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

PACIFIC CONNECTOR GAS PIPELINE PROPOSAL
(APPEAL OF THE SIXTH EXTENSION REQUEST FOR
COUNTY FILE NO. HBCU 10-01 / REM 11-01,
AKA: THE "ORIGINAL ALIGNMENT")
COOS COUNTY, OREGON

FILE NO. AP 19-004
(APPEALS OF COUNTY FILE NOS. EXT-19-04).

10 OCTOBER 2019

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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"), an additional one-year extension on its development approval for HBCU 10-01, Final Order 10-08-045PL, as amended on remand from LUBA, County File No. REM 11-01, Final Order 12-03-18 PL. The staff decision under appeal approves the permit for a sixth one-year extension. The staff decision for the file, which was assigned file No. EXT-19-04 is dated June 21, 2019. Staff assigned the file No. AP 19-004 to the appeal.

Previous one-year extensions are documented as follows:

- File No. ACU 14-08 / AP-14-02, Final Order No. 14-09-063PL (Oct 21, 2014).
- File No. ACU 15-07/ AP-15-01, Final Ord. No. 15-08-039PL (Oct. 6, 2015).
- File No. ACU-16-013 (no appeal filed after staff decision)
- File No. EXT-17-005/ AP-17-004, Final Ord. No. 17-11-046PL (Dec. 19, 2017).
- File No. EXT 18-003 / AP-18-003, Final Order No. 18-11-073PL (Nov. 20, 2018).

B. Detailed Case History of the Pipeline

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

On September 8, 2010, the County Board of Commissioners (Board) adopted and signed Final Order No. 10-08-045PL, approving Applicant's request for a Conditional Use Permit ("CUP") authorizing development of the Pipeline and associated facilities, subject to certain conditions. The decision was subsequently appealed to, and remanded by the Oregon Land Use Board of Appeals (LUBA). *Citizens Against LNG, Inc v. Coos County*, 63 Or LUBA 162 (2011).

On March 13, 2012, the Board addressed and resolved two grounds from remand, and approved findings supporting approval of the CUP for the Pipeline and associated facilities on remand in Final Order No. 12-03-018PL. The March 13, 2012 decision became final when the 21-day appeal window expired and no appeals were filed on April 2, 2012. The 2010 and 2012

approvals are referred to collectively as the CUP. The CUP authorizes construction and operation of a natural gas pipeline and associated facilities on approximately 49.72 linear miles within Coos County, extending from Jordan Cove Energy Project's LNG Terminal to the alignment section in adjacent Douglas County.

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

Due to FERC's decision to revoke Pacific Connector's FERC Certificate, it was necessary for Pacific Connector to seek new FERC approval for the Pipeline as reconfigured to serve Jordan Cove's proposed LNG export facility. In June 2012, Pacific Connector initiated the mandatory FERC "pre-filing" process to seek a new FERC Certificate. FERC Docket No. PF12-17-000. Following a public scoping process initiated by FERC that lasted until October 29, 2012, Pacific Connector filed a new application with FERC on June 6, 2013. FERC Docket No. CP-13-492-00.

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

Project opponents appealed the County's Condition 25 Decision to LUBA, which upheld the County decision on July 15, 2014. *McCaffree et al. v. Coos County et al.*, 70 Or LUBA 15 (2014). After further appeal of the LUBA decision, the Oregon Court of Appeals affirmed LUBA's decision without opinion in December of 2014.

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

On December 5, 2013, PCGP submitted an application requesting approval of another alternative segment of pipeline route, known as the "Blue Ridge Alternative Alignment." The

hearings officer recommended approval of this route amendments and the Board accepted those recommendations on October 21, 2014. Final Decision and Order HBCU-13-06; Order No. 14-09-0062PL.

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

Meanwhile, in light of the withdrawal of its FERC Certificate and the consequent impossibility of obtaining all federal approvals necessary to initiate construction within the original two-year County approval period, Pacific Connector filed a request with the County on March 7, 2014 to extend its original CUP approval (*i.e*. HBCU-10-01- County Ordinance No. 10-08-045PL (Pacific Connector Pipeline Approved, County File No. HBCU-10-01, on remand Final Decision and Order No. 12-03-018PL) for two additional years. The Planning Director approved this request on May 2, 2014, pursuant to extension provisions (then codified at CCZLDO § 5.0.700). The Planning Director's decision was appealed on May 27, 2014 (AP-14-02). The hearings officer issued his Analysis, Conclusions and Recommendations to the Board of Commissioners, recommending approval of the application on September 19, 2014. On October 21, 2014, the Board adopted its decision approving an extension of Pacific Connector's conditional use approval for the original alignment for one year, until April 2, 2015. File No. ACU 14-08 / AP-14-02, Final Order No. 14-09-063PL (Oct 21, 2014).

