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

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

FILE NO. AP-20-001
(APPEAL OF COUNTY FILE NO. EXT-20-005).

10 MARCH 2021

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I. INTRODUCTION

A. Nature of the Local Appeal

The appellants challenge the Planning Director's decision to allow the applicant, PCGP Gas Pipeline, LP, (hereinafter the "applicant" or "PCGP"), an additional one-year extension on its development approval for HBCU 10-01, Final Order 10-08-045PL, as amended on remand from LUBA, County File No. REM 11-01, Final Order 12-03-18 PL. The Planning Director's decision approves the permit for a seventh one-year extension. The Planning Director's decision for the file, which was assigned file No. EXT-20-005, is dated September 3, 2020. Staff assigned the file number AP 20-001 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).
- File No. EXT 19-004 / AP-19-04, Final Order No. 19-11-069PL (Nov. 26, 2019).

B. Detailed Case History of the Pipeline

In 2010, PCGP 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 PCGP'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 PCGP's application for local land use approvals, including the 2010 application to Coos County.

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

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

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

Over the past several years, PCGP has been pursuing the necessary approvals for the Pipeline. PCGP received a FERC Certificate on December 17, 2009. *PCGP 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. *PCGP 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 PCGP to seek new FERC approval for the Pipeline as reconfigured to serve Jordan Cove's proposed LNG export facility. In June 2012, PCGP 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, PCGP 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, PCGP applied to Coos County on May 30, 2013 for an amendment to the CUP requesting deletion or modification of Condition 25 as necessary for the use of the Pipeline to serve the Jordan Cove LNG export facility. After a revised application narrative was submitted, the application was deemed complete on August 23, 2013, and the County provided a public hearing before the hearings officer. On February 4, 2014, the County Board of Commissioners adopted the hearings officer's decision and approved Pacific Connector's requested modification of Condition 25. Final Order No. 14-01-006PL, HBCU-13-02 (Feb. 4, 2014).

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

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

On December 5, 2013, PCGP submitted an application requesting approval of another alternative segment of pipeline route, known as the "Blue Ridge Alternative Alignment." The hearings officer recommended approval of this route amendments and the Board accepted those

recommendations on October 21, 2014. Final Decision and Order HBCU-13-06; Order No. 14-09-0062PL.

On November 7, 2014, FERC issued a Draft Environmental Impact Statement (DEIS) for the Pipeline, with public comment held open until mid-February 2015. FERC's revised schedule for the project now indicates that completion of the Final EIS is scheduled for June 12, 2015, with a FERC decision on Pacific Connector's application expected by September 10, 2015. *Notice of Revised Schedule for Environmental Review of the Jordan Cove Liquefaction and PCGP Pipeline Projects*; Jordan Cove Energy Project, LP, Docket No. CP13-483-000; PCGP 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, PCGP 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 (PCGP Pipeline Approved, County File No. HBCU-10-01, on remand Final Decision and Order No. 12-03-018PL) for two additional years. The Planning Director approved this request on May 2, 2014, pursuant to extension provisions (then codified at CCZLDO § 5.0.700). The Planning Director's decision was appealed on May 27, 2014 (AP-14-02). The hearings officer issued his Analysis, Conclusions and Recommendations to the Board of Commissioners, recommending approval of the application on September 19, 2014. On October 21, 2014, the Board adopted its decision approving an extension of Pacific Connector's conditional use approval for the original alignment for one year, until April 2, 2015. File No. ACU 14-08 / AP-14-02, Final Order No. 14-09-063PL (Oct 21, 2014).

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

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

On March 16, 2015, PCGP filed a request for a second extension of the land use approvals for the original Pipeline alignment. File No. ACU-15-07. Staff reviewed the matter, deemed the application complete on April 8, 2015, and the Planning Director rendered a decision approving the extension request on April 14, 2015. The approval was appealed on April 30, 2015. File No. AP-15-01. After a hearing before a County Hearings Officer, the Hearings Officer issued a written opinion and recommendation to the Board of Commissioners that they affirm the Planning Director's decision granting the one-year extension to April 2, 2016. On October 6, 2015, the Board adopted the Hearings Officer's recommended decision and approved the requested extension. Final Decision No. 15-08-039PL. The Board of Commissioners' approval

of Pacific Connector's second extension request was not appealed to LUBA, and that decision is final.

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

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

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

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

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

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

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

On September 21, 2017, PCGP 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 November 9, 2017, PCGP submitted second one-year extension request to continue HBCU 13-06, which is the "Blue Ridge alignment." File No. EXT 17-015. Staff approved the request in a decision dated February 26, 2018. (Extension to Nov. 11, 2018). No local appeal filed.

On February 21, 2018, the applicant submitted a third extension request for the Brunschmid and Stock Slough alignments. The Planning Director approved this extension on May 18, 2018 (HBCU-13-04 / EXT-18-001). The opponents filed a timely appeal of the Planning Director's decision county file numberAP-18-001. The Board of Commissions issued a final decision approving the extension Nov. 20, 2018 (No. 18-11-072PL). Opponents appealed to LUBA.

On or about March 20, 2018, the applicant filed PCGP's fifth extension request of the original pipeline alignment. (EXT 18-003). The Planning Director approved this extension request on May 21, 2018, and followed that up with a corrected notice on May 24, 2018. Opponents filed a timely appeal, and the Board of Commissions issued a final decision on Nov 20, 2018. AP-18-002. Opponents appealed to LUBA. LUBA consolidated the two appeals (AP-18-001 and AP-18-002). On April 25, 2019, LUBA issued a Final Opinion and Order in which it rejected challenges to the Board's decision to grant additional extensions. *See Williams v. Coos County*, __ Or LUBA __ (LUBA Nos. 2018-141/142, April 25, 2019), *aff'd w/o op.,* 298 Or App 841 (2019).

On October 18, 2018, the Coos County Board of Commissioners adopted certain legislative amendments to CCZLDO 5.2.600, which governs the criteria for processing extensions for land use permits. *See* Ord. 18-09-009PL. Although opponents to PCGP filed an appeal, LUBA affirmed the County and the Court of Appeals affirmed without opinion. *McCaffree v. Coos County*, __ Or LUBA ___ (LUBA No. 2018-132, June 6, 2019). *aff'd w/o op.*, 299 Or App 521 (2019).

On November 8, 2018, PCGP filed a third one-year extension request to continue the development approval for HBCU 13-06 (Blue Ridge Alignment). Staff assigned file No. EXT-18-012 to the case. The Planning Director's decision approving the extension is dated March 8, 2019, AP-19-002. Opponents filed a local appeal, and the Board of Commissioners approved the extension on August 20, 2019 Final Decision and Order No. 19-08-054PL .

On February 21, 2019, the applicant submitted a fourth extension request for the Brunschmid and Stock Slough alignments. (County File No. EXT-19-002). A Planning Director's notice of decision approving the extension was mailed on June 21, 2019. No local appeal was filed.

On March 6, 2019, DEQ denies PCGP's Section 401 Water Quality Permit, without prejudice.

On March 28, 2019, the applicant filed PCGP's sixth extension request of the original pipeline alignment. (EXT 19-004). The Planning Director approved extension request on June 21, 2019. Opponents filed a timely appeal on July 1, 2019. AP-19-004. The Board granted the sixth extension on Nov. 26, 2019. *See* Final Order No. 19-11-069PL. No LUBA appeal followed.

On December 18, 2019, the Coos County Board of Commissioners adopted certain legislative amendments to conform the Coos County Comprehensive Plan and Implementing Ordinance to state statutes and rules governing the regulation of farm and forest lands. As

relevant here, this Ordinance also made changes to CCZLDO 5.2.600. *See* Ord. 19-12-011PL. (AM-19-006), Exhibit 30, Sub-Exhibit 11. No appeal was filed.

On February 20, 2020, the applicant submitted a fifth extension request for the Brunschmid and Stock Slough alignments. (County File No. EXT-20-002). A notice of decision approving the extension was mailed initially mailed on September 4, 2020 but due to an error in the notice it was corrected and mailed on September 24, 2020. No appeal of this application was filed. This application is valid until February 25, 2021 unless otherwise approved for an extension.

On January 24, 2020, JCEP withdraws its Application for certain Fill-Removal permits that it had pending with the Oregon Division of State Lands ("DSL").

On February 19, 2020, the Oregon Department of Land Conservation and Development ("DLCD") objects to the Applicant's Coastal Zone Management Act consistency certification. *See* Exhibit 30, Sub-Exhibit 9.

On March 19, 2020, the Applicant filed a Notice of Appeal to initiate proceedings at the United States Department of Commerce to override the objection by DLCD to the Coastal Zone Management Act consistency certification for the Pipeline. *See* Exhibit 30, Sub-Exhibit 9.

On March 19, 2020, the Federal Energy Regulatory Commission (FERC) issued a Certificate of Public Convenience & Necessity. Exhibit 30, Sub-Exhibit 8.

On March 27, 2020, the Applicant filed PCGP's current (seventh) extension request of the original pipeline alignment and paid the application fee. The Planning Director approved this extension request on September 3, 2020 (EXT 20-005); however, due to a typo in the notice of decision a new notice was provided on September 24, 2020. Opponents filed a timely appeal on October 8, 2020. AP-20-001. The hearings officer held a duly noticed public hearing on December 18, 2020, taking testimony from the applicant and various opponents of the project.

