COOS COUNTY HEARING OFFICER
ANALYSIS, CONCLUSIONS, AND
RECOMMENDATIONS
TO THE COOS COUNTY BOARD OF COMMISSIONERS

PACIFIC CONNECTOR GAS PIPELINE PROPOSAL
COOS COUNTY, OREGON

FILE NO. HBCU-13-02
DECEMBER 05, 2013
(REVISED 12 DECEMBER 2013)

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I. Summary of Proposal and Process

A. Summary of Proposal.

The applicant has applied to the Federal Energy Regulatory Commission (FERC) to construct, install, own, operate and maintain an interstate natural gas pipeline to transport natural gas from the Jordan Cove liquefied natural gas (LNG) terminal.

The Coos County Board of Commissioners (“BCC” or “Board”) approved a conditional use application in March 2012 for the pipeline. Since that time the applicant has chosen to change the request to allow for exportation and this triggered a new review through FERC.

As discussed at the September 20, 2013 public hearing, the application initially requested that Condition No. 25 be “deleted.” However, the Planning Director pointed out that the relevant section of the Coos County Zoning and Land Development Ordinance (“CCZLDO”), at Section 5.0.350(C) provides that: “At an applicant's request, the county may modify or amend one or more conditions of approval for an application previously approved and final.” Accordingly, in order to avoid any potential issue on appeal, the applicant has changed its initial request for the deletion of Condition No. 25 to a request to modify it with the language recommended by the Planning Director in her staff report submitted in advance of the public hearing.

B. Process

The review timeline for this application is as follows:

- June 28, 2013: Application deemed incomplete.
- August 23, 2013: Application deemed complete.
- September 20, 2013: Public Hearing
- September 27, 2013: First Open Record Period Closed (any testimony).
- October 4, 2013: Second Open Record Period Closed (for rebuttal testimony only)
- October 11, 2013: Third Open Record Period Closed (for surrebuttal testimony only)
- October 18, 2013: Applicant’s Final Argument
- December 5, 2013: Hearings Officer’s Recommendation.
- December 12, 2013: Hearings Officer’s Recommendation (Revised Version).

C. Nature of Decision and Scope of Review

The decision to modify an earlier approval will constitute a land use decision reviewable by the Land Use Board of Appeals (“LUBA”). Reusser v. Washington County, 25 Or LUBA 252 (1993). McElroy v. City of Corvallis, 36 Or LUBA 185 (1999), aff’d without opinion, 162 Or App 390, 991 P.2d 582 (1999). But See Neelund v. Josephine County, 52 Or LUBA 683 (2006) (code provided that a “decision by the Director to modify or not modify a condition or conditions shall be processed using ministerial review procedures * * *.). Note that the local government’s

The question of whether Condition No. 25 should be modified primarily presents an issue of law, but also presents issues of facts as well. If appealed, LUBA will review the BCC’s decision to determine if it contains errors of law and is supported by substantial evidence in the whole record. Since many of the key legal issues presented by this case depend on interpretations of state or federal law, LUBA will not give deference to the BCC on those issues. ORS 197.829(1).

II. **Background on the Genesis of Condition of Approval No. 25.**

Condition No. 25 was imposed as part of County File No. HBCU-10-01, which was the initial land use application seeking approval of the Pacific Connector Gas Pipeline ("PCGP") pipeline route through Coos County. See Final Decision and Order No. 10-08-045PL, at p. 154. Exh 8. It arose in the context of a debate concerning whether the proposed PCGP pipeline facility was "necessary" or "needed" for purposes of ORS 215.275. That statute provides that a utility facility is necessary for public service when it must be located in an Exclusive Farm Use zone in order to provide the service. The statute articulates factors that will demonstrate whether a facility is "necessary." Because ORS 215.275(6) and OAR 660-033-0139(16) exempts Federal Energy Regulatory Commission (FERC)-regulated pipelines from the "necessary for public service" test, the Board determined in the Final Decision that ORS 215.275(1) was preempted by federal law and thus not applicable to the PCGP. See Final Decision and Order No. 10-08-045PL, Findings at p. 116-119.

Notwithstanding the state of the law, the opponents contended that the PCGP was not needed or "necessary" to serve the U.S. market and thus there was a purported concern that the PCGP would be used to transport natural gas that might be converted to LNG and ultimately exported from the United States:

"WELC addresses this criterion by arguing that '[r]eams of testimony submitted to [FERC] explained how the *** pipeline is not at all necessary in order for natural gas to be provided to US residents.' See Letter from WELC staff attorney Jan Wilson dated June 8, 2010, at p. 5. Ms. Wilson goes on to state that California and other states will not need natural gas, and that 'the threat of this pipeline being used to bring domestic natural gas *** to a coastal terminal is very real.' Id."

See Final Decision and Order No. 10-08-045PL, Findings at p. 120. In responding to this issue, the BCC adopted the recommended findings of the hearings officer and concluded that it lacked any legal basis under state or local law to impose a limitation on which direction the natural gas would travel within the PCGP and only imposed Condition No. 25 because the applicant acquiesced to it:
"Frankly, the Board fails to understand why, from a land use perspective, it matters which direction the gas is traveling, or why exporting gas is a 'threat.' To the contrary, it seems that if the United States is to be faulted, it is because it fails to export enough goods to other countries. Nonetheless, if ‘reams of testimony’ were submitted to FERC, then it seems proper that FERC decide the issue. There is no County zoning code provision that requires the County to make that decision.

"At the hearing, the applicant agreed to a condition of approval limiting the use of the pipeline to import use. Regardless, case law makes clear that the issue of whether new gas pipelines are 'needed' is not relevant to any approval standard contained in ORS 215.275 or CCZLDO §4.9.450. *Sprint PCS v. Washington County*, 186 Or App 470, 63 P3d 1261 (2003); *Dayton Prairie Water Ass'n v. Yamhill County*, 170 Or App 6, 11 P3d 671 (2000)."

See Final Decision and Order No. 10-08-045PL, Findings at p. 120 (emphasis added). Thus, on the basis of the BCC's own findings, the condition was not imposed to ensure compliance with any provisions of state or local law. Therefore, modifying the condition will not cause the PCGP to become non-compliant in any way.

As stated at the public hearing held on September 20, 2013, the applicant withdrew its consent to the condition and asked that it be modified. The opponents oppose modifying or deleting the condition.

Additional points should be raised as background to this discussion. Many of the persons testifying at the public hearing (and in writing) emphasized that Section 7 of the Natural Gas Act ("NGA") requires FERC to issue “certificate[s] of public convenience and necessity” for the construction and operation of natural gas facilities for the transportation of gas in “interstate commerce.” Most commentators spoke of this determination by reference to the generic phrases “public need” and “public benefit.” Ms. Janet Stoffel’s testimony dated September 26, 2013 and Mr. Sean Malone’s testimony dated Sept. 20, 2013 typify the argument. See Exhibits 10 & 14. Commentators advancing this position generally seemed perplexed at the hearing when the hearings officer stated that there did not seem to be a basis to impose Condition No. 25 and therefore the Condition must be modified once the applicant submitted a request to delete / modify the condition. To these commentators, it seemed rather obvious that an LNG export facility has different impacts than an import facility. For example, attorney Sean Malone articulates the concerns about Condition No. 25 not in terms of the pipeline, but rather in the context of the overall project:

Because the direction of the natural gas has changed to export, the Applicant had to site a power plant that was not anticipated in the original application to change the gas to a liquid state. This power plant changes the calculus, and the new application has not
considered this sea change in the applicant’s proposal. Thus, the condition of approval is more substantive than just changing the flow of the pipeline; instead, it alters the application significantly given that a new, large-scale power plant must also be included to make the overall project feasible.

See Malone letter dated Sept 20, 2013, at p. 5. Mr. Malone, like many of the other commentators, fails to appreciate the fact that the land use application that is before the County relates solely to the pipeline portion of the project. Although Mr. Malone tries to analytically merge the PCGP pipeline application with the Jordan Cove Energy Project (“JCEP”) LNG terminal application, the two must be considered separately by law. Mr. Malone is correct that the decision to convert the project to an export facility does have land use implications for the LNG terminal, because additional facilities and structures will be needed. However, that does not change anything with regard to the pipeline. Condition No. 25 related to the pipeline only. To the extent that a similar condition was imposed upon the LNG terminal, then that question must be considered as part of a separate proceeding.

Thus, the arguments made by the commentators concerning NEPA and Condition No. 25 are misdirected: while these concerns may be valid in the FERC proceedings conducted pursuant to Section 7 of the NGA, they are not necessarily relevant to a local land use proceeding, which is limited to approval standards set forth in the zoning code and comprehensive plan. The federal government does not have the same general type of “police power” that is reserved to the states by the Tenth Amendment. At least in theory and design, the federal government is one of limited enumerated powers. Nonetheless, the federal government does have power to regulate gas pipelines under the Commerce Clause, and also with regard to international trade as well. For these reasons, the types of arguments related to NEPA are, therefore, best directed at FERC.

