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Jill Rolfe, Planning Director

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## STAFF REPORT

Friday, June 21, 2019

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

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

**FILE NUMBER:** EXT-19-004

**DECISION:** APPROVED

**APPEAL DEADLINE** Monday, July 01, 2019 at 12:00 p.m.

### I. RELEVANT CRITERIA:

Coos County Zoning and Land Development Ordinance (CCZLDO)

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

660-033-0010 Purpose

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

**II. PROPERTY LOCATION:** The original conditional use application was approved for a natural gas pipeline referred to as the “Original Alignment” (County Order No. 12-03-018PL, County File Nos. HBCU-10-01/REM-11-01)

### III. BACKGROUND:

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

The applicant has been working toward obtaining all state and federal approvals necessary to initiate construction, however, the process is ongoing and it was found to be impossible complete within the original two-year County approval period, Pacific Connector filed a request with the County on March 7, 2014 to extend its original land use approvals for two additional years (ACU-14-08). The Planning Director approved this request on May 2, 2014, pursuant to provisions of CCZLDO § 5.0.700. The Planning Director’s decision was appealed on May 27, 2014 (AP-14-02).

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

On March 16, 2015, Pacific Connector filed a request for a second extension of the land use approvals for the original Pipeline alignment. File No. ACU-15-07. Staff reviewed the matter, deemed the application complete on April 8, 2015, and the Planning Director rendered a decision approving the extension request on April 14, 2015. The approval was appealed on April 30, 2015. File No. AP-15-01. After 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 16, 2016 the applicant's attorney filed for an extension and it was approved on April 5, 2016 (ACU-16-013). This decision was not appealed and was valid until April 2, 2017. The applicant's attorney submitted a subsequent extension as the applicant (EXT-17-05) that was approved granting an extension to the effective time to April 2, 2018. The prior extension was submitted on March 30, 2018 prior to the expiration date (EXT-18-003) and was appealed. Copies of the extensions are on file with the Planning Department. The last extension was approved on November 20, 2018 (County File Nos. AP-18-002/EXT-18-003). This extended the approval date to April 2, 2019. Opponents appealed this decision to the Land Use Board of Appeals. The County staff received the LUBA decision on April 25, 2019. The decision made by LUBA was to affirm the county's prior decision. Issues that have been raised in prior appeals should be raised in this current appeal. Therefore, if this decision is appealed there will be no arguments accepted regarding the criteria that applicant shall comply with.

The current application for extension was received on March 28, 2019 via email followed by a hardcopy on March 29, 2019. The applicant has requested decisions on extensions be processed as a land use decisions. The County has decided in this situation that there may be discretion applied and; therefore, chooses to be conservative in their approach and provide a notice of decision and opportunity to appeal.

The application was found to be completed and met the submittal criteria on April 26, 2019 (within 30 days).

An extension of the County approval for the original is the sole subject of this application and arguments regarding changes to the original route or argument beyond the criteria found in Section 5.2.600 Expiration and Extension of Conditional Uses will not be accepted.

An extension shall be received prior the expiration date of the conditional use or the prior extension.

Coos County updated the zoning ordinance to incorporate extension language to follow OAR 660-033-0140 permit expiration dates for any permit that is subject to Farm and Forest Zones. The County was appealed on this text amendment. However, the County was affirmed on the text amendment on June 6, 2019. Staff has been reviewing the history and intent of the OAR 660-033-0140 due to the prior appeals just for clarification and has included the relevant background information for guidance to this decision and to help understand how OAR 660-033-0140 applies.

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

***ORS 215.417 Time to act under certain approved permits; extension.***

***(1) If a permit is approved under ORS 215.416 for a proposed residential development on agricultural or forest land outside of an urban growth boundary under ORS 215.010 to 215.293 or 215.317 to 215.438 or under county legislation or regulation, the permit shall be valid for four years.***

***(2) An extension of a permit described in subsection (1) of this section shall be valid for two years.***

***(3) For the purposes of this section, "residential development" only includes the dwellings provided for under ORS 215.213 (3) and (4), 215.284, 215.317, 215.705 (1) to (3), 215.720, 215.740, 215.750 and 215.755 (1) and (3).***

Staff has determined that notice should be provided in the event that discretion has been applied even though it is not required. There is nothing in the OAR that prevents the county for taking a conservative approach and sending notice with the opportunity to appeal on the limited criteria for extensions. Staff is not legally changing the authority that LCDC had to adopt language that states under OAR 660-033-0140 is not a land use decision (effective 1993).

