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

PACIFIC CONNECTOR GAS PIPELINE PROPOSAL
(APPEAL OF THE THIRD EXTENSION REQUEST FOR
COUNTY FILE NO. HBCU 13-06, AKA: THE "BLUE RIDGE ALIGNMENT")
COOS COUNTY, OREGON

FILE NO. AP 19-002
(APPEALS OF COUNTY FILE NOS. EXT-18-012).

JULY 10, 2019

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I. INTRODUCTION

A. Nature of the Local Appeal

On November 8, 2018, Pacific Connector Gas Pipeline, LP, (hereinafter the "Applicant") filed a third one-year extension request to continue the development approval for HBCU 13-06 (Blue Ridge Alternative Alignments). The extension will keep the original approval active until November 11, 2019. Staff assigned file No. EXT-18-012 to the case. The Planning Director's decision approving the extension is dated March 8, 2019.

The appellant challenges the Planning Director's decision. Staff has assigned the file No. AP 19-002 to the appeal.

Previous one-year extensions are documented as follows:

- File No. EXT 16-007 (Extension to Nov 11, 2017)
  - Application submitted on November 9, 2016
  - Staff decision dated Dec. 28, 2016
  - No local appeal filed
- File No. EXT 17-015 (Extension to Nov. 11, 2018)
  - Application Submitted on Nov. 9, 2017
  - Staff decision dated February 26, 2018
  - No local appeal filed.

B. Detailed Case History of the Pipeline

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. 10-08-045PL, approving Applicant's request for a Conditional Use Permit ("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). *Citizens Against LNG, Inc v. Coos County*, 63 Or LUBA 162 (2011).

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).

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 mandatory FERC "pre-filing" process to seek a new FERC Certificate. FERC Docket No. PF12-17-000. Following a public scoping process initiated by FERC that lasted until October 29, 2012, Pacific Connector filed a new application with FERC on June 6, 2013. FERC Docket No. CP-13-492-00.

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 the hearings officer. On February 4, 2014, the County Board of Commissioners 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 on July 15, 2014. *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 in December of 2014.

On August 13, 2013, PCGP submitted an application requesting approval of two alternative segments of pipeline route, known as the "Brunschmid" and "Stock Slough" Alternative Alignments. The hearings officer recommended approval of these two route amendments and the Board accepted those recommendations on February 4, 2014. Final Decision and Order HBCU-13-04; Order No. 14-01-007PL.

On December 5, 2013, PCGP submitted an application requesting approval of another alternative segment of pipeline route, known as the "Blue Ridge Alternative Alignment." The hearings officer recommended approval of this route amendments and the Board accepted those recommendations on October 21, 2014. Final Decision and Order HBCU-13-06; Order No. 14-09-0062PL.

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 now indicates that completion of the Final EIS is 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).

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 (*i.e*. HBCU-10-01- County Ordinance No. 10-08-045PL (Pacific Connector Pipeline Approved, County File No. HBCU-10-01, on remand Final Decision and Order No. 12-03-018PL) for two additional years. The Planning Director approved this request on May 2, 2014, pursuant to extension provisions (then codified at CCZLDO § 5.0.700). The Planning Director's decision was appealed on May 27, 2014 (AP-14-02). The hearings officer issued his Analysis, Conclusions and Recommendations to the Board of Commissioners, recommending approval of the application on September 19, 2014. On October 21, 2014, the Board adopted its decision approving an extension of Pacific Connector's conditional use approval for the original alignment for one year, until April 2, 2015. File No. ACU 14-08 / AP-14-02, Final Order No. 14-09-063PL (Oct 21, 2014).

On November 12, 2014, Jody McCaffree and John Clarke filed a Notice of Intent to Appeal the Board's decision to LUBA. Petitioners voluntarily withdrew their Notice of Intent to Appeal, and LUBA dismissed Petitioners' appeal. *McCaffree v. Coos County*, (LUBA No. 2014-102 (Feb. 3, 2015). Accordingly, the Board's decision to extend Pacific Connector's conditional use approval until April 2, 2015 was final and not subject to further appeal.

On January 20, 2015, the Coos County Board of Commissions enacted Final Decision and Ordinance 14-09-012PL. This Ordinance amended Section 5.2.600 of the Zoning Code in a number of substantive ways. Most significantly, it allowed an applicant for a CUP located out of Resource zones to apply for - and obtain - addition extensions to a CUP. It also changed the substantive criteria for extensions.

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 of Commissioners that they

affirm the Planning Director's decision granting the one-year extension to April 2, 2016. On October 6, 2015, the Board adopted the Hearings Officer's recommended decision and approved the requested extension. Final Decision No. 15-08-039PL. The Board of Commissioners' approval of Pacific Connector's second extension request was not appealed to LUBA, and that decision is final.

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 of the original pipeline alignment, which 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.

On April 11, 2016, Staff approved the first one-year extension request for the Brunschmid and Stock Slough alignments, (HBCU-13-04 /ACU- 16-003). No local appeal was filed.

On April 11, 2016, Staff approved the third one-year extension request for the original alignment (HBCU-10-01 / ACU-16-013). No local appeal was filed.

On December 28, 2016, Staff approved the first one-year extension request for the Blue Ridge alignment, (HBCU-13-06 /EXT 16-007). No local appeal was filed.

PCGP filed a Request for Pre-Filing Approval with FERC on January 23, 2017. FERC approved that request on February 10, 2017. *Id.*

On February 13, 2017, the applicant submitted a second extension request for the Brunschmid and Stock Slough alignments (County File No. EXT-17-002). The Planning Director approved this extension on May 21, 2017. The opponents did not file an appeal of the Planning Director's decision.

On March 30, 2017, the applicant submitted PCGP's fourth extension request for the original pipeline alignment (County File No. EXT-17-005). A notice of decision approving the extension was mailed on May 18, 2017. Opponents filed a timely appeal on June 2, 2017, which staff assigned file no. AP-17-004. The hearings officer recommended approval of the extension, and that recommendation was approved by the Board on December 19, 2017 (Final Decision and Order No. 17-11046PL). No further appeal ensued.

On September 21, 2017, Pacific Connector submitted an application to FERC requesting a Certificate of Public Convenience and Necessity pursuant to Section 7(c) of the Natural Gas Act (NGA) to construct, operate, and maintain certain natural gas pipeline facilities.

On February 21, 2108, the applicant submitted a third extension request for the Brunschmid and Stock Slough alignments. The Planning Director approved this extension on

May 18, 2018 (HBCU-13-04 / EXT-18-001). The opponents filed a timely appeal of the Planning Director's decision. AP-18-001. Board of Commissions issued a final decision approving the extension Nov. 20, 2018 (No. 18-11-072PL). Opponents appealed to LUBA.

On or about March 20, 2018, the applicant filed PCGP's current (fifth) extension request of the original pipeline alignment. (EXT 18-003). The Planning Director approved this latest extension request on May 21, 2018, and followed that up with a corrected notice on May 24, 2018. Opponents filed a timely appeal, and the Board of Commissions issued a final decision on Nov 20, 2018. AP-18-002. Opponents appealed to LUBA.