The hearings officer tried to explain to the commentators who appeared at the public hearing that the County’s jurisdiction over this pipeline is limited, and begins and ends with the comprehensive plan and land use regulations (and even then, only to the extent that those plans and codes are not preempted by federal law). One commentator vents her frustration created by this legal paradigm by stating “when Mr. Stamp is not interested in what this means for our community or what the NEPA rules are and all that matters to him are the land use codes, I come to wonder how we got to this point.” See Letter from Janet Stoffel dated Sept 26, 2013, at p. 2. While it is perhaps understandable that the overlapping regulatory processes related to energy facilities cause confusion for a lay person as to whom certain arguments should be directed, the issue is not whether the hearings officer (or the County’s elected officials, for that matter) are “interested in what this means for our community.” Rather, the issue is about jurisdiction and who has authority to enforce the rule of law. In this case, the County’s role in the siting process is limited, and NEPA-related issues and LNG terminal issues are simply not within the scope of this proceeding.

With that background in mind, the hearings officer will endeavor to set forth the legal principles at issue when considering whether Condition No. 25 is a lawful exercise of the police power.
III. Legal Analysis.

A. Oregon Law Pertaining to Conditions of Approval in Land Use Cases.

In order for a local government to impose a condition of approval, the record must demonstrate that conditions attached to the land use approval must support some legitimate planning purpose. Furthermore, the local government must have authority under its comprehensive plan or land use regulations to impose the condition. Wastewood Recyclers v. Clackamas County, 22 Or LUBA 258, 263-65 (1991); Wheeler v. Marion County, 20 Or LUBA 379, 385 (1990); Century 21 Properties v. City of Tigard, 17 Or LUBA 1298, 1314-15 (1989); Consolidated Rock Products v. Clackamas County, 17 Or LUBA 609, 628 (1989); Benj. Fran. Dev. v. Clackamas County, 14 Or LUBA 758, 761 (1986); Davis v. City of Bandon City, 28 Or LUBA 38, 48 (1994). With regard to the first point, a local government’s obligation when imposing conditions of approval has been summarized as follows:

“A local government’s findings and evidentiary record supporting its decision to impose conditions of approval need only be sufficient to demonstrate that the conditions support or further a legitimate planning purpose. It is not required that the evidentiary record ‘prove the need for a condition but it must lead a reasonable person to conclude that the evidence supports a need for a condition.’ * * * “ (Citation Omitted) (Emphasis added).

Vestibular Disorder Consult. v. City of Portland, 19 Or LUBA 94, 102 (1990). Examples of conditions that have been found acceptable by LUBA include:


- Condition prohibiting the use of heavy construction vehicles on certain streets. Benjamin Franklin Dev’l v. Clackamas County, 14 Or LUBA 758, 762 (1986).


- Conditions limiting the time of approval of a land use. Id.
However, some limits have been established in the case law. Examples of impermissible conditions include:


- Conditions that do not relate to an approval standard or otherwise further a legitimate government interest. *King v. Washington County*, 60 Or LUBA 253 (2009). *See also generally Davis v. City of Bandon City*, 28 Or LUBA 38, 48 (1994); *Sellwood Harbor Condo Assoc. v. City of Portland*, 16 Or LUBA 505, 522 (1988); *Benjamin Franklin Dev. v. Clackamas County*, 14 Or LUBA 758, 761 (1986).


In this case, Condition No. 25 is questionable because it does not, on its face, relate to an approval standard or otherwise further a legitimate governmental planning interest. This issue is discussed in detail below.

**B. Limits on the Police Power: A Lawful Condition of Approval Must Promote the Health, Safety, Morals, or General Welfare of the Community in Order to Be Constitutional.**

The lawmaking power of the federal government is limited to the specific grants of power found in the Constitution. The Tenth Amendment to the U.S. Constitution reserves the right of the states to make laws governing safety, health, welfare, and morals. It states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people."

Thus, under the system of government in the United States, only the states and their political subdivisions have the right to make laws based on the so-called “police power.” The term “police power” describes the basic right of governments to make laws and regulations for the benefit of their communities. State legislatures exercise their police power by enacting
Police power is used as the basis for enacting a variety of substantive laws in such areas as zoning, land use, fire codes, building codes, gambling, discrimination, parking, crime, licensing of professionals, liquor, motor vehicles, bicycles, nuisances, schooling, and sanitation. In 1926, the United States Supreme Court upheld a zoning regulation as a constitutional exercise of the police power. The court stated that such an ordinance was a legitimate exercise of the police power on the grounds of preserving property values and promoting a rational scheme of land development. Village of Euclid v. Ambler Realty Company, 272 U.S. 365, 389-90 (1926). The court noted that the four purposes of the police power were the protection of the health, safety, morals, and general welfare of a community, and that a restrictive zoning ordinance must bear a rational relationship to at least one of these purposes. See also Kroner v. City of Portland, 116 Or. 141; 240 P. 536 (1925); Holt v. City of Salem, 192 Or. 200, 207, 234 P.2d 564 (1951); Page v. City of Portland, 178 Or. 632, 637, 165 P. 2d 280 (1946); Miller v. Columbia River Gorge Commission 118 Or. App. 553, 556, 848 P.2d 629 (1993) (under both federal and Oregon case authority construing the takings provisions of the federal and state constitutions, the police power encompasses the authority to regulate land, inter alia, for aesthetic purposes and for purposes of channeling development to existing urban areas); Beaver Gasoline Co. v. Zoning Hearing Board, 445 Pa. 571, 285 A.2d 501 (1971).

Since that time, courts have interpreted the four purposes very broadly, and have, for the most part, been very deferential to local governments when seeking to regulate under the guise of the police power. For example, courts have allowed zoning regulations which seek to regulate aesthetics, the visual architecture of buildings, historical preservation of buildings, the character of a community, and matters related to environmental protection. See Oregon City v. Hartke, 240 Or. 35, 400 P.2d 255 (1965) (upholding right to ban commercial automobile wrecking in the City - except for one existing non-conforming use - on the ground that the use is offensive to aesthetic sensibilities.”

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1 See also Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (declaring zoning power could be used to create a “quiet place where yards are wide, people few, and motor vehicles restricted . . . to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people”); Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956, 959 (1st Cir. 1972) (holding municipalities can use general welfare and other acceptable criteria to “preserv[e] the charm of a New England small town”); County Comm’rs v. Miles, 228 A.2d 450, 459 (Md. 1967) (finding “preservation, in some measure, of existing conditions” is an appropriate ends for zoning); Bellaire v. Lankin, 317 S.W.2d 43, 46 (Tex. App. 1959) (ruling a thirty-inch fence violated an ordinance limiting fence height to twenty-four inches because the higher fence could serve as a hiding place for criminals); Gunning Adver. Co. v. St. Louis, 137 S.W. 929, 942 (Mo. 1911) (finding billboards “endanger the public health, constitute hiding places and retreats for criminals and all classes of miscreants”); see also Berman v. Parker, 348 U.S. 26, 33 (1954) (holding values that represent public welfare include the “spiritual as well as [the] physical, aesthetic as well as monetary”); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 528 n.7 (1981) (Brennan, J., concurring) (holding that an ordinance banning billboards was valid, even though Justice Brennan was not satisfied with the sufficiency of the evidence connecting billboards with traffic safety).
Nonetheless, local government’s authority to regulate the use of land within its jurisdiction represents a delicate balance between the private property rights of the landowner and the local government’s interest in protecting the public’s health, safety and welfare. If a law enacted pursuant to the police power does not promote the health, safety, or welfare of the community, it is likely to be an unconstitutional substantive due process deprivation of life, liberty, or property. *Mahony v. Township of Hampton*, 539 Pa. 193, 651 A.2d 525 (1994); *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (finding zoning regulations irrational because they do not achieve their asserted, legitimate goals); *Colorado Springs v. Grueskin*, 422 P.2d 384, 388 (CO 1967) (en banc) (striking down gasoline delivery regulations after expert testimony showed that the regulations did not protect public safety). As an example, one basic and fundamental principle of zoning law is that zoning regulations must directly affect land, as opposed to the owners of land.2 A city cannot, as an example, give a conditional use permit for a dog kennel but limit that approval to only the current owner of the kennel. Similarly, a city cannot grant a variance to a landowner on account of the landowner’s age or physical condition. *Erickson v. City of Portland*, 9 Or App 256, 262, 496 P2d 726 (1972).

Often, challenges to zoning laws which do not advance a legitimate governmental interest are framed as violations of “substantive due process.” The term “substantive due process” is derived from the Fourteenth Amendment, and protects individuals from arbitrary actions of government. Ordinances that are arbitrary or an abuse of power will be found to be unconstitutional violations of substantive due process. However, an ordinance enacted to protect either the health, safety, morals, or general welfare of the inhabitants of the municipality generally will not be found to violate substantive due process rights so long the regulation bears a rational relation to a legitimate governmental purpose.

