

2019-014558

Klamath County, Oregon



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Fee: NO FEE

**BEFORE THE KLAMATH COUNTY  
BOARD OF COMMISSIONERS**

**IN THE MATTER OF FILE NO. TYPE II 2-19 (CUP 5-15) FINAL ORDER**

**WHEREAS**, Pacific Connector Gas Pipeline, LP requested that the County approve a one-year extension to the approval period for a conditional use permit (County File No. 5-15) that authorized construction of a gas transmission compressor station, meter stations, and associated facilities on property located at the northeast corner of Malin Loop Road and Morelock Road in the Forestry/Range zoning district; and

**WHEREAS**, the County processed the application pursuant to the County's Type II procedures; and

**WHEREAS**, after providing public notice and the opportunity for comment, the County Planning Director approved the application; and

**WHEREAS**, Greater Good Oregon, Cornelius Boshuizen, Debra Matthews appealed the Planning Director's decision to the Board of Commissioners; and

**WHEREAS**, the Board of Commissioners held a noticed public hearing on the application on August 20, 2019; and

**WHEREAS**, at the request of the appellants, the Board of Commissioners held the record open after the hearing for seven days, followed by an additional seven days for final written argument; and

**WHEREAS**, at the conclusion of the initial seven-day open record period, at the appellants' request, the Board reopened the record for seven days to allow a response to new evidence submitted by the applicant followed by an additional seven days for applicant to submit final written argument; and

**WHEREAS**, based upon the testimony entered in consideration of the whole record, the Klamath County Board of Commissioners concluded that the application conformed with applicable approval criteria, and the arguments and evidence presented with the appeal did not undermine this conclusion; and

**WHEREAS**, the Klamath County Board of Commissioners acting within their authority adopted the findings of fact in **Exhibit A** approved File No. Type II 2-19 (CUP 5-15).

**NOW, THEREFORE, THE KLAMATH COUNTY BOARD OF COMMISSIONERS ORDERS AS FOLLOWS:**

1. The Appeal is Denied.
2. The Application to extend CUP 5-15 is approved, subject to the Findings of Fact and Conclusions of Law in **Exhibit A**.

Dated this 6 day of December 2019.

**FOR THE BOARD OF COMMISSIONERS**



Chair

**Not Present**

\_\_\_\_\_  
Commissioner



Commissioner



County Counsel

Approved as to form

*Mark Bartholomew*

**NOTICE OF APPEAL RIGHTS**

This decision may be appealed to the Oregon Land Use Board of Appeals (LUBA) within 21 days following the date of the mailing of this order. Contact LUBA for information as to how to file this appeal (LUBA by phone at 1-503-373-1265 or mail at 775 Summer Street NE, Suite 330, Salem, Oregon 97301-1283). Failure to do so in a timely manner may affect your rights.

EXHIBIT A

BEFORE THE BOARD OF COMMISSIONERS  
OF KLAMATH COUNTY, OREGON

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF DENIAL OF THE  
APPEAL AND APPROVAL OF THE APPLICATION

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In the Matter of an Appeal of the Planning Director's Approval of a One-Year Time Extension of a Conditional Use Permit (County File No. CUP 5-15) to Authorize Construction of a Gas Transmission Compressor Station, Meter Stations, and Associated Facilities on Property Located at the Northeast Corner of the Intersection of Malin Loop Road and Morelock Road in the Forestry/Range Zoning District.

COUNTY FILE NO.  
TYPE II 2-19 (CUP 5-15)

**I. INTRODUCTION**

In this matter, the Klamath County ("County") Board of Commissioners ("Board") denied an appeal of the County Planning Director's decision to approve a one-year time extension to implement a conditional use permit (County File No. CUP 5-15) ("Approval") to authorize construction of a gas transmission compressor station, meter stations, and associated facilities on real property located at the northeast corner of the intersection of Malin Loop Road and Morelock Road ("Property"). In support of this decision, the Board adopts the following findings of fact and conclusions of law.

**II. PROCEDURAL FINDINGS**

**A. Initiation and Completeness of Application**

In this case, Pacific Connector Gas Pipeline, LP ("Applicant"), who is both the permit holder and the owner of the Property, submitted an application on the required form and with the required information and fees ("Application"). On the basis of these facts,

the Board finds that the Application has been properly initiated and is complete for review.

