

BOARD OF COMMISSIONERS  
COUNTY OF COOS  
STATE OF OREGON

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2  
3 IN THE MATTER OF APPROVING AN )  
4 EXTENSION REQUEST APPLIED FOR BY ) FINAL DECISION AND ORDER  
5 PACIFIC CONNECTOR GAS PIPELINE, LP ) NO. 19-11-069PL  
6 AND APPEALED BY DODDS AND RANKER )

7 NOW BEFORE THE Board of Commissioners sitting for the transaction of County  
8 business on the 26<sup>th</sup> day of November, 2019, is the matter of the appeal of the Planning  
9 Director's June 21, 2019, decision granting Pacific Connector Gas Pipeline, LP's (hereinafter  
10 the "Applicant") application for approval of an extension to a conditional use approval for  
11 the construction and operation of a natural gas pipeline to provide gas to Jordan Cover  
12 Energy Project's liquefied natural gas (LNG) terminal and upland facilities.

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

18 Hearings Officer Stamp conducted a public hearing on this matter on September 30,  
19 2019. At the conclusion of the hearing the record was closed.

20 Hearings Officer Stamp issued his Analysis, Conclusions and Recommendations to  
21 the Board of Commissioners on October 10, 2019. Staff presented some minor revisions to  
22 the Findings of Fact; Conclusions of Law and Final Decision for the Board of Commissioners  
23 to consider.

24 The Board of Commissioners held a public meeting to deliberate on the matter on  
25 November 15, 2019. All members present and participating unanimously voted to  
tentatively accept the decision of the Hearings Officer, and continued the final decision on

1 the matter to allow staff to draft the appropriate order and findings. The meeting was  
2 continued to November 26, 2019, for final approval.

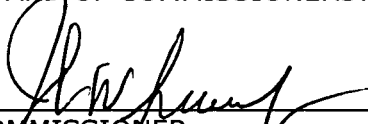
3 On November 15, 2019, the meeting on deliberation was opened to provide an  
4 additional opportunity to the Board of Commissioners to declare any potential ex-parte  
5 contacts or conflicts of interest. All Commissioners revealed potential ex-parte  
6 communications and those present were allowed to challenge and rebut the substance of  
7 the Commissioner's disclosure.


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

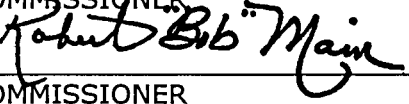
11 IT IS HEREBY ORDERED that the Planning Director's June 21, 2019, decision granting  
12 Pacific Connector Gas Pipeline, LP's (hereinafter the "Applicant") application for approval of  
13 an extension to the conditional use approval for the construction and operation of a natural  
14 gas pipeline is affirmed, and the Board further adopts the Findings of Fact; Conclusions of  
15 Law, and Final Decision attached hereto as "Attachment A" and incorporated by reference  
16 herein.

17 ADOPTED this 26th day of November 2019.

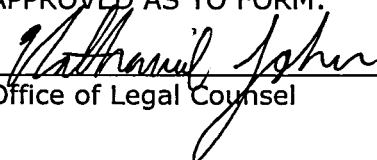
18 BOARD OF COMMISSIONERS:

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RECORDING SECRETARY

APPROVED AS TO FORM:  
  
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Office of Legal Counsel

**ATTACHMENT "A"**  
**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND**  
**FINAL DECISION OF 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).**

**NOVEMBER 26, 2019**

## I. INTRODUCTION

The Board of Commissioners (“Board”) has received and reviewed the record of proceedings and the Hearings Officer’s Analysis, Conclusions, and Recommendations to the Coos County Board of Commissioners dated October 10, 2019 (“Recommended Order”). In this decision, the Board adopts the Recommended Order, as modified, denies the appeal, and approves the requested application.

### A. Nature of the Local Appeal

The appellants appealed the Planning Director’s decision to allow the applicant Pacific Connector Gas Pipeline, LP, (hereinafter “Applicant” or “Pacific Connector”), an additional one-year extension to implement 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 Pacific Connector’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 Board adopted the Hearings Officer's recommendation 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 13, 2013, Pacific Connector 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, Pacific Connector 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 these 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 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).