On November 11, 2020 the Blue Ridge Alternative Route authorization was not renewed by the Applicant, and thus expired.

C. Timeline of Events.

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

- Application for Extension Submitted (EXT 20-005). March 27, 2020
- Staff Decision September 3, 2020
- Local Appeal filed (AP-20-001) October 8, 2020
- Public Hearing December 18, 2020
- First Open Record Period (Extended due to holidays) January 8, 2021
- Second Open Record Period January 14, 2021
- Applicant's Final Argument January 21, 2021
- Hearings Officer Recommendation March 10, 2021

II. LEGAL ANALYSIS.

A. Preliminary Procedural Matters.

Tonia Moro of Citizens for Renewables and Rogue Climate asked the hearings officer to take judicial notice of all relevant ordinances and final decisions and orders adopted by the [BOC] as may be referenced by the participants in these proceedings. The motion is denied.

Ashley Audycki of "Rogue Climate" sent an email to County Planning staff stating that she was unable to find the Planning Commission materials for docket AM-19-006 to enter into the record, and asked to keep the record open for seven days (past the 5.p.m. January 14, 2021 deadline) as a consequence. Exhibit 34. This request arrived via email past the 5 p.m. "rebuttal period" open record deadline on January 14.

Staff states that the entire AM-19-006 file (including all Planning Commission materials) may be found by clicking on docket number AM-19-006 at the County Planning Department website: http://www.co.coos.or.us/Departments/Planning/PlanningDepartment--Applications2019.aspx Furthermore, Rogue Climate's attorney Tonia Moro was able to locate and include the 2019 materials, which she timely submitted into the record that same day, January 14, 2021 (*see* Exhibit 31, Sub-Exhibit 116).

Rogue Climate's concern seems to be the County's notice and/or process for adopting the 2019 CCZLDO amendments was somehow legally flawed. Counsel Tonia Moro writes: "The 2019 amendment did not strike the 2018 amendment so it appears the county had adopted inconsistent code provisions and it is ultra vires to apply what was purported to be adopted in 2019." (Exhibit 31, p. 1). For reasons discussed in more detail in Section C.2, *infra*, the hearings officer finds that even if that were true, this hearings officer does not have jurisdiction to revisit nor remedy any such alleged error as part of these proceedings. To my knowledge, no LUBA appeal of the AM-19-006 amendments was filed. Had the LUBA or Courts stricken the 2019 ordinance amendments, then of course the hearings officer would not apply them. Ms. Moro did, in fact, challenge the 2018 amendments to the CCZLDO, but that appeal was unsuccessful. The LUBA affirmed the County's amendments. *McCaffree v. Coos County*, 79 Or LUBA 512 (2019).

Rogue Climate attempted to raise this issue during the rebuttal period. That final open record period is, as the name implies, intended for rebuttal argument only, not the raising of new arguments nor the introduction of new evidence that is not in rebuttal to submittals made in the first open-record period. For this reason, Rogue Climate's request is untimely, seeks evidence already submitted that same day (as Exhibit 31, Sub-Exhibit 116) and appears to seek a remedy the hearings officer is powerless to grant. For these reasons, Rogue Climate's request to leave the record open past the 5 p.m. on January 14, 2021 deadline is denied.

On March 9, 2021, the hearings officer received a request to reopen the record from Tonia Moro to include an "excerpt from Pembina's 2020 Annual Report." Ms. Moro argues that this excerpt "indicat[es] a complete write off of the $349 million dollar investment in the Jordan Cove / Pacific Connector and Ruby Pipeline Projects." Ms. Moro argues that the hearings

officer may "take notice of facts not subject to reasonable dispute." Ms. Moro cites no case law to support the idea that the Hearings officer can take notice of adjudicative facts. In Blatt v. City of Portland 21 Or LUBA 337 (1991), LUBA stated

> Although LUBA has held it has authority to take official notice of judicially cognizable law, as described in OEC 202, LUBA has never held it has authority to take official notice of adjudicative facts, as set out in OEC 201. With regard to adjudicative facts, LUBA's review is limited by ORS 197.830(13)(a) to the record of the proceeding below, except in instances where an evidentiary hearing is authorized by ORS 197.830(13)(b). LUBA has also held that pursuant to the directive of ORS 197.805 that its proceedings be conducted consistently with sound principles of judicial review, it will consider facts outside the record where they are essential to determining whether it has jurisdiction or whether an appeal is moot. *Hemstreet v. Seaside Improvement Comm*., 16 Or LUBA 630, 632 (1988); *Century 21 Properties v. City of Tigard*, 17 Or LUBA 1298, *rev'd on other grounds* 99 Or App 435 (1989).

Ms. Moro does not mention mootness, but presumably her argument is that the permit should not be extended because Pembina "no longer has an interest in the Original Alignment." The hearings officer reviewed the two pages provided by Ms. Moro, and does not understand how it makes or even assists her mootness argument. For this reason, the request to reopen the record is denied.

B. <u>Summary of Appellants' Arguments Against Granting the Extension.</u>

- Appellants stated it is unclear if the application materials were received before the expiration of the permits and in the proper form.

- The County violated the acknowledged CCZLDO §5.2.600 and the rule it implements. The director misconstrued the applicable code provision and rule and interpreted the code provision inconsistently with the code provision it adopted with the State rule it implements. OAR 660-033-0140.

- The county violated the CCZLDO §5.0.500 when it failed to deem the permit automatically revoked due to the inconsistencies of the pipeline project proposed in the HDD alignment the county approved in December 2019.

- The county erred in determining that the applicant was unable to begin development during the approval period for reasons for which the applicant was not responsible.

- The director's decisions misconstrue CCLZLDO §5.2.600(2)&(3) and the record does not otherwise support a finding of compliance.

- ❖ There is insufficient evidence in the record to support the director's decision that the applicable criteria for the original decision has not changed.

- ❖ The extensions continue to impose a taking of the property of the landowners along the alignments through inverse condemnation. The county is aware that the landowners have not consented to this application. The county is aware that the applicant may not and (for some segments) will not obtain federal approval to build the pipeline proposed, and does not intend to initiate development for years. The county is aware that the permit constitutes a cloud over the landowners' ability to sell and fully use their property. The county must prevent further damage to the landowners by denying the extension and inviting the applicant to reapply when it knows what alignment FERC will approve.

- ❖ The process violates Statewide Planning Goal 1.

The appellants' further explanation of the issues: (Copied directly from submittal):

> "The county's decision states: "The applicant has provided a reason that prevented the applicant to continue development which was based on obtaining permits from other agencies. Therefore, the reason the development cannot continue is that it requires additional state and federal permitting to be completed. This is necessary to comply with the conditions of approval placed on the application by the County and to comply with federal law."
>
> Yet the county knows that the applicant has no intent to obtain state permits. The county knows the applicant has admitted that it need not obtain state permits. The county may not approve an extension of a permit that is conditioned upon the applicant obtaining state permits when it has admitted and the evidence is that it will not seek the permits.
>
> Said another way, the applicant has misrepresented that it is "obtaining permits" from other agencies, including state agencies. The applicant has not only not been diligent in "obtaining permits," it has unilaterally determined that it does not need them. So, PCGP is responsible for the delay.
>
> The permits the applicant is "obtaining" will not cure the default because they will not be obtained within the "current" approval period. And, PCGP will also be unable to initiate any development within the extension period and, likely, for years to come, if at all, because it needs access to the land and that will be vigorously contested and is not likely to occur before February 25, or April 2, 2021.

> To the extent the director interp1ets the provision differently, the director misconstrues the provision. It's aim is to require diligence in exercising permitting rights and not to allow the avoidance of the county's legitimate police and land use powers to regulate the uses of land by extending old decisions that may no longer be valid due to changes in legislation or other circumstances."

See Appellants' "Appeal of a Land Use Decision" dated October 8, 2020, pp.2-3.

C. <u>Matters Related To While Set of Approval Standards Apply.</u>

As most recently adopted in 2019, the criteria for extensions for a conditional use permit as set forth in CCZLDO 5.2.600. The hearings officer addresses each criterion separately below. Before addressing the criteria, however, the opponents have raised a threshold issue about which criteria apply to this case. Attorneys Tonia Moro and Katy Eymann argue that the County wrongly applied only the 2019 version of CCZLDO §5.2.600 when evaluating this extension request. Ms. Moro argues:

> "Appellant-opponents have demonstrated that the county has not adopted a version of LDO 5.2.600 as quoted in the staff report. *See* the discussion above and exhibits 101-103. Staff should be required to apply the criteria adopted by the BOC."

Moro memorandum, Exh. 18, at p.6. As the hearings officer understands the issue, the opponents seek to have the County apply certain provisions from CCZLDO 5.2.600 as they were written in 2018. The 2019 Ordinance attempted to remove certain language which was previously a part of CCZLDO 5.2.600(2)(d). Specially, the 2018 version of the code contained the following non-exclusive list of examples of reasons that would be grounds for an extension;

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

According to these opponents, there are three reasons why this portion of the 2018 Ordinance is still operative. *See* Eymann letter, Exibit 33, p.1. The hearings officer addresses all three issues in sequence.

