NOW BEFORE THE Board of Commissioners sitting for the transaction of County business on the 19th day of December, 2017, is the matter of the appeal of the Planning Director's May 18, 2017, decision granting Pacific Connector Gas Pipeline, LP's (hereinafter the "Applicant") application for approval of an extension to a conditional use approval for the construction and operation of a natural gas pipeline to provide gas to Jordan Cove Energy Project's liquefied natural gas (LNG) terminal and upland facilities.

The Board of Commissioners invoked its authority under the Coos County Zoning and Land Development Ordinance (CZLDO) §5.0.600.4 to pre-empt the appeal process and appoint a Hearings Officer to conduct the initial public hearing for the application and then make a recommendation to the Board of Commissioners. The Board of Commissioners appointed Andrew H. Stamp to serve as the Hearings Officer.

Hearings Officer Stamp conducted a public hearing on this matter on August 25, 2017. At the conclusion of the hearing the record was held open to accept additional written evidence and testimony. The record closed with final argument from the Applicant received on September 22, 2017.

Hearings Officer Stamp issued his Analysis, Conclusions and Recommendations to the Board of Commissioners on October 20, 2017. Staff presented some revisions to the Findings of Fact; Conclusions of Law and Final Decision for the Board of Commissioners to consider.
The Board of Commissioners held a public meeting to deliberate on the matter on November 21, 2017. All members present and participating unanimously voted to tentatively accept the decision of the Hearings Officer, and continued the final decision on the matter to allow staff to draft the appropriate order and findings. The meeting was continued to December 5, 2017, for final approval.

On December 5, 2017, the meeting on deliberation was reopened to provide an additional opportunity to the Board of Commissioners to declare any potential ex-parte contacts or conflicts of interest. Commissioner John Sweet revealed two potential ex-parte communications and those present were allowed to challenge and rebut the substance of Commissioner Sweet’s disclosure. The deliberation was then continued to December 19, 2017, for final adoption and signatures.

NOW, THEREFORE, the Board of Commissioners, having reviewed the Hearings Officer’s Analysis, Conclusions and Recommendation, the arguments of the parties, and the records and files herein,

IT IS HEREBY ORDERED that the Planning Director’s May 18, 2017, decision granting Pacific Connector Gas Pipeline, LP’s (hereinafter the “Applicant”) application for approval of an extension to the conditional use approval for the construction and operation of a natural gas pipeline is affirmed, and the Board further adopts the Findings of Fact; Conclusions of Law, and Final Decision attached hereto as “Exhibit A” and incorporated by reference herein.

ADOPTED this 19th day of December 2017.

BOARD OF COMMISSIONERS:

[Signatures]

[Signatures]

[Signatures]

[Signatures]

Page 2
Order 17-11-064PLi
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION OF THE COOS COUNTY BOARD OF COMMISSIONERS

PACIFIC CONNECTOR GAS PIPELINE
(APEAL OF A SECOND EXTENSION REQUEST FOR COUNTY FILE NO. HBCU 10-01 / REM 11-01)
COOS COUNTY, OREGON

FILE NO. AP 17-004 (APEAL OF COUNTY FILE NO. EXT-17-005).

DECEMBER 19, 2017

EXHIBIT A
I. INTRODUCTION

A. NATURE OF THE LOCAL APPEAL

The appellant challenges the Planning Director’s decision to allow the applicant Pacific Connector Gas Pipeline, LP, (hereinafter the “Applicant,” “Pacific Connector,” or “PCGP”), an additional one-year extension on its development approval, to April 2, 2018.

B. CASE HISTORY

In 2010, Pacific Connector submitted a land use application seeking development approval to construct and operate a natural gas pipeline to provide gas to Jordan Cove Energy Project’s liquefied natural gas (LNG) terminal and upland facilities. As established in Pacific Connector’s original land use application and subsequent proceedings, the Pipeline is within the exclusive siting and authorizing jurisdiction of the Federal Energy Regulatory Commission (FERC), requiring a FERC-issued Certificate of Public Convenience and Necessity (Certificate) prior to construction. Under the federal Coastal Zone Management Act, however, a land use consistency determination is also required within the state’s Coastal Zone Management Area (CZMA), precipitating Pacific Connector’s application for local land use approvals, including the 2010 application to Coos County.

On September 8, 2010, the County Board of Commissioners (Board) adopted and signed Final Order No. 10-08-04SPL, approving Applicant’s request for a CUP 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 from 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 March 13, 2012 decision became final when the 21-day appeal window expired and no appeals were filed on April 2, 2012. The 2010 and 2012 approvals are referred to collectively as the CUP. The CUP authorizes construction and operation of a natural gas pipeline and associated facilities on approximately 49.72 linear miles within Coos County, extending from Jordan Cove Energy Project’s LNG Terminal to the alignment section in adjacent Douglas County.

Over the past several years, Pacific Connector has been pursuing the necessary approvals for the Pipeline. Pacific Connector received a FERC Certificate on December 17, 2009. Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project, LP, 129 FERC ¶ 61, 234 (2009). However, due to changes in the natural gas market and Jordan Cove’s reconfiguration of its facility from an LNG import facility to an LNG export facility, FERC issued an order on April 16, 2012 vacating Pacific Connector’s Certificate despite objections of Pacific Connector. Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project, LP, 139 FERC ¶ 61,040 (2012) (attached as Exhibit D).

Due to FERC’s decision to revoke Pacific Connector’s FERC Certificate, it was necessary for Pacific Connector to seek new FERC approval for the Pipeline as reconfigured to serve Jordan Cove’s proposed LNG export facility. In June 2012, Pacific Connector initiated the

On November 7, 2014, FERC issued a Draft Environmental Impact Statement (DEIS) for the Pipeline, with public comment held open until mid-February 2015. FERC’s revised schedule for the project indicated that completion of the Final EIS was scheduled for June 12, 2015, with a FERC decision on Pacific Connector’s application expected by September 10, 2015. Notice of Revised Schedule for Environmental Review of the Jordan Cove Liquefaction and Pacific Connector Pipeline Projects; Jordan Cove Energy Project, LP, Docket No. CP13-483-000; Pacific Connector Gas Pipeline LP, Docket No. CP13-492-000 (Feb. 6, 2015).

Pacific Connector’s CUP originally contained a condition which prohibited the use of the CUP “for the export of liquefied natural gas” (Condition 25). After the initial FERC authorization for the Pipeline was vacated due to the reconfiguration of the Jordan Cove facility, Pacific Connector applied to Coos County on May 30, 2013 for an amendment to the CUP requesting deletion or modification of Condition 25 as necessary for the use of the Pipeline to serve the Jordan Cove LNG export facility. After a revised application narrative was submitted, the application was deemed complete on August 23, 2013, and the County provided a public hearing before a Hearings Officer. On February 4, 2014, the Board adopted the Hearings Officer’s decision and approved Pacific Connector’s requested modification of Condition 25. Final Order No. 14-01-006PL, HBCU-13-02 (Feb. 4, 2014).

Project opponents appealed the County’s Condition 25 Decision to LUBA, which upheld the County decision. McCaffree et al. v. Coos County et al., 70 Or LUBA 15 (2014). After further appeal of the LUBA decision, the Oregon Court of Appeals affirmed LUBA’s decision without opinion. McCaffree v. Coos County, 267 Or App 424, 341 P3d 252 (2014).

Meanwhile, in light of the withdrawal of its FERC Certificate and the consequent impossibility of obtaining all federal approvals necessary to initiate construction within the original two-year County approval period, Pacific Connector filed a request with the County on March 7, 2014 to extend its original CUP approval for two additional years. 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 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, Hearings Officer Andrew Stamp issued his Analysis, Conclusions and Recommendations to the Board, 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 CUP approval from April 2, 2014 to April 2, 2015.
The Board held a public meeting to deliberate on the matter on September 30, 2014. At the hearing, the Board voted to accept the Hearings Officer’s recommended approval as it was presented. On October 21, 2014, the Board adopted its decision approving an extension of Pacific Connector’s conditional use approval for one year, until April 2, 2015.

On November 12, 2014, Jody McCaffree and John Clarke (Petitioners) filed a Notice of Intent to Appeal the Board’s decision to LUBA. On January 28, 2014, the deadline for Petitioners to file their Petition for Review, Petitioners instead voluntarily withdrew their Notice of Intent to Appeal, and LUBA dismissed Petitioners’ appeal. McCaffree v. Coos County, ___ Or LUBA ___. LUBA No. 2014-102 (Feb. 3, 2015). Accordingly, the Board’s decision to extend Pacific Connector’s conditional use approval until April 2, 2015 is final and not subject to further appeal.