LUBA consolidated the two appeals (AP-19-001 and AP-19-002). On April 25, 2019, LUBA issued a Final Opinion and Order in which it rejected challenges to the Board's decision to grant additional extensions. *See Williams v. Coos County*, ___ Or LUBA ___ (LUBA Nos. 2018-141/142, April 25, 2019). The opponents have filed an appeal of this decision with the Oregon Court of Appeals.

C. Timeline

The timeline of key dates for this application is set forth below:

- Application Submitted November 8, 2018
- Staff Decision January 24, 2019
- Local Appeal filed February 8, 2019
- Staff decision withdrawn February 8, 2019
- Rev. Staff Decision March 8, 2019
- Local Appeal Filed March 25, 2019
- Public hearing May 31, 2019
- First Open Record June 13, 2019
- Second Open Record July 1, 2019 (No submittals)
- Applicant's Final Argument July 8, 2019
- Hearings Officer Recommendation July 10, 2019

On May 31, 2019, Ms. Jody McCaffree submitted a letter requesting that the record be left open. The hearings officer granted this request, and held the record open for two weeks. Ms. McCaffree did not submit any substantive comments during the open record period.

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 were amended on October 2, 2018 (County File No. AM-18-005), and the current version is reproduced below.

New Version:

SECTION 5.2.600 EXPIRATION AND EXTENSION OF CONDITIONAL USES

1. ***Permit Expiration Dates for all Conditional Use Approvals and Extensions:***
    a. ***On lands zoned Exclusive Farm, Forest and Forest Mixed Use:***
        (1) Except as provided for in section (5) of this rule, a discretionary decision, except for a land division, made after the effective date of this division approving a proposed development on agricultural or forest land outside an urban growth boundary under ORS 215.010 to 215.293 and 215.317 to 215.438 or under county legislation or regulation adopted pursuant thereto is void two years from the date of the final decision if the development action is not initiated in that period.
        (2) A county may grant one extension period of up to 12 months if:
            (a) An applicant makes a written request for an extension of the development approval period;
            (b) The request is submitted to the county prior to the expiration of the approval period;
            (c) The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and
            (d) The county determines that the applicant was unable to begin or continue development during the approval period[1] for reasons for which the applicant was not responsible.

            Coos County has and will continue to accept reasons for which the applicant was not responsible as, but limited too, financial hardship, death or owner, transfer of property, unable to complete conditions of approval and projects that require additional permits. The County's Ordinance does not control other permitting agency processes and the County shall only consider if the applicant has requested other permits as a valid reason and to show they are attempting to satisfy conditions of approval. This is a different standard then actually showing compliance with conditions of approval. This also, does not account for other permits that may be required outside of the land use process.

        (3) Approval of an extension granted under this rule is not a land use decision as described in ORS 197.015 and is not subject to appeal as a land use decision.

[1] The hearings officer notes the following: The "approval period" is the time period that the either the original application was valid, or the extension is valid, as applicable. If multiple extensions have been filed the decision maker may only consider facts that occurred during the time period when the current extension was valid. Prior approval periods shall not be considered. For example, if this is the third extension request up for review the information provided during the period within last extension time frame shall be considered and not the overall time the application has been approved. This prevents a collateral attack on the original authorization.

(4) Additional one-year extensions may be authorized where applicable criteria for the decision have not changed.
(5) (a) 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.
(b) An extension of a permit described in subsection (5)(a) of this rule shall be valid for two years.
(6) For the purposes of section (5) of this rule, "residential development" only includes the dwellings provided for under ORS 215.213(3) and (4), 215.284, 215.705(1) to (3), 215.720, 215.740, 215.750 and 215.755(1) and (3).
(7) There are no limit on the number of extensions that can be applied for unless this ordinance otherwise allows.

b. ***On lands not zoned Exclusive Farm, Forest and Forest Mixed Use:***
(1) All conditional uses for residential development including overlays shall not expire once they have received approval.
(2) All conditional uses for non residential development including overlays shall be valid for period of four (4) years from the date of final approval.
(3) Extension Requests:
a. For all conditional uses subject to an expiration date of four (4) years are eligible for extensions so long as the property has not been:
i. Reconfigured through a property line adjustment or land division; and
ii. Rezoned to another zoning district.
(4) An extension shall be applied for on an official Coos County Planning Department Extension Request Form with the fee.
(5) An extension shall be received prior the expiration date of the conditional use or the prior extension.

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

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.

The opponents argue that is the old version of CCZDO 5.2.600 (*i.e*. the 2013 version of the extension criteria) apply to this case, as opposed to the current version. For example, in her letter dated May 31, 2019, Ms. Natalie Ranker argues that "[a]ny changes to [CCZLDO 5.2.600]

[2] Natural hazards are: floods (coastal and riverine), landslides, earthquakes and related hazards, tsunamis, coastal erosion, and wildfires.

are not applicable to the extension request." *See also* Tonia Moro's Hearing Memorandum, at p. 11 (making same argument). However, the opponents do not expand on the argument or otherwise provide any further legal support for their position. Moreover, opponents fail to explain how either the County's analysis or decision would be different if the 2013 standards applied to the Application instead of the 2018 version.

It is not obvious to the hearings officer why the old version of the extension criteria would apply. Normally, the law that applies to an application is the law in effect on the date the application is submitted. ORS 215.427(3). Without further explanation from the opponents, their argument is simply not developed sufficiently to allow review.

On page 6 of the staff report, the Planning Director engaged in a discussion concerning CCZDLO 5.2.600(1)(a)(1) and whether the applicant had initiated the development action plan. See Staff Decision dated March 8, 2019, at p. 6-7. In the staff decision, staff argues that the applicant has in fact initiated the development by applying for required permits that implement the approval. In the Staff Report dated May 24, 2019, at p. 6-7, staff notes that this is merely an academic point, since the applicant has in fact requested the extension, an act which is premised on the assumption that the development has not been initiated. Nonetheless, staff's initial conclusion is challenged in the appeal. In the appeal narrative, Ms. Moro notes that the county has always required more action than merely applying for permits to warrant a determination that the development has been initiated. The hearings officer finds that the discussion is a red herring that does not need to be resolved as part of this appeal. The hearings officer does not adopt that portion of the March 8, 2019 staff decision (i.e. the last full paragraph on page 6 and continuing on the middle of page 7) as findings, and that discussion has no further legal affect in this proceeding. For this reason, the argument set forth in Ms. Moro's Hearings Memorandum at p. 7 under subheading ("B") provides no reason for denial.

B. Pacific Connector's Compliance with the Applicable Standards for a Conditional Use Extension Request on Farm and Forest Zoned Lands.

1. The Applicant Meets the Applicable Criteria Set Forth at § 5.2.600(1)(a)(2)(a).

CCZLDO §5.2.600(1)(a)(2)(a) provides as follows:

> ***(2) A county may grant one extension period of up to 12 months if:***
> ***(a) An applicant makes a written request for an extension of the development approval period;***

The hearings officer finds that Pacific Connector's application and attachments demonstrate compliance with the code requirements at CCZLDO §5.2.600(1)(a)(2)(a) for granting extension requests for land use approvals on farm and forest lands.

This criterion is met because a timely extension request was filed. The applicant submitted written narratives and applications, which specifically request an extension, on November 8, 2018 (EXT-18-012), which is within the development approval period.