1. Failure to Set Forth Code Language Intended for Deletion using a "strikethrough" format.

First, opponents argue that the 2019 ordinance that adopted the most recent changes to CCZLDO §5.2.600 failed to delete certain previously-adopted code provisions, including the above-quoted language. In support of this theory, opponents note that the 2019 revisions did not set forth the old 2018 text in a "strikethrough" format. Rather, the County relied solely on "bold" text to show what the board considered to be the new language it was adopting. For example, Ms. Moro argues:

> "The 2019 amendment did not strike the 2018 amendment so it appears the county had adopted inconsistent code provisions and it is ultra vires to apply what was purported to be adopted in 2019."

Moro letter, Exh. 31, p. 1.

Opponents further note that Section 7 of the 2019 Ordinance sets forth a list of three ordinances that are repealed to the extent that they are in conflict with the 2019 ordinance. The opponents note that the 2018 Ordinance is not listed in Section 7.

As an initial matter, the hearings officer does not agree that the application of the 2019 Amendments to the exclusion of the 2018 amendments is "ultra vires." The term "ultra vires" has a well understood meaning in Oregon law. The Oregon Supreme Court summarized the meaning of the term in *West Linn Corporate Park, L.L.C. v. City of West Linn*, 349 Or 58, 240 P3d 29 (2010), as follows:

> An act of a city or other governmental entity is ultra vires when that act falls outside the entity's corporate powers. *Keeney v. City of Salem*, 150 Or. 667, 669–71, 47 P.2d 852 (1935). When a governmental entity's power is conferred by statute, actions outside the scope of that power are "extra statutory" and therefore ultra vires. *See, e.g., State v. United States F. & G. Co. et al.*, 125 Or. 13, 24–25, 265 P. 775 (1928) (so applying to the context of state highway commission). However, where a city has broad power to act, but is required to exercise that power in conformance with certain procedures or limitations, a failure to so conform does not necessarily render a given governmental action ultra vires. For example, in *Kernin v. City of Coquille*, 143 Or. 127, 135–36, 21 P.2d 1078 (1933), the city charter granted the city council authority to contract, but required that it do so through a competitive bidding procedure. When the city failed to follow that procedure, the court held that the doctrine of ultra vires was irrelevant: the city possessed "ample power" to enter into contracts. *Id.*

Ms. Moro makes no attempt to demonstrate that staff's application of the 2019 ordinance falls outside of the corporate powers of the County, or that it is an action that falls outside the scope of that power conferred by Oregon's land use planning statutes. Therefore, the hearings officer assumes, for sake of argument, that Ms. Moro intended to use the term "ultra vires" in a non-technical sense, such as to mean "not in accordance with applicable law" or something to that effect.

The issues raised by the opponents require the hearings officer to determine the legislative intent behind the 2019 amendments to CCZLDO §5.2.600, as they are set forth in Ordinance No. 19-12-011PL. Since this document is merely a "recommendation" to the Board of Commissioners, it isn't entirely productive for a hearings officer to explain to the Board what *it meant to say*, since ultimately the Board will make the final decision and is in a better position to explain what *it* intended. Nonetheless, the hearing officer will discuss the parties' arguments and apply rules of construction in an attempt to suggest what was the *most likely* original intent of the 2019 amendments. The Board is obviously free to agree or disagree with this "recommendation," or otherwise clarify the Board's original intent in adopting this language.

Katy Eymann expands on the opponent's argument by noting that the 2019 ordinance did not repeal the 2018 language in question. She notes that repeal by implication is not favored, but that courts have used it "in appropriate cases." *See* Exhibit 33, p.1 (citing *State v. Buck*, 200 Or 87, 262 P2d 495 (1953)). In *City of Lowell v. Wilson*, 197 Or App 291, 105 P3d 856 (2005), the Court of Appeals stated:

> In undertaking that inquiry, we note that "[r]epeal by implication is not favored and must be established by "plain, unavoidable, and irreconcilable repugnancy" between the prior and subsequent statutes. *State v. Langdon*, 330 Or. 72, 81, 999 P.2d 1127 (2000) (*quoting State v. Shumway*, 291 Or. 153, 160, 630 P.2d 796 (1981)). Whether such a conflict exists "must be determined in light of the statutory mandate that, where there are several provisions relating to a subject, such construction is to be adopted as will give effect to all." *State v. Johnston*, 176 Or App 418, 430, 31 P3d 1101 (2001); *see also State v. Thompson–Seed*, 162 Or App 483, 491, 986 P2d 732 (1999) (addressing the relationship between repeal by implication and ORS 174.010).

The hearings officer does not see that the "repeal by implication" doctrine applies in this case. Repeal by implication involve situations where a legislative body enacts a new law that is inconsistent with a prior law, but the new law does not expressly repeal the older, inconsistent law. But that is not what happened here. The Board adopted new text in "bold," and the hearings officer believes that the bold text was intended to supersede all previously adopted text in that section.

Ordinance 19-12-011PL contains findings which shed some light on the proposed amendment to CCZLDO 5.2.600. Section 4 of in the ordinance states, in relevant part:

> CCZLDO 5.2.600 Section Chapter 5.
>
> - ❖ Expiration and Extension of Conditional Uses. ORS 215.417 was updated to control the number of extensions for certain farm and forest dwellings. These changes reflect the change in state law. There were some other suggestions that staff and legal counsel suggested to make the section understandable and consistent with other sections of the ordinance.

The hearings officer understands the findings to suggest that the primary purpose of the amendment was to conform the CCZLDO to changes in state law. From this information, we see legislative intent to amend the text of CCZLDO §5.2.600(1)(a)(ii) to limit the number of extensions which an applicant can apply for residential development on EFU and Forest Land, consistent with recent changes to ORS 215.417. *See* HB 2106 (2019), 2019 Or Laws Ch. 432, Sec. 3, 3a. Incorporating the change for residential development required a complete structural reorganization of CCZLDO §5.2.600

The 2018 version of CCZLDO §5.2.600 can be outlined as follows:

1. Extensions for Conditional Uses.
   a. CUP on Resource Land (EFU, Forest, and Mixed Farm/Forest).
   b. CUP On Non-resource land
2. Changes / amendments to areas subject to Natural Hazards.

In contrast, the 2019 version of CCZLDO §5.2.600 further delineated the analysis into four (4) subsections, and can be outlined as follows:

1. Expiration and Extensions for Permits for residential development on EFU or Forest Land.
2. Expiration and Extensions and Permits for Non-residential development on EFU or Forest land.
3. Extensions Permits for on lands other than EFU or Forest land.
4. Changes / amendments to areas subject to Natural Hazards.

Despite the structural change, the overall effect of the change was relatively minor. The 2019 Amendments appear to make it a bit easier to get additional extensions for permits for residential uses, but the four core criteria for extensions for non-residential uses on resource lands remain intact despite being renumbered. *Compare* CCZLDO §5.2.600(1)(a)(2)(a)-(d)(2018) with CCZLDO §5.2.600(2)(a)(i)-(iv)(2019).

The applicant argues that the County has applied the correct (2019) version of CCZLDO §5.2.600. The applicant states:

> Pursuant to the "goal post rule" in ORS 215.427(3)(a), when a permit application is complete when filed (or within 180 days thereafter) and the county has an acknowledged comprehensive plan and land use regulations, approval or denial of the permit application must be based upon the standards and criteria that were applicable *when the application was first submitted.* In the present case, the Extension Request is a permit application that was complete when filed on March 27, 2020, and the County's comprehensive plan and land use regulations are acknowledged. Accordingly, the County was required to apply the standards and criteria in effect on March 27, 2020, when deciding whether to approve or deny the Extension Request. These standards and criteria are set forth in CCZLDO §5.2.600, which was most recently amended by County Ordinance No. 19-12-011PL. The County Board of Commissioners adopted this ordinance, and it became effective on December 18, 2019. *See* Applicant's Exhibit 11. The Planning Director's decision applies these criteria. *See* Planning Director's decision. Therefore, the County has complied with the "goal post" rule in the present case.

Exhibit 35, p.6. It is true that an extension of a permit is also a permit. *See Wilhoft v. City of Gold Beach*, 38 Or LUBA 375, 384 (2000); *Scovel v. City of Astoria*, 60 Or LUBA 371 (2010); Bard v. Lane Cty, 63 Or LUBA 1 (2011). Therefore the "goal post rule" applies. ORS 215.427(3). However, the goal post rule does not resolve the issue raised by the opponents. The goal post rule requires that the standards and criteria that were applicable when the application was submitted govern the application. However, it does not resolve which set of competing criteria were operative on that day.