On 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 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. Final Decision No. 15-08-039PL. The Board’s approval of Pacific Connector’s second extension request was not appealed to LUBA, and that decision is final.

On March 11, 2016, FERC issued an Order denying PCGP’s application for a certificate of public convenience and necessity. Nonetheless, on March 16, 2016, the applicant’s attorney filed for a third extension and it was approved on April 5, 2016 (ACU-16-013). This decision was not appealed and was valid until April 2, 2017.

The FERC Order issued on March 11, 2016 was made “without prejudice,” which means that PCGP can file again if it wishes to do so. See FERC Order dated March 11, 2016 at 21. On April 8, 2016, PCGP filed a request for a rehearing to FERC. FERC issued a denial of that request on December 9, 2016.

PCGP promptly filed a Request for Pre-Filing Approval on January 23, 2017. See Exhibit C to Perkins Coie’s September 8, 2017 letter. FERC approved that request on February 10, 2017. Id

The Applicant’s attorney submitted PCGP’s fourth extension request on March 30, 2017 (County File No. EXT-17-005), prior to the expiration of the prior extension approval. A notice of decision approving the extension was mailed on May 18, 2017. An appeal was filed on June 2, 2017 which was within the appeal deadline. On August 25, 2017 the public hearing was held on this matter. Subsequent written testimony was received until September 15, 2017. The applicant’s final argument was received on September 22, 2017. On October 20, 2017, the County Hearings Officer issued his recommended order that the Board approve the Applicant’s request. On November 21, 2017 the Board of Commissioners held a public hearing to review the
Hearings Officer decision and deliberate on the matter. The Board of Commissioners made a tentative decision and instructed staff to draft the order and findings incorporating the Hearings Officers recommendation for final adoption. The Board generally accepts the Hearings Officer’s recommendation and affirms the staff decision for the reasons explained below.

II. LEGAL ANALYSIS.

A. Criteria Governing Extensions of Permits.

Once a development approval has been granted, as happened in this case, an extension may or may not be allowed, based on the criteria found in CCZLDO § 5.2.600. Under the terms of CCZLDO § 5.2.600, the Planning Director may approve extension requests as an Administrative Action under the local code. Extension decisions are subject to notice as described in CCZLDO § 5.0.900(2) and appeal requirements of CCZLDO § 5.8 for a Planning Director’s decision. The criteria set forth in CCZLDO § 5.2.600 are reproduced below.

Any conditional use not initiated within the time frame set forth in subsection (3) of this section may be granted an extension provided that an applicant has made a request and provided the appropriate fee for an extension prior to the expiration of the conditional use permit approval. Such request shall be considered an Administrative Action and shall be submitted to the Director.

1. Extensions on Farm and Forest (Resource) Zoned Property shall comply with OAR 660-033-0140 Permit Expiration Dates which states:

a. Except as provided for in subsection (e) of this section, a discretionary decision, except for a land division, made after the effective date of this section approving a proposed development on agricultural or forest land outside an urban growth boundary is void two years from the date of the final decision if the development action is not initiated in that period.

b. Coos County may grant one extension period of up to 12 months if:

i. An applicant makes a written request for an extension of the development approval period;
ii. The request is submitted to the county prior to the expiration of the approval period;
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.

c. Additional one-year extensions may be authorized where applicable criteria for the decision have not changed.

d. If a permit is approved for a proposed residential development on agricultural or forest land outside of an urban growth boundary, the permit shall be valid for four years. An extension of a permit described in subsection (e) of this section shall be valid for two years.
e. For the purposes of subsection (c) of this section, "residential development" only includes the dwellings provided for under in the EFU and Forest zones in Chapter 4.

f. Extension requests do not apply to temporary use permits, compliance determinations or zoning compliance letters.

2. Extensions on all non-resource zoned property shall be governed by the following.

a. The Director shall grant an extension of up to two (2) years so long as the use is still listed as a conditional use under current zoning regulations.

b. If use or development under the permit has not begun within two (2) years of the date of approval and an extension has not been requested prior to the expiration of the conditional use then that conditional use is deemed to be invalid and a new application is required.

c. If an extension is granted, the conditional use will remain valid for the additional two years from the date of the original expiration.

3. Time frames for conditional uses and extensions are as follows:

a. All conditional uses within non-resource zones are valid four (4) years from the date of approval; and

b. All conditional uses for dwellings within resource zones outside of the urban growth boundary or urban unincorporated community are valid four (4) years from the date of approval.

c. All non-residential conditional uses within resource zones are valid (2) years from the date of approval.

d. For purposes of this section, the date of approval is the date the appeal period has expired and no appeals have been filed, or all appeals have been exhausted and final judgments are effective.

CCZLDO § 5.2.600; see also OAR 660-033-0140(2). These criteria are addressed individually below.

Note: The CUP authorizes the Pipeline to be developed on both resource-zoned and non-resource zoned land. Therefore, the Applicant takes the conservative approach and requests a one-year extension for the entire CUP.

B. **Pacific Connector’s Compliance with the Applicable Standards for a CUP Extension Request on Farm and Forest Lands**

CCZLDO § 5.2.600(1)(a) provides as follows:

1. Extensions on Farm and Forest (Resource) Zoned Property shall comply with OAR 660-033-0140 Permit Expiration Dates which states:

a. Except as provided for in subsection (e) of this section, a discretionary decision, except for a land division, made after the effective date of this section approving a proposed development on
agricultural or forest land outside an urban growth boundary is void two years from the date of the final decision if the development action is not initiated in that period.

The Board finds that Pacific Connector’s application and attachments demonstrate compliance with the code requirements at CCZLDO 5.2.600(1)(a) and OAR 660-033-0140(1) for granting extension requests for land use approvals on farm and forest lands.

This criterion is met because a timely extension request was filed and the criteria have not changed. (See discussion below).

C. The Applicant Meets the Applicable Criteria Set Forth at § 5.2.600(1)(b).

a. Pacific Connector has made a written request for an extension of the development approval period.

CCZLDO § 5.2.600(1)(b)(i) provides as follows:

b. Coos County may grant one extension period of up to 12 months if:

i. An applicant makes a written request for an extension of the development approval period;

The written narrative and application specifically request an extension submitted by the Applicant on March 30, 2017 of the development approval period. CCZLDO § 5.2.600(1)(b)(i).

This criterion is met.

b. Pacific Connector’s request was submitted to the County prior to the expiration of the approval period.

CCZLDO § 5.2.600(1)(b)(ii) provides as follows:

b. Coos County may grant one extension period of up to 12 months if:

ii. The request is submitted to the county prior to the expiration of the approval period;

As noted above, the CUP was set expire on April 2, 2017. On March 30, 2017, Pacific Connector applied for a fourth extension of the approval period. The March 30, 2017 extension application was thus timely submitted prior to the April 2, 2017 expiration of the extended CUP. CCZLDO § 5.2.600(1)(b)(ii).

This criterion is met.

PCGP was unable to begin or continue development during the approval period for reasons for which the Applicant was not responsible.

Board of Commissioners' Findings AP-17-04 (Extension of HBCU-10-01 / REM 11-01)
Page 6

EXHIBIT A
CCZLDO § 5.2.600(1)(c)(iii) and (iv) provides as follows:

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.

To approve this extension application, the Board must find that PCGP has stated reasons that prevented PCGP from beginning or continuing development within the approval period and PCGP is not responsible for the failure to commence development. CCZLDO § 5.2.600 (1)(b)(iii) & (iv).

These two provisions have generated quite a bit of testimony and discussion among the parties. While there are good arguments on both sides of the debate, PCGP ultimately has the better arguments, as discussed below.

As the Applicant explains, the Pipeline is an interstate natural gas pipeline that requires pre-authorization by FERC. Until PCGP obtains a FERC certificate authorizing the Pipeline, PCGP cannot begin construction or operation of the facilities in the County or elsewhere along the Pipeline route. FERC has not yet authorized the Pipeline. Therefore, PCGP cannot begin or continue development of the Pipeline along the alignment authorized by the approval.

The opponents argue that PCGP’s failure to secure the necessary FERC authorizations was PCGP’s own fault. See, e.g., Letter from Jody McCaffree dated August 25, 2017. Ms. McCaffree points out that FERC denied PCGP’s application and also denied PCGP’s request for a rehearing. The opponents’ argument is also articulated in letters by Mr. Wim de Vriend dated August 25, 2017 and Sept 8, 2017. Exhibits 6 and 9. For example, in his Sept 8, 2017 letter, Mr. de Vriend points out that PCGP’s application was denied because PCGP failed to provide evidence of sufficient market demand, and because PCGP failed to secure voluntary right-of-way from a majority of landowners on the pipeline route.