In their appeal, the opponents argue that the original CUP permit expired on October 21, 2016. However, it is too late to appeal issues related to the first or second extension requests. Any findings of fact or conclusions or law made in those extension decisions cannot be revisited here, because that would constitute a collateral attack on the earlier extensions.

In any event, even if the issue could be reviewed, it provides no basis for finding that the original CUP is void. CCZLDO 5.0.250(5) states that "[t]he period for expiration of a permit begins when the appeal period for the final decision approving the permit has expired and no appeals have been filed, or all appeals have been exhausted and final judgments are effective." In this case, the final decision was issued on October 21, 2014, and the appeal period is 21 days. Therefore, the period for expiration began on November 11, 2014.
This criterion is met.

2. Pacific Connector's request was submitted to the County prior to the expiration of the approval period.

CCZLDO § 5.2.600(1)(a)(2)(b) provides as follows:

> ***(2) A county may grant one extension period of up to 12 months if:***
> **** * * * ****
> ***(b) The request is submitted to the county prior to the expiration of the approval period;***

As noted above, the CUP for the Blue Ridge alignment was operating on the second one-year extension request and was set to expire on November 11, 2018. A third extension application was received on November 8, 2018 and is therefore timely submitted prior to the expiration of the previously extended CUP. CCZLDO §5.2.600(1)(b)(ii).

The opponents argue that the CUP permit became void on November 11, 2017 because the applicant did not submit the extension application EXT 17-015 until November 17, 2017, and that the county did not receive this application until November 20, 2017. Documents submitted into the record could be read to support this thesis. However, both at the hearing and in the staff report, staff clarified the applicant submitted the application by email on November 9, 2017. Staff accepted this filing as timely. The applicant discusses this in its final argument, and correctly notes the following:

> The record reflects that, in 2017, PCGP filed an application for an extension of the Blue Ridge Alignment permit and paid the required fee, and the County received these materials on November 9, 2017, prior to the expiration date on November 11, 2017. *See* bulleted items in cover letter dated November 17, 2017, attached to end of County Exhibit 1. Although PCGP did not make that application complete until November 17, 2017, it does not take away from the application being filed on November 9, 2017.

Even if this were not true, the hearings officer would not entertain this issue in the merits because it is a collateral attack on the staff decision in EXT 17-015, which was issued on February 26, 2018. In that decision, staff stated that the applicant submitted the application for the extension on November 9, 2017, and that factual finding was not appealed.

This criterion is met.

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

CCZLDO §5.2.600(1)(a)(2)(c) & (d) provides as follows:

> ***(2) A county may grant one extension period of up to 12 months if:***
> **** * * * ****
> ***(c) The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and***
>
> ***(d) The county determines that the applicant was unable to begin or continue development during the approval period[1] for reasons for which the applicant was not responsible.***
>
> ***Coos County has and will continue to accept reasons for which the applicant was not responsible as, but limited too, financial hardship, death or owner, transfer of property, unable to complete conditions of approval and projects that require additional permits. The County's Ordinance does not control other permitting agency processes and the County shall only consider if the applicant has requested other permits as a valid reason and to show they are attempting to satisfy conditions of approval. This is a different standard then actually showing compliance with conditions of approval. This also, does not account for other permits that may be required outside of the land use process.***

To approve this extension application, the hearings officer must find that PCGP has stated reasons that prevented PCGP from beginning or continuing development within the current approval period (*i.e*. since the last extension was applied for and granted), and PCGP is not responsible for the failure to commence development. CCZLDO §5.2.600 (1)(b)(iii) & (iv).

In Williams v. Coos County, __ Or LUBA __ (LUBA No. 2018-141/ 142, April 25, 2019) (appeal pending), LUBA stated as follows:

[1] The approval period is the time period the original application was valid or the extension is valid. If multiple extensions have been filed the decision maker may only consider the time period that the current extension is valid. Prior approval periods shall not be considered. For example, if this is the third extension request up for review the information provided during the period within last extension time frame shall be considered and not the overall time the application has been approved. This prevents a collateral attack on the original authorization.

> We reject petitioners' arguments. First, the board of commissioners found that the uncertainty of the final alignment does not undercut the reason stated for the delay under LDO 5.2.600.1(b)(iii). Record 33-34. In essence, we understand the board of commissioners to have interpreted LDO 5.2.600.1(b)(iii) [now "CCZLDO §5.2.600(1)(a)(2)(c)"] as not being a particularly demanding standard, and that it may be satisfied where the reason for the delay is that additional state or federal approvals have been applied for, but not yet secured. That interpretation of the requirement to "state the reasons" is not inconsistent with the express language of the provision, and we affirm it. ORS 197.829(1)(a).

In its application narrative for the extension, the Applicant explains why it has not begun construction on the Blue Ridge alignment:

> The Applicant was prevented from beginning or continuing development within the approval period because the Pipeline has not yet obtained federal authorization to proceed. The Pipeline is an interstate natural gas pipeline that requires preauthorization by the Federal Energy Regulatory Commission ("FERC"). Until Applicant obtains a FERC certificate authorizing the Pipeline, the Applicant cannot begin construction or operation of the facilities in the County or elsewhere along the Pipeline route. As of the date of this Application, FERC has not yet authorized the Pipeline. Therefore, Applicant cannot begin or continue development of the Pipeline along the alignment that the Approval authorizes.
>
> The County previously accepted this reasoning as a basis to grant a time extension for the Pipeline. First, the County found that the lack of FERC approval meant Applicant 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, Exhibit 3 at 13.

Continuing, the Applicant further states:

Likewise, in granting a previous extension of an approval for a different alignment of the Pipeline, 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, Exhibit 4 at 13.

Further, 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 Applicant and the developer of the related Jordan Cove Energy Project can begin construction. *See* permit list in Exhibit 5 hereto. 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. 17-11-064PL, File No. AP 17-00/EXT 17-005, Exhibit 6 hereto at 11. Therefore, Applicant has identified reasons that prevented Applicant from commencing or continuing development within the approval period.

In addition, Applicant is not responsible for FERC not yet approving the Pipeline. Applicant has worked diligently and in good faith to obtain all necessary Permit approvals. For example, FERC previously approved Applicant's original application for a certificate for an interstate natural gas pipeline in the County. Later modifications to the project nullified that approval, and Applicant applied for a new authorization, which FERC denied. The Board has previously determined that Applicant was not "responsible" for this denial. *See* Exhibit 6 at 9-12. FERC's denial was *without prejudice*, and Applicant has reapplied for FERC authorization. Applicant has *at all times* since the County issued the Approval, and regardless of FERC's conduct, which the Applicant cannot control, continued to seek the required FERC authorization of the Pipeline. For example, during the 12-month period of the current extension (November 2017-November 2018), Applicant took steps in furtherance of the FERC permitting process. Applicant diligently responded to FERC's requests for additional information in support of the certificate request. *See* record of applicant submittals in the 12-month FERC docket in Exhibit 7. The certificate request is still pending before FERC. *Id.*

> Applicant was, therefore, prevented from beginning or continuing development during the Approval period and was not responsible for the circumstances that prevented it. These approval criteria are satisfied.

