EXHIBIT "C"
Staff Report

File Number: ACU-16-013

Applicant: Richard Allan, Marten Law representing Pacific Connector Gas Pipeline, LP

Property Information:

Map Number	Acreage	Landowner	Zoning
25-13-00-200	191.58	Oregon International Port of Coos Bay	6-WD
25-13-04-101	4.76	Fort Chicago Holdings II U.S. LLC	6-WD
25-13-04-300	228.88	Roseburg Forest Products	6-WD
25-13-04-400	16.25	Fort Chicago Holdings II U.S. LLC	6-WD
25-13-04-100	97.11	Fort Chicago Holdings II U.S. LLC	6-WD, IND, 7-D
25-13-03-200	69.17	Fort Chicago Holdings II U.S. LLC	7-D, 8-WD, 8-CA
25-13-04-500	48	Oregon International Port of Coos Bay	8-CA, 13A-NA, 11-NA, 11-RS
24-13-36B-700	6.85	Donald & Carol Thompson	11-RS, RR-2, F
24-13-36B-1101	2.25	Hal & Donna Blomquist	RR-2, F
24-13-36B-1100	79.43	Weyerhaeuser Company	F
24-13-36B-100	36.01	Hal & Donna Blomquist	F
24-13-36-100	400	Weyerhaeuser Company	F
24-13-36-200	80	Weyerhaeuser Company	F
25-13-01-100	443.19	Weyerhaeuser Company	F
25-13-01D-200	32.57	Jason & Christine Snelgrove	F
25-13-01D-100	41.03	Gary E. Smith Trust	EFU, F
25-12-06C-100	83.19	Fort Chicago Holdings II U.S. LLC	EFU, F
25-12-06C-601	45.58	Lone Rock Timber Investments I, LLC	F
25-12-07-500	47.42	Lone Rock Timber Investments I, LLC	F
25-12-07-400	78.80	Lone Rock Timber Investments I, LLC	F
25-12-07-1300	71.74	Lone Rock Timber Investments I, LLC	F
25-12-07-1301	8.26	Lone Rock Timber Investments I, LLC	F
25-112-07-1301A02		U.S. A. Federal Aviation Administration	F
25-12-07-2400	40	Steven Sweet	F
25-12-18-300	40	Steven Sweet	F
25-12-18-200	77.14	Steven Sweet	F, EFU
25-12-17-300	2.10	Steven Sweet	EFU
25-12-17-400	12.05	Monte Rutherford	EFU
25-12-17-600	16	Jackie Shaw ETAL	EFU
25-12-17-700	5.47	William Edwards	EFU
25-12-17-900	40	Lone Rock Timber Investments I, LLC	F, EFU
25-12-17-1000	240	Weyerhaeuser Company	F
25-12-20-100	440	Weyerhaeuser Company	F
25-12-29-1100	99.61, 2.25	Donald Fisher 2012 Delaware Trust	F, EFU
25-12-30-501	32.24	Marjorie Brunschmid ETAL	EFU, 18-RS

25-12-30-600	12.04	Gregory Demers	18-RS
25-12-30D-1501	7.71	Agri Pacific Resources, INC	18-RS
25-12-30D-508	3.83	Kay Kronsteiner	18-RS
25-12-30-700	78.78	City of North Bend	19-D
25-12-31-100	107.59	City of North Bend	19-D
25-12-32B-300	17.60	City of North Bend	19-D, 19B-DA, 20-CA
25-12-32B-600	2.60	Fred Messerle & Sons, INC	20-RS
25-12-32-100	126.85	Fred Messerle & Sons, INC	20-RS, EFU
25-12-32-400	60	Fred Messerle & Sons, INC	EFU, F
26-12-05-200	242.89	Fred Messerle & Sons, INC	F
25-12-32-300	102.30	Louis McCarthy ETAL	F
26-12-05-300	23.66	Solomon Joint Living Trust	F
26-12-08B-100	16.09	Michael & Debra Prugh	F, RR-2
26-12-08-900	2.10	Jeffrey Hill	RR-5
26-12-08-1000	2.64	Jeffrey & Gidgette Hill	RR-5
26-12-08-1100	34.06	Alvin & Lou Ann Rode	RR-5, EFU, F
26-12-08-500	17.32	Mark & Melody Sheldon	RR-5
26-12-08B-1400	10.45	Larry & Shirley Wheeker	F
26-12-08-1102	22.91	Jeffrey & Gidgette Hill	F
26-12-08B-1500	15.75	Michael Mcginnis	F
26-12-08-1601	10.63	Gunnell Family Trust	F
26-12-08-1700	25.72	Curtis & Melissa Pallin	F, 21-RS
26-12-07-700	196.18	Fred Messerle & Sons, INC	21-CA, 21-RS, F
26-12-18A-100	77.24	Wright Loving Trust	F
26-12-18A-200	10.01	Paul & Eura Washburn	RR-5
26-12-18A-201	4.08	David & Emily McGriff	RR-5
26-12-18B-1900	2.91	James & Archina Davenport	RR-5
26-12-18B-1700	25.07	Nova & Ellen Lovell	F
26-12-18C-103	57.27	John & Mary Muencrath Trust 12-22-11	F
26-12-18C-300	4.8	Edgar Maeyens Jr	RR-5
26-12-18C-200	38.78	Roseburg Resources Co.	F
26-12-19-200	38.66	Roseburg Resources Co.	F
26-12-19-300	315.54	Roseburg Resources Co.	F
26-12-30-100	43.57	Victor & Arianne Elam	F
26-12-30-600	3.5	Robert Scoville	RR-5
26-12-30-100	40	Jimmie & Carolyn Ketchum	F
26-12-30A-500	70.99	Lone Rock Timber Investments I, LLC	F
26-12-30-1200	75.46	Menasha Forest Products Corporation	F
26-12-30-1400	77.69	Fred Messerle & Sons, INC	F
26-12-31A-100	34.48	Ronald & Molly Foord	F
26-12-32-400	39.68	Fred Messerle & Sons, INC	F
26-12-32-500	161.13	Dee Willis	EFU,F
26-12-31-700	120	Pacific West Timber Company (Oregon) LL	F
26-12-31-900	30	Anna & Daniel Fox	F
27-12-06-100	141.68	Lone Rock Timber Investments I, LLC	F
27-12-06-200	10.06	Steven & Carole Stalcup	F

27-12-06-300	470.98	Menasha Forest Products Corporation	F
27-12-05-100	475.68	USA (CBWRGL)	F
27-12-00-1700	160	Roseburg Resources Co.	F
27-12-00-1600	9.55	Pacificorp	F
27-12-00-1500	470.45	Menasha Forest Products Corporation	F
27-12-00-2500	400	USA (CBWRGL)	F
27-12-00-2400	638.62	Coos County Sheep Co.	F, EFU
27-12-00-2300	637.56	USA (CBWRGL)	F
27-12-22-100	640	Coos County Sheep Co.	F
27-12-23-200	320	USA (CBWRGL)	F
27-12-23-100	183.31	Coos County Sheep Co.	EFU, F
27-12-23-300	117.98	Lucky T LLC	F
27-12-24C-1500	11.10	John & Kara Breuer	F
27-12-24C-1600	10.99	Virgil & Carol Williams	RR-5
27-12-24C-1200	3.63	Mary Metcalf	RR-5
27-12-24C-1700	11	Virgil & Carol Williams	EFU
27-12-25-200	64.10	Charles & Johanna Yates	EFU
27-12-24C1800	11.26	Rodney Dalton	EFU
27-12-24C-2100	10.01	Ted L. Fife Family Trust	EFU
27-12-25-201	11.80	Donald & Shirley Fisher	F
27-12-25-203	47.28	Walter & Wendy Hazen	F
27-12-25-100	155.19	USA (CBWRGL)	F
27-11-00-1500	601.60	Menasha Forest Products Corporation	F
27-11-00-1400	643.31	USA (CBWRGL)	F
27-11-00-1700	629.56	USA (CBWRGL)	F
27-11-32-1000	80	Pacific West Timber Company (Oregon) LL	F
27-11-32-800	269.90	Menasha Forest Products Corporation	F
27-11-32-1300	66.56	Menasha Forest Products Corporation	F
28-11-05-100	340.26	USA (CBWRGL)	F
28-11-05-200	45.99	Windlinx Family Trust	F
28-11-04-600	470.04	Moore Mill & Lumber Co.	F
28-11-04-800	40	Menasha Forest Products Corporation	F
28-11-00-400	640, 240	USA (CBWRGL)	F
28-11-10-1000	80	Pacific West Timber Company (Oregon) LL	F
28-11-10-900	189.67	Lone Rock Timber Investments I, LLC	F
28-11-10-901	1.05	Dora Cemetery Assn.	F
28-11-10-1300	57.25	Cynthia Garrett	F, EFU
28-11-10-1400	128.15	Laird Timberlands, LLC	EFU
28-11-15-100	7.31	Laird Timberlands, LLC	EFU, F
28-11-00-500	280	Moore Mill & Lumber Co.	EFU, F
28-11-00-700	200	Plum Creek Timberlands, L.P.	F
28-11-13-900	437.52	USA (CBWRGL)	F
28-11-24-100	639.76	Keystone Forest Investments, LLC.	F
28-11-00-1900	40	Roseburg Resources Co.	F
28-10-00-3500	34.93	Roseburg Resources Co.	F
28-10-00-3400	503.57	USA (CBWRGL)	F
28-10-00-3600	79.54	Lone Rock Timber Investments I, LLC	F

28-10-00-3300	160	FIA Timber Partners II, L.P.	F
28-10-00-3800	160	FIA Timber Partners II, L.P.	F
28-10-00-4100	480	USA (CBWRGL)	F
28-10-00-4200	440	USA (O& C)	F
28-10-00-4600	280	USA (CBWRGL)	F
28-10-00-4500	160	Lone Rock Timberland Co.	F
28-10-00-5000	320	Tri-W Group Limited Partnership	F
28-10-00-4900	160	Plum Creek Timberlands, L.P.	F
28-10-00-4800	160	Tri-W Group Limited Partnership	F
28-10-00-5600	160	USA (CBWRGL)	F
28-10-00-5500	160	Tri-W Group Limited Partnership	F
28-10-00-5200	160	Tri-W Group Limited Partnership	F
28-09-00-3500	670.72	USA (CBWRGL)	F
28-09-00-300	656.61	Plum Creek Timberlands, L.P	F
29-09-00-200	623.72	USA (CBWRGL)	F
29-09-00-500	160	Lone Rock Timberland Co.	F
29-09-00-600	598.18	Plum Creek Timberlands, L.P	F
29-09-00-700	640	USA (CBWRGL)	F
25-13-04-300	228.88	Roseburg Forest Products Co.	CBEMP
25-13-03-200	69.17	Fort Chicago Holdings II U.S., LLC	IND, CBEMP
28-12-07C-101	17.54	Ron Lafranchi	Q-IND
28-12-07C-1000	17.24	Ron Lafranchi	CREMP, CREMP IND
28-12-07C-900	9.34	LBA Contract Cutting, INC	CREMP, CREMP IND
28-12-18B-1500	8.29	LBA Contract Cutting, INC	CREMP, CREMP IND
27-12-26D-1200	18.85	Spencer & Truly Yates	EFU
28-13-01DB-300	5.56, .54	City of Coquille	City
28-13-01DB-309	10.31	City of Coquille	City
28-13-01DB-310	6.59	City of Coquille	City
25-13-35-400	94.76	Georgia- Pacific Wood Products Northwest	CBEMP
25-13-36-1000	39.18	Georgia- Pacific Wood Products Northwest	CBEMP

Reviewing Staff: Jill Rolfe, Planning Director
Date of Report: April 10, 2016

I. PROPOSAL

Request for Planning Director Approval for an extension of a conditional use to site natural gas pipeline as provided by Coos County Zoning and Land Development Ordinance (CCZLDO) § 5.2.600 Expiration and Extension of Conditional Uses.

II. BACKGROUND INFORMATION

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

Over the past several years, Pacific Connector has been pursuing the necessary approvals for the Pipeline. All necessary approvals have not been secured as of the date of this report.

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)

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 land use approvals for two additional years. The Planning Director approved this request on May 2, 2014, pursuant to provisions of CCZLDO § 5.0.700. The Planning Director's decision was appealed on May 27, 2014 (AP-14-02).

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

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 hearings 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 (attached as Exhibit G). The Board of Commissioners' approval of Pacific Connector's second extension request was not appealed to LUBA, and that decision is final.

III. APPROVAL CRITERIA & FINDINGS OF FACT

- **SECTION 5.2.600 EXPIRATION AND EXTENSION OF CONDITIONAL USES**

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

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

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

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

        i. *An applicant makes a written request for an extension of the development approval period;*
        ii. *The request is submitted to the county prior to the expiration of the approval period;*
        iii. *The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and*
        iv. *The county determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.*

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

FINDING: The request covers both the resource and non-resource zoning districts. This section only covers the resources portion of the approval; however, the applicant has requested the conservative approach and requests a one-year extension for the entire ACU. The applicant made a written request for the extension of the Pacific Connector Gas Pipeline development. The applicant submitted the application for an extension on March 17, 2016, prior to the expiration date of April 2, 2016. The applicant has provided the reasons that prevented the applicant from beginning or continuing development within the approval period.

The applicant has explained that the reason that the project has not begun is because the Federal Energy Regulatory Commission's (FERC) final authorization has not been completed. The project cannot begin construction without a final decision from FERC as well as other permitting agencies as listed in the applicant's Exhibit D. 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.

The last consideration for the extension of a conditional use approval in the resource zone is that the applicable criteria for the decision have not changed. The application criteria pursuant to which the approval was originally granted have not changed. There has been some additional language added to the resource section of the ordinance as well as some renumbering but the language of the criteria has not been altered.

Therefore, the application as presented meets the criteria.

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

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

FINDING: The request covers both the resource and non-resource zoning districts. This section only covers the non-resources portion of the approval; however, the applicant has requested the conservative approach and requests a one-year extension for the entire ACU.

The applicant made a written request for the extension of the Pacific Connector Gas Pipeline development. The applicant submitted the application for an extension on March 17, 2016, prior to the expiration date of April 2, 2016.

The pipeline crosses both resource and non-resource zones, requiring the applicant to request an extension under both subsection one and two of CCZLDO § 5.2.600. In non-resource the extension is for up to two years as long as the use is still listed as a conditional use under the current zoning regulations. The use is still a listed conditional use in the relevant non-resource zones and the applicant requested the extension prior to the expiration. Therefore, the application request complies with the criteria the requested one-year extension shall be granted on all non-resource zoning districts the pipeline was approved to cross.

IV. DECISION:

The applicant has supplied written findings and evidence to support approval of this application. There may be some debate about the FERC decision but that is irrelevant to the criteria. There are conditions that apply to this use that can be found at Exhibit "A".

V. EXPIRATION AND EXTENSION OF CONDITIONAL USES

Time frames for conditional uses are as follows:

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

c. *All non-residential conditional uses within resource zones are valid (2) years from the date of approval.*
d. *For purposes of this section, the date of approval is the date the appeal period has expired and no appeals have been filed, or all appeals have been exhausted and final judgments are effective.*
e. *Additional extensions may be applied.*

This approval has been extended for one year unless the development, activity or use has been extended.

Table 1.6-1
Permits and Approvals Necessary for Construction and Operation

Agency	Permit/Approval	Contact	Filing Date	Approval/ Anticipated Approval
Federal				
U.S. Department of Energy (DOE)	Order Granting Long Term, Multi-Contract Authorization to Export Natural Gas to Free Trade Agreement Nations under Section 3 of the Natural Gas Act	Amy Sweeney (202) 586-2627 1000 Independence Ave., SW Room 3E-052 Washington, D.C. 20585	September 2011	Received December 7, 2011[6]
	Order Conditionally Granting Long-Term Multi-Contract Authorization To Export Liquefied Natural Gas To Non-Free Trade Agreement Nations under Section 3 of the Natural Gas Act.	Amy Sweeney (202) 586-2627 1000 Independence Ave., SW Room 3E-052 Washington, D.C. 20585	March 2012	Conditionally received March 24, 2014[1]
Federal Energy Regulatory Commission	Section 7 of the Natural Gas Act – issuance of Certificate of Public Convenience and Necessity	John Peconom (202) 502-6352 888 First St., NE Washington, D.C. 20426	September 2017	November 2018
	Section 3 of the Natural Gas Act – order granting Section 3 authorization		September 2017	November 2018
FERC (as lead agency)	National Historic Preservation Act § 106 Review/Memorandum of Agreement among federal agencies, consulting parties, and SHPO	Paul Friedman (202) 502-8059 888 First St., NE Washington, D.C. 20426	September 2017	November 2018
FERC (as lead agency)	National Environmental Policy Act Review - EIS	John Peconom (202) 502-6352 888 First St., NE Washington, D.C. 20426	September 2017	August 2018

[6] JCEP will submit an amendment to the FTA authorization and pending non-FTA authorization to reflect the new export capacity of the LNG Terminal and will confirm receipt of such authorizations prior to construction.

Agency	Permit/Approval	Contact	Filing Date	Approval/ Anticipated Approval
U.S. Army Corps of Engineers	Clean Water Act – issuance of permit under Section 404 to allow placement of dredge or fill material into waters of the United States	Tyler Krug Regulatory Project Manager 541-756-2097 tyler.j.krug@usace.army.mil North Bend Field Office 2201 N. Broadway, Suite C North Bend, OR 97459	October 2017	November 2018
	Section 10 of the Rivers and Harbors Act – permit issued to allow structures or work in or affecting navigable waters of the United States			
	Section 408 of the Clean Water Act – issuance of permit allowing the occupation or alteration of Army Corps of Engineers civil works projects	Marci Johnson U.S. Army Corps of Engineers P.O. Box 2946 Portland, OR 97285 (503) 808-4765	September 2017	November 2018
U.S. Coast Guard (USCG)	Letter of Recommendation and Letter of Recommendation Analysis under the Ports and Waterway Safety Act	Captain Timmons USGS Sector Columbia River 2185 SE 12th Place Warrenton, Oregon 97146	April 2006	December 2017
U.S. Fish and Wildlife Service	Endangered Species Act – consultation under Section 7 and issuance of biological opinion	Joe Zisa 503-231-6179 joe_zisa@fws.gov Oregon Fish and Wildlife Office 2600 SE 98th Ave., Ste. 100 Portland, OR 97266	September 2017	November 2018
	Fish and Wildlife Coordination Act – consultation with federal agencies to prevent loss or damage to wildlife resources		September 2017	November 2018
	Migratory Bird Treaty Act Review		September 2017	

Agency	Permit/Approval	Contact	Filing Date	Approval/ Anticipated Approval
National Marine Fisheries Service	ESA Section 7 Consultation – issuance of biological opinion	Chuck Wheeler Fisheries Biologist 541-957-3379 chuck.wheeler@noaa.gov 2900 Stewart Parkway Roseburg, OR 97471	September 2017	November 2018
	Magnuson-Stevens Fishery Conservation and Management Act consultation on Essential Fish Habitat		September 2017	November 2018
	Marine Mammal Protection Act – Issuance of Incidental Harassment Authorization	Jordan Carduner 1315 East West Highway Silver Spring, MD 20910	October 2017	November 2018
Federal Aviation Administration (FAA)	Determination of No Hazard to Air Navigation pursuant to 14 CFR Part 77.	Dan Shoemaker 1601 Lind Ave SW Renton, WA 98055 (425) 227-2791	October 2017	Prior to Construction
USDOI Bureau of Land Management	Mineral Leasing Act – issuance of Right-of-Way Grant	Miriam Liberatore Planning and Environmental Coordinator 541-618-2412 mliberat@blm.gov 3040 Biddle Road Medford, OR 97504	October 2017	November 2018
	Mineral Leasing Act – issuance of Temporary Use Permit			
	Federal Land Policy and Management Act - Amendments to Resource Management Plans			
USDA Forest Service	Mineral Leasing Act - Right-of-Way Grant Letter of Concurrence	David Krantz PCGP Project Manager 541-618-2082 dkrantz@fs.fed.us 3040 Biddle Road Medford, OR 97525	October 2017	November 2018
	Federal Land Policy and Management Act - Amendments to Existing Forest Plans			

Agency	Permit/Approval	Contact	Filing Date	Approval/ Anticipated Approval
USDI Bureau of Reclamation	Right-of-Way Grant Letter of Concurrence Letter of Consent covering lands on which BOR has reserved rights or acquired easements	Lila Black 541-880-7510 lblack@usbr.gov Klamath Basin Area Office 6600 Washburn Way Klamath Falls, OR 97603	October 2017	November 2018
Tribal				
Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians	FERC to consult with the Tribes under NHPA Section 106	Ms. Stacy Scott 541-888-9577x7513 sscott@ctclusi.org 1245 Fulton Avenue Coos Bay, OR 97420	FERC to initiate after receipt of applications	November 2018
Coquille Indian Tribe		Kassandra Rippee 541-756-0904x10216 kassandrarippee@coquilletribe.org 3050 Tremont Street North Bend, OR 97459		
Cow Creek Band of Umpqua Indians		Mr Dan Courtney (541) 672-9405 dlcourtney5431@msn.com 2371 Stephens Street, Suite 500 Roseburg, OR 97470		
The Klamath Tribes		Mr. Perry Chocktoot Culture & Heritage Director 541-783-2219x159 Perry.Chocktoot@klamathtribes.com P.O. Box 436 Chiloquin, OR 97624		
Confederated Tribes of the Siletz Indians		Mr. Robert Kentta Cultural Resources Director 541-444-2532 rkentta@ctsi.nsn.us P.O. Box 549 Siletz, OR 97380		

Agency	Permit/Approval	Contact	Filing Date	Approval/ Anticipated Approval
Confederated Tribes of the Grand Ronde Community		David Harrelson 503-879-1630 david.harrelson@grandronde.org 9615 Grand Ronde Road Grand Ronde, OR 97347		
State				
Oregon Division of State Parks Office of Historic Preservation	National Historic Preservation Act – Section 106 Consultation	John Pouley Assistant State Archaeologist 503-986-0675 john.pouley@oregon.gov 725 Summer St. NE, #C Salem, OR 97301	Initiated by FERC upon receipt of application	November 2018
Oregon Department of Environmental Quality	CWA 401 Water Quality Certification	Mary Camarata 541-687-7435 camarata.mary@deq.state.or.us 165 East 7th Ave., Ste. 100 Eugene, OR 97401	October 2017	October 2018
	Clean Air Act – issuance of Title V Operating Air Permit		To be filed one year after operation.	Within 1 year of filing
	Clean Water Act – issuance of permit under the National Pollutant Discharge Elimination System ("NPDES") - 1200A General Permit for Concrete Batch Plant		Prior to construction	Prior to construction
	Clean Water Act – issuance of NPDES - 1200-C General Permit for any Contiguous Sites		Prior to construction	October 2018
	Clean Water Act – issuance of NPDES Wastewater Permit for current site conditions – allows discharge of treatment of leachate from landfill through the ocean outfall		Renewed July 26, 2015. Expires June 30, 2020	Issued

Agency	Permit/Approval	Contact	Filing Date	Approval/ Anticipated Approval
	CWA 402 NPDES Construction Stormwater Permit		Prior to construction	Prior to construction
	CWA 402 NPDES Operating Stormwater Permit		Prior to operation	Prior to operation
	CWA 402 NPDES Water Pollution Control Facility (WPCF) – Hydrostatic Test Water		Prior to operation	Prior to operation
	Type B NSR Air Permit for LNG Terminal		Updated filed September 2017	Approved June 2015/October 2018
	Air Contaminant Discharge Permit for Compression Facilities		Modifying pending application October 2017	October 2018
Oregon Department of Water Resources	Permit to Appropriate Water	Jerry K. Sauter Water Rights Program Analyst 503-986-0817 jerry.k.sauter@state.or.us Water Right Services Division 725 Summer Street NE, Ste. A Salem, OR 97301	Prior to operation	Prior to operation
Oregon Department of Fish and Wildlife	In-Water Blasting Permit Fish Passage	Sarah Reif Energy Coordinator, Wildlife Division 503-947-6082 sarah.j.reif@state.or.us 4034 Fairview Industrial Drive SE Salem, OR 97302	October 2017	October 2018
	Fish Passage Approval	Greg Apke 4034 Fairview Industrial Dr. SE Salem, OR 97302 503-947-6228 Greg.d.apke@state.or.us	December 2017	October 2018
Oregon Department of Transportation	State Highway Crossing Permit	Roger B. Allemand Permit Specialist – District 8	Prior to construction	Prior to construction

Agency	Permit/Approval	Contact	Filing Date	Approval/ Anticipated Approval
	Railroad Flagging Permit	541-774-6360 roger.b.allemand@odot.state.or.us	Prior to Construction	Prior to construction
	Oversize Load Permit	Dave Wells Permit Specialist – District 7 541-957-3588 david.wells@odot.state.or.us	Prior to Construction	Prior to construction
	Overweight Load Permit		Prior to Construction	Prior to construction
	Street Use Permit		Prior to Construction	Prior to construction
Oregon Department of State Lands	Joint Permit with the USACE Removal/Fill Permit	Bob Lobdell 503-986-5282 bob.lobdell@state.or.us 775 Summer Street NE, Ste. 100 Salem, OR 97301	October 2017	October 2018
	Proprietary easements and licenses for land access and gravel use		October 2017	October 2018
	Wetland Report Concurrence	Lynne McAllister Jurisdiction Coordinator 503-986-5300 lynne.mcallister@state.or.us 775 Summer Street NE, Ste. 100 Salem, OR 97301	October 2017	October 2018
Oregon Department of Land Conservation and Development	Coastal Zone Management Consistency Determination	Elizabeth Ruther 503-934-0029 elizabeth.j.ruther@state.or.us 635 Capitol Street, Suite 150 Salem, Oregon 97301-2540	November 2017	October 2018
Oregon Department of Forestry	Operate Mechanical Equipment	Josh Barnard Field Support Unit Manager 503-945-7493 josh.w.barnard@oregon.gov 2600 State Street, Bldg. A Salem, OR 97310	Prior to Construction	Prior to Construction
	Written Plan & Alternate Plan			
Oregon State Building Codes Division (BCD)	Building Permits – for various permanent structures.	Mark Long (503) 373-7235	Prior to Construction	Prior to Construction
BCD	Temporary Building Permit – for any temporary structures.	Mark Long (503) 373-7235	Prior to Construction	Prior to Construction

Agency	Permit/Approval	Contact	Filing Date	Approval/ Anticipated Approval
Oregon State Historic Preservation Office (SHPO)	Section 106 Consultation	John O. Pouley 503-986-0675	September 2017	November 2018
County				
City of North Bend Planning Department	Conditional Use Permit (for pipeline in City of North Bend)	Chelsea Schnabel City Planner City of North Bend (541) 756-8535 cschnabel@northbendcity.org 835 California Avenue North Bend, OR 97459	October 2017	May 2018
Coos County Planning Department	Conditional Use Permit	Jill Rolfe 541-396-7770 jrolfe@co.coos.or.us Coos County Planning Department 225 N. Adams Coquille, OR 97423		Approved 2016
Douglas County Planning Department	Conditional Use Permit	Cheryl Goodhue Planning Department 541-440-4289 cagoodhu@co.douglas.or.us Douglas County Courthouse Justice Building – Room 106 Roseburg, OR 97470		Approved 2010 and 2014
Klamath County Planning Department	Conditional Use Permit – Compressor Station	Mark Gallagher Planning Director 541-883-5121x3064 mgallagher@co.klamath.or.us 305 Main Street Klamath Falls, OR 97601		Approved 2015

BOARD OF COMMISSIONERS
COUNTY OF COOS
STATE OF OREGON

IN THE MATTER OF APPROVING AN EXTENSION REQUEST APPLIED FOR BY PACIFIC CONNECTOR GAS PIPELINE, LP AND APPEALED BY CITIZENS AGAINST LNG	)	FINAL DECISION AND ORDER NO. 17-11-064PL

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

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

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

Hearings Officer Stamp issued his Analysis, Conclusions and Recommendations to the Board of Commissioners on October 20, 2017. Staff presented some revisions to the Findings of Fact; Conclusions of Law and Final Decision for the Board of Commissioners to consider.

The Board of Commissioners held a public meeting to deliberate on the matter on November 21, 2017. All members present and participating unanimously voted to tentatively accept the decision of the Hearings Officer, and continued the final decision on the matter to allow staff to draft the appropriate order and findings. The meeting was continued to December 5, 2017, for final approval.

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

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

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

ADOPTED this 19th day of December 2017.

BOARD OF COMMISSIONERS:

COMMISSIONER

Bobbi Brooks
RECORDING SECRETARY

absent
COMMISSIONER

APPROVED AS TO FORM:

COMMISSIONER

Office of Legal Counsel

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION OF THE COOS COUNTY BOARD OF COMMISSIONERS

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

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

DECEMBER 19, 2017

EXHIBIT A

I. INTRODUCTION

A. NATURE OF THE LOCAL APPEAL

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

B. CASE HISTORY

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

On September 8, 2010, the County Board of Commissioners (Board) adopted and signed Final Order No. 10-08-045PL, approving Applicant's request for a CUP authorizing development of the Pipeline and associated facilities, subject to certain conditions. The decision was subsequently appealed to, and remanded by, the Oregon Land Use Board of Appeals (LUBA). On March 13, 2012, the Board addressed and resolved two grounds from remand, and approved findings supporting approval of the CUP for the Pipeline and associated facilities on remand in Final Order No. 12-03-018PL. The March 13, 2012 decision became final when the 21-day appeal window expired and no appeals were filed on April 2, 2012. The 2010 and 2012 approvals are referred to collectively as the CUP. The CUP authorizes construction and operation of a natural gas pipeline and associated facilities on approximately 49.72 linear miles within Coos County, extending from Jordan Cove Energy Project's LNG Terminal to the alignment section in adjacent Douglas County.

