



Hearings Body Staff Report

Coos County Planning
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Date: Wednesday, November 25, 2020

File Number: AP-20-001 (Appeal of EXT-20-005)

Applicants: Pacific Connector Gas Pipeline, LP
c/o Perkins Coie LLP, Attn: Seth King
1120 NW Couch Street, Tenth Floor
Portland OR 97209

Appellants: Kathy Dodds Natalie Ranker
613 Central Ave, Apt 2 414 Simpson Ave
Coos Bay OR 97420 North Bend OR 97459

Planning Staff: If you have any questions regarding this matter please contact Jill Rolfe,
Planning Director.

Review Type: Appeal of an Application request for an Extension to a Conditional Use Permit

Decision: This extension request is approved Based on the information provided by the
applicant. The application has been extended to February 25, 2021

PROPERTY INFORMATION:

Account Number:
Map Number:
Property Owner: See Map at Attachment A

REVIEW AND CONCLUSION OF REQUEST:

Proposal: Request for Planning Director Approval for an extension of the expiration of a
Conditional Use Application, File Numbers HBCU-10-01/REM-11-01 (County
Order No. 12-03-018PL) approval pursuant to Coos County Zoning and Land
Development Ordinance (CCZLDO) § 5.2.600 Expiration and Extension of
Conditional Uses.

Original Application: The original application was for an approval for Nonresidential Development that
spanned multiple zoning districts.

Extension Request: On March 27, 2020 the extension request was received by the Planning
Department.

Applicable Statute: The applicable statute and/or local land use regulation that granted the use has not
been amended following the approval of the permit.

Reason for Additional Extensions: The applicant stated the reason for the extension was for additional time to obtain
necessary state and federal permits for the interstate natural gas pipeline that is the
subject of this County approval. These state and federal permits are prerequisites to
construction of the pipeline.

Background: On September 8, 2010, the County Board of Commissioners (Board) adopted and signed Final Order No. 10-08-045PL, approving Applicant's request for a conditional use permit authorizing development of the Pipeline and associated facilities, subject to certain conditions. The decision was subsequently appealed to, and remanded by the Oregon Land Use Board of Appeals (LUBA). On March 13, 2012, the Board addressed and resolved two grounds for remand, and approved findings supporting approval of the CUP for the Pipeline and associated facilities on remand in Final Order No. 12-03-018PL.

The applicant has been working toward obtaining all state and federal approvals necessary to initiate construction, however, the process is ongoing and it was found to be impossible to complete within the original two-year County approval period, Pacific Connector filed a request with the County on March 7, 2014 to extend its original land use approvals for two additional years (ACU-14-08). The Planning Director approved this request on May 2, 2014, pursuant to provisions of CCZLDO § 5.0.700. The Planning Director's decision was appealed on May 27, 2014 (AP-14-02).

On local appeal, the Board of Commissioners invoked its authority under CCZLDO § 5.0.600 to appoint a hearings officer to conduct the initial public hearing for the appeal and make a recommendation to the Board. After a public hearing, an extended open record period for written evidence and testimony, and final written argument from the applicant, the Hearings Officer issued his Analysis, Conclusions and Recommendations to the Board of Commissioners, recommending approval of the application on September 19, 2014. In light of limitations contained in OAR 660-033-0140 applicable to extensions in farm- and forest-zoned lands, the Hearings Officer recommended approving the extension request for only one year, extending the conditional use permit approval from April 2, 2014 to April 2, 2015.

The subsequent applications were submitted:

- March 16, 2015, Pacific Connector filed a request for a second extension of the land use approvals for the original Pipeline alignment. File No. ACU-15-07. Staff reviewed the matter, deemed the application complete on April 8, 2015, and the Planning Director rendered a decision approving the extension request on April 14, 2015. The approval was appealed on April 30, 2015. File No. AP-15-01. After a hearing before a County Hearings Officer, the Hearings Officer issued a written opinion and recommendation to the Board of Commissioners that they affirm the Planning Director's decision granting the one year extension to April 2, 2016. On October 6, 2015, the Board adopted the Hearings Officer's recommended decision and approved the requested extension in Final Decision No. 15-08-039PL. The Board of Commissioners' approval of Pacific Connector's second extension request was not appealed to LUBA, and that decision is final.