### **B. Planning Director Proceedings**

The Board finds that the Planning Director proceedings in this matter complied with applicable law. On March 23, 2019, Applicant submitted the Application to the County. Although the KCLDC provides that extension applications are subject to a Type I ministerial review, the Applicant requested that the County process the Application pursuant to its Type II procedures to ensure that the public had greater involvement opportunities, including notice of the Application, opportunity to comment, and opportunity to appeal to a public hearing before a final County decision was made. Applicant paid the additional fee associated with Type II review.

While not conceding that the additional procedures were required, the County agreed to process the Application pursuant to the County's Type II procedures. On April 2, 2019, the Planning Director deemed the Application complete. On April 29, 2019, the Planning Director mailed a Notice of Administrative Review and Opportunity to Comment to owners of property within 500 feet of the Property, consistent with KCLDC 32.030.C and KCLDC 32.070. No one from the public submitted written comments on the Application by the April 29, 2019 deadline provided in the notice. No one objected to the Planning Director's procedures in this matter. On April 29, 2019, the Planning Director signed a Final Order approving the Application. On May 1, 2019, the Planning Director mailed notice of his decision in accordance with KCLDC 31.010.G.

On the basis of these facts, the Board finds that the Planning Director conducted lawful proceedings in this matter consistent with applicable local and state requirements.

### **C. Board Proceedings**

The Board finds that the Board appeal procedures in this matter complied with applicable law. On May 13, 2019, Greater Good Oregon, Cornelius Boshuizen, and Debra Matthews (together, "Appellants") filed an appeal of the Planning Director's decision. On May 20, 2019, Appellants filed a written statement in support of the Appeal.

The Board finds that Appellants have standing to file the Appeal. Although none of the Appellants submitted written comments regarding the Application during the public comment period before the Planning Director, the Board finds that they are aggrieved for the reasons explained in the Appeal statement. Accordingly, the Board finds that the

Appellants have standing to file this local appeal of the Planning Director's decision made without a hearing pursuant to ORS 215.416(11) and *Hood River Valley Residents Committee v. Hood River County*, \_\_ Or LUBA \_\_ (LUBA No. 2018-028, Oct. 15, 2018).

The Board finds that the County gave proper notice of the Appeal hearing in this matter by publishing a notice in the Herald and News on July 25, 2019, and on July 26, 2019, with both dates being at least 20 days in advance of the Board public hearing in this matter.

On August 20, 2019, the Board opened the public hearing for the appeal of the Planning Director's decision. A quorum of the Board was present, consisting of Chair Donnie Boyd and Commissioner Derrick DeGroot. Chair Boyd inquired whether any Board members needed to disclose any *ex parte* communications, site visits, conflicts of interest, or bias. No disclosures were made. No one challenged the jurisdiction of the Board or any of its members to participate in this matter.

Next, County staff presented the staff report. After that, counsel for Applicant presented Applicant's case. Following Applicant's testimony, the Board accepted oral testimony from counsel for the Appellants, followed by oral testimony from seven proponents and nine opponents. The Board then accepted oral rebuttal from Applicant's counsel. Before presenting their testimony, each person took an oath swearing to tell the truth in their comments.

At the conclusion of the testimony, the Board closed the public hearing and approved a motion, 2-0, to hold the record open for seven days ending on August 27, 2019, followed by a seven-day period to allow Applicant to submit its final written argument ending on September 3, 2019.

During the first open record period, Appellants requested the right to respond to new evidence submitted by Applicant during the first open record period. The County understood Appellants' request to be made pursuant to ORS 197.763(6)(c). By the terms of this statute, the County is obligated to re-open the record pursuant to ORS 197.763(7). Accordingly, on September 4, 2019, at a noticed public meeting, the Board voted to grant Appellants' request and allow Appellants a seven-day period ending on September 10, 2019, to submit argument and evidence in rebuttal to new evidence submitted by Applicant during the first open record period, followed by a seven-day period for Applicant to submit final written argument. The County accepted submittals from Appellants and Applicant, respectively, during this extended open record period.