The hearings officer argues with this analysis and adopts it as findings for this case.

Ms. Moro states that it is clear that PCGP will not obtain federal authorization to proceed with the CCBRA route. *See* Tonia Moro's Hearings Memorandum at p. 7. In their respective letters dated May 31, 2019, two opponents, Ms. Ranker and Ms. Moro, argue that FERC has rejected the Blue Ridge Alternative as an alternative in the March 29, 2019 DEIS. A third opponent, Ms. Kathy Dodds, states that "FERC has instructed {PCGP] to drop the route over Blue Ridge, and to consider three other routes for the Project, called collectively "The Blue Ridge Variation." Exhibit 4.

Ms. Moro includes pages 3-20 and 3-21 as an exhibit to her Hearings Memo. Similarly, Ms. Ranker quotes from the Executive Summary of the March 29, 2019 DEIS. Neither of the quoted sections support their theory concerning the rejection of the Blue Ridge Alternative.

In fact, a plain reading of these two passages from the DEIS supports the precise opposite conclusion advanced by the opponents. As the underlined text below demonstrated, FERC has recommended that PCGP "incorporate the Blue Ridge variation * * * into its proposed route for the project." According to Ms. Ranker, the Executive Summary of the DEIS states:

> Pipeline route alternatives considered include three major route alternatives and nine pipeline route variations. Based on our analysis as described in the draft EIS, we conclude that four route variations would be preferable to the corresponding proposed action. <u>We are recommending that Pacific Connector incorporate the Blue Ridge Variation, the Survey and Manage Species Variation, the East Fork Cow Creek Variation, and the Pacific Crest Trail Variation into its proposed route for the Project.</u> We have concluded that these variations would offer a significant environmental advantage over the proposed action.

Quoting from the DEIS at page 3-21, which is in the record, FERC states:

> In the alternatives methodology described at the beginning of this section, we state that an alternative would be preferable if it meets the stated purpose of the Project; is technically and economically feasible and practical; and if implemented would result in a significant environmental advantage when compared to the proposed action. We also state that when making an alternatives determination we attempt to balance the overall impacts (and other relevant considerations) of the alternative and the proposed action. Therefore, recognizing the trade-offs between the proposed route

> and the variation; the differences between terrestrial and aquatic resource impacts in regard to temporal effects, as well as the scope of avoidance, minimization, and mitigation for these effects; and the magnitude of the effects, we have determined that the Blue Ridge Variation would result in an overall environmental advantage when compared to the corresponding segment of the proposed route. Our conclusion is based primarily on the variation's ability to reduce long-term to permanent impacts on particularly valuable LSOG habitat affected by the proposed route. Both the sensitivity and value of this habitat and the duration of the impact contribute to this finding. Therefore, **we recommend that:**
>
> - **Prior to construction, Pacific Connector should file with the Secretary, for review and written approval by the Director of OEP, revised alignment sheets that incorporate the Blue Ridge Variation into its proposed route between MP 11 and MP 25.** (Underline emphasis added, Bold in Original.).

Ms. Ranker tries to account for the discrepancy by saying that "[t]he route is called the 'Blue Ridge Variation' because it is the variation that avoids Blue Ridge." *See* Ranker letter dated May 31, 2019 at p. 3 (Exhibit 2). The record does not contain enough information to verify or disprove Ms. Ranker's statement. There is a map in the record with faint topo, but it does not identify a "Blue Ridge." The hearings officer understands that when the DEIS mentions "three major route alternatives and nine pipeline route variations," that the "Blue Ridge variation" entails more or less the original Blue Ridge route, which deviates from that route in one or more locations.

The applicant responds to the opponents by agreeing that the DEIS "recommended that PCGP eliminate the Blue Ridge Alignment from the project in favor of another alignment," as follows:

> In March 2019, FERC issued the DEIS, which recommended that PCGP eliminate the Blue Ridge Alignment from the project in favor of another alignment. *See* Draft EIS at 3-20 and 3-21 (included as attachment to County Exhibit 1). FERC made this recommendation despite the fact "many additional private parcels" are affected by the favored alignment. *Id.* Although opponents contend that FERC's recommendation to eliminate the Blue Ridge Alignment should dispense with any need for this extension request, opponents are mistaken. The DEIS is a draft document, and only a recommendation at that. As stated at the hearing, PCGP disagrees with FERC's recommendation to eliminate the Blue Ridge Alignment in part due to the significant number of additional private property owners that will be affected by the FERC-recommended alternative. PCGP has submitted comments responding to FERC's recommendation. FERC will

> issue a Final EIS and Record of Decision for the Application that will identify FERC's decision regarding the Pipeline and its alignment. Until that occurs, FERC has not officially eliminated the Blue Ridge Alignment from further federal review. That FERC decision will likely not preclude PCGP from filing an application to amend its certificate to include the Blue Ridge Alignment.
>
> In any event, as has been exhaustively discussed in this and previous proceedings, no local criterion requires a pre-approval by FERC in order for the County to approve the Application.

The hearings officer finds that the applicant is correct that the DEIS is only a draft at this point, and could change as the result of public comments. Moreover, there are no approval criteria that relate to the issue raised. This issue provides no basis for a denial.

Ms. Moro continues to advance the argument that the extensions create a burden on affected property owners, and effectively asking the hearings officer to weigh these detriments against any benefits an extension provides to the applicant. *See* Tonia Moro's Hearings Memorandum at p. 8. The criteria do not call for this type of balancing, however.

Ms. Moro states, without citation to any authority, that granting an extension violates the "constitutional rights" of affected landowners because the permit "causes a nuisance, condemnation blight and/or regulatory invasion that has devalued and substantially interferes with their right of possession, use, and enjoyment of the property. *See* Tonia Moro's Hearings Memorandum at p. 8. This argument is not developed sufficiently to give fair notice of the issue raised. To the extent that her clients have a cause of action against the County or PCGP, this is not the proper forum to raise those legal issues.

Ms. Moro and other opponents contend that PCGP must demonstrate that it can cure the "reasons" that prevented implementing the permit within the new 12-month extension period, LUBA has rejected this reading of the code in *Williams*:

> "Finally, we reject petitioners' argument that LDO 5.2.600.1(b)(iii) requires an applicant to demonstrate that the 'reason' can be 'cured' within the extension period. Nothing in the express language of that provision, or any other provision of LDO 5.2.600 cited by petitioners, supports that interpretation."

Williams, __ Or LUBA at __ (slip op. at 9).

4. The BCC's Decision at Issue Will Constitute a Land Use Decision.

CCZLDO § 5.2.600 (1)(a)(3) provides as follows:

> ***(3) Approval of an extension granted under this rule is not a land use decision as described in ORS 197.015 and is not subject to appeal as a land use decision.***

The Applicant requests that the County ignore this provision and process this request pursuant to the County's Type II procedures in order to provide notice and an opportunity for public comment. The hearings officer agrees with this approach. The hearings officer has previously found that this provision is intended to implement OAR 660-033-0140(3), which is an administrative rule of questionable provenance.