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

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

On March 16, 2015, Pacific Connector filed a request for a second extension of the land use approvals for the original Pipeline alignment. File No. ACU-15-07. Staff reviewed the matter, deemed the application complete on April 8, 2015, and the Planning Director rendered a decision approving the extension request on April 14, 2015. The approval was appealed on April 30, 2015. File No. AP-15-01. After a hearing before a County Hearings Officer, the Hearings Officer issued a written opinion and recommendation to the Board of Commissioners that they affirm the Planning Director's decision granting the one-year extension to April 2, 2016. On October 6, 2015, the Board adopted the Hearings Officer's recommended decision and approved

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

On March 11, 2016, FERC issued an Order denying PCGP's application for a certificate of public convenience and necessity. Nonetheless, on March 16, 2016, the applicant's attorney filed for a third extension of the original pipeline alignment, which was approved on April 5, 2016 (ACU-16-013). This decision was not appealed and was valid until April 2, 2017. The FERC Order issued on March 11, 2016 was made "without prejudice," which means that PCGP can file again if it wishes to do so. *See* FERC Order dated March 11, 2016 at 21. On April 8, 2016, PCGP filed a request for a rehearing to FERC. FERC issued a denial of that request on December 9, 2016.

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

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

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

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

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

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

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

On February 21, 2108, the applicant submitted a third extension request for the Brunschmid and Stock Slough alignments. The Planning Director approved this extension on May 18, 2018 (HBCU-13-04 / EXT-18-001). The opponents filed a timely appeal of the

Planning Director's decision. AP-18-001. Board of Commissions issued a final decision approving the extension Nov. 20, 2018 (No. 18-11-072PL). Opponents appealed to LUBA.

On or about March 20, 2018, the applicant filed PCGP's fifth extension request of the original pipeline alignment. (EXT 18-003). The Planning Director approved this extension request on May 21, 2018, and followed that up with a corrected notice on May 24, 2018. Opponents filed a timely appeal, and the Board of Commissions issued a final decision on Nov 20, 2018. AP-18-002. Opponents appealed to LUBA. LUBA consolidated the two appeals (AP-18-001 and AP-18-002). On April 25, 2019, LUBA issued a Final Opinion and Order in which it rejected challenges to the Board's decision to grant additional extensions. *See Williams v. Coos County*, ___ Or LUBA ___ (LUBA Nos. 2018-141/142, April 25, 2019), *aff'd w/o op.*, 298 Or App 841 (2019). The opponents filed an appeal of this decision with the Oregon Court of Appeals, but the Court affirmed without an opinion. The hearings officer was told at the hearing that the opponents filed a Request for Reconsideration with the Court of Appeals, which apparently is currently pending.

On October 18, 2018, the Coos County Board of Commissioners adopted certain legislative amendments to *See* Ord. 18-09-009PL. LUBA affirmed the County and the Court of appeals affirmed without opinion. *McCaffree v. Coos County*, __ Or LUBA ___ (LUBA No. 2018-132, June 6, 2019). *aff'd w/o op.*, 299 Or App 521 (2019).

On or about March 28, 2019, the applicant filed PCGP's current (sixth) extension request of the original pipeline alignment. (EXT 19-004). The Planning Director approved extension request on June 21, 2019. Opponents filed a timely appeal on July 1, 2019. AP-19-004. The hearings officer held a public hearing, but the appellants did not attend. The hearings officer took testimony from the applicant and various opponents of the project.

C. Timeline of Events.

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

- Application Submitted March 28, 2019
- Staff Decision June 21, 2019
- Local Appeal filed July 1, 2019
- Public hearing, record closed Sept 31, 2019
- Hearings Officer Recommendation October 10, 2019

II. LEGAL ANALYSIS.

A. Appellant's "Objection" Has No Merit.

Appellants state that they "object to the numerous errors stated in the decision's 'background' statement because many statements are not true and they are not supported by substantial evidence." The hearings officer notes that this is an insufficient way to preserve error in an appeal. If an appellant seeks to challenge specific findings of fact, the appellant has the obligation to specify those issues with sufficient specificity to enable review.