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

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

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.

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

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

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

Meanwhile, in light of the withdrawal of its FERC Certificate and the consequent impossibility of obtaining all federal approvals necessary to initiate construction within the original two-year County approval period, Pacific Connector filed a request with the County on March 7, 2014 to extend its original CUP approval for two additional years. The Planning Director approved this request on May 2, 2014, pursuant to provisions of CCZLDO § 5.0.700. The Planning Director's decision was appealed on May 27, 2014 (AP-14-02).

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

The Board held a public meeting to deliberate on the matter on September 30, 2014. At the hearing, the Board voted to accept the Hearings Officer's recommended approval as it was presented. On October 21, 2014, the Board adopted its decision approving an extension of Pacific Connector's conditional use approval for one year, until April 2, 2015.

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

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

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

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

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

The Applicant's attorney submitted PCGP's fourth extension request on March 30, 2017 (County File No. EXT-17-005), prior to the expiration of the prior extension approval. A notice of decision approving the extension was mailed on May 18, 2017. An appeal was filed on June 2, 2017 which was within the appeal deadline. On August 25, 2017 the public hearing was held on this matter. Subsequent written testimony was received until September 15, 2017. The applicant's final argument was received on September 22, 2017. On October 20, 2017, the County Hearings Officer issued his recommended order that the Board approve the Applicant's request. On November 21, 2017 the Board of Commissioners held a public hearing to review the

Hearings Officer decision and deliberate on the matter. The Board of Commissioners made a tentative decision and instructed staff to draft the order and findings incorporating the Hearings Officers recommendation for final adoption. The Board generally accepts the Hearings Officer's recommendation and affirms the staff decision for the reasons explained below.

II. LEGAL ANALYSIS.

A. Criteria Governing Extensions of Permits.

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

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

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

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

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

i. An applicant makes a written request for an extension of the development approval period;
ii. The request is submitted to the county prior to the expiration of the approval period;
iii. The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and
iv. The county determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.

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

d. If a permit is approved for a proposed residential development on agricultural or forest land outside of an urban growth boundary, the permit shall be valid for four years. An extension of a permit described in subsection (e) of this section shall be valid for two years.

e. For the purposes of subsection (e) of this section, "residential development" only includes the dwellings provided for under in the EFU and Forest zones in Chapter 4.

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

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

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

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

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

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

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

B. <u>Pacific Connector's Compliance with the Applicable Standards for a CUP Extension Request on Farm and Forest Lands</u>

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

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

a. Except as provided for in subsection (e) of this section, a discretionary decision, except for a land division, made after the effective date of this section approving a proposed development on

agricultural or forest land outside an urban growth boundary is void two years from the date of the final decision if the development action is not initiated in that period.

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

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

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

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

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

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

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

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

This criterion is met.

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

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

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

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

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

This criterion is met.

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

CCZLDO § 5.2.600(1)(b)(iii) and (iv) provides as follows:

iii. The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and

iv. The county determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.

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

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

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

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

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

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

> "In this case, the applicant needs federal approval for the gas pipeline project, and the project cannot commence until those federal approvals are forthcoming. Even the primary opponent to the project, Ms. Jody McCaffree, admits the facts that caused the applicant to be unable to begin

> or continue development during the approval period, i.e., that [FERC] vacated the federal authorization to construct the pipeline."

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

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

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

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

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

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

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

- Delays caused by construction contractors or inability to hire sufficient workers;
- Unusual delays caused by abnormal weather years, such as in the case of El Nino or La Nina weather patterns;
- Delays in obtaining financing from banks;
- Delays in getting approval from HOA architectural review committees;

- Encountering unexpected legal problems related to the land, such as a previously unknown adverse possession claim;
- Encountering sub-surface conditions differing from the approved plans,
- Exhuming Native American artifacts; and
- Inability to meet requirements imposed by other governmental agencies.

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

- Failing to apply for required permits;
- Failing to exercise due diligence in pursuing the matter;
- Procrasination.

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

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

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

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

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

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

steps within its control to implement the Approval. As explained above, PCGP has taken those steps.

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

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

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

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

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

Further, PCGP cannot control if or when third parties will enter contracts with PCGP or whether third parties are unreasonable in their negotiations. Under these circumstances, PCGP is not the "primary cause" for not demonstrating a "need" for the Pipeline.

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

> During the applicable one-year approval period (April 2016-April 2017), PCGP took the following specific actions to implement the Approval:
>
> - Actively acquired voluntary easements with landowners by reaching agreements with both private landowners and commercial timber companies.
> - Performed civil and environmental surveys within the County to advance the design and routing of the Pipeline
> - Engaged specialist contractors to perform geotechnical investigations along the Pipeline route
> - Negotiated with potential end users for the transmission of natural gas that will be transported by the Pipeline

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

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

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

In its final argument, PCGP states:

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

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

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

These two criteria are met.

The Criteria Governing the PCGP CUP Have Not Changed.

CCZLDO § 5.2.600.1.c provides as follows:

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

While the County standards for approving extensions have recently been modified, none of the applicable substantive approval criteria for the Pipeline have changed since the original County decision to approve the Pipeline in 2010.[1]

[1] While the County amended its criteria for evaluating extension applications in January 2015, these amendments did not affect the criteria on which the "decision" – the initial land use approval – was based.

The opponents contend that the approval criteria for a Pipeline permit decision have changed because County Ordinance No. 15-05-005PL—which adopted amendments to the Coos County Comprehensive Plan (CCCP) pertaining to natural hazards—became effective in 2016. The Board does not agree for two reasons.

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

The Applicant states as follows:

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

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

The Board does not believe that the decision to delay the effective date of the Ordinance is a land use decision, for the reasons set forth in detail below. But the Board does agree with

the Applicant's broader point, which is that the decision would need to be appealed and determined to defective by a Court; it is not void on its face.

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

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

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

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

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

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

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

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

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

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

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

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

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

However, finality is not the only requirement that is required to meet the definition of a statutory land use decision. In order to constitute a statutory land use decision, the County's decision must also either apply or amend: (1) a provision contained in a local government's comprehensive plan, (2) land use regulation, or it must (3) apply a Statewide Planning Goal. ORS 197.015(11)(a)(A)(i)-(iv). LUBA has repeatedly stated that in order for a challenged decision to be a statutory "land use decision," it must "concern" itself with the application of the comprehensive plan provision or land use regulation, or a Goal. *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004). In determining whether a local government decision "concerns" the application of a comprehensive plan provision or a land use regulation, " * * * it is not sufficient that a decision may touch on some aspects of the comprehensive plan [or land use regulations], rather the comprehensive plan [or land use regulations] must contain provisions intended as standards or criteria for making the appealed decision. *Billington*, 299 Or at 475." *Portland Oil Service Co. v. City of Beaverton*, 16 Or LUBA 255, 260 (1987).[3] However, the decision does not necessarily have to permit the "use" or "development" of land. *Contrast Medford Assembly of God v. City of Medford*, 6 Or LUBA 68 (1982), *rev'd* 64 Or App 815 (1983), *aff'd* 297 Or 138 (1984). Rather, a local government decision which makes a binding interpretation of its regulations, but without amending or adopting regulation provisions or granting or denying a development application, is a "final" decision, even if other actions are required to give that decision practical effect. *Medford Assembly of God v. City of Medford*, 297 Or 138, 140, 681 P2d 790 (1984); *Hollywood Neigh. Assoc. v. City of Portland*, 21 Or LUBA 381, 384 (1991); *General Growth v. City of Salem*, 16 Or LUBA 447, 451-53 (1988).

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

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[3] *See also Knee Deep Cattle Co. v. Lane County*, 28 Or LUBA 288 (1994); *Fence v. Jackson County*, 135 Or App 574, 900 P2d 524 (1995) ("We agree with the county that the fact that a regulation is embodied in something called a land use ordinance does not convert it into a land use regulation, subject to LUBA's review, if the substance of the regulation clearly pertains to something other than land use.").

The Board generally disagrees with the substance of the analysis set forth on page 1-3 of Kathleen Eymann's letter dated September 13, 2017. Delaying the effective date of a Comprehensive Plan Amendment is not the same as substantively amending a comprehensive plan. Ms. Eymann is correct that substantive amendments to the comprehensive plan would require the County to undertake the procedures for a Post Acknowledgement Plan Amendment (PAPA). However, simply delaying the effective date of the Ordinance prior to its effective date can be accomplished by a motion made at a public hearing. There are no criteria for such a decision, and it is within the sole discretion of the Board to do so.

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

E. <u>Even if the CCCP natural hazard provisions were in effect when PCGP submitted the Application, these provisions are not "approval criteria" for a Pipeline permit.</u>

Opponents contend that the "applicable criteria" for the CUP permit have changed. *See* Letter from Jody McCaffree dated Aug. 25, 2017. *See* Letter from Vim de Vriend dated Aug. 25, 2017. *See* Letter from Kathleen Eymann, Aug. 25, 2017.

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

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

In some cases, the plan itself will provide a "roadmap" by expressly stating which, if any, of its policies are applicable approval standards for certain types of development. For example, if the comprehensive plan specifies that a particular plan policy is itself an implementing measure, LUBA will conclude that policy applies as an approval criterion for land use decisions. *Murphey v. City of Ashland*, 19 Or LUBA 182 (1990). On the other hand, where the comprehensive plan emphasizes that plan policies are intended to *guide* development actions and decisions, and that the plan must be implemented through the local code to have effect, such plan policies are not approval standards for individual conditional use decisions. *Schellenberg v. Polk County*, 21 Or LUBA 425 (1991). Similarly, statements from introductory findings to a comprehensive plan

chapter are not plan policies or approval standards for land use decisions. *19th Street Project v. City of The Dalles*, 20 Or LUBA 440 (1991). Comprehensive plan policies which the plan states are specifically implemented through particular sections of the local code do not constitute independent approval standards for land use actions. *Murphey v. City of Ashland*, 19 Or LUBA 182 (1990). Where the county code explicitly requires that a nonfarm conditional use in an exclusive farm use zone "satisfy" applicable plan goals and policies, and the county plan provides that its goals and policies shall "direct future decisions on land use actions," the plan agriculture goals and policies are applicable to approval of the nonfarm conditional use. *Rowan v. Clackamas County*, 19 Or LUBA 163 (1990).

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

In some cases, an otherwise applicable plan policy will be fully implemented by the zoning code. Where the text of the comprehensive plan supports a conclusion that a city's land use regulations fully implement the comprehensive plan and displace the comprehensive plan entirely as a potential source of approval criteria, demonstrating that a permit application complies with the city's land use regulations is sufficient to establish consistency/compliance with the comprehensive plan. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192, 211-12 (1994); *Murphy v. City of Ashland*, 19 Or LUBA 182, 199 (1990); *Miller v. City of Ashland*, 17 Or LUBA 147, 169 (1988); *Durig v. Washington County*, 35 Or LUBA 196, 202 (1998) (explicit supporting language is required to establish that land use regulations entirely displace the comprehensive plan as a source of potentially applicable approval criteria for land use decisions). However, a local government errs by finding that its acknowledged zoning ordinance fully implements the acknowledged comprehensive plan, thus making it unnecessary to apply comprehensive plan provisions directly to an application for permit approval, where the acknowledged zoning ordinance specifically requires that the application for permit approval must demonstrate compliance with the acknowledged comprehensive plan and the county does not identify any zoning ordinance provisions that implement applicable comprehensive plan policies. *Fessler v. Yamhill County*, 38 Or LUBA 844 (2000).

The opponents argue that the Hazard Maps, including the Tsunami, Landslide, Wildfire, Liquefaction, and Earthquake maps adopted in Ord. 15-05-005PL are "in and of themselves" independent approval criterion. *See* Letter from Kathleen Eymann dated Sept. 13, 2017, at p. 5. However, standing alone, the maps accomplish nothing more than identifying land that is subject to an overlay zone. They do not establish criteria. It is only when they are paired with text that establishes criteria do the maps have operative effect.

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

> ***"4. Coos County shall permit the construction of new structures in known areas potentially subject to Landslides only:***
>
> ***"i. If dwellings are otherwise allowed by this Comprehensive Plan; and***
>
> ***"ii. After the property owner or developer files with the Planning Department a report certified by a qualified geologist or civil engineer stipulating –***
>
> ***"a) his/her professional qualifications to perform foundation engineering and soils analyses***
>
> ***"b) that a dwelling can or cannot be safely constructed at the proposed site, and whether any special structural or siting measures should be imposed to safeguard the proposed building from unreasonable risk of damage to life or property."***

Exhibit A to Ordinance No. 15-05-0005PL at 2 (emphasis added). This provision shall be referred to as the "Landslide Provision." The second provision reads as follows:

> ***"Earthquakes and Tsunamis***
>
> ***"To protect life, minimize damage and facilitate rapid recovery form a local Cascadia Subduction earthquake and tsunami, the County will * * ***
>
> ***"iv. Consider potential land subsidence projections to plan for post Cascadia event earthquake and tsunami redevelopment.***
>
> ***"v. Require a tsunami hazard acknowledgment and disclosure statement for new development in tsunami hazard areas.***
>
> ***"vi. Identify and secure the use of appropriate land above a tsunami inundation zone for temporary housing, business and community functions post event."***

Exhibit A to Ordinance No. 15-05-005PL at 2-3. This provision shall be referred to as the "Tsunami Provision."

The text and context of these two provisions does not support opponents' contention that they are "approval criteria."

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

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

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

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

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

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

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

directive could just as easily be implemented outside the land use context. For example, it could be applied at the time of issuance of building permits.

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

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

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

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

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

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

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

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

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

This criterion is met.

The Applicant complies with the Two-year Extension Limitation.

CCZLDO § 5.2.600.2 provides as follows:

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

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

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

This criterion is met.

The Applicant complies with the Two-year Extension Limitation.

CCZLDO § 5.2.600.2 provides as follows:

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

a. All conditional uses within non-resource zones are valid four (4) years from the date of approval; and
b. All conditional uses for dwellings within resource zones outside of the urban growth boundary or urban unincorporated community are valid four (4) years from the date of approval.
c. All non-residential conditional uses within resource zones are valid (2) years from the date of approval.

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

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

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

This criterion is met.

F. Additional Issues.

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

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

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

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

G. Procedural

a. Hearings Officer Objection

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

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

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

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

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

b. Board Objection

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

then asked if anyone present wished to challenge any member of the Board from participation in the proceeding.

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

i. McCaffree Exhibit A – Email from County Counsel

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

ii. McCaffree Exhibit B – Luncheon and Comments to Press

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

Further, the Board denies Ms. McCaffree's contention that Board member attendance at a community luncheon where JCEP made a presentation about the project resulted in ex parte communications pertaining to this request. The luncheon occurred in 2014, long before Applicant submitted this application. Therefore, by definition, any communications that occurred between Applicant any Board members at this event are necessarily not ex parte as to this application. Additionally, the two Board members who attended the luncheon each disclosed their attendance at the event at the December 5, 2017 Board meeting. Commissioner Sweet disclosed that he attended two community meetings pertaining to the project for the purpose of keeping himself current on the project. He said that approximately 50 or more people attended the events. He said that attendance at the event would not affect his ability to review planning issues related to the project or to make decisions based upon applicable criteria. Commissioner Main disclosed that he attended a luncheon presentation at Bandon Dunes and

said no one affiliated with Applicant spoke with him individually and that the presentation was generalized in nature.

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

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

iv. McCaffree Exhibit D – Public Statements by Commissioner Sweet

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

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

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

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

For three reasons, the Board denies Ms. McCaffree's contention that the Board members were biased due to funding by JCEP for the County Sheriff's Office. First, JCEP is not the

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

vii. McCaffree Exhibit G – Agreement Between Applicant and County

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

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

III. CONCLUSION.

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

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

For these reasons, the Board finds and concludes that the Applicant, Pacific Connector, has met the relevant CCZLDO § 5.2.600 approval criteria for a CUP extension of one year, to

April 2, 2018. The Board affirms the Planning Director's May 18, 2017 decision granting the one (1) year CUP in County File No. HBCU-10-01 / REM-11-01, to April 2, 2018.

EXHIBIT A

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Category Accession	Doc Date Filed Date	Docket Number	Description	Class Type	Files	Size	
Submittal 20181029-5009 Document Components	10/26/2018 10/29/2018	CP17-494-000 CP17-495-000	Supplemental Information of Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians under CP17-494, et. al.. Availability: Privileged	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	2371K 2383K	INFO FILE
Submittal 20181025-5125	10/25/2018 10/25/2018	CP17-494-000 CP17-495-000	Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project L.P. - Agency Communications Update, Docket Nos. CP17-494, et al. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	118K 123K	INFO FILE
Submittal 20181025-5127	10/25/2018 10/25/2018	CP17-494-000 CP17-495-000	Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project L.P. - Tribal Communications Update, Docket Nos. CP17-494, et al. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	356K 373K	INFO FILE
Submittal 20181019-5131	10/19/2018 10/19/2018	CP17-494-000	Supplemental Information of S. L. McLaughlin under CP17-494. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	91K 96K	INFO FILE
Submittal 20181017-5047	10/17/2018 10/17/2018	CP17-494-000 CP17-495-000	Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP - Verification to Data Request Response, Docket Nos. CP17-494. and CP17-495. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	185K 188K	INFO FILE
Submittal 20181015-5142	10/15/2018 10/15/2018	CP17-494-000 CP17-495-000	Letter to State of Oregon regarding Jordan Cove Meeting of Confederated Tribes of Coos, Lower Umpqua & Siulaw Indians under CP17-495, et. al.. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	305K 308K	INFO FILE
Submittal 20181012-5180 Document Components	10/12/2018 10/12/2018	CP17-494-000 CP17-495-000	Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project L.P. Supplemental Response to January 3, 2018 Data Request Availability: Public	Pleading/Motion / Answer/Response to a Pleading/Motion Applicant Correspondence /	PDF FERC Generated PDF	52K 58K	INFO FILE

				Supplemental/Additional Information			
Submittal 20181012-5181 Document Components	10/12/2018 10/12/2018	CP17-494-000 CP17-495-000	Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project L.P. Supplemental Response to January 3, 2018 Data Request Availability: Privileged	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	12977K 13270K	INFO FILE
Submittal 20181011-5056	10/11/2018 10/11/2018	CP17-494-000 CP17-495-000	Jordan Cove Energy Project L.P. - Verification to Data Request Response, Docket Nos. CP17-494-000 and CP17-495. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	485K 488K	INFO FILE
Submittal 20181005-5154 Document Components	10/05/2018 10/05/2018	CP17-494-000 CP17-495-000	Jordan Cove Energy Project L.P. Supplemental Response to January 3, 2018 Data Request under CP17-494, et al Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	1259K 1265K	INFO FILE
Submittal 20181005-5155 Document Components	10/05/2018 10/05/2018	CP17-494-000 CP17-495-000	Jordan Cove Energy Project L.P. Supplemental Response to January 3, 2018 Data Request under CP17-494, et al Availability: Privileged	Applicant Correspondence / Supplemental/Additional Information	PDF PDF FERC Generated PDF	26082K 28024K 54486K	INFO FILE
Submittal 20181005-5175 Document Components	10/05/2018 10/05/2018	CP17-494-000	Pacific Connector Gas Pipeline, LP Supplemental Information under CP17-494. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	8164K 8229K	INFO FILE
Submittal 20181005-5176 Document Components	10/05/2018 10/05/2018	CP17-494-000	Pacific Connector Gas Pipeline, LP Supplemental Information under CP17-494. Availability: Privileged	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	850K 879K	INFO FILE
Submittal 20180928-5104	09/28/2018 09/28/2018	CP17-494-000 CP17-495-000	Follow-up Letter to July 2018 Meeting with FERC Staff of Coos, Lower Umpqua & Siulaw Indians under CP17-495, et. al.. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	441K 444K	INFO FILE
Submittal 20180928-5174	09/28/2018 09/28/2018	CP17-494-000 CP17-495-000	Supplemental Information / Oregon Department of Environmental Quality under CP17-495, et. al.. Withdraw/Resubmit Request for CWA Section 401 Water Quality Certification Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	543K 543K	INFO FILE
Submittal 20180921-5124	09/21/2018 09/21/2018	CP17-494-000 CP17-495-000	Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP - Response to August 16, 2018 Klamath Tribes letter to U.S. Army Corps of Engineers, Docket Nos. CP17-494. and CP17-495. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	972K 975K	INFO FILE
Submittal 20180917-5000 Document Components	09/14/2018 09/17/2018	CP17-494-000 CP17-495-000	Applicant Prepared Draft Biological Assessment of Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP Availability: Public	Applicant Correspondence /	PDF PDF	350K 17981K	INFO FILE

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				Supplemental/Additional Information		
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Submittal 20180917-5001 Document Components	09/14/2018 09/17/2018	CP17-494-000 CP17-495-000	Applicant Prepared Draft Biological Assessment of Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP Availability: Privileged	Applicant Correspondence / Supplemental/Additional Information	PDF 5904K PDF 37591K PDF 37989K PDF 38343K PDF 40541K PDF 39022K PDF 39022K PDF 40391K PDF 39082K PDF 39635K PDF 9327K More Files – See List.	INFO FILE
Submittal 20180913-5062	09/13/2018 09/13/2018	CP17-494-000	Pacific Connector Gas Pipeline, LP Response to May 4, 2018 Data Request under CP17-494. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF 194K FERC Generated PDF 198K	INFO FILE
Submittal 20180912-5146	09/12/2018 09/12/2018	CP17-494-000 CP17-495-000	Jordan Cove Energy Project L.P. and Pacific Gas Connector Gas Pipeline, LP Section 401 Water Quality Package Supplemental Information Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF 75K PDF 26051K PDF 25893K PDF 27477K PDF 21186K PDF 34498K PDF 29633K PDF 37029K	INFO FILE

Exhibit 7
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					PDF 15920K PDF 40835K PDF 41447K More Files – See List.		
Submittal 20180831-5054	08/31/2018 08/31/2018	CP17-494-000 CP17-495-000	Supplemental Response of Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project L.P. to January 3 Data Request Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF 24315K FERC Generated PDF 25793K	INFO FILE	
Submittal 20180831-5058	08/31/2018 08/31/2018	CP17-494-000 CP17-495-000	Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project L.P. Supplemental Information Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF 34K FERC Generated PDF 37K	INFO FILE	
Submittal 20180820-5018	08/17/2018 08/20/2018	CP17-494-000	Supplemental Information of Alisa Acosta under CP17-494. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF 190K FERC Generated PDF 191K	INFO FILE	
Submittal 20180713-5172	07/13/2018 07/13/2018	CP17-494-000 CP17-495-000	Response of Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP to June 13, 2018 Data Request Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF 524K PDF 13737K PDF 44976K FERC Generated PDF 59522K	INFO FILE	
Submittal 20180517-5059 Document Components	05/17/2018 05/17/2018	CP17-494-000 CP17-495-000	Supplemental Information / Updated OCI Statement by Tetra Tech, Inc. under CP17-494, et al. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF 99K FERC Generated PDF 107K	INFO FILE	
Submittal 20180517-5060 Document Components	05/17/2018 05/17/2018	CP17-494-000 CP17-495-000	Supplemental Information / Updated OCI Statement by Tetra Tech, Inc. under CP17-494, et al. Availability: Privileged	Applicant Correspondence / Supplemental/Additional Information	PDF 156K FERC Generated PDF 180K	INFO FILE	
Submittal 20180409-5215 Document Components	04/09/2018 04/09/2018	CP17-494-000	Pacific Connector Gas Pipeline, LP Updated Landowner List Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF 19K FERC Generated PDF 21K	INFO FILE	
Submittal 20180409-5216 Document Components	04/09/2018 04/09/2018	CP17-494-000	Pacific Connector Gas Pipeline, LP Updated Landowner List Availability: Privileged	Applicant Correspondence / Supplemental/Additional Information	Excel 152K FERC Generated PDF 274K	INFO FILE	
Submittal 20180329-5204	03/29/2018 03/29/2018	CP17-494-000 CP17-495-000	Section 401 Water Quality Package of Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP in Docket Nos. CP17-494 and CP17-495.	Applicant Correspondence /	PDF 81K	INFO	

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Submittal 20180323-5126 Document Components	03/23/2018 03/23/2018	CP17-494-000 CP17-495-000	Supplement to APBDA of Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF 27K	INFO
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Submittal 20180316-5011	03/15/2018 03/16/2018	CP17-494-000 CP17-495-000	Oregon Business & Industry Association letter of support under CP17-494-000 and CP17-495, Jordan Cove Natural Gas Export Terminal and Pacific Connector Pipeline. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF 89K	INFO
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Submittal 20180221-0006	11/20/2017 02/21/2018	CP17-494-000	United States Coast Guard D.F. Berliner submits comments re the environmental impact for the Jordan Cove LNG Terminal and Pacific Connector Gas Pipeline Projects under CP17-494. Availability: Public	Other Submittal / Government Agency Submittal Applicant	Image 17K	INFO
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				Correspondence / General Correspondence			
Submittal 20180220-5153	02/20/2018 02/20/2018	CP17-494-000	Verification for Response to February 13 Data Request of Pacific Connector Gas Pipeline, LP under CP17-494 Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	182K 186K	INFO FILE
Submittal 20180206-5088 Document Components	02/06/2018 02/06/2018	CP17-494-000	Updated Landowner List of Pacific Connector Gas Pipeline, LP under CP17-494. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	18K 21K	INFO FILE
Submittal 20180206-5089 Document Components	02/06/2018 02/06/2018	CP17-494-000	Updated Landowner List of Pacific Connector Gas Pipeline, LP under CP17-494. Availability: Privileged	Applicant Correspondence / Supplemental/Additional Information	Excel FERC Generated PDF	169K 273K	INFO FILE
Submittal 20180129-5051	01/28/2018 01/29/2018	CP17-494-000	Supplemental Information / Request of S. L. McLaughlin under CP17-494. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	85K 90K	INFO FILE
Submittal 20180129-5052	01/28/2018 01/29/2018	CP17-494-000	Supplemental Information / Request of S. L. McLaughlin under CP17-494. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF PDF FERC Generated PDF	2519K 96K 3273K	INFO FILE
Submittal 20180126-5174 Document Components	01/26/2018 01/26/2018	CP17-494-000 CP17-495-000	Response to Commission Staff's January 3 Data Request of Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP under CP17-494, et al. Availability: Public	Pleading/Motion / Answer/Response to a Pleading/Motion Applicant Correspondence / Supplemental/Additional Information	PDF PDF PDF PDF Image Image Image Image Image Image More Files – See List.	2044K 45565K 47184K 5525K 1117K 1121K 922K 905K 1106K 1117K 7345K	INFO FILE
Submittal 20180126-5175 Document Components	01/26/2018 01/26/2018	CP17-494-000 CP17-495-000	Response to Commission Staff's January 3 Data Request of Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP under CP17-494, et al. Availability: Privileged	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated	12289K 12858K	INFO FILE

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					PDF		
Submittal 20180125-5041	01/25/2018 01/25/2018	CP17-494-000 CP17-495-000	Response to January 22, 2018 Letter from the Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians (CTCLUSI) of Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project L.P. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF 245K FERC Generated PDF 248K	INFO FILE	
Submittal 20180123-5100	01/23/2018 01/23/2018	CP17-494-000	Supplemental Information - Plan of Development of Pacific Connector Gas Pipeline, LP under CP17-494. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF 1778K PDF 8814K PDF 41893K PDF 34973K PDF 37561K Excel 85K PDF 6157K PDF 13112K FERC Generated PDF 145653K	INFO FILE	
Submittal 20180117-5031	01/17/2018 01/17/2018	CP17-494-000	Supplemental Information / Request of S. L. McLaughlin under CP17-494. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF 83K FERC Generated PDF 88K	INFO FILE	
Submittal 20171222-5173	12/22/2017 12/22/2017	CP17-494-000 CP17-495-000	Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP - Applicant Prepared Draft Biological Assessment under CP17-494, et al. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF 24K PDF 29134K PDF 30731K PDF 24968K PDF 5783K PDF 149K PDF 249K PDF 24833K PDF 18382K PDF 1434K PDF 328K More Files – See List.	INFO FILE	
Submittal 20171222-5282	12/22/2017 12/22/2017	CP17-494-000	Lawsuit Notification of S. L. McLaughlin under CP17-494. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF 80K FERC Generated PDF 83K	INFO FILE	

Submittal 20171221-5288	12/21/2017 12/21/2017	CP17-494-000	Response to Commission Staff's December 13 Data Request of Pacific Connector Gas Pipeline, LP under CP17-494. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF Excel FERC Generated PDF	254K 29K 293K	INFO FILE
Submittal 20171220-5157	12/20/2017 12/20/2017	CP17-494-000 CP17-495-000	Supplemental Information of Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP under CP17-494, et al. Availability: Public	Pleading/Motion / Answer/Response to a Pleading/Motion Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	27K 29K	INFO FILE
Submittal 20171211-5172	12/11/2017 12/11/2017	CP17-494-000 CP17-495-000	Section 404/10 Permit Application and Supplemental Information filed with the U.S. Army Corps of Engineers of Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP under CP17-494 and CP17-495. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF PDF PDF PDF PDF PDF PDF PDF PDF Excel More Files – See List	37K 27305K 29006K 42606K 43097K 35200K 29866K 35893K 27110K 3007K 93K	INFO FILE
Submittal 20171121-5152 Document Components	11/21/2017 11/21/2017	CP17-494-000	Updated Landowner List of Pacific Connector Gas Pipeline, LP under CP17-494. Availability: Public	Applicant Correspondence / Supplemental/Additional Information	PDF FERC Generated PDF	18K 21K	INFO FILE
Submittal 20171121-5153 Document Components	11/21/2017 11/21/2017	CP17-494-000	Updated Landowner List of Pacific Connector Gas Pipeline, LP under CP17-494. Availability: Privileged	Applicant Correspondence / Supplemental/Additional Information	Excel FERC Generated PDF	168K 277K	INFO FILE

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

PACIFIC CONNECTOR GAS PIPELINE PROPOSAL
(APPEAL OF ADDITIONAL EXTENSION REQUEST FOR
COUNTY FILE NO. HBCU 13-04)
COOS COUNTY, OREGON

FILE NO. AP 18-001
(APPEALS OF COUNTY FILE NOS. EXT-18-01).