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2 Zoning laws regulate the use, not the person, and when discussing “impacts” in a zoning sense, the County must consider only those impacts that would occur regardless of the specific owner or occupant. See generally *Dexter v. Town Bd. of Gates*, 36 NY2d 102, 324 NE2d 870 (1975) (“it is a fundamental principle of zoning that a zoning board is charged with the regulation of land use and not with the person who owns or occupies it); *Matter of Weinrib v. Weisler*, 27 N.Y.S.2d 592, 313 N.Y.S.2d 407, 261 N.E.2d 406, affg. 33 A.D.2d 923, 307 N.Y.S.2d 603; 1 Rathkopf, Law of Zoning and Planning, p. 1-24). *Arkam Machine & Tool Co. v. Lyndhurst Tp.*, 180 A2d 348, 350 (NJ App.Div. 1962); *Karp v. Zoning Board*, 240 A2d 845 (Conn 1968) (zoning regulations the use of land irrespective of who may be the owner of such land at any given time * * *); *O'Connor v. City of Moscow*, 202 P2d 401, 404 (Idaho 1949) (“A zoning ordinance deals basically with the use, not ownership, of property.”); *Dawson Enterprises, Inc. v. Blaine County*, 567 P2d 1257, 1264 n6 (Idaho 1977) (identity of owner, length of ownership and form of ownership are not factors to be weighed in even-handed administration of zoning ordinances); *Dinan v. Board of Zoning Appeals*, 595 A2d 864, 867 n4 (Conn 1991) (the identity of a particular user of the land is irrelevant to zoning law); *Faircloth v. Lyles*, 592 So2d 941 (Miss. 1991) (“Nonconforming uses fix themselves to the land, not to the owner of the land. Thus, any prohibition in the ordinance on the transfer of nonconforming uses with the land is invalid.”); *Blades v. City of Raleigh*, 187 SE2d 35, 43 (NC 1972) (“The whole concept of zoning implies a restriction upon the owner's right to use a specific tract for a use profitable to him but detrimental to the value of other properties in the area, thus promoting the most appropriate use of land throughout the municipality, considered as a whole.”); *Elizabeth City v. Aydlett*, 161 SE 78 (NC 1931); *Graham Court Associates v. Town Council of Town of Chapel Hill*, 281 SE2d 418 (NC App 1981). See also 82 Am.Jur.2d, Zoning and Planning, §§ 5 and 13; Robert Anderson, 1 American Law of Zoning § 6.40 (3d ed. 1986); Rathkopf, The Law of Zoning and Planning, §1.01 (4th ed. 1981).
The case of *Mahony v. Township of Hampton*, 539 Pa. 193, 651 A.2d 525 (1994) presents a good example of how a local jurisdiction can exceed its police power. In *Mahony*, the township of Hampton in Pennsylvania enacted a zoning ordinance which prohibited a private party from operating a gas well in a residential district but allowed the operation of such wells by the government. Obviously, prohibiting private competition was economically advantageous to the government, but it did nothing to further a legitimate planning interest. Jack D. Mahony, a landowner who operated a gas well, objected to the ordinance, arguing that the disparate treatment of public and private operation of gas wells was arbitrary and not justified by any concerns related to the police power. Mr. Mahony noted that the State of Pennsylvania already regulated all gas wells in the state, and that there was no factual basis for distinguishing between public and private wells.

The Supreme Court of Pennsylvania agreed with Mahony that the state’s regulations were sufficient to secure the safety of the community. The court opined that if the township wished to further ensure gas well safety, it could require the posting of a bond with the township before granting a license to operate the well. Such a measure would ensure that the gas well was being operated by a financially secure person who would have the resources to keep the well in good repair. The court held that the total ban on private operation of gas wells in residential districts was unreasonable and that it bore no real and substantial relation to the health, safety, and welfare of the community. Therefore, the ordinance was an invalid exercise of the police power.

Turning to Oregon law, the Legislative policy underlying the creation of comprehensive planning and zoning in Oregon is set forth in ORS 197.010, as follows:

**197.010 Policy.** The Legislative Assembly declares that:

* * * * *

(2)(a) The overarching principles guiding the land use program in the State of Oregon are to:

(A) Provide a healthy environment;
(B) Sustain a prosperous economy;
(C) Ensure a desirable quality of life; and
(D) Equitably allocate the benefits and burdens of land use planning.

(b) Additionally, the land use program should, but is not required to, help communities achieve sustainable development patterns and manage the effects of climate change.

(c) The overarching principles in paragraph (a) of this subsection and the purposes in paragraph (b) of this subsection provide guidance to:

(A) The Legislative Assembly when enacting a law regulating land use.
(B) A public body, as defined in ORS 174.109, when the public body:
(i) Adopts or interprets goals, comprehensive plans and land use regulations implementing the plans, or administrative rules implementing a provision of ORS chapter 195, 196, 197, 215 or 227; or
(ii) Interprets a law governing land use.

Coos County’s Zoning and Land Development Code sets forth a similar purpose statement:

**SECTION 1.1.200 Purpose.** It is the purpose of this Ordinance to implement the Coos County Comprehensive Plan by:
1. Promoting the orderly growth of Coos County,
2. Protecting and enhancing the environment,
3. Conserving and stabilizing the value of property,
4. Reducing excessive traffic congestion,
5. Preventing overcrowding of land by establishing standards for proper density,
6. Providing adequate open space for light and air,
7. Conserving natural resources,
8. Encouraging the most appropriate use of land,
9. Preventing water and air pollution,
10. Facilitating fire and police protection,
11. Providing for community facilities,
12. Promoting and protecting the public health, safety, convenience and general welfare.

The County’s zoning ordinances and subdivision laws must be written to advance a legitimate municipal interest.

The question before the County is whether a condition of approval limiting the use of a pipeline to the importation of national gas relates to a legitimate governmental interest in the health, safety, morals, or public welfare of the citizens of Coos County. In light of the fact that no new structures or facilities are proposed along the pipeline route, the answer is an obvious “No.”

**C. Condition No. 25 Violates the Substantive Due Process of the Applicant Because It Does Not have a Legitimate Planning Purpose and Does Not Advance The Health, Safety, Morals, or General Welfare of the Community.**

At the September 20, 2013 hearing, the hearings officer questioned the applicant’s representatives and employees to determine if any additional structures or facilities would be needed in order to transition the pipeline from an import facility to an export facility. This question is critical, because if there is no proposed physical modification of the pipeline, there is no legitimate planning purpose in continuing to impose the condition over the objection of the applicant.
PCGP employee Robert Peacock, the Project Manager of the proposed pipeline, presented oral testimony at the hearing, and written testimony thereafter. He noted that the physical nature of the PCGP pipeline facilities in Coos County would be identical regardless of whether the PCGP was used to support an LNG export terminal versus an LNG import terminal. This expert testimony constituted substantial evidence, because a reasonable decision-maker could rely on that testimony to support a conclusion.

One commentator attempted to rebut Mr. Peacock’s testimony by arguing the following:

The sameness of the pipeline whether it is an import vs. export pipeline was a significant point during the 9-20-13 hearing. I argue that the pipeline structure will not be identical if erected for exported or bi-directional gas as it were erected for import only. The following is a letter dated 7 – 3 – 12 from the attorneys for the LNG Development Company LLC and the Oregon Pipeline Company to FERC. I have highlighted the portion of the letter which clearly state that the component modification is inevitable. On page 2, the following is stated “Once all facilities are constructed and placed in service, Oregon LNG will operate the Export Project on an integrated basis with its pending Import Project to provide bi-directional service such integrated operation will require modification of certain components on the import Project currently pending before the Commission.

[Internet Link Omitted] * * * * *.

This is proof that the system for import will not be identical to the system for export.

See letter from Ms. Dawn Brittian, dated Sept 26, 2013, Exh. 13. The hearing officer’s analysis is confined to the record. The hearings officer cannot consider testimony that is only provided via a “link” to an internet site. Furthermore, Ms. Brittain does not explain what relation that “LNG Development Company, LLC” and “Oregon Pipeline Company” have to the PCGP pipeline. The hearings officer suspects that these are competitors of the applicant that are involved with an unrelated LNG terminal and pipeline project proposed for Astoria. If that is indeed the case, then the testimony does not constitute substantial evidence that undermines Mr. Peacock’s testimony.

Some commentators attempted to offer other explanations as to why Condition No. 25 was still relevant. For example, in a letter dated October 11, 2013, Jody McCaffree argues that Condition No. 25 was related to an approval standard. She states:

The reason that citizens and landowners fought for this Condition of Approval was because it was apparent that the proposed Jordan Cove and Pacific Connector Gas Pipeline “project” would do this bait and switch. They previously applied for permits under the
misconception that their project would be importing natural gas which made it easier for them to show a justifiable public need and benefit when the real intent of the project was to actually export natural gas to markets overseas for the benefit and “interest” of the foreign-owned and controlled Jordan Cove Energy Project.