The Board has reservations about the precedent that would be set by accepting the opponents’ contention: The concern is that the opponents’ detailed inquiry would only be used in this case, which essentially means that PCGP would be treated differently than other applicants.

In this regard, the Applicant points out that the County previously accepted the “no federal permits in hand" reasoning as a basis to grant a time extension for the Pipeline, without getting into a detailed analysis regarding who is “at fault” for not obtaining the needed permits. In a previous case, the County found that the lack of FERC approval meant PCGP could not begin or continue development of the project:

“In this case, the applicant needs federal approval for the gas pipeline project, and the project cannot commence until those federal approvals are forthcoming. Even the primary opponent to the project, Ms. Jody McCaffree, admits the facts that caused the applicant to be unable to begin
or continue development during the approval period, i.e., that [FERC] vacated the federal authorization to construct the pipeline."

See County Final Order No. 14-09-063PL, ACU-14-08/AP 14-02 in Exhibit 3 to the Application narrative at 9.

Likewise, in granting a previous extension of this Approval, the County Planning Director stated:

"The fact that the project is unable to obtain all necessary permits to begin prior to the expiration of a conditional use approval is sufficient to grant the applicant’s requested extension."

See Director’s Decision for County File No. ACU-16-013 in Exhibit 2 to Application narrative on page 13. This 2016 decision was not appealed. While previous decisions are not likely going to be considered formal binding “precedent,” the Board believes that it is important for the County to be consistent in how it applies its code from case to case. So how rigorous of a look that the County takes in attempting to assign fault for the failure of PCGP to obtain the FERC permits is an issue that could have consequences for future cases.

Arguably, the facts are different for this extension than the facts presented in previous extension requests. Unlike previous extensions, FERC has now issued both a denial and has rejected a rehearing request, and, as of the close of the evidentiary record in this case, there was no current application pending with FERC.

Perhaps the most vexing issue is whether the opponents are correct that PCGP is “responsible” for FERC not yet approving the Pipeline. The code is drafted in a manner that it requires the County to determine, for any given extension request, that the applicant was not “responsible” for the reasons that caused the delay. The Webster’s Third New International Dictionary (1993) defines the term “responsible” as “answerable as the primary, cause, motive, or agent whether of evil or good.” The Board interprets the word “responsible” to be the same as “within the applicant’s control.” Stated another way, the question is whether the applicant is “at fault” for not exercising its permit rights in a timely manner. The aim of the criterion is to not reward applicants that do not actively pursue their development, while at the same time providing some measure of sympathy and assistance to applicants who are diligently trying to effectuate their permit but who run into unexpected problems that they are not in full control to correct or fix.

Reasons that might typically found to be “beyond the control” of an applicant would include:

- Delays caused by construction contractors or inability to hire sufficient workers;
- Unusual delays caused by abnormal weather years, such as in the case of El Nino or La Nina weather patterns;
- Delays in obtaining financing from banks;
- Delays in getting approval from HOA architectural review committees;
• Encountering unexpected legal problems related to the land, such as a previously unknown adverse possession claim;
• Encountering sub-surface conditions differing from the approved plans,
• Exhuming Native American artifacts; and
• Inability to meet requirements imposed by other governmental agencies.

Failures to act which might be considered to be within the control of an applicant include:

• Failing to apply for required permits;
• Failing to exercise due diligence in pursuing the matter;
• Procrastination.

As shown above, this is a highly subjective determination, and judicial review of well-documented reason for granting or denying an extension is likely limited, at best.

In this case, it is sufficient to conclude that because the Applicant has thus far been unsuccessful in obtaining permits from FERC despite the Applicant’s reasonable efforts to obtain same, the Applicant is therefore not at fault for failing to begin construction on the pipeline.

The opponents would have the Board delve deeply into FERC’s administrative proceedings and assess PCGP’s actions and inactions and draw conclusions about same within the context of a complex, multi-party administrative proceeding being conducted by a non-County agency. Both the Applicant and the opponents have apparently been deeply involved in the FERC process, but the Board has had no involvement with that process. The Board believes that the opponents are asking the County to get into too much detail about the reasons for the FERC denial.

FERC has specifically left the door open for PCGP to reapply, and it appears that the pre-filing process has been initiated. The Board sees no harm in leaving these County land use permits in place in the interim. As has been repeatedly pointed out, these permits are conditioned upon - and are worthless without – concurrent FERC approvals.

The Board finds the Applicant’s following argument to be compelling:

Quite simply, th[e] level of inquiry [demanded by the opponents] is absurd: It forces the Hearings Officer to engage in a practically futile exercise and one that greatly exceeds the scope of the extension criteria. It would be akin to asking the Hearings Officer to determine whether an applicant, who needed an extension because it could not obtain financing, was “responsible” for a lender denying the applicant’s loan application. The Hearings Officer is neither qualified nor required to conduct this analysis. Thus, properly construed, in order to determine whether PCGP was “responsible” for circumstances that prevented permit implementation under CCZLDO §5.2.600.1.b.iv, the Hearings Officer was only required to verify whether PCGP had exercised
steps within its control to implement the Approval. As explained above, PCGP has taken those steps.

Thinking about how this level of analysis might affect future precedent, the argument from Applicant’s counsel, Mr. King, is persuasive. He is correct that it would be asking too much for the County to analyze, as an example, exactly why bank financing was not forthcoming, or who was at fault if an HOA withholds ARC approvals. It is sufficient to conclude that bank financing involves discretionary decision making on the part of a third party who is not under the control of the applicant. If that process does not result in a favorable outcome for an applicant, he or she should not be found to be “responsible” for that failure, given that it was not a decision that was within their complete control.

Beyond that policy point, however, there are further reasons why the Applicant is correct. When construing the text of a provision, an appellate body is to give words their “plain, natural, and ordinary meaning.” *PG&E v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). The term “responsible” is not defined in the CCZLDO.

In such cases, Oregon courts rely, to the extent possible, on dictionaries contemporaneous with the enactment of the disputed words. Although the Supreme Court has stated that “no single dictionary is authoritative,” *Davidson v. Oregon Government Ethics Com.*, 300 Or 415, 420, 712 P2d 87 (1985), Oregon courts have predominantly used *Webster’s Third New International Dictionary* as the authority for determining the plain meaning of a term in an ordinance. The *Webster’s Third New International Dictionary* (1993) defines the term “responsible” in a number of ways, including as “answerable as the primary cause, motive, or agent whether of evil or good.” As the Applicant notes, “[T]his is the only plausible definition in this context because the issue under CCZLDO 5.2.600.1.b.iv is whether the applicant is at fault in not exercising its permit rights.” The Board concurs with and utilizes the Applicant’s definition of this term.

The Board finds that PCGP was not the “primary cause” of the circumstances causing PCGP to be unable to begin or continue development during the development approval period. First, PCGP cannot be “responsible” for the FERC denial because PCGP did not request or issue that denial. Stated another way, because PCGP was required to obtain a discretionary permit from another agency as a prerequisite to implementing the permit, PCGP necessarily was not in sole control, i.e., was not the “primary cause,” over whether or when FERC issued that permit.

Likewise, although FERC wanted additional evidence of “need,” obtaining that evidence was also not within PCGP’s control. For example, as FERC’s order states, the existence of long-term precedent or service agreements with end users is “significant evidence of need or demand for a project.” See FERC Order dated March 11, 2016 at 15. Further, the requirement to show this market “need” is reduced if an applicant can show that it has acquired all, or substantially all, of the right-of-way along the pipeline route. See FERC Order dated March 11, 2016 at 14-15. But, both of these categories of evidence (precedent agreements with end users and agreements with landowners) are bilateral contracts, which require a meeting of the minds between PCGP and a third party. PCGP cannot unilaterally enter a bilateral contract or coerce another party into such a contract.
Further, PCGP cannot control if or when third parties will enter contracts with PCGP or whether third parties are unreasonable in their negotiations. Under these circumstances, PCGP is not the “primary cause” for not demonstrating a “need” for the Pipeline.