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 Board 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 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 Pacific Connector's application for a Certificate. Nonetheless, on March 16, 2016, Pacific Connector 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 Pacific Connector can file again if it wishes to do so. *See* FERC Order dated March 11, 2016 at 21. On April 8, 2016, Pacific Connector 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.

Pacific Connector 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, Pacific Connector 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, Pacific Connector submitted a 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, 2018, Pacific Connector submitted a third extension request for the Brunschmid and Stock Slough alignments. The Planning Director approved this extension on





Appellants state that they “object to the numerous errors stated in the Planning Director’s decision’s ‘background’ statement because many statements are not true and they are not supported by substantial evidence.” The Board finds that appellants’ generalized statement 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 identify 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.” As stated above, opponents’ appeals of the 2018 extensions failed at both LUBA and the Oregon Court of Appeals. Further, the Court of Appeals denied opponents’ petition for reconsideration. Accordingly, all appeals that are available by right have been exhausted.

## **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<sup>[1]</sup> 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 than 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.**

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

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

CCZLDO 5.2.600. 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 contend that a previous version of CCZLDO 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 “goal post” statute. It states that the law that applies to a land use application is the law in effect on the date the application is filed:

**(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.**

Appellants are correct that the “goal post” statute applies to Pacific Connector’s application, though it does not have the effect appellants contend that it does. The version of CCZLDO 5.2.600 in effect when Pacific Connector filed its application (March 29, 2019) was adopted in

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

2018. Pursuant to ORS 215.427(3), the 2018 version of CCZLDO 5.2.600 applies to the application. Although the appellants contend that ORS 215.427(3) locks in the extension criteria that govern any further extension request to an approved permit to those criteria that were in effect when the original permit application was first approved, the Board finds that this contention is not supported by any plausible reading of ORS 215.427(3), and LUBA has therefore correctly rejected appellants' contention. *See Williams v. Coos County*, \_\_\_ Or LUBA \_\_\_ (LUBA Nos. 2018-141/142, April 25, 2019), *aff'd without opin.*, 298 Or App 841 (2019).

ORS 215.427(3) is limited to locking in the "standards and criteria" that apply to the particular pending 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 than governed the initial approval decision, and the filing of the original application does not vest the criteria for an extension.

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

**1. The Applicant Meets the Applicable Criteria Set Forth at § 5.2.600.1.a.(2)(a).**

CCZLDO §5.2.600.1.a.(2)(a) provides as follows:

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

The Board 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. Pacific Connector submitted a written narrative and application, which specifically requests an extension, on March 28, 2019, which is within the development approval period.

This criterion is met.

**2. Pacific Connector's request was submitted to the County prior to the expiration of the approval period. § 5.2.600.1.a.(2)(b).**

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 Pacific Connector to submit an extension request prior to that date. Pacific Connector complied with this requirement by submitting the “Application for Extension” on March 28, 2019.

This criterion is met.

**3. Pacific Connector 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)**

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<sup>[1]</sup> 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 than 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 Board must find that Pacific Connector has stated reasons that prevented it from beginning or continuing development within the current approval period (*i.e.* since the last extension was applied for and granted), and Pacific Connector is not responsible for the failure to commence development. CCZLDO 5.2.600.1.a.(2)(c), (d).

In the recent appeal of two other pipeline extension decisions, LUBA affirmed (and quoted) the County’s determination that applied a “reasonable efforts” test to determine whether

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<sup>[1]</sup> 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.

Pacific Connector was responsible for not yet obtaining permits from other agencies to allow development of the pipeline to proceed:

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.

*Williams v. Coos County*, \_\_\_ Or LUBA \_\_\_ (LUBA Nos. 2018-141/ 142, April 25, 2019), *aff'd without opin.*, 298 Or App 841 (2019). The Board finds that Pacific Connector has presented credible evidence to support that it has made reasonable efforts in this case. In support of this conclusion, the Board relies upon the following:

In its application narrative for the extension, Pacific Connector explains why it has not begun construction on this 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.