The hearings officer denies the opponents' contention that the 2018 version of CCZLDO §5.2.600 continues to apply. Ordinance No. 19-12-011PL was adopted after the 2018 amendments and adopted new language for CCZLDO §5.2.600(1) and (2). *See* Exhibit 30, Sub-Exhibit 11 at 65-66. The Board stated that Ordinance No. 19-12-011PL amended the County Comprehensive Plan and its implementing ordinance, the CCZLDO. *See Id*. at 1-2. The County Board intended for the language adopted in Ordinance No. 19-12-011PL to replace the previous version of these subsections because it is set forth in bold and italicized font. *Id.* Moreover, the fact that the entire subsections are bold and italicized indicate that the Board replaced these subsections in their entirety. By contrast, when the Board was retaining some language from existing subsections, it would identify that language in plain font and then utilize strikethrough to show specific words being deleted and bold and italics to show language being added. *See generally* amendments to CCZLDO §5.2.600(3) in Ordinance No. 19-12-011PL, Exhibit 30 Sub-Exhibit 11, at p. 66-67. Because the Board did not identify any existing language from CCZLDO §5.2.600(1) and (2) in plain font in Ordinance No. 19-12-011PL, none of this language was retained. Thus, contrary to Ms. Eymann's and Ms. Moro's contention, this is not an instance where the previous language was not repealed and thus would continue to apply. Instead, it is

clear that it was repealed because it was not identified as plain text in the amendments adopted in Ordinance No. 19-12-011PL.

The applicant argues that to the extent the 2018 version of CCZLDO §5.2.600 continues to apply, its criteria are satisfied in the present case. In all relevant ways, the same approval criteria apply to permit extensions under either the 2018 and 2019 versions of CCZLDO §5.2.600. *Compare* CCZLDO §5.2.600(2)(a) (2019) with CCZLDO §5.2.600(1)(a)(2) (2018) (resource land) and CCZLDO §5.2.600(3)(c) (2019) with CCZLDO §5.2.600 (b)(3) (non-resource land). Although opponents contend that a particular passage of CCZLDO 5.2.600 (2018) would require the County to find that PCGP does not have valid "reasons" for not commencing development, the hearings officer agrees with the applicant that the passage in question simply provides a non-exclusive list of "reasons" the County may consider to be valid grounds for an extension. The provision stated:

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

CCZLDO §5.2.600(2018). Notably, the hearings officer believes that the "but limited to" language represents a typographic error. The hearings officer believes that the Board meant to say "but not limited to..." The hearings officer is mindful that ORS 174.010 cautions that statutes and ordinances generally should not be interpreted in a manner that requires the decisionmaker to "insert what has been omitted," but this is one of those cases were the context makes it obvious that the omission of the word "not" was a typo. *Fechtig v. City of Albany*, 31 Or LUBA 410 (1996) (LUBA gave deference to city interpretation which concluded that the word "or" was a typo and the correct and intended word was "on."); *McCaffree v. Coos County*, __ Or LUBA __ (LUBA No. 2018-132, June 6, 2019). *aff'd w/o op.,* 299 Or App 521 (2019) (recognizing that the word "not" was omitted, and inserting it back into the quotation of the provision).

Because the list of "reasons" is non-exclusive, it is not mandatory in nature, and it does not require a County conditional use permit holder to apply for all other needed permits in order to demonstrate sufficient "reasons" to qualify for a permit extension. The opponents' contentions to the contrary misconstrue this provision.

2. Allegations of Notice Errors in the Process Leading Up the Adoption of Ord. 19-12-011PL.

The second raised by opponents relates to alleged notice errors which they allege occurred in the proceedings that led to the adoption of Ord. 19-12-011PL. For example, attorney Katy Eymann asserts that the County's notice and/or process for adopting the 2019 CCZLDO amendments was legally flawed. Ms. Eymann argues that these notice errors make the 2019 Amendments ineffective, and therefore, the 2018 version of CCZLDO §5.2.600 is still in effect. *See* Eymann letter dated January 14, 2021, Exhibit 34.

Ms. Eymann cites to no statute, rule, or case law to support her argument. The hearings officer is not aware of any law that supports that argument. To the contrary, procedural errors are generally waived if not raised as part of that proceeding. Even if there was merit to the suggestion that the notice was defective, the hearings officer does not have subject matter jurisdiction to review old County legislative ordinances as part of these proceedings. The correct way to challenge the County's 2019 decision was via a LUBA appeal. Apparently, no LUBA appeal of the AM-19-006 amendments was filed, and the time to do so has now expired.

Had the LUBA or Courts stricken the 2019 ordinance amendments, the hearings officer would not apply them. Ms. Moro did, in fact, challenge the 2018 amendments to the CCZLDO, but that appeal was unsuccessful. *McCaffree v. Coos County*, 79 Or LUBA 512 (2019).

For these reasons, the hearings officer finds the opponents' contentions on this issue are without merit.

3. Assertion That to County May Conclude the Applicant Has Been Insufficiently Diligent in Pursuing Permits.

Ms. Eymann's third argument is that even if the 2018 language was removed, it does not prevent the County from finding that the applicant failed to pursue permits:

> Further, the failure of the applicant to apply for permits demonstrates it lack diligence in this matter. The change made by Order 19012-01 did [not] remove the requirement that the county must determine that *"the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible."* CCLDO 5.2.600(2)(a)(iv). The County is urged to find that the applicant is at least partly responsible to the failure to begin development because it has failed to apply for the necessary permits described in my earlier comments on this matter.

Eymann letter, Exhibit 33, p. 2. Ms. Eymann is certainly correct that the County *may* decide that the Applicant was insufficiently diligent in pursuing the necessary permits. However, the hearings officer recommends denying this allegation. As discussed herein, there is substantial

evidence in the record demonstrates that the Applicant was highly diligent during the relevant time period. *See* "List of Land Use Approvals and Appeals Occurring between April 2, 2019 – April 2, 2020," Exhibit 30, subexhibit 12.

D. <u>Applicable Coos County Zoning and Land Development Ordinance Sections:</u>

SECTION 5.2.600 EXPIRATION AND EXTENSION OF CONDITIONAL USES

(1) Permits 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 is valid for four years.

a. Extensions for Residential Development as 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) shall be granted as follows:

i. First Extension - An extension of a permit for "residential development" as described in Subsection (1) above is valid for two (2) years.

1. *The applicant shall submit an application requesting an extension to the County Planning Department prior to expiration of the final decision. See Section 5.0.250 for time lines for final decisions. Untimely extension requests will not be processed.*
2. *Upon the Planning Department receiving the applicable application and fee, staff shall verify that the application was received within the deadline and if so issue an extension.*
3. *An extension of a permit as described in this section is not a land use decision as defined in ORS 197.015.*

ii. Additional Extensions - A county may approve no more than five additional one-year extensions of a permit if:

1. *The applicant submits an application requesting the additional extension prior to the expiration of a previous extension;*
2. *The applicable residential development statute has not been amended following the approval of the permit; and*
3. *An applicable rule or land use regulation has not been amended following the issuance of the permit, unless allowed by the county, which may require that the applicant comply with the amended rule or land use regulation.*
4. *An extension of a permit as described in this section is not a land use decision as defined in ORS 197.015.*

<u>Hearings Officer Recommendation:</u> A portion of this application request crosses agricultural and forest lands outside of an Urban Growth Boundary but this is not for residential development. Therefore, this criterion is not applicable to the request.

(2) Permits approved under ORS 215.416, except for a land division and permits described in Subsection (1)(a) of this section, for 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, are void two years from the date of the final decision if the development action is not initiated in that period.

a. Extensions for Non-Residential Development as described in Subsection (2) above may be granted if:

i. The applicant submits an application requesting an extension to the County Planning Department prior to expiration of the final decision. See Section 5.0.250 for time lines for final decisions.

ii. The Planning Department receives the applicable application and fee, and staff verifies that it has been submitted within the deadline;

Hearings Officer Recommendation: According to the previous extension request (*i.e.* the 6th Extension request: Final Decision and Order No. 19-11-069PL), the prior extension extended the approval date to April 2, 2020. Therefore, a 7th one-year extension request had to be filed prior to that date. The applicant submitted the application for extension on March 27, 2020 via email. The applicant made a payment via credit card on March 25, 2020, and therefore the fee was provided with the application – *(see* the application at Attachment B). Staff verified that the request was timely filed. This is proof that the applicant submitted the application in proper form with the correct fee.

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

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

Hearings Officer Recommendation: The hearings officer begins by noting that the zoning code, specifically CCZLDO §5.2.600(2)(a)(iii)&(iv), limits the consideration of reasons that occurred "within the "approval period" which prevented the Applicant from beginning construction. The relevant "approval period" for the 6th Extension was only 12 months long, and runs from April 2, 2019 to April 2, 2020. Accordingly, reasons occurring before or after that time period are not relevant to the analysis required by the CCZLDO.

Multiple opponents, who have followed the PCGP pipeline/Jordan Cover Energy Project case for years, raise concerns about events and actions that occurred prior to April 2, 2019. Many opponents, most notably Mr. Graybill, erroneously emphasize PCGP's actions/inactions throughout the nearly 9-year life of the Original Approval. These events are generally *not relevant* to the current extension request, and thus will not be considered by the hearings officer.

Staff made a finding that the applicant has provided a reason that prevented the applicant from beginning construction of the development, specifically that the applicant has not yet obtained permits from other agencies. PCGP was prevented from beginning construction of the Pipeline within the 12-month approval period because due to delays associated with federal permitting process. Exhibit 30, subexhibit 12. Nonetheless, during this one-year time period, PCGP achieved a significant milestone by obtaining the Certificate of Public Convenience and Necessity for the project from Federal Energy Regulatory Commission ("FERC").