PCGP argues that it worked diligently and in good faith during the one-year approval period to obtain approval of required permits and otherwise implement the Approval. PCGP emphasizes that it has taken affirmative steps to pursue the applicable FERC permits and related move the project closer to fruition:

During the applicable one-year approval period (April 2016-April 2017), PCGP took the following specific actions to implement the Approval:

- Actively acquired voluntary easements with landowners by reaching agreements with both private landowners and commercial timber companies.
- Performed civil and environmental surveys within the County to advance the design and routing of the Pipeline
- Engaged specialist contractors to perform geotechnical investigations along the Pipeline route
- Negotiated with potential end users for the transmission of natural gas that will be transported by the Pipeline

See letter from PCGP Project Director regarding implementation activities in Exhibit D to Perkins Coie’s September 8, 2017 letter. This testimony appears to be largely unrefuted in the record.

Finally, PCGP argues that the delay in obtaining FERC approval of an alignment for the Pipeline has caused other agencies to also delay their review and decision on Pipeline-related permits. The Pipeline is a complex project that requires dozens of major federal, state, and local permits, approvals, and consultations needed before PCGP and the developer of the related Jordan Cove Energy Project can begin construction. See permit list in Exhibit 4 to the Application narrative. The County has previously accepted this explanation as a basis to find that a Pipeline-related time extension request satisfies this standard. See County Final Order No. 15-08-039PL, File No. AP-01-01, ACU15-07 in Exhibit 5 to the Application narrative at 11. Therefore, PCGP has identified reasons that prevented PCGP from commencing or continuing development within the approval period.

Opponents do not dispute that PCGP engaged in the implementing actions during the approval period. Instead, they note that, subsequent to PCGP filing the Application with the County, FERC denied PCGP’s request for reconsideration of FERC’s denial of the project certificate. Opponents further contend that PCGP was “responsible” for FERC’s denial because PCGP did not meet its burden of proof before FERC.
In its final argument, PCGP states:

Under opponents’ theory that PCGP is the “responsible” party, if PCGP had simply presented additional evidence regarding public need for the project to FERC, FERC would have unquestionably approved the certificate request and would have done so before April 2, 2017. But it is entirely possible that, FERC would not have done so. Even if PCGP presented additional evidence of public need, another party—perhaps one of the opponents even—might have presented evidence that rebutted or undermined PCGP’s evidence, causing delay or even denial. Alternatively, even if PCGP had presented additional evidence of public need, FERC might not have issued a decision until after December 10, 2016. A third plausible option is that FERC could have approved the certificate, but that approval could have been bound up in appeals or requests for reconsideration filed by opponents, which would have delayed PCGP’s implementation. In short, there are simply too many potential variables and outcomes to declare PCGP the “responsible” party under the circumstances.

The Board agrees with his analysis. The opponents’ argument places too high a burden of proof on the Applicant. Again, the Board believes that the County should be able to grant extensions so long as the reason for the delay in the project was caused by external factors that the Applicant does not have a complete ability to control. This should set a fairly low bar, and in general, the County should err on the side of granting extensions.

The opponents have not presented evidence that undermines PCGP’s evidence that it was not the “primary cause” for the circumstances causing PCGP to be unable to begin or continue development during the approval period. Therefore, the Board denies opponents’ contention on this issue. The Board finds that the application satisfies CCZLDO 5.2.600.1.b.iii and iv.

These two criteria are met.

The Criteria Governing the PCGP CUP Have Not Changed.

CCZLDO § 5.2.600.1.c provides as follows:

c. Additional one-year extensions may be authorized where applicable criteria for the decision have not changed.

While the County standards for approving extensions have recently been modified, none of the applicable substantive approval criteria for the Pipeline have changed since the original County decision to approve the Pipeline in 2010.¹

¹ While the County amended its criteria for evaluating extension applications in January 2015, these amendments did not affect the criteria on which the “decision” – the initial land use approval – was based.
The opponents contend that the approval criteria for a Pipeline permit decision have changed because County Ordinance No. 15-05-005PL—which adopted amendments to the Coos County Comprehensive Plan (CCCP) pertaining to natural hazards—became effective in 2016. The Board does not agree for two reasons.

First, the ordinance in question did not take effect until July 30, 2017. Ordinance No. 15-05-005PL had an original effective date of July 30, 2016. On July 19, 2016, and prior to the effective date of Ordinance No. 15-05-005PL, the Board “deferred” the effective date of Ordinance No. 15-05-005PL to August 16, 2017. The Board understands the term “defer” in this context to be the same as “delay” its implementation. The Board continued to defer the effective date of Ordinance No. 15-05-005PL in public meetings held on August 16, 2016, September 7, 2016, October 19, 2016, December 7, 2016, January 12, 2017, and March 15, 2017. See generally Board meeting minutes reflecting Board approval of extensions of the effective date of Ordinance No. 15-05-005PL, attached to County staff memo dated September 1, 2017. PCGP’s extension application was deemed complete on or about March 31, 2017. Because the CCCP provisions at issue were not in effect on that date (or at any point during the one-year approval period at issue), they cannot be considered as changes to the “approval criteria.”

The Applicant states as follows:

Although opponents contend that the Board’s actions to extend the effective date of Ordinance No. 15-05-005PL were ineffective because the Board failed to follow the correct procedures for amending an earlier land use decision, the Hearings Officer should deny this contention. Even accepting opponents’ initial contention as correct—that the Board failed to follow the correct procedures for amending an earlier land use decision when it extended the effective date of Ordinance No. 15-05-005PL—opponents mischaracterize the consequence of the Board’s error. To the extent the Board erred, it does not render the Board’s action void on its face. Instead, because the Board’s decisions to toll the effective date, according to opponents, were appealable land use decisions, they only become void if appealed and reversed or remanded by LUBA. Neither opponents nor any other party have appealed the Board’s actions. Therefore, the Board’s extension of the effective date of Ordinance No. 15-05-005PL was valid, and the CCCP natural hazard provisions did not take effect until July 30, 2017.

See Applicant’s Final Argument, Exhibit 16 at p. 2. In other words, the Applicant is saying that even if the Board’s Motions, which are memorialized in minutes, were procedurally and substantively flawed, these decisions constitute a final land use decision that must be appealed to LUBA.

The Board does not believe that the decision to delay the effective date of the Ordinance is a land use decision, for the reasons set forth in detail below. But the Board does agree with
the Applicant's broader point, which is that the decision would need to be appealed and
determined to defective by a Court; it is not void on its face.

To constitute a statutory "land use decision," a number of prerequisites must be met.
Among other things, the decision at issue must be "final." ORS 197.830(9); E & R Farm
Partnership v. City of Cervais, 37 Or LUBA 702, 705 (2000). The legislative intent behind
the concept of finality is to ensure that local governments have the first opportunity to both preside
over and reach a final determination on land use matters within their respective jurisdictions,
before those decisions are reviewed by LUBA. The doctrine also serves as a method to achieve
judicial efficiency, by making sure that issues are fully vetted at the local level.

The case law addressing the finality concept reveals three separate lines of cases, or
prongs, of the doctrine:

(1) what local event or action triggers "finality;"
(2) whether the decision is binding vs. advisory, and
(3) whether the decision is an interlocutory decision.

The first line of cases could be relevant here. These cases focus on when the decision is
final at the local level. In other words, this aspect of the finality requirement concerns what
specific event triggers the 21-day appeal clock to LUBA (i.e. whether that is the oral decision,
the point where the decision is reduced to writing and signed, or when it is mailed to the parties,
etc). See generally Columbia River Television v. Multnomah County, 299 Or 325, 331, 702 P2d
1065 (1985); Hemstreet v. Seaside Improvement Commn., 16 Or LUBA 748, 750 (1988); Gordon
v. Clackamas County, 10 Or LUBA 240, 247 (1984). Generally speaking, the point in time
where the decision is reduced to writing and signed triggers the 21-day clock. 2 ORS 197.830(9).

LUBA has enacted an administrative rule that is aimed at this prong of the finality
concept. OAR 661-010-0010(3) creates a default rule by defining the term "final decision" as
follows:

(3) "Final decision": A decision becomes final when it is reduced to
writing and bears the necessary signatures of the decision maker(s),
unless a local rule or ordinance specifies that the decision becomes
final at a later date, in which case the decision is considered final as
provided in the local rule or ordinance.

