications. It’s important to remember that the LUCS informs decisions by state agencies on whether to grant a permit to a business. In this case, Oregon’s Department of Environmental Quality (DEQ) will now consider the LUCS in its review of Zenith’s Air Contaminant Discharge Permit and Air Quality Permit, and there will be a regular DEQ public process with a written comment period and at least one public hearing as DEQ considers whether to grant those permits.”).

¹³³ ORS 197.825(2)(a); PCC 33.730.020.H (requiring local appeal within 14 days of Type II quasi-judicial decision).

¹³⁴ *Zenith Energy Terminal Holdings LLC v. City of Portland*, *supra* note 35, LUBA No. 2021-083 at 26.

¹³⁵ See PCC 33.720.014–031 (detailing quasi-judicial procedures for land use planning decisions by the City of Portland). Attachment C.

¹³⁶ ORS 197.797(2).

¹³⁷ PCC 33.730.070.

¹³⁸ October 2022 Notice of Decision, *supra* note 41. Attachment B.2.

¹³⁹ October 2022 Notice of Decision, *supra* note 41, at 9.

¹⁴⁰ Portland Comprehensive Plan at HTU-4 (May 2023). Compare with “discretionary review,” which “ involves judgment or discretion in determining compliance with the approval requirements. The review is discretionary because not all of the approval requirements are objective. That is, they are not easily definable or measurable. . . . Discretionary reviews must provide opportunities for public involvement.” PCC 33.800.020. Additionally, the City can only apply conditions to discretionary reviews, not administrative reviews. PCC 33.800.070. That the City applied a large list of conditions to its LUCS supports the conclusion that it was not simply an administrative review.

permits for construction¹⁴¹ or the application of a numerical setback standard from the applicable Zoning Code.¹⁴² As a decision that reviews an activity and use against the goals and policies of the Comprehensive Plan, a LUCS is not merely an administrative decision under the City's Code and Comprehensive Plan.¹⁴³

In direct contradiction with the City's own definitions and LUBA's classification of LUCS decisions, the City has continued to assert that its October 2022 LUCS decision was purely "administrative." This is also contrary to the heart of its argument to LUBA back in 2021.¹⁴⁴ In accordance with this portrayal of the LUCS decision, and without any legal support, the City has also continuously asserted that no notice was required for its decision.¹⁴⁵ The City has additionally represented that DEQ is the proper avenue for challenging the permit and that there is no recourse before the City. Together, these errors resulted in a legally insufficient process that prejudiced the public's right to participate in the process.

ii. The City's Procedural Errors Left the Public Without a Meaningful Opportunity to Appeal the Decision

Because of the lack of clarity and misdirection around the type of decision used, the public did not have a meaningful opportunity to appeal the City's LUCS decision locally or to LUBA. The City did not specify what procedure it was applying to the LUCS, and improperly informed interested parties that

¹⁴¹ See, e.g. ORS 197.810(10)(b)(B): A land use decision *is not* a city decision "That approves or denies a building permit issued under clear and objective land use standards".

¹⁴² 2035 Comprehensive Plan at 4.

¹⁴³ These procedural failures are also in violation of numerous Portland Comprehensive Plan policies. PCP Goal 2.D requires the City to "make[] it clear to the community who is responsible for making decisions and how community input is taken into account." Similarly, Policy 2.12 requires that the City "[e]stablish clear roles, rights, and responsibilities for participants and decision makers in planning and investment processes," and Policy 2.14 requires that "[a]t each stage of the process, [the City] identify which elements of a planning and investment process can be influenced or changed through community involvement." Finally, and most specifically, Policy 2.39 requires that the City "[n]otify affected and interested community members and recognized organizations about administrative, quasi-judicial, and legislative land use decisions with enough lead time to enable effective participation." The City improperly applied its own comprehensive plan while evaluating whether DEQ's action was in alignment with it.