As discussed in earlier cases, OAR 660-033-0140(3) appears to be on shaky legal grounds to the extent that it purports to assign appellate jurisdiction to a co-equal branch of government (*i.e.* Circuit Court) to review extension decisions adopted pursuant to ORS 215.402 and OAR 660-033-0140. That matter is something that is normally reserved for the legislature. As far as the hearings officer has been able to determine, there is nothing in the state land use statutes that suggest that it would be proper for LCDC to determine that the Circuit Courts should review what would otherwise meet the definition of land use decision under ORS 197.015(10).

It is not clear why OAR 660-033-0140(3) is written the way it is. No party has presented legislative history of the rule to the hearings officer. On the other hand, Oregon statutes are crystal clear that a decision to grant an extension of a permit is itself a "permit" subject to LUBA's jurisdiction pursuant to ORS 197.015(10), when that decision is governed by discretionary criteria. *See Wilhoft v. City of Gold Beach*, 38 Or LUBA 375, 384 (2000); *Scovel v. City of Astoria*, 60 Or LUBA 371 (2010). When the first extension for the pipeline was considered back in 2014, Coos County has adopted a local code provision that implemented OAR 660-033-0140(3). That the time, that local code provision was codified at CCZLDO §5.0.700. The hearings officer then suggested that the County, at some time in the future, might want to revise this section of the Ordinance to make it consistent with state statutes, and, in the meantime, the hearings officer suggested that it would be appropriate to disregard OAR 660-033-0140(3) and the local provision it had adopted to implement it because it is inconsistent with state statutes.

LUBA has also struggled to make sense of OAR 660-033-0040(3). As LUBA noted in *Jones v. Douglas County*, 63 Or LUBA 261 (2011):

> OAR 660-033-0140(3) possibly represents LCDC's interpretation of the ORS 197.015(10) definition of "land use decision" or one of the exclusions to that definition, at ORS 197.015(10)(b). Or possibly it represents the creation of an additional exclusion, independent from those set out in the statute. LCDC has general statutory authority to "adopt rules that it considers necessary to carry out ORS chapters 195, 196 and 197." ORS 197.040(1)(b). LCDC also has broad statutory authority to adopt rules regarding use of farm and forest lands. *See generally Lane County v. LCDC*, 325 Or 569, 942 P2d 278 (1997).

Id. at 282-3. *See also McLaughlin v. Douglas County*, __ Or LUBA ___ (LUBA No. 2017-008, July 20, 2017).

With regard to LUBA first point, OAR 660-033-0140 states that ORS 197.015 is one the statutes it implements. ORS 197.015(10)(b) states, in turn that the definition of "land use decision" does not include a decision "[t]hat is made under land use standards that do not require interpretation or the exercise of policy or legal judgment." That exception would simply not apply in any of *these* extension cases, because the stated approval criteria for extensions are highly subjective in nature. DLCD can't have it both ways by first selecting discretionary approval criteria for extensions and then state that determinations made thereunder are not "land use decisions."

Turning to LUBA's second point, ORS 197.040(1)(c)(B) states that "[t]he Land Conservation and Development Commission shall: "[a]dopt by rule in accordance with ORS chapter 183 any procedures necessary to carry out ORS 215.402(4)(b) and 227.160(2)(b)." It seems doubtful that this delegation of authority is broad enough to include the selection of the Circuit Courts of this state as a forum for judicial review of permit extension decisions.

In both of the above-mentioned cases, LUBA specifically noted that no party challenged LCDC's authority to enact OAR 660-033-0140(3).

It continues to be the hearings officer's belief that OAR 660-033-0040(3) violates ORS 197.015(10). Moreover, it is also bad policy. Among other things, it will create a problem for extension decisions that cover land that is partially within resource districts and partially outside of resource districts. In such cases, appellate jurisdiction over the case would likely have to the split, and that is a problematic outcome on many levels. In any event, this case is being processed as a land use decision, consistent with ORS 197.015(10).

This criterion is met.

5. The Criteria Governing the PCGP CUP Have Not Changed.

CCZLDO § 5.2.600 (1)(a)(4) provides as follows:

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

This request is Applicant's third request for an extension of the Approval. As a result, the County must find that, for that portion of the alignment located on resource land, "applicable criteria for the decision have not changed." CCZLDO 5.2.600.1.a.(4). As explained at page 11 of the Planning Director's May 24, 2019 staff report in this matter, the applicable criteria for the decision have not changed:

> None of the *applicable criteria for the decision* have changed since the last extension was granted in February 2018. The emphasis in this case is on "applicable criteria for the decision".

> The following were identified as the criteria that were applicable to the Farm and Forest Zone. Remember that OAR 660 Division 33 only covers Agricultural Lands and some Forest (Mixed Use) Lands: *LDO § 4.8.300(F) New distribution lines with rights-of way 50-feet or less in width LDO § 4.8.400 Review Criteria for Conditional Uses in § 4.8.300 and § 4.8.350 LDO § 4.8.600 Mandatory Siting Standards Required for Dwellings and Structures in the Forest Zone. LDO § 4.8.700 Fire Siting and Safety Standards LDO § 4.8.750 Development Standards LDO § 4.9.450(C) Additional Hearings Body Conditional Use and Review Criteria LDO § 4.9.600 Siting Standards for Dwellings and Structures in EFU LDO § 4.9.700 Development Standards.* Since the approval was received the criteria was renumbered and reformatted but all of the standards remain the same. Therefore, the "applicable" criteria still remain "applicable" for the purposes of an extension subject to OAR 660-033-0140.

Therefore, staff has not found that the applicable criteria have changed. In its application narrative, the applicant correctly states:

> The approval criteria applicable to a conditional use permit to construct this segment of the Pipeline have not changed since the County issued the Approval on October 21, 2014. In a recent decision recommending an extension of the Brunschmid/Stock Slough Alignment of the Pipeline, the County's Hearings Officer agreed with this conclusion and adopted detailed findings regarding same. *See* Exhibit 8 at 28-33. On October 24, 2018, the County Board of Commissioners tentatively approved the Hearings Officer's recommendation, subject to minor changes to the decision (that do not alter the underlying conclusion on this issue) to be presented to the Board of Commissioners on November 20, 2018. Therefore, the approval criteria applicable to the Pipeline have not changed since the County issued the Approval. This criterion is satisfied.

Opponents contend that the "applicable criteria" for the CUP permit have changed. *See* Hearing Memorandum from Tonia Moro, received May 31, 2019. All of the opponents' arguments have previously been rejected, and are simply a collateral attack on the either or both of previous Blue Ridge extension decisions issued in EXT 16-007 and EXT 17-015. LUBA also rejected the same arguments in *Williams v. Coos County,* __ Or LUBA __ (LUBA No. 2018-141/ 142, April 25, 2019) (appeal pending).

In her Hearings Memorandum submitted on May 31, 2019, Ms. Moro argues that OAR 660-033-0140 "prohibits an additional one-year extension if the applicable criteria have changed," and that "there is no exemption from this directive simply because the county does not want to apply them." The hearings officer agrees with this argument, as far as it goes. However.