On September 24, 2019, the Board reconvened to make a final decision on the Application. A quorum of the Board was present at the meeting consisting of Commissioner DeGroot and Vice Chair Kelley Minty Morris. At the commencement of the meeting, Vice Chair Minty Morris introduced the item and inquired whether any members of the Board needed to disclose any *ex parte* communications, site visits, conflicts of interest, or bias. No members of the Board made any disclosures. No one challenged the jurisdiction of the Board or any of its members to participate in this matter. After that, the Board approved a motion to deny the Appeal and approve the Application, subject to approval of findings of fact and conclusions of law in support of the Application at a subsequent meeting. The Board adopted these findings of fact and conclusions of law on September 19, 2019.

On the basis of these facts and conclusions, the Board finds that it has conducted lawful proceedings in this matter consistent with established quasi-judicial principles and applicable local and state requirements.

### **III. SUBSTANTIVE FINDINGS**

#### **A. Findings on Specific Issues**

##### **1. The nature of the project and original conditions warrant an extension of the Approval (KCLDC 44.050.D.1).**

The Approval authorizes the development of large, complex facilities that are interrelated and interconnected with Applicant's overall pipeline project ("Pipeline"), which extends across hundreds of miles through multiple counties. As explained below, Applicant is awaiting federal approval of the Pipeline and its related components, including the facilities authorized by the Approval. Contrary to appellants' unsubstantiated contention, until Applicant receives that federal approval, Applicant cannot commence construction of the Pipeline, including the facilities authorized by the Approval. Further, as also explained below, Applicant has acted in good faith and made reasonable efforts to obtain the federal approval. In light of these facts, the Board finds that the nature of the project supports an extension. Although opponents contend that the nature of the project has changed because Applicant is now proposing a different version of the compressor station to the Federal Energy Regulatory Commission ("FERC"), the Board denies this contention for the reasons explained below in Section III.B.3 of these findings. Further, although opponents contend that new research has yielded updated information on impacts from the project, the Board finds that this information is not genuinely directed at this approval criterion but is instead a collateral attack on the Approval. The Board denied this contention for the reasons explained

below in Section III.B.2 of these findings. The Board finds that the Application satisfies this criterion.

**2. Applicant's acts arise beyond mere contemplated use (KCLDC 44.050.D.2).**

During the relevant previous 12-month extension period for the Approval, Applicant has taken several steps to implement the Approval, including the following essential pre-construction activities:

- Responding to data requests from FERC associated with that application;
- Compiling all hydraulics information to determine the needed compression at the Klamath Compressor Station;
- Continuing engineering consultation to advance the compressor station design, including detailed vendor equipment package evaluations, which allowed for a Process Hazard Analysis workshop to be completed;
- Conducting cultural field surveys on-site supporting agency reporting; and
- Implementing site vegetation control measures in consultation with the local Fire Marshall to reduce fire load.

In support of these findings, the Board relies upon the letter from Pipeline Project Manager Jimmy Bernabe in Exhibit 3 to Applicant's August 27, 2019 open record submittal, which clarified Mr. Penning's earlier letter on this subject. The Board finds that, as mentioned in Mr. Bernabe's letter, some additional site-specific measures are contingent upon obtaining federal approval for the Pipeline. *Id.*

In addition to these site-specific activities, Applicant and its team have spent thousands of hours and substantially in excess of \$1,000,000 toward development of the Pipeline as a whole, including engaging in due diligence, acquisition, permitting, and similar measures. *Id.* Further, contrary to appellants' contention, Applicant has acquired the Property. See Exhibit 1 to Applicant's August 27, 2019 open record submittal. Together, these activities reflect Applicant's ongoing and extensive activities to implement the Approval.