***660-033-0140***

***Permit Expiration Dates***

***(1) Except as provided for in section (5) of this rule, a discretionary decision, except for a land division, made after the effective date of this division approving a proposed development on agricultural or forest land outside an urban growth boundary under ORS 215.010 to 215.293 and 215.317 to 215.438 or under county legislation or regulation adopted pursuant thereto is void two years from the date of the final decision if the development action is not initiated in that period.***

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

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

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

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

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

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

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

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

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

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

This OAR incorporates rules for all “*proposed development on agricultural or forest land outside an urban growth boundary under ORS 215.010 to 215.293 and 215.317 to 215.438*”

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

- *215.294 Railroad facilities handling materials regulated under ORS chapter 459 or 466*
- *215.296 Standards for approval of certain uses in exclusive farm use zones; violation of standards; complaint; penalties; exceptions to standards*
- *215.297 Verifying continuity for approval of certain uses in exclusive farm use zones*
- *215.298 Mining in exclusive farm use zone; land use permit*
- *215.299 Policy on mining resource lands*
- *215.301 Blending materials for cement prohibited near vineyards; exception*
- *215.304 Rule adoption; limitations*
- *215.306 Conducting filming activities in exclusive farm use zones*
- *(Temporary provisions relating to guest ranches are compiled as notes following ORS 215.306)*
- *(Temporary provisions relating to alteration, restoration or replacement of dwellings are compiled as notes following ORS 215.306)*
- *215.311 Log truck parking in exclusive farm use zones; dump truck parking in forest zones or mixed farm and forest zones*
- *215.312 Public safety training facility*
- *(Marginal Lands)*
- *215.316 Termination of adoption of marginal lands*
- *PERMITTED USES IN ZONES*
- *215.438 Transmission towers; location; conditions*
- *215.439 Solar energy systems in residential or commercial zones*
- *215.441 Use of real property for religious activity; county regulation of real property used for religious activity*
- *215.445 Use of private property for mobile medical clinic*
- *215.447 Photovoltaic solar power generation facilities on high-value farmland*
- *215.448 Home occupations; parking; where allowed; conditions*
- *215.451 Cider business; conditions; permissible products and services; local government findings and criteria*
- *215.452 Winery; conditions; permissible products and services; local government findings and criteria; fees*
- *215.453 Large winery; conditions; products and services; local government findings and criteria*
- *215.454 Lawful continuation of certain winery-related uses or structures*
- *215.455 Effect of approval of winery on land use laws*
- *215.456 Siting winery as commercial activity in exclusive farm use zone*
- *215.457 Youth camps allowed in forest zones and mixed farm and forest zones*
- *215.459 Private campground in forest zones and mixed farm and forest zones; yurts; rules*
- *215.501 Accessory dwelling units in rural residential zones\*\*\**

\*\*\*Note: The list does continue

OAR 660 Division 33 regulates Agricultural Uses but it does incorporate certain dwellings addressed under OAR 660 Division 6<sup>1</sup>. OAR 660 Division 6 is silent in regards to an extension of time or expiration of permits. Due to the fact that there are no other statutory authority or rules to rely upon regarding expiration of permits, with the exception of ORS 92 that controls Land Divisions, staff shall rely on the acknowledged comprehensive plan and implementing ordinance. Staff finds that all other extension that are beyond what are regulated in ORS 92, ORS 215.417 and OAR 660 Division 33 are within the County's discretion to create a process if they choose. The Comprehensive Plan is silent on the issue which requires staff and the applicant to rely on the ordinance. The CCZLDO only has jurisdiction to govern land use outside of the incorporated boundaries of the cities located within the boundary of Coos County.

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

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

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

OCMP is made up of 40 partners at the county and city level and 11 state agency partners. Each local entity has documents governing how they operate and guiding how they administer land use in their community. Each state agency has chapters of statutes guiding operations and helping them administer

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

state law. These documents include comprehensive plans and land use regulations, state statutes, and statewide planning goals. DLCD incorporates the documents in their entirety into the Program.

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

Federal consistency does not authorize a local jurisdiction to exceed the authority given them through Statute or Rule. Opponents continue to ask to incorporate in federal regulations such as environmental impact studies as an example. The local jurisdiction does not have authority to make determination using federal laws unless that federal law has been incorporated into a Statewide Planning Goal. Planning Goals, Statutes and Rules that regulate land use are the basis for creating comprehensive plans. However, some language in Planning Goals, Statutes and Rules are not mandatory language and that is why it may not have been incorporated into the local comprehensive plans.