The appellants further state that "[a]ll of the issue[s]raised in the previous proceedings on the 2018 extensions are pending resolution on appeal and have not been resolved so they can be raised again, here." At this point, all appeals that are available by right have been exhausted, and, as expected, the challenges to the prior Coos County extension decision did not prevail. The hearings officer acknowledges that if the Oregon Supreme Court were to accept review and reverse LUBA, that the county would revisit the decisions in accordance with the guidance provided by the court. At this point, however, that seems to be a highly unlikely scenario.

B. Criteria Governing Extensions of Permits.

Once a development approval has been granted, as happened in this case, an extension may or may not be allowed, based on the criteria found in CCZLDO §5.2.600. Under the terms of CCZLDO §5.2.600, the Planning Director may approve extension requests as an Administrative Action under the local code. Extension decisions are subject to notice as described in CCZLDO §5.0.900(2) and appeal requirements of CCZLDO §5.8 for a Planning Director's decision. The criteria set forth in CCZLDO §5.2.600 were amended on October 2, 2018 (County File No. AM-18-005), and the current version is reproduced below.

New Version:
SECTION 5.2.600 EXPIRATION AND EXTENSION of Conditional Uses

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

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

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

(3) Approval of an extension granted under this rule is not a land use decision as described in ORS 197.015 and is not subject to appeal as a land use decision.
(4) Additional one-year extensions may be authorized where applicable criteria for the decision have not changed.
(5) (a) If a permit is approved for a proposed residential development on agricultural or forest land outside of an urban growth boundary, the permit shall be valid for four years.
(b) An extension of a permit described in subsection (5)(a) of this rule shall be valid for two years.
(6) For the purposes of section (5) of this rule, "residential development" only includes the dwellings provided for under ORS 215.213(3) and (4), 215.284, 215.705(1) to (3), 215.720, 215.740, 215.750 and 215.755(1) and (3).
(7) There are no limit on the number of extensions that can be applied for unless this ordinance otherwise allows.

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

2. *Changes or amendments to areas subject to natural hazards[2] do not void the original authorization for a use or uses, as they do not determine if a use can or cannot be sited, but how it can be sited with the least amount of risk possible. Overlays and Special*

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

Development Considerations may have to be addressed to ensure the use can be sited with an acceptable level risk as established by Coos County.

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

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

The opponents argue that is the old version of CCZDO 5.2.600 (*i.e*. the 2013 version of the extension criteria) apply to this case, as opposed to the current version. For example, in the appeal narrative, the appellants state that

> "[a]ny changes to the provisions since 2010 or since 2013 are not applicable to the extension requests because the provisions in effect at the time of the application constitute the applicable goal posts for subsequent decisions related to the permits. The extension of the permits on non-resource lands has exceeded the applicable time limit of two years."

See Appeal Narrative at p. 2.

ORS 215.427(3) is known as the "no changing of the goal posts" rule. It states:

> *(3)(a) If the application was complete when first submitted or the applicant submits additional information, as described in subsection (2) of this section, within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted.*

The appellants argue that ORS 215.427(3) locks in the extension criteria that govern any further extension request to an approved application to those criteria that were in effect when the application was first approved. The argument is not supported by any rational or plausible reading of ORS 215.427(3), and LUBA has therefore correctly rejected that argument. *See Williams v. Coos County*, ___ Or LUBA ___ (LUBA Nos. 2018-141/142, April 25, 2019), *aff'd w/o op*., 298 Or App 841 (2019).

ORS 215.427(3) is limited to locking in the "standards and criteria" that apply to the application. Nothing in ORS 215.428(3) requires a county to apply standards in effect at the time one development application is submitted to a distinct and subsequent development application. *Tuality Lands Coalition v. Washington County*, 22 Or LUBA 319 (1991). In this case, the application for an extension is governed by different criteria that governed the initial

approval decision, and the filing of the original application does not vest the criteria for an extension.

C. <u>Pacific Connector Has Established Compliance with the Applicable Standards for a Conditional Use Extension Request on Farm and Forest Zoned Lands.</u>

1. **<u>The Applicant Meets the Applicable Criteria Set Forth at § 5.2.600(1)(a)(2)(a).</u>**

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

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

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

This criterion is met because a timely extension request was filed. The applicant submitted written narratives and applications, which specifically request an extension, on March 28, 2019, which is within the development approval period.

This criterion is met.