---

2 Previously, there had been a rule established by the Oregon Court of Appeals in League of Women Voters v. Coos
County, 82 Or App 673, 729 P2d 588 (1986) stating that, under most circumstances, the time for appealing a local
land use decision or limited land use decision was tolled from the time the decision was signed until the local body
provided notice of the decision to the appealing party. However, in Wicks-Snodgrass v. City of Reedsport, 148 Or
App 217, 939 P2d 625 (1997) rev. den., 326 Or 59 (1997), the court concluded that its earlier reading of ORS
197.830(8) was contrary to the language of the statute, and overruled League of Women Voters. Under the rule
announced in Wicks-Snodgrass, the time for a petitioner to appeal a local land use decision to LUBA under ORS
197.830(8) begins to run from the date the local decision becomes final, and not from the date when the local
government provides notice of that decision. Wicks-Snodgrass, 148 Or App at 223-24.

Board of Commissioners' Findings: AP-17-94 (Extension of HBCU-10-01 / REM 11-01)
Page 14

EXHIBIT A
Thus, under the rule, the oral vote by a Board of Commissioners, is generally not the final decision because it is not reduced to writing. Elton v. City of Tigard, 1 Or LUBA 349 (1980); Noble v. City of Fairview, 27 Or LUBA 649, 650 n 2 (1994); Shaffer v. City of Happy Valley, 44 Or LUBA 536, 544 (2003) (city council action on appeal must be in writing). However, the minutes of that oral vote were memorialized in writing, and that writing could be a land use decision.

Despite the language of the rule set forth in OAR 661-010-0010(3), the Court of Appeals and LUBA have held that a signature is only an essential element for finality if another statute, rule or ordinance provides that the signature is necessary for that type of decision. For example, in Weeks v. City of Tillamook, 113 Or App 285, 832 P2d 1246 (1992), the Court of Appeals held that an oral decision by the city council, reflected in its minutes, was a final “land use decision” under the circumstances of that case. Id. at 289. The court explained that procedural defects in the decision do not mean that there is no land use decision subject to LUBA’s jurisdiction; rather, such defects simply mean that “there is a potentially reversible land use decision, if the defects are assigned as error in the appeal.” See also Cascade Geographic Society v. Clackamas County, 57 Or LUBA 270, 273 n5 (2008); Beilke v. City of Tigard, 51 Or LUBA 837 (2006); Shaffer v. City of Happy Valley, 44 Or LUBA 536 (2002); Cedar Mill Creek Corridor Committee v. Washington County, 37 Or LUBA 1011 (2000) (A county decision, reflected in a “minute order,” determining that a letter from a city transportation director satisfies a plan design element and a specific development’s condition of approval is a land use decision subject to LUBA review.); Halvorson Mason Corp. v. City of Depoe Bay, 39 Or LUBA 193(2000); North Park Annex Business Trust v. City of Independence, 33 Or LUBA 695 (1997); Urban Resources v. City of Portland, 5 Or LUBA 299 (1982)(A distinction exists between no land use decision taken and a land use decision made that does not meet legal requirements. The former circumstance vests no jurisdiction in LUBA, the latter circumstances vests jurisdiction and may result in reversal or remand.); Astoria Thunderbird, Inc. v. City of Astoria, 13 Or LUBA 297 (1985) (Written minutes that reflect vote of the City Council and that bear the signature of both the city finance director and the secretary to the city council can be considered to be a land use decision.). But See Sparks v. Polk County, 34 Or LUBA 731 (1998) (when only one party has signed an intergovernmental agreement, it is not yet a final document for purposes of a LUBA appeal).

In this case, the minutes of the Board Hearing of March 15, 2017 could constitute a final land use decision, assuming other prerequisites are met. At this meeting, a Motion was made to extend (or “keep in effect”) the deferral of Ordinance 15-05-005PL “until the current language is adopted.” The minutes are reduced to writing and signed by the Board Chair, Melissa Cribbins, with the words “Minutes Approved by” directly above her signature. There is no requirement that all three Board members must sign a land use decision, despite the fact that having all three signatures in Ordinances does seem to be the County’s practice. Nonetheless, despite the general practice, the Coos County Code provides as follows:

SECTION 01.01.010 MEETINGS OF THE BOARD OF COUNTY COMMISSIONERS
The Board of Commissioners shall meet for the transaction of County business at such days and times as may be set by the Board. All agreements, contracts, real property

Board of Commissioners' Findings AP-17-04 (Extension of HBCU-10-01 / REM 11-01)
Page 15

EXHIBIT A
transactions, legislative and quasi-judicial decisions and other formal documents will not be deemed final and binding on the County until reduced to writing, and formally approved and signed by the Board. For purposes of this section "signed by the Board" means signed by at least two (2) members of the Board or, after approval by the Board, signed by the Chairperson, or in the absence of the Chair, by the Vice Chairperson. Board actions other than those listed above will be deemed final upon approval by the Board.

In this case, the deferrals were memorialized in the minutes of the public meetings. The last deferral was set forth in minutes that were approved by the Board and signed by the Chair. Thus, the minutes might therefore constitute a statutory land use decision, if other requirements are met.

However, finality is not the only requirement that is required to meet the definition of a statutory land use decision. In order to constitute a statutory land use decision, the County’s decision must also either apply or amend: (1) a provision contained in a local government’s comprehensive plan, (2) land use regulation, or it must (3) apply a Statewide Planning Goal. ORS 197.015(1)(a)(A)(i)-(iv). LUBA has repeatedly stated that in order for a challenged decision to be a statutory “land use decision,” it must “concern” itself with the application of the comprehensive plan provision or land use regulation, or a Goal. *Jaqua v. City of Springfield, 46 Or LUBA 566, 574 (2004).* In determining whether a local government decision “concerns” the application of a comprehensive plan provision or a land use regulation, *"...it is not sufficient that a decision may touch on some aspects of the comprehensive plan [or land use regulations], rather the comprehensive plan [or land use regulations] must contain provisions intended as standards or criteria for making the appealed decision. Billington, 299 Or at 475.” Portland Oil Service Co. v. City of Beaverton, 16 Or LUBA 255, 260 (1987).* However, the decision does not necessarily have to permit the “use” or “development” of land. *Contrast Medford Assembly of God v. City of Medford, 6 Or LUBA 68 (1982), rev’d 64 Or App 815 (1983), aff’d 297 Or 138 (1984).* Rather, a local government decision which makes a binding interpretation of its regulations, but without amending or adopting regulation provisions or granting or denying a development application, is a “final” decision, even if other actions are required to give that decision practical effect. *Medford Assembly of God v. City of Medford, 297 Or 138, 140, 681 P2d 790 (1984); Hollywood Neigh. Assoc. v. City of Portland, 21 Or LUBA 381, 384 (1991); General Growth v. City of Salem, 16 Or LUBA 447, 451-53 (1988).*

In this case, the decision to delay the Effective Date of the Ordinance is not a decision that requires the County to apply or amend a provision contained in a local government’s comprehensive plan, land use regulation, or apply a statewide planning goal. Therefore, the decision is not a land use decision.

---

3 See also *Knee Deep Cattle Co. v. Lane County, 28 Or LUBA 288 (1994); Fence v. Jackson County, 135 Or App 574, 900 P2d 524 (1995)* (“We agree with the county that the fact that a regulation is embodied in something called a land use ordinance does not convert it into a land use regulation, subject to LUBA’s review, if the substance of the regulation clearly pertains to something other than land use.”).
The Board generally disagrees with the substance of the analysis set forth on page 1-3 of Kathleen Eymann’s letter dated September 13, 2017. Delaying the effective date of a Comprehensive Plan Amendment is not the same as substantively amending a comprehensive plan. Ms. Eymann is correct that substantive amendments to the comprehensive plan would require the County to undertake the procedures for a Post Acknowledgement Plan Amendment (PAPA). However, simply delaying the effective date of the Ordinance prior to its effective date can be accomplished by a motion made at a public hearing. There are no criteria for such a decision, and it is within the sole discretion of the Board to do so.

Nonetheless, even if the opponents’ arguments had merit, they should have been either directed to LUBA in the form of a land use appeal or directed to a Circuit Court. The Applicant is correct when it states that the Board error does not render the Board’s action void on its face. Instead, as the Applicant notes, the Board’s decision to toll the effective date was either an appealable land use decision or a decision which could be appealed to the Circuit Court. Such action only becomes void if appealed and reversed or remanded by LUBA or by a Circuit Court. Neither such appeal has occurred.

E. Even if the CCCP natural hazard provisions were in effect when PCGP submitted the Application, these provisions are not “approval criteria” for a Pipeline permit.


For example, in her letter dated Aug. 25, 2017, Ms. Eymann argues that the comprehensive plan is binding law, and cites to Baker v. City of Milwaukee and some out of context quotes from the County’s Hearings Officer. While Ms. Eymann is correct that the Comprehensive Plan is law, that fact does not end the pivotal inquiry. The more difficult question is whether any of the policies and directives set forth in the Comprehensive Plan constitute applicable “criteria” for the conditional use permit at issue.