¹⁴⁴ See, e.g., *Zenith Energy Terminal Holdings LLC v. City of Portland*, *supra* note 35, LUBA No. 2021-083 at pages 16-17 ("[T]he city takes the position that ORS 197.810(1)(b) and LCDC's implementing rules require the city to determine whether petition's use of the property is compatible with the relevant provisions of the city's comprehensive plan. Accordingly, the city argues, the fact that the use is allowed outright under the existing PCC does not foreclose the city from evaluating compatibility with the 2035 Plan.")

¹⁴⁵ See, e.g., Attachment A.7, Letter from Rebecca Esau, Director, BDS to Breach Collective et al. (Nov. 21, 2022), ("A LUCS is a form developed by state agencies to determine whether a state agency permit or approval, sought by a business, will be consistent with a local government's comprehensive plan and land use regulations. The applicable state agency determines when the LUCS is required. The City completes the LUCS as an administrative matter. Consistent with Oregon law and the City of Portland's Zoning Code, there is no required notice or hearing on a LUCS."); see also, Statement by TJ McHugh, Representative of Commissioner Dan Ryan, [Email Record](#).

no notice was required and that there was no opportunity to appeal. This prevented an ordinary appeals process and prejudiced the substantial rights of parties entitled to notice.

Under ordinary circumstances, a land use decision made without a hearing can be appealed by a “person adversely affected by the decision” within 21 days of “actual notice where notice is required.”¹⁴⁶ When no notice is required, a land use decision can be appealed within 21 days “of the date a person knew or should have known of the decision.”¹⁴⁷ These appeal deadlines must occur after any local appeals have been exhausted.

The 21 days for appeal under ORS 197.830(3)(a) are triggered when actual notice occurs. The 21-day deadline does not begin to run until the local government provides (1) the legally required written notice of decision or (2) a copy of the decision itself.¹⁴⁸ The City has asserted that no notice was required, rendering parties entitled to actual notice, i.e. the Linnton Neighborhood Association (which was entitled to notice because they are an adjacent neighborhood association under PCC 33.730.014 et. seq.) without the actual notice that would serve as an antecedent to appeal. Under PCC 33.730.070, this notice would have contained information on how, when, and to whom to appeal.

Alternatively, ORS 197.830(3)(b) applies only to parties who are not entitled to actual notice. These parties must be “adversely affected” and must appeal within 21 days of when they “knew or should have known” of the decision. A party is adversely affected when the decision “either applies to the person directly or affects the person’s interests in an adverse way.”¹⁴⁹ Because of the city’s failure to disclose its *ex parte* contacts, many of the adverse effects of the decision did not come to light until after the appeal window had closed. Many of the potential claims around improper process are related to documents obtained in public records requests that could not have been obtained within the 21 day LUBA appeal window.

Furthermore, despite the City eventually formalizing its process into a bounded LUCS review and determination, it is clear from the record that the City functionally began the process of strategizing and facilitating a second LUCS with Zenith as early as February 2022 and certainly by July 2022, well before a second LUCS application was submitted to BDS.¹⁵⁰ As mentioned above, meeting notes show that the City Attorney was coordinating alignment not only between the City and Zenith, but also potentially with DEQ,¹⁵¹ prior to Zenith’s submission of the second LUCS. This shows clearly that the formal

¹⁴⁶ ORS 197.830(3)(a).

¹⁴⁷ ORS 197.830(3)(b).

¹⁴⁸ Frymark v. Tillamook County, 45 Or LUBA 685, 696–97 (2003) (“ORS 197.830(3)(a) applies where the local government has committed a procedural error by failing to provide timely notice of its permit decision. . . . We now conclude that the “actual notice” referred to in ORS 197.830(3)(a) is provided only when the local government provides the written notice of decision that is required by law.”).

¹⁴⁹ Devin Oil Co., Inc. v. Morrow County, 275 Or App 799, 807, 365 P3d 1084 (2015).

¹⁵⁰ See section I.A. above.

¹⁵¹ “8.30.22 - Armstrong” ([Link](#)).