OAR 660-033-0140 is not directly applicable to this case. *See Byrd v. Stringer*, 295 Or 311, 666 P2d 1332 (1983) (land use decisions made by local jurisdictions with acknowledged comprehensive plans and land use regulations are not reviewable for compliance with the Statewide Planning Goals and their implementing rules). *See also Gould v. Deschutes County*, 67 Or LUBA 1 (2013) (fact that local jurisdiction had acknowledged land use regulation that slightly differed from OAR 660-033-0140 did not make OAR 660-033-0140 directly applicable to the local land use decision). The hearings officer notes that Mr. King and Mr. Pfeiffer were the attorneys of record for the party that prevailed on that issue in the *Gould* case.

Ms. Moro then goes on to state that "any attempt to grandfather in the pipeline is ultra vires and preempted by the rule." The county has authority to create - or not create - zoning criteria applicable to pipelines, subject only to the requirement that it must comply with applicable statutes set forth in Chapter 197 and 215, the Statewide Planning Goals, and applicable OARs adopted by LCDC. Ms. Moro seeks to have the hearings officer deny the application for the extension, but makes no attempt to explain why state law requires the County to create new "hazard" criteria that would be applicable to the pipeline. Ms. Moro mentions ORS 477.205 *et seq*., but makes no effort to explain how that set of statutes compels the County to make zoning decisions consistent with those statutes. This issue is not developed sufficiently to enable review.

In her Hearings Memorandum submitted on May 31, 2019, Ms. Moro argues that since 2013, the following comprehensive map and code changes, among others, were adopted:

- CCZLDO §5.0.175, amended by County File AM 14-11 (Ord. 14-09-012PL dated January 20, 2015, effective April 20, 2015).

- Comprehensive Plan Vol 1, Part 1, §5.11 & Part 2, §3.9 Natural Hazard Maps, amended by County File AM-15-03 and County File AM-15-04 (Ord. 15-05-005PL, dated July 30, 2015, which had a delayed effective date of July 30, 2016 and was again delayed until July 30, 2017).[1]

- CCZLDO §4.11.125 (Special Development Considerations); CCZLDO §5.11.300(1)(Geologic Assessments), County File AM 16-01 (Ord. 17-04-004PL) dated May 2, 2017, effective July 31, 2017.

This appears to be a cut-and-paste argument lifted from a previous appeal. Nonetheless, each of these three issues is addressed below.

Opponents contend that CCZLDO §5.0.175 constitutes an "applicable criteri[on]" that has changed; however, this contention lacks merit because this provision is a submittal requirement, not an approval criterion. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004);

[1] County Ordinance No. 15-05-005PL—which adopted amendments to the Coos County Comprehensive Plan (CCCP) pertaining to natural hazards— had an original effective date of July 30, 2016. However, on July 19, 2016, 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.

Frewing v. City of Tigard, 59 Or LUBA 23 (2008); *Stewart v. City of Salem*, 58 Or LUBA 605 (2008). The term "criteria" is intended to be a term of art: it is a regulatory standard that can form the basis of a denial of a permit. Ms. Moro is correct that the Board has previously ruled that the signature requirement set forth at CCZLDO §5.0.150 is an approval standard because the failure to have signatures could form the basis of denial of an application. That does not make CCZLDO §5.0.175 an approval standard, particularly when it exists as an alternative to CCZLDO §5.0.150.

CCZLDO §5.0.175 is entitled "Application Made by Transportation Agencies, Utilities or Entities." It allows transportation agencies, utilities, or entities with the private right of property acquisition pursuant to ORS Chapter 35 to apply for a permit without landowner consent, subject to following certain procedural steps; provided, however, the approvals do not become effective until the entity either obtains landowner consent or property rights necessary to develop the property. As discussed above, CCZLDO §5.0.175 is an alternative to the traditional requirement that an application must include the landowner's signature. CCZLDO §5.0.150. As such, even if CCZLDO §5.0.175 could be an application requirement, it is not necessarily "applicable" because an applicant could always opt to file its application pursuant to CCZLDO §5.0.150 rather than CCZLDO §5.0.175. For the same reason, CCZLDO 5.0.175 is not mandatory in nature. As such, it is not properly construed to be a "criteri[on]."

In 2015, the County amended its comprehensive plan and land use regulations to adopt provisions pertaining to natural hazards, but the County has previously determined that these provisions are not "applicable criteria for the decision." *See* Findings of Fact, Conclusions of Law, and Final Decision of the Coos County Board of Commissioners for AP-17-004 ("2017 Extension Decision") at pp.17-23. With regard to the comprehensive plan provisions, the Board previously determined that they were not "approval criteria" for a Pipeline permit. *Id.* Raising this issue in this extension decision may not be a collateral attack on the previous 2017 Extension Decision because that case dealt with a different segment of pipeline. Even so, there is no reason for the hearing officer to deviate from the Board's prior decision. The collateral attack doctrine can be invoked with regard to either or both of previous Blue Ridge extension decisions issued in EXT 16-007 and EXT 17-015, because this issue could have been raised in those cases.

Ms. Moro argues that "the doctrine of collateral attack does not apply for several reasons, including that the affected landowner's appellants have not been a party to the [previous] extension proceedings." *See* Hearings Memorandum at p. 9. However, the "new party" argument applies only to issue preclusion, not collateral attack. *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 103, 862 P2d 1293 (1993). Despite requests from the hearings officer to brief this issue in detail, neither Ms. Moro nor any other party makes any attempt to explain why issue preclusion would apply instead of collateral attack doctrine. Unfortunately, neither LUBA or the courts have done a good job explaining when the issue preclusion test is applied and when the collateral attack doctrine is applied.

Under the collateral attack doctrine, a local government cannot deny a land use application based on (1) issues that were conclusively resolved in a prior related discretionary land use decision, or (2) issues that could have, but were not, raised and resolved in an earlier related land use proceeding. *Safeway, Inc. City of North Bend*, 47 Or LUBA 489, 500 (2004). In

Butte Conservancy v. City of Gresham, 47 Or LUBA 282, *aff'd* 195 Or App 763, 100 P3d 218 (2004), LUBA described the doctrine as merely representing the "unexceptional principle that assignments of error that collaterally attack a decision other than the decision on appeal do not provide a basis for reversal or remand." *See also Robson v. City of La Grande*, 40 Or LUBA 250, 254 (2001)(same). In this case, the very same arguments related to natural hazards could have been raised in EXT 16-007 and EXT-17-015.

Ms. Moro argues that the collateral attack doctrine violates ORS 197.005 as well as Statewide Planning Goals 1 and 2. Ms. Moro cites no authority for this argument, nor does she develop the argument sufficiently to enable the hearings officer to understand the basis for her argument. It is not obvious to the hearings officer how the collateral attack doctrine violates the Goals or state statutes. To the extent there is an argument to be made to support the thesis, Ms. Moro simply does not invest enough time or effort into the argument to merit a substantive response. In this regard, footnote 5 of the Moro Hearings Memorandum simply expresses a policy disagreement with the County's extension criteria.

Even if the hearings officer was to reach the merits, the Opponents do not identify any errors in staff's determination. The Board of Commissioners has provided guidance to the parties in other extension cases, and these issues were even raised unsuccessfully to LUBA. Therefore, there is no basis for the hearings officer to reach a different conclusion about the comprehensive plan natural hazard provisions in the present case.