We first look at the comprehensive plan policies that the opponents argue are new approval standards. But before doing so, a quick summary of applicable case law is in order. Determining whether any given Comprehensive Plan policy is an “applicable” criterion or approval standard can present vexing questions for practitioners, so a summary of the applicable law should be beneficial to the parties.

In some cases, the plan itself will provide a “roadmap” by expressly stating which, if any, of its policies are applicable approval standards for certain types of development. For example, if the comprehensive plan specifies that a particular plan policy is itself an implementing measure, LUBA will conclude that policy applies as an approval criterion for land use decisions. Murphy v. City of Ashland, 19 Or LUBA 182 (1990). On the other hand, where the comprehensive plan emphasizes that plan policies are intended to guide development actions and decisions, and that the plan must be implemented through the local code to have effect, such plan policies are not approval standards for individual conditional use decisions. Schellenberg v. Polk County, 21 Or LUBA 425 (1991). Similarly, statements from introductory findings to a comprehensive plan.
chapter are not plan policies or approval standards for land use decisions. *19th Street Project v. City of The Dalles*, 20 Or LUBA 440 (1991). Comprehensive plan policies which the plan states are specifically implemented through particular sections of the local code do not constitute independent approval standards for land use actions. *Murphey v. City of Ashland*, 19 Or LUBA 182 (1990). Where the county code explicitly requires that a nonfarm conditional use in an exclusive farm use zone "satisfy" applicable plan goals and policies, and the county plan provides that its goals and policies shall "direct future decisions on land use actions," the plan agriculture goals and policies are applicable to approval of the nonfarm conditional use. *Rowan v. Clackamas County*, 19 Or LUBA 163 (1990).

Often, however, no roadmap is provided. In those cases, the key is to look at the nature of the wording of the plan provision at issue. LUBA has often held that some plan policies in the comprehensive plan will constitute mandatory approval criteria applicable to individual land use decisions, depending on their context and how they are worded. See *Stephan v. Yamhill County*, 21 Or LUBA 19 (1991); *Yon Lubken v. Hood River County*, 19 Or LUBA 404 (1990). For example, where a comprehensive plan provision is worded in mandatory language — such as when the word "shall" is used — and is applicable to the type of land use request being sought, then LUBA will find the standard to be a mandatory approval standard. Compare *Axon v. City of Lake Oswego*, 20 Or LUBA 108 (1990) ("Comp plan policy that states that "services shall be available or committed prior to approval of development" is a mandatory approval standard); *Friends of Hood River v. City of Hood River*, Or LUBA 144 (LUBA No. 2012-050, March 13, 2013). Conversely, use of aspirational language such as "encourage" "promote," or statements to the effect that certain things are "desirable" will generally not be found to be mandatory approval standards. *Id.; Neuschwander v. City of Ashland*, 20 Or LUBA 144 (1990); *Citizens for Responsible Growth v. City of Seaside*, 23 Or LUBA 100 (1992), aff’d w/o op. 114 Or App 233 (1993).

In some cases, an otherwise applicable plan policy will be fully implemented by the zoning code. Where the text of the comprehensive plan supports a conclusion that a city’s land use regulations fully implement the comprehensive plan and displace the comprehensive plan entirely as a potential source of approval criteria, demonstrating that a permit application complies with the city’s land use regulations is sufficient to establish consistency/compliance with the comprehensive plan. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192, 211-12 (1994); *Murphy v. City of Ashland*, 19 Or LUBA 182, 199 (1990); *Miller v. City of Ashland*, 17 Or LUBA 147, 169 (1988); *Durig v. Washington County*, 35 Or LUBA 196, 202 (1998) (explicit supporting language is required to establish that land use regulations entirely displace the comprehensive plan as a source of potentially applicable approval criteria for land use decisions). However, a local government errs by finding that its acknowledged zoning ordinance fully implements the acknowledged comprehensive plan, thus making it unnecessary to apply comprehensive plan provisions directly to an application for permit approval, where the acknowledged zoning ordinance specifically requires that the application for permit approval must demonstrate compliance with the acknowledged comprehensive plan and the county does not identify any zoning ordinance provisions that implement applicable comprehensive plan policies. *Fessler v. Yamhill County*, 38 Or LUBA 844 (2000).
The opponents argue that the Hazard Maps, including the Tsunami, Landslide, Wildfire, Liquefaction, and Earthquake maps adopted in Ord. 15-05-005PL are “in and of themselves” independent approval criterion. See Letter from Kathleen Eymann dated Sept. 13, 2017, at p. 5. However, standing alone, the maps accomplish nothing more than identifying land that is subject to an overlay zone. They do not establish criteria. It is only when they are paired with text that establishes criteria do the maps have operative effect.

Opponents identify two provisions that they contend are “approval criteria.” The first of these two provisions reads as follows:

“4. Coos County shall permit the construction of new structures in known areas potentially subject to Landslides only:

   “i. If dwellings are otherwise allowed by this Comprehensive Plan; and

   “ii. After the property owner or developer files with the Planning Department a report certified by a qualified geologist or civil engineer stipulating –

   “a) his/her professional qualifications to perform foundation engineering and soils analyses

   “b) that a dwelling can or cannot be safely constructed at the proposed site, and whether any special structural or siting measures should be imposed to safeguard the proposed building from unreasonable risk of damage to life or property.”

Exhibit A to Ordinance No. 15-05-005PL at 2 (emphasis added). This provision shall be referred to as the “Landslide Provision.” The second provision reads as follows:

“Earthquakes and Tsunamis

“To protect life, minimize damage and facilitate rapid recovery form a local Cascadia Subduction earthquake and tsunami, the County will **

“iv. Consider potential land subsidence projections to plan for post Cascadia event earthquake and tsunami redevelopment.

“v. Require a tsunami hazard acknowledgment and disclosure statement for new development in tsunami hazard areas.

“vi. Identify and secure the use of appropriate land above a tsunami inundation zone for temporary housing, business and community functions post event.”

Exhibit A to Ordinance No. 15-05-005PL at 2-3. This provision shall be referred to as the “Tsunami Provision.”
The text and context of these two provisions does not support opponents’ contention that they are “approval criteria.”

According to the introductory section of the CCCP regarding natural hazards, all of the CCCP natural hazard provisions require further implementation by land use regulations:

“This strategy shall be implemented by enacting special protective measures through zoning and other implementing devices, designed to minimize risks to life and property.”

 Exhibit A to Ordinance 15-05-005PL at 1. This “roadmap” provision strongly suggests that these comprehensive plan policies are not intended to apply directly to permit decisions. No party argues that these provisions “apply” as an interim measure prior to the adoption of the implementing ordinances.

The plain text of the so-called “Landslide Provision” only applies to “dwellings” and “buildings.” Although the initial clause refers to “new structures,” the remainder of this provision is concerned with protecting “dwellings” and “buildings.” For example, it requires a determination whether “dwellings” are allowed and whether “dwellings” can be safely constructed. If the policy was actually concerned with siting all structures, there would be no need to address “dwellings” in particular, especially if the “structure” has different siting or safe construction parameters than “dwellings” do.

As far as the record makes clear, the PCGP pipeline does not authorize construction of any dwellings or buildings. Various opponents note that the pipeline will involve some “structures.” Specifically, two above-ground pipe valve structures are authorized by the approval. However, these pipe valve structures are not located in buildings. Although the record does not appear to address the issue, it is also highly unlikely that these values are located in “areas of known landslide hazards.” After all, these valves are intended to be used to shut off gas if the pipe is compromised in any way. These structures need to be located in stable areas in order to accomplish their mission.

Kathleen Eymann and Jody McCaffree argue that these gas valves are “structures” because the Code definition of “structure” includes “a gas *** storage tank that is principally above ground.” The Board does not believe that a pipe valve is a “storage tank” within the meaning of that definition. But even if it was a storage tank, it would not be a storage tank that is “principally above ground.” But again, even if it’s a “structure,” it is not a dwelling, which is the primary focus of the landslide provision.

Turning to the “Tsunami Provision,” it does appear that that at least one of these provisions is written in mandatory terms. This provision requires a tsunami hazard acknowledgment and disclosure statement for new “development” in tsunami hazard zones. No party contends that the pipe is not a development. The maps submitted by the opponents make clear that the pipelines traverses land located in the tsunami hazard zones. See Letter from Kathleen Eymann dated Sept. 13, 2017 at p. 6. However, as the Applicant points out, there is also no indication that this provision must be implemented at the time of CUP approval. This
directive could just as easily be implemented outside the land use context. For example, it could be applied at the time of issuance of building permits.