Although appellants contend that Applicant's activities are mere "planning" exercises and do not constitute sufficient progress in implementing the Approval, the Board denies appellants' contention for four reasons. First, appellants incorrectly equate this approval criterion with a vested rights factor that uses similar language. As a permit extension criterion and not a vested rights factor, KCLDC 44.050.D.2 must establish a standard lower than would occur in the vested rights context because otherwise, meeting this standard would presumably vest the permit, in which case no extension of

the Approval would be needed. Second, even in the vested rights context, the “contemplated use” factor does not require actual construction. *Cook v. Clackamas County*, 50 Or App 75 (1981). The holding in *Cook* supports the conclusion that even relevant pre-construction activities go beyond mere “contemplated use.” Third, appellants do not present any credible evidence that Applicant did not engage in the activities identified in Mr. Bernabe’s letter within the most recent permit approval period, and their contention that Applicant’s activities were directed at a different design are unsubstantiated and therefore not persuasive. Fourth, contrary to the opponents’ characterization, the relevant provision does not require “development;” it requires “acts.”

For these reasons, the Board denies appellants’ contentions under this criterion and finds that the Application satisfies this criterion.

**3. Development is unable to occur due to circumstances beyond Applicant’s control (KCLDC 44.050.D.3).**

The Board finds that Applicant is not at fault for not yet implementing the Approval. Contrary to the appellants’ contention, the compressor station, together with the Pipeline as a whole, cannot be constructed or operated without federal approval. Applicant has requested federal approval for the Pipeline and its components and is awaiting that final decision, which is expected in early 2020 (delayed in part according to Applicant’s testimony due to the federal government shutdowns that have occurred while the FERC application has been pending). The Board finds that Applicant has acted in good faith and has been responsive to the data requests from FERC. *See, e.g., Exhibit 2* to Applicant’s August 27, 2019 open record submittal, which identifies the actions made by Applicant to respond to FERC’s data requests through March 2019.

Although FERC denied Applicant’s previous application for a Pipeline certificate, FERC denied without prejudice to Applicant submitting a new application, and Applicant has submitted that new application to FERC. Unlike when local governments consider land use applications, FERC does not have a deadline to act.

The Board finds that Applicant was not the cause of the circumstances leading to Applicant being unable to begin or continue development during the development approval period. Instead, for the reasons stated above, the Board finds that Applicant worked diligently and in good faith during the one-year approval period to obtain approval of required permits and otherwise implement the Approval.

The Board further finds that opponents’ contention that Applicant was responsible for FERC’s denial because Applicant did not meet its burden of proof before FERC warps the relevant inquiry and attempts to fabricate ambiguity where none exists. Opponents



would have the Board delve into FERC's administrative proceedings and assess Applicant's actions and inactions and draw conclusions about same within the context of a complex, multi-party administrative proceeding being conducted by a non-County agency. The Board finds that this level of inquiry is absurd: It forces the Board to engage in a practically futile exercise and one that greatly exceeds the scope of the extension criteria. It would be akin to asking the Board to determine whether an applicant, who needed a permit extension from the County because it could not obtain financing, was responsible for a lender denying the applicant's loan application. The Board is neither qualified nor required to conduct this analysis. Thus, properly construed, in order to determine whether Applicant was responsible for circumstances that prevented permit implementation, the Board is only required to verify whether Applicant had exercised reasonable efforts to implement the Approval. For the reasons stated above, the Board finds Applicant has done so.

Alternatively, to the extent the Board is required to conduct the level of analysis proffered by opponents, the Board still finds that Applicant is not responsible for not obtaining the FERC approval by March 2019. First, Applicant cannot be the cause of the FERC denial because Applicant did not request or issue that denial. Stated another way, because Applicant was required to obtain a discretionary permit from another agency as a prerequisite to implementing the permit, it was necessarily out of Applicant's control whether or when FERC issued that permit.

Moreover, the Board finds that opponents' contention fails because it assumes too much. Under opponents' theory that Applicant is at fault, if Applicant had simply presented additional evidence regarding public need for the project to FERC, FERC would have unquestionably approved the certificate request and would have done so before March 26, 2019 (the end of the previous extension of the Approval). But it is entirely possible that, FERC would not have done so. Even if Applicant presented additional evidence of public need, another party—perhaps one of the opponents even—might have presented evidence that rebutted or undermined Applicant's evidence, causing delay or even denial. Alternatively, even if Applicant had presented additional evidence of public need, FERC might not have issued a decision until after March 26, 2019. A third plausible option is that FERC could have approved the certificate, but that approval could have been bound up in appeals or requests for reconsideration filed by opponents, which would have delayed Applicant's implementation. In short, there are simply too many potential variables and outcomes in the FERC process to declare that development was unable to occur due to circumstances within Applicant's control.