2. <u>Pacific Connector's request was submitted to the County prior to the expiration of the approval period. § 5.2.600(1)(a)(2)(b).</u>

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

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

The approval period for the fifth extension expired on April 2, 2019, and it was incumbent upon the applicant to submit an extension request prior to that date. The applicant complied with this requirement by submitting the "Application for Extension" on March 28, 2019.

This criterion is met.

3. <u>PCGP was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible. §5.2.600(1)(a)(2)(c) & (d)</u>

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

(2) A county may grant one extension period of up to 12 months if:

* * * * *

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

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

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

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

In Williams v. Coos County, __ Or LUBA __ (LUBA No. 2018-141/ 142, April 25, 2019), *aff'd w/o op.*, 298 Or App 841 (2019) (reconsideration requested), LUBA stated as follows:

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

[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.

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

> RESPONSE: Applicant was prevented from beginning or continuing development within the approval period because the Pipeline has not yet obtained federal authorization to proceed. The Pipeline is an interstate natural gas pipeline that requires pre-authorization by the Federal Energy Regulatory Commission ("FERC"). Until Applicant obtains a FERC certificate authorizing the Pipeline, the Applicant cannot begin construction or operation of the facilities in the County or elsewhere along the Pipeline route. As of the date of this Application, FERC has not yet authorized the Pipeline. Therefore, Applicant cannot begin or continue development of the Pipeline along the alignment that the Approval authorizes.
>
> The County previously accepted this reasoning as a basis to grant a time extension for the Pipeline. First, the County found that the lack of FERC approval meant Applicant could not begin or continue development of the project:
>
> > "In this case, the applicant needs federal approval for the gas pipeline project, and the project cannot commence until those federal approvals are forthcoming. Even the primary opponent to the project, Ms. Jody McCaffree, admits the facts that caused the applicant to be unable to begin or continue development during the approval period, i.e., that [FERC] vacated the federal authorization to construct the pipeline."
>
> *See* County Final Order No. 14-09-063PL, ACU-14-08/AP 14-02, Exhibit 3 at 13. 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, Exhibit 4 at 8.
>
> Further, the delay in obtaining FERC approval of an alignment for the Pipeline has caused other agencies to also delay their review and decision on Pipeline-related permits. The Pipeline is a complex

project that requires dozens of major federal, state, and local permits, approvals, and consultations needed before Applicant and the developer of the related Jordan Cove Energy Project can begin construction. *See* permit list in Exhibit 5 hereto. The County has previously accepted this explanation as a basis to find that a Pipeline-related time extension request satisfies this standard. *See* County Final Order No. 17-11-064PL, File No. AP 17-00/EXT 17-005, Exhibit 6 hereto at 11. Therefore, Applicant has identified reasons that prevented Applicant from commencing or continuing development within the approval period.

In addition, Applicant is not responsible for FERC not yet approving the Pipeline. Applicant has worked diligently and in good faith to obtain all necessary permit approvals. For example, FERC previously approved Applicant's original application for a certificate for an interstate natural gas pipeline in the County. Later modifications to the project nullified that approval, and Applicant applied for a new authorization, which FERC denied. The Board has previously determined that Applicant was not "responsible" for this denial. *See* Exhibit 6 at 10-15.

FERC's denial was *without prejudice*, and Applicant has reapplied for FERC authorization. Applicant has *at all times* since the County issued the Approval, and regardless of FERC's conduct, which the Applicant cannot control, continued to seek the required FERC authorization of the Pipeline. For example, during the 12-month period of the current extension (April 2018-April 2019), Applicant took steps in furtherance of the FERC permitting process. Applicant diligently responded to FERC's requests for additional information in support of the certificate request. *See* record of applicant submittals in the 12-month FERC docket in Exhibit 7. Furthermore, due to delays in its review associated with the shutdown of the federal government, FERC has recently issued a revised schedule extending the deadline for completion of its environmental review and final order for the Jordan Cove Energy Project, which includes the Pipeline. *See* FERC Notice of Revised Schedule for the Environmental Review and the Final Order for the Jordan Cove Energy Project in Exhibit 8. The certificate request is still pending before FERC. *Id*. Applicant is not responsible for FERC's lengthy review process and delays of the same.

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

The hearings officer has reviewed the step taken in the past 12 months by the applicant and argees that such actions are sufficient to show that it is being diligent in pursuing its permits.