SEPTEMBER 21, 2018

ANDREW H. STAMP, P.C.
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I. INTRODUCTION

A. NATURE OF THE LOCAL APPEAL

The appellant challenges the Planning Director's decisions to allow the applicant Pacific Connector Gas Pipeline, LP, (hereinafter the "Applicant" or "Pacific Connector"), a third one-year extension on its development approval for HBCU 13-04 (Brunschmid & Stock Slough Alternative Alignments), to February 25, 2019. The staff decision for the file, which was assigned file No. EXT-18-001 is dated May 21, 2018. Staff assigned the file No. AP 18-001 to the appeal.

Previous one-year extensions are documented as follows:

- ❖ File No. ACU-16-003 Staff decision dated April 11, 2016 (No local Appeal Filed)
- ❖ File No. EXT-17-002 Staff decision dated May 21, 2017 (No local appeal filed)

B. CASE HISTORY

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

On September 8, 2010, the County Board of Commissioners (Board) adopted and signed Final Order No. 10-08-045PL, 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). 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 2014.

On August 19, 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 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).

On local appeal, the Board of Commissioners appointed a hearings officer to conduct the initial public hearing for the appeal and make a recommendation to the Board. After a public hearing, an extended open record period for written evidence and testimony, and final written argument from the applicant, The hearings officer issued his Analysis, Conclusions and Recommendations to the Board of Commissioners, recommending approval of the application on September 19, 2014. In light of limitations contained in OAR 660-033-0140 applicable to extensions in farm- and forest-zoned lands, the hearings officer recommended approving the extension request for only one year, extending the CUP approval from April 2, 2014 to April 2, 2015. The Board of Commissioners held a public meeting on September 30, 2014 and voted to accept the hearings officer's recommended approval as it was presented. On October 21, 2014, the Board adopted its decision approving an extension of Pacific Connector's conditional use approval for the original alignment for one year, until April 2, 2015.

On November 12, 2014, Jody McCaffree and John Clarke (Petitioners) filed a Notice of Intent to Appeal the Board's decision to LUBA. On January 28, 2014, the deadline for Petitioners to file their Petition for Review, Petitioners instead voluntarily withdrew their Notice of Intent to Appeal, and LUBA dismissed Petitioners' appeal. *McCaffree v. Coos County*, (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 and it was approved on April 5, 2016 (ACU-16-013). This decision was not appealed and was valid until April 2, 2017. The FERC Order issued on March 11, 2016 was made "without prejudice," which means that PCGP can file again if it wishes to do so. *See* FERC Order dated March 11, 2016 at 21. On April 8, 2016, PCGP filed a request for a rehearing to FERC. FERC issued a denial of that request on December 9, 2016.

On April 11, 2016, Staff approved a one-year extension request for the Brunschmid and Stock Slough alignments, (HBCU-13-04 /ACU-16-003). 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. (HBCU-13-04 / ACU-16-003). The opponents did not file an appeal of the Planning Director's decision. The second extension kept the CUP active until February 25, 2018.

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. The hearings officer recommended approval of the extension, which was approved by the Board on December 19, 2017 (Final Decision and Order No. 17-11046PL). This fourth extension kept the CUP active until April 2, 2018.

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. See Letter from Pacific Connector Gas Pipeline to Ms. Kimberly D. Bose, dated January 256, 2018. Exhibit 7.

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, which has been assigned to the hearings officer for consideration. The hearings officer held a duly noticed public hearing on July 13, 2018, wherein the applicant and the opponents presented arguments and evidence to the hearings officer. The hearings officer allowed an open record period for both sides to present additional arguments in writing.

On or about March 20, 2018, the applicant filed PCGP's current (fifth) extension request of the original pipeline alignment. Staff assigned the number EXT 18-003 to this application, which was timely filed and was submitted with all of the required documents to allow the application to be deemed complete. 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. The hearings officer held a duly noticed public hearing on July 13, 2018, wherein the applicant and the opponents presented arguments and evidence to the hearings officer. The hearings officer allowed an open record period for both sides to present additional arguments in writing.

These two cases have not been consolidated. County staff has kept the records separate. The hearings officer did allow the audio tapes from AP-18-001 to be added to the record of AP-18-002 and to consider arguments raised in the first proceeding to have also been raised in the second proceeding. Likewise, and person who testified verbally in AP-18-001 will be considered to have standing via appearance in AP-18-002.

This Recommendation is the result of that local appeal and the evidence and arguments presented by the parties at the public hearing and during the subsequent open record period.

II. LEGAL ANALYSIS.

A. Procedural Issues.

At the hearing held on July 13, 2018, the hearings officer set a schedule for post-hearing submittals. Staff issued a memorandum on July 17, 2018 that further memorialized the schedule in writing. The hearings officer left the record open until July 20, 2018 for rebuttal evidence and argument responding to issues raised at the July 13, 2018 hearing. Surrebuttal evidence was due on July 27, 2018, in addition to any final argument submitted by opponents. The applicant was given until August 3, 2018 to submit final arguments.

Some concern was raised pertaining the standing of the opponents to appeal this extension decision. The hearings officer finds that all parties that have appeared have standing.

B. General Statement Summarizing Overall Policy Concern of the Opponents.

Before delving deep into the substance of the approval criteria, the hearings would like to document the overarching policy point asserted by the opponents. First, the opponents state, perhaps correctly, that the delays the applicant has experienced in obtaining the FERC permits is causing severe hardship for property owners who own land in the potential paths of the pipeline. In particular, they argue that the potential for the pipeline to be built inhibits the ability of landowners' whose property is in the proposed route to sell their property. The opponents do not offer any direct evidence to back up this claim, but intuitively it does seem to have some basis in fact. While that specter is perhaps not a literal cloud on title, one can surmise that buyers are rightfully not anxious to buy property when there is potential for the land to be affected by the pipeline route, and presumably they might offer less money when they do make offers. Again, there is no evidence in the record to support these claims, but the arguments seem plausible. In the case of the original route, the opponents note that it has been eight years since the County granted the original land use approval for the PCGP pipeline. The opponents have therefore

asked the County to balance the rights of the landowners against the rights of the pipeline company.

The hearings officer is sympathetic to these concerns. The hearings officer is also sympathetic to the fact that the applicant faces a very byzantine and inefficient regulatory process for approval of gas pipelines that is going to take time. For purposes of this recommendation, the hearings officer does not see these issues as being relevant to the approval criteria, and has therefore has not allowed these policy or political considerations to detract from the mission of applying the facts to criteria as written in the code.

Moreover, the reality is, as the Board correctly noted back in 2010, that the "cloud" affecting these properties will exist so long as the FERC process is active, regardless of the County land use permitting process, which the hearings officer noted was a "sideshow" to the FERC process. *See* Findings of Fact, Conclusions of Law, and Final Decision of the Board of Commissioners dated Sept. 8, 2010, at p. 22. FERC specifically allowed PCGP to reapply for a new certificate, and PCGP has done so. That process will likely take a few years to work through the federal bureaucracy. In the meantime, nothing the County does in these land use proceedings will cause that "cloud" to disappear.

As discussed in more detail below, the current land use law does not provide a remedy to those landowners who are under the cloud of future condemnation. The criteria for extensions are circumscribed, and does not really allow for this type of testimony to play a role in the decision-making process. However, there *may* ultimately be a remedy for some of the landowners under the condemnation statutes themselves. In some jurisdictions, it is possible for a landowner to obtain what are known as "condemnation blight" damages, or "precondemnation damages." *See, e.g., Lincoln Loan v. State Hwy. Comm.*, 274 Or. 49, 51, 545 P.2d 105 (1976); *Klopping v. City of Whittier*, 8 Cal.3d 39 (1972). The hearings officer has not researched Oregon law extensively on this topic, and does not know if or how this body of law would apply in the case of a pipeline case. Nonetheless, it does appear, generally speaking, that these types of damages *may* be available when the condemning authority causes or experiences excessive delays in commencing the condemnation action, particularly after making a public announcement of its intent to take real property. For example, in some jurisdictions, a landowner may be entitled to precondemnation damages if they are unable to rent their property at market rents because tenants are unwilling to move in as a result of the condemnation announcement, or if the property value is reduced because of the excessive delay. It is unclear to the hearings officer how this law applies in Oregon, or whether landowners who ultimately do not face condemnation proceedings could seek damages for the temporary blight or cloud on their property. Having said that, this issue is not directly relevant to the case at hand, and it is only mentioned for discussion purposes.

C. Criteria Governing Extensions of Permits.

Once a development approval has been granted, as happened in this case, an extension may or may not be allowed, based on the criteria found in CCZLDO §5.2.600. Under the terms of CCZLDO §5.2.600, the Planning Director may approve extension requests as an Administrative Action under the local code. Extension decisions are subject to notice as

described in CCZLDO §5.0.900(2) and appeal requirements of CCZLDO §5.8 for a Planning Director's decision. The criteria set forth in CCZLDO §5.2.600 are reproduced below.

> ***Any conditional use not initiated within the time frame set forth in subsection (3) of this section may be granted an extension provided that an applicant has made a request and provided the appropriate fee for an extension prior to the expiration of the conditional use permit approval. Such request shall be considered an Administrative Action and shall be submitted to the Director.***
>
> ***1. Extensions on Farm and Forest (Resource) Zoned Property shall comply with OAR 660-033-0140 Permit Expiration Dates which states:***
>
> ***a. Except as provided for in subsection (e) of this section, a discretionary decision, except for a land division, made after the effective date of this section approving a proposed development on agricultural or forest land outside an urban growth boundary is void two years from the date of the final decision if the development action is not initiated in that period.***
>
> ***b. Coos County may grant one extension period of up to 12 months if:***
>
> ***i. An applicant makes a written request for an extension of the development approval period;***
> ***ii. The request is submitted to the county prior to the expiration of the approval period;***
> ***iii. The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and***
> ***iv. The county determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.***
>
> ***c. Additional one-year extensions may be authorized where applicable criteria for the decision have not changed.***
>
> ***d. If a permit is approved for a proposed residential development on agricultural or forest land outside of an urban growth boundary, the permit shall be valid for four years. An extension of a permit described in subsection (e) of this section shall be valid for two years.***

e. For the purposes of subsection (e) of this section, "residential development" only includes the dwellings provided for under in the EFU and Forest zones in Chapter 4.

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

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

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

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

a. All conditional uses within non-resource zones are valid four (4) years from the date of approval; and
b. All conditional uses for dwellings within resource zones outside of the urban growth boundary or urban unincorporated community are valid four (4) years from the date of approval.
c. All non-residential conditional uses within resource zones are valid (2) years from the date of approval.
d. For purposes of this section, the date of approval is the date the appeal period has expired and no appeals have been filed, or all appeals have been exhausted and final judgments are effective.
e. Additional extensions may be applied.[1]

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.

[1] The section was modified to add subsection (3)(e) by Coos County Ordinance 14-09-012PL on January 20, 2015.

D. Pacific Connector's Compliance with the Applicable Standards for a CUP Extension Request on Farm and Forest Lands

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

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

> ***1. Extensions on Farm and Forest (Resource) Zoned Property shall comply with OAR 660-033-0140 Permit Expiration Dates which states:***
>
> ***a. Except as provided for in subsection (e) of this section, a discretionary decision, except for a land division, made after the effective date of this section approving a proposed development on agricultural or forest land outside an urban growth boundary is void two years from the date of the final decision if the development action is not initiated in that period.***

The hearings officer finds that Pacific Connector's application and attachments demonstrate compliance with the code requirements at CCZLDO §5.2.600(1)(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 and the approval criteria have not changed. (See discussion below).

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

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

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

> ***b. Coos County may grant one extension period of up to 12 months if:***
>
> ***i. An applicant makes a written request for an extension of the development approval period;***

The applicant submitted written narratives and applications, which specifically request an extension, on February 21, 2018 (EXT-18-001), which is within the development approval period. CCZLDO § 5.2.600(1)(b)(i).

This criterion is met.

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

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

> ***b. Coos County may grant one extension period of up to 12 months if:***
>
> ***ii. The request is submitted to the county prior to the expiration of the approval period;***

As noted above, the CUP for the Brunschmid & Stock Slough alignment was operating on the second one-year extension request and was set to expire on February 25, 2018 (EXT-18-001). The extension application was thus timely submitted prior to the expiration of the previously extended CUP. CCZLDO §5.2.600(1)(b)(ii).

This criterion is met.

c. <u>PCGP was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.</u>

CCZLDO §5.2.600(1)(b)(iii) and (iv) provides as follows:

> ***iii. The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and***
>
> ***iv. The county determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.***

To approve this extension application, the 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).

At the July 13, 2018 hearing, the hearings officer asked the parties to brief the issue of whether the opponent's arguments are barred by the doctrine of issue preclusion, law of the case, collateral attack, or some similar jurisprudential doctrine. The concern was that some of the arguments seemed to the same as arguments which were resolved in the decision in AP-17-004, or other prior extension decisions.

Unfortunately, neither party put much effort towards fulfilling the request, and therefore the hearings officer did not receive much useful input from the parties on how to resolve these issues. Mr. King briefly mentions the "collateral attack" doctrine in his Final Argument, and concludes that some of the issues, including the "FERC denial issue" are "a blatant and impermissible collateral attack on the 2017 extension decision." Mr. King does not address the "issue preclusion" doctrine described in *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 103, 862 P2d 1293 (1993).

On the other hand, Ms. Moro ignores the collateral attack doctrine and instead discusses the "issue preclusion" doctrine, and concludes that her arguments should not be barred by that doctrine.

Frustratingly, neither party attempts to explain why their preferred doctrine should be applied in this case to the exclusion of the other doctrine. Given that the hearings officer suspects that this issue will continue to play a central role in these extension cases in the future, the topic warrants a more thorough treatment than the short shrift offered by the parties.

As a preliminary matter, it is important to think about what authority LUBA has for using jurisprudential rule that seek to promote judicial efficiency, such as collateral attack, law of the case, and issue preclusion. Unlike a court, LUBA is a creature of statute, and its authority begins and ends with the statutes that created it. For example, LUBA has stated on many occasions that it cannot apply equitable doctrines such as laches, because it does not possess the same powers as a court. *See, e.g., Jones v. Douglas County*, 63 Or LUBA 261, 269-70 (2011); *Macfarlane v. Clackamas County*, 70 Or LUBA 126, 131 (2014). As discussed below, at least one statute that governs LUBA has been determined to prohibit a jurisprudential rule that sought to promote judicial efficiency.

In *Macfarlane,* LUBA held for the first time that it "would no longer entertain arguments based on equitable doctrines, unless the proponent first establishes that LUBA has the authority under its governing statutes to reverse, remand or affirm a land use decision based on the exercise of equitable doctrines." The timing of LUBA's pronouncement in *Macfarlane* was notable, as it came directly on the heels of *Dexter Lost Valley Cmty. Ass'n v. Lane* County, 255 Or. App. 701, 300 P3d 1243 (2013).

Dexter Lost Valley Cmty. Ass'n is an interesting case because it indicates how closely the Court of Appeals is willing to scrutinize LUBA's procedural practices for consistency with LUBA's enabling statute. For many years, LUBA had created various procedural practices intended to create efficiency in the review process. One example of this was LUBA's creation of the practice for accepting "Motions for Voluntary Remand." While provisions for voluntary remand are not set forth in the statutes or rules, LUBA had established a framework for voluntary remand through case law. *Hastings Bulb Growers, Inc. v. Curry Co.*, 25 Or LUBA 558, 562 (1993), *aff'd without opinion*, 123 Or App 642, 859 P2d 1208 (1993); *See also Angel v. City of Portland*, 20 Or LUBA 541 (1991), *Smith v. Douglas Co.*, 34 Or LUBA 682, LUBA (1997); *Mazeski v. Wasco Co.*, 27 Or LUBA 45, 47 (1994). LUBA would routinely grant motions for voluntary remand if it concluded that granting the motion was "consistent with sound principles governing judicial review." LUBA believes that such procedure was allowed by ORS 197.805, which states that "[i]t is the policy of the Legislative Assembly that time is of the essence in reaching final decisions in matters involving land use and that those decisions be made consistently with sound principles governing judicial review."

However well-settled the practice had been, voluntary remands came to a sudden and unexpected halt when the Court of Appeals issued its opinion in *Dexter Lost Valley Cmty. Ass'n.* The Court of Appeals noted that "[a]n administrative agency cannot act outside of its legislative

grant of authority in order to "amend, alter, enlarge or limit the terms of a legislative enactment." The court then looked at what called the "unusually persuasive legislative history" of the statute now codified at ORS 197.830(13)(b) and concluded that the voluntary remand practice is inconsistent with the intent of that statute.

It is unclear how far *Dexter* should be extended in different but related contexts. It is unlikely that other LUBA statutes have legislative history that give such clear guidance as was the case in *Dexter*. Nonetheless, *Dexter* certainly raises the question of how far LUBA can create procedural practices based on common-law doctrines which are based on "judicial economy." As discussed in more detail below, the use of both the "collateral attack" doctrine (aka "waiver") and the application of *Nelson* test for "issue preclusion" have been reviewed approved of the Court of Appeals for use in a land use context. As far as the hearings officer can tell, however, no focused challenges were raised in those cases, as happened in *Dexter*. Nonetheless, for now, the answers remain elusive, and given the Court of Appeals case law on the topic, the hearings officer assumes that the "collateral attack", "law of the case," and "issue preclusion" doctrines are still viable for use by LUBA, and by extension, by the County.

The discussion begins with issue preclusion, which in the civil context is a common law doctrine[2] that bars relitigation of an issue in subsequent proceedings in some situations, when the issue has been determined by a valid and final determination in a prior proceeding. *Nelson,* 318 Or at 103. Like the related doctrines of waiver and collateral attack, issue preclusion is a jurisprudential rule that seeks to promote judicial efficiency.

As early as 1969, Oregon courts recognized that a governing body is not necessarily bound to decide a land use matter in the same manner as a previous governing body. In *Archdiocese of Portland v. Washington County*, 254 Or 77, 87-8, 458 P2d 682 (1969), the Oregon Supreme Court stated:

> "Implicit in the plaintiff's contention is the assumption that the Board of County Commissioners of Washington County is bound by the action of previous Boards of County Commissioners in that county. This assumption is not sound. Each Board is entitled to make its own evaluation of the suitability of the use sought by an applicant. The existing Board is not required to perpetuate errors of its predecessors. Even if it were shown that the previous applications were granted by the present Board, there is nothing in the record to show that the conditions now existing also existed at

[2] According to the Oregon Supreme Court, "[i]ssue preclusion can be based on the constitution, common law, or a statute." *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 103, 862 P2d 1293 (1993)(citing *State v. Ratliff*, 304 Or 254, 257, 744 P2d 247 (1987). The five-part *Nelson* test is based on common law. *Hickey v. Settlemier*, 318 Or. 196, 201, 864 P.2d 372 (1993). In *Nelson*, the Court stated, as an example, that there is a constitutional basis for issue preclusion in a criminal case via the principle of double jeopardy. The Court further noted that the civil common-law doctrine of issue preclusion is based on judicial economy. Finally, the Court cited to ORS 43.130 as an example of a statute setting forth a principle of issue preclusion. *See also Fisher Broadcasting v. Department of Revenue*, 321 Or. 341, 898 P.2d 1333 (1995); *DLCD v. Benton County*, 27 Or LUBA 49, 61 (1994).

the time the previous applications were granted."

See also Okeson v. Union County, 10 Or LUBA 1, 5 (1983) ("There is no requirement local government actions must be consistent with past decisions, but only that a decision must be correct when made. Indeed, to require consistency for that sake alone would run the risk of perpetuating error."); *Reeder v. Clackamas County*, 20 Or LUBA 238 (1990) (same).

Similarly, in *Nelson v. Clackamas County,* 19 Or LUBA 131, 140 (1990), LUBA recognized that Oregon's system of land use adjudication "is incompatible with giving preclusive effect to issues previously determined by a local government tribunal in another proceeding."[3] In a more recent case, *Green v. Douglas County,* 63 Or LUBA 200, 207 (2011), LUBA stated the following:

> It is not clear that issue preclusion applies generally in land use appeals. In at least two decisions, based on the fifth *Nelson* factor, LUBA has concluded that it does not. *Lawrence v. Clackamas County*, 40 Or LUBA 507, 519-20 (2001), *aff'd* 180 Or App 495, 43 P3d 1192 (2002); *Nelson v. Clackamas County*, 19 Or LUBA 131 (1990). However, as we noted in *Kingsley v. City of Portland*, 55 Or LUBA 256, 262-63 (2007), the Court of Appeals in *Lawrence* affirmed our decision in that appeal on narrower grounds, and reserved its opinion on whether under the fifth *Nelson* factor the issue preclusion doctrine categorically could never apply to land use proceedings. *Lawrence v. Clackamas County*, 180 Or App 495, 504, 43 P3d 1192 (2002). For purposes of this opinion we will assume without deciding that the fifth *Nelson* factor is present. However, as explained below, two other *Nelson* factors are missing and the issues petitioners raise in this appeal are not barred by issue preclusion.

See also Broderson v. City of Ashland, 62 Or LUBA 329, 338 (2010). That uncertainty remains, but as the case law now stands, LUBA's *Lawrence* decision remains good law according to LUBA. Thus, while some exceptions to this general rule exist,[4] the hearings officer understands

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[3] *See also Alexanderson v. Clackamas County*, 126 Or App 549, 869 P2d 873, *rev den*, 319 Or 150, 877 P2d 87 (1994); *Douglas v. Multnomah County*, 18 Or LUBA 607, 612-3 (1990); *BenjFran Development v. Metro Service Dist.*, 17 Or LUBA 30, 46-47 (1988); *S & J Builders v. City of Tigard*, 14 Or LUBA 708, 711-712 (1986).

[4] LUBA has stated, in dicta, that "[a]rbitrary and inconsistent interpretation of approval criteria in deciding applications for land use permits may provide a basis for remand. *See Friends of Bryant Woods Park v. City of Lake Oswego,* 26 Or LUBA 185, 191 (1993), *aff'd,* 126 Or App 205, 868 P2d 24 (1994) (although local legislation may be susceptible of more than one interpretation, local government may not "arbitrarily * * * vary its interpretation"); *Smith v. Clackamas County*, 25 Or LUBA 568, 570 n1 (1993). For example, when a local government determines that comprehensive plan objectives are mandatory approval standards in one case, it may not later determine that those plan objectives are mere guidelines in a different unrelated case, absent some reasonable explanation for the disparity. *Welch v. City of Portland*, 28 Or LUBA 439, 448 (1994). Nonetheless, LUBA has also stated that the exception is not triggered unless "there is an indication that different interpretations are the product of a design to act arbitrarily or inconsistently from case to case." *Greer v. Josephine County*, 37 Or LUBA 261 (1999). Thus, the exception does not prevent a local jurisdiction from changing previously-stated interpretations; it merely prohibits

that local land use decisions do not create legal precedent that is binding on subsequent land use decision-makers concerning: (1) unrelated property, or (2) new, unrelated land use applications proposing development on the same property as an earlier land use decision, particularly then the prior land use decision has expired or is inconsistent with the newer land use decision .

Unfortunately, neither LUBA nor the courts have ever clearly explained the distinction between issue preclusion and the collateral attack doctrine, or give a clear rule what situations call for the application of one doctrine to the exclusion of the other. Even more surprising, the hearings officer's research reveals that LUBA rarely uses the two phrases in the same case. As far as the hearings officer can tell, in cases where the *issues* raised between earlier and later cases addressing the same property really are the same, the only principled way to distinguish when collateral attack applies and when issue preclusion applies is to limit issue preclusion to situations where the decisions are not sequential (*i.e.* one is not needed to implement the other) and either:

- the first decision expired, or was not otherwise acted upon, and therefore a second application had to be filed. *See Widgi Creek Homeowner's Ass'n v. Deschutes County,* __ Or LUBA ___ (2015), *aff'd w/o op.* 273 Or App 821, 362 P2d 1215 (2015); *Broderson v. City of Ashland*, 62 Or LUBA 329, 338 (2010); *Davenport v. City of Tigard*, 27 Or LUBA 243 (1994), or

- the first decision resulted in a denial. *Kingsley v. City of Portland*, 55 Or LUBA 256, 262-63 (2007); *Lawrence v. Clackamas County*, 40 Or LUBA 507, 519-20 (2001), *aff'd,* 180 Or App 495, 43 P3d 1192 (2002), *rev den*, 334 Or 327, 52 P3d 435 (2002); *Nelson v. Clackamas County,* 19 Or LUBA 131,140 (1990).

In these limited situations, under current law articulated in *Lawrence,* issues that were decided in an earlier proceeding can be re-litigated.[5]

In her surrebuttal argument dated July 27, 2018, attorney Tonia Moro argues that the hearings officer should not apply the five-part *Nelson* test for "issue preclusion" because the doctrine does not apply to this proceeding. Ms. Moro states that legal issues decided in County land use decisions should categorically not be given preclusive effect in later land use proceedings. In support of this argument, she cites *Lawrence v. Clackamas County*, 40 Or LUBA 507, 519-20 (2001), *aff'd,* 180 Or App 495, 43 P3d 1192 (2002) *rev den*, 334 Or 327, 52 P3d 435 (2002). *Lawrence* addresses a situation where an applicant seeks to apply for a second land use determination after having been *denied* in a first land use application. *Lawrence* has no applicability here.

Ms. Moro then applies the five-part *Nelson* test to the facts of this case and concludes that

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the arbitrary flip-flopping of interpretations on a case-by-case basis.

[5] Another situation where the five *Nelson* factors would apply is when determining whether a Circuit Court proceeding should have preclusive effect in a subsequent LUBA appeal. *See, e.g., DLCD v. Benton County,* 27 Or LUBA 49 (1994).

the test is not met because, among other reasons, "the issue is more developed," and "it is about the effect [of FERC denying the prior application] and its cause on the ability of the applicant to obtain a FERC permit within a one year extension." With regard to this point, the hearings officer partially agrees with Ms. Moro. The issue of whether the applicant is responsible for the failure to commence development within the current approval period (*i.e.* since the last extension was applied for and granted). Those dates are from February 25, 2017 to February 25, 2018 (EXT-18-001). With regard to events that happened within those time periods, no party can be prohibited from raising issues premised on those time periods. The hearings officer disagrees that the approval criteria require the applicant to prove that it will be able to obtain a FERC permit within a one-year extension and commence development. The hearings officer anticipates that the process with take another 3-5 years, but that is somewhat speculative.

Ms. Moro also argued that because the parties are different, the *Nelson* test is not met. If one is correct in applying *Nelson* to this case, that is indeed a relevant factor. But it is not relevant under the collateral attack doctrine, as discussed in more detail below. That is why it so important to know which test to apply. Unfortunately, as mentioned above, neither party briefed that issue.

The applicant essentially ignores the opponent's *Nelson* analysis, and instead focuses on the doctrine of collateral attack:

> 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. *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.

See Applicant's Final Written Argument, Seth King letter dated August 3, 2018, page 9. Unfortunately, the *Noble Built Homes* case is unremarkable and does not get to the core of the issue presented here.

The hearings officer is not aware of cases that applied the collateral attack doctrine to extensions. It is true that these serial extension requests seem, in a very real sense, to be a continuation of the same case. In a similar context, the court of appeals has stated that the "same parties" issue does not matter in a second land use proceeding on remand from LUBA because it is part of the same case. *See Mill Creek Glen Protection Ass'n v. Umatilla County,* 88 Or App 522, 746 P2d 728 (1987):

> Petitioners maintain that, whether or not a law of the case or waiver principle might bar new arguments by parties who participated in an earlier appeal, neither should apply when, as here, different parties bring the second appeal and the appellant in the first was not represented by counsel. We do not think that petitioners' distinction aids them. Although it is true that new parties in a second appeal could not have raised particular issues in the earlier appeal in which they did not participate, it is also true that they did have and did forego the opportunity to participate in the first appeal. A party who did not raise an issue in an earlier proceeding because he chose not to participate in it should be as precluded from later raising the issue as a party who did participate but neglected to raise the issue.

See also Beck v. City of Tillamook, 313 Or 148, 154 n2, 831 P.2d 678 (1992). This, of course, makes sense, since a party should not be afforded more rights by *not* showing up to a fight than if it had showed up.

That quote from *Mill Creek* hints at the problem in this case. It is clear that if the applicant had let these permits expire and was filing an entirely new land use application, then all issues and interpretations would be back on the table. However, the opponents fail to acknowledge that both LUBA and the courts have applied two different sets of rules in situations where the previous interpretation is made in the same case / proceeding or, in an earlier phase of a multi-phase development.