Thus, opponents have misconstrued this provision, and they have not presented evidence that undermines Applicant's evidence that development of the compressor

station was unable to occur for reasons outside of Applicant's control. Therefore, the Board denies opponents' contention on this issue and find that the Application satisfies KCLDC 44.050.D.3.

**4. Before this decision, Applicant had not yet obtained the maximum number of extensions allowed under the KCLDC for the Approval.**

A conditional use permit holder is eligible to obtain three one-year extensions to a permit from the County. KCLDC 44.050.D.4. The Board finds that the County granted one-year extensions to the Approval in 2017 and 2018. The Application requests a third one-year extension for the Approval. Therefore, the Board finds that granting this request is within the number of extensions permitted by KCLDC 44.050.D.4.

**B. Opponents' additional contentions lack merit.**

**1. OAR 660-033-0140 does not establish approval criteria applicable to the Application.**

The County has adopted its own standards for granting permit extensions, and these standards have been acknowledged as being in compliance with the Statewide Planning Goals ("Goals"), including their implementing rules. As a result, neither the Goals nor their implementing rules (including OAR 660-033-0140) directly apply to the County's land use decisions. *Byrd v. Stringer*, 295 Or 311, 318-19, 666 P2d 1332 (1983) ("[O]nce acknowledgment has been achieved, land use decisions must be measured not against the goals but against the acknowledged plan and implementing ordinances."). Under similar circumstances, LUBA upheld Deschutes County's decision to apply its own, acknowledged, generally applicable permit extension criteria in lieu of applying OAR 660-033-0140 to a request for a permit extension on farm land. *Gould v. Deschutes County*, 67 Or LUBA 1 (2013). The Board finds that this appellate decision is precedential and validates the County's application of its own code in this circumstance.

Next, appellants erroneously attempt to make an end run around the acknowledgment rules by challenging, pursuant to ORS 197.829(1)(d), the Board's interpretation of KCLDC 44.050.D as being inconsistent with the rule when, in reality, appellants are impermissibly challenging whether the underlying provision (not the interpretation thereof) complies with the rule. The Court of Appeals has rejected similar attempts in the past:

"The initial question is whether respondents' ORS 197.829(1)(d) argument is reviewable. We held in *Friends of Neabeck Hill v. City of Philomath*, 139 Or App 39, 911 P2d 350, *rev den* 323 Or 136, 916 P2d 311 (1996),

[Footnote omitted] that, in the review of a local land use decision to which an acknowledged comprehensive plan or regulatory provision is applicable, ORS 197.829(1)(d) does not enable LUBA or us to consider a *goal* consistency challenge to a local interpretation of the provision if: (1) the local government's interpretation is a correct statement of the meaning of the provision; (2) the challenge depends in substance on a showing that the acknowledged provision itself, as distinct from the interpretation of it, is contrary to a goal; and (3) a direct assertion that the acknowledged provision is inconsistent with the goal would not be cognizable under ORS 197.835."

*Opus Development Corp. v. City of Eugene*, 141 Or App 249, 255-56, 918 P2d 116 (1996) (Italics in original).

The Board finds that appellants' contention easily meets this test. First, as stated in the findings in response to KCLDC 44.050.D above, the County's interpretation is a correct construction of the KCLDC. Second, the appellants purport to be challenging the County's interpretation, but the County's interpretation is based upon the plain language of the County's provisions, which, together, do not require compliance with all of the requirements of OAR 660-033-0140. Thus, what the appellants are actually challenging is whether KCLDC 44.050.D complies with OAR 660-033-0140. Because the County's provisions are acknowledged, the appellants cannot raise that challenge at this time, as explained above. Therefore, the appellants are making a collateral attack that the Board denies pursuant to *Byrd*, 295 Or at 311.