LUCS review and determination was just a formality after months of off-the-books negotiation and coordination. The City, Zenith, and DEQ had already arrived at the desired outcome without public consultation, and they simply needed to formalize their agreement. The *ex parte* communications between the City and Zenith from July to September are strong evidence that the City prejudged Zenith’s second LUCS submission—going so far as to play a pivotal role in structuring its contents and strategizing to ensure that DEQ would accept this process as legitimate.¹⁵² Given the City’s clear efforts at frustrating access to these communications, it is highly likely that there are further documents that would elucidate all of the details of this coordination. However, the evidence available is more than enough to demonstrate the City’s clear intent and action to prevent a process that would allow adequate participation from interested parties and the general public.

The failure to adhere to the City’s own procedure, provide notice, and provide information on the opportunity to appeal, are all legal insufficiencies in the LUCS approval process that left the public without a meaningful opportunity to appeal the decision. This further supports denial of Zenith’s ACDP or remand of the LUCS to the City.

C. DEQ’s Position that All Questions Surrounding the Legal Sufficiency of the 2022 Zenith LUCS Must Be Answered by LUBA is Unreasonable

DEQ claims that “[o]ne of the basic premises of DEQ’s state agency coordination program, and particularly its reliance on LUCS, is that the interpretation and application of local land use laws is primarily a responsibility of local governments,” and that all those who are adversely affected by a local land use decision can appeal to LUBA.¹⁵³ However, this statement of the state agency coordination program ignores DEQ’s role in vetting the legal sufficiency of a LUCS as part of the agency’s larger permitting responsibilities. It is unreasonable for DEQ to shift the responsibility for assessing legal sufficiency to LUBA when DEQ is the agency responsible for ensuring that permits are properly issued. In doing so, DEQ thwarts the public’s ability to review the City’s erroneous procedure while simultaneously facilitating a scenario in which the City evades substantive scrutiny. No reasonable interpretation of Oregon statutes or administrative rules supports DEQ’s view that all questions surrounding the legal sufficiency of a LUCS must be answered by LUBA.

DEQ need not, and should not, rely on a LUBA appeal to address these issues. The objectives of DEQ’s land use coordination program and clear rule language definitively authorize, and in fact obligate, DEQ to remand the LUCS to the City to address its legal insufficiencies. Further, DEQ is empowered to deny the permit altogether in light of the nature and seriousness of the City’s insufficiencies.

¹⁵² See section I.A. above; see also DEQ Letter October 6, 2023, Attachment A.2, at 3-8 for a more detailed timeline of events; see also “Public Records Timeline” at <https://shorturl.at/dpCMZ>.

¹⁵³ Attachment A.2, DEQ October 6, 2023 Letter, at 2.

Most LUCS approvals are specifically excluded from the definition of a land use decision and thereby outside of LUBA's jurisdiction.¹⁵⁴ Also excluded from LUBA's jurisdiction is the final state agency decision relying on a LUCS approval in most circumstances.¹⁵⁵ These provisions demonstrate that, contrary to DEQ's assertion, the agency has clear jurisdiction to evaluate the City's LUCS review and determination. These overlapping jurisdictional boundaries demonstrate that the legislature contemplated multiple avenues for petitioners to challenge LUCS determinations depending on the circumstances.

D. DEQ has the Authority to Act on Legal Insufficiencies in the LUCS Without LUBA's Intervention

Regardless of uncertain jurisdictional boundaries, DEQ is incorrect that a LUBA appeal is the *only* means by which the city's LUCS can be evaluated for legal insufficiencies. OAR 340-018-0050(2)(a)(C) very explicitly authorizes DEQ to either deny a permit or remand the LUCS decision to the local government for reconsideration if DEQ "concludes a local government LUCS review and determination may not be legally sufficient." Additionally, DEQ's coordination program has dispute resolution processes for addressing differences of opinions on LUCS decisions.¹⁵⁶ Neither of these avenues for contesting a local LUCS determination include any qualifications that limit this authority with regard to LUBA's jurisdiction.