The appellants argue that "the applicant has not been diligent in pursuing a dispositive permit." The appellants note, correctly, that DEQ denied its DEQ permit application in part because it did not submit sufficient information to obtain the permit. However, the DEQ permit is an extremely complex permit, and even the letter of denial is 80+ pages long. A project of this scope is unprecedented in Oregon's history, and the learning curve is undoubtedly steep for regulator and regulated alike. Given the massive scope of the project, it would not surprise the hearings officer that it would take 2-3 tries to get the DEQ permit successfully issued. DEQ did invite the applicant to re-apply for the permit, so the hearings officer does not view the DEQ denial as dispositive. Having said that, it may well be the case that the applicant may not be able to meet the DEQ requirements. However, it would be unjust to deny an extension to County land use permits simply because the applicant did not acquire other another complex permit on the first try.

For the same reason, the hearings officer also does not fault the applicant for proposing "significant changes" to the pipeline route. If the applicant did not propose significant changes along the way, the opponents would complain that the applicant is not being responsive to their concerns. Obviously, in a project of this magnitude, there are going to be changes to the project as time goes on. Most of the proposed changes are done to be responsive to FERC and other agencies, which is exactly what is supposed to happen during a complex permitting project. As we have seen in other cases, the applicant is also proposing changes to the projects due to new technology such as HDD bores, that can reduce environmental impacts. The hearings officer will not fault the applicant for proposing changes midstream, and in fact, finds the applicant's willingness to propose changes to be laudable. The opponent's views on this point seem extreme, unworkable, and unjust.

The appeal narrative argues that the fact that the applicant's preferred alignment proposed in the current FERC application is different than the alignment approved by Coos County. *See* Appellant's Narrative, at p. 4. This argument was raised and rejected in the local proceedings that resulted in previous extensions, and is a "collateral attack" on the previous extension approvals.

Nonetheless, to the extent the opponents 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)(a)(2)(c) & (d) 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.

The appellants are also wrong to the extent that they argue that "pursuing additional [required] permits" does not provide valid grounds for granting an extension. The appellant argues that "Development does not mean seeking additional permits within the meaning of the rule." The appellant argues that the applicant is required to start actual construction" in order to be eligible for a permit extension. The argument is not well-developed, and is difficult to follow. However, this argument does not assist the appellants. To be granted an extension, the applicant need only show that "reasons" exist why "development" did not occur. Even assuming the appellant is correct that "development" is the same as "construction / ground breaking" (an issue the hearings officer does not decide), the inability to obtain permits despite reasonable efforts would be a reason to grant an extension despite not breaking ground, unless of course the applicant is somehow foreclosed as a matter of law from obtaining those needed permits. For example, if FERC were to deny the project with prejudice with no opportunity to resubmit the same or substantially similar project, then it would be likely that no further extension of the County permit would issue.

4. <u>The BCC's Decision at Issue Will Constitute a Land Use Decision.</u>

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

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

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

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

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

want to revise this section of the Ordinance to make it consistent with state statutes, and, in the meantime, the hearings officer suggested that it would be appropriate to disregard OAR 660-033-0140(3) and the local provision it had adopted to implement it because it is inconsistent with state statutes.

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

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

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

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

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

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

It continues to be the hearings officer's belief that OAR 660-033-0040(3) violates ORS 197.015(10). Moreover, it is also bad policy. Among other things, it will create a problem for extension decisions that cover land that is partially within resource districts and partially outside of resource districts. In such cases, appellate jurisdiction over the case would likely have to the

split, and that is a problematic outcome on many levels. In any event, this case is being processed as a land use decision, consistent with ORS 197.015(10).

This criterion should not be applied to the facts of this case, because the decision is a land use decision as defined by ORS 197.015(10).

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

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

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

This request is Applicant's sixth request for an extension of the Approval. As a result, the County must find that, for that portion of the alignment located on resource land, "applicable criteria for the decision have not changed." CCZLDO 5.2.600.1.a.(4). The time period that the hearings officer will consider consists of the time period that the last permit extension was in place: April 2, 2018 to April 2, 2019. Legislative Amendments that occurred prior to April 2, 2018 are not relevant to this sixth extension request.

In their appeal narrative, the opponents argue that the following are "criteria" that have "changed."