This set of facts is closer to *Mill Creek* than to *Lawrence.* In this case, these permit extensions all relate to the same permit (HBCU-13-04), and are in some ways similar to a proceeding on remand. They essentially act to perpetuate the life of the existing permit that would otherwise expire, and denial of an extension must be based on certain facts taking place relevant to the original permit. The question here is when a county decides certain issues in a decision granting a third or fourth extension for a permit, can an opponent get another bite at the apple at the hearing for the fifth extension by raising the same issues that were decided – or could have been raised and decided, in the earlier extension proceeding?

Under the doctrine of "waiver" (aka "law of the case") once a land use decision is remanded by LUBA and a local government adopts a decision on remand, issues that can be raised on remand or in a subsequent LUBA appeal of the second decision are limited to those that could not have been raised in the first LUBA appeal. *Portland Audubon v. Clackamas County*, 14 Or LUBA 433, *aff'd,* 80 Or App 593, 722 P2d 748 (1986).[6] Although nothing in the land use statutes directly calls for use of this doctrine, LUBA noted in *Portland Audubon* that various statutory provisions support its use. *See* ORS 197.805; 198.830(14); 197.835(10);

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[6]*See also Holland v. City of Cannon Beach*, 154 Or App 450, 962 P2d 701 (1998), *rev den.*, 328 Or 115 (1998); *McCulloh v. City of Jacksonville*, 49 Or LUBA 345 (2005); *Halverson-Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 193, 205 (2000); *Dickas v. City of Beaverton*, 17 Or LUBA 578, 582-3 (1989); *Hearne v. Baker County*, 16 Or LUBA 193, 195 (1987), *aff'd*, 89 Or App 282, 748 P2d 1016, *rev den*, 305 Or 576 (1988).

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In *Mill Creek Glen Protection Ass'n v. Umatilla County*, 88 Or App 522, 526, 746 P2d 728 (1987), the court of appeals approved of LUBA's use of the "law of the case" doctrine, but stated that the preferred term should be "waiver." The *Mill Creek* court also clarified that this waiver principle applied even to persons who did not appear in the first proceeding. *Id.* at 527.

In *Davenport v. City of Tigard*, 27 Or LUBA 243, 246-7 (1994), LUBA stated an important limit on the "law of the case" doctrine: as the name implies, it only applies in subsequences stages of the *same case.* In *Davenport,* the applicant was granted approval for a site plan review, but then submitted a new application seeking to modify the approval in minor ways pertaining to landscaping and parking. LUBA stated that the fact that the application is a "new" one prohibits application of the "waiver" doctrine, even though the proposed development differs from the earlier approved decision in only minor details.[7] The hearings officer believes that the key distinction in *Davenport* is that the modification of the plan essentially meant that older aspects of the plan were being abandoned, which is very similar to what would happen if the permit had expired: the modification triggered the ability to revisit old issues that might overwise be off the table.

Many LUBA cases refer to the term "collateral attack" but do not make it clear if that is the same thing as the "waiver" doctrine or something doctrinally different. As discussed below, it must be something slightly different. 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) (When a city previously approved a "site plan review" decision that decided certain issues but deferred other non-discretionary issues to a later ministerial process, the City cannot revise issues previously decided to "correct" any "mistakes" it might have made which benefited the applicant at the expense of the City); *Carlsen v. City of Portland*, 169 Or App 1, 8 P3d 234 (2000).[8] Unlike the pure "law of the case" doctrine, the "collateral attack" doctrine does not have to apply to the same case.

The "collateral attack" concept has been used in many different contexts, including:

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[7] *See also Sequoia Park Condominium Unit Owner's Ass'n v. City of Beaverton*, 36 Or LUBA 317, 326-7 (1999); *Green v. Douglas County*, 63 Or LUBA 200, 205-6 (2011); *Neighbors Against Apple Valley Expansion v. Washington County*, 59 Or. LUBA 153 (2009); *Durig v. Washington County*, 40 Or LUBA 1, 8 (2001), *aff'd*, 177 Or App 453, 34 P3d 169 (2001).

[8] *See also Northwest Aggregate v. City of Scappoose,* 34 Or LUBA 498, 510-11 (1998) *Rocklin v. Multnomah County*, 37 Or LUBA 237, 247-8 (1999); *Dalton v. Polk County,* 61 Or LUBA 27, 38 (2009); *Shoemaker v. Tillamook County,* 46 Or LUBA 433 (2004); *Sahagain v. Columbia County*, 27 Or LUBA 341 (1994); *Louks v. Jackson Co.,* 65 Or LUBA 58 (2012); *Just v. Linn County,* 59 Or LUBA 233 (2009); *ONRC v. City of Seaside,* 27 Or LUBA 679, 681 (1994); *Drake v. Polk County*, 30 Or LUBA 199 (1995).

- ❖ goal challenges directed at land use ordinances that were not timely appealed,[9]
- ❖ belated challenges to building permits that inadvertently made land use decisions without undertaking land use procedures,[10]
- ❖ Implementing permits: arguments directed at ministerial permits that should have instead been directed at the preceding land use decisions,[11] and
- ❖ Multi-Phase projects: arguments directed at land use actions that should have been directed at earlier phases of a multi-phase approval process.[12]

Putting aside attacks on legislation, which have no applicability here, in the quasi-judicial context a collateral attack argument only applies to the same property, and it does not apply to previous permit decisions that have expired or abandoned.

The phrase "collateral attack" can be viewed as a type of statutory issue preclusion. It is really nothing more than an informal term describing a series of separate but related statutory requirements embodied in Oregon's land use laws. *See, e.g.,* ORS 197.835(1) (limiting LUBA's scope of review to land use decisions under appeal); ORS 197.625(1)(setting forth rules for when ordinances are deemed to be "acknowledged" and therefore immune from goal challenges); and ORS 197.825(2)(a)(setting forth an "exhaustion of remedies" rule that can trigger application of the collateral attack doctrine).[13]

Various LUBA cases discuss the nature and origins of the "collateral attack" doctrine. For example, 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). Similarly, in *Safeway, Inc. City of North Bend,* 47 Or LUBA

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[9] *Byrd v. Stringer,* 295 Or 311, 316-17; 666 P2d 1332 (1983); *Friends of Neaback Hill v. City of Philomath,* 139 Or App 39, 49, 911 P2d 350 (1996); *Urquhart v. Lane Council of Governments,* 80 Or App 176, 181, 721 P2d 870 (1986); *Femling v. Coos County,* 34 Or LUBA 328, 333 (1998); *Lowery v. City of Kaiser,* 48 Or LUBA 568 (2005); *Crowley v. City of Bandon,* 41 Or LUBA 87 (2001); *Greenwood v. Polk County,* 11 Or LUBA 230 (1984); *Holloway v. Clatsop Co.,* 52 Or LUBA 644 (2006); *Toler v. City of Cave Junction,* 53 Or LUBA 635 158 (2008).

[10] *Ortman v. City of Forest Grove,* 55 Or LUBA 426 (2007); *Ceniga v. Clackamas County,* 32 Or LUBA 273 (1997); *Corbett / Terwilliger Lair Hill Neigh. Ass'n v. City of Portland,* 16 Or LUBA 49, 52 (1987).

[11] *Bullock v. City of Ashland,* 57 Or LUBA 635 (2008); *Sandler v. City of Ashland,* 21 Or LUBA 483 (1991); *Butte Conservancy v. City of Gresham,* 47 Or LUBA 282, 296, *aff'd,* 195 Or App 763, 100 P3d 218 (2004); *Piltz v. City of Portland,* 41 Or LUBA 461 (2002); *Bauer v. City of Portland,* 38 Or LUBA 715, 721 (2000).

[12] *DLCD v. Crook County,* 25 Or. LUBA 625 (1993), *aff'd,* 124 Or App 8, 10, 860 P2d 907 (1993) (discussing County's three-stage PUD approval process); *Safeway, Inc. City of North Bend,* 47 Or LUBA 489, 500 (2004); *Westlake Homeowners Ass'n v. City of Lake Oswego.,* 25 Or LUBA 145, 148 (1993); *Headley v. Jackson County,* 19 Or LUBA 109 (1990); *Edwards Ind. Inc., v. Board of Comm'rs of Washington Co.,* 2 Or LUBA 91 (1980); *J.P. Finley & Son v. Washington County,* 19 Or LUBA 263 (1990).

[13] *See, e.g., Petterson v. Klamath Co.,* 31 Or LUBA 402 (1996) (When a planning director rescinds a decision he issued two days earlier, the applicant cannot fail to appeal that rescission and then attempt to challenge that decision as part of a later appeal of a denial of the same permit); *Lloyd Dist. Community Ass'n v. City of Portland,* 141 Or App 29, 916 P2d 884 (1996); *Ortman v. City of Forest Grove,* 55 Or LUBA 426 (2007).

489, 500 (2004), LUBA described one aspect of the collateral attack doctrine as it relates to sequential permits needed for a single phase development, as follows: "As a general principle, issues that were conclusively resolved in a final discretionary land use decision, or that could have been raised and resolved in that land use proceeding, cannot be raised to challenge a subsequent application for permits necessary to carry out that earlier final decision."

In *VanSpeybroeck v. Tillamook County*, 56 Or LUBA 184 (2008), *aff'd*, 221 Or App 677, 191 P3d 712 (2008), LUBA set forth in the limits of the doctrine, by stated that "[i]n our view, to give preclusive effect to an earlier unappealed land use decision and thus bar raising issues in a subsequent decision on a related, but separate permit proceeding, the issue must concern particular development that was proposed, considered and approved in the earlier unappealed decision." *Id.* at 204. Thus, once it has been determined that the issues raised in the subsequent proceeding concern the same particular development that was "proposed, considered and approved" in the earlier unappealed decision, any issues that were decided, or could have been raised and decided, in the earlier unappealed decisions are "beyond LUBA's scope of review." In a very real sense, this makes the earlier decision "precedential" in nature, regardless of the correctness of those earlier decisions, at least in regards to the land for which the earlier decision was issued. That is the very essence of what it means to say that the earlier decision cannot be "collaterally attacked."

Unlike the waiver doctrine, which is limited to giving preclusive effect to issues raised in the same case / proceeding, collateral attack arises most frequently when challenges are made against discretionary and ministerial permits needed to carry out an earlier land use approval. *See* cases collected at fn 11, *supra*. Collateral attack also plays a role when developments that are approved via multi-phase sequential land use decisions, and issues decided in earlier phases are challenged in the decisions approving later phases. *See* cases collected at fn 12, *supra*. In this regard, the Court of Appeals has stated that "local decisions rendered at the early stages of multi-stage review processes can be final and, if they are, issues that could have been raised in an appeal or review proceeding at an earlier stage are not cognizable in an appeal to LUBA from a later decision." *Carlsen v. City of Portland*, 169 Or. App. 1, 8 P3d 234 (2000).

For example, in *Hoffman v. City of Lake Oswego*, 20 Or LUBA 64, 70-1 (1990), LUBA addressed how the collateral attack doctrine works in the context of a multi-phase development. At the time *Hoffman* was decided, the City of Lake Oswego Code allowed "major developments" to occur in phases. The City's approval process called for the submission of an "Overall Development Plan and Schedule ("ODPS"), which was intended to address the overall plan so as to give the development "reliable assurance of the City's expectations for the overall project as a basis for detailed planning and investment." *Id.* at 68. Once the ODPS was approved, development permits for each successive phase of the development could be issued without revisiting issues determined by the ODPS. The applicant had obtained ODPS approval in 1981, and by 1989 was working on Phase 6 of the plan. Petitioner appealed Phase 6 to LUBA, arguing that even though various Comprehensive Plan policies related to schools have been addressed by the ODPS, that circumstances had changed to the point where the schools are no longer adequate to provide the required levels of service needed by Phase 6. LUBA determined that the Code did not necessarily requires that all comprehensive plan policies be reapplied each time a new phase of a PUD is approved. *Id.* at 70. LUBA stated that where comprehensive plan

compliance issues have been fully resolved for a PUD during the ODPS process, those comprehensive plan issues need not be reconsidered in approving individual phases of the PUD. *Id.* at 72.

In *Edwards Ind., Inc. v. Board of Comm'rs of Washington County*, 2 Or LUBA 91 (1980), LUBA reached the same conclusion interpreting a similar Washington County PUD approval procedure. In *Edwards*, the County granted initial approval of an "outline master plan," subject to a condition that development be phased to allow adjoining roadways to be improved to provide adequate capacity. No party appealed the decision approving the outline master plan. Two years later, a request for subdivision plat approval for one of the approved phases was turned down solely on the basis of concerns over impacts on the road system adjoining the PUD. LUBA concluded that under the county's PUD approval procedures, the submission of the preliminary plat in accordance with the outline master plan could not be used as a vehicle to reopen the issue of impacts on external roadways which was decided in the approval of the outline master plan. *Id.* at 96, n8. *See also J.P. Finley & Son v. Washington County*, 19 Or LUBA 263, 269-70 (1990) (Petitioner participated in first decision but did not appeal it, and was foreclosed from appealing the second decision even though that second process used the wrong (Type I) procedure, because the first decision specified use of the Type I procedure);

Finally, in cases where the collateral attack doctrine applies, the issue preclusion doctrine does not operate to defeat it. For example, in *Doney v. Clatsop County*, 142 Or App 497, 921 P2d 1346 (1996), the Court rejected the county's argument that it could deny an access permit for reasons that would have essentially have required the applicant to modify the decision and reapply for a new decision from the City. Citing to "law of the case" case law, including *Beck* and *Mill Creek, supra,* the Court noted that the county could have - but did not - participate in the city's proceedings approving the development or in an appeal to LUBA from the city's decision, and it *could have* raised questions regarding access in that forum. It did not do so. The Court emphasized that: "[t]he county's argument that its denial of the access permit was also a land use decision amounts to nothing more than a collateral attack on the city's decision." *Doney,* 142 Or. App. at 503. While using the "collateral attack" moniker, the fact that the *Doney* Court cited to two cases that address "law of the case" doctrine does tend to blur the distinction between the two doctrines to an extent, and suggests that same policy basis underlies both doctrines.

Whereas the *Doney* court found that the county was bound by a city land use decision even though it did not participate in that decision, *Doney*, 146 Or App at 499, application of the third *Nelson* factor would suggest that the County should not have been precluded from denying the access permit. Thus, *Doney* provides authority for the fact that issue preclusion does not apply where collateral attack / waiver doctrine does apply.

As discussed above, these "extension" cases such as this present a situation which is similar, but not exactly the same as, a "multi-phase" development case. There is no reason why issues that were raised and decided (or could have been raised and decided) during the process leading to the first extension, for example, should be relitigated as part of the second or third extension. This is particularly true in cases where an appeal process was previously undertaken, because these extension appeals are very time consuming and expensive for staff.

However, in this case the applicant is seeking extensions on three different alignments: (1) the 2010 "main route" alignment, (2) the Brunschmid / South Slough alignment, and (3) the Blue Ridge alignment. It does not appear that issues decided in an extension decision governing one of the three routes would create a collateral attack / waiver situation with regard to extension decisions related to the other two routes.

Having said that, the hearings officer has been consistent in treating interpretations made in one extension case as precedent for future cases. As previously noted, the code is drafted in a manner that it requires the County to determine, for any given extension request, that the applicant was not "responsible" for the reasons that caused the delay. The *Webster's Third New International Dictionary* (1993) defines the term "responsible" as "answerable as the primary, cause, motive, or agent whether of evil or good." The Board of Commissioners previously interpreted the word "responsible" to be the same as "beyond the applicant's control." Stated another way, the Board determined that the question is whether the applicant is "at fault" for not exercising its permit rights in a timely manner. The Board further found that "[t]he aim of the criterion is to not reward applicants that do not actively pursue their development, while at the same time providing some measure of sympathy and assistance to applicants who are diligently trying to effectuate their permit but who run into unexpected problems that they are not in full control to correct or fix." No party appealed that decision, and the hearings officer will continue to apply that same standard. *See* Findings of Fact, Conclusions of Law and Final Decision of the Coos County Board of Commissioners, dated December 19, 2017, at p. 8.

In AP 17-004, the Board of Commissioners adopted the hearings officer's discussion of examples of factual situations that might help guide staff's analysis. Reasons that might typically found to be "beyond the control" of an applicant would include:

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

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

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

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

See Findings of Fact, Conclusions of Law and Final Decision of the Coos County Board of Commissioners, dated December 19, 2017, at p. 8.

In proposing this interpretation and providing these examples, the hearings officer intended to set a low bar for extensions. The primary concern for the hearings officer was that he did not want to force staff into delving deeply into the underlying causes of various delays affecting development permits, particularly with those delays involved third parties. This is largely due to the fact that such analysis would be very time consuming and not particularly fruitful, which is to say that it would be difficult to correctly ascertain the truth in many cases. Given the chosen formulation, the intent of the hearings officer was create a relatively clear lines for staff to follow, essentially only denying extensions when it was relatively obvious that the permit was not implemented due to some rather blatant and obvious failures that were the responsibility of the applicant.

In this case, it is not difficult to conclude that the applicant has not been responsible for the delays that prevent it from building the pipeline. As the applicant explains, the pipeline is an interstate natural gas pipeline that requires pre-authorization by the Federal Energy Regulatory Commission ("FERC"). Until PCGP obtains a FERC certificate authorizing the Pipeline, PCGP cannot begin construction or operation of the facilities in the County or elsewhere along the Pipeline route. FERC has not yet authorized the Pipeline. Therefore, PCGP cannot begin or continue development of the Pipeline along the alignment authorized by the County's land approval.

It is true that FERC was not persuaded by the applicant's previous presentation, and the applicant has been forced to reapply for a new FERC Certificate. However, the facts surrounding that process were addressed by the last extension and are not relevant here. Moreover, the legal process for obtaining the plethora of federal, state, and local permits for this facility is lengthy, byzantine, and cumbersome. To get a flavor of the complexity of the project, it must be understood that the following laws apply and have permitting requirements that apply to this pipeline:

- Natural Gas Act
- Section 401 and 404 of the Clean Water Act
- Coastal Zone Management Act (requires consistency determination from the State)
- Clean Air Act
- Rivers and Harbors Act
- National Historic Preservation Act
- National Environmental Policy Act
- Migratory Bird Treaty Act
- Marine Mammals Protection Act
- Northwest Forest Plan, Federal Land policy Management Act
- Oregon and California Lands Act
- Endangered Species Act

- ❖ Magnuson-Stevens Fishery Conservation Act

See Exhibit 4, at p. 4-5. This type of permitting process does not happen overnight, and there is no possible way that any applicant could acquire its permits sequentially, as Ms. McCaffree argues should happen. Rather, it must the various permit applications concurrently. And during this process, change in market conditions have changed due to refinement of fracking technology, which has caused the applicant's partner to redesign the LNG gas terminal from an import facility to an export facility. In the meantime, the applicant has been forced into a juggling effort: it has to file concurrent applications and thereby keep as many balls in the air as possible.

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

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

See Director's Decision for County File No. ACU 14-08/AP 14-02, a copy of which is found at Application Narrative Exhibit 4, at p. 13.

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-16-003 in Application Narrative Exhibit 2 at p.8.

The opponents read the Board's formulation in the exact opposite manner as was intended. Latching on to the subjective nature of the inquiry, the opponents provide evidence intended to convince the hearings officer that PCGP was in fact "responsible" for the delay because they did not actively pursue the permits they needed from FERC. In their estimation, getting denied by FERC is a per se example of failure to exercise due diligence.

The opponents argue that PCGP's failure to secure the necessary FERC authorizations was PCGP's own fault. For example, Ms. McCaffree points out that PCGP's application was denied because they failed to provide evidence of sufficient market demand, and because they failed to secure voluntary right-of-way from a majority of landowners on the pipeline route. *See,*

e.g., Letter from Jody McCaffree dated July 13, 2018, at p. 2. Ms. Moro similarly argues that the "FERC specifically found that the applicant had not been diligent." *See* Letter from Tonia Moro dated July 27, 2018, ap. 2. The hearings officer has read the relevant FERC Orders and does not have the same takeaway.

It is certainly true that FERC stated that "Pacific Connector had every opportunity to demonstrate market demand," and it "failed to do so over a three-and-a-half year long period, despite the issuance of four data requests by Commission staff seeking such information." *See* FERC Order Denying Rehearing, dated December 9, 2016, at p. 8. However, the opponents seem to conflate a lack of success with a lack of effort and diligence. This seems to an unwarranted inference that is not compelled by the facts. To make a football analogy, the Cleveland Browns have been a perennial loser over the past one or two decades, but that lack of success may or may not be related to a lack of effort or a lack of diligence. *Why* do they consistently lose? It's hard to say, especially for someone outside the organization. Similarly, it is not fair to conclude that PCGP did not prove market demand because they weren't trying very hard or they were exercising a lack of diligence. The hearings officer does not know why they failed, but it seems highly unlikely, given the obviously large amounts of time and money that they were spending pursuing permits in various forums, that they simply "failed to exercise due diligence in pursuing the matter."

Beyond that, however, the opponents would have the hearings officer delve deeply into FERC's administrative proceedings and assess PCGP's actions and inactions and draw conclusions about same within the context of a complex, multi-party administrative proceeding being conducted by a non-County agency. Both the applicant and the opponents have apparently been deeply involved in the FERC process, but the hearings officer has had no involvement with that process, and the hearings officer does not know the level of involvement by the County BCC or planning staff. The hearings officer believes that the opponents are asking the County to get into way too much detail about the reason for the FERC denial.

In this case, the hearings officer continues to find that "it is sufficient to conclude that because the applicant has thus far been unsuccessful in obtaining permits from FERC despite its reasonable efforts, the applicant is therefore *not at fault* for failing to begin construction on the pipeline."

Regardless, what happened in December of 2016 (or before) is information that is not relevant to the *current* extension request, which addresses the events the applicant took during the prior one-year time-period. In its final argument, the applicant discusses the steps it has taken over the past year to move towards permit approval. The hearings officer finds the applicant's following arguments to be compelling, and are quoted as length:

> Opponents have not cited any new facts in support of their position that PCGP caused the FERC denial. They also have not identified any legal errors in the Board's earlier decision. There is simply no basis to sustain opponents' contention on this issue.
>
> Opponents' related contentions also fail. For example, although opponents contend that PCGP must now submit evidence that it

has cured the deficiencies from the FERC denial (including supplying contracts from end users), the Hearings Officer should deny this contention for four reasons.

First, this contention manufactures a requirement that does not exist in the CCZLDO.

Second, it is inconsistent with the Board's application of CCZLDO 5.2.600.1.b.iv in the 2017 Extension Decision, which concluded that signed contracts were not required because they were necessarily outside of PCGP's control:

> "But, both of these categories of evidence (precedent agreements with end users and agreements with landowners) are bilateral contracts, which require a meeting of the minds between PCGP and a third party. PCGP cannot unilaterally enter a bilateral contract or coerce another party into such a contract."

2017 Extension Decision at 10.

Third, petitioners' contention ignores the unrebutted new evidence PCGP has submitted in the current proceeding, which includes evidence that PCGP has progressed to holding an "open season" for commitments for firm natural gas pipeline transportation on the Pipeline. *See* Exhibit C to Letter from Perkins Coie LLP dated July 20, 2018 at 5. PCGP never progressed to this stage during the last FERC proceedings. *See* FERC Order dated March 11, 2016. Thus, the only evidence in the record supports the conclusion that PCGP is actively working to cure prior deficiencies identified by FERC.

Fourth, opponents misstate the applicable standard. The correct question, as identified by the Board, is whether PCGP has made "reasonable efforts" to obtain its FERC certificate within the 12-month period since the previous extension and whether PCGP has "exercised steps within its control to implement" the permit. The Hearings Officer should find that PCGP easily meets these standards. The record reflects that in September 2017, PCGP filed an application with FERC requesting authorization for a liquefied natural gas pipeline and export terminal in Coos County. *See* Exhibit 7 to Application narrative. The record also reflects that PCGP has diligently supplemented its application on multiple occasions in response to FERC data requests over the course of the year. *See* FERC docket for the certificate application in Exhibit A to the Perkins Coie LLP letter dated July 20, 2018. The record also includes an excerpt of one of the data requests to illustrate the

> level of detail of both FERC's questions and PCGP's responses. *See* Exhibit B to the Perkins Coie letter dated July 20, 2018. Opponents do not challenge any of this evidence or present any conflicting evidence. Therefore, the Hearings Officer should rely upon this evidence to support the conclusion that PCGP has made "reasonable efforts" to obtain its FERC certificate and has "exercised steps within its control to implement" the County land use approval.
>
> Finally, although opponents contend that PCGP's inability to obtain approval of the now-pending FERC certificate request is not the actual cause of PCGP's delay in building the Pipeline because the now-pending request before FERC does not mirror the alignment approved by the County, opponents' contention lacks merit. In fact, with the exception of about 6-7 miles near the Jordan Cove terminal, the preferred alignment PCGP identified in the new FERC submittal closely tracks the route approved by the County in the Pipeline permit. *See* Exhibit D to the respective Perkins Coie letters dated July 20, 2018. Further, the FERC submittal identifies the Brunschmid/Stock Slough alignment as an alternative. *Id.* Accordingly, FERC approval of the pending certificate would affect the vast majority of the Pipeline alignment. The Hearings Officer should deny opponents' contention on this issue.

See Applicant's Final Written Argument, dated August 3, 2018, page 11. (Appeal Rec. at Exhibit 11).

Mr. King's arguments are persuasive. He is correct that the 2017 extension decision (EXT-17-002 Staff decision dated May 21, 2017) is not subject to collateral attack, at least to the extent that certain issues could have been raised and decided in that forum, as discussed in more detail below. He also accurately characterizes the "reasonable efforts" standard. There is no need to take a deep look into the interactions between PCGP and FERC that have occurred over the past year, as it is reasonably clear that there is a current pending application before the Agency and the applicant is submitting regular submittals of information to FERC and has provided notice that it is providing a binding open season for its proposed pipeline. *See* Rec. Exhibit 7 (Applicant's July 20, 2018 submittal, Exhibit C, p. 5 of 10).

In her submittal dated July 13, 2018, Ms. Moro argues that the fact that the applicant applied for a FERC Certificate on September 21, 2017 is not dispositive, because the applicant's preferred alignment proposed in that current FERC application is different than the alignment approved by Coos County. *See* Appellant's Hearing Memorandum dated July 13, 2018, at p. 6-7. This is new argument that could not have been raised in the local proceedings that resulted in previous extensions, because the applicant had not submitted the applications at that time. This new argument is therefore not subject to "collateral attack" analysis.

Nonetheless, to the extent the opponent have raised a viable argument, they have simply not developed it sufficiently to allow the hearings officer to understand how it relates to an approval standard for an extension, or why it should succeed on the merits. As best the hearing officer can tell, the argument is intended to relate to CCZLDO §5.2.600(1)(b)(iii) and (iv), which together require the applicant to state reasons for the delay and requires the county to determine that "the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible." The fact that the applicant may be submitting various other proposed alignments to FERC is not a valid reason to deny the extension request for alignments previously approved by the County. FERC will pick the ultimate route via the NEPA process. Until that happens, no route is off the table, particularly one that fared well during the last NEPA process.

Although Ms. Moro argues that the applicant is responsible for failing to be able to build the pipeline approved in the HBCU 13-04 because it has not applied for a FERC Certificate to build that particular route, that argument does not reflect a correct understanding the permitting process. It is true that Coos County can only approve or deny whatever pipeline route that is requested by the applicant in a formal land use application. FERC is different, however. FERC has the regulatory authority to approve routes that are different from the applicant's "preferred" route. In this regard, it is important to understand a pipeline applicant does not select that actual approved route of the pipeline. Rather, the route is selected by FERC via the NEPA process. The fact that PCGP has sought – at great expense – approval for alternative alignments that deviate from the original alignment approved in 2010 is testament to the fact that PCGP is not in control of the route selection process. It also demonstrated that FERC does not place much, if any, weight on the fact that County approved the original route in 2010. PGCP cannot be faulted to wanting to keep the county permits alive while FERC determines the route that has the least environmental impact. In fact, it is quite possible that FERC could approve the original alignment, perhaps as modified by the County approved alternative or something close thereto.

Ms. Moro further argues that the County may not simply "rely on unsworn statements from the applicant about what actions it has taken to obtain third party approval," and "much obtain evidence from the applicant that demonstrates that it has cured the deficiencies that led to the last denial." *Id.* at p.3. The argument is made without citation to authority, and therefore the hearings officer is uncertain of the legal basis for the claim. If this argument is intended to be a substantial evidence challenge, it fails.

The term "substantial evidence" means "evidence that a reasonable person could accept as adequate to support a conclusion." *Constant Velocity Corp v. City of Aurora*, 136 Or App 81, 901 P2d 258 (1995); *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988). The evidence cited by the applicant at Exhibit 7 is unrebutted, and there is nothing that seems facially or inherently unreliable about this evidence that would cause a reasonable decisionmaker to conclude that the applicant has not been diligent in pursuing its FERC permits.

3. <u>The Criteria Governing the PCGP CUP Have Not Changed.</u>

CCZLDO § 5.2.600.1.c provides as follows:

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

Opponents contend that the "applicable criteria" for the CUP permit have changed. *See* Letter from Jody McCaffree dated July 13, 2018. *See* Hearing Memorandum from opponents' counsel, Tonia Moro, dated July 31, 2018.

For example, in her memo submitted on July 13, 2018, 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).[14]

- 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.

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); *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

[14] 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.

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 fifth extension is a collateral attack on the 2017 Extension Decision.