This point is demonstrated by DEQ's own examples of instances when it has found LUCS to be legally insufficient in the past. In its October 6, 2023, letter to community organizations, DEQ wrote:

You have correctly cited another paragraph in that same rule, OAR 340-018-0050(2)(a)(C), which provides that DEQ may deny a permit application if DEQ "concludes [that a LUCS] may not be legally sufficient." DEQ occasionally relies upon that provision if, for example, DEQ receives a LUCS that on its face is legally insufficient, such as one that makes it clear there is still local government land use process yet to be completed before it is considered a final decision, or where the activity described in the LUCS does not fully include the activity being permitted by DEQ.¹⁵⁷

¹⁵⁴ ORS 197.015(10)(b)(H) [Attachment C]; McPhillips Farm, Inc. v. Yamhill Cnty., 256 Or App 402, 408–09, 300 P3d 299, 302–03 (2013) ("[T]he effect of ORS 197.015(10) and ORS 197.825(1) is to allow LUBA the authority to review the merits of a LUCS determination that a proposed state action is not compatible with local land use laws and to preclude such review of a LUCS determination of existing or potential compatibility, as described in ORS 197.015(10)(b)(H)(i), (ii)."); Bend Research, Inc. v. Deschutes County, 2022 WL 18354152, at *3 ("ORS 197.015(10)(b)(H) excludes from the definition of "land use decision" most, if not nearly all, LUCS decisions.")

¹⁵⁵ ORS 197.015(10)(e)(C)

¹⁵⁶ OAR 340-018-0020(8) defines a "land use dispute" that would warrant the dispute resolution process as "a difference of opinion between the Department and local government as to the compatibility of a Department land use action with the provisions of an acknowledged comprehensive plan."

¹⁵⁷ Attachment A.2, DEQ October 6, 2023 Letter.

Both of the examples cited in the above passage are also instances in which jurisdiction could still reside with LUBA, yet DEQ has chosen to return the decision to the local government. For example, if the LUCS does not fully describe the activity in a way that puts interested parties on notice, such an error could fall under LUBA's scope of review regarding decisions that "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner" and/or decisions that "improperly construed the applicable law."¹⁵⁸ And a LUCS that still requires local land use processes might, under DEQ's logic, also ultimately fall within LUBA's jurisdiction under a later appeal. But in both such instances, DEQ clearly believes it is appropriate for DEQ to deny a permit application. These examples demonstrate that DEQ can take action on the errors brought to its attention without LUBA's intervention at this stage.

The legal sufficiency of a LUCS is not defined in the rule or case law and must be viewed in the context of DEQ mandates and rules. The language of OAR 340-018-0050(2)(a)(C) is clear that DEQ's authority to remand the decision is broader than the examples provided by DEQ. The rule provides that, upon a determination of legal insufficiency, "when the applicant and local government express a willingness to reconsider the land use determination, the Department may hold the permit application in abeyance until the reconsideration is made." That DEQ may return the LUCS to the local government for "reconsideration" suggests more than the limited review DEQ provides as examples. "Reconsideration" suggests a substantive reevaluation of the details of the decision and process rather than simply waiting for local appeals to resolve.

Legal sufficiency must also be viewed in the context of why a LUCS is required in the first place: DEQ must ensure that its decisions are in compliance with the statewide land use planning goals and compatible with acknowledged comprehensive plans.¹⁵⁹ The mechanism through which DEQ does this is its state agency coordination program ("SAC").¹⁶⁰ Among other requirements, the SAC must provide procedures to assure goal compliance and compatibility with acknowledged comprehensive plans and a procedure for the resolution of land use disputes.¹⁶¹ Within its SAC, DEQ states its intent "to achieve goal compliance by relying on local government determinations of acknowledged comprehensive plan compatibility *to the degree possible*."¹⁶² This must be read in conjunction with the corresponding OAR requirement that the Department rely on affirmative LUCS determinations "unless otherwise obligated by statute."¹⁶³ This qualification recognizes that, in some circumstances, relying on local government determinations would not be sufficient to uphold the Department's ultimate duty to ensure compliance

¹⁵⁸ ORS 197.835(9)(a)(B), (D).