The Pipeline is an interstate natural gas pipeline that requires pre-authorization by FERC. PCGP could not begin construction or operation of the facilities in the County or elsewhere along the Pipeline route until PCGP obtained the FERC certificate authorizing the Pipeline. After a lengthy review process dating back to 2018, FERC issued a certificate of public convenience and necessity for the Pipeline on March 19, 2020. *See* Applicant's Exhibit 8. This was only two weeks before the extension period ran. Therefore, PCGP could not legally begin development of the Pipeline for virtually the entire extension period running from April 2, 2019 to April 2, 2020). *See Williams v. Coos County*, __ Or LUBA __ (LUBA Nos. 2018-141/142, April 25, 2019), *aff'd w/o op.,* 298 Or App 841 (2019)(affirming the same rationale for granting a previous extension).

The County previously accepted this reasoning as a basis to grant a time extension for the Pipeline. Specifically, the County found that the lack of a FERC certificate meant PCGP could not begin or continue development of the project:

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

See County Final Order No. 14-09-063PL, ACU-14-08/AP 14-02, Application Exhibit 4 at p.13. This is the beginning, and the end, of the "reasons" inquiry because, without the FERC approval, the project could not legally proceed, even if all permits were in hand and all other construction preparation had occurred. In other words, the absence of a FERC approval alone for 50 of the 52 weeks of the approval period is a sufficient "reason" that PCGP was unable to "begin and continue development within the approval period."

Further, PCGP was not "responsible" for FERC's delay in issuing the certificate. As noted, PCGP applied for the FERC certificate in 2018 and made reasonable efforts to obtain the certificate. FERC is an independent third-party agency, and PCGP had no direct control over the timing of the FERC decision. For that matter, as stated on the record, FERC delayed its decision by 30 days due to late opposition from the State of Oregon.

Several opponents allege that the Applicant was unable to begin development because the Applicant was insufficiently diligent is pursuing permits from the state and Federal governments. See, *e.g.* JC Williams letter, Exh. 21; Kathy Dodds letter, Exh. 22, Rick Eichstaedt letter, Exh. 12, p.1-2. In other words, according to these opponents, it is the applicant's own fault that they did not begin construction during approval period of April 2019 - April 2020. For example, Rick Eichstaedt, counsel for the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians, wrote:

> "The Tribe does not believe that the applicant has met the requirement under [CCLZDO §5.2.600(2)(a)(iv)] stated above because the applicant has elected not to complete the permitting process required for the project. Failure to apply and seek permit approval is the applicant's responsibility."

Eichstaedt letter dated December 17, 2020, Exh. 12, p.1. As another example, opponent Jenny Jones wrote:

> "Oregon has denied the required permits because Jordan Cove LNG and PCGP Pipeline does not meet state standards to work in our waterways, State lands, or the coastal zone. Pembina has still not reapplied for these state permits that Coos County requires. Pembina says the company has "worked diligently and in good faith to obtain all necessary Permit approvals," yet Pembina has no requests or pending hearings for necessary permits previously denied by the State of Oregon."

Jones email, Exh. 4, p.1.[1] Similarly, Opponent Natalie Ranker alleges:

> "However, the Applicant has not been diligent in trying to obtain all necessary permits, and in some instances their actions are the exact opposite…. However, JCEP is making no attempt to apply for any state permits. It has been 11 months since they withdrew their DSL Removal Fill permit and 19 months since DEQ denied their 401 Water Quality Certification. JCEP also gives no evidence that it is pursuing or plans to pursue in future any of the necessary permits from the state or federal government required for this section of pipeline. They are not in compliance with ORS 215.416(2)a.iii. and viii. [*sic*: CCLZDO §5.2.600(2)(a)(iii)&(iv)]. They do not require an extension because they need more time to obtain necessary state and federal permits if they have no intention of applying for these permits. Perhaps the county has made an error in accepting PCGP's explanation for their extension request. Another very valid reason for denying the extension."

Ranker letter, Exh. 14.

Although opponents contend that PCGP had not yet obtained (and in some cases did not have active applications pending for) state permits for the project, the hearings officer finds that this fact does not establish that PCGP is "responsible" for "reasons" that prevented PCGP from "beginning development" within the approval period for three reasons. First, as explained above, PCGP did not secure its FERC certificate until two weeks remained in the approval period, so the absence of the FERC certificate alone was a sufficient "reason" for not being able to

[1] Opponent Russell Furchner submitted an email with identical wording. Exh. 5.

implement the Original Approval. *See Williams v. Coos County*, __ Or LUBA __ (LUBA Nos. 2018-141/142, April 25, 2019), *aff'd w/o op.,* 298 Or App 841 (2019).

Second, and perhaps more importantly, PCGP's act of withdrawing its state permit applications in no way demonstrates that they are responsible for not being able to get started on construction. PCGP pursued a legally permissible federal alternative to obtaining most state permits after the Oregon Department of Land Conservation and Development ("DLCD") objected to the project's Coastal Zone Management Act consistency certification on February 19, 2020. Specifically, on March 19, 2020, PCGP filed a Notice of Appeal to initiate proceedings at the United States Department of Commerce to override the objection by DLCD to the Coastal Zone Management Act consistency certification for the Pipeline. *See* Exhibit 30, Sub-Exhibit 9. PCGP action is allowed by 15 CFR Part 930, Subpart H. *Id.* PCGP's notice of appeal was pending as of the close of the extension period (April 2, 2020). *Id.* Because this process was not resolved within the extension period, PCGP was unable to plan its next steps and take further action to implement the Original Approval either by obtaining additional state permits or by relying on a federal determination that they are not required.

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

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

The hearings officer also gave examples of "failures to act" which might be considered to be within the control of an applicant:

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

The hearings officer noted that "this is a highly subjective determination..." The hearings officer does not believe that PCGP pursuing a legally-available potential alternative to state permits via the United States Department of Commerce is the equivalent of simply "failing to apply to permits." What is obvious is that PCGP is still trying to work through this complex

permitting process. It did not give up, it did not procrastinate, it did not fail to take action in furtherance of its ultimate goal. The hearings officer is not in a position to evaluate whether trying to initiate proceedings at the Dept. of Commerce to override objections by DLCD was a reasonable path. However, it is not a basis for denying an extension.

Third, as the applicant correctly notes, the opponents' argument fails to take into account the extreme complexity of implementing the original Approval, which is not a stand-alone project. Rather, the Pipeline crosses four counties and at least one city, and it is also associated with, and contingent upon, approval of the Jordan Cove Energy Project, which itself has project components in three different local jurisdictions. The project is a unique and complex one, and the hearings officer finds PCGP is exercising reasonable efforts under the circumstances toward beginning and continuing development of the Pipeline.

PCGP and its sister company Jordan Cove Energy Project L.P. used the 12-month approval period (April 2019 - April 2020) requesting, obtaining, maintaining, extending, and defending the various local land use permits for the projects. *See* Exhibit 30, Sub-Exhibit 12. The detailed summary of actions in that exhibit belies opponents' attempt to frame PCGP as resting on its laurels or not committing sufficient resources toward implementing the Pipeline. It also underscores opponents' appeals of the approvals, which constitute further "reasons" for not yet implementing the project.

The opponents argue that the "county knows that the applicant has no intent to obtain state permits". Appellants' "Appeal of a Land Use Decision" dated October 8, 2020, pp.2. To the contrary, the hearings officer has no such evidence before it regarding the applicant's intentions. Nor is it relevant to the approval criteria, at least as related to the applicable time period of April 2, 2019 to April 2, 2020. Nonetheless, now that the United States Department of Commerce has denied PCGP's appeal seeking to override the objection by DLCD to the Coastal Zone Management Act consistency certification, it states to reason that PCGP will attempt to go back to the drawing board, so to speak, in an effort to obtain the CZMA consistency certification, as well as the other key needed state approvals, such as the DSL Removal Fill permit and DEQ 401 Water Quality Certification. Or maybe it will give up. The actions PCGP takes in the upcoming months may be relevant in the event that PCGP seeks additional extensions in the future.

The opponents argue that the county can somehow make a finding that even if the extension can be granted, that it should not be denied because the applicant could not begin the project by February or April of 2021. Ms. Moro and other opponents have previously raised similar arguments: *i.e*. they previously argued that PCGP must demonstrate that it can cure the "reasons" that prevented implementing the permit within the new 12-month extension period. LUBA rejected this reading of the code in *Williams*:

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

See Williams v. Coos County, __ Or LUBA __ (LUBA Nos. 2018-141/142, April 25, 2019), *aff'd w/o op.*, 298 Or App 841 (2019). Any such speculation cannot form the basis for denying an extension request. Granted, it is probably true that the applicant will not begin construction in 2021 or even 2022. It seems very likely that they will seek further extensions in the months to come. However, the fact that the project is so complex that it requires decades to gain permitting, is not a basis for denying an extension.

b. An extension of a permit as described in this section is not a land use decision as defined in ORS 197.015.

Hearings Officer Recommendation: This criterion only applies if the Application does not require the decisionmaker to exercise discretion in analyzing the criteria. *See McLaughlin v. Douglas Co.*, __ Or LUBA __ (LUBA No. 2017-008, July 20, 2017). Thus, it does not apply here, as discretion is required. The Planning Director's approval was a land use decision.

c. Additional one-year extensions may be authorized where applicable criteria for the original decision have not changed, unless otherwise permitted by the local government.