- March 16, 2016 the applicant's attorney filed for an extension and it was approved on April 5, 2016 (ACU-16-013). This decision was not appealed and was valid until April 2, 2017.
- March 3, 2017 the applicant's attorney submitted a subsequent extension as the applicant (EXT-17-05) that was approved granting an extension to the effective time to April 2, 2018.
- March 30, 2018, prior to the expiration date (EXT-18-003) another extension was filed and staff issued an approval which was appealed (County File Nos. AP-18-002/EXT-18-003). A hearing was held and a recommendation was made to the Board of Commissioners. The Board of Commissioners reviewed the recommendation and made a final decision to approve the extension to April 2, 2019 Final Decision NO 18-11-073PL. Opponents appealed this decision to the Land Use Board of Appeals. The County staff received the LUBA decision on April 25, 2019 affirm the county's decision. The appellant filed an appeal of the LUBA decision to the Court of Appeals and on August 7, 2019 the Court of Appeals affirmed LUBA's decision without opinion, *Williams et v. Coos County*, 298 OR App 841 (2019).
- October 2, 2018, Coos County updated the zoning ordinance to incorporate extension language to follow OAR 660-033-0140 permit expiration dates for any permit that is subject to Farm and Forest Zones. The County was appealed on this text amendment. An appeal was filed to the Land Use Board of Appeals regarding the amendments. The Land Use Board of Appeals rendered a decision affirming the county's decision to amend the text of the CCZLDO, *McCaffree v. Coos County*, 2018-132. A subsequent appeal was filed with the Court of Appeals and the Court of Appeals affirmed LUBA's decision without opinion on September 11, 2019.
- March 28, 2019, A subsequent extension was received (EXT-19-004) extension request was received by the Coos County Planning Department via email followed by a hardcopy on March 29, 2019. The applicant requested decisions on extensions be processed as a land use decisions. The County decided in this situation that there may be discretion applied and; therefore, chooses to be conservative in their approach and provide a notice of decision and opportunity to appeal. An appeal was filed on this application on this application and final decision rendered approving the extension application on November 26, 2019. This was not further appealed.
- March 27, 2020, A subsequent extension request was received (EXT-20-001) on the appropriate form with correct fee. A notice of decision was not rendered on this matter until September 3, 2020; however, there was a mistake (the date of notice was missing) and a new notice was mailed and posted on September 24, 2020. The current appeal was filed timely and did include the correct fee.

APPELLANTS ARGUMENT:

- Appeals stated it is unclear if the application materials were received before the expiration of the permits and in the proper form.
- The County violated the acknowledged CCZLDO 5.2.600 and the rule it implements. The director misconstrued the applicable code provision and rule and interpreted the code provision inconsistently with the code provision it adopted with the State rule OAR 660-003-140 it implements.
- The county violated the CCZLDO 5.0.500 when it failed to deem the permit automatically revoked due to the inconsistencies of the pipeline project proposed in the HDD alignment the county approved in December 2019.

File Number: Appeal AP-20-001 of Extension EXT-20-005

- The county erred in determining that the applicant was unable to begin development during the approval period for reasons for which the applicant was not responsible.
- The director's decisions misconstrue LUDO 5.2.600(2)&(3) and the record does not otherwise support a finding of compliance.
- There is insufficient evidence in the record to support the director's decision that the applicable criteria for the original decision has not changed.
- The extensions continue to impose a taking of the property of the landowners along the alignments through inverse condemnation. The county is aware that the landowners have not consented to this application. The county is aware that the applicant may not and for some segments will not obtain federal approval to build the pipeline proposed, and does not intend to initiate development for years. The county is aware that the permit constitutes a cloud over the land owners ability to sell and fully use their property. The county must prevent further damage to the landowners by denying the extension and inviting the applicant to reapply when it knows what alignment FERC will approve.

The appellants further explanation of the issues: (Copied directly from submittal)

The county's decision states: "The applicant has provided a reason that prevented the applicant to continue development which was based on obtaining permits from other agencies. Therefore, the reason the development cannot continue is that it requires additional state and federal permitting to be completed. This is necessary to comply with the conditions of approval placed on the application by the County and to comply with federal law."

Yet the county knows that the applicant has no intent to obtain state permits. The county knows the applicant has admitted that it need not obtain state permits. The county may not approve an extension of a permit that is conditioned upon the applicant obtaining state permits when it has admitted and the evidence is that it will not seek the permits.

Said another way, the applicant has misrepresented that it is "obtaining permits" from other agencies, including state agencies. The applicant has not only not been diligent in "obtaining permits," it has unilaterally determined that it does not need them. So, PCGP is responsible for the delay.

The permits the applicant is "obtaining" will not cure the default because they will not be obtained within the "current" approval period. And, PCGP will also be unable to initiate any development within the extension period and, likely, for years to come, if at all, because it needs access to the land and that will be vigorously contested and is not likely to occur before February 25, or April 2, 2021.

To the extent the director interprets the provision differently, the director misconstrues the provision. It's aim is to require diligence in exercising permitting rights and not to allow the avoidance of the county's legitimate police and land use powers to regulate the uses of land by extending old decisions that may no longer be valid due to changes in legislation or other circumstances.