The Applicant is also correct that the CCCP natural hazard provisions are not approval criteria that would apply to the Application because the CCZLDO provides a “grandfather” clause that exempts the Pipeline from compliance with the CCCP natural hazard provisions. See CCZLDO 4.11.125 (“Hazard review shall not be considered applicable to any application that was deemed complete as of the date this ordinance became effective (July 31, 2017).” The Application for the extension was deemed complete on or about March 31, 2017. Thus, pursuant to CCZLDO 4.11.125, the Application is not subject to hazard review.

As a final note, Ms. Macaffree continually raises the issue of NEPA compliance. In this case, she argues that the NEPA process must be completed before land use approvals can be issued. See McCaffree Letter dated Aug. 25, 2017 at p. 2. However, NEPA is not an approval standard for a land use case. Ms McCaffree cites to certain quotes from NEPA, its implementing CFRs, and agency commentary set forth in the Federal Register, but these quotes are all taken out of context. For example, when these quotes refer to “the decision-making process,” they are referring to a federal decision-making process. One quote even expressly states that the EIS “shall be by federal officials * * *.” (Emphasis added). However, Ms. McCaffree is only partially correct when she states that “Coos County has clearly demonstrated that it views the EIS not as a critical part of the decision process.” The EIS is not an approval standard. It could be submitted into a record of a land use proceeding and relied on for its evidentiary value. In fact, the county relied on the prior EIS to draw certain factual conclusions related to the original PCGP approvals back in 2010. However, it is simply legally wrong for Ms. McCaffree to argue that the County cannot issue land use permits for a project before that project undergoes an EIS process.

Having said that, the County land use approvals issued in this case are all contingent on FERC approval, which, in turn, is based on the results of the NEPA EIS process. The County land use approvals have absolutely no preclusive effect on the NEPA process, and are worthless to the extent they materially deviate from any final route approved by FERC.

In her letter dated September 8, 2017, Ms. McCaffree rhetorically asked the following question:

How can FERC “have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal.” [15 USC § 717b(e)(1) if the Jordan Cove and Pacific Connector project are allowed to continue processing land use permit applications for the previously FERC “denied” Jordan Cove / Pacific Connector LNG terminal design and pipeline?

The short answer is two-fold. First, FERC left the door open for PCGP to apply again. Second, 15 USC § 717b(d) states the following:

(d) Construction with other laws. Except as specifically provided in this chapter, nothing in this chapter affects the rights of States under —

Board of Commissioners’ Findings AP-17-04 (Extension of HBCU-10-01 / REM 11-01)
Page 21

EXHIBIT A
(1) the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.);
(2) the Clean Air Act (42 U.S.C. 7401 et seq.); or
(3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

Coos County permitting authority is a mandate of the Coastal Zone Management Act of 1972. If not for the CZMA, Coos County would have no land use permitting jurisdiction or authority over the pipeline project.

This criterion is met.

The Applicant complies with the Two-year Extension Limitation.

CCZLDO § 5.2.600.2 provides as follows:

2. Extensions on all non-resource zoned property shall be governed by the following.

a. The Director shall grant an extension of up to two (2) years so long as the use is still listed as a conditional use under current zoning regulations.
b. If use or development under the permit has not begun within two (2) years of the date of approval and an extension has not been requested prior to the expiration of the conditional use then that conditional use is deemed to be invalid and a new application is required.
c. If an extension is granted, the conditional use will remain valid for the additional two years from the date of the original expiration.

The Applicant proposes only a one-year extension due to the fact that the pipeline is located partially on EFU and Forest zoned land. As explained in the Applicant’s narrative and as set forth in the CCZLDO and CBEMP, the pipeline is still listed as a conditional or permitted use in all of the CBEMP zones which it traverses, and the pipeline is still listed as a conditional or permitted use in rural residential zones.

This criterion is met.

The Applicant complies with the Two-year Extension Limitation.

CCZLDO § 5.2.600.2 provides as follows:

3. Time frames for conditional uses and extensions are as follows:

a. All conditional uses within non-resource zones are valid four (4) years from the date of approval; and
b. All conditional uses for dwellings within resource zones outside of the urban growth boundary or urban unincorporated community are valid four (4) years from the date of approval.
c. All non-residential conditional uses within resource zones are valid (2) years from the date of approval.
d. For purposes of this section, the date of approval is the date the appeal period has expired and no appeals have been filed, or all appeals have been exhausted and final judgments are effective.

The Pipeline is permitted on EFU lands as a “utility facility necessary for public service” under CCZLDO 4.9.450(C) and ORS 215.283(1)(c). The applicable County criteria at CCZLDO § 4.9.450(C) have not changed since the County’s original 2010 decision to approve the CUP.

The Pipeline is permitted as a “new distribution line” under CCZLDO § 4.8.300(F) and OAR 660-006-0025(4)(q). The applicable County criteria at CCZLDO § 4.8.300(F) have not changed since 2010. Accordingly, an additional one-year extension may be authorized for the Pipeline pursuant to CCZLDO § 5.2.600(1)(c).

This criterion is met.

**F. Additional Issues.**

The Board finds that additional issues raised during the local proceedings do not concern the limited approval criteria that apply to this request and thus do not provide a basis to approve, deny, or further condition the request.

For example, in their appeal statement, appellants contended in Issue B that Applicant is considering a different pipeline route and that this new route does not satisfy various criteria, including CCZLDO 4.11.435, ORS 455.447(4), and all provisions of the CBEMP. In Issue D of that statement, appellants expressed concern that approval of a time extension as requested by the Applicant could be perceived to permit Applicant’s modified pipeline route. The Board denies the appellants’ issues. The Board is unaware of any changes to the pipeline route involved in this request. Accordingly, approval of this request does not approve any modifications to the pipeline route, only to the time period within which Applicant has to initiate the original pipeline route. Likewise, because no modifications to the pipeline route are requested in this application, the Board takes no position as to whether any modifications would or would not comply with the criteria identified in Issues B and D in the appeal statement.

Other citizens objected to the impacts of the pipeline itself, including potential use of eminent domain and/or damage to private property rights. While the Board recognizes the importance of these concerns, they are not directed at the limited approval criteria applicable to this request. Therefore, the Board finds that these concerns are outside the scope of this proceeding and do not provide a basis to deny or further condition the request.

Further, while Ms. Williams testified at the public hearing that she could not determine how the pipeline would affect her since the route has not been selected, the Board reiterates that this proceeding concerns a time extension only and does not affect the route previously approved by the Board.
G. Procedural

a. Hearings Officer Objection
At the public hearing on August 25, 2017, the Hearings Officer declared that he had no prehearing ex-parte contacts or conflicts of interest relating to this case. He then provided a chance for anyone to challenge his ability to review this matter based on his disclosures. The Hearings Officer received a challenge stating that the Hearings Officer was paid by the Applicant.

The Board rejects this challenge because the Hearings Officer is not paid directly by the Applicant, and the manner of the Hearings Officer’s compensation does not bring his objectivity into question. In cases where a Hearings Officer is hired to review a case, the actual cost is charged to an applicant by the Coos County Planning Department. This payment is not directly sent to the Hearings Officer from an applicant. Rather, a Hearings Officer is a contract employee of Coos County. As such, the Hearings Officer does not receive a financial benefit from the actual project approval of denial of an application.

The Hearings Officer also received a challenge alleging that the board as an unwritten clause requiring the Hearings Officer to approve any proposed projects. The Board rejects this challenge because there is no such clause and the Board is the final decision maker in this matter. The Board has the ability to accept, modify, or reject the decisions of the Hearings Officer. The Hearings Officer’s role in the matter is limited to holding the public hearing and giving a legal opinion if the matter meets the applicable criteria. The Hearings Officer further stated that he did not have any direct contact with the Board and is not from the area. He had also never visited any of the properties in which the pipeline will cross for this case. He may have driven by a site through is travels, but never specifically to review the site for this case.

Ms. McCaffree also challenged the Hearings Officer, stating that she believed in past cases that the Hearings Officer favored attorney testimony over non-attorney testimony, and that evidenced bias on the part of the Hearings Officer. The Board rejects this objection because there is no evidence of an actual bias. Further, Ms. McCaffree’s contention appears to relate to past cases, not the current case.