Even if the hearings officer was to reach the merits, the Opponents do not identify any errors in the Board's previous determination. 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.

In the 2017 Extension Decision, 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. This determination is not subject to collateral attack in this proceeding. More importantly, pursuant to CCZLDO §4.11.125(7), the natural hazard provisions are not "applicable approval criteria" that have changed.

In her submittal dated July 13, 2018, Ms. Moro attempts to re-litigate issues related to CCZLDO §4.11.125(7) natural hazard provisions were raised and decided in 2017 Extension Decision. *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. While not a "collateral attack" problem, the argument fails on the merits for the same reasons that are set forth in the 2017 Extension decision. That portion of the 2017 Extension decision is incorporated herein by reference.

On page 8 of her submittal dated July 13, 2018, Ms. Moro then makes a new argument that was previously not raised: she argues that the county did not have the authority to "grandfather in" existing permits simply by declaring that the new text amendments passed in Ord. 17-04-004PL did not apply to approved permits and permit extensions. Ms. Moro argues that that "[s]uch an act by the County is void because it is merely an attempt to * * * legislate around state law [i.e. OAR 660-033-0140] that requires the county to deny an extension application when applicable criteria have changed."

The argument does not succeed on the merits. Mr. King responds on behalf of the applicant by citing to *Gould v. Deschutes County,* 67 Or LUBA 1 (2012), which appears to be

directly on point. In *Gould*, the petitioner argued that the county should have applied OAR 660-033-0140 rather than the similar, but different, permit expiration standards set out in the County Code. A key difference between the rule and the county permit expiration standards was that the county permit expiration standards expressly tolled the running of the two-year period while there are pending land use appeals; OAR 660-033-0140 does not expressly do so. In *Gould*, LUBA summarized the Deschutes County hearings officer's findings as follows:

> The hearings officer found that because the county's comprehensive plan and land use regulations have been acknowledged, DCC 22.36.010 applies in this case and OAR 660-033-0140, which is part of the Land Conservation and Development Commission's (LCDC's) administrative rule implementing Goal 3 (Agricultural Lands), does not apply. *Byrd v. Stringer*, 295 Or 311, 318-19, 666 P2d 1332 (1983) ("[O]nce acknowledgment has been achieved, land use decisions must be measured not against the goals but against the acknowledged plan and implementing ordinances."); *Friends of Neabeck Hill v. City of Philomath*, 139 Or App 39, 46, 911 P2d 350 (1996) (same). Petitioner contends *Byrd* is not controlling here because OAR 660-033-0140 applies specifically to permits on agricultural and forest land and DCC 22.36.010 is a generally applicable permit expiration provision that is not specific to agricultural land.

LUBA affirmed the hearings officer, and therefore, the *Gould* case conclusively resolves the issue against the opponents.

On page 9 of her submittal dated July 13, 2018, Ms. Moro cites to new requirements for geologic assessments, including new reporting requirements *See* CCZLDO §4.11.125(7), CCZLDO §5.11.100, §5.11.200, and CCZLDO §5.11.300(1). The requirement to perform these geologic reviews applies when a landowner proposes to build a "structure," and the board has previously determined that the applicant is not proposing to build a structure in these particular areas. *See* Findings of Fact, Conclusions of Law, and Final Decision of the Coos County Board of Commissioners for AP-17-004, at pp. 20. Ms. Moro does not explain why this determination, incorrect, and the hearings officer will not attempt to develop her argument for her. As presented, the argument provides no basis for determining that these new requirements are changes in the law that would constitute approval standards for the applicant.

On page 10 of her Hearings Memorandum, Ms. Moro argues that the County should apply CCZLDO §5.0.500 to deny the extension. She argues that this provision prohibits Coos County from allowing an applicant to submit two different ("alternative") pipeline routes for the same pipeline project. She states, for example, that the South Slough route is a "substitution" of a portion of the original route, and therefore "automatically revokes" the previous.

However, the Planning Director, Ms. Jill Rolfe, testified at the public hearing that this provision has not been amended since 2014, which was when the pipeline's Brunschmid and Stock Slough alternative route were first approved. It is therefore not a "change" in the

applicable criteria. This argument could have easily been brought up in the 2014 CUP proceeding that approved these alignments. It constitutes a collateral attack on the original approval and is therefore waived.

Even if this provision was new (and thus the issue was not waived), this provision does not constitute an approval criterion for an extension of a CUP, nor it is an approval criterion for the original CUP. Instead, it is a provision that explains the consequence of submitting an application that is inconsistent with any previously submitted pending application. It only applies to "previous pending applications" in any event, as opposed to applications which have been approved but not yet implemented. Therefore, it provides no basis for denial of an extension.

Ms. McCaffree also identified a number of issues in her appeal. In many cases, she did not elaborate or further develop the arguments at the hearing or in her written open-record submittals. None of the provisions listed by Ms. McCaffree constitute changed approval criteria that would apply to the pipeline:

- CCZLDO §5.0.150: In 2014 the County amended this section to require that land use applicants submit either two paper copies or one paper copy and one electronic copy of any land use application. (AM-14-11). This file includes amendments to CCZLDO Chapter 5, including the amendments to CCZLDO §5.0.150 and §5.0.175 addressed above. In general, these amendments involved renumbering, changes to application submittal requirements, and changes to make the CCZLDO consistent with state law. This minor change in submittal requirements does not constitute a change in "applicable criteria."

- CCZLDO §5.2.500: The County amended this provision in 2014 to revise a cross-reference to Chapter 4, which was modified as a result of reformatting. These amendments did not constitute changes in approval criteria because both before and after the amendments, CCZLDO §5.2.500 required compliance with "any other applicable requirements of this Ordinance." The full text of the amendment reads as follows:

  - "An application for a conditional use or an administrative conditional use shall be approved only if it is found to comply with this Article and the applicable review standards and special development conditions set forth in ~~Tables 4.2.a through 4.2 f, and Table 4.3 a~~ ***the zoning regulations*** and any other applicable requirements of this Ordinance."

- CCZLDO §5.2.600(1)(a)(b)(iv) and (c): This citation does not exist in the CCZLDO; however, to the extent it is an attempt to reference one or more subsections of CCZLDO 5.2.600, it does not identify any changed criteria that would apply to a Pipeline conditional use permit. Rather, CCZLDO §5.2.600 concerns criteria for evaluation extension applications. As mentioned above, the County amended these criteria in January 2015; however, as noted in the Board's decision approving the 2017 extension (AP-17-004), "these amendments did not affect the criteria on which the 'decision' —the initial land use approval—was based." 2017 Extension Decision at p.12, n 1.

- AM-16-01: This file includes the CCZLDO amendments pertaining to natural hazards, which are not "applicable criteria" for the pipeline for the reasons explained above.

- AM-15-04: This file includes the CCCP amendments pertaining to natural hazards, which are not "applicable criteria" for the pipeline, for the reasons explained above.

- AM-14-01: This file includes amendments to adopt the updated Flood Insurance Maps and Flood Insurance Study completed by the Federal Emergency Management Agency. Even to the extent these amendments affect areas along the pipeline alignment, they do not constitute "changes" in "applicable criteria." The Pipeline decision is subject to a condition requiring floodplain certification for any development in a flood hazard area. *See* Condition of Approval A.15. That condition is not limited the flood hazard areas in effect at the time of the decision; rather, it will include the adopted flood hazard areas in effect when development proceeds. Thus, the condition ensures that the updated maps apply to the Pipeline approval. In this way, the amendments are not "changes" that the Pipeline approval would evade compliance with if it is extended.

- AM-14-10: Ms. McCaffree mentions "Final Ordinance AM-14-10" in her appeal, and states that the proposed pipeline is in the applicant does not meet CCZLDO §4.11.430,[15] §4.11.440[16] and §4.11.445(3) & (6).[17] Her arguments are not developed well enough to

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[15] **SECTION 4.11.430 NOTICE OF LAND USE, PERMIT APPLICATIONS AND OVERLAY ZONE BOUNDARY OR SURFACE CHANGES WITHIN OVERLAY ZONE AREA:**

Except as otherwise provided herein, written notice of applications for land use decisions, including comprehensive plan or zoning amendments, in an area within this overlay zone, shall be provided to the airport sponsor and the Department of Aviation in the same manner as notice is provided to property owners entitled by law to written notice of land use applications found in Article 5.0.

[16] **SECTION 4.11.440 PROCEDURES:**

An applicant seeking a land use approval in an area within this overlay zone shall provide the following information in addition to any other information required in the permit application:

1. A map or drawing showing the location of the property in relation to the airport imaginary surfaces. The airport authority shall provide the applicant with appropriate base maps upon which to locate the property.

2. Elevation profiles and a plot plan, both drawn to scale, including the location and height of all existing and proposed structures, measured in feet above mean sea level (reference datum NAVD 88).

[17] **SECTION 4.11.445 LAND USE COMPATIBLITY REQUIRMENTS:**

Applications for land use or building permits for properties within the boundaries of this overlay zone shall comply with the requirements of this section as provided herein:

* * * * *.

3. Glare. No glare producing material, including but not limited to unpainted metal or reflective glass, shall be used on the exterior of structures located within an approach surface or on nearby lands where glare could impede a pilot's vision.

* * * * *.

permit adequate review of the issues she seeks to raise. In any event, none of the three cited code sections create approval criteria applicable to a pipeline conditional use permit. CCZLDO §4.11.430 and CCZLDO §4.11.440 represent both procedural requirements and application submittal requirements, not approval standards. CCZLDO §4.11.445(3) might be an applicable approval standard to any structure associated with the pipeline that is located in the airport overlay zone. However, Ms. McCaffree does not identify any evidence in the record that suggests that the applicant has proposed to build any above-ground structures in the airport overlay zone. Therefore, her argument fails.

- AM-12-04: With these legislative amendments, the County attempted to clarify use of the various terms "site plan," "plot plan," and "sketch plan." These amendments also removed site plan review for industrial development. These amendments did not modify the approval criteria that would apply to a conditional use permit for a pipeline.

- CCZLDO 4.11.125.[18] Ms. McCaffree argues that this section applies to the application and constitutes changed criteria. Her arguments are not developed well enough to permit adequate review of the issues she seeks to raise.

E. The Applicant Complies with the Two-Year Extension Limitation – Non-Resopurce Land Criteria.

CCZLDO § 5.2.600.2 provides as follows:

> ***2. Extensions on all non-resource zoned property shall be governed by the following.***
>
> ***a. The Director shall grant an extension of up to two (2) years so long as the use is still listed as a conditional use under current zoning regulations.***
> ***b. If use or development under the permit has not begun within two (2) years of the date of approval and an extension has not been requested prior to the expiration of the conditional use then that conditional use is deemed to be invalid and a new application is required.***

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6. Communications Facilities and Electrical Interference. Proposals for the location of new or expanded radio, radiotelephone, television transmission facilities and electrical transmission lines within this overlay zone shall be coordinated with the Department of Aviation and the FAA prior to approval.

[18] **SECTION 4.11.125 SPECIAL DEVELOPMENT CONSIDERATIONS:**
The considerations are map overlays that show areas of concern such as hazards or protected sites. Each development consideration may further restrict a use. Development considerations play a very important role in determining where development should be allowed In the Balance of County zoning. The adopted plan maps and overlay maps have to be examined in order to determine how the inventory applies to the specific site.

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

The applicant proposes only a one-year extension due to the fact that the pipeline is located partially on EFU and Forest zoned land. 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.

In her letter dated July 20, 2018, Ms. Jody McCaffree cites to argues that CCZLDO § 5.2.600.2(c) only allows one extension. *See* Letter from Jody McCaffree dated July 20, 2018 at pp. 2-3. She notes that PCGP's original CUP was final on March 13, 2012 and had a two-year expiration date (i.e. March 13, 2014). She argues that the one allowed extension would have expired March 13, 2016, which is two years from the original approval's expiration date.

The problem with Ms. McCaffree's analysis is that it failed to account for the fact that the County amended the code on January 20, 2015 to allow additional extensions. *See* Ordinance 14-09-012PL, dated 20 January 2015. Exhibit 10. This issue is discussed in more detail below.

This criterion is met.

F. <u>Additional Extensions Are Authorized.</u>

CCZLDO § 5.2.600.3 provides as follows:

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

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

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

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

While the County may therefore grant the extension for the prior approvals on Farm and Forest resource lands based *solely* on the absence of any changes to relevant County approval criteria, this is the first extension that Pacific Connector has requested under the amended extension criteria at CCZLDO § 5.2.600.

Opponents argued at the hearing that there is a "cap" on the number of extensions that an applicant may receive. That is, they argued that the applicant has already been granted two extensions on the Brunschmid alignment, and a third extension is not allowed.

In the hearings officer's recommendation in ACU-14-08 / AP 14-02 dated September 19, 2014, the hearings officer pointed out to the County that the county code only authorized one extension. Apparently in response to this, the county amended its code to add CCZLDO § 5.2.600(3)(e), which states: "Additional extensions may be applied."

The hearings officer sent out a letter on July 16, 2018 seeking input from the County and the parties with regard to this issue. *See* letter from Andrew Stamp to Planning Director Jill Rolfe dated July 16, 2018. In that letter, the hearings attempted to quote the entirety of § 5.2.600, but accidentally left out the critical provision that resolved the very issue that was perplexing the hearings officer: § 5.2.600(3)(e), which states that "*additional extensions may be applied.*"

County Counsel Nathaniel Johnson responded with an opinion letter stating that "serial permit extensions are allowed on non-resource zoned property under CCZLDO § 5.2.600(2)." (*see* Johnson legal opinion letter, Exhibit 10, dated July 27, 2018, page 1). The hearings officer agrees with the County Counsel and hereby adopts his reasoning contained in that letter, incorporated by this reference.

This criterion is met.

G. Other Issues Raised by Opponents.

1. Discussion Related to the Argument that "Extension Decision Are Not 'Land Use Decisions."

In her letter dated July 20, 2018, Jody McCaffree makes an argument related to the relationship between OAR 660-033-0140(3) and CCZLDO §5.2.600. The argument is difficult to follow, and the hearings officer does not understand why the argument is relevant to this case, at least with regard to its current procedural posture. In other words, the argument may have relevance once the Board adopted its final decision and one or more of the parties wish to seek judicial review. To be safe, parties will have to file both in Circuit Court and at LUBA, and then ask LUBA to transfer the case to the Circuit Court if LUBA does not have jurisdiction.

Having said that, OAR 660-033-0140(3) does appear 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 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 will likely have to the split, and that is a problematic outcome on many levels.

Irrespective of the hearings officer's opinion, this issue will have to be resolved in a different forum, as the issue is a hypothetical as the case sits now, and therefore the question is not ripe for review by the hearings officer.

2. <u>NEPA Compliance.</u>

Ms. McCaffree continually raises the issue of NEPA compliance and the related Environmental Impact Statement (EIS). In this case, she argues that the NEPA process must be completed before land use approvals can be issued. *See* McCaffree Letter dated July 13, 2018, at p. 3. However, Board has rejected that argument on numerous previous occasions. NEPA is not an approval standard for a land use case. These arguments offer nothing new of substance, and do not seem to acknowledge previous holdings from the County on these topics. The hearing officer finds that Ms. McCaffree's arguments constitute nothing more than a collateral attack on previously-issued land use decisions. Ms. McCaffree's arguments on this topic are meritless, and frankly, becoming increasingly tedious and repetitive.

For example, in her letter dated July 13, 2018, Ms. McCaffree rhetorically the following question:

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

Ms. McCaffree posed this exact same question to the hearings officer in a letter dated September 8, 2017, and the hearings officer addressed issue in his Recommendation to the Coos County Board of Commissioners dated October 20, 2017. *See* Case File AP-17-004. The answer remains the same: First, FERC left the door open for PCGP to apply again, and PCGP has done so.

Second, 15 USC § 717b(d) states the following:

> ***(d) Construction with other laws. Except as specifically provided in this chapter, nothing in this chapter affects the rights of States under—***
> ***(1) the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.);***
> ***(2) the Clean Air Act (42 U.S.C. 7401 et seq.); or***
> ***(3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).***

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

3. PCGP's Right of Condemnation.

As the hearings officer understands the facts, the opponents argue 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* Letter from Tonia Moro dated July 27, 2018, at p. 6.

The applicant argues, with virtually no elaboration, that this argument "is not relevant to determining compliance with any approval criteria for this Application." *See* Final Argument dated Aug. 3, 2018, at p. 13.

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.

Having said that, 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. The issue is not jurisdictional, and therefore the issue can be, and has been, waived.

4. <u>DOGAMI Comments.</u>

The opponents presented at Exhibit 3 a letter from Oregon's Dept. of Geology ("DOGAMI") that sets forth a punch list for changes that need to be made to certain Resource Reports submitted by PCGP to address geologic hazards along the route. It is not apparent whether the report has any obvious relevance to the approval criteria, but to the extent that it does, that issue has not been raised with sufficient specificity to allow for a response.

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 February 25, 2019 (EXT-18-001). The hearings officer recommends to the Coos County Board of Commissioners that they so find, thereby affirming the Planning Director's May 21, 2018 decisions granting the one (1) year CUP in County File No. HBCU-10-01 / REM-11-01, to February 25, 2019 (EXT-18-001), subject to the conditions of approval set forth in Exhibit A to the Planning Directors' decisions.

Respectfully submitted this 19th day of September, 2018.

Andrew H. Stamp

Hearings Officer

January 24, 2019 Public Notice and Staff Report

Coos County Planning Department
Coos County Courthouse Annex, Coquille, Oregon 97423
Mailing Address: 250 N. Baxter, Coos County Courthouse, Coquille, Oregon 97423
Physical Address: 225 N. Adams, Coquille, Oregon
(541) 396-7770
FAX (541) 396-1022 / TDD (800) 735-2900
planning@co.coos.or.us
Jill Rolfe, Planning Director

NOTICE OF PLANNING DIRECTOR'S DECISION/PUBLIC NOTICE

This notice is to serve as public notice and decision notice and if you have received this notice by mail it is because you are a participant, adjacent property owner, special district, agency with interest, or person with interest in regard to the following land use application. Please read all information carefully as this decision may affect you. (See attached vicinity map for the location of the project).

On Thursday, January 24, 2019 the Coos County Planning Director rendered a decision to approve this applicaiton for an extension of a conditional use (see staff report for further details) file number EXT-18-012, submitted by Seth King, Perkins Coie, representing Pacific Connector Gas Pipeline, LP. The original conditional use application was approved for a natural gas pipeline and associated facilities on approximately 49.72 miles extending from Jordan Cove Energy Project's LNG Terminal upland from the Port's Marine Terminal to the alignment segment in adjacent Douglas County.

The application, staff report and any conditions may be found at the following link: http://www.co.coos.or.us/Departments/Planning/2018Applications.aspx or by visiting the Coos County Planning Department's home page.

APPLICABLE CRITERIA Coos County Zoning and Land Development Ordinance (CCZLDO) and Coos County Comprehensive Plan (CCCP)		
CCZLDO	§5.2.600.1	Extensions on Farm and Forest (Resource) zone property.
CCZLDO	§5.2.600.2	Extensions on all non-resource zoned property.

The application and all documents and evidence contained in the record, including the staff report and the applicable criteria, are available for inspection, at no cost, in the Planning Department located at 225 North Adams Street, Coquille, Oregon. Copies may be purchased at a cost of 50 cents per page. The decision is based on the application submittal and information on record.

APPEAL INFORMATION

Pursuant to Article 5.8 of the LDO, this decision may be appealed to the Coos County Hearings Body within 15 days of the date notice of this decision is mailed, by filing an appeal on the appropriate form, along with the required filing fee. This means appeals must be received in the Planning Department by 5:00 p.m. on **Friday, February 08, 2019;** otherwise, the appeal is not

timely and will not be considered. The decision on this application will not be final until the period for filing an appeal has expired. Pursuant to Oregon Revised Statutes (ORS) 197.830, the decision cannot be appealed directly to the Land Use Board of Appeals.

Further explanation concerning any information contained in this notice can be obtained by contacting the Planning Department at (541) 396-7770, or by visiting the Planning Department between the hours of 8:00 AM – 5:00 PM (closed noon – 1:00 PM), Monday through Friday. The staff report in this matter was completed by Jill Rolfe, Planning Director.

COOS COUNTY PLANNING DEPARTMENT

Jill Rolfe Planning Director

Coos County Staff Members
Jill Rolfe, Planning Director
Amy Dibble, Planner II
Crystal Orr, Planning Specialist
Sierra Brown, Planning Specialist

POSTED & MAILED ON: **Thursday, January 24, 2019**
POST THROUGH: **Friday, February 08, 2019**

COOS COUNTY PLANNING DEPARTMENT

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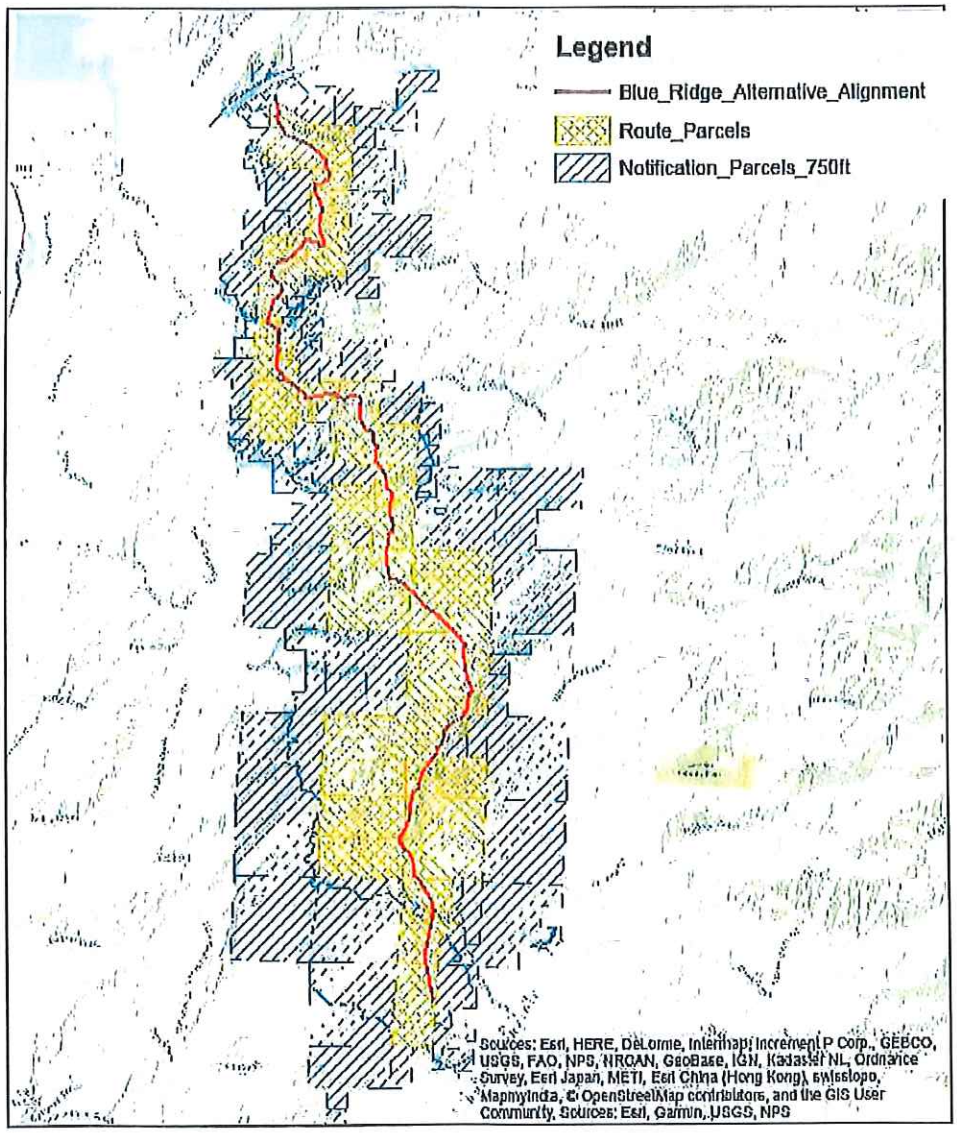

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Jill Rolfe, Planning Director

STAFF REPORT

Thursday, January 24, 2019

APPLICANT: Seth King, Perkins Coie LLP on behalf of Pacific Connector Gas Pipeline, LP.

TYPE OF APPLICATION: Extension of a Conditional Use Application Authorization.

FILE NUMBER: EXT-18-012

DECISION: APPROVED

APPEAL DEADLINE Monday, February 04, 2019 at 12:00 p.m.

I. **RELEVANT CRITERIA:**
Coos County Zoning and Land Development Ordinance (CCZLDO)
- § 5.2.600 Expiration and Extensions of Conditional Uses.
  - § 5.2.600.1 Extensions on Farm and Forest (Resource) zone property.
  - § 5.2.600.2 Extensions on all non-resource zoned property.

II. **PROPERTY LOCATION:** The original conditional use application was approved for a natural gas pipeline alternative segment of the original route referred to as the Blue Ridge Alignment. The subject properties are shown on the vicinity map and further described in the original authorization.

III. **BACKGROUND:** On October 21, 2014, the Board of Commissioners adopted and signed Order No. 14-09-062PL, File No. HBCU-13-06, approving Applicant's request for a conditional use permit to authorize development of the Blue Ridge alternative alignment for a portion of the pipeline and to authorize associated facilities, subject to conditions of approval.

This approval became effective on the date the appeal period for the approval expired pursuant to Coos County Zoning and Land Development Ordinance § 5.2.600.3.d, on November 11, 2014.

The County has issued other approvals for the pipeline project, including approving and extending the original pipeline approval and the alternative pipeline route referred to as the Brunschmid/Stock Slough alignment. The other applications that have been approved are subject to different timelines and are not being reviewed as part of this extension request.

This application was set to expire on November 11, 2018 but the applicant requested this extension prior to that date (received on November 8, 2018). This approval will grant an additional year.

IV. FINDINGS TO THE CRITERIA:

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.

FINDING: The request covers both the resource and non-resource zoning districts. This section only covers the resources portion of the approval; however, the applicant has requested the conservative approach and requests a one-year extension to the approval. The applicant made a written request for the extension of the Pacific Connector Gas Pipeline Blue Ridge route development. The applicant submitted the application for an extension on November 8, 2018, via email, including proof of payment, prior to the expiration date of November 11, 2018. The applicant provided a hard copy to the Planning Department as well to conform to the submittal requirements.

(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

[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.

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.

Finding: The applicant filed with the County a completed and signed application for requesting an extension. The application included the appropriate application fee. Therefore, the extension application was submitted prior to the expiration of the approval period.

The applicant has provided the reasons that prevented the applicant from beginning or continuing development within the approval period. The county has changed the criteria to make this review nondiscretionary but the applicant has requested that the county take the conservative approach and send notice with the opportunity to appeal as it may be possible that there is a discretionary standard in this matter. The County adopted the OAR language that states this is not a land use decision because it is not an action of an actual permit but an extension to that permit.

Notwithstanding (3) above, the applicant has requested that the County process this application as a discretionary land use decision, and the County has agreed to do so. The County shall make the determination if the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not "responsible". There have been arguments in prior cases before the county that asked staff to look at the reasons that caused the delay. The Webster's Third New International Dictionary (1993) defines the term "responsible" as "answerable as the primary, cause, motive, or agent whether of evil or good." In a prior permit extension decision for the pipeline, the Board of Commissioners interpreted the word "responsible" to mean "beyond the applicant's control." Stated another way, the question is whether the applicant is "at fault" for not exercising its permit rights in a timely manner. The aim of the criterion is to not reward applicants that do not actively pursue their development, while at the same time providing some measure of sympathy and assistance to applicants who are diligently trying to effectuate their permit but who run into unexpected problems that they are not in full control to correct or fix.

The applicant has explained that the reason that the project has not begun is because 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 is required to obtain authorization from the Federal Energy Regulatory Commission ("FERC"). Until the applicant obtains FERC certificate authorizing the pipeline, the Applicant cannot begin construction or operation of

the facilities. This interpretation has been made in other cases and the County will continue to accept this reasonable explanation of why an extension should be granted.

Therefore, the application as presented meets the criteria.

(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.

Finding: The current ordinance allows for additional one-year extensions where applicable criteria for decisions have not changed. None of the applicable criteria have changed since the last extension was granted in February 2018. The emphasis in this case is on "applicable criteria" and staff has not found that the applicable criteria have not changed.

(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.

Finding: This is not for residential development and there are no limits on the number of extensions that can be applied.

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.

Finding: A portion of the alignment is located on non-resource zones. The staff has addressed these criteria in prior portion of the staff report. The applicant is not applying for residential development but is eligible for an extension. The application, fee and

criteria were addressed. The application was received prior to the expiration of the conditional use.

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.

Finding: The applicant acknowledges this provision and if it applies in the future will comply. Therefore, this has been addressed.

V. CONCLUSION:

The conditional use authorizes the Pipeline to be developed on both resource-zoned and non-resource zoned land. Therefore, the applicant has taken the conservative approach and requests a one-year extension for the condition use.

For the reasons set forth in this staff report and based on the evidence and documentation presented by the application, incorporated herein as Attachment A, the Planning Director approves the one year extension request made by the applicant. The expiration for this application is November 11, 2019.

All conditions remain in effect unless otherwise amended.