Hearings Officer Recommendation: In order to approve an extension of the Original Approval on resource land, the County must find that "applicable criteria for the original decision have not changed, unless otherwise permitted by the local government." CCZLDO §5.2.600(2)(c). This provision implements OAR 660-033-0140(4), which states that "[e]xcept for "residential development" as defined in section (6), additional one-year extensions may be authorized where applicable criteria for the decision have not changed."

It does appear that the language adopted by Coos County adds to the administrative rule in two ways. First, it clarifies that the "decision" at issue is the "*original"* decision, which in this case is the 2010 decision. That seems to be a rather straight-forward reading and clarification of OAR 660-033-0140(4). The hearings officer takes no issue with that clarification, since is fairly implied from the rule itself.

Second, CCZLDO §5.2.600(2)(c) adds the following clause, which is not found in the LCDC administrative rule: "*unless otherwise permitted by the local government*." The statute and administrative rule do not have this exception except as applied to residential uses. For non-residential uses, the County lacks the authority to grant an extension if the criteria governing the original decision have "changed." The hearings officer will apply the administrative rule directly so as to avoid any inconsistency created by the italicized clause in CCZLDO §5.2.600(2)(c). The hearings officer does not rely on that clause to support this recommendation.

Several opponents assert that the conditional use permit approval criteria under which the land use application was approved have changed in the decade since the pipeline was originally approved. As a result, these opponents argue that an extension cannot be granted. CCLZDO §5.2.600(2)(c). For example, attorney Tonia Moro argues:

> "Despite the staff decision's attempted alteration of the relevant criteria to suggest that the county has discretion to ignore changes

> in applicable criteria, the criteria does not allow that. It is clearly intended to disallow extensions when, if a new application was filed at the time of the permit extension request, the substantive criteria applicable to such new application would be different (and at least more exacting) than when the application was filed.

Tonia Moro memorandum, Exh. 18, at pp. 7-8. In contrast, Staff asserts that the criteria for the original decision have not changed:

> The criteria for the Original Approval (*i.e*. the 2010/2012 decision, *aka*: HBCU-10-01/REM-11-01) have not changed in this case. Although the opponents have argued there is no evidence to support the applicable criteria, there have been no changes to any of the language that permitted the pipeline in 2010/2011. The ordinances have transitioned over the year from text to tables, but the relevant criteria have not changed.

Staff Report, pp. 6-7. The Planning Director again determined in her supplemental staff report, Exhibit 28, that applicable criteria for the Original Approval have not changed. The Planning Director argues that Section §5.2.600(4) was specifically adopted by the Board of Commissioners to recognize that the various "hazards" provisions would not be a "change" in "applicable criteria," but would rather be considered an additional permit that a permit holder might have to apply for if their lands are mapped such potential hazards. To recap, CCZLDO §5.2.600(4) states:

> ***Changes or amendments to areas subject to natural hazards 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.***

Staff discusses the relationship between CCZLDO §5.2.600(2)(c) and CCZLDO §5.2.600(4) as follows:

> It is important to remember the criteria set out in subsection 2(c) requires the reviewing body to [determine] that applicable criteria for the original decision has not changed, unless otherwise permitted by the local government. Subsection (4) states any changes or amendment to natural hazards are not relevant criteria to the original decision but does provide a path that allows the county to consider if additional reviews are required to determine if new hazards apply in the Agricultural (Exclusive Farm Use) and Forest (Forest or Forest Mixed Use) zoned properties if found the pipeline route is within a regulated hazard area then a Geological Hazard Review would be required.

Supplemental Staff Report by Planning Director Jill Rolfe, Exh. 28. p.3. Staff goes on to write:

> Ms. Moro fails to show why or how the updated language is "relevant criteria" or how it would apply on the pipeline route. She continually makes the argument that any change or amendment is just cause for a denial. This is completely false as a change in language does not automatically cause a denial of any prior application applying for an extension. It has to be shown the language change is applicable relevant approval criteria. The language for extensions states "[a]dditional one-year extensions may be authorized where applicable criteria for the original decision have not changed, unless otherwise permitted by the local government." The original applicable criteria are in place but there may be additional criteria to be addressed prior to this project receiving a Zoning Compliance Letter. This is a consistent interpretation given Section 5.2.600(4) which specifically states additional criteria may apply with the hazards updates. It is also worth noting Section 5.2.600(4) was not part of the 2019 amendments and has been in place and this seems like another attempt to overturn the applicability of this subsection.

Supplemental Staff Report, Planning Director Jill Rolfe, Exh. 28, at p.3-4.

Whether CCZLDO §5.2.600(4) works in the manner it was intended is a close call. The administrative rule states that "additional one-year extensions may be authorized where applicable criteria for the decision have not changed." The County takes the position that CCZLDO §5.2.600(4) essentially makes the hazards provisions *additional* applicable standards *subject to a new permit*, as opposed to being "applicable criteria" for the "original decision" which have "changed." At least in the abstract, the hearings officer will give the benefit of the doubt, although admittedly the County makes a razor thin and nuanced distinction.

The Planning Director explains that CCLZDO §5.2.600(4) draws a distinction between "approval criteria," which determine if a use can or cannot be sited, and other standards that seek to regulate "how a use can be sited with the least amount of risk possible." Staff states:

> Staff would like to clarify that amendments to areas subject to natural hazards completed in 2018 and 2019 do not provide justification for a denial of an extension. The language [in CCZLDO 5.2.600(4)] clearly states 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.

Staff memo, Exhibit 28, p.3. Staff seems to be making the distinction between a "performance standard / siting standard" and an "approval criterion." The Applicant makes the same argument, as follows:

> Second, as expressly provided in CCZLDO §5.2.600(4), the natural hazard regulations and other special considerations under the CCZLDO are not "criteria" at all but are siting standards. As such, even if the natural hazard regulations changed and assuming *arguendo* that they would even apply to the Pipeline, they are simply not relevant to determining compliance with CCZLDO §5.2.600(2)(c), which, by its terms, is only concerned with changes to "criteria."

See Applicant's Final Argument, Exhibit 35, at p. 5. If the hearings officer understands the argument correctly, the apparent distinction being argued for is that the latter can be used as a basis for denial of a decision, whereas the former simply demands that the applicant perform certain actions within a set of adopted parameters. *Zusman v. Clackamas County*, 13 Or LUBA 39 (1985) ("performance standards are not necessary prerequisites to issuance of a permit although they may be stated as conditions to operations under a permit."). In this regard, LUBA has stated that the primary difference between a performance standard and an approval standard is that a performance standard only provides a basis for revocation of a permit after it is issued, whereas an approval standard requires findings of compliance prior to issuance of a permit. *Towry v. City of Lincoln City*, 26 Or LUBA 554 (1994). The former may not be a basis for denial of an application, but may be a condition upon which the permit is granted.

The hearings officer might be a bit skeptical about this argument as it relates to some of the hazard criteria such as CCZLDO §4.11.251(7). This is because CCZLDO §4.11.251(7) reads more like an approval standard than a performance standard. CCZLDO §4.11.251(7) even requires that the engineering analysis must occur *before* development commences. That sounds more like approval criteria.

Staff further states that "the applicant acknowledged in their submittal that they would address any additional hazards if necessary." Whether or not this is true, it seems irrelevant to the criterion at hand. The criterion asks whether any newly adopted provisions constitute changes in the applicable criteria for the "decision."

The hearings officer does agree with staff that is that there is textual support in the code for the idea that the hazards special development review is a *separate process that is in addition to other land use permits*: For example, CCZLDO 4.11.150 states that "[A]pplications for a geologic hazard review may be made concurrently with any other type of application required for the proposed use or activity." That strongly suggests that this permit is a stand-alone permit and not an integral part of a CUP. On the other hand, CCZLDO §5.2.500 states that "An application for a conditional use or an administrative conditional use shall be approved only if it is found to comply with this Article and the applicable review standards and special development conditions set forth in the zoning regulations and any other applicable requirements of this Ordinance." There does seem to be some inconsistency in how these provisions operate.

In its final argument, the applicant seizes upon the Code's (and administrative rule's) use of the word "decision," and argues that this term should be distinguished from the term "use." The applicant points out that:

> the standard concerns changes to "applicable criteria for the original decision" (underline added). Assuming *arguendo* that the natural hazard regulations would even apply to the Pipeline, they would not alter the approval criteria applicable to the "original decision," *i.e.*, the permits that PCGP obtained. Rather, they would require PCGP to obtain new permits altogether (*e.g.*, floodplain development permit, geological hazard review, etc.). Thus, opponents appear to either misconstrue CCZLDO §5.2.600(2)(c), or to improperly rewrite it to read "applicable criteria for the original use" (underline added).