See Letter from Jody McCaffree dated October 11, 2013, at p. 1. Ms. McCaffree may be correct that the change from import to export will change the way that FERC will view their determination of public necessity, but Coos County does not have a similar “public need” or “public benefit / public necessity” standard applicable to gas pipelines. Nor could it, due to federal preemption of that issue in the NGA. See also ORS 215.275(6). Therefore, this line of argument provides no legitimate planning basis to retain Condition No. 25 in an unmodified form.

Mr. John Clarke argues that the pressures inside the pipeline will be different between an import facility and an export facility. See Letter from John Clarke dated Sept. 25, 2013, at p. 1. Even if this were true, however, Mr. Clarke does not explain how this fact relates to any approval standard at issue in this case. Reading between the lines, the hearings officer presumes the issue relates to pipeline safety. However, Congress has expressly pre-empted a state or local government’s ability to regulate issues related to the safety of pipelines. The Natural Gas Pipeline Safety Act of 1968 originally directed the Secretary of Transportation to establish minimum federal safety standards for the design, installation, inspection, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities used for the transportation of gas. The Act’s text, its legislative history, administration implementation, and

3 For example, 49 U.S.C. Chapter 601 sets out federal safety standards for gas pipelines. 49 U.S.C. § 60104(c) states: “Preemption: A State authority that has submitted a current certification under section 60105(a) of this title may adopt additional or more stringent safety standards for intrastate pipeline facilities and intrastate pipeline transportation only if those standards are compatible with the minimum standards prescribed under this chapter. A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation. Notwithstanding the preceding sentence, a State authority may enforce a requirement of a one-call notification program of the State if the program meets the requirements for one-call notification programs under this chapter or chapter 61.

Prior to 1994, there were two Acts controlling the area of interstate pipeline safety - the Natural Gas Pipeline Safety Act of 1968 (NGPSA) and the Hazardous Liquid Pipeline Safety Act of 1979 (HLPSA). The NGPSA and the HLPSA were combined and recodified without substantial change at 49 U.S.C. §§ 60101 to 60125 in 1994. See P.L. 103-272, 108 Stat. 1371 (July 5, 1994). The two similar provisions from each Act pertaining to preemption were consolidated into what is now 49 U.S.C. § 60104(c). Compare 49 U.S.C. § 60104(c) with 49 U.S.C. § 1672(a)(1) (NGPSA) and 49 U.S.C. § 2002(d) (HLPSA). Title 49 U.S.C. 1672(b) (1972) originally provided for the establishment of minimum federal safety standards for the transportation of gas. The section concluded:

'Any State agency . . . may not adopt or continue in force after the minimum Federal safety standards referred to in this subsection become effective any such standard applicable to interstate transmission facilities.'

4 The relationship of Federal-State regulatory authority created by this bill differs as between local pipelines and interstate transmission lines. In the latter area, the lines of a single transmission company may traverse
judicial interpretation, attest to federal preemption of the field of safety with respect to the establishment and enforcement of standards regulating the interstate transmission of gas by pipeline. *ANR Pipeline Co. v. Iowa State Commerce Commission*, 828 F.2d 465, 470 (8th Cir.1987) (Iowa may not impose its own safety standards on facilities). The constitutional basis of preemption is the commerce clause and the supremacy clause.

In addition, FERC has ruled that state agencies could not use state law to “prohibit or unreasonably delay the construction or operation of [LNG] facilities approved by this Commission.” *Weaver’s Cove Energy, LLC*, 112 F.E.R.C. ¶61070, at ¶ 61,546, on rehearing, 114 F.E.R.C. ¶61058, at 61185-6.

Mr. Clarke also states that “my source tells me that the pressure will be between 700-800 p.s.i. at the coast. To bring that pressure up more compressor stations must be added.” See Letter from John Clarke dated Sept. 25, 2013, at p. 1. To the extent that Mr. Clarke intends his testimony to undermine Mr. Peacock’s testimony, that effort fails because the source of Mr. Clark’s data is uncertain. Anonymous sources may be appropriate for the CIA, but not in a land use hearing. Substantial evidence does not exist to support a conclusion if the only supporting evidence “consists of an opinion whose foundation is unclear or which is inconsistent with the information on which it is based.” *1000 Friends of Oregon v. LCDC*, 83 Or App 278, 286, 731 P2d 457 (1987), aff’d in part, rev’d in part on other grounds, 305 Or 384, 752 P2d 271 (1988). In *Worcester v. City of Cannon Beach*, 10 Or LUBA 307 (1983), LUBA held that when a witness does not offer any supporting documentation and does not state how he arrived at his conclusions, and does not explain how he is qualified to make conclusions of a scientific nature, LUBA will not find the testimony to be convincing. *Id.* at 310. *See also Tournier v. City of Portland*, 16 Or LUBA 546, 553 (1988) (A local government's decision is supported by substantial evidence if contrary evidence in the record does not so detract from the weight or undermine the credibility of the evidence relied on by the local government as to render it not substantial.).


In 1973, the Secretary of Transportation reported to Congress that the Department of Transportation through its Office of Pipeline Safety exercised exclusive authority for safety regulation of interstate gas transmission lines. *See Federal-State Relations in Gas Pipeline Safety 3, 7, 10 (1973).*

The ’Natural Gas Pipeline Safety Act of 1968’... has entered the field of ’design, installation, inspection, testing, construction, extension, operation, replacement and maintenance of pipeline facilities.’... As applied to interstate transmission pipelines, the Safety Act must prevail over and pre-empt any state (law).’ *United Gas Pipeline Co. v. Terrebonne Parish Police Jury*, 319 F.Sup. 1138, 1139 (E.D.La. (1970), aff’d 445 F.2d 301 (5th Cir. 1971). *See also generally Northern Border Pipeline Co. v. Jackson County*, 512 F.Sup. 1261 (D.Minn.1981) (Natural Gas Pipeline Safety Act of 1968 barred a condition on a construction permit requiring that the gas line be buried a minimum of six feet); *Williams Pipe Line Co. v. City of Mounds View*, 651 F Supp 551 (1987).

7 U.S.Const., art. I, 8.

8 U.S.Const., art VI.
Citing a link to a Wikipedia page,\(^9\) Ms. Janet Stoffel discusses the liquefaction process from gas to liquid, and expresses concern about how the by-products of the freezing process will be managed. See Letter from Janet Stoffel dated September 26, 2013, at p. 1. She points out that that certain components need to be removed from the gas prior to the actual freezing process. She asks numerous questions related to potential hazards and potential environmental problems associated with this process. She points out that natural gas contains a mixture of methane and heavier hydrocarbon gases, as well as carbon dioxide, nitrogen, water and a range of other impurities. These impurities must be removed and the heavier hydrocarbons separated prior to liquefying and transporting natural gas. Each LNG plant consists of one or more “trains” to compress natural gas into liquefied natural gas.

Whatever the answers to these questions may be, this land use application deals only with the pipeline component of the overall project, and does not address issues related to the LNG terminal and liquefaction plant itself. While the questions that Ms. Stoffel raises are legitimate and important, they are not properly raised in this proceeding. The hearings officer understands that the applicant withdrew the application addressing the changes to the LNG terminal and will now seek approvals for that facility under the State’s Energy Facility Siting Council (EFSC) process. It seems that the issues that Ms. Stoffel brings up may be appropriate subjects for consideration by EFSC and/or FERC.

Ms. Jody McCaffree takes Ms. Stoffel’s argument one step further in an attempt to create a nexus to the gas pipeline. She argues that an export LNG terminal would receive “dirty” natural gas which would have a corrosive effect on the interstate gas pipeline system. See Letter from Jody McCaffree dated October 4, 2013, at p. 6. Exh. 20. There does not appear to be any merit to this suggestion, and Ms. McCaffree seems simply to misunderstand the technical aspects of the LNG liquefaction process. The applicant rebutted the McCaffree testimony with surrebuttal evidence based upon information obtained from Mr. Robert Braddock of the Jordan Cove Energy Project, LP. See Letter from Mark Whitlow dated October 11, 2013, at p. 2. Exh. 21. The applicant pointed out that natural gas, like crude oil, is fungible. Basically, all producers must meet certain minimum quality standards prior to placing their product in the pipe system. Once the gas is in the system, however, it is mixed up with all the other gas in the system. Thus, producers place a certain quality of gas in the common pipe system, and simply are allocated an equal amount at the other end of the pipe. In that sense, “gas as gas,” and once it is in the pipes there really is no way to differentiate one company’s gas from that owned by another companies. As a result, there is no such thing as “clean” or “dirty” natural gas once that gas is in the pipe system, because it’s all pretty much the same.

\(^9\) The hearings officer would like to remind the parties that the County’s review of evidence is limited to the record, and the decision-maker is not permitted to access information referenced by a mere link to an internet address. Parties wishing to have the hearings officer review information contained on internet sites must provide paper copies of that material into the record using the procedure set forth in the zoning code or by local policy.
D. The Pipeline Is Lawful Under Oregon Law Even If It Does Not Provide Natural Gas Service To Coos County Residents or Oregon Residents.