- 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.
- CCZDLO 5.11.100 to .5.11.300 (Geologic Hazards).Comprehensive Plan Vol 1, Part 1, §5.11 & Part 2, §3.9 Natural Hazard Maps, amended by County File AM-15-03 and County File AM-15-04 (Ord. 15-05-005PL, dated July 30, 2015, which had a delayed effective date of July 30, 2016 and was again delayed until July 30, 2017).[1]
- CCZLDO 5.0.175(1), amended by County File AM 14-11 (Ord. 14-09-012PL dated January 20, 2015, effective April 20, 2015).
- Amendments adopted in AM-18-005.

See Appeal Narrative at p. 2. With regard to the first three bulleted points, these issues are all a collateral attack on previous extension decisions, and cannot be re-raised here. With regard to "AM-18-005," the appellants do not explain what decision they are referring to, and therefore the issue is not developed sufficiently to raise the issue sufficient to allow a response. To the extent that they are referring to the legislative amendments adopted by Ord. 18-09-009PL, that Ordinance is 208 pages long and it is unclear which provisions in that Ordinance would be new approval standards for a pipeline in the EFU zone. The hearings officer can simply not

[1] County Ordinance No. 15-05-005PL—which adopted amendments to the Coos County Comprehensive Plan (CCCP) pertaining to natural hazards— had an original effective date of July 30, 2016. However, on July 19, 2016, prior to the effective date of Ordinance No. 15-05-005PL, the board "deferred" the effective date of Ordinance No. 15-05-005PL to August 16, 2017.

respond to the concern because it is insufficiently developed. Nonetheless, staff testified at the hearing that no approval standards for pipelines were amended in 2018.

In the 2017 Extension Decision, the Board 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. Pursuant to CCZLDO §4.11.125(7), the natural hazard provisions are not "applicable approval criteria" that have changed.

As noted above, the appellants cite to requirements for geologic assessments, including new reporting requirements, which were adopted in July of 2015 and which were delayed until 2017. *See* 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 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. 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.

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. Under CCZLDO §5.0.175, the approvals do not become effective until the entity either obtains landowner consent or property rights necessary to develop the property. As discussed above, CCZLDO §5.0.175 is an alternative to the traditional requirement that an application must include the landowner's signature. CCZLDO §5.0.150. As such, even if CCZLDO §5.0.175 could be an application requirement, it is not necessarily "applicable" because an applicant could always opt to file its application pursuant to CCZLDO §5.0.150 rather than CCZLDO §5.0.175. For the same reason, CCZLDO §5.0.175 is not mandatory in nature. As such, it is not properly construed to be a "criteri[on]."

In *Williams v. Coos County*, __ Or LUBA __ (LUBA No. 2018-141/ 142, April 25, 2019), *aff'd w/o op.*, *aff'd w/o op.*, 298 Or App 841 (2019), LUBA rejected appellants' argument on this point. LUBA stated as follows:

> LDO 5.0.175 took effect in 2015. LDO 5.0.175(1) provides that for an application for a permit "[a] transportation agency, utility company or entity with the private right of property acquisition pursuant to ORS Chapter 35 may submit an application to the Planning Department for a permit or zoning authorization required for a project without landowner consent otherwise required by this ordinance." Differently, LDO 5.0.150(1) provides that an application for a permit "shall include the signature of all owners of the property." Petitioners argue that LDO 5.0.175 is a new "approval criteri[on]" within the meaning of LDO 5.2.600.1(c), and that it applies to the 2010 CUP and the 2013 CUP.
>
> The board of commissioners adopted findings that LDO 5.0.175 is not an "approval criteri[on]" but rather is an application submittal requirement. The board of commissioners also adopted alternative findings that even if LDO 5.0.175 is an "approval criterion," it is not "applicable" to the 2010 CUP and the 2013 CUP, because it is an optional provision that allows certain entities to choose to apply for a permit without landowner consent. Petitioners argue that in its decision approving the 2010 CUP, the county concluded that LDO 5.0.150 is an "approval criterion," and accordingly, the county must also conclude that LDO 5.0.175 is an approval criterion, and not merely a submittal requirement.
>
> As intervenor points out, petitioners' argument does not address the board of commissioners' alternative finding that, even if LDO 5.0.175 could constitute an "approval criterion," it is not an "applicable" approval criterion within the meaning of LDO 5.2.600.1(c) because it merely provides an alternative, optional pathway for certain entities to apply for a permit. We agree with intervenor that absent any challenge to that finding, petitioners' argument provides no basis for reversal or remand.

The appellants' arguments provide no basis for denial of another extension.

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

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

> *(5) (a) If a permit is approved for a proposed residential development on agricultural or forest land outside of an urban growth boundary, the permit shall be valid for four years.*

(b) An extension of a permit described in subsection (5)(a) of this rule shall be valid for two years.