Applicant's Final Argument, Exhibit 35, at p. 5. Again, the hearings officer thinks the applicant is making a hyper-technical distinction. The intent of the extension criteria is to allow extensions so long as the substantive criteria governing the decision have not changed. On the other hand, if the criteria have changed in a substantive way, it makes sense from a policy perspective that the County would want to reevaluate the proposed development under those new criteria. The hearings officer could see that LUBA might find that there is no substantive difference between the use of the word "decision" and "use" in the *context of an extension.* As far as this or any other extension request is concerned, "decision vs. use" could be a distinction without a difference. However, on the flipside, ORS 174.010 cautions against inserting what has been omitted, and therefore it does make sense to assign deliberate effect to the choice of words chosen. This is particularly true when the hazards provisions can be implemented via a separate permit, and the Board of Commissioners did seem to envision that applicants with prior unexpired CUPs could simply supplement their prior approvals with additional permits addressing the hazards criteria. That addresses the policy concern that the County reevaluate the proposed development under those new criteria – it would be done in the context of a review format that has a more narrow focus, and is not redditive of work that has already been done.

Given the broad deference that the Board of Commissioners is granted by LUBA regarding interpretations of its own code, it does seem possible that LUBA would accept an interpretation and application of CCZLDO §5.2.600(4) that concludes that amendments to the code provisions related to "hazards" does not constitute a "*change*" in the "applicable criteria for the original decision" within the meaning of OAR 660-033-0140(4) and CCZLDO §5.2.600(2)(c).

We turn to address some of the specific provision which the opponents state are applicable approval standards for a pipeline. In this regard, Ms. Moro states:

> If the application for PCGP's original alignment was filed today, the hazard zone requirements the county has adopted since 2015 would apply because the legacy clause has been revoked."

Tonia Moro memorandum, Exh. 18, at pp. 7-8. She quotes what she says is Section 4.11.252, (and, indeed, Ms. Moro is quoting directly from the wording of Attachment A of Ord. 18-09-009PL, at pg. 90.). However, as far as the hearings officer can determine, the language Ms. Moro quotes is actually codified at Section 4.11.251(7), not 4.11.252(7):

> *SECTION 4.11.251 GENERAL STANDARDS In all areas of special flood hazards, the following standards are required:*
>
> *7. Other Development. Includes mining, dredging, filling, grading, paving, excavation or drilling operations located within the area of a special flood hazard, but does not include such uses as normal agricultural operations, fill less than 12 cubic yards, fences, road and driveway maintenance, landscaping, gardening and similar uses which are excluded from definition because it is the County's determination that such uses are not of the type and magnitude to affect potential water surface elevations or increase the level of insurable damages. Review and authorization of a floodplain application must be obtained from the Coos County Planning Department before "other development" may occur. Such authorization by the Planning Department shall not be issued unless it is established, based on a licensed engineer's certification that the "other development" shall not: a. Result in any increase in flood levels during the occurrence of the base flood discharge if the development will occur within a designated floodway; or,*
>
> *b. Result in a cumulative increase of more than one foot during the occurrence of the base flood discharge if the development will occur within a designated flood plain outside of a designated floodway.*

The hearings officer notes that because CCLZDO §5.2.600(4) was applicable to the last extension request, any argument concerning areas of special hazards could have been raised in the proceeding that led to the sixth extension and is therefore a collateral attack on that previous extension.

As an alternative basis for denial of this appeal issue, the hearings officer rejects the argument on the merits as well. Ms. Moro argues that CCZLDO §4.11.251(7) applies to the pipeline. Her argument is unfocused, however, as it makes no effort to explain where specifically the applicant proposes to engage in any of the listed regulated activities within a floodplain. While the applicant will be engaging in "excavation," it is not clear that such activity is proposed in an "area of special flood hazard "where base flood elevation data has been provided (Zones A1-30, AH, and AE) as set forth in Section 4.11.232, BASIS FOR ESTABLISHING THE AREAS OF SPECIAL FLOOD HAZARD or Section 4.11.243(2), Use of Other Base Flood Data (In A and V Zones)." That is a pre-requisite to the application of CCZLDO §4.11.251(7).

The Planning Director disputes the opponents' allegation:

> There has been no proof that the pipeline has been inventoried in a regulated mapped Hazard or Overlay zone that has changed and requires additional review within this last extension approval period. Staff has reviewed the pipeline route and the regulated mapped hazard areas along with the adopted language and found no changes to that are applicable in this review period that would void or provide justification for a denial of an extension.

See Supplemental Staff Report, Planning Director Jill Rolfe, Exh. 28 at p. 3. Staff's evidence is unrebutted. Ms. Moro points out that it is not the opponents' burden to show the applicability of land use regulations: "Contrary to the County's argument, it is not appellant-opponents burden to identify where PCGP's pipeline is subject to new hazard overlay criteria." Moro letter, Exhibit 31, p. 2. While that is correct, when there is substantial evidence in the record that demonstrates the Applicant's 2010 pipeline project approval is not prohibited by, or even subject to, flood plain regulations, it is incumbent on the opponents to rebut that evidence. The opponents have failed to do so.

The hearings officer finds that CCZLDO §4.11.251(7) does not apply to pipelines in any event. A subsurface pipeline is a use which is "excluded from the definition" because "such uses are not of the type and magnitude to affect potential water surface elevations or increase the level of insurable damages." Pipelines are located underground, and do not therefore displace floodwaters. The point of this floodplain regulation is to prevent the displacement of water in the event of a flood. If one sites a large building in a floodplain, the water displaced by that structure will have to go somewhere else, just as a full bathtub can overflow if a person gets into the tub. An underground pipeline does not displace flood water, as it is located under the ground. Thus, the pipeline clearly falls into the exception set forth in CCZLDO §4.11.251(7).

Next, Ms. Moro argues that CCZLDO §4.11.214(1) is a new approval criterion that would be applicable to the decision if PCGP applied for a Conditional Use in 2020. This provision provides:

> ***SECTION 4.11.214 METHODS OF REDUCING FLOOD LOSSES In order to accomplish its purposes, this ordinance includes methods and provisions for:***
>
> ***1. Restricting or prohibiting uses which are dangerous to health, safety, and property due to water or erosion hazards, or which result in damaging increases in erosion or in flood heights or velocities;***

A plain reading of this provision indicates that it is merely an informational "preamble," and it is not an approval standard for a Conditional Use Permit.

Ms. Moro also argues that CCZLDO §4.11.132 Natural Hazards (Balance of County Policy 5.11) is a new criterion that would be applicable to the CUP decision had PCGP applied in 2020. This provision states:

> *b. Landslides and Earthquakes Landslides: Coos County shall promote protection to life and property in areas potentially subject to landslides. New development or substantial improvements proposed in such areas shall be subject to geologic assessment review in accordance with section 4.11.150. Potential landslide areas subject to geologic assessment review shall include all lands partially or completely within "very high" landslide susceptibility areas as mapped in DOGAMI Open File Report O-16-02, "Landslide susceptibility map of Oregon."*

CCZLDO §4.11.155(1) states that all "development" is subject to this "geologic assessment review" unless it is exempted:

> *1. Except for activities identified in Subsection 2 of this section, as exempt, any new development or substantial improvement in an area subject to the provisions of this section shall require a Geologic Assessment Review.*

As Ms. Moro correctly notes, none of the exemptions in CCZLDO §4.11.155(1) apply. However, Ms. Moro has not shown that the pipeline will traverse areas which are mapped as being within "very high" landslide susceptibility areas. Both staff and the applicant confirm that the pipeline does not cross such areas, which of course makes sense given the nature of the application. Exhibit 28.

Ms. Moro also argues that CCZLDO §4.11.155(A)(1) is a new criterion that would be applicable to the decision had PCGP applied in 2020. This provision states:

> *A. ENGINEERING GEOLOGIC REPORTS 1. Engineering geologic reports required pursuant to this section shall be prepared by a certified engineering geologist licensed in the State of Oregon. Such reports shall be prepared consistent with standard geologic practices and employing generally accepted scientific and engineering principles. The content of such reports shall be generally consistent with the applicable provisions of "Guideline for Preparing Engineering Geologic Reports," 2nd Edition, 5/30/2014, published by the Oregon Board of Geologist Examiners.*

The requirement to submit an engineering geologic report only applies if the applicant proposes "new development or substantial improvement in an area subject to the provisions of this section," which is to say within an area mapped as being subject to "very high" landslide susceptibility, which is not the case here. Exhibit 28.

Ms. Moro further argues that the "wildfire" standard set forth at CCZLDO §4.11.132(f) is a new criterion that would be applicable to the decision had PCGP applied in 2020.

> *f. Wildfires: Coos County shall promote protection of property from risks associated with wildfires. New development or substantial improvements shall, at a minimum, meet the following standards, on parcels designated or partially designated as "High" or "Moderate" risk on the Oregon*

Department of Forestry 2013 Fire Threat Index Map for Coos County or as designated as at-risk of fire hazard on the 2015 Coos County Comprehensive Plan Natural Hazards Map:

However, the standards that follow apply only to dwellings and structures and the access road that serve them. The County previously determined that the pipeline is not a structure because it is underground. Ms. Moro's argument is a collateral attack on this previous determination. The "wildfire" provisions are not criteria for a pipeline.

Either way, the hearings officer finds the opponents' contention that the applicable criteria for the original decision have changed is incorrect.

(3) On lands not zoned Exclusive Farm, Forest and Forest Mixed Use:

a. All conditional uses for residential development including overlays shall not expire once they have received approval.

Hearings Officer Recommendation: This provision is not applicable because the proposed use is not residential in nature.

b. All conditional uses for nonresidential development including overlays shall be valid for period of five (5) years from the date of final approval.