Finally, the Hearings Officer is not the decision maker in this matter. The Hearings Officer was appointed by the Board as described in ORS 215.406, and the Board is the final decision-maker. Ms. McCaffree has not explained how the Hearings Officer’s alleged bias tainted the proceedings before, or the decision of, the Board. The Board denies the contention that the Hearings Officer was biased.

b. Board Objection
On November 21, 2017, the Board held deliberations on this matter in a public hearing. The testimony portion was closed but County Counsel asked the Board to disclose any conflicts or ex-parte contacts, and also asked if any Board member needed to abstain from participating in the matter. Each Board member stated they had no conflicts of interest or ex-parte contacts regarding the extension application or the appeal of the extension application. County Counsel
then asked if anyone present wished to challenge any member of the Board from participation in the proceeding.

Ms. McCaffree raised objections stating that Board members were biased and had received ex parte communications. She submitted a packet of information to support her claims. The packet consisted of seven exhibits. The Board denies Ms. McCaffree’s contentions as follows:

i. McCaffree Exhibit A – Email from County Counsel

The Board denies Ms. McCaffree’s contention that a 2011 email from an Assistant County Counsel to Ms. McCaffree demonstrates any procedural error by the County. The email requested that Ms. McCaffree refrain from further ex parte communications with Board members on a specific, then-pending application. The Board finds that the email was appropriate at the time given the pending nature of the application and Ms. McCaffree’s repeated attempts to communicate with Board members on the substance of that application. The email is limited to that circumstance. The Board finds that the email did not affect Ms. McCaffree’s ability to prepare and present her case in the current application proceeding, including presenting both oral and written testimony on the merits. Further, although Ms. McCaffree suggested at the November 21, 2017 Board meeting that Applicant was not held to a similar standard, she also admitted that she was not aware of any recent communications between Applicant and Board members. The Board denies Ms. McCaffree’s contentions on this issue.

ii. McCaffree Exhibit B – Luncheon and Comments to Press

The Board denies Ms. McCaffree’s contention that quotations from Board members in the press from 2014 demonstrate bias or prejudgment in favor of this application. The comments all pre-date the filing of this application and simply express generalized support for significant economic development projects such as the pipeline associated with this request; however, these comments do not constitute “statements, pledges or commitments” from any Board members that they have prejudged this land use application. Therefore, these statements do not demonstrate “actual bias” by any Board member.

Further, the Board denies Ms. McCaffree’s contention that Board member attendance at a community luncheon where JCEP made a presentation about the project resulted in ex parte communications pertaining to this request. The luncheon occurred in 2014, long before Applicant submitted this application. Therefore, by definition, any communications that occurred between Applicant any Board members at this event are necessarily not ex parte as to this application. Additionally, the two Board members who attended the luncheon each disclosed their attendance at the event at the December 5, 2017 Board meeting. Commissioner Sweet disclosed that he attended two community meetings pertaining to the project for the purpose of keeping himself current on the project. He said that approximately 50 or more people attended the events. He said that attendance at the event would not affect his ability to review planning issues related to the project or to make decisions based upon applicable criteria. Commissioner Main disclosed that he attended a luncheon presentation at Bandon Dunes and
said no one affiliated with Applicant spoke with him individually and that the presentation was
generalized in nature.

iii. McCaffree Exhibit C – Letter from Commissioner Sweet to FERC

The Board denies Ms. McCaffree’s contention that the letter from Commissioner Sweet
to FERC demonstrates actual bias. Ms. McCaffree raised this contention in her recent appeal to
LUBA of the JCEP decision, and it was rejected. Oregon Shores Conservation Coalition v. Coos
County, ___ Or LUBA at ___ (LUBA No. 2016-095, November 27, 2017) (slip op. at 36-37) (“We
disagree with McCaffree that Chair Sweet’s April 11, 2016 letter * * * demonstrate[s] that Chair
Sweet was incapable of determining the merits of the land use application based on the evidence
and arguments presented.”). LUBA explained that Commissioner Sweet’s statements “represent
no more than general appreciation of the benefits of local economic development that is common
among local government elected officials.” Id. The Board adopts LUBA’s reasoning in
response to this issue.

iv. McCaffree Exhibit D – Public Statements by Commissioner Sweet

The Board denies Ms. McCaffree’s contention that the public statements attributed to
Commissioner Sweet at a January 2015 community meeting demonstrate actual bias. Ms.
McCaffree raised this contention as to these specific statements in her recent appeal to LUBA of
the JCEP decision, and it was rejected. Oregon Shores Conservation Coalition, ___ Or LUBA at
___ (slip op. at 36-37) (“We disagree with McCaffree that Chair Sweet’s * * * public statements
[] demonstrate that Chair Sweet was incapable of determining the merits of the land use
application based on the evidence and arguments presented.”). The Board adopts LUBA’s
reasoning in response to this issue.

v. McCaffree Exhibit E – Sheriff’s Office Budget Request

For three reasons, the Board denies Ms. McCaffree’s contention that this exhibit, which
shows a budget request for the Sheriff’s Office to conduct a major incident command system
exercise that will be funded by JCEP, demonstrates that any Board member has “actual bias.”
First, JCEP is not the applicant in this case, so even if there were bias in favor of JCEP, it would
not necessarily be bias in favor of Applicant. Second, Ms. McCaffree has not adequately
explained how the existence of this funding would cause any Board members to prejudge the
application (which is not related to funding of the Sheriff’s Office), and she has not identified
any “statements, pledges or commitments” from any Board members that the existence of the
funding has caused them to prejudge the application. Third, the Sheriff’s Office funding is not
contingent upon approval of the application. Therefore, Ms. McCaffree has not demonstrated
that any Board member demonstrated “actual bias” due to this funding.

vi. McCaffree Exhibit F – Press Reports of JCEP Funding for County
Sheriff’s Office

For three reasons, the Board denies Ms. McCaffree’s contention that the Board members
were biased due to funding by JCEP for the County Sheriff’s Office. First, JCEP is not the
applicant in this case, so even if there were bias in favor of JCEP, it would not necessarily be bias in favor of Applicant. Second, Ms. McCaffree has not adequately explained how the existence of this funding would cause any Board members to prejudge the application (which is not related to funding of the Sheriff’s Office), and she has not identified any “statements, pledges or commitments” from any Board members that the existence of the funding has caused them to prejudge the application. Third, the Sheriff’s Office funding is not contingent upon approval of the application. Therefore, Ms. McCaffree has not demonstrated that any Board member demonstrated “actual bias” due to this funding.

vii. McCaffree Exhibit G – Agreement Between Applicant and County

The Board denies Ms. McCaffree’s contention that the Board members were biased due to a 2007 agreement between Applicant and the County pursuant to which Applicant pays the County $25,000 a month. Ms. McCaffree has not adequately explained how the existence of this agreement would cause any Board members to prejudge the application (which is not related to the Agreement), and she has not identified any “statements, pledges or commitments” from any Board members that the existence of the Agreement has caused them to prejudge the application. Further, the Agreement does not require the Board to approve the application. Therefore, Ms. McCaffree has not demonstrated that any Board member demonstrated “actual bias,” due to this agreement.

Finally, before taking final action to approve these findings, each Board member stated that he/she had not prejudged the application and that he/she could evaluate the testimony and evidence in the record and make a decision based upon whether the testimony and evidence demonstrates compliance with applicable criteria. For these reasons, the Board finds that it has addressed the contentions that Board members were biased or received undisclosed ex parte communications pertaining to the project.

III. CONCLUSION.

To summarize, this extension request concerns both resource and non-resource lands. Under the terms of the relevant criteria, CCZLDO § 5.2.600, there are two different standards for granting an extension. For granting an extension on resource lands, the Applicant must show it was unable to begin construction for reasons out of its control. The Board finds that, despite the Applicant’s diligent pursuit of the federal approvals required, those approvals have not yet been secured, and thus the Applicant was unable to commence its development proposal before the April 2, 2017 date for reasons beyond the Applicant’s control.

For granting an extension on non-resource lands, CCZLDO § 5.2.600 only requires that an Applicant show that none of the relevant approval criteria have changed since the development approval was given. The Applicant’s use is still listed as a conditional use in the relevant non-resource zones under the current zoning regulations, and thus the Board finds the Applicant meets this second criterion as well.

For these reasons, the Board finds and concludes that the Applicant, Pacific Connector, has met the relevant CCZLDO § 5.2.600 approval criteria for a CUP extension of one year, to
April 2, 2018. The Board affirms the Planning Director’s May 18, 2017 decision granting the one (1) year CUP in County File No. HBCU-10-01 / REM-11-01, to April 2, 2018.