(6) For the purposes of section (5) of this rule, "residential development" only includes the dwellings provided for under ORS 215.213(3) and (4), 215.284, 215.705(1) to (3), 215.720, 215.740, 215.750 and 215.755(1) and (3).

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

7. The Code Allowed for Multiple Extensions.

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

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

This provision provides express authority for the County to grant multiple extensions of the approval. This is the sixth one-year extension, with previous extensions being granted in 2014, 2015, 2016, 2017, and 2018.

D. <u>Pacific Connector Has Established Compliance with the Applicable Standards for a Conditional Use Extension Request on Non-Farm and Non-Forest Zoned Lands.</u>

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

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

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

The land use approval does not involve property that has been reconfigured through a property line adjustment or land division nor does it involve property that has been rezoned since the date the County granted the approval in 2012. Therefore, the approval is eligible for an extension.

The applicant has included a completed and signed county extension application form and the required application fee with this request. The County received the extension request on March 28, 2019, which was before the expiration of the approval period. Therefore, the application meets the requirements of this provision.

The appellants argue that "the county erred in giving the applicant additional CUP extensions on non-resource lands for four years." Not only does the amendment not apply, even if it did, these permits are not eligible for a four-year extension because they were "subject to an expiration date of four years." *See* Appeal Narrative at p. 2. Opponent's argument is exceedingly difficult to follow, and simply lacks any coherent thought process sufficient to articulate a reviewable legal issue. Moreover, the argument is not supported by any developed legal argument. The hearings officer will not independently attempt to develop incoherent statements set forth in an appeal. Whatever issue was attempted to be raised is not sufficiently preserved to enable review.

To the extent that the appellants are arguing that the previous "2 year" time period applies with only one possible two-year extension available (for a total of four years), that argument is rejected. The code allowed for additional extensions to be submitted. In any event, even if the challenge were valid it has long since been waived; this is the sixth extension and the issue could have been raised beginning in 2016.

E. <u>CCZLDO §5.2.600(2) Provides No Reason for Denial.</u>

The appellants argue that CCZLDO §5.2.600(2)(2018) is 'beyond the scope of the County's authority." This provision states:

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

In the appeal narrative, the appellants argue:

> "[A]pplication of CCZLDO 5.2.600(2)(as amended in 2018) is beyond of the scope of the County's authority. As understood[,] it is an attempt to avoid the application of the hazard-related criteria

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

> 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.

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

Nonetheless, to the extent the hearings officer understands the issue, it appears to be similar to an argument raised and rejected by LUBA in *Williams v. Coos County,* __ Or LUBA __ (LUBA No. 2018-141/ 142, April 25, 2019), *aff'd w/o op*., __ Or App ___ (2019). The proper time for appealing the new language set forth in CCZLDO 5.2.600(2)(2018) was at the time of adoption. Any current attempt to declare CCZLDO 5.2.600(2)(2018) inconsistent with state law is a collateral attack on the legislative enactment and is waived.

This criterion is met.

F. <u>Other Issues Raised by Opponents.</u>

1. Right of Condemnation: Alleged Violation of CCZDLO 5.0.150(1) and CCZLDO 5.0.175(1).

The appellants argue that the county is violating CCZLDO 5.0.150(1) & 5.0.175(1) because the applicant no longer has the right of condemnation pursuant to ORS Chapter 35. The opponents base their argument on the fact that PCGP's right of condemnation stems from federal law and is premised on the acquisition of a Certificate of Public Convenience and Necessity. They argue that since PCGP lost its certificate, it may no longer file land use applications.

As previously noted, CCZLDO 5.0.150(1) and CCZLDO §5.0.175 are not approval criteria for a permit extension. *Williams v. Coos County,* __ Or LUBA __ (LUBA No. 2018-141/ 142, April 25, 2019), *aff'd w/o op*., 298 Or App 841 (2019).

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

pipeline matter was conditioned to require the applicant to obtain landowner signatures. The applicant will have to obtain a FERC Certificate in order to effectuate that condition.

Moreover, whatever the merits of this argument, this issue could have been raised in any of the five other land use applications that resulted in permit extensions. The issue is not jurisdictional, and therefore the issue can be, and has been, waived. For these reasons, the hearings officer does not agree with the opponent's understanding of CCZLDO 5.0.150 or CCZLDO 5.0.175. Having said that, it remains the fact that the County permits cannot be acted upon unless and until FERC issues a Certificate of Public Convenience and Necessity.