Oregon Shores Conservation Coalition (“OSCC”) has a different take on the issue. OSCC notes that the term “utility” is defined in the CCZLDO as “public service structures.” See Letter from Courtney Johnson dated September 20, 2013, at p. 2. OSCC argues that, unlike an import terminal which brings in natural gas that could potentially be used by either county residents or U.S. citizens in general, “it is questionable whether an export pipeline remains a utility, because it would no longer be providing LNG service to the domestic public.” Ms. Johnson argues that since the proposed gas pipeline used for export, it no longer complies with CCZLDO §4.9.450.10

OSCC’s argument rises or falls on the presumption that a proposed pipeline can only fall within the definition of “utility” if it serves the “domestic public” with a service such as natural gas. However, this argument is not well developed in Ms. Johnson’s Sept. 20, 2013 letter, and does not account for either federal preemption doctrines applicable to natural gas pipelines. Nor does it take into account ORS 215.275(6), which effectively exempts interstate gas pipelines from proving that they are “necessary for public service” in the EFU zone.

While this question is somewhat tedious to resolve, the hearings officer believes that it is legally incorrect to interpret the term “utility” to require either local service or domestic service to the U.S. population. As the hearings officer noted in previous cases, it is apparent from reading the code that the drafters did not, in many instances, contemplate linear interstate pipeline features when drafting various code provisions. Nonetheless, the intent of both the Oregon legislature and LCDC, and by extension – the County - can be determined by a review of the patchwork assortment of statutory provisions and administrative rules applicable to pipelines.

We begin with CCZLDO §4.9.450, which is a provision intended to regulate uses in the EFU zone. CCZLDO §4.9.450(C) applies to “utility facilities necessary for public service.” It is more or less a direct codification of ORS 215.283(1)(c).11 As such, the hearings officer will

10 CCZLDO §4.9.450 is more or less a direct codification of ORS 215.283(1)(c). CCZLDO §4.9.450 provides:

The following uses and their accessory uses may be allowed as hearings body conditional uses in the “Exclusive Farm Use” zone and “Mixed Use” overlay subject to the corresponding review standard and development requirements in Sections 4.9.600 and 4.9.700.

* * * * *.

C. Utility facilities necessary for public service…. A facility is necessary if it must be situated in an agricultural zone in order for the service to be provided.

11 ORS 215.283(1) provides, in relevant part:
assume that County intended §4.9.450 to both implement state law and be interpreted consistent with state law. See WKN Chopin, LLC v. Umatilla Electric Cooperative, ___ OR LUBA ___ (LUBA No. 2012-016 2012) (using same approach).

CCZLDO §4.9.450 provides:

The following uses and their accessory uses may be allowed as hearings body conditional uses in the “Exclusive Farm Use” zone and “Mixed Use” overlay subject to the corresponding review standard and development requirements in Sections 4.9.600 and 4.9.700.

* * * * *.

C. Utility facilities necessary for public service…. A facility is necessary if it must be situated in an agricultural zone in order for the service to be provided.

Because Subsection (1)(C) appears in the first subsection of ORS 215.283, a “utility facility” necessary for public service is a use that is allowed “outright” in the EFU zone. See Brentmar v. Jackson County, 321 Or 481, 496, 900 P2d 1030 (1995) (“legislature intended that the uses delineated in ORS 215.213(1) be uses ‘as of right,’ which may not be subjected to additional local criteria”). WKN Chopin, LLC v. Umatilla Electric Cooperative, ___ OR LUBA ___ (LUBA No. 2012-016 2012) (Citing ORS 215.276(1)(c) and noting that “[a] transmission line is a type of ‘utility facility,’ bringing it within the list of ‘sub 1’ uses subject to Brentmar). Uses found in the second subsection of ORS 215.283 can, in contrast, be subject to more intensive regulation by the County.

Under state law, utility facilities sited on EFU lands are subject to ORS 215.275, as well as the administrative rules adopted by LCDC. ORS 215.275 provides:

(1) The following uses may be established in any area zoned for exclusive farm use: * * *.

(c) Utility facilities necessary for public service, including wetland waste treatment systems but not including commercial facilities for the purpose of generating electrical power for public use by sale or transmission towers over 200 feet in height. A utility facility necessary for public service may be established as provided in ORS 215.275.

12 CCZLDO 4.9.600 pertains to “Siting Standards for Dwellings and Structures in the EFU Zone.”

13 CCZLDO 4.9.700 Development Standards for dwellings and structures (CCZLDO 2.1.200 defines “Structure: Walled and roofed building includes a gas or liquid storage tank that is principally above ground.” The proposed pipeline is not a “structure” under this definition and therefore the siting standards do not apply.
215.275 Utility facilities necessary for public service; criteria; rules; mitigating impact of facility. (1) A utility facility established under ORS 215.213 (1)(c) or 215.283 (1)(c) is necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service.

(2) To demonstrate that a utility facility is necessary, an applicant for approval under ORS 215.213 (1)(c) or 215.283 (1)(c) must show that reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:

(a) Technical and engineering feasibility;
(b) The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;
(c) Lack of available urban and nonresource lands;
(d) Availability of existing rights of way;
(e) Public health and safety; and
(f) Other requirements of state or federal agencies.

(3) Costs associated with any of the factors listed in subsection (2) of this section may be considered, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service. Land costs shall not be included when considering alternative locations for substantially similar utility facilities. The Land Conservation and Development Commission shall determine by rule how land costs may be considered when evaluating the siting of utility facilities that are not substantially similar.

(4) The owner of a utility facility approved under ORS 215.213 (1)(c) or 215.283 (1)(c) shall be responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility. Nothing in this section shall prevent the owner of the utility facility from requiring a bond or other security from a contractor or otherwise imposing on a contractor the responsibility for restoration.
(5) The governing body of the county or its designee shall impose clear and objective conditions on an application for utility facility siting under ORS 215.213 (1)(c) or 215.283 (1)(c) to mitigate and minimize the impacts of the proposed facility, if any, on surrounding lands devoted to farm use in order to prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on the surrounding farmlands.

(6) The provisions of subsections (2) to (5) of this section do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by the Federal Energy Regulatory Commission. (Emphasis added).

The exception in Subsection 6 of ORS 215.275 is important for two reasons. First, it indicates that the Oregon legislature views “interstate natural gas pipelines and associated facilities” as a type of “utility facility.” Were this not the case, then the legislature would surely have not felt the need to add subsection 6 to ORS 215.275.

Second, ORS 215.275(6) states that subsections 2-5 do not apply to “interstate natural gas pipelines.” Since the criteria set forth in Subsections (2) through (5) are intended to inform the analysis of whether a particular type of facility must necessarily be sited in a EFU zone (as opposed to in other rural or urban lands), then the fact that the legislature excepted gas pipelines from such scrutiny appears to recognize federal preemption on the issue of route selection for interstate gas pipelines. LCDC has also recognized this fact in their administrative rule implementing ORS 215.275, as they exempt FERC-regulated pipelines from the “necessary for public service” test. See OAR 660-033000139(16).14 Given the nature of ORS 215.275(6), the

14 OAR 660-033-0130 (16) provides:

(16)(a) A utility facility is necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service. To demonstrate that a utility facility is necessary, an applicant must show that reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:

(A) Technical and engineering feasibility;

(B) The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;

(C) Lack of available urban and nonresource lands;

(D) Availability of existing rights of way;

(E) Public health and safety; and

(F) Other requirements of state and federal agencies.
hearing officer concludes that interstate natural gas pipelines are recognized under state land use laws as being a “utility facility” for purposes of rural zoning in EFU zones. Because of this fact, the County cannot conclude that “interstate natural gas pipelines and associated facilities” are not a “utility,” notwithstanding any quirks in the zoning code’s definition of “utility.” To do so would be contrary to the legislative intent behind ORS 215.275, and the County’s Zoning Code needs to be interpreted consistent with state law.

Further evidence of legislative intent can be found in the administrative rules that implement Goal 4 and define standards for compliance with implementing statutes at ORS 215.700 through 215.799. Unlike the manner in which Oregon statutes address uses allowed in EFU zones, Oregon statutes do not contain a similar “list” of allowed uses for Forest zones. LCDC used its delegated authority to fill that void, however. OAR 660-006-0025 is the LCDC administrative rule that sets forth the list of uses that are allowed conditionally and “by right” in the Forest zone. As relevant here, it provides as follows:

(1) Goal 4 requires that forest land be conserved. Forest lands are conserved by adopting and applying comprehensive plan provisions and zoning regulations consistent with the goals and this rule. In addition to forest practices and operations and uses auxiliary to forest practices, as set forth in ORS 527.722, the Commission has determined that five general types of uses, as set forth in the goal, may be allowed in the forest environment, subject
to the standards in the goal and in this rule. These general types of uses are:

* * * * *.