Third, because this decision only applies, and does not amend, the KCLDC, the appellants could not directly challenge the County's decision on the grounds that it does not comply with a Goal or a rule implementing a Goal. ORS 197.835(8) (LUBA must reverse or remand a decision applying a plan or land use regulation if the decision is not in compliance with applicable provisions of the plan or land use regulations). *Compare* ORS 197.835(6) (LUBA must reverse or remand a plan amendment if the amendment is not in compliance with the Goals).

Because the factors of the *Opus* test are met, the appellants' ORS 197.829(1)(d) argument does not provide a basis to apply additional criteria in this matter or to deny the Application.

For all of these reasons, the Board denies opponents' contentions on this issue.

**2. Attempts to challenge potential impacts of the compressor station are outside the scope of this proceeding.**

Many of the opponents' contentions challenge alleged impacts from the construction and operation of the compressor station, including potential use of eminent domain to acquire land; construction worker camps; noise; night lighting; emissions; risks of leaks, explosions, or fires; contamination of water supply; and impacts to wildlife and livestock. The Application is a request for an extension of time, not a request for a new conditional use permit. Therefore, the Board is limited to reviewing the Application for compliance with the permit extension criteria; the Board finds that it lacks the authority to re-apply the underlying conditional use permit criteria or to re-examine the merits of the Approval. Opponents have not established how their concerns about potential impacts from the compressor station are relevant to the permit extension criteria, and the Board finds that they are not. Opponents' attempts to challenge the Approval in this proceeding are therefore an impermissible collateral attack on the Approval, which became final in 2015. For these reasons, the Board denies the opponents' contentions on these issues.

**3. The existence of differences between Applicant's current FERC application and the Approval are irrelevant to this Application.**

The Application requests an extension of the permit granted by the County in 2015. Applicant is not seeking to modify the County permit as part of this process. As Applicant testified in these proceedings, FERC has the ultimate authority in determining the scope of any approval of the Pipeline and its related components, including the compressor station. FERC could approve the current version of the compressor station, a past version of the compressor station, or some entirely different version of the compressor station. To the extent there are material differences between the ultimate federal approval and the Approval that require further County review, Applicant has stated that it will seek that County review at a later time; the Board finds it is not part of this process and cannot be used as a basis to deny the Application. The Board denies the opponents' contentions on this issue.

**4. The extension requests and County decisions granting these requests have been timely.**

Opponents also contend that Applicant did not request the previous Approval extensions until after the Approval had already expired, but Opponents are mistaken. Applicant filed both such requests before March 26 of the respective years (March 23, 2017 and March 22, 2018). *See generally* 2017 and 2018 extension application narratives attached to appellants' September 10, 2019 open record submittal, which refer to the March 26 date as occurring in the future and previous application materials included in the official file for the Application. In any event, the Board also finds it is too late for the opponents to challenge the 2017 and 2018 extension decisions as they are

final and no longer appealable. It is undisputed that Applicant submitted the 2019 extension request in a timely manner (on March 22, 2019, which is before the March 26, 2019 conclusion of the previous approval period).

Further, the Board finds that if a permit extension is requested before the permit expiration date (as occurred here), the permit does not expire while County review of the request is pending. Stated another way, KCLDC 44.050.D. does not require the County to grant an extension request before the end of the one-year period of the previous extension, provided the extension request was filed within that time period. In fact, it would be unfair to permit holders for the Board to interpret the KCLDC otherwise. LUBA upheld a local government's interpretation of its own code to this effect under similar circumstances. *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995). The Board denies opponents' contention on this issue.

**5. The County is not required to find that Applicant has engaged in "substantial development" in order to grant the extension.**

The introductory statement of KCLDC 44.050.D provides that "[r]equests for an extension of time based on substantial development of an approved and final Conditional Use Permit shall be reviewed against the following criteria." Contrary to appellants' contention, this statement does not establish any approval criteria. Rather, as the plain language indicates, it introduces the approval "criteria," which follow after the statement. Appellants do not offer any other explanation that gives effect to the actual code language as it is structured; therefore, the Board finds there is no basis to grant the appellants' contention on this issue.

#### **IV. CONCLUSION**

Based upon the evidence and argument identified above, the Board finds that the Application satisfies all applicable approval criteria and that the Appeal lacks merit. Accordingly, the Board denies the Appeal and approves the Application.