For example, in the 2017 Extension Decision in AP-17-004, the Board also concluded that the CCCP and CCZLDO §4.11.125(7) natural hazard provisions are not approval criteria that would apply to the Pipeline "decision" because the CCZLDO includes a "grandfather" clause that exempts the Pipeline from compliance with these provisions: "Hazard review shall not be considered applicable to any application that has received approval and [is] requesting an extension to that approval * * *." CCZLDO §4.11.125(7). *See* Findings of Fact, Conclusions of Law, and Final Decision of the Coos County Board of Commissioners for AP-17-004, at p. 21. Even if the collateral attack doctrine does not apply in this proceeding, the hearings officer sees no reason to recommend an inconsistent approach to the issue. More importantly, pursuant to CCZLDO §4.11.125(7), the natural hazard provisions are not "applicable approval criteria" that have changed.

In her Hearings Memorandum submitted on May 31, 2019, Moro attempts to re-litigate issues related to CCZLDO §4.11.125(7) natural hazard provisions were raised and decided in 2017 Extension Decision for other sections of the pipeline. *Compare* Hearings Memorandum, at p. 9, with File No. EXT-17-005/ AP-17-004, Final Ord. No. 17-11-046PL Dec. 19, 2017 at pp. 17-23. The applicant argues that is constitutes a "collateral attack" on the previous Board decision:

> Notwithstanding the Board's careful consideration and resolution of the FERC denial issue in the 2017 Extension Decision, opponents nevertheless attempt to resurrect it in the current proceedings. The Hearings Officer should deny opponents' attempt to do so for two reasons. First, opponents' actions is a blatant and

> impermissible collateral attack on the 2017 Extension Decision.[2] *See Noble Built Homes, LLC v. City of Silverton*, 60 Or LUBA 460, 468 (2010) (a party "cannot, in an appeal of one [local land use decision], collaterally attack a different final [local] land use decision."). Although opponents attempt to frame the question as one of issue preclusion (not collateral attack), they are mistaken. There is simply no authority—and opponents do not cite to any—that permits someone to utilize one land use proceeding to challenge a previous, final, unappealed land use decision.

As mentioned above, the Opponents' arguments pertaining to CCZLDO §4.11.125(7) are at the very least a "collateral attack" on the decisions issued in EXT 16-007 and EXT-17-015, because the very same arguments related to natural hazards *could have been raised* in those proceedings. Even so, the argument fails on the merits for the same reasons that are set forth in the 2017 Extension Decision, that portion of which is adopted herein by reference. *See* Final Ord. No. 17-11-046PL Dec. 19, 2017 at pp. 17-23.

6. The Extension Does Not Seek Approval of Residential Development.

CCZLDO § 5.2.600(1)(a)(5) & (6) provide as follows:

> ***(5) (a) 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.***
> ***(b) An extension of a permit described in subsection (5)(a) of this rule shall be valid for two years.***
> ***(6) For the purposes of section (5) of this rule, "residential development" only includes the dwellings provided for under ORS 215.213(3) and (4), 215.284, 215.705(1) to (3), 215.720, 215.740, 215.750 and 215.755(1) and (3).***

The Approval did not authorize any residential development on agricultural or forest land outside of an urban growth boundary. The hearings officer finds that these provisions are not applicable.

7. The Code Allowed for Multiple Extensions.

CCZLDO § 5.2.600 (1)(a)(7) provides as follows:

> ***(7) There are no limit on the number of extensions that can be applied for unless this ordinance otherwise allows.***

This provision provides express authority for the County to grant multiple extensions of the approval.

[2] *See* Findings of Fact, Conclusions of Law, and Final Decision of the Coos County Board of Commissioners for AP-17-004, dated December 19, 2017.

C. The Applicant Complies with the Two-Year Extension Limitation for Non-Resource Zone Criteria

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

> ***b. On lands not zoned Exclusive Farm, Forest and Forest Mixed Use:***
> ***(1) All conditional uses for residential development including overlays shall not expire once they have received approval.***
> ***(2) All conditional uses for non residential development including overlays shall be valid for period of four (4) years from the date of final approval.***
> ***(3) Extension Requests:***
> ***a. For all conditional uses subject to an expiration date of four (4) years are eligible for extensions so long as the property has not been:***
> ***i. Reconfigured through a property line adjustment or land division; and***
> ***ii. Rezoned to another zoning district.***
> ***(4) An extension shall be applied for on an official Coos County Planning Department Extension Request Form with the fee.***
> ***(5) An extension shall be received prior the expiration date of the conditional use or the prior extension.***

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

The Approval does not involve property that has been reconfigured through a property line adjustment or land division nor does it involve property that has been rezoned since the date the County granted the Approval. Therefore, the Approval is eligible for an extension.

The Applicant has included a completed and signed County extension application form and the required $561.00 fee with this request. The County received the extension request on November 9, 2018, which was before the expiration of the Approval period. Therefore, the Application meets the requirements of this provision.

Ms. Moro argues that CCZLDO 5.2.600(2)(2018) is 'beyond the scope of the County's authority." *See* Hearings Memorandum at p. 11. This provision states:

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

[2] Natural hazards are: floods (coastal and riverine), landslides, earthquakes and related hazards, tsunamis, coastal erosion, and wildfires.

Ms. Moro argues.:

> "[CCZLDO 5.2.600(2)(2018)] is an attempt to avoid the application of the hazard-related criteria that are applicable if the application was filed today and would have been applicable at the time the CUP application was filed. The county may not legislate around the rule's prohibition of extensions when the applicable criteria has changed."

Ms. Moro's argument is conclusionary in nature, and appears to reflect a policy disagreement, as opposed to making an argument based on applicable law. Ms. Moro makes no attempt to support the argument in any manner. If there is a legal deficiency with CCZLDO 5.2.600(2)(2018), Ms. Moro makes no effort to explain the legal basis for that assertion. The issue is simply not raised with sufficient specificity to give fair notice of the nature of the problem. For this reason, the argument is rejected.

This criterion is met.

D. Other Issues Raised by Opponents.

1. No Current Private Right of Condemnation / No signatures of Owners.

LDO 5.0.150(1) provides that an application for a permit "shall include the signature of all owners of the property." This is not an approval criterion for an extension.

Opponents argue that LDO 5.0.175 is a new "approval criteri[on]" within the meaning of LDO 5.2.600(1)(a)(4), and that it applies to the 2014 CUP for Blue Ridge. In *Williams v. Coos County,* __ Or LUBA __ (LUBA No. 2018-141/ 142, April 25, 2019) (appeal pending), LUBA rejected that argument. LUBA stated as follows:

> LDO 5.0.175 took effect in 2015. LDO 5.0.175(1) provides that for an application for a permit "[a] transportation agency, utility company or entity with the private right of property acquisition pursuant to ORS Chapter 35 may submit an application to the Planning Department for a permit or zoning authorization required for a project without landowner consent otherwise required by this ordinance." Differently, LDO 5.0.150(1) provides that an application for a permit "shall include the signature of all owners of the property." Petitioners argue that LDO 5.0.175 is a new "approval criteri[on]" within the meaning of LDO 5.2.600.1(c), and that it applies to the 2010 CUP and the 2013 CUP.
>
> The board of commissioners adopted findings that LDO 5.0.175 is not an "approval criteri[on]" but rather is an application submittal

> requirement. The board of commissioners also adopted alternative findings that even if LDO 5.0.175 is an "approval criterion," it is not "applicable" to the 2010 CUP and the 2013 CUP, because it is an optional provision that allows certain entities to choose to apply for a permit without landowner consent. Petitioners argue that in its decision approving the 2010 CUP, the county concluded that LDO 5.0.150 is an "approval criterion," and accordingly, the county must also conclude that LDO 5.0.175 is an approval criterion, and not merely a submittal requirement.
> As intervenor points out, petitioners' argument does not address the board of commissioners' alternative finding that, even if LDO 5.0.175 could constitute an "approval criterion," it is not an "applicable" approval criterion within the meaning of LDO 5.2.600.1(c) because it merely provides an alternative, optional pathway for certain entities to apply for a permit. We agree with intervenor that absent any challenge to that finding, petitioners' argument provides no basis for reversal or remand.