(c) Locationally dependent uses, such as communication towers, mineral and aggregate resources, etc;

(3) The following uses may be allowed outright on forest lands:

* * * * *.

(c) Local distribution lines (e.g., electric, telephone, natural gas) and accessory equipment (e.g., electric distribution transformers, poles, meter cabinets, terminal boxes, pedestals), or equipment that provides service hookups, including water service hookups;

(4) The following uses may be allowed on forest lands subject to the review standards in section (5) of this rule:

* * * * * *.

(q) New electric transmission lines with right of way widths of up to 100 feet as specified in ORS 772.210. New distribution lines (e.g., gas, oil, geothermal, telephone, fiber optic cable) with rights-of-way 50 feet or less in width; * * * * (Emphasis added).

Thus, OAR 660-006-0025(3)(c) allows certain small-scale pipeline uses outright as a "[l]ocal distribution lines (e.g., electric, telephone, natural gas) and accessory equipment." In contrast, OAR 660-006-0025(4)(q) allows “[n]ew distribution lines (e.g., gas, oil, geothermal, telephone, fiber optic cable) with rights-of-way 50 feet or less in width” as a conditional use. OAR 660-006-0025(4)(q) specifically lists “gas” amongst a list of examples of “distribution lines.” Because the rule creates a separate category for “local” gas distribution lines, the only logical inference is that all other gas lines (i.e. “non-local gas lines”) fall within the realm of conditional uses authorized by OAR 660-006-0025(4)(q).

OAR 660-006-0025(4)(q) uses the term “transmission” lines when describing large-scale electrical lines. In this regard, the rule appears to recognize the vernacular used in the state statute addressing electricity. See ORS Chapter 772. Cyrus v. Deschutes County, 46 Or LUBA 703, 705 n1 (2004) (“The parties advise us that a transmission line transmits electricity from one station or substation to another, while a distribution line is an entirely separate line that distributes electricity to individual properties.”). Opponents have argued that Land Conservation
and Development Commission’s (LCDC’s) failure to similarly provide for “gas transmission lines” creates a negative implication that such large-scale interstate gas pipelines are not allowed.

It is true that LCDC uses the words “distribution lines” instead of “transmission lines” when describing gas pipelines. OAR 660-006-0025(4)(q). However, this appears to be unintentional, and the hearings officer believes that LCDC uses the term “distribution line” in a manner that is synonymous with “transmission line,” as that term is used in ORS 215.275 and 215.276. Had LCDC intended to distinguish between two types of gas “distribution” pipe uses and third category of gas “transmission” pipeline uses, then it is likely that such a policy would have been set forth with express language. By only specifying two categories of gas pipelines, the intent appears to be that all gas pipelines were intended to fit within those two categories of distribution lines.

Furthermore, as the applicant noted in their materials submitted in HCBU 10-01, there is no indication in Statewide Planning Goal 4 or OAR 660-006-0025(4)(q) that LCDC purposefully intended to use the federal or the industry vernacular for gas lines. There is also no indication that LCDC sought to purposefully exclude interstate gas “transmission” pipelines from Forest zones when it drafted OAR 660-006-0025. Neither the FERC classification or other federal law is necessarily “context” for interpreting LCDC’s administrative rule, because there is simply no evidence to suggest that OAR 660-006-0025(4)(q) implements federal law or was enacted with federal law in mind.

If anything, the only express discussion of large-scale interstate gas pipelines in the LCDC administrative rules is set forth in the rules regulating uses in EFU zones. OAR 660-033-0130(16). As mentioned above, OAR 660-033-0130(16) states, in essence, that FERC-regulated gas pipelines are exempt from the “necessary for public service” applicable to other utility facilities seeking to locate in EFU zones. LCDC’s “hands off” approach to gas pipelines in EFU zones was apparently a response to the passage of ORS 215.275(1)-(6) in 1999. See Chapter 816 Oregon Laws 1999 (HB 2865). It would make little sense to create a highly permissive environment for gas pipelines in EFU zones but then somehow prohibit them in Forest zones. This is particularly true since as a practical matter, it is not possible to construct gas pipelines for any significant distance in Oregon without traversing a forest zone.

The legislative history of OAR 660-006-0025(4)(q) is also telling because there is really no discussion regarding gas “transmission” lines. If LCDC were making a purposeful decision to exclude interstate gas transmission lines from Forest zones, one would think that such a monumental decision would have generated more debate and attention. Such debate and discussion would be reflected in the legislative history. However, the tenor of the legislative history is much more in line with “housekeeping” changes, as opposed to a major shift in public policy.

One final point is worth exploring here. Although no party raised the issue, ORS 215.276 contains language which, on initial glance, tends to further confuse the “transmission” line vs. “distribution” line issue. ORS 215.276 is a little known provision added to ORS Chapter 215 in 2009. See 2009 Or Laws Ch 854 (HB 3153). No party raises any implications resulting from
ORS 215.276. The statute provides as follows:

215.276 Required consultation for transmission lines to be located on high-value farmland. (1) As used in this section:
(a) “Consult” means to make an effort to contact for purpose of notifying the record owner of the opportunity to meet.
(b) “High-value farmland” has the meaning given that term in ORS 195.300.
(c) “Transmission line” means a linear utility facility by which a utility provider transfers the utility product in bulk from a point of origin or generation, or between transfer stations, to the point at which the utility product is transferred to distribution lines for delivery to end users.

(2) If the criteria described in ORS 215.275 for siting a utility facility on land zoned for exclusive farm use are met for a utility facility that is a transmission line, the utility provider shall, after the route is approved by the siting authorities and before construction of the transmission line begins, consult the record owner of high-value farmland in the planned route for the purpose of locating and constructing the transmission line in a manner that minimizes the impact on farming operations on high-value farmland. If the record owner does not respond within two weeks after the first documented effort to consult the record owner, the utility provider shall notify the record owner by certified mail of the opportunity to consult. If the record owner does not respond within two weeks after the certified mail is sent, the utility provider has satisfied the provider’s obligation to consult.

(3) The requirement to consult under this section is in addition to and not in lieu of any other legally required consultation process. [2009 c.854 §1] (Emphasis added).

Although the opponents in this case did not make the argument, it could be argued that the definition of “transmission line” in ORS 215.276 could be read in conjunction with a negative inference concerning the allowance of gas “distribution lines” in OAR 660-006-0025(4)(q). The argument would be that since gas “distribution lines” are allowed in Forest zones, and since the various statutes and rules – when read together – seem to differentiate between “transmission lines” and “distribution lines” (and specifically allow electrical transmission lines), that gas transmission lines are, by negative inference, not allowed in Forest zones.

However, that line of reasoning would be both flawed and an amateurish attempt at statutory interpretation. As an initial matter, any negative inference that can be gleaned from OAR 660-006-0025(4)(q) is tenuous at best. The recent Oregon State Bar (OSB) publication entitled “Interpreting Oregon Statutes” Steve Johansen, Hon. Jack Landau, and Anne Villella ed.
OSB CLE (2009) contains a lengthy but highly relevant discussion of the use of negative inferences in statutory construction analysis, as follows:

*Expressio unius est exclusio alterius,* another common-law aid to the construction of statutes, “hold[s] that to express or include one thing implies the exclusion of the other, or of the alternative.” Black’s Law Dictionary 620 (Bryan A. Garner ed., 8th ed 2004). The rule may also be stated as *inclusio unius est exclusio alterius.* Waddill v. Anchor Hocking, Inc., 330 Or 376, 382, 8 P3d 200 (2000); Fisher Broadcasting v. Department of Revenue, 321 Or 341, 353, 898 P2d 1333 (1995).

By way of example, saying that citizens are entitled to vote implies that noncitizens are not entitled to vote. Black’s Law Dictionary, *supra,* at 620. Including one group impliedly excludes the other. However, saying that citizens may vote does not expressly say anything about the rights of noncitizens; it simply assumes the negative of the first statement about citizens.

However, both the court of appeals and the supreme court have repeatedly warned the bench and bar that the maxim “is to be applied with caution and merely as an auxiliary rule to determine the legislative intention.” *Cabell v. Cottage Grove,* 170 Or 256, 281, 130 P2d 1013 (1943).

Although *expressio unius* is consistent with ORS 174.010, and the legislature’s directive to the courts “not to insert what has been omitted or omit what has been inserted,” which the court regularly relies on (see §§2.32, 5.3), the court rarely relies on the maxim. In fact, the supreme court has only looked to the rule as an aid to construction once in the last eight years. See Waddill, 330 Or at 382.