Continuing, Pacific Connector further states:

Likewise, in granting a previous extension of an approval for a different alignment of the Pipeline, the County Planning Director stated:

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

See Director’s Decision for County File No. ACU-16-003, 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 Board has reviewed the evidence in the record regarding the implementing steps taken in the past 12 months by Pacific Connector and agrees that such actions are sufficient to show that Pacific Connector is being diligent in pursuing its permits. The Board agrees with the above-quoted analysis from Pacific Connector and adopts it as findings for this case.

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. DEQ did invite Pacific Connector to re-apply for the permit, so the DEQ denial is not dispositive of the project. Under these circumstances, it would be unjust to deny an extension to the County permit.

For the same reason, the Board also does not fault Pacific Connector for proposing “significant changes” to the pipeline route. If Pacific Connector did not propose significant changes along the way, the opponents would complain that Pacific Connector 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. The Board will not fault Pacific Connector for proposing changes midstream, and in fact, finds Pacific Connector's willingness to propose changes to be laudable. The opponents' views on this point seem extreme, unworkable, and unjust.

The appeal narrative argues that the fact that Pacific Connector's preferred alignment proposed in the current FERC application is different than the alignment approved by Coos County disproves Pacific Connector's claim that the delay in the FERC proceedings is actually holding up implementation of the County permit. *See* Appellant's Narrative, at p. 4. This argument was raised and rejected by the Board in the local proceedings that resulted in previous extensions and is a “collateral attack” on the previous extension approvals. Moreover, LUBA affirmed the Board's previous determination on appeal:



“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).”

*Williams*, \_\_ Or LUBA at \_\_ (slip op. at 10).

Nonetheless, to the extent the opponents have raised a viable argument, they have simply not developed it sufficiently to allow the Board to understand how it relates to an approval standard for an extension, or why it should succeed on the merits. As best the Board can tell, the argument is intended to relate to CCZLDO 5.2.600.1.a.(2)(c) and (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 Pacific Connector 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 contend that “pursuing additional [required] permits” does not provide valid grounds for granting an extension. They contend that Pacific Connector 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, Pacific Connector need only show that “reasons” exist why “development” did not occur. Even assuming the appellants are correct that “development” is the same as “construction / ground breaking” (an issue the Board does not decide), the inability to obtain permits despite reasonable efforts would be a reason to grant an extension despite not breaking ground, unless Pacific Connector is somehow foreclosed as a matter of law from obtaining those needed permits.

#### **4. The Board’s Decision at Issue Will Constitute a Land Use Decision.**

CCZLDO § 5.2.600.1.a.(3) provides as follows:

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

Notwithstanding the language in this subsection, at Pacific Connector’s request, the County has processed this request pursuant to the City’s Type II procedures. The Board finds that the Type II process has provided for greater public notice and opportunity for public comment (including an appeal hearing and Board-level decision) than would have occurred if the County followed the process under this subsection. Further, the Board finds that the County’s

land use decision is a final land use decision, and appeal of that decision will be as determined by Oregon law, not this code section.

**5. The Criteria Governing the Pipeline Permit Have Not Changed.**

CCZLDO § 5.2.600.1.a.(4) provides as follows:

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

This request is Pacific Connector’s sixth request for an extension of the original 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 Board 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.
- ❖ CCZLDO 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).<sup>1</sup>
- ❖ 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 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 Board can simply not 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.

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<sup>1</sup> 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.

In a 2017 permit 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. LUBA and the Court of Appeals affirmed the Board’s analysis on this point. *Williams*, \_\_\_ Or LUBA at \_\_\_ (slip op. at 11-13), *aff’d* 298 Or App 841 (2019). In the present case, opponents have not provided a sufficient legal basis for the Board to find that LUBA and the Court of Appeals erred. Therefore, 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 Pacific Connector 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. LUBA and the Court of Appeals affirmed the Board’s analysis on this point. *Williams*, \_\_\_ Or LUBA at \_\_\_ (slip op. at 13-15), *aff’d* 298 Or App 841 (2019). In the present case, opponents have not provided a sufficient legal basis for the Board to find that LUBA and the Court of Appeals erred. Therefore, as presented, appellants’ contention provides no basis for determining that these new requirements are changes in the law that would constitute approval standards for a pipeline permit.