Applicable Coos County Zoning and Land Development Ordinance Sections:

SECTION 5.2.600 EXPIRATION AND EXTENSION OF CONDITIONAL USES

(1) *Permits approved under ORS 215.416 for a proposed residential development on agricultural or forest land outside of an urban growth boundary under ORS 215.010 to 215.293 or 215.317 to 215.438 or under county legislation or regulation, the permit is valid for four years.*

a. *Extensions for Residential Development as provided for under ORS 215.213 (3) and (4), 215.284, 215.317, 215.705 (1) to (3), 215.720, 215.740, 215.750 and 215.755 (1) and (3) shall be granted as follows:*

i. *First Extension - An extension of a permit for “residential development” as described in Subsection (1) above is valid for two (2) years.*

1. *The applicant shall submit an application requesting an extension to the County Planning Department prior to expiration of the final decision. See Section 5.0.250 for time lines for final decisions. Untimely extension requests will not be processed.*

2. *Upon the Planning Department receiving the applicable application and fee, staff shall verify that the application was received within the deadline and if so issue an extension.*

3. *An extension of a permit as described in this section is not a land use decision as defined in ORS 197.015.*

ii. *Additional Extensions - A county may approve no more than five additional one-year extensions of a permit if:*

1. *The applicant submits an application requesting the additional extension prior to the expiration of a previous extension;*

2. *The applicable residential development statute has not been amended following the approval of the permit; and*

3. *An applicable rule or land use regulation has not been amended following the issuance of the permit, unless allowed by the county, which may require that the applicant comply with the amended rule or land use regulation.*

4. *An extension of a permit as described in this section is not a land use decision as defined in ORS 197.015.*

RESPONSE: A portion of this application request crosses agricultural and forest lands outside of an Urban Growth Boundary but this is not for residential development. Therefore, this criterion is not applicable to the request.

(2) *Permits approved under ORS 215.416, except for a land division and permits described in Subsection (1)(a) of this section, for agricultural or forest land outside an urban growth boundary under ORS 215.010 to 215.293 and 215.317 to 215.438, or under county legislation or regulation adopted pursuant thereto, are void two years from the date of the final decision if the development action is not initiated in that period.*

a. *Extensions for Non-Residential Development as described in Subsection (2) above may be granted if:*

i. *The applicant submits an application requesting an extension to the County Planning Department prior to expiration of the final decision. See Section 5.0.250 for time lines for final decisions.*

- ii. *The Planning Department receives the applicable application and fee, and staff verifies that it has been submitted within the deadline;*
 - iii. *The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and*
 - iv. *The county determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.*
- b. *An extension of a permit as described in this section is not a land use decision as defined in ORS 197.015.*
 - c. *Additional one-year extensions may be authorized where applicable criteria for the original decision have not changed, unless otherwise permitted by the local government.*

RESPONSE: According to Final Decision and Order No. 19-11-069PL (not appealed) the prior extension extended the approval date to April 2, 2020. The applicant submitted via email the application for extension on March 27, 2020 and made payment via credit card on March 25, 2020 (see the application at Attachment B). This is proof that the applicant submitted the application in proper form with the correct fee which addresses appellant's first issue.

The application request was for a non-residential use and a portion of the project crosses agricultural and forest lands. The applicant provided an application request on a County application prior to the final expiration. The fee was provided with the applications and Staff verified that the request was timely filed.

Staff made a finding that the applicant has provided a reason that prevented the applicant to continue development which was based on obtaining permits from other agencies. Therefore, the reason the development cannot continue is that it requires additional state and federal permitting to be completed. This is necessary to comply with the conditions of approval placed on the application by the County and to comply with federal law. The appellants seem to be arguing that the "county knows that the applicant has no intent to obtain state permits". The County has no such evidenced before them to make such a conclusion. Pacific Connector Gas Pipeline filed for Coastal Consistency (State Permits) and were denied but have filed an appeal that is pending through the Department of Commerce; see Attachment C regarding the notice of appeal. Furthermore, the appellants seem to speculating that the county can somehow make a finding that even if the appeal is granted that it should not be considered because the applicant could not begin the project by February or April of 2021. This argument does not seem developed enough for staff to completely respond to but maybe the appellant can elaborate in their testimony.

Extensions may be authorized where applicable criteria for the original decision have not changed that would require a denial of the application. Such criteria have not changed in this case. In order to provide the most transparency to the public of this high-profile project, the applicant has requested that this application be processed as a land use decision with notice and an opportunity for appeal. Although this additional process is not required by this section, the County has, as a courtesy, agreed to applicant's request. The appellants have argued there is no evidence to support the applicable criteria. There have been no changes to any of the language that permitted the pipeline. The ordinances have transitioned over the

year from text to tables but the relevant criteria have not changed. If the appellants would like to show staff where they think the relevant criteria has changed then staff is will review.