*Expressio unius* applies only in limited circumstances. “Before the maxim *expressio unius est exclusio alterius* can be instructive as to what a statute excludes, one must first identify what it includes.” *Carlson v. Benton County,* 154 Or App 62, 67, 961 P2d 248 (1998) (emphasis added). And, because *expressio unius* is a rule of inference, it gives way to stronger evidence of legislative intent. *Cabell,* 170 Or at 281. Thus, lawyers should limit use of this maxim, and consider its application cautiously:

The maxim “*expressio unius est exclusio alterius*” is not of universal, but of limited, use and application. It is an aid to construction, not a rule of law. It is not conclusive, is applicable
only under certain conditions, is subject to exceptions, may not be
used to create an ambiguity, and requires great caution in its
application . . . It may not be used to defeat or override clear and
contrary evidence of legislative intent.


Judge Posner has pointed out another weakness: “The canon
expressio unius est exclusio alterius is . . . based on the assumption
of legislative omniscience, because it would make sense only if all
omissions in legislative drafting were deliberate.” Richard A.
Posner went on to say “[a]lthough this canon seemed dead for a
while, it has been resurrected by the Supreme Court . . . Its recent
disparagement by a unanimous Court [in Herman & MacLean v.
Huddleston, 459 US 375, 386 n 23, 103 S Ct 683, 690 n 23 (1983)]
puts its future in some doubt but more likely confirms that judicial
use of canons of construction is opportunistic.” Posner, supra.

The discussion quoted above has relevance here, and the assumption that OAR 660-006-
0025(4)(q) contains a negative inference related to gas “transmission lines” is faulty for a
number of reasons.

First, the hearings officer considers the analytical rule which states that “one must first
identify what [the statute] includes” “[b]efore the maxim expressio unius est exclusio alterius
can be instructive as to what a statute excludes.” Here, the rule itself only creates two classes of
gas lines (i.e. “local gas distribution lines” under subsection 3(c), and non-local “distribution
lines” under subsection 4(Q)). To assume that LCDC not only understood that there exists a
third possible category of gas pipelines known as “gas transmission lines,” but also that LCDC
intended to prohibit such transmission lines in Forest zones seems to be highly speculative at
best.

Secondly, even if we assume that a mythical third category of “non-local distribution
line” does exist, it is hard to envision what features this third category of pipeline would have
that distinguish it from a “transmission line.” In fact, the term would appear to be an oxymoron if
it is interpreted to mean anything other than a “transmission line” as defined in ORS
215.276(1)(c). As a practical matter, there is really no way to create three categories of gas
pipelines: any individual pipe will either provide local service (in which case it is a local
distribution line), or it does not (in which case it will meet the definition of “transmission line” in
ORS 215.276(1)(c)). If we are to believe that OAR 660-006-0025(4)(q) establishes some sort of
third category of intermediate non-local distribution line that serves a different function from
either the “transmission lines” as defined in ORS 215.276(1)(c) and “local” lines as defined in
subsection 3(c), it is certainly not obvious what function such a “distribution line” would serve.
Stated another way, gas lines either serve local users (in which they fall under OAR 660-006-
0025(3)(c), or they don’t (in which case there are transmission lines under ORS 215.276. In

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light of this fact, the term “distribution line” as used in OAR 660-006-0025(4)(q) must mean the same thing as “transmission line” as that term is defined in ORS 215.276(1)(c).

Second, the easy explanation why electrical “transmission” lines are called out separately in OAR 660-006-0025(4)(q) from other types of gas and water “distribution lines” is simply to recognize that the large-scale overhead electrical lines need a wider 100 foot easement (as compared to the 50 foot easement allowed for gas, water, and similar pipelines, which do not need the same high ground clearance).

Finally, the legislative history\textsuperscript{15} of ORS 215.276 conclusively resolves any question about whether the definition of “transmission line” in ORS 215.276(1)(c) meaning and intent. ORS 215.276 was enacted in the 2009 legislative session. See House Bill 3153 (2009). On its face, the law applies only to EFU land, was intended to provide requirements for “transmission line” installers to consult with owners of farm land during the siting process.

\textsuperscript{15} The 1993 case \textit{PGE v. BOLI} established a strict, three-step methodology whereby legislative history could not be considered if an analysis of the text and context resolved any ambiguity. This rigid hierarchy proved somewhat unpopular with legislators, and in 2001, the Oregon Legislature passed 2001 Or Laws Ch. 438 (HB 3677) in an effort to modify \textit{PGE v. BOLI}. It amended ORS 174.020 to state, among other things, the following new language:

\begin{quote}
(1)(b) To assist a court in its construction of a statute, a party may offer the legislative history of the statute.

* * * * *

(3) A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate.
\end{quote}

It is this 2001 legislative enactment that led the Supreme Court to modify how the \textit{PGE v. BOLI} test is formulated. See \textit{State v. Gaines}, 346 Or 160, 171–172, 206 P3d 1042 (2009). Viewed in this light, \textit{Gaines} is not so much a wholesale repudiation of \textit{PGE v. BOLI}, but rather it is a judicial recognition of the fact that 2001 OR Laws Ch. 438 causes the first and second steps of the three-step \textit{PGE v. BOLI} methodology to be effectively compressed into one “first” step.

ORS 174.020 and, by extension, \textit{Gaines}, now permit a party to submit legislative history to a court, and the court may analyze and give consideration to that legislative history. As stated by the Supreme Court in \textit{Gaines}:

\begin{quote}
But, contrary to this court's pronouncement in \textit{PGE}, we no longer will require an ambiguity in the text of a statute as a necessary predicate to the second step -- consideration of pertinent legislative history that a party may proffer. Instead, a party is free to proffer legislative history to the court, and the court will consult it after examining text and context, even if the court does not perceive an ambiguity in the statute's text, where that legislative history appears useful to the court's analysis.
\end{quote
Although the initial version of the bill was controversial, the final “Dash-11” amendments proved to be rather low-key and non-controversial. Northwest Natural Gas, Portland General Electric, League of Oregon Cities, Oregon Rural Electrical Cooperative Association, 1000 Friends of Oregon, and the Oregon Farm Bureau all testified at various public hearings in favor of the amended version of the bill. At no point in the proceedings did any member of the legislature or any commenter opine that the effect of the Engrossed versions of the bill was to prohibit the siting of interstate gas transmission pipelines on Forest land. In particular, Northwest Natural Gas, who owns and operates a large number of “transmission lines,” would obviously not have testified in favor of a bill had the intent been to effectively make all gas pipelines that do not provide local service a prohibited use in the Forest zone.

In light of the aforementioned discussion, the hearing officer recommends the Board of Commissioners continue to find that the interstate gas transmission pipeline falls within the meaning of a “utility facility necessary for public service” in CCZLDO §4.9.450, despite the change from export to import. The hearing officer also recommends that the Board of Commissioners continue to find that the proposed pipeline constitutes a “distribution line” as that term is used in OAR 660-006-0025(4)(q), and also that it constitutes a gas “transmission line” as that term is used in 215.276(1)(c).

E. CCZLDO §5.7.300(4)(B): Written Authorization Required for Representative Who Presents Testimony on Behalf of an Organization.

In her letter dated October 11, 2013, Ms. Jody McCaffree argued that Mr. Robert Peacock did not include the letter required by CCZLDO §5.7.300(4)(B) as an exhibit to his October 4, 2013 testimony.

CCZLDO §5.7.300 is entitled “Quasi-Judicial Land Use Procedures.” Among other things, it sets forth a requirement that a person who is “presenting testimony” on behalf of an organization provide a letter establishing that the person is authorized to appear on behalf of the organization. CCZLDO §5.7.300(4)(B) provides as follows:

4. Representatives

A. A party may represent themselves or be represented by an attorney. Consultants and other non-attorney professionals may appear as fact witnesses for any party, but may not appear as a legal representative.

B. Any person presenting testimony on behalf of a group, company or any other organization, except an attorney, must enter written evidence into the record establishing that the person is authorized to appear on behalf of the organization. Such written authorization must:
Both the applicant, via counsel, and Ms. McCaffree have gone back and forth trying to use this provision seek tactical advantage over one another in the various proceedings before the hearings officer. The hearings officer has consistently been reluctant to prevent relevant testimony from being entered into the record on the basis of CCZLDO §5.7.300(4)(B). The law seems to intended to prevent persons from appearing on behalf of a larger organization when it appears that such representation is not sanctioned. For example, if John Q. Public shows up and states that he is appearing on behalf of Greenpeace, then it appears that CCZLDO §5.7.300(4)(B) is intended to provide a safeguard to ensure that Greenpeace actually is sanctioning John Q. Public’s testimony. Presumably, there has been some problem in the past with persons assuming the role of a representative of an organization with having any actual authority to do so.