The opponents also argue that the applicant cannot seek an extension of the CUP because they currently do not have the authority under state or federal law to exercise the private right of condemnation. The opponents base their argument on the fact that PCGP's right of condemnation stems from federal law and is premised on the acquisition of a Certificate of Public Convenience and Necessity. They argue that since PCGP lost its certificate, it may no longer file land use applications. *See* Hearing Memorandum from Ms. Tonia Moro received May 31, 2019, at p. 11.

While the applicant is correct regarding the relevance of the argument to the approval criteria, that point could in itself be irrelevant if the issue is one that affects the jurisdiction of the county to hear an extension request. It certainly makes sense that the same jurisdictional requirements that apply to the initial CUP decision would apply to extension requests as well. Stated another way, jurisdictional requirements for filing an application also apply, implicitly, to the filing of an extension. No party raises this issue, however.

As noted in previous cases, the County has previously determined that the owner signature requirement for filing a land use application is not jurisdictional. *See* Findings of Fact, Conclusions of Law, and Final Decision of the Board of Commissioners dated Sept. 8, 2010, at p. 15-17. PCGP is in the process of applying for a Certificate of Public Convenience and Necessity from FERC. The fact that such a Certificate was previously issued to PCGP is at least indicative that it is plausible for another Certificate to be issued to PCGP in the future. In other words, the applicant is not precluded as a matter of law from obtaining FERC permits. Although FERC denied the previous application, it did so for reasons that can be remedied by obtaining foreign or domestic contracts for the purchase of natural gas. The initial land use decision on the pipeline matter was conditioned to require the applicant to obtain landowner signatures. The applicant will have to obtain a FERC Certificate in order to effectuate that condition.

Moreover, whatever the merits of this argument, this issue could have been raised in either of the two other land use applications that resulted in permit extensions in EXT 16-007 and EXT 17-015. The issue is not jurisdictional, and therefore the issue can be, and has been, waived.

For these reasons, the hearings officer does not agree with the opponent's understanding of CCZLDO 5.0.150 or CCZLDO 5.0.175.

2. The Tort Claim Notice Is Not Relevant

Exhibit 6 sets forth a Notice of Tort Claim from Cary Norman, which alleges that the County's approval and continued extension of the Pipeline interferes with the use and enjoyment of the Norman property. The notice alleges potential claims, including inverse condemnation, intentional deprivation of civil rights, and intentional emotional distress.

As the applicant notes, the issues raised in the Notice of Tort Claim are not directed at any of the approval criteria applicable to the Application but instead pertain to potential future litigation. Therefore, this is not the appropriate forum to address the substance of the Notice of Tort Claim. Further, because it is not directed at any approval criteria, it does not provide a basis to deny or condition the Application.

3. Alleged Bias of Hearings Officer

In her letter dated May 31, 2019, Ms. Natalie Ranker challenges the hearings officer for bias. She suggests that the fact that the hearings officer is compensated by the County for JCEP / PCGP decisions in what she suspects is a "highly lucrative" manner, and that such compensation may lend itself to the possibility of "continued judgments in favor of JCEP." The argument apparently is that approving, as opposed to denying, JCEP permits, leads to more financial compensation for the hearings officer.

Under Oregon law, the hearings officer's job is merely to provide a recommendation to the Board of Commissioners. The hearings officer is not a decision-maker; it is the Board that makes the final decision, so the bias by a hearings officer would have to be of a nature that taints the proceedings before the board, or the Board itself. See *Oregon Shores Conservation Coalition et al. v. Coos County*, 76 Or LUBA 346 (2017) ("Moreover, even if we concluded that the hearings officer was biased, JCEP is correct that the hearings officer was not the final county decision-maker. Ms. Ranker offers no argument as to why the hearings officer's alleged bias tainted the proceedings before, or the decision of, the board of commissioners, the final decision-maker.").

This would be difficult for the hearings officer to accomplish in any event, given that the Board has no contact with the hearings officer other than reading his recommendations. Furthermore, the Board certainly can disregard any recommendation that they do not agree with. Finally, the Board has the authority to replace the hearings officer for if the Board believes that the hearings officer's recommendations unfairly favor the applicant.

Nonetheless, the alleged concern is without merit. In fact, the exact opposite its true. The hearings officer provides his services to the county as a discounted rate, as is customary in the legal industry for government projects. Rather than being "highly lucrative," the work that the hearings officer performs as a hearings officer prevents the hearings officer from taking on other *more* lucrative work that pays 50-100% more per hour than what the hearings officer charges the County. Normally, this is not an issue, since the hearings officer generally has a good mix of private and public clients. However, in 2019 the County's JCEP /PCGP case load has been unusually high, and this has hindered the hearings officer's ability to adequately provide service to existing private clients. The hearing officer serves more out the spirit of public service than for the financial gain that arises therefrom. For this reason, it is simply ludicrous to suggest that the hearings officer approves applications to keep the gravy train running.

But, even if one were to apply the logic set forth in Mr. Ranker's argument, it seems it would be more lucrative to *deny* extension requests, thereby forcing the applicant to resubmit and undergo a more complicated re-approval process. While the hearings officer certainly does not think in those terms, it reveals the flaws in Ms. Ranker's logic.

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 hearings officer 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 expiration 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 hearings officer finds the applicant meets this second criterion as well.

For these reasons, the hearings officer finds and concludes that the applicant, Pacific Connector, has met the relevant the CCZLDO § 5.2.600 approval criteria for a CUP extension of one year, to November 11, 2019 (EXT-18-012). The hearings officer recommends to the Coos County Board of Commissioners that they so find, thereby affirming the Planning Director's March 11, 2019 decision granting the one (1) year CUP in County File No. HBCU 14-06, to November 11, 2019 , 2019 (EXT-18-012), subject to the conditions of approval set forth in Exhibit A to the Planning Directors' decisions.

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As a caveat to the above recommendation: this recommendation is premised on the correctness of the LUBA decision in *Williams v. Coos County*, __ Or LUBA __ (LUBA No. 2018-141/ 142, April 25, 2019). If the Court of Appeals reverses LUBA's decision before the Board issues a final decision in this matter, the hearings officer recommends that the Board revisit this recommendation, and seek advice from the County Counsel on how to proceed.

Respectfully submitted this 10th day of July, 2019.

Andrew H. Stamp
Hearings Officer