2. CCZLDO Section 5.0.500 Does Not Apply.

On page 1 of the Appeal Narrative, appellants argue that the County violated CCZLDO §5.0.500, which provides as follows:

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

Th appellants argue that CCZLDO §5.0.500 is violated because the County failed to deem the original permit automatically revoked because a different alignment was submitted to FERC. However, any application submitted to FERC is not an "application for a land use" within the meaning of this provision. Moreover, the decision for which this extension is being sought is no longer "pending," so CCZLDO §5.0.500 does not apply to this case.

3. The Appellant's "Takings" Argument Lacks Merit.

In the appeal narrative, the opponents argue that the "extensions continue to impose a taking on property of the landowners along the alignment through inverse condemnation." *See* Appeal narrative at p. 3. The hearings officer addressed this issue in previous extension decisions and the answer has not changed since then. This argument does not relate to an approval standard for an extension, and therefore provides no basis for a denial of the extension.

4. Argument that Original Alignment Became Void in 2015 because the Extension Request was Untimely.

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 public hearing, 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.

The appellants now seek to revisit the decision to grant the second extension, because they argue that the appeal was filed three days late (i.e. on March 16, 2016 instead of the deadline they assume to apply: March 13, 2016). *See* Appeal Narrative, at p 2. However, the premise of the argument, which is that the permit expired on March 13, 2015, appears to be incorrect. The argument is based on the fact that the Board of Commissioners signed the "Oyster Remand" decision on March 12, 2012. However, CCZLDO §5.0.250 delays the effective date of the decision until after the 21-day appeal period to LUBA has run:

> *SECTION 5.0.250 TIMETABLE FOR FINAL DECISIONS (ORS 215.427):*
>
> ******
>
> *4. Time periods specified in this Section shall be computed by excluding the first day and including the last day. If the last day is a Saturday, Sunday, legal holiday or any day on which the County is not open for business, the time deadline is the next working day. [OAR 661-010-0075]*
>
> *5. The period for expiration of a permit begins when the appeal period for the final decision approving the permit has expired and no appeals have been filed, or all appeals have been exhausted and final judgments are effective.*

For this reason, the appellants are wrong when they assert that the extension needed to be filed on, or prior to, March 13, 2015. The correct "deadline" date was April 2, 2015, and the applicant complied with this requirement by submitting on March 16, 2015.

In addition to being wrong on the merits, any argument directed at the second extension is a collateral attack on Final Decision No. 15-08-039PL. it is simply too late to revisit that decision here. The appellants seek to avoid the collateral attack doctrine by stating that the decision became "null and void." Although the appellants do not develop the argument, the hearings officer understands that they seek to argue that a decision that is "null and void" can be attacked at any time. Appellant cites only to the definition of "land use decision" and states that "the rule that CCZLDO implements uses the same term so there is no authority for the Director to interpret the term differently." Appeal Narrative at p. 5. The appellant's argument is difficult to follow, and reads like pure gibberish. The hearings officer suggest that in future cases, appellants should take more time to explain their arguments in detail and with organization and full citation to legal authority, instead of writing in a "stream of consciousness" fashion. In any event, in this case the appeal narrative is not drafted in a sufficiently coherent manner to enable review. The hearings officer will not conduct extensive independent research to develop the argument on the appellant's behalf.

III. CONCLUSION.

To summarize this case, 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 April 2, 2020. The hearings officer recommends to the Coos County Board of Commissioners that they so find, thereby affirming the Planning Director's June 21, 2019 decision granting the one (1) year CUP in County File No. HBCU 10-01 / REM 11-01 to April 2, 2019 (EXT-19-04), subject to the conditions of approval set forth in the Planning Directors' decisions.

As a caveat to the above recommendation: this recommendation is premised on the correctness of the LUBA decision in *Williams v. Coos County*, __ Or LUBA __ (LUBA No. 2018-141/ 142, April 25, 2019), *aff'd w/o op*., 298 Or App 841 (2019). In the highly unlikely event that the Court of Appeals reconsiders its decision or the Oregon Supreme Court accepts review and reverses LUBA's decision before the Board of Commissioners issues a final decision in this matter, the hearings officer recommends that the Board revisit this recommendation, and seek advice from the County Counsel on how to proceed.

Respectfully submitted this 10th day of October, 2019.

Andrew H. Stamp
Hearings Officer