Whatever the purpose behind CCZLDO §5.7.300(4)(B), it is not in the public interest to deprive a party an opportunity to a full and fair hearing by using technical provisions such as CCLDO §5.7.300(4)(B) as a basis to reject otherwise relevant public testimony. In this case, Mr. Peacock is “presenting testimony on behalf of a * * * company,” and therefore appears to fall within the class of persons to which CCZLDO §5.7.300 applies. Nonetheless, the record makes clear that Mr. Peacock is an employee of Pacific Connector Gas Pipeline Limited Partnership. He submitted a letter dated October 4, 2013 on PCGP letterhead in which he identifies himself as a “PCGP Project Manager.” Although is not clear whether his signature counts as a “signature of a person with authority to grant the authorization” within the meaning of CCZLDO §5.7.300(4)(B)(4), the hearings officer is inclined find that it does so. The only thing that the letter does not expressly do is “specify the scope of the authorization,” but that may be implicit from the job title of “project manager.” No party, including Ms. McCaffree, rebutted the substance of Mr. Peacock’s October 4, 2013 letter or otherwise attempted to show that Mr. Peacock is not who he says he is. Nor did Ms. McCaffree express any concern that his testimony goes beyond his authorization as project manager. Rather, in her October 11, 2013 letter, Ms. McCaffree seems to mention the issue solely to “return the favor” to the applicant, so to speak. Under this set of facts, the hearings officer believes that the spirit, if not the letter, of CCZLDO §5.7.300 is met by Mr. Peacock’s October 4, 2013 letter. In light of the fact that this is at best a procedural requirement, it is not apparent how any party to this case could show that they are prejudged by any technical defects in compliance with CCZLDO §5.7.300, given that no specific objection to his testimony was preserved.

Moreover, although CCZLDO §5.7.300(4)(B) sets forth a mandatory requirement, it does
not set forth a remedy for any violation of the requirement. It is unclear what remedy, if any, exists for a violation of CCZLDO §5.7.300(4)(B). In a previous case, JCEP argued unsuccessfully that CCZLDO §5.8.100 requires dismissal, because it states “The Board of Commissioners or Hearings Body shall dismiss an appeal for failure to follow the requirements of this article.” JCEP previously argued that CCLDO §5.7.300 is a “requirement of this article” by operation of CCZLDO §5.8.200, which states that “[t]he appeal hearing procedure shall be in accordance with Section 5.7.300.” Both the hearings officer and the Board rejected this argument.

F. Request for “Unbiased Authority” to Review Application.

In her testimony dated September 26, 2013, Ms. Janet Stoffel argues that “an unbiased authority needs to be consulted about changing the flow of gas from import to export and whether it makes a difference regarding the safety of the pipeline or the effects upon this community.” See Exh. 14, at p. 1. Such comments demonstrate a lack of understanding of how the land use process works. The public hearing process is a creature of statute. ORS 197.763. When a County holds a public hearing on a land use matter, interested persons are allowed to come forth and provide evidence and argument pertaining to the question of whether the application meets the applicable legal standards. Generally speaking, the only persons that “generate” evidence are the applicant and any members of the public that wish to testify. While it is legally permissible for staff to generate its own evidence, it is uncommon for staff to hire a third party to “consult” on the application. Certainly, persons such as Ms. Stoffel are allowed to hire their own experts and present their findings at the hearing, but is not, generally speaking, the role of the County or the hearings officer to provide independent third parties to review facts provided by the applicant.

Likewise, a public hearing is not a question and answer session. It is not a time for members of the public to ask questions of the applicant, although on occasions you will find applicants who will make some effort to answer questions in any event. Often, members of the public will ask the hearings officer or staff to justify certain aspects of the application. However, it is not the hearings officer’s role to explain or defend the application. Rather, the hearings officer is solely tasked with accepting evidence and argument that is relevant to the approval criteria and then recommending approval or denial of the application based on applicable legal standards.

Ms. Stoffel also faults the hearings officer for claiming to be unbiased, and “yet he took testimony at the hearing from a Williams Pipeline project manager [Mr. Robert Peacock] and appeared to take it as the gospel truth.” See Exh. 14, at p. 1. Perhaps Ms. Stoffel would have preferred the hearing officer to have berated Mr. Peacock with a strenuous cross-examination to better judge the veracity of his testimony. While that may have perhaps made for good theater, it was not required in this case. A hearings officer will sometimes ask questions to clarify testimony that seems unbelievable, but there was nothing about Mr. Peacock’s testimony that seemed to lack veracity or candor.

Ms. Stoffel goes on to suggest that Mr. Robert Peacock was not telling the truth, simply because he “will say whatever serves the best interest of the company from who he earns his
While it may be appropriate to sometimes view the testimony of so-called “hired guns” with some degree of skepticism based on the understanding that experts do tend to view the facts with the interests of their client in mind, that type of skepticism goes only to the weight which the testimony is given. Particularly when there is no evidence presented to the contrary, it would be reversible error in most cases to simply reject such “hired gun” testimony wholesale without having some specific reason to believe that the testimony is insufficient, false, or otherwise untrustworthy. In this case, it would make little sense for Mr. Peacock to misrepresent the facts about the physical nature of the pipeline, since his representations bind PCGP in any event. See Frankland v. City of Lake Oswego, 267 Or 452, 517 P2d 1042 (1973); Friends of the Metolius v. Jefferson Co., 25 Or LUBA 411, 421 (1993); aff’d, 123 Or App 256, on recons, 125 Or App 122 (1993); Perry v. Yamhill County, 26 Or LUBA 73, 83 (1993); Wilson Park Neighborhood Ass’n v. City of Portland, 27 Or LUBA 106, 123-4 (1994); Saylor v. Durham, 63 Or App 327, 663 P.2d 803 (1983).

In this case, the hearings officer found the project manager’s testimony to be truthful. Having working on land use cases for over 15 years representing applicants, opponents, and local governments, it is the hearings officer’s experience that it would be rare for an applicant to lie about something that could be so easily verified. Having said that, if Ms. Stoffel thought Mr. Peacock was lying, the hearings officer gave her and other opponents plenty of time to provide rebuttal evidence to prove that his testimony was not true. No opponent availed themselves of this opportunity. In the absence of any evidence to the contrary, the substantial evidence standard is a very low one, and is easily met in this instance.

G. Request for a Stay of Proceedings.

Various commentators request that the County stay these land use proceedings pending the outcome of the FERC process that is currently underway. See Letter from Janet Stoffel dated Sept. 26, 2013, at p. 3; Letter from Sean Malone, Sept 20, 2013, at p. 4. Neither the Stoffel or Malone letters (nor other related testimony) cited any legal authority for the County to “stay” a land use application over the objection of the applicant, and the hearing officer is not aware of any such authority. See ORS 215.428 et seq.

It is clear that the local and state permitting processes are separate from the federal NEPA process. As a result, Coos County is only obligated to comply with its code and applicable state law -- nothing more or less. Neither the CCZLDO nor state law requires or even authorizes delaying a final decision in a quasi-judicial land use proceeding so that a federal agency that is not even a party to the proceeding can comply with NEPA in issuing a separate federal permit or approval. The legislature, moreover, has made it clear through the statutory time limits of ORS 215.427 that applications for land use permits are to be processed expeditiously to a final decision. The legislature did not authorize local governments to suspend those time limits while a federal agency completes NEPA documentation.

In her letter dated Sept. 26, 2013, Ms. Janet Stoffel provides testimony that exemplifies some of the confusion that various opponents displayed in this case. She states as follows:
I concur with the Revised Narrative in Support of the Amendment to the Pacific Gas Connector Pipeline Land Use Approval where on page 4 in the last sentence of the first quoted paragraph (referring to the Board of [sic Commissioners] it states “Nonetheless, if ‘reams of testimony’ were submitted to FERC, then it seems proper that FERC decide the issue. There is no County zoning code provision that requires the County to make that decision.” This statement makes it very clear that Coos County Should not be making the decision at this time. This is a decision that needs to be made by the FERC, not a hearings officer proposing it to the Board of Commissioners. (Emphasis added).

In this regard, Ms. Stoffel is absolutely correct that it is FERC that should be making the decision on the issue of public necessity. Where she goes wrong is her failure to understand that the County is not tasked with replicating the work that FERC is undertaking. FERC and the County are governed by different standards, and the two processes have little intersection. Much of the testimony that the opponents have entered into the record of these local land use proceedings may be highly relevant to the FERC process, but that same testimony has no relevance here. The County is simply tasked with reviewing the approval standards contained in its comprehensive plan and land use regulations to determine if the proposed gas pipeline is consistent with those standards. The opponents also seem to not appreciate the fact that the County land use approvals are worthless to the applicant if the FERC certificates of necessity are not also forthcoming.

The hearings officer recommends that the request for a stay be denied, as there is no legal authority for the request.

IV. Conclusion and Recommendation.

The hearings officer has always been of the opinion that Condition of Approval No. 25 was legally suspect, but felt that there was no harm in imposing the condition so long as the applicant supported it. Now that the applicant seeks to modify the condition, the hearings officer recommends that the Board of Commissioners modify the condition to read as follows:

25. “The conditional use permits approved by this decision shall not be used for the export transportation of liquefied natural gas.”

In its modified form, the recommended condition reads as follows:

25. “The conditional use permits approved by this decision shall be used for the transportation of natural gas.”
RESPECTFULLY SUBMITTED this 5th day of December, 2013.

ANDREW H. STAMP, P.C.
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