Jill Rolfe Planning Director

Coos County Staff Members
Jill Rolfe, Planning Director
Amy Dibble, Planner II
Crystal Orr, Planning Specialist
Sierra Brown, Planning Specialist

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

February 8, 2019 Appeal

APPEAL OF A DIRECTOR'S DECISION

SUBMIT TO COOS COUNTY PLANNING DEPT AT 225 N. ADAMS STREET OR MAIL TO: COOS COUNTY PLANNING 250 N. BAXTER COQUILLE, OR 97423. EMAIL: PLANNING@CO.COOS.OR.US PHONE: 541-396-7770

Planning Director Appeal Fee $250.00 / Hearings Body or Officer Appeal Fee $2500.00

Date Received: 2/8/19 *Fee Received* $250 *FILE # AP-* 19-001

If the correct fee is not with the appeal it will not be processed.

List the names and signatures of each petitioner and a statement of the interest of each petitioner to determine party status. Multiple parties shall join in filing a single petition for review, but each petitioner shall designate a single Contact Representative for all contact with the Planning Department. All communications regarding the petition, including correspondence, shall be with the Contact Representative. This can be attached to this form marked as Attachment "A".

Appellant: Kathy Dodds, Natalie Ranker, Cary Norman, and The Elk Lake Corporation

Mailing address: 3783 Spruce St, North Bend 97459

Phone: 541-435-4125 Email: wisewalker@hotmail.com

Signature: Kathy Dodds Natalie Ranker Cary Norman Cinda Ashcraft

Appellant's Representative : Tonia Moro, Tonia L. Moro Attorney at Law P.C.

Mailing address: 19 S. Orange Street, Medford OR 97501

Phone: 541-973-2063 Email: Tonia@ToniaMoro.com

Signature:

The name of the applicant: Seth King, Perkins Coie representing Pacific Connector Gas Pipeline, Inc.

County application file number being appealed: EXT-18-012

☑ Planning Director's Decision ☐ Hearings Body or Hearings Officer Decision

The appellant must explain how they have achieved party status pursuant to the applicable sections of 5.8.150 or 5.8.160:

See Attachment "A"

The appeal deadline, as stated in the Director's Decision: February 8th, 2019

The nature of the decision and the specific grounds for appeal, citing specific criteria from the Coos County Zoning and Land Development Ordinance, Comprehensive Plan, Statute or Rule. (This can be attached to this form marked as Attachment "B".)

See Attachment "B"

The appellant must explain in detail, on the appeal form or attached to the appeal form, how the application did not meet the criteria in the case of an approval or why the criteria should or should not apply; or, in the case of a denial the appellant shall explain why the application did meet the criteria or why certain criteria did not apply to the application. (This can be attached to this form marked as Attachment "C".)

See Attachment "C"

AP-19-_____

Attachment "A"

The Elk Lake Corp. and Carey Norman achieved party status pursuant to 5.8.150 because they were entitled to and did receive notice of the decision and are aggrieved or have interests adversely affected by the decision because they own property affected by the pipeline, and otherwise live, work and recreate in the areas affected by the decision.

Kathy Dodds, Natalie Ranker are aggrieved or have interests adversely affected by the decision because they own property near the pipeline and otherwise live, work, and recreate in the areas affected by the decision.

This decision approves development within Coos County which is directly adverse to Kathy Dodds, Natalie Ranker, Cary Norman and The Elk Lake Corp's interests.

AP-19-_____

Attachment "B"

The January 24, 2019, decision described in EXT-18-012 an Extension of a Conditional Use Permit for the Pacific Connector Gas Pipeline Blue Ridge Alignment, which was set to expire Nov 11th, 2018.

The specific grounds for appeal, citing specific criteria from the Coos County Zoning and Land Development Ordinance, Comprehensive Plan, Statue or Rule are as follows:

A. The Applicant has proposed significant changes to the **entire** pipeline route and configuration in applications to other governmental agencies, including the Federal Energy Regulatory Commission. There are even changes proposed along the Blue Ridge alignment, including changes in the temporary work areas. The new pipeline route and the changes to the Blue Ridge alignment have not been approved and it is not compliant with the applicable criteria.

B. The County violated CCZLDO 5.2.600 (1)(a) (b) (ii) (iv) (c) and (2). Specifically, the county erred in determining that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible. The County erred in giving the Applicant additional CUP extensions on Non-Resource lands after the permit had expired and also beyond 2 years from the date of the original extension. The County does not have authority to apply adopt or apply standards that limit the inquiry necessary to determine if the applicant was responsible for the delay. It must consider the evidence presented and make a determination based upon substantial evidence in the record.

C. The County violated SECTION 5.0.150 (1) as the applicant does not have the private right to property, and SECTION 5.0.175 (1) as the applicant does not have private right of property acquisition pursuant to ORS Chapter 35. This is also a new criteria that prevents approval of the extension application.

D. The county violated the CCZLDO 5.0.500 when it failed to deem the permit automatically revoked due to the inconsistencies of the pipeline project proposed in the application pending FERC approval.

E. The permit is void because the applicant failed to file an application for extension before it expired on October 21, 2016 and the applicable code provision seemingly allowing such is internally inconsistent and is beyond the authority of the County. Moreover, the permit is void because it had expired when it was not renewed over two years from the original extension.

F. The applicable criteria has changed or the County has purposely avoided applying amended and new land use criteria to zones within the County to benefit the applicant which is beyond its authority. The additional criteria include but are not limited to CCZLDO §4.11.125 (Special Development Considerations) and CCZLDO §§5.11.100 - 5.11.300(Geologic Assessments) adopted pursuant to Ordinance Ord. 17-04-004PL dated May 2, 2017, effective July 31, 2017 and those amendments adopted in AM-18-005.

G. The Amendment to 5.2.600(2) – what is now (1)(b) is not applicable to the extension request. It did not exist to govern the county's discretion when the CUP application was filed and is not an applicable goal post. The extension of the permit on non-resource lands has exceeded the applicable time limit of 2 years and, for that matter, the new limit of 4 years.

H. Application of Section 5.2.600(2) (as amended) is beyond the scope of the County's authority. As understood it is an attempt to avoid the application of hazard related criteria that are applicable and would have been applicable at the time the CUP application was filed.

AP-19-____

Attachment "C"

To the extent this narrative cites to a former version of Section 5.2.600 it is because the county's web site library only provides the former version codification, because the amendment is subject to review, because, alternatively, the prior ordinance is applicable as it's substantive provisions were in effect at the time the original CUP application was filed and because most of the provisions are substantially similar.

A. The Applicant has proposed significant changes to the entire pipeline route and configuration in applications to other governmental agencies. These changes were not proposed in the application approved by Coos County. Thus, the applicant has abandoned the project proposed in the application which led to the permit decision. Said another way, the application/project authorization by the permit and the extension application is not a complete application or project. The new pipeline route has not been approved and it is not compliant with the applicable criteria.

B. The County violated Coos County Zoning and Land Development Ordinance (CCZLDO) 5.2.600 (1)(a) (b) (ii)(iv) (c) and (2).

SECTION 5.2.600 EXPIRATION AND EXTENSION OF CONDITIONAL USES

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

a. Except as provided for in subsection (e) of this section, a discretionary decision, except for a land division, made after the effective date of this section approving a proposed development **on agricultural or forest land outside an urban growth boundary is void two years from the date of the final decision if the development action is not initiated in that period**. [Now (1)(a)(1)]

The original approval by the Board of Commissioners of the Blue Ridge Route Alternative alignment was on Oct 21, 2014 [HBCU-13-06]. Pacific Connector requested an extension [EXT-17-015] for this CUP on November 20, 2017 which puts it past the two years allowed under OAR 660-033-0140 for a CUP on Farm and Forest lands outside of the Urban Growth Boundary. The application window for the extension had lapsed. Thus, a current extension is not warranted due to the permit application extension being out of time in November of 2017. The County erred in giving the Applicant additional CUP extensions on Non-Resource lands after the permit had expired and also beyond 2 years from the date of the original extension.

(b) **Coos County may grant *one extension* period of up to 12 months if**:

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

(ii) **The request is submitted to the county prior to the expiration of the approval period**;

(iii) The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and

(iv) **The county determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible**. [Now (1)(a)(2)].

Specifically, the county erred in issuing a second extension, and in determining that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.

(c) Additional one-year extensions may be authorized **where applicable criteria for the decision have not changed.** [Now 1)(a)(4)].

Applicable code changes both procedural and substantive have occurred and therefore the application fails to meet this criteria. See Attachment B.

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

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

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

(c) **If an extension is granted, the conditional use will remain valid for the additional two years from the date of the original expiration.** [Effectively Abrogated]

C. The County violated SECTION 5.0.150 (1) as the applicant does not have the private right to property, and SECTION 5.0.175 (1) as the applicant does not have private right of property acquisition pursuant to ORS Chapter 35.

SECTION 5.0.150 (1) Applications **shall be submitted by the property owner or a purchaser under a recorded land sale contract. "Property owner" means the owner of record, including a contract purchaser. The application shall include the signature of all owners of the property. A legal representative may sign on behalf of an owner upon providing evidence of formal legal authority to sign**.

SECTION 5.0.175 APPLICATION MADE BY TRANSPORTATION AGENCIES, UTILITIES OR ENTITIES:

(1) 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.

D. The county violated the CCZLDO SECTION 5.0.500 when it failed to deem the permit automatically revoked due to the inconsistencies of the pipeline project proposed in the application pending FERC approval.

SECTION 5.0.500 INCONSISTENT APPLICATIONS:

Submission of any application for a land use or land division under this Ordinance **which is inconsistent with any previously submitted pending application shall constitute an automatic revocation** of the previous pending application to the extent of the inconsistency.

February 8, 2019 Notice of Reconsideration

Coos County Planning Department
Coos County Courthouse Annex, Coquille, Oregon 97423
Mailing Address: 250 N. Baxter, Coos County Courthouse, Coquille, Oregon 97423
Physical Address: 225 N. Adams, Coquille, Oregon
(541) 396-7770
FAX (541) 396-1022 / TDD (800) 735-2900
planning@co.coos.or.us
Jill Rolfe, Planning Director

NOTICE OF PLANNING DIRECTOR'S DECISION OF RECONSIDERATION
PUBLIC NOTICE

This notice is to serve as public notice that the Planning Director is withdrawing the decision rendered on January 24, 2019 for the purpose of reconsiders, Pursuant to Section 5.8.250. A new decision will be rendered within 30 days. If you have received this notice by mail it is because you are a participant, adjacent property owner, special district, agency with interest, or person with interest in regard to the following land use application. Please read all information carefully as this decision may affect you. (See attached vicinity map for the location of the project).

The original authorization was for an extension of a conditional use (file number EXT-18-012) submitted by Seth King, Perkins Coie, representing Pacific Connector Gas Pipeline, LP. The original conditional use application was approved for a natural gas pipeline and associated facilities on approximately 49.72 miles extending from Jordan Cove Energy Project's LNG Terminal upland from the Port's Marine Terminal to the alignment segment in adjacent Douglas County. There have been some issues raised that Staff would like to review in through reconsideration.

The application, staff report and any conditions may be found at the following link: http://www.co.coos.or.us/Departments/Planning/2018Applications.aspx or by visiting the Coos County Planning Department's home page.

The application and all documents and evidence contained in the record, including the staff report and the applicable criteria, are available for inspection, at no cost, in the Planning Department located at 225 North Adams Street, Coquille, Oregon. Copies may be purchased at a cost of 50 cents per page. The decision is based on the application submittal and information on record.

Further explanation concerning any information contained in this notice can be obtained by contacting the Planning Department at (541) 396-7770, or by visiting the Planning Department between the hours of 8:00 AM – 5:00 PM (closed noon – 1:00 PM), Monday through Friday. The staff report in this matter was completed by Jill Rolfe, Planning Director.

COOS COUNTY PLANNING DEPARTMENT

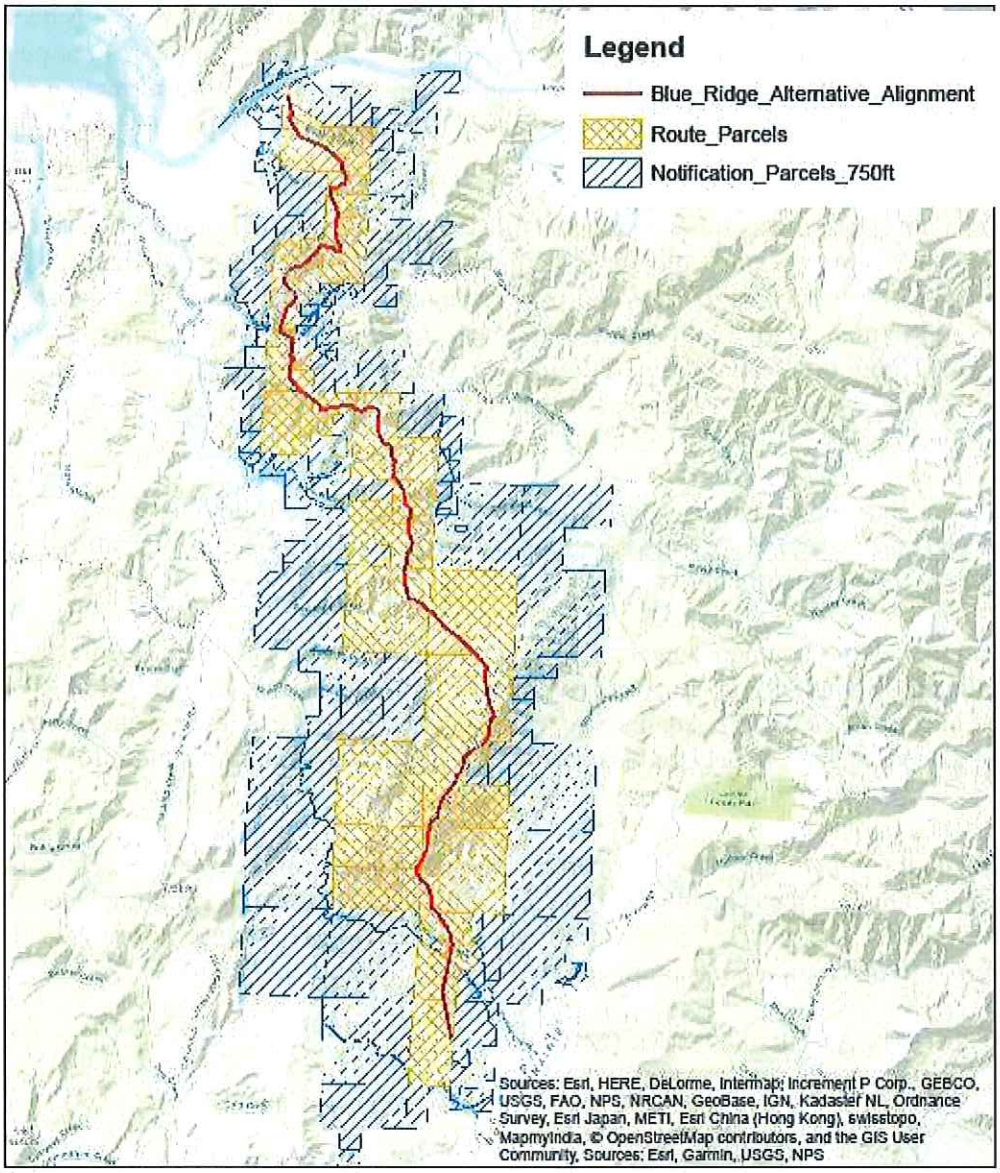
Jill Rolfe, Planning Director

Coos County Staff Members
Jill Rolfe, Planning Director
Crystal Orr, Planning Specialist
Amy Dibble, Planner II
Sierra Brown, Planning Specialist

Mailed and posted on February 8, 2019

COOS COUNTY PLANNING DEPARTMENT

Mailing Address: 250 N. Baxter, Coos County Courthouse, Coquille, Oregon 97423
Physical Address: 225 N. Adams, Coquille Oregon
Phone: (541) 396-7770
Fax: (541) 396-1022/TDD (800) 735-2900



Mailed and posted on February 8, 2019

March 8, 2019 Notice of Reconsidered Decision and Staff Report

Coos County Planning Department
Coos County Courthouse Annex, Coquille, Oregon 97423
Mailing Address: 250 N. Baxter, Coos County Courthouse, Coquille, Oregon 97423
Physical Address: 225 N. Adams, Coquille, Oregon
(541) 396-7770
FAX (541) 396-1022 / TDD (800) 735-2900
planning@co.coos.or.us
Jill Rolfe, Planning Director

NOTICE OF PLANNING DIRECTOR'S RECONSIDERATION OF A DECISION/PUBLIC NOTICE

This notice is to serve as public notice and decision notice and if you have received this notice by mail it is because you are a participant, adjacent property owner, special district, agency with interest, or person with interest in regard to the following land use application. Please read all information carefully as this decision may affect you. (See attached vicinity map for the location of the project).

On Thursday, January 24, 2019 the Coos County Planning Director rendered a decision to approve this applicaiton for an extension of a conditional use (see staff report for further details) file number EXT-18-012, submitted by Seth King, Perkins Coie, representing Pacific Connector Gas Pipeline, LP. The original conditional use application was approved for a natural gas pipeline and associated facilities on approximately 49.72 miles extending from Jordan Cove Energy Project's LNG Terminal upland from the Port's Marine Terminal to the alignment segment in adjacent Douglas County. This decision was withdrawn for reconsideration on February 8, 2019. The reconsidered decision was rendered and mailed out on March 8, 2019.

The application, staff report and any conditions may be found at the following link: http://www.co.coos.or.us/Departments/Planning/2018Applications.aspx or by visiting the Coos County Planning Department's home page.

APPLICABLE CRITERIA Coos County Zoning and Land Development Ordinance (CCZLDO) and Coos County Comprehensive Plan (CCCP)		
CCZLDO	§5.2.600.1	Extensions on Farm and Forest (Resource) zone property.
CCZLDO	§5.2.600.2	Extensions on all non-resource zoned property.

The application and all documents and evidence contained in the record, including the staff report and the applicable criteria, are available for inspection, at no cost, in the Planning Department located at 225 North Adams Street, Coquille, Oregon. Copies may be purchased at a cost of 50 cents per page. The decision is based on the application submittal and information on record.

APPEAL INFORMATION

Pursuant to Article 5.8 of the LDO, this decision may be appealed to the Coos County Hearings Body within 15 days of the date notice of this decision is mailed, by filing an appeal on the

appropriate form, along with the required filing fee. This means appeals must be received in the Planning Department by 12:00 p.m. on **Monday, March 25, 2019;** otherwise, the appeal is not timely and will not be considered. The decision on this application will not be final until the period for filing an appeal has expired. Pursuant to Oregon Revised Statutes (ORS) 197.830, the decision cannot be appealed directly to the Land Use Board of Appeals.

Further explanation concerning any information contained in this notice can be obtained by contacting the Planning Department at (541) 396-7770, or by visiting the Planning Department between the hours of 8:00 AM – 5:00 PM (closed noon – 1:00 PM), Monday through Friday. The staff report in this matter was completed by Jill Rolfe, Planning Director.

COOS COUNTY PLANNING DEPARTMENT

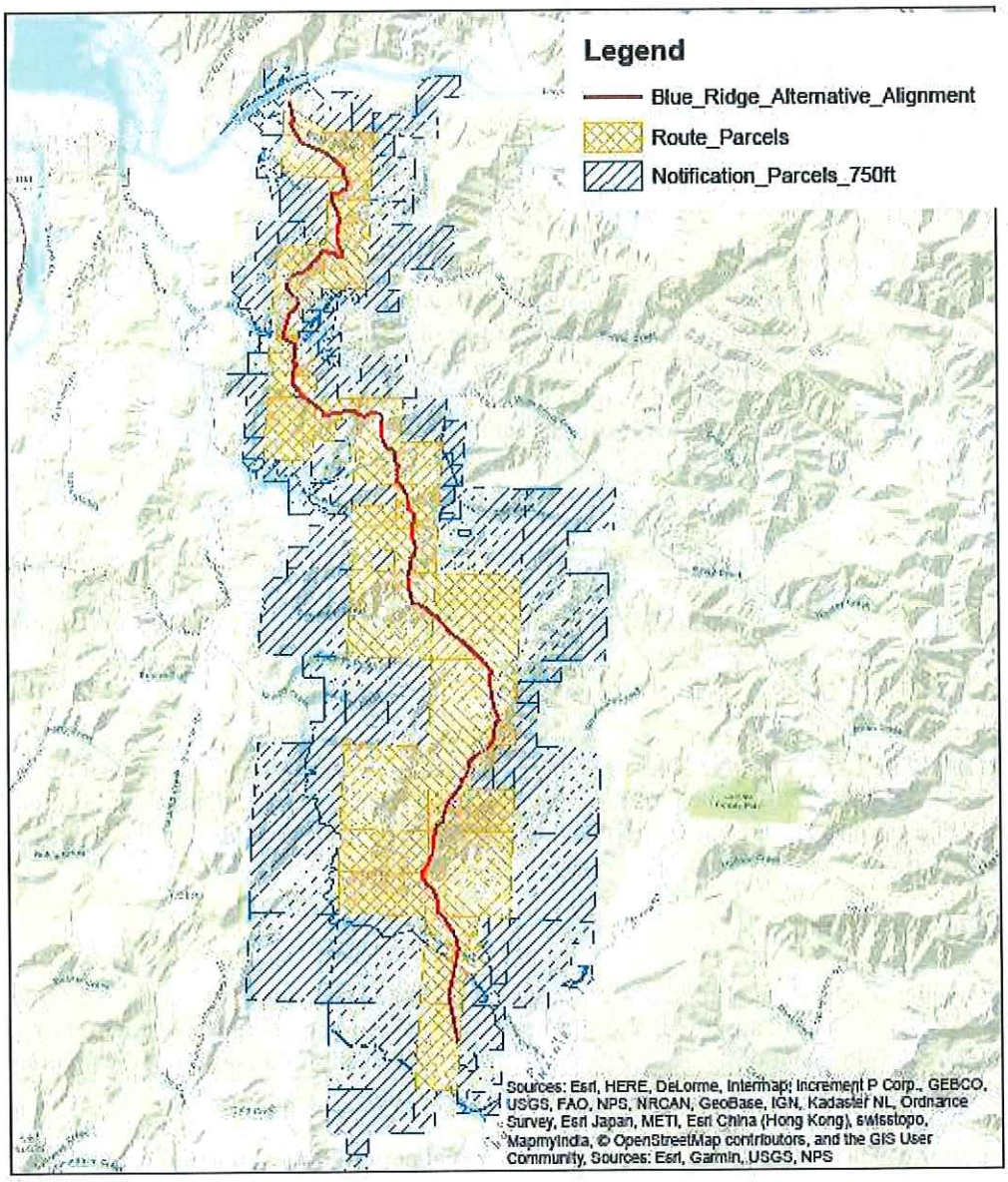
Jill Rolfe, Planning Director

Coos County Staff Members
Jill Rolfe, Planning Director
Amy Dibble, Planner II
Crystal Orr, Planning Specialist
Sierra Brown, Planning Specialist

POSTED & MAILED ON: **Friday, March 08, 2019**
POST THROUGH: **Monday, March 25, 2019**

COOS COUNTY PLANNING DEPARTMENT

Mailing Address: 250 N. Baxter, Coos County Courthouse, Coquille, Oregon 97423
Physical Address: 225 N. Adams, Coquille Oregon
Phone: (541) 396-7770
Fax: (541) 396-1022/TDD (800) 735-2900



Coos County Planning Department
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planning@co.coos.or.us
Jill Rolfe, Planning Director

STAFF REPORT

Friday, March 08, 2019

APPLICANT: Seth King, Perkins Coie LLP on behalf of Pacific Connector Gas Pipeline, LP.

TYPE OF APPLICATION: Extension of a Conditional Use Application Authorization.

FILE NUMBER: EXT-18-012

DECISION: APPROVED

APPEAL DEADLINE Monday, March 25, 2019 at 12:00 p.m.

I. RELEVANT CRITERIA:

Coos County Zoning and Land Development Ordinance (CCZLDO)

- § 5.2.600 Expiration and Extensions of Conditional Uses.
  - § 5.2.600(1) Extensions on Farm and Forest (Resource) zone property.
  - § 5.2.600(2) Extensions on all non-resource zoned property.
  - OAR 660-033-0140 Agricultural Land
    - Division 33 AGRICULTURAL LAND

      660-033-0010 Purpose

      The purpose of this division is to preserve and maintain agricultural lands as defined by Goal 3 for farm use, and to implement ORS 215.203 through 215.327 and 215.438 through 215.459 and 215.700 through 215.799.

II. PROPERTY LOCATION:

The original conditional use application was approved for a natural gas pipeline alternative segment of the original route referred to as the Blue Ridge Alignment. The subject properties are shown on the vicinity map and further described in the original authorization.

III. BACKGROUND:

On October 21, 2014, the Board of Commissioners adopted and signed Order No. 14-09-062PL, File No. HBCU-13-06, approving the Applicant's request for a conditional use permit to authorize development of the Blue Ridge alternative alignment for a portion of the pipeline and to authorize associated facilities, subject to conditions of approval.

This approval became effective on the date the appeal period for the approval expired pursuant to Coos County Zoning and Land Development Ordinance § 5.2.600.3.d, on November 11, 2014. Section 5.2.600 is predicated on ORS 215.417 and ORS 215.427 Final action on permit. Therefore, the decision was final on November 11, 2014. The following application have been filed and reviewed:

1. The applicant filed for an extension to that decision on November 9, 2016 and staff issued a decision on December 28, 2016 to extend the decision out to November 11, 2017.
2. The applicant filed for an extension to extend the November 11, 2017 final action date on November 9, 2017 and staff issued a decision on January 2018 to extend the application to November 11, 2018.
3. The applicant filed the current extension on November 8, 2018 prior to the expiration date.

All applications were submitted electronically and then paper copies followed in the mail. Staff accepted the applications through a completeness process. The owner signature was not required on the form prescribed by the county and there was a condition of approval that addressed the signature issue. The applications were deemed completed for the purpose of review within the 30 days of electronical submittal. The signature requirement is addressed in the Board of Commissioners decision on another approval but is applicable to the argument raised by the opponents (Attachment B).

The County has issued other approvals for the pipeline project, including approving and extending the original pipeline approval and the alternative pipeline route referred to as the Brunschmid/Stock Slough alignment. The other applications that have been approved are subject to different timelines and are not being reviewed as part of this extension request.

This application was set to expire on November 11, 2018 but the applicant requested this extension prior to that date (received on November 8, 2018). Staff reviewed this application and mailed out a notice of decision but then issued a reconsideration to respond to new information received from opponents. Therefore, the notice of decision that was originally mailed out is no longer in effect. The appeal that was received during the appeal period has been added as comments but the money for the appeal has been returned to the party that submitted. Staff thought it was important to make certain that clarifications are made and some of the objections be addressed. Once the new notice of decision is mailed out there will be a new opportunity to appeal. The County Administrative process does not provide for a comment period; however, comments may be made and included in the record.

Furthermore, Coos County recently updated the zoning ordinance to incorporate extension language to follow OAR 660-033-0140 permit expiration dates for any permit that is subject to Farm and Forest Zones. This language is under appeal at LUBA and has not been acknowledged at this time; however, it is applicable as the Farm and Forest updates are based on OAR 660-033-0140. Staff has been reviewing the history and intent of the OAR 660-033-0140 due to the appeal but there is relevant background information that has been included in this report.

OAR 660-033-0140 appears to have been adopted to implement portions of requirements of ORS (in part) 215.416, 215.417 and 215.427 (in part) regarding final land use permit actions, expiration of permits, and extensions to certain approved permits pertaining to Agricultural Lands and certain residential uses that can be sited on Forest Lands. Statutory actions, and laws created to implement statutes, can only be based upon the particular statues or rules creating them. In other words it cannot enforce or regulate other statutes or rules unless expressly stating so.

> ***ORS 215.417 Time to act under certain approved permits; extension.***
> ***(1) If a permit is approved under ORS 215.416 for a proposed residential development on agricultural or forest land outside of an urban growth***

boundary under ORS 215.010 to 215.293 or 215.317 to 215.438 or under county legislation or regulation, the permit shall be valid for four years.
(2) An extension of a permit described in subsection (1) of this section shall be valid for two years.
(3) For the purposes of this section, "residential development" only includes the dwellings provided for under ORS 215.213 (3) and (4), 215.284, 215.317, 215.705 (1) to (3), 215.720, 215.740, 215.750 and 215.755 (1) and (3).

Staff has determined that notice should be provided under the administrative land use process. Staff is not legally changing the authority that LCDC had to adopt language that states under OAR 660-033-0140 is not a land use decision (effective 1993).

660-033-0140
Permit Expiration Dates
(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 for reasons for which the applicant was not responsible.
(3) Approval of an extension granted under this rule is an administrative decision, is not a land use decision as described in ORS 197.015 and is not subject to appeal as a land use decision.
(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).