(3) On lands not zoned Exclusive Farm, Forest and Forest Mixed Use:

- a. All conditional uses for residential development including overlays shall not expire once they have received approval.*
- b. All conditional uses for nonresidential development including overlays shall be valid for period of five (5) years from the date of final approval.*
- c. Extension Requests:*
 - i. All conditional uses subject to an expiration date of five (5) years are eligible for extensions so long as the subject property has not been:*
 - 1. Reconfigured through a property line adjustment that reduces the size of the property or land division; or*
 - 2. Rezoned to another zoning district in which the use is no longer allowed.*
- d. Extensions shall be applied for on an official Coos County Planning Department Extension Request Form with the fee.*
- e. There shall be no limit on the number of extensions that may be applied for and approved pursuant to this section.*
- f. An extension application shall be received prior the expiration date of the conditional use or the prior extension. See section 5.0.250 for calculation of time.*

RESPONSE: The application request was for a non-residential use and a portion of the project crosses lands that are not zoned farm or forest. Conditional uses are valid for a period of five years and are eligible for extensions. The only standards related to extensions under this subsection are that the properties have not been reconfigured, divided or rezoned to a zoning that would prohibit the use. No such reconfiguration, division, or rezoning has occurred in this case. The extension was submitted on official form with the fee. There are no limits to the number of extensions and the extension was received prior to the expiration date. Therefore, there are no reasons not to grant the extension request as submitted.

(4) Changes or amendments to areas subject to natural hazards^[2] do not void the original authorization for a use or uses, as they do not determine if a use can or cannot be sited, but how it can be sited with the least amount of risk possible. Overlays and Special Development Considerations may have to be addressed to ensure the use can be sited with an acceptable level risk as established by Coos County.

RESPONSE: The application acknowledges this requirement. Therefore, the extension has been granted.

Other issues raised:

- The County violated the acknowledged CCZLDO 5.2.600 and the rule it implements. The director misconstrued the applicable code provision and rule and interpreted the code provision inconsistently with the code provision it adopted with the State rule OAR 660-003-140 it implements.

- The county violated the CCZLDO 5.0.500 when it failed to deem the permit automatically revoked due to the inconsistencies of the pipeline project proposed in the HDD alignment the county approved in December 2019.
- The director's decisions misconstrue LUDO 5.2.600(2)&(3) and the record does not otherwise support a finding of compliance.
- There is insufficient evidence in the record to support the director's decision that the applicable criteria for the original decision has not changed.
- The extensions continue to impose a taking of the property of the landowners along the alignments through inverse condemnation. The county is aware that the landowners have not consented to this application. The county is aware that the applicant may not and for some segments will not obtain federal approval to build the pipeline proposed, and does not intend to initiate development for years. The county is aware that the permit constitutes a cloud over the land owners' ability to sell and fully use their property. The county must prevent further damage to the landowners by denying the extension and inviting the applicant to reapply when it knows what alignment FERC will approve.

RESPONSE: The appellants do not offer any argument to most of these statements to allow staff to respond. Some of these seem to be a repeat of prior arguments. However, given that the extension criteria was updated to coincide with the last legislative changes (2019 Session) to farm and forest dwellings there have been some modifications and some of the issues may be treated as new issues. Staff does believe if the appellants felt that the modifications were in conflict with any of the Oregon Administrative Rules (OAR) then the County Ordinance that adopted the provisions should have been appealed and should not be raised through an extension application. Furthermore, the appellant cites to OAR 660-003-140 but this seems to be a mistake. OAR 660 Division 3 is the procedures for review and approval of compliance acknowledgement request and staff can only make assumptions this is an attempt to argue the county failed to go through an acknowledgment process, which is a false statement.

The county violated the CCZLDO 5.0.500 when it failed to deem the permit automatically revoked due to the inconsistencies of the pipeline project proposed in the HDD alignment the county approved in December 2019.

Section 5.0.500 "Submission of any application for a land use or land division under this Ordinance which is inconsistent with any previously submitted pending application shall constitute an automatic revocation of the previous pending application to the extent of the inconsistency. Such revocation shall not be cause for refund of any previously submitted application fees."

In order for this to be a valid argument there has to be a pending application on the subject properties and the only portion that would be revoked would be the portion of the application found to be inconsistent, this provision does not revoke the entire application. The Appellants fails to explain how the decision made in December is inconsistent and to what extent it would be inconsistent with the pending extension.

The director's decisions misconstrue LUDO 5.2.600(2)&(3) and the record does not otherwise support a finding of compliance. This argument is not developed in a manor sufficient enough

to allow staff to respond. Staff provided an explanation and cited to the application as evidenced to support the argument.

The last issue raised “extensions continue to impose a taking of the property of the landowners along the alignments through inverse condemnation” was addressed in Final Decision and Order No. 19-11-069PL and unless there is a new argument this issue was addressed.

Attachments:

A – Map of Pipeline

B – Application

C – Federal Consistency Appeal by Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP

D – Appeal