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 without opin.*, 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.

In the present case, appellants have not established that CCZLDO 5.0.175 is an "applicable" criterion or presented any other contentions that would allow the Board to reach a different conclusion than LUBA did. Therefore, the appellants' contentions 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 original approval did not authorize any residential development on agricultural or forest land outside of an urban growth boundary. The Board 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 original approval. This is the sixth one-year extension, with previous extensions being granted in 2014, 2015, 2016, 2017, and 2018.

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

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.**

Pacific Connector 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 original 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 original approval. Therefore, the original approval is eligible for an extension.

Pacific Connector 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. Moreover, the Board finds that the appellants’ contention is exceedingly difficult to follow and is not adequately developed for 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. CCZLDO 5.2.600(2) Provides No Reason for Denial.**

CCZLDO 5.2.600(2)(2018) reads as follows:

***2.Changes or amendments to areas subject to natural hazards<sup>[2]</sup> 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 contend that the County lacks the authority to apply this section:

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

“[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 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 Board finds that this contention is conclusory in nature and appears to reflect a policy disagreement, as opposed to making an argument based on applicable law. Appellants make no attempt to support the argument in any manner or to explain that “rule” to which they refer. The issue is simply not raised with sufficient specificity to give fair notice of the nature of the problem. For this reason alone, the Board denies appellants’ contention on this issue.

Nonetheless, to the extent the Board 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 without opin.*, 298 Or App 841 (2019). The proper time for appealing the new language set forth in CCZLDO 5.2.600(2)(2018) was at the time of adoption. In fact, Ms. McCaffree did appeal these amendments to LUBA; however, she did not raise this issue and also did not prevail on appeal. *McCaffree v. Coos County*, \_\_ Or LUBA \_\_ (LUBA No. 2018-132, June 6, 2019). 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. Other Issues Raised by Opponents.**

**1. Right of Condemnation: Alleged Violation of CCZLDO 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 Pacific Connector’s right of condemnation stems from federal law and is premised on the acquisition of a Certificate. They argue that since Pacific Connector 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 without opin.*, 298 Or App 841 (2019).

As noted, Pacific Connector has applied for a Certificate from FERC. The fact that such a Certificate was previously issued to Pacific Connector is at least indicative that it is plausible for another Certificate to be issued to Pacific Connector in the future. In other words, Pacific Connector 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 County's original approval for the pipeline matter is conditioned to require Pacific Connector to obtain landowner signatures. Pacific Connector must obtain a Certificate in order to effectuate that condition. Granting this extension does not modify or eliminate that condition. As a result, the consent issue will be resolved before the original approval, as extended, is implemented.

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 Board 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.

## **2. CCZLDO Section 5.0.500 Does Not Apply.**

On page 1 of the Appeal Narrative, appellants contend 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 contend 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 Appellants' "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 Board 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. Contention 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 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.

The appellants now seek to revisit the decision to grant the second extension, because they argue that the application 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 contention, which is that the permit expired on March 13, 2015, appears to be incorrect. The contention is based upon the fact that the Board 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):**

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**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 Board understands this contention to be that a decision that is "null and void" can be attacked at any time. Appellants 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 appellants' contention is difficult to follow. In any event, in this case the appeal narrative is not drafted in a sufficiently coherent manner to enable review. The Board will not conduct extensive independent research to develop the argument on the appellant's behalf.

## 5. Allegations of *Ex Parte* Communications and Bias

At the November 15, 2019 Board deliberation hearing, Board members were provided an opportunity to disclose any *ex parte* contacts as described in ORS 215.422 and 197.835(12), conflicts of interest as described in ORS 244.120, and any actual bias regarding the application. *1000 Friends of Oregon v. Wasco County Court*, 304 Or 76, 747 P2d 39 (1987). Board members made disclosures, including Commissioner Sweet disclosing his attendance at a 2014 civic luncheon at which elements of the broader JCEP and Pacific Connector project were discussed.