This OAR incorporates rules for all "*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*"

The only exemption is provided for ORS 215.294 to ORS 215.316 and anything beyond 215.438

- *215.294 Railroad facilities handling materials regulated under ORS chapter 459 or 466*

- *215.296 Standards for approval of certain uses in exclusive farm use zones; violation of standards; complaint; penalties; exceptions to standards*
- *215.297 Verifying continuity for approval of certain uses in exclusive farm use zones*
- *215.298 Mining in exclusive farm use zone; land use permit*
- *215.299 Policy on mining resource lands*
- *215.301 Blending materials for cement prohibited near vineyards; exception*
- *215.304 Rule adoption; limitations*
- *215.306 Conducting filming activities in exclusive farm use zones*
- *(Temporary provisions relating to guest ranches are compiled as notes following ORS 215.306)*
- *(Temporary provisions relating to alteration, restoration or replacement of dwellings are compiled as notes following ORS 215.306)*
- *215.311 Log truck parking in exclusive farm use zones; dump truck parking in forest zones or mixed farm and forest zones*
- *215.312 Public safety training facility*
- *(Marginal Lands)*
- *215.316 Termination of adoption of marginal lands*
- *PERMITTED USES IN ZONES*
- *215.438 Transmission towers; location; conditions*
- *215.439 Solar energy systems in residential or commercial zones*
- *215.441 Use of real property for religious activity; county regulation of real property used for religious activity*
- *215.445 Use of private property for mobile medical clinic*
- *215.447 Photovoltaic solar power generation facilities on high-value farmland*
- *215.448 Home occupations; parking; where allowed; conditions*
- *215.451 Cider business; conditions; permissible products and services; local government findings and criteria*
- *215.452 Winery; conditions; permissible products and services; local government findings and criteria; fees*
- *215.453 Large winery; conditions; products and services; local government findings and criteria*
- *215.454 Lawful continuation of certain winery-related uses or structures*
- *215.455 Effect of approval of winery on land use laws*
- *215.456 Siting winery as commercial activity in exclusive farm use zone*
- *215.457 Youth camps allowed in forest zones and mixed farm and forest zones*
- *215.459 Private campground in forest zones and mixed farm and forest zones; yurts; rules*
- *215.501 Accessory dwelling units in rural residential zones****

***Note: The list does continue

OAR 660 Division 33 regulates Agricultural Uses but it does incorporate certain dwellings addressed under OAR 660 Division 6[1]. OAR 660 Division 6 is silent in regards to an extension of time or expiration of permits.. Due to the fact that there are no other statutory authority or rules to rely upon

[1] As authorized in Exclusive Farm Use Zones in ORS Chapter 215, and in OAR 660-006-0025 and 660-006-0027, subject to the requirements of the applicable section, may be allowed in any agricultural/forest zone. The county shall apply either OAR chapter 660, division 6 or 33 standards for siting a dwelling in an agriculture/forest zone based on the predominant use of the tract on January 1, 1993.

regarding expiration of permits, with the exception of ORS 92 that controls Land Divisions, staff shall rely on the acknowledged comprehensive plan and implementing ordinance. Staff finds that all other extension that are beyond what are regulated in ORS 92, ORS 215.417 and OAR 660 Division 33 are within the County's discretion to create a process if they choose. The Comprehensive Plan is silent on the issue which requires staff and the applicant to rely on the ordinance. The CCZLDO only has jurisdiction to govern land use outside of the incorporated boundaries of the cities located within the boundary of Coos County.

Appellants in the past have continued to raise an issue with changes to the location of the pipeline. CCZLDO Section 1.1.300 states, "[i]t shall be unlawful for any person, firm, or corporation to cause, develop, permit, erect, construct, alter or use any building, structure or parcel of land contrary to the provisions of the district in which it is located. No permit for construction or alteration of any structure shall be issued unless the plans, specifications, and intended use of any structure or land conform in all respects with the provisions of this Ordinance, unless approval has been granted by the Hearings Body". This is a compliance issue that falls under enforcement but this is not an issue to be considered under an extension as it is limited to the criteria for extensions. The county has no control over applications that are submitted to a different agency by applicants. Staff does participate through a process referred to as "Coastal Consistency" review or through Land Use Compatibility Statements (LUCS). Staff reviews the other agency permits in most cases and can mark if an application has been completed. This is the appropriate time to decide if changes require additional applications to be submitted but it does not invalidate prior final permits that are on file.

Oregon's land use planning program is integrated with other regulations. The land use program is locally regulated by cities and counties, with plans that meet Oregon's shared goals and guidelines; these are Oregon's Statewide Planning Goals. Coos County is within the Coastal Zone Management Area which adds some additional layers of review that other counties outside the management area do not have, and that is the reason that Coos County is allowed to apply their local comprehensive plan and implementing ordinance to a review only to the extent required under the Oregon Coastal Management Program. Coos County is a partner in this program which will help DLCD determine Federal Coastal Consistency.

The Oregon Coastal Management Program (OCMP) is regulated and managed under Department of Land Conservation and Development (DLCD). DLCD has the responsibility and authority to make federal consistency decisions. Decisions agree or object to the proposed federal activity based on an analysis of how 'consistent' the project is with the state's management program. The National Oceanic and Atmospheric Administration (NOAA)-approved management program contains specific policies that have been selected from existing state law, the statewide planning goals, and local comprehensive plans and ordinances. Together, these specific policies are called enforceable policies.

OCMP is made up of 40 partners at the county and city level and 11 state agency partners. Each local entity has documents governing how they operate and guiding how they administer land use in their community. Each state agency has chapters of statutes guiding operations and helping them administer state law. These documents include comprehensive plans and land use regulations, state statutes, and statewide planning goals. DLCD incorporates the documents in their entirety into the Program.

Within the various statutes, goals, plans, and ordinances only certain elements meet the criteria to be used for federal consistency review.

Federal consistency does not authorize a local jurisdiction to exceed the authority given them through Statute or Rule. Opponents continue to ask to incorporate in federal regulations such as environmental impact studies as an example. The local jurisdiction does not have authority to make determination using federal laws unless that federal law has been incorporated into a Statewide Planning Goal. Planning

Goals, Statutes and Rules that regulate land use are the basis for creating comprehensive plans. However, some language in Planning Goals, Statutes and Rules are not mandatory language and that is why it may not have been incorporated into the local comprehensive plans.

Coos County strives to ensure that all regulations are updated but has to balance staffing and funding. Staff has worked with DLCD on grants to allow updates to continue. Staff has been working over the past few years on updating natural hazards, housing, readability issues, mapping digitization and estuary management. However, the opposition to the Liquefied Natural Gas project has continued to hinder updates by appealing amendments and raising issues outside of the scope of the amendments including the current extension language that staff attempted to include requiring additional hazards review. However, due to the fact that the County's current language is under appeal at the Land Use Board of Appeals staff has been working with Counsel to determine if modifications or a repeal of this language should be done. This does not affect the current review because staff is required to apply the provisions in place at the time the application was submitted.

Staff has attached the last Board of Commissioners decision on the appeal of another section of pipeline because the opponents have raised some of the same issues. Staff has referenced this decision instead of rehashing out the same arguments.

IV. FINDINGS TO THE CRITERIA:

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.

FINDING: The applicant made a written request for the extension of the Pacific Connector Gas Pipeline Blue Ridge route development. The applicant submitted the application for an extension on November 8, 2018, via email, including proof of payment, prior to the expiration date of November 11, 2018. The applicant provided a hard copy to the Planning Department as well to conform to the submittal requirements.

As explained in the background Coos County has adopted criteria to govern local extension provisions based on OAR 660 Division 33. The County adopted the language that states if a "development action is not initiated in that period" an extension may be granted. Staff has reviewed the criteria and application. In looking at the criteria the first thing to consider is if permit request is still valid. In reviewing this requirement there are terms to consider "development action" and "initiated". In researching the Statute and Rule and land use case law, to draw a better understanding of the terms, staff was unable to find a definition. Staff then relied upon the CCZLDO which does define development as, the act, process or result of developing. Webster's Dictionary defines "action" as a thing done **or** the accomplishment of a thing usually over a period of time, in stages, or with the possibility of repetition. The definition of initiated is to cause or facility the beginning of. Again, the relevant criterion states that proposed

development is void two years from the date of the final decision[2] "if the development action is not initiated in that period". The applicant has started or initiated the development action plan by applying for permits to other agencies as stated in Condition 14 of Final and Decision Order 14-09-062PL.

> 14. All necessary federal, state and local permits must be obtained prior to commencement of construction, including any required NPDES 1200-c permits. Prior to the commencement of construction activities, Pacific Connector shall provide the County with a copy of the "Notice to Proceed" issued by FERC. [*See Letter from Mark Whitlow, dated June 24, 2010, at p. 52.*]

The applicant has been submitting applications for permits to other agencies as required by the conditions of the permit. This permit is only for small segments of the pipeline and may not be part of the final selected route. This is why it is important for the applicant to secure the federal permit prior to commencement of construction. The opposition to this process has confirmed that the applicant is still seeking federal permits. The applicant has not only initiated the development action but they have consistently complied with local provisions regarding permit time frames and extension. Therefore, the permit is not void and is found to comply with both CCZLDO 5.2.600.a.(1) and OAR 660-033-0140(1). There may be other conditions of approval the applicant has started or continued to start but staff does not have that information in the record[3].

The opposition raised the following issue:

> **a. Except as provided for in subsection (c) of this section, a discretionary decision, except for a land division, made after the effective date of this section approving a proposed development <u>on agricultural or forest land outside an urban growth boundary is void two years from the date of the final decision if the development</u> action is not initiated in that period.** [Now (1)(a)(1)]

The original approval by the Board of Commissioners of the Blue Ridge Route Alternative alignment was on Oct 21, 2014 [HBCU-13-06]. Pacific Connector requested an extension [EXT-17-015] for this CUP on November 20, 2017 which puts it past the two years allowed under OAR 660-033-0140 for a CUP on Farm and Forest lands outside of the Urban Growth Boundary. The application window for the extension had lapsed. Thus, a current extension is not warranted due to the permit application extension being out of time in November of 2017. The County erred in giving the Applicant additional CUP extensions on Non-Resource lands after the permit had expired and also beyond 2 years from the date of the original extension.

Staff Response:
Prior to the current revision to the CCZLDO regarding extensions the language was very similar. It stated:

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

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[2] Final Decision ORS 215.427 and CCZLDO Section 5.0.250

[3] The record for this application starts on the day the application is submitted. If other information is considered or relied upon to make the decision such information shall be included as part of the official record. Contents of the official record are described in 661-010-0025

a. ***Except as provided for in subsection (e) of this section, a discretionary decision, except for a land division, made after the effective date of this section approving a proposed development on agricultural or forest land outside an urban growth boundary is void two years from the date of the final decision if the development action is not initiated in that period.***
b. ***Coos County may grant one extension period of up to 12 months if:***

    i. ***An applicant makes a written request for an extension of the development approval period;***
    ii. ***The request is submitted to the county prior to the expiration of the approval period;***
    iii. ***The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and***
    iv. ***The county determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.***

c. ***Additional one-year extensions may be authorized where applicable criteria for the decision have not changed.***
d. ***If a permit is approved for a proposed residential development on agricultural or forest land outside of an urban growth boundary, the permit shall be valid for four years. An extension of a permit described in subsection (e) of this section shall be valid for two years.***
e. ***For the purposes of subsection (e) of this section, "residential development" only includes the dwellings provided for under in the EFU and Forest zones in Chapter 4.***
f. ***Extension requests do not apply to temporary use permits, compliance determinations or zoning compliance letters.***

This language is almost the same as the current language especially the language the opponent cites to and states the county did not have authority to grant additional extensions. However, a final decision was made with an opportunity to appeal the decision made in 2017 that extended the date. Staff understands that the criteria did change but not substantially and not the portion that specifically refers to OAR 660-033-0140. In order for the opponent to argue this it should have been raised at the time the prior decision was made but to the extent that it was raised staff has addressed it below.

"[D]ate of final decision" is calculated from the date all appeals of been exhausted. This is consistent with ORS 215.427 and CCZLDO Section 5.0.250. The Board of Commissioners adopted the final decision on October 14, 2014 and factoring in the 21 day appeal period set the expiration of a final decision at November 11, 2016. The applicant filed for an extension of this application prior to the November 11, 2016 and staff issued a decision with the opportunity to appeal on December 28, 2016. The applicant filed and paid by electronic means on November 9, 2017 and was confirmed by email that the application was accepted. The applicant filed supplemental paper materials on November 20, 2017. If you read the letter from the applicant it references the electronic submission. Staff accepted the electronic application. The one posted on line was the paper copy but staff has provided a copy of all application and decision as part of Attachment A. The opponents could have made a records request at any time to verify the document referenced in the applicants' letter but failed. This decision was not appealed and is a final land use decision that extended the deadline to November 11, 2018. The current application was filed and received electronically on November 8, 2018 prior to the expiration date.

Therefore, the application is valid and has been implemented. The extension has met the criteria and is found to be in compliance with both the OAR 660 Division 33 and CCZLDO Section 5.2.600.1(a).

> ***(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[4] 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.**

Finding: The applicant filed with the County the required application for requesting an extension. The application included the appropriate application fee. Staff finds that this is a valid permit but in the case the permit application would potentially expire and to cover any ambiguity in the extension criteria, the applicant submitted a request for an extension request to extend the date of approval for the original application.

The opponents raised objections to this application made unfounded accusations about the County's process and prior decisions which led to staff reconsidering this matter. One of the issues raised, as in numerous other appeals, is that the county failed to adequately determine that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible. The opponents assert that it the County's responsibility to consider processes that are not within the local review authority, specifically the FERC process. Making demands that staff participate in the federal permitting process and use that information to make the determination that an applicant has failed to ***"begin or continue development during the approval period"*** Staff has already found the applicant has initiated the process by seeking other permit approvals as conditions which indicates that they have begun the process for development. ***CCZLDO Section 2.1.200 states that DEVELOPMENT is the act, process or result of developing.*** The CCZLDO requires a permit and compliance conditions of approval in order to continue development; therefore, it is valid for staff to find that the applicant is in the process and continues to be in the process of development by seeking and continuing to seek permits.

[4] 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.

This is only "responsibility" required to be addressed by the applicant and staff. Therefore, applicable criteria have been met.

Furthermore, the applicant has provided the reason that prevented the applicant from beginning or continuing development within the approval period to the extent that further analysis is required the applicant has addressed all of the applicable criteria within the jurisdiction of the county. The county has changed the criteria to follow OAR 660-033-0140 for resource lands (Agriculture and Forest). This language does state this review is not a land use decision because this is an extension of a land use review and not a review to determine consistency for a "new or pending" application. However, staff agrees that there may be some discretionary standards applied in this review so it has been processed as a land use decision.

The criteria states the County shall make the determination if the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not "responsible". There have been arguments in prior cases before the county that asked staff to look at the reasons that caused the delay. To the extent this may be a valid review criteria staff has incorporated the hearings officer's recommendation. The Webster's Third New International Dictionary (1993) defines the term "responsible" as *"answerable as the primary, cause, motive, or agent whether of evil or good."* In a prior permit extension decision for the pipeline, the Board of Commissioners interpreted the word "responsible" to mean *"beyond the applicant's control."* Stated another way, the question is whether the applicant is "at fault" for not exercising its permit rights in a timely manner. The aim of the criterion is to not reward applicants that do not actively pursue their development, while at the same time providing some measure of sympathy and assistance to applicants who are diligently trying to effectuate their permit but who run into unexpected problems that they are not in full control to correct or fix.

The applicant has explained that the reason that the project has not continued is because the applicant was has not yet obtained federal authorization to proceed which is not only a requirement under federal law but is a condition of approval (#14). This project has various layers of permitting and they have different time lines and criteria. The pipeline is an interstate natural gas pipeline that is required to obtain authorization from the Federal Energy Regulatory Commission ("FERC"). Until the applicant obtains a FERC certificate authorizing the pipeline, the Applicant cannot begin construction or operation of the facilities. However, working toward securing the permits is part of the instating or implementing the permit by obtaining permits. This is part of the action plan which what the OAR references.

Staff is including the Board Order into this record and attaching it to this staff report (Attachment B), this explains more about the argument raised on a prior case by the opponents for background to help understand more about what is within the County's Jurisdiction and the interpretation of law. The decision was very thorough and covered arguments that were raised about what is under the County's jurisdiction to consider and what is considered ***"reasons for which the applicant was not responsible"***.

Therefore, the application as presented meets the criteria.

(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.

Finding: The applicant has requested that the County process this application as a discretionary administrative land use decision and the County has agreed.

> ***(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.***

Finding: The current ordinance allows for additional one-year extensions where applicable criteria for decisions 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. There are no limits regarding the number of extensions that may be applied.

> 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.***

Finding: This portion of the CCZLDO is within the discretion of the local code and not governed by the statute or the rule. A portion of the alignment is located on non-resource zones. The staff has addressed these criteria in a prior portion of the staff report. The applicant is not applying for residential development but is eligible for an extension. The application, fee and criteria were addressed. The application was received prior to the expiration of the conditional use.

2. ***Changes or amendments to areas subject to natural hazards[5] 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.***

Finding: The applicant acknowledges this provision and if it applies in the future they will comply. Therefore, this has been addressed.

V. OTHER ISSUED RAISED:

A. The Applicant has proposed significant changes to the entire pipeline route and configuration in applications to other governmental agencies, including the Federal Energy Regulatory Commission. There are even changes proposed along the Blue Ridge alignment, including changes in the temporary work areas. The new pipeline route and the changes to the Blue Ridge alignment have not been approved and it is not compliant with the applicable criteria.

Response: The application request is for an extension to an approved final decision. This does not authorize the applicant to site anything beyond the approval. The issue raised is a compliance issue as addressed in ORS 215.190 and through the violation process set out in CCZLDO Chapter 1. This is not a valid argument. This was brought up in a prior appeal case and is covered in detail in attachment B.

C. The County violated SECTION 5.0.150 (1) as the applicant does not have the private right to property, and SECTION 5.0.175 (1) as the applicant does not have private right of property acquisition pursuant to ORS Chapter 35. This is also a new criteria that prevents approval of the extension application.

Response: *SECTION 5.0.150 APPLICATION REQUIREMENTS (Language that was in place at the time the original application was applied)*

Applications for development or land use action shall be filed on forms prescribed by the County and shall include sufficient information and evidence necessary to demonstrate compliance with the applicable criteria and standards of this Ordinance and be accompanied by the appropriate fee. An application shall not be considered to have been filed until all application fees have been paid. All applications shall include the following:

Applications shall be submitted by the property owner or a purchaser under a recorded land sale contract. "Property owner" means the owner of record, including a contract purchaser. The application shall include the signature of all owners of the property. A legal representative may sign on behalf of an owner upon providing evidence of formal legal authority to sign.

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

An application for a variance to the requirements of the Airport Surfaces Overlay zone may not be considered unless a copy of the application has been furnished to the airport owner for advice as to the aeronautical effects of the variance. If the airport owner does not respond to the application within twenty (20) days after receipt, the Planning Director may act to grant or deny said application.

The current language reads: *Applications for development or land use action shall be filed on forms prescribed by the County and shall include sufficient information and evidence necessary to demonstrate compliance with the applicable criteria and standards of this Ordinance and be accompanied by the appropriate fee. An application shall not be considered to have been filed until all application fees have been paid. All applications shall include the following:*

1. *Applications shall be submitted by the property owner or a purchaser under a recorded land sale contract. "Property owner" means the owner of record, including a contract purchaser. The application shall include the signature of all owners of the property. A legal representative may sign on behalf of an owner upon providing evidence of formal legal authority to sign.*

2. *An application for a variance to the requirements of the Airport Surfaces Overlay zone may not be considered unless a copy of the application has been furnished to the airport owner for advice as to the aeronautical effects of the variance. If the airport owner does not respond to the application within twenty (20) days after receipt, the Planning Director may act to grant or deny said application.*

3. *One original and one exact unbound copy of the application or an electronic copy shall be provided at the time of submittal for all applications.*

An application may be deemed incomplete for failure to comply with this section.

Staff Response: The highlighted language which is what the opposition is referencing to is exactly the same language so this is not a changed in criteria that would apply. Even if it did apply it is part of the procedure for deeming an application complete and would not be review criteria. This was also addressed in a prior decision. The application for an extension references "applicant" and not "property owner". There is a condition of approval that was drafted to specifically address this provision. A condition of approval is required to be addressed unless it is modified through a land use procedure under CCZLDO. Therefore, this is not a valid issue.

D. The county violated the CCZLDO 5.0.500 when it failed to deem the permit automatically revoked due to the inconsistencies of the pipeline project proposed in the application pending FERC approval.

Response: Section CCZLDO 5.0.500 states:

Submission of any application for a land use or land division under this Ordinance which is inconsistent with any previously submitted pending application shall constitute an automatic revocation of the previous pending application to the extent of the inconsistency.

Such revocation shall not be cause for refund of any previously submitted application fees.

Staff Response: First, the language actually states applications "under this ordinance", which means an application would have to be subject to review by the CCZLDO and would have to be pending. If a final decision has been issued it is no longer considered "pending". A "pending" application is waiting to

receive a final decision. The CCZLDO has no authority over other regulatory agencies. Staff explained how agency coordination is handled earlier in this report.

Example: If an applicant filed for a property line adjustment and it was under review it would be considered a "pending application". Then the applicant filed a land division prior to a final decision on the land division this is cause to revoke the first permit as it would be inconsistent. However, staff may choose to just deem the application incomplete. This provision pre-dates the completeness review process.

The opponents do not get to interpret local land use law; the Board of Commissioners have the discretionary authority or deference to make the determination. This has been made and it cannot extend beyond the regulatory authority of the CCZLDO. Therefore, this is not a valid argument. Staff again would state this was raised in a prior decision.

F. The applicable criteria has changed or the County has purposely avoided applying amended and new land use criteria to zones within the County to benefit the applicant which is beyond its authority. The additional criteria include but are not limited to CCZLDO §4.11.125 (Special Development Considerations) and CCZLDO §§5.11.100 - 5.11.300(Geologic Assessments) adopted pursuant to Ordinance Ord. 17-04-004PL dated May 2, 2017, effective July 31, 2017 and those amendments adopted in AM-18-005.

Response: The applicant should have raised any objections to Ord. 17-04-004PL on appeal but that opportunity has passed. Besides, staff has explained why this would not have been a valid criteria in the context of an extension granted under OAR 660-033-0140. The other amendment that is listed (AM-18-005) is under appeal and that is the appropriate time to raise that issue. The opponent has no authority to raise this argument for an extension application. The county's amendments do not constitute "***reasons for which the applicant was not responsible***" and goes beyond the scope of the limited review.

G. The Amendment to 5.2.600(2) – what is now (1)(b) is not applicable to the extension request. It did not exist to govern the county's discretion when the CUP application was filed and is not an applicable goal post. The extension of the permit on non-resource lands has exceeded the applicable time limit of 2 years and, for that matter, the new limit of 4 years.

Response: The opponent in this case does not seem to realize the there are no applicable statute or rule that govern extensions beyond ORS 92, OAR 660 Division 33 and ORS 215.417; therefore, it is fully within the discretion of the county to create standards or simply state that any permit outside of Farm and Forest zoned are regulated by OAR 660 Division 33 and ORS 215.417 never expire with the exception of land divisions that are governed under ORS 92. This is a local decision and it is inappropriate to bring up through the extension process. The appropriate place to argue this is through the amendment process. This amendment is under appeal; therefore, the opponent should save the argument.

H. Application of Section 5.2.600(2) (as amended) is beyond the scope of the County's authority. As understood it is an attempt to avoid the application of hazard related criteria that are applicable and would have been applicable at the time the CUP application was filed.

Response: The applicant should have raised any objections to Ord. 17-04-004PL on appeal but that opportunity has past. In addition, staff has explained why this would not have been a valid criteria in the context of an extension granted under OAR 660-033-0140. The other amendment that is listed (AM-18-

005) is under appeal and that is the appropriate time to raise that issue. The opponent has no authority to raise this argument for an extension application. The county's amendments do not constitute ***"reasons for which the applicant was not responsible"*** and goes beyond the scope of the limited review.

Furthermore, the hazard review was not adopted until 2015 with standards following in 2017. This application was approved in 2014 so staff finds that argument "[a]s understood it is an attempt to avoid the application of hazard related criteria that are applicable and would have been applicable at the time the CUP application was filed." This does not make logical or legal sense as the criteria was adopted after the CUP applicable was final. If the criteria were in place at the time the CUP application was filed it would not be seen as "new" criteria. There are no hazard criteria that would apply in any way because hazards criteria would, at most, apply to structures. The pipeline is not a "structure". Remember this is the alternative pipeline "route". Also, for reasons stated in this report hazards are not regulated under OAR 660 Division 33.

VI. CONCLUSION:

The conditional use authorizes the Pipeline to be developed on both resource-zoned and non-resource zoned land. Therefore, the applicant has taken the conservative approach and requested a one-year extension for the conditional use.

For the reasons set forth in this staff report and based on the evidence and documentation presented by the application, incorporated herein as Attachment A, the Planning Director approves the one year extension request made by the applicant. The expiration for this application is November 11, 2019.

All conditions remain in effect unless otherwise amended.

Jill Rolfe Planning Director

Coos County Staff Members
Jill Rolfe, Planning Director
Amy Dibble, Planner II
Crystal Orr, Planning Specialist
Sierra Brown, Planning Specialist

Attachment "B"

APPEAL OF A DIRECTOR'S DECISION

SUBMIT TO COOS COUNTY PLANNING DEPT. AT 225 N. ADAMS STREET OR MAIL TO: COOS COUNTY PLANNING 250 N. BAXTER, COQUILLE OR 97423. EMAIL: PLANNING@CO.COOS.OR.US PHONE: 541-396-7770

Planning Director Appeal Fee $250.00 / Hearings Body or Officer Appeal Fee $2500.00

Date Received: 3/25/19 *Fee Received* 250.00 *FILE # AP-* 19-002

If the correct fee is not with the appeal it will not be processed.

List the names and signatures of each petitioner and a statement of the interest of each petitioner to determine party status. Multiple parties shall join in filing a single petition for review, but each petitioner shall designate a single Contact Representative for all contact with the Planning Department. All communications regarding the petition, including correspondence, shall be with the Contact Representative. This can be attached to this form marked as Attachment "A".

Appellant: Kathy Dodds, Natalie Ranker, and The Elk Lake Corporation, and Cary A. Norman

Mailing address: 3783 Spruce St, North Bend 97459

Phone: 541-435-4125 Email: wisewalker@hotmail.com

Signature: Kathy Dodds Natalie Ranker Cary A. Norman

Appellant's Representative : Tonia Moro, Tonia L. Moro Attorney at Law P.C.

Mailing address: 19 S. Orange Street, Medford OR 97501

Phone: 541-973-2063 Email: Tonia@ToniaMoro.com

Signature:

The name of the applicant: Seth King, Perkins Cole representing Pacific Connector Gas Pipeline, Inc.

County application file number being appealed: EXT-18-012

☑ Planning Director's Decision ☐ Hearings Body or Hearings Officer Decision

The appellant must explain how they have achieved party status pursuant to the applicable sections of 5.8.150 or 5.8.160:

See Attachment "A"

The appeal deadline, as stated in the Director's Decision: March 25, 2019

The nature of the decision and the specific grounds for appeal, citing specific criteria from the Coos County Zoning and Land Development Ordinance, Comprehensive Plan, Statute or Rule. (This can be attached to this form marked as Attachment "B".)

See Attachment "B"

The appellant must explain in detail, on the appeal form or attached to the appeal form, how the application did not meet the criteria in the case of an approval or why the criteria should or should not apply; or, in the case of a denial the appellant shall explain why the application did meet the criteria or why certain criteria did not apply to the application. (This can be attached to this form marked as Attachment "C".)

See Attachment "C"

AP-19-_____

Attachment "A"

The Elk Lake Corp. and Carey Norman achieved party status pursuant to 5.8.150 because they were entitled to and did receive notice of the decision and are aggrieved or have interests adversely affected by the decision because they own property affected by the pipeline, and otherwise live, work and recreate in the areas affected by the decision.

Kathy Dodds, Natalie Ranker are aggrieved or have interests adversely affected by the decision because they own property near the pipeline and otherwise live, work, and recreate in the areas affected by the decision.

This decision approves development within Coos County which is directly adverse to Kathy Dodds, Natalie Ranker, and The Elk Lake Corp's interests.

AP-19-_____

Attachment "B"

The March 8, 2019, decision on reconsideration in EXT-18-012 an Extension of a Conditional Use Permit for the Pacific Connector Gas Pipeline Blue Ridge Alignment, which, according to the County was set to expire Nov 11th, 2018.

Grounds for appeal, relevant to the specific criteria from the Coos County Zoning and Land Development Ordinance, Comprehensive Plan, Statue or Rule are as follows:

The County violated CCZLDO 5.2.600 and the rule it implements. It has misconstrued applicable rule and exceeded its authority in re-interpreting the rule to conclude, as understood, that the applicant has initiated the development action by applying for other agency permits.

The county has violated the CCZLDO 5.0.500 when it failed to deem the permit automatically revoked due to the inconsistencies of the pipeline project proposed in the application pending FERC approval.

The county specifically violated CCZLDO 5.2.600 (1)(a) (b) (ii) & (iv) and the rule it impliments. The county erred in determining that the applicant was unable to begin development during the approval period for reasons for which the applicant was not responsible.

The director's decision misconstrues LUDO 5.2.600(2) and the record does not otherwise support a finding of compliance.

The County erred in giving the Applicant additional CUP extensions on Non-Resource lands after the permit had expired and also beyond 2 years from the date of the original extension.

The county continues to violate SECTION 5.0.150 (1) as the applicant does not have the private right to property, and SECTION 5.0.175 (1) as the applicant does not have private right of property acquisition pursuant to ORS Chapter 35. This is also a new criteria that prevents approval of the extension application.

The county violates Section 5.2.600 and the rule it implements because the permit is void and became null and void when the applicant failed to file an application for extension before it expired on October 21, 2016.