¹⁵⁹ ORS 197.180.

¹⁶⁰ Department of Environmental Quality, State Agency Coordination Program (Aug. 28, 1990), Available at DEQ: [Link](#).

¹⁶¹ OAR 660-030-0070(1).

¹⁶² Department of Environmental Quality, State Agency Coordination Program, *supra* note 160 at iv (emphasis added)

¹⁶³ OAR 340-018-0050(2)(a)(B).

with the land use goals and comprehensive plans under ORS 197.180. At minimum, remand to the City is proper and permissible.¹⁶⁴

DEQ has been presented with information that the City's decision "may not have been legally sufficient." Petitioners notified DEQ and provided evidence that the City failed to adhere to the process set forth by LUBA precedent and its own Code and Comprehensive Plan. DEQ's obligation to ensure its decisions are in alignment with land use laws require it to deny the permit or return the LUCS to the City to ensure legal sufficiency.

E. DEQ or EQC Should Deny Zenith's ACDP Instead of Remanding the 2022 LUCS to the City of Portland for Reconsideration

Under ORS 183.410, EQC can determine rulings of law as applied to a discrete set of facts. In light of the City's failure to follow legally required procedures in issuing the 2022 LUCS, along with unlawful non-disclosures and *ex parte* communications. Petitioners request that EQC make a declaratory ruling that the City's LUCS review and determination may not be legally insufficient. As a result, EQC should direct DEQ to reject the LUCS and ACDP. While DEQ and Zenith may argue that DEQ cannot reject the entire ACDP for an insufficient LUCS, OAR 340-018-0050(2)(a)(C) clearly states that, if DEQ "concludes a local government LUCS review and determination may not be legally sufficient, the Department may deny the permit application and provide notice to the applicant."

Although DEQ can hold the permit in abeyance until the applicant and the local government reconsider the LUCS, the nature of the unlawfulness in the 2022 LUCS process taints any subsequent proceedings. The evidence shows that the LUCS was prejudged without adequate process in a strategy intentionally designed to frustrate public involvement and prevent party-intervenors to litigation from interfering with the City and Zenith's desired outcome. As such, the City cannot be trusted to conduct a fair and unbiased process upon remand. At a minimum, any abeyance and remand should be conditioned upon the required disclosure of all *ex parte* communications, ensuring that these previous unlawful contacts are put on the administrative record.

¹⁶⁴ The language of OAR 340-018-0050(2)(a)(C) is clear that DEQ's authority to remand the decision is broader than the examples provided by DEQ. Upon a determination of legal insufficiency, "when the applicant and local government express a willingness to reconsider the land use determination, the Department may hold the permit application in abeyance until the reconsideration is made." Reconsideration suggests a substantive reevaluation of the details of the decision and process rather than simply waiting for local appeals to resolve.

III. Relief Sought

In light of the procedurally erroneous and unlawful issuance of the 2022 LUCS, Petitioners seek the following relief from EQC:

- (1) A declaratory ruling correcting DEQ's unreasonably narrow interpretation of its authority under OAR 340-018-0050 and its assertion that LUBA is the exclusive recourse for Petitioners.
- (2) A declaratory ruling acknowledging that the facts available to DEQ and now EQC exceed the low threshold needed to establish that the City's October 2022 LUCS review and determination "may not be legally sufficient" and directing DEQ to deny Zenith's ACDP. This relief is proper due to the extent of coordination between the City and Zenith in undermining the legal sufficiency of the LUCS review and determination, and the improbability that the City will process a remanded LUCS application in good faith.
- (3) In the alternative, a declaratory ruling acknowledging that the facts available to DEQ and now EQC are sufficient to establish that the City's LUCS review and determination "may not be legally sufficient" and remanding to the City to conduct a lawful quasi-judicial process provided the City and Zenith agree to disclose on the record all of their prior *ex parte* communications.