Hearings Officer Recommendation: This provision is not applicable because the original approval occurred in 2012.

c. Extension Requests:

i. All conditional uses subject to an expiration date of five (5) years are eligible for extensions so long as the subject property has not been:

1. Reconfigured through a property line adjustment that reduces the size of the property or land division; or

2. Rezoned to another zoning district in which the use is no longer allowed.

Hearings Officer Recommendation: This provision is not applicable because the original approval is not subject to the five-year expiration date.

d. Extensions shall be applied for on an official Coos County Planning Department Extension Request Form with the fee.

Hearings Officer Recommendation: The applicant used the County's form and paid the applicable fee. This criterion is met.

e. There shall be no limit on the number of extensions that may be applied for and approved pursuant to this section.

Hearings Officer Recommendation: This is not an approval standard.

f. An extension application shall be received prior the expiration date of the conditional use or the prior extension. See section 5.0.250 for calculation of time.

Hearings Officer Recommendation: The application request was for a non-residential use and a portion of the project crosses lands that are not zoned farm or forest. Conditional uses are valid for a period of five years and are eligible for extensions. The only standards related to extensions under this subsection are that the properties have not been reconfigured, divided or rezoned to a zoning that would prohibit the use. No such reconfiguration, division, or rezoning has occurred in this case. The extension was submitted on official form with the fee. There are no limits to the number of extensions and the extension was received prior to the expiration date. Therefore, there are no reasons not to grant the extension request as submitted.

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

Hearings Officer Recommendation: The application of this provision is discussed *supra*.

E. Other Issues Raised by the Appellants Which are Unrelated to the Approval Criteria:

1. CCZLDO §5.0.500

The opponents argue that the county violated the CCZLDO §5.0.500 when it failed to deem the permit automatically revoked due to the inconsistencies of the pipeline project proposed in the HDD alignment the county approved in December 2019.

Hearings Officer Recommendation: The argument concerning CCZLDO §5.0.500 seems to be a repeat of prior arguments in earlier proceedings. To the extent that these issues have been addressed in previous County extension decisions, bring up this issue again is a collateral attack on those decisions. Turning to the merits, appellants argue that the County violated CCZLDO §5.0.500, which provides as follows:

SECTION 5.0.500 INCONSISTENT APPLICATIONS:

Submission of any application for a land use or land division under this Ordinance which is inconsistent with any previously submitted pending application shall constitute an automatic revocation of the previous pending application to the extent of the inconsistency.
Such revocation shall not be cause for refund of any previously submitted application fees.

The appellants argue that CCZLDO §5.0.500 is violated because the County failed to deem the original permit automatically revoked because the County approved the HDD alignment December 2019. However, the original decision for which this extension is being sought is no longer "pending" within the meaning of this section, so CCZLDO §5.0.500 does not apply to this case. Also, it is not clear to the hearings officer that the original route and the HDD Bore Route are "inconsistent." The HDD route was approved as a partial "alternative" route, as opposed to a replacement. There is nothing in the code that prohibits an applicant from applying for different alternative pipeline routes on different properties, and, in light of NEPA, it seems to be a practical necessity. An alternative route is not necessarily "inconsistent" with the original route – it's just an alternative.

Having said, if the Board of Commissioners were to find that the Original Approval route is still "pending," the Board could determine that the portion of the "Original Route" that differs from the HDD route (aka the "Early Works" route) is automatically revoked to the extent of the inconsistency. This would essentially mean that the portion of the original route that traverses Hayes Inlet is revoked. Although legally it seems like a stretch, it would not necessarily be a bad result from a policy perspective, especially if the applicant were to agree with it. Given that it seems unlikely that the Hayes Inlet portion of the original route is still viable in light of FERC's approval of the HDD bore alternative, it may be a mechanism to clean up the approved route, thereby releasing some of the affected property owners from the burden on title.

2. Takings Argument.

Opponents continue to argue that the extensions continue to impose a taking of the property of the landowners along the alignments through inverse condemnation. They argue that the county is aware that some landowners have not consented to this application. They argue that the county is aware that the applicant may not - and for some segments - will not obtain federal approval to build the pipeline proposed, and does not intend to initiate development for years. They argue that the county is aware that the permit constitutes a cloud over the land owners' ability to sell and fully use their property. They argue that the county must prevent further damage to the landowners by denying the extension and inviting the applicant to reapply when it knows what alignment FERC will approve.

Hearings Officer Recommendation: The Board addressed this issue in Final Decision and Order No. 19-11-069PL, the relevant portion of which is incorporated herein by reference. In short, the issue is not developed sufficiently to enable review. Takings arguments of this sort should be presented in a different forum, in any event.

3. Allegation of Goal One Violation.

Appellants contend that the County "is engaged in a pattern and practice of violating Goal 1." Moro Rebuttal Open Record Period Submittal, Exhibit 31, p 2.

Hearings Officer Recommendation: To the extent the contention is directed at the County's processing of the Extension Request, it provides no basis for relief. As LUBA has recently stated, Goal 1 does not apply to permit proceedings: "Goal 1 does not apply to a proceeding on a

permit and an allegation of a violation of Goal 1 accordingly provides no basis for reversal or remand of a decision on a permit." *Oregon Shores Conservation Coalition v. City of North Bend*, __ Or LUBA __ (LUBA No. 2019-118, July 17, 2020) (slip op at 38). *See also Byrd v. Stringer*, 295 Or 311, 316-317, 666 P2d 1332 (1983) (where a local government has an acknowledged comprehensive plan and land use regulations, the Goals do not directly apply as approval criteria to development proposals in that jurisdiction). In the present case, the County's comprehensive plan and land use regulations are acknowledged, and the Extension Request is an application for a permit. As a result, the Goals do not dictate any approval criteria applicable to the Extension Request.

Additionally, to the extent this contention is directed at the process the County followed in adopting past ordinances like Ordinance No. 19-12-011PL, the contention is misplaced in the present case, which does not concern the adoption of county ordinances. Any concerns such should have been raised in a LUBA appeal of that ordinance.

4. Miscellaneous Arguments Unrelated to Approval Criteria.

Multiple opponents raised issues outside the scope of this extension request and unrelated to the relevant CCZLDO §5.2.600 approval criteria. As such, the hearings officer did not consider these topics when making this recommendation. These include:

- Community opposition to the project. Diana Zutell, Exh. 1; June Willoughby, Exh. 2.
- Danger from earthquakes, terrorists, or maritime accidents. Kirk Patrick, Exh. 3
- Harm to the tourism industry. Kirk Patrick, Exh. 3; Emily Church, Exh. 10.
- Noise, light, and air pollution. Suzanne Brimhall, Exh. 9.
- Dislike of liquified natural gas and fossil fuels. Martha Gregor, Exh. 11; Diane Tracey, Exh. 17; Lydia Delgado email, Exh. 23.
- Suggestions that hemp is a better alternative to natural gas. Lydia Delgado email, Exh. 23.
- Protection of existing jobs instead of creating new ones. Ashley Audycki, Rogue Climate, Exh. 15.

None of these issues relate to the approval criteria and are therefore not relevant to the decision-making process.

Finally, various opponents, including Larry and Sylvia Mangan, raise the issue that the pipeline route approved by the County Board of Commissioners a decade ago differs from the route approved by FERC in March 2020. Mangan letter, Exh. 16. While this may be true, it is outside the scope of this extension request hearing, and not relevant to the CCZLDO §5.2.600 approval criteria.

At the December 18, 2021 hearing, the hearing officer suggested to staff and the Applicant that it might be a might be a good idea if the County modified and combined its original conditional use permit and supplemental route approvals to arrive at one route that is consistent with the route approved by FERC. Perhaps the project opponents would even join in that effort. The mechanics of such an effort would be complex and may require enabling legislation. Nonetheless, it would appear to be a laudable goal, given the fact that the FERC-approved route has now been determined. In any event, this topic is not relevant to this particular extension request.

III. CONCLUSION.

For granting the requested extension, CCZLDO §5.2.600 *primarily* requires compliance with two core subjective criteria. The applicant must show that that none of the relevant approval criteria have changed since the development approval was given, and that it was unable to begin construction for reasons out of its control.

The applicant's use is still listed as a conditional use in the relevant non-resource zones under the current zoning regulations, and the relevant approval criteria have not changed. In addition, the hearings officer finds that, despite the applicant's diligent pursuit of the federal approvals required, those approvals have not yet been secured, and thus the applicant was unable to commence its development proposal before the expiration date for reasons beyond the applicant's control.

For these reasons, the hearings officer finds and concludes that the applicant, PCGP has met the relevant the CCZLDO §5.2.600 approval criteria for a CUP extension of one year, to April 2, 2021. With one possible exception, the hearings officer recommends to the Coos County Board of Commissioners that they so find, thereby affirming the Planning Director's decision granting the one (1) year CUP extension in County File No. HBCU 10-01 / REM 11-01 to April 2, 2021 (EXT-20-005), subject to the conditions of approval set forth in the Planning Director's decision. The hearings officer believes it may be worthwhile to at CCZLDO §5.0.500 as mechanism to consolidate the various alternative routes.

Respectfully submitted this 10th day of March, 2021.

Andrew Stamp

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Andrew H. Stamp
Hearings Officer