The decision misconstrues LUDO 5.2.600.1.c. and there is insufficient evidence in the record to support the director's decision that this criteria has been met. The applicable criteria has changed or the County has purposely avoided applying amended and new land use criteria to zones within the County to benefit the applicant which is beyond its authority. The additional criteria include but are not limited to CCZLDO §4.11.125 (Special Development Considerations) and CCZLDO §§5.11.100 - 5.11.300(Geologic Assessments) adopted pursuant to Ordinance Ord. 17-04-004PL dated May 2, 2017, effective July 31, 2017 and those amendments adopted in AM-18-005. Moreover, the adoption of Section 5.0.175 (1) also constitutes new criteria.

The applicable criteria is 5.2.600(2) relating to the non-resource CUP permitted uses. The director's decision misconstrues 5.2.600(2) (2013). The provision allows for one extension of up to 2 years and it requires that the use or development begin within the first two years of the date of approval or a new application must be obtained. The date of approval is the date of approval, October 21, 2014. Neither the use nor the development has begun in over four years. Any changes to the provision since 2013 not applicable to the extension request. As understood it has changed since CUP application was filed and is not an applicable goal post. The extension of the permit on non-resource lands has exceeded the applicable time limit of 2 years and, for that matter, the new limit of 4 years.

Moreover, application of Section 5.2.600(2) (as amended in 2018) is beyond the scope of the County's authority. As understood it is an attempt to avoid the application of 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.

The extension continues to impose a taking of the property of the landowners along the Blue Ridge alignment through inverse condemnation. The county is aware that the landowners have not consented to this application. The county is aware that the applicant may not and for some segments will not obtain federal approval to build the pipeline proposed. The county is aware that the permit constitutes a cloud over the land owners ability to sell and fully use their

property. The county must prevent further damage to the landowners by denying the extension and inviting the applicant to reapply when it knows what alignment FERC will approve.

AP-19-____

Attachment "C"

Appellants assert that former version of Section 5.2.600 (2013) applies for several reasons, including the fact that it's substantive provisions were in effect at the time the original CUP application was filed. As the provision the director applied - the amended version - is similar, the arguments are relevant to the amended version as well.

The County has previously determined that more than applying for additional permits is necessary to initiate the development action and without appropriate legislative authority may not now reinterpret the LDO which adopts the state rule. The county mis-construes the state rule and has no authority to limit its interpretation to deem that extensions are not required or allow endless extensions of resource land development permits simply because the permit holder is seeking other permits it needs, especially where as here the applicant and the county know that the applicant proposes its development on lands it has no current rights to and knows and knew in 2014 that the third party permits would take years to obtain. "Development" does not mean seeking additional permits within the meaning of the rule. The development action is the building of a pipeline. The rule does not state that merely the "process" of development need be started. Neither does it state that merely an "action plan" must be implemented.

Moreover, the Applicant has proposed significant changes to the **entire** pipeline route and configuration in applications to other governmental agencies, including the Federal Energy Regulatory Commission (FERC). FERC approval of the entire 200 plus miles of the pipeline (including that portion in Coos County Coastal Management Zone) is required for the applicant to build the pipeline. There are even changes proposed along the Blue Ridge alignment, including changes in the temporary work areas. The new pipeline route and the changes to the Blue Ridge alignment have not been approved and it is not compliant with the applicable criteria. Thus, the applicant has abandoned the project proposed in the application which led to the permit decision. Said another way, the application/project authorization by the permit and the extension application is not a complete application or project.

The **reason** the applicant has not started construction is because it does not propose to and will not obtain FERC authority to build the alignment the county approved pursuant to the permit subject to this application. Thus, it is the applicant's failure to pursue a FERC permit authorizing the county approved pipeline which prevents it from having authority to proceed now or later to build the pipeline approved by the county. The FERC permit is not the causation of the default because 1) the FERC's permit will not authorize the pipeline approved by county in the permits (only portions of it), and thus, the applicant will have to obtain a new and additional permit from the county; and 2) the FERC permit will not cure the default because the FERC permit will not issue within the "current" approval period and the applicant has not even determined that it will

begin construction after it issues as it will only make its final investment decision after it issues. Moreover to the extent the county has issued LUCS to third party agencies regarding this alignment, those LUCS cannot be based upon the permit subject to this application.

The applicant was **responsible** because the applicant continues to change the project presented to FERC and because it willfully failed to even attempt to satisfy FERC's economic test when it did propose the project approved by the county over 5 years ago to FERC. Thus, it is the applicant's failure to diligently prosecute the last application which results in the applicant's inability to obtain the necessary FERC permit before the end of the last and even the now extended current extension period.

To the extent the director interprets the provision differently, the director misconstrues the provision. It's aim is to require diligence in exercising permitting rights and not to allow the avoidance of the county's legitimate police and land use powers to regulate the uses of land by extending old decisions that may no longer be valid due to changes in legislation or other circumstances. Moreover, the county does not have authority to apply standards that limit the inquiry necessary to determine if the applicant was responsible for the delay. It must consider the evidence presented and make a determination based upon substantial evidence in the record.

A application to extend a permit cannot extend a void permit. ORS 197.015 defines "final decision" as the final determination made by a local government, and the rule which LUDO 5.2.600 implements uses the same term so there is no authority for the director to interpret the term differently. And to do so misconstrues the rule the LUDO states it is implementing. Moreover, to the extent the former section 5.2.600 (2013) defined the expiration "final decision" date and/or the county has interpreted the such provision to be the date of the Board of Commissioner's decision when no appeal is taken, the director has misconstrued the criteria and exercised authority she does not have to change the final decision date. This record demonstrates that the county has so interpreted the provision. Finally, to the extent the county has required physical receipt of applications and fees to meet filing deadlines, the director's reliance on an electronic service date misconstrues the LUDO and is beyond the authority of the director to re-interpret.

See above for the discussion concerning 5.2.600(1)(c) and 5.2.600(2) and 5.2.600(2)(2018).

ARTICLE 5.8 APPEAL REQUIREMENTS

SECTION 5.8.100 Appeals General

Coos County has established an appeal period of fifteen (15) days from the date written notice of administrative or Planning Commission decision is mailed with the exception of Property Line Adjustments and lawfully created parcel determinations, which are subject to a twelve (12) day appeal period. The Board of Commissioners or Hearings Body shall dismiss an appeal for failure to follow the requirements of this article.

SECTION 5.8.150 standing to Appeal a Planning Director's Decision: A decision by the Planning Director to approve or deny an application shall be appealed as identified in the Sections below. The appeal must be filed within the appeal period and meet one of the following criteria: 1. In the case of a decision by the Planning Director, the appellant was entitled to notice of the decision; or 2. The person is aggrieved or has interests adversely affected by the decision.

SECTION 5.8.160 Standing to Appeal a Hearings Body, Appointed Hearings Officer(s) or Board of Commissioner Decision: A decision by the Hearings Body, Appointed Hearings Officer(s) or Board of Commissioners to approve or deny an application shall be appealed as identified in the Sections below. The appeal must be filed within the appeal period. In the case of an appeal of a Hearings Body decision to the Board of Commissioners, the appellant must have appeared before the Hearings Body or appointed Hearings Officer(s) orally or in writing. [OR 04 12 013PL 2/09/05]

SECTION 5.8.170 Appeal procedures: An appellant shall file the appeal for review on the appropriate county form and the form shall be completely filled out as required by this section. If an appellant fails to correctly fill out the form, and there has already been a public hearing on the matter, the Board of Commissioners may deny the appeal based on failure to comply with this section. In the event the appeal is denied based on a failure to comply with this section, a refund of unexpended fees shall be returned to the appellant.

The appeal form shall contain the following:

1. The name of the applicant and the County application file number;
2. The name and signature of each petitioner and a statement of the interest of each petitioner to determine party status. Multiple parties shall join in filing a single petition for review, but each petitioner shall designate a single Contact Representative for all contact with the Planning Department. All communications regarding the petition, including correspondence, shall be with the Contact Representative;
3. The appellant must explain how they have achieved party status pursuant to the applicable sections of 5.8.150 or 5.8.160;
4. The date that the notice of the decision was mailed as written in the notice of decision;
5. The nature of the decision and the specific grounds for appeal citing specific criteria from the Coos County Zoning and Land Development Ordinance, Comprehensive Plan, Statute or Rule.
6. The appellant must explain in detail, on the appeal form or attached to the appeal form, how the application did not meet the criteria in the case of an approval or why the criteria should or should not apply; or, in the case of a denial the appellant shall explain why the application did meet the criteria or why certain criteria did not apply to the application.
7. Appeals of Planning Director's decision will be de novo;
8. Appeals of Planning Commission's or appointed Hearings Officer(s) decision shall be reviewed by the Board of Commissioners or Hearings Officer if the Board of Commissioners so chooses. The Board of Commissioners shall, provided there has been an initial evidentiary hearing:
    a. Decline to hear the matter and enter an order affirming the lower decision; or
    b. Accept the appeal and: i. Make a decision on the record without argument; ii. Make a decision on the record with argument; iii. Conduct a hearing de novo; or iv. Conduct a hearing limited to specific issues.
        c. In the decision, the Board shall affirm, modify, or reverse the lower decision, and accept any or all of the findings and conditions in the Hearings Body decision, or modify or adopt new findings and conditions on a permit.
        d. If the Board allows argument only on the record, no new evidence shall be submitted.
        e. Any legal issues not specifically raised are considered waived for purposes of appeal to the Land Use Board of Appeals (LUBA).
        f. Where a hearing is limited to specific issues, any evidence or argument submitted must be relevant to the specific issue.
        g. All items to be submitted to the County must actually be received by the County Planning Department no later than 5:00 p.m. on the on the last day of the appeal period. If the last day of the appeal period falls on a weekend or County holiday, then the item must actually be received by the County Planning Department no later than 12:00 p.m. on the next County business day following the deadline date. All items to be mailed to another party must be postmarked no later than the end of the appeal period.
        h. The decision of the Board of Commissioners shall not be final for the purpose of appeal until reduced to writing and signed by the Board.

Attachment "C"

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CAROL WILLIAMS AND JODY MCCAFFREE,
Petitioners,

vs.

COOS COUNTY,
Respondent,

and

PACIFIC CONNECTOR GAS PIPELINE, LP,
Intervenor-Respondent.

LUBA Nos. 2018-141/142

FINAL OPINION
AND ORDER

Appeal from Coos County.

Tonia L. Moro, Medford, filed the petition for review and argued on behalf of petitioners.

No appearance by respondent.

Seth J. King and Steven L. Pfeifer, Portland, filed the response brief and Seth J. King argued on behalf of intervenor-respondent. With them on the brief was Perkins Coie LLP.

RYAN, Board Chair; RUDD, Board Member; ZAMUDIO, Board Member, participated in the decision.

AFFIRMED 04/25/2019

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a board of commissioners' decision granting one-year extensions of two conditional use permits to develop segments of a natural gas pipeline.

REPLY BRIEF

Petitioners move for permission to file a reply brief to respond to waiver arguments raised in the response brief. There is no opposition to the motion and the reply brief is allowed.

BACKGROUND

This appeal involves extensions granted by the county of two previously-issued conditional use permits for a pipeline to serve the proposed Jordan Cove liquefied natural gas (LNG) export facility in the county. We set out the history of the two conditional use permit approvals and subsequent extensions below.

A. 2010 CUP

In 2010, intervenor-respondent (intervenor) applied for a conditional use permit to develop and operate a LNG pipeline in connection with the proposed Jordan Cove LNG terminal in Coos Bay (2010 CUP). The pipeline is proposed to be developed on both resource and non-resource land in the county. We discuss the significance of the difference in classification of land on which the pipeline is proposed to be developed as resource or non-resource later in this opinion.

The county approved the application, and the decision was appealed to LUBA. We remanded the county's decision in *Citizens Against LNG, Inc. v. Coos County*, 63 Or LUBA 162 (2011). Thereafter, the county again approved the application, and that decision became final. In 2013, intervenor applied to the county to modify the 2010 CUP to delete a condition that prohibited use of the pipeline "for the export of LNG." Record 49. The county granted that approval, the county's decision was appealed to LUBA, and we affirmed. *McCaffree v. Coos County*, 70 Or LUBA 15 (2014), *aff'd*, 267 Or App 424, 341 P3d 252 (2014).

In March 2014, intervenor applied for an extension of the 2010 CUP for two additional years. The county approved that request, but limited its approval to a one-year extension. In March 2015, April 2016, and March 2017, intervenor sought and the county approved additional one-year extensions.

In March 2018, intervenor sought and received a fifth one-year extension to April 2, 2019. That decision is the subject of LUBA No. 2018-142.

B. 2013 CUP

In 2013, intervenor applied for and the county approved a conditional use permit for two alternative alignments of the proposed pipeline route, the Brunschmid and Stock Slough alignments (2013 CUP). The original approval was valid for two years.

In April 2016 and May 2017 the county approved additional one-year extensions of the 2013 CUP. In February 2018, intervenor applied for a third one-

year extension of the 2013 CUP, and the county approved the extension request. That decision is the subject of LUBA No. 2018-141.

C. Amendments to the Coos County Zoning and Land Development Ordinance

Since the county's original approvals of the 2010 CUP and the 2013 CUP, the county has amended various provisions of the Coos County Zoning and Land Development Ordinance (LDO). In 2015, the county amended LDO 5.0.175, adding a provision expressly authorizing transportation agencies, public utilities, and certain private entities with a private right of condemnation to apply for a permit without landowner consent. Also in 2015, the county amended LDO 5.2.600, which governs the expiration and extension of conditional use permits, to add two new subsections, subsections 2 and 3.

In 2017, the county adopted LDO Article 5.11, which includes special regulations for development and uses in hazard areas identified on the county's Natural Hazards Map, and LDO 4.11.125, which includes special development considerations for areas of concern, including hazard areas.

We discuss those LDO provisions later in this opinion.

FIRST ASSIGNMENT OF ERROR

LDO 5.2.600 governs extensions of previously issued conditional use permits. As relevant here, for resource-zoned lands, LDO 5.2.600.1(b)(iii) and (iv) allow the county to grant "one extension period of up to 12 months if;"

"(iii) The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and

"(iv) The county determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible."

LDO 5.2.600(1)(c) provides that "[a]dditional one-year extensions may be authorized where applicable criteria for the decision have not changed." LDO implements OAR 660-033-0140, an administrative rule adopted by the Land Conservation and Development Commission (LCDC).

In several subassignments of error under the first assignment of error, petitioners argue that the board of commissioners "[i]mproperly construed the applicable law," and that the county's findings are inadequate to explain why the county determined that the extension requests satisfied LDO 5.2.600.1(b)(iii) and (iv). ORS 197.835(9)(a)(C) and (D).

A. LDO 5.2.600.1(b)(iii) – "States the Reasons"

The application stated that the "reason[]" that prevented intervenor from beginning development of the pipeline is "because the Pipeline has not yet obtained federal authorization to proceed." Record 1501. The board of commissioners found that the reason for the delay in beginning development is that a certificate issued by the Federal Energy Regulatory Commission (FERC) is required in order to begin development, and intervenor has applied for a certificate but it has not been issued. Record 28, 70.

In a portion of their first subassignment of error and in their second subassignment of error, petitioners argue that the county's decision that the application met the requirement to "state[] reasons" that prevented intervenor from beginning development is not supported by substantial evidence in the record, and improperly construes the provision. ORS 197.835(9)(a)(C) and (D). Petition for Review 17, 19-20. That is so, according to petitioners, because the pending FERC application proposes alignments for the pipeline that differ from the alignments approved in the 2010 CUP and the 2013 CUP. Petitioners also argue that there is not substantial evidence in the record that the reason for the extension is able to be "cured within the extension period." Petition for Review 20. We also understand petitioners to argue that the evidence in the record is that intervenor is not seeking a FERC certificate to build the pipeline in the exact location where it was approved by the county in the 2010 CUP and the 2013 CUP, and therefore the lack of FERC approval is not a valid "reason[]" that prevented intervenor from beginning development. Petitioners also argue that the board of commissioners improperly construed LDO 5.2.600.1(b)(iii) when it failed to interpret that provision to require an applicant for an extension to "demonstrate[e] a sufficient causal relationship between the * * * statement of reason and the delay." Petition for Review 17.

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) 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 addition, we reject petitioners' argument that the board of county commissioners' decision that LDO 5.2.600.1(b)(iii) is met is not supported by substantial evidence in the whole record. The board of commissioners' decision is supported by evidence in the record that one of the alignments proposed in the pending application to FERC is nearly identical to the route approved by the county in the 2010 CUP.[1] Record 33, 75, 342.

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[1] The county's findings explain:

> "[Petitioners'] argument does not reflect a correct understanding [of] the permitting process. It is true that Coos County can only approve or deny whatever pipeline route that is requested by the applicant in a formal land use application. FERC is different, however. FERC has the regulatory authority under NEPA to approve routes that are different from the applicant's 'preferred' route. In this regard, it is important to understand a pipeline applicant does not select the actual approved route of the pipeline. Rather, the route is selected by FERC via the NEPA process. The fact that [intervenor] has sought – at great expense – approval for alternative alignments that deviate from the original alignment approved in 2010 is testament to the fact that [intervenor] is not in control of the route selection process. It also demonstrates that

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.

B. LDO 5.2.600.1(b)(iv) – "Reasons for which the applicant was not responsible"

In the third subassignment of error, we understand petitioners to argue that there is not substantial evidence in the record to support the county's conclusion under LDO 5.2.600.1(b)(iv) that intervenor "was unable to begin or continue development during the approval period for reasons for which [intervenor] was not responsible." Petitioners repeat the argument made in their first subassignment of error that intervenor is responsible for its inability to begin development because intervenor has failed to apply for a FERC approval to build the pipeline in the exact alignments that the county approved in the 2010 CUP and the 2013 CUP. The evidence in the record is that in 2017 intervenor applied for a FERC certificate, and that application is pending. Record 317-320. While the new FERC application proposes largely the same alignment that was

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> FERC does not place much, if any, weight on the fact that County approved the original route in 2010. [Intervenor] cannot be faulted [for] wanting to keep the county permits alive while FERC determines the route that has the least environmental impact. In fact, it is quite possible that FERC could approve the original alignment, perhaps as modified by the County-approved alternatives, or something close thereto." Record 33, 75.

approved in the 2010 CUP and the 2013 CUP, approximately 6 or 7 miles of the pipeline differ from what was originally proposed and approved in 2010 and 2013. After rejecting petitioners' proposed interpretation of LDO 5.2.600.1(b)(iv), the board of commissioners adopted findings that:

> "In this case, the Board continues to find that 'it is sufficient to conclude that because [intervenor] has thus far been unsuccessful in obtaining permits from FERC despite its reasonable efforts, [intervenor] is therefore *not at fault* for failing to begin construction on the pipeline.'" Record 30 (emphasis in original.)

We understand the board of commissioners to have interpreted LDO 5.2.600.1(b)(iv) to mean that as long as intervenor has in fact applied for the FERC certificate, a difference in the alignment proposed in the application to FERC from what was approved in the 2010 CUP and the 2013 CUP does not alter that fact and intervenor is not "responsible" for the lack of an approved FERC certificate. That interpretation is not inconsistent with the express language of the provision, and we affirm it. ORS 197.829(1)(a). Under that interpretation, we also agree with intervenor that the FERC application in the record is substantial evidence that the criterion is satisfied.

C. Collateral Attack

The board of commissioners adopted alternative findings that the doctrine of "collateral attack" applies to decisions on an application for an extension of a permit, to preclude a party challenging an extension application from raising issues "actually decided in [the county's] previously issued extension decisions."

Record 27. According to the board of commissioners, the extension application is part of the "same case." Record 25-26. Petitioners challenge those findings and argue that the doctrine of collateral attack does not apply to a decision to extend a previously issued permit, and does not provide a basis for rejecting petitioners' challenges to the extensions.

Intervenor responds that the even if the county's alternative findings that petitioners were precluded under the collateral attack doctrine from raising issues "actually decided" in the previous extension decisions are legally incorrect, the county also adopted findings that LDO 5.2.600.1(b)(iii) and (iv) were met, and therefore, petitioners' arguments provide no basis for reversal or remand of the decision. We agree.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

LDO 5.2.600.1(c) provides that, for an extension on resource lands "[a]dditional one-year extensions may be authorized where applicable criteria for the decision have not changed." In their second assignment of error, petitioners argue that provisions of the LDO adopted between 2015 and 2017 apply to the 2010 CUP and the 2013 CUP, and that therefore the applicable criteria for the decision have changed.

A. Hazard Review

As explained above, in 2017 the county adopted the special development considerations for hazard areas identified on the Natural Hazards Map.

Petitioners take the position that some areas where the pipeline was approved are located in areas identified on the Natural Hazards Map.

LDO 4.11.125.7 provides that "[h]azard review shall not be considered applicable to any application that has received approval and is [sic] requesting an extension to that approval[.]" The parties refer to this provision using the colloquial phrase "grandfather clause." The board of commissioners relied on the grandfather clause to conclude that "applicable criteria for the extension have not changed," LDO 5.2.600.1(c), because both the 2010 CUP and the 2013 CUP "ha[ve] received approval." Record 33.

Petitioners argue that the board of commissioners improperly construed LDO 5.2.600.1(c) and the grandfather clause when it concluded that the provision does not apply to the 2010 CUP and the 2013 CUP. In particular, petitioners argue that the 2010 CUP and 2013 CUP proposed, and the county approved, above ground block valve stations that qualify as structures, to which firebreak standards in LDO 4.11.125.7.f apply. Petition for Review 26.

Petitioners also argue that the grandfather clause is inconsistent with LCDC's administrative rule at OAR 660-033-0140(1)(c), which LDO 5.2.600.1(c) implements word for word. According to petitioners, OAR 660-033-0140(1)(c) "directly prevents 'grandfathering' of un-executed permitted uses beyond that first-year extension. Said another way, the rule imposes a three-year statute of repose on a resource permitted use." Petition for Review 30.

Intervenor responds that the time for petitioners' challenge to the grandfather clause as being inconsistent with OAR 660-033-140(1)(c), the administrative rule that implements Statewide Planning Goal 3 (Agricultural Lands), was when the provision was adopted in 2017. We agree. LDO 4.11.125.7 is acknowledged to comply with the statewide planning goals, including administrative rules that implement the goals. ORS 197.625(1); *Gould v. Deschutes County*, 67 Or LUBA 1, 5 (2013) (the time to challenge an ordinance as inconsistent with OAR 660-033-0140 was prior to acknowledgement).

However, even if we assume for purposes of this opinion that in this appeal, petitioners could challenge the grandfather clause as inconsistent with the administrative rule that implements Goal 3, we would reject that argument. The grandfather clause is not inconsistent with the rule. Nothing in the rule prohibits a local government from adopting new criteria and exempting existing issued permits from those new criteria. Accordingly, the board of commissioners correctly concluded that, pursuant to the grandfather clause, the standards at LDO 4.11.125.7., including the fuel break standards at LDO 4.11.125.7.f., do not apply to the extension requests.

B. LDO 5.11.100-.300

As noted above, in 2017, the county adopted amendments to the LDO to add LDO Article 5.11, Geologic Assessment Reports. LDO 5.11.300.1 provides in relevant part that "the review and approval of a conditional use in a Geologic Hazard Special Development Consideration area shall be based on the

conformance of the proposed development plans with the following standards. * * *." The remainder of LDO 5.11.300 contains the requirements for the contents of a geologic assessment, and additional standards for oceanfront development not relevant here. We understand petitioners to argue that LDO 5.11.300 is a new criterion that applies to the 2010 CUP and the 2013 CUP and accordingly, the extensions are prohibited pursuant to LDO 5.2.600.1(c).

Relying on context provided in LDO 4.11.125.7, the board of commissioners interpreted LDO 5.11.100 to .300 to apply only when a landowner proposes to build a "structure" in a Geologic Hazard Special Development Consideration area, and concluded that the 2010 CUP and 2013 CUP do not authorize a structure.[2] Petitioners argue that the board of county commissioners improperly construed LDO 5.11.300 to only apply when a landowner proposes to build a structure.

Intervenor responds that, based on context provided in LDO 4.11.125.7.b., d., and e., the board of commissioners properly construed LDO 5.11.300 as

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[2] The board of commissioners found:

> "[Petitioners' counsel] cites to new requirements for geologic assessments, including new reporting requirements. See LDO 4.11.125(7), LDO 5.11.100, 5.11.200. and LDO 5.11.300(1). The requirement to perform these geologic reviews applies when a landowner proposes to build a 'structure,' and the Board has previously determined that the Applicant is not proposing to build a structure in these areas. * * *" Record 36, 78.

applying only when a landowner proposes to build a "structure" in a Geologic Hazard Special Development Consideration area. Those provisions state generally that the county may allow construction of "new structures" in known areas potentially subject to landslides, earthquakes, and erosion, "subject to a geologic assessment review as set out in Article 5.11." LDO 4.11.125.7.b., d., and e. Absent any developed argument by petitioners as to why we are not required to affirm the board of county commissioners' interpretation under ORS 197.829(1)(a), we agree with intervenor that the board of county commissioners' interpretation is not inconsistent with the express language of LDO 5.11.300 or LDO 4.11.125.7.

C. LDO 5.0.175

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 second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

As noted, the pipeline routes authorized in the 2010 CUP and the 2013 CUP are located on both resource and non-resource land. LDO 5.2.600.2 (subsection 2) governs extensions on non-resource lands and provides:

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

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

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

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

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

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

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

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

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

"e. Additional extensions may be applied."

As noted above, subsection 3 was added to LDO 5.2.600 in 2015. Relying on LDO 5.2.600.3.e, the board of county commissioners approved the extensions of the 2010 CUP and the 2013 CUP for the portions of the pipeline located on non-

resource land. The board of commissioners interpreted subsection 3 as modifying subsection 2 to allow for additional extensions:

> "If [LDO] 5.2.600(3)(e) does not modify [LDO] 5.2.600(2)(b) then subsection (3)(b) is rendered 'superfluous' and is not given effect. ORS 174.010 provides that 'where there are several provisions or particulars such construction is, of possible, to be adopted as will give effect to all.' * * *
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> "Subsection (3)(e)'s provision that 'additional extensions may be applied' is rendered meaningless if it does not modify subsection (2) and allow for additional extensions of conditional uses on non-resource zoned property. The word 'additional' is defined by the Oxford English Dictionary as 'added, extra or supplementary to what is already present or available.' In order to give the work additional effect in subsection (3)(e) it must be read to provide for the 'added' or 'supplementary' extensions to those extensions already provided for in LDO 5.2.600 as a whole. The only subsection that could logically be modified by subsection (3)(e) is thus subsection (2), which standing along only provides for one extension.
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> "If the intent of subsection (3)(e) was merely to serve as a reminder that the extensions under subsections (1) and (2) may serve to modify the initial conditional use time periods specified in subsection (2), this intent could have been accomplished by providing that 'extensions may be applied' with the word 'additional' omitted altogether. Once again, the word 'additional' makes clear that subsection (3)(e) is intended to add to the limited extensions in subsection (2). While this is not an example of the most artful drafting, any other interpretation renders subsection (3)(e) meaningless." Record 41-42.

Under the deferential standard of review set out at ORS 197.829(1), LUBA is required to affirm the board of county commissioners' interpretation of the LDO unless the interpretation is "(a) Is inconsistent with the express language of

the comprehensive plan or land use regulation;" or "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements." *Siporen v. City of Medford*, 349 Or 247, 252, 243 P3d 776 (2010) (LUBA must affirm a city council's code interpretation under ORS 197.829(1) unless the interpretation is "implausible"). Petitioners argue that LUBA is not required to affirm the board of county commissioners' interpretation of subsection 3 because the interpretation is inconsistent with the express language of subsection 2, and that there is no way to give effect to both provisions.

Intervenor responds, and we agree, that the board of commissioners' interpretation of subsection 2 and subsection 3 is not inconsistent with the express language of either provision. The board of commissioners' interpretation that subsection 3 modifies subsection 2 to allow for "additional" extensions beyond the single extension allowed by subsection 2 is supported by the plain meaning of the word "additional" as providing for supplemental extensions beyond the one allowed in subsection 2. Petitioners do not offer any other interpretation that harmonizes subsection 2 and subsection 3; rather, petitioners focus solely on subsection 2.

Petitioners also argue that LUBA is not required to affirm the board of county commissioners' interpretation because it is contrary to ORS 197.010(2), Statewide Planning Goal 1 (Citizen Involvement) and Statewide Planning Goal

2 (Land Use Planning).[3] Petition for Review 33; ORS 197.829(1)(d). We also conclude that the board of commissioners' interpretation is not contrary to ORS

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[3] ORS 197.010(2) provides:

"(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.

197.010(2)(a), Goal 1, or Goal 2. First, ORS 197.010(2)(d) provides that the overarching principles set out in ORS 197.010(2)(a)(A)-(D) are not a legal requirement for a public body and are "not judicially enforceable." Second, petitioners do not develop any argument explaining why the board of commissioners' interpretation is contrary to the overarching principles guiding the land use program set out in ORS 197.010(2)(a), or otherwise explain how those overarching principles should be applied in interpreting LDO 5.2.600.2 and .3. For example, it is reasonably clear that application of the overarching principles would call for some type of balancing, and petitioners do not explain how the board of commissioners' interpretation is contrary to any balancing that the overarching principles require. Finally, petitioners do not develop any argument explaining why the board of commissioners' interpretation is contrary to Goal 1 and Goal 2. *Deschutes Development Co. v. Deschutes County*, 5 Or LUBA 218, 220 (1982).

The third assignment of error is denied.

The county's decision is affirmed.

> "(d) Use of the overarching principles in paragraph (a) of this subsection and the purposes in paragraph (b) of this subsection is not a legal requirement for the Legislative Assembly or other public body and is not judicially enforceable.