Coos County strives to ensure that all regulations are updated but has to balance staffing and funding. Staff has worked with DLCD on grants to allow updates to continue. Staff has been working over the past few years on updating natural hazards, housing, readability issues, mapping digitization and estuary management. However, the opposition to the Liquefied Natural Gas project has continued to hinder updates by appealing amendments and raising issues outside of the scope of the amendments including the current extension language that staff attempted to include requiring additional hazards review.

The background provided is not addressing the criteria or meant to be any type of findings to the criteria. The findings to the criteria are found in the next section. The background provides context and reasoning to why the application was submitted and how the relevant criteria were determined.

#### **IV. FINDINGS TO THE CRITERIA:**

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

1. *Permit Expiration Dates for all Conditional Use Approvals and Extensions :*
  - a. *On lands zoned Exclusive Farm, Forest and Forest Mixed Use:*
    - (1) *Except as provided for in section (5) of this rule, a discretionary decision, except for a land division, made after the effective date of this division approving a proposed development on agricultural or forest land outside an urban growth boundary under ORS 215.010 to 215.293 and 215.317 to 215.438 or under county legislation or regulation adopted pursuant thereto is void two years from the date of the final decision if the development action is not initiated in that period.*
    - (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>2</sup> for reasons for which the applicant was not responsible.*

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<sup>2</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.

*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.*

**FINDINGS: A portion of the alignment authorized by in the prior approval crosses resource zoned property (Exclusive Farm Use, Forest and Forest Mixed Use). Coos County may grant an extension of up to 12 months if the applicant makes a written request for an extension of the development approval period. The approval period was clearly stated in the last approved extension as April 2, 2019 (County File Nos. AP-18-002/EXT-18-003). The applicant provided an electronic application followed by a hardcopy prior to the April 2, 2019 date (email March 28, 2019 and hardcopy received March 29, 2019). The application was reviewed for relevant completeness pursuant to Section 5.0.200 and found to meet the submittal requirements on April 26, 2019. Therefore, based on the dates of submittal found in the record the permit was valid and the applicant submitted the request prior to the expiration.**

**The applicant has provided the reasons that prevented the applicant from beginning or continuing development within the approval period. The applicant states that they were 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 required pre-authorization by the Federal Energy Regulatory Commission ("FERC"). Until the Applicant obtains a FERC certificate authorizing the pipeline, the Applicant cannot begin construction or operation of the facilities in the County or elsewhere along the pipeline route. As of the date the application was submitted FERC had not made a final decision.**

**The County has previously accepted this reasoning as a basis to grant a tem extension for the pipeline. The applicant has correctly identified several citations to prior extension cases in which the County accepted this as a reasonable cause for granting an extension. Therefore, staff concurs with the applicants statements.**

- (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.*

**FINDINGS: The applicant has requested a notice of decision be made as a land use decision in this matter. Nothing in the county’s ordinance prohibits the county from processing this as a land use decision. Therefore, given the controversy over this applicant and the fact that discretion may be applied the county is treating this as a land use application in the same manner as a conditional use.**

**The county has the ability to authorize one-year extension where the applicable criteria have not changed. There have been no change in the Exclusive Farm Use, Forest or Forest Mixed Use criteria that have changed. Therefore, staff is able to grant additional one-year extensions. Given the CCZLDO allows for an unlimited number of extensions it is consistent to grant another extension.**

**Therefore, the applicant has complied with the criteria. The permit has been extended to April 2, 2020.**

- 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.

**FINDINGS: All portions of the pipeline, given this is a nonresidential use, that are located outside of the Exclusive Farm, Forest and Forest Mixed Use areas are subject to extensions under this section. There have been no areas reconfigured and rezoned in the pipeline route. The application applied for the extension on the official form and provided the fee. The prior extension determined the date to be April 2, 2020 as explained in prior section and the applicant has complied. Therefore, all portions of the pipeline outside of the Exclusive Farm Use, Forest Mixed Use or Forest Use zones are extended for four years, April 2, 2023. The applicant may choose to reapply within one year to be on the same time table as the portions located in the resource zones, April 2, 2020.**

- 2. Changes or amendments to areas subject to natural hazards<sup>3</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.

**FINDINGS: The applicant has acknowledged that they will comply with this section if it is found to be applicable.**

## **V. CONCLUSION:**

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<sup>3</sup> Natural hazards are: floods (coastal and riverine), landslides, earthquakes and related hazards, tsunamis, coastal erosion, and wildfires.



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

For the reasons set forth in this staff report and based on the evidence and documentation presented by the application, incorporated herein as Attachment A, the Planning Director approves the one year extension request made by the applicant. The expiration for this application is **April 2, 2020**.

All conditions remain in effect unless otherwise amended.

*Jill Rolfe* Planning Director

Coos County Staff Members

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