Natalie Ranker and Jody McCaffree contended that Commissioners were biased and should not participate in the deliberations or decision for the application. The Board finds that most of these allegations were previously raised and rejected by the Board in a land use proceeding involving a related land use development proposed by Jordan Cove Energy Project L.P. (“JCEP”) (County File Nos. HBCU-15-05 / CD-15-152 / FP-15-09, August 30, 2016 and AP-18-18-002 November 20, 2018). Opponents then raised these issues on appeal to LUBA:

“McCaffree alleges that Chair Sweet was biased in favor of the proposed LNG terminal. According to McCaffree, on April 22, 2016, Chair Sweet sent a letter, on county letterhead, to FERC expressing support for the Jordan Cove LNG terminal and Pacific Connector Pipeline Project applications then pending before FERC. Supplemental Record 527. In addition, McCaffree quotes Chair Sweet as making public statements in support of the Jordan Cove project. *Id.* at 529-30. McCaffree contends that the letter and statements demonstrate that Chair Sweet was incapable of deciding the land use application pending before the county with the requisite impartiality.”

*Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346, 369-370 (2017). After discussing the high bar for disqualifying bias in local land use proceedings, LUBA denied McCaffree’s assignment of error and concluded that then-Chair Sweet was not actually biased:

“We disagree with McCaffree that Chair Sweet’s April 11, 2016 letter, or his public statements, demonstrate that Chair Sweet was incapable of determining the merits of the land use application based on the evidence and arguments presented.

\* \* \* \*

“As far as McCaffree has established, Chair Sweet’s statements of support of the LNG terminal represent no more than the general appreciation of the benefits of local economic development that is common among local government officials. Those statements fall far short of demonstrating that Chair Sweet was not able to make a decision on the land use application based on the evidence and arguments of the parties.”

*Oregon Shores Conservation Coalition*, 76 Or LUBA at 370-71. The Court of Appeals affirmed LUBA’s decision on this issue. *Oregon Shores Conservation Coalition v. Coos County*, 291 Or

App 251, 416 P3d 1110 (2018). The Supreme Court denied review on this issue. *Oregon Shores Conservation Coalition v. Coos County*, 363 Or 481, 291 Or App 251 (2018). The Board finds that none of the challengers explain why a different outcome is warranted in the present case.

The Board denies the current contentions as follows:

Agreement between Pacific Connector and County: The Board denies the contention that the Board members were biased due to a 2007 agreement between Pacific Connector and the County pursuant to which Pacific Connector pays the County \$25,000 a month. The challengers did not adequately explain the terms of the agreement, how they were related to the specific matter pending before the Board, or how the existence of the agreement would cause any of the Board members to prejudice the application. As a result, the Board finds that the facts alleged by Ms. McCaffree are not sufficient to establish disqualifying actual bias by any Board members.

Reports of JCEP Funding for County Sheriff's Office: For three reasons, the Board denies the 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 Pacific Connector. Second, challengers have not adequately explained how the existence of this funding would cause any Board members to prejudice the application (which is not related to funding of the Sheriff's Office), and they have not identified any "statements, pledges or commitments" from any Board members that the existence of the funding has caused them to prejudice the application. Third, the Sheriff's Office funding is not contingent upon approval of the application. Therefore, the challengers have not demonstrated that any Board member demonstrated "actual bias" due to this funding.

Letter from Commissioner Sweet to FERC: The Board denies Ms. McCaffree's contention that Commissioner Sweet was biased due to a letter he wrote to FERC in support of the project in April 2016. Ms. McCaffree did not adequately explain the content of the letter, or how it related to the specific matter pending before the Board. Additionally, the Board finds that, even if the facts alleged by Ms. McCaffree are correct and Commissioner Sweet did express general support for the project in the letter to FERC, the requests pending before FERC are not of the same nature as the application at issue in this proceeding. In other words, the letter does not demonstrate that Commissioner Sweet has prejudged the specific applications pending before the County or that he is unable to objectively apply the County's approval criteria to the application. Finally, as noted above, the Board finds that LUBA, the Court of Appeals, and the Supreme Court all previously concluded that the statements in question simply reflected a generalized support for economic development in the community. As a result, the Board finds that the facts alleged by Ms. McCaffree are not sufficient to establish disqualifying actual bias by Commissioner Sweet.

Statements Made by Commissioners in 2014 and 2015: The Board denies the contention that Commissioners Sweet and Cribbins were biased due to statements they made to the media about the project in 2014 and 2015. The facts alleged by the challengers are not supported by substantial evidence because they did not provide enough details about the statements such as their substance, their timing, or their context, or how they demonstrate prejudgment by the Board members. Further, the Board finds that all of these statements appear to predate the filing of the

application and thus they could not relate to the specific matter pending before the Board. Finally, the Board notes that LUBA, the Court of Appeals, and the Supreme Court all previously concluded that the statements in question simply reflected a generalized support for economic development in the community. The Board finds that the facts alleged by the challengers are not sufficient to establish disqualifying actual bias by any Board members.

Private Meetings Between Pacific Connector and Board Members: The Board denies Ms. McCaffree's contention that Board members were biased due to their attendance at private meetings with Pacific Connector. The facts alleged by Ms. McCaffree are not supported by substantial evidence because she did not provide any details about the meetings such as when and where they occurred, what was discussed, how they related to the matter pending before the Board, or how they would cause the Board members to prejudge the Application. As a result, the Board finds that Ms. McCaffree has not alleged facts sufficient to establish disqualifying actual bias arising from the alleged meetings.

Trip to Colorado: The Board denies the contention that Commissioner Sweet's trip to Colorado in September 2018 caused him to be actually biased in the matter. The record reflects that, on the trip, Commissioner Sweet learned more about the natural gas market and met with elected officials. Challengers did not present any evidence that tied the trip to Pacific Connector or the specific matter pending before the Board. Challengers also did not identify with specificity why the existence of the trip caused Commissioner Sweet to be biased.

Campaign Contribution by JCEP to Commissioner Sweet: The Board denies the contention that a cash contribution by JCEP to Commissioner Sweet's campaign caused him to be biased. Commissioner Sweet acknowledged the campaign contribution on the record. The challengers did not explain why this disclosure was inadequate or what bearing the existence of the contribution has on the ability of Commissioner Sweet to render an unbiased decision. Under similar circumstances, LUBA rejected a bias claim. *Crook v. Curry County*, 38 Or LUBA 677, 690 n 17 (2000) (mere existence of campaign contribution by a party to a decision-maker does not cause the decision-maker to be biased).

Ms. Ranker echoed many of the circumstances identified by Ms. McCaffree, but she did not offer any additional evidence or legal authority to support these allegations.

Finally, before taking final action to approve these findings, each of the Board members 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 denies the bias and *ex parte* challenges in this case.

No other challenges were made, and Board members participated in the deliberations and the decision.

### 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 sets of standards for granting an extension. For granting an extension on *resource lands*, Pacific Connector must, among other things, show it was unable to begin construction for reasons out of its control. The Board finds that, despite Pacific Connector's diligent pursuit of the federal approvals required, those approvals have not yet been secured, and thus Pacific Connector was unable to commence its development proposal before the expiration date for reasons beyond Pacific Connector's control.

For granting an extension on *non-resource lands*, CCZLDO 5.2.600 requires that Pacific Connector show, among other things, that the proposed use is still listed as a conditional use in the relevant non-resource zones under the current zoning regulations, that the subject property has not been reconfigured through a property line adjustment or land division, and that the subject property has not been rezoned. For the reasons explained in this decision, the Board finds that the application meets these criteria 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 one-year extension of the original approval. Accordingly, the Board denies the appeal and affirms the Planning Director's June 21, 2019 decision granting the one-year time extension in County File No. HBCU 10-01 / REM 11-01 to April 2, 2020 (EXT-19-004).

Adopted this 26<sup>th</sup> day of November, 2019.