

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR DOUGLAS COUNTY

STACEY MCLAUGHLIN, R. FRANCIS
EATHERINGTON, PAMELA BROWN
ORDWAY and JOHN CLARKE

Petitioners,

vs.

DOUGLAS COUNTY

Respondent,

CASE NO.

PETITION FOR WRIT FOR REVIEW

Petitioners Stacey McLaughlin, R. Francis Eatherington, Pamela Brown Ordway and John Clark by and through their attorney Tonia Moro, seek a writ of review to reverse or invalidate Douglas County’s December 8, 2017, decision granting a seventh one-year extension of time to construct a high pressured natural gas transmission pipeline in Douglas County’s Coastal Zone Management Area (CZMA) pursuant to the Conditional Use Permit and Utility Facility land use permit, originally approved on December 10, 2009.

Petitioners allege:

Parties and Nature of Decision

1.

Respondent Douglas County is duly organized and existing by virtue of the laws of the State of Oregon. The Douglas County Planning Commission and the Planning Director are authorized in some circumstances to make decisions regarding the application of Douglas County’s land development code. Douglas County’s Board of Commissioners has discretionary authority to review such decisions. (Unless otherwise specified, these entities are referred to as “County”).

2.

The permit holder is Pacific Connector Gas Pipeline, LP (PCGP), is a foreign limited

1 partnership registered with the Oregon Secretary of State whose primary business address is
2 Calgary, Alberta, Canada. The decision at issue concerns PCGP's 2017 application requesting
3 the County's approval of a 12-month extension, of the County's Planning Department File No.
4 09-045, Conditional Use Permit and Utility Facility.

5 3.

6 In file number 09-045, the County approved a conditional use permit to construct that
7 portion of a 232 mile 36" high-pressured natural gas pipeline which traverses Douglas County
8 and extends from Malin, Oregon to Coos Bay, Oregon. The permit was approved on December
9 10, 2009. One of the conditions of approval requires PGCP to obtain approval of the pipeline
10 by Federal Energy Regulatory Commission (FERC): "Condition of Approval 2 requires that
11 prior to any construction activity, the applicant must provide the County with proof that FERC
12 has issued a 'Certificate of Public Convenience and Necessity' as well as a 'Notice to Proceed.'"

13 4.

14 PGCP failed to commence construction within the initial two-year approval period and
15 has sought and been granted seven one-year extensions beginning in October 2011, and
16 continuing in October 2012, November 2013, December 2014 and November 2015, December
17 20, 2016 (decision pending review in Douglas County Circuit Court No. 17CV32687), and most
18 recently on December 8, 2017, the decision challenged in this proceeding.

19 5.

20 The County issued its 2017 extension through it's planning director's decision entitled,
21 "Planning Department File No. 09-045, Extension Request" on December 8, 2017 (the 2017
22 extension), the same day it received PGCP's application for the extension. A copy of the letter
23 decision is attached as Exhibit A.

24 6.

25 Petitioners are and at all times material herein were real property owners whose land has
26 been subject to the permit holder's right to exercise eminent domain since 2009. The 2009

1 proposed route of the PGCP pipeline traverses petitioners' property. Petitioner Pamela Brown
2 Ordway owns property within 750 feet of the project.

3 **Background to the 2017 extension decision**

4 7.

5 Prior to the county's issuance of the last two extensions, on March 11, 2016, FERC
6 denied PCGP's application for approval of the pipeline. The bases of the denial included:

7 [PGCP] has presented little or no evidence of need for the Pacific
8 Connector Pipeline. [PGCP] has neither entered into any precedent agreements
9 for its project, nor conducted an open season, which might (or might not) have
10 resulted in "expressions of interest" the company could have claimed as indicia of
11 demand. As it stands, [PGCP] states that the pipeline will benefit the public by
12 delivering gas supply from the Rocky Mountains and Canada to the Jordan Cove
13 LNG Terminal and by providing an additional source of gas supply to
14 communities in southern Oregon (though, again, it has presented no evidence of
15 demand for such service).

12 * * *

13 Thus, the Commission's issuance of a certificate would allow Pacific
14 Connector to proceed with eminent domain proceedings in what we find to be the
15 absence of a demonstrated need for the pipeline.

16 41. We find the generalized allegations of need proffered by Pacific
17 Connector do not outweigh the potential for adverse impact on landowners and
18 communities.

19 154 FERC ¶ 61,190, FERC Order Denying Applications for Certificate and Section 3
20 Authorization (issued March 11, 2016) Docket Nos. CP13-483-000 and CP13-492-000. The
21 County was aware of this decision.

22 8.

23 PGCP filed a Request for Rehearing with FERC which was denied on December 9, 2016.
24 FERC found that PGCP failed to demonstrate "extraordinary circumstances" that overcome the
25 need for finality of the litigation because:

26 Prior to issuing the March 11 Order, Commission staff sent four data
requests to [PGCP] asking it to show that the public benefits of its proposed
Pacific Connector Pipeline outweighed the project's adverse impacts, consistent
with the Commission's Certificate Policy Statement. In response to each data
request, [PGCP] stated that its negotiations were "active and ongoing" and
provided no certainty as to when it would receive agreements for the pipeline's

1 capacity. We afforded [PGCP] ample time - over 3.5 years - to demonstrate
2 evidence of market demand or to contract for and submit the precedent
agreements with its firm shippers prior to issuing the March 11 Order.

3 157 FERC 61,194, FERC Order Denying Rehearing (issued December 9, 2016). Moreover,
4 FERC noted that to preserve the integrity of its process it was required to demand due diligence
5 of the applicant to obtain and present evidence in a timely manner. FERC therefore found that
6 PGCP had not exercised due diligence. The County was aware of this decision.

7 9.

8 Nevertheless, the county issued its sixth extension of the original pipeline configuration
9 permit on December 20, 2016. The extension decision stated:

10 In accordance with LUDO Section 2.800 (Permit Expiration Dates on Farm and
11 Forest Lands) and Section 3.39.300 (Granting of Extensions) the Douglas County
12 Planning Department has granted a 1-year extension concerning your request The
approval will now expire December 10, 2017.

13 Please be aware, if the approval expires, any subsequent proposal for a
14 Conditional Use Permit and Utility Facility on the aforementioned property will
require an entirely new application, and associated filing fees, in accordance with
the land use regulations in affect at the time of the new application.

15 Further extension opportunities exist in accordance with LUDO Section 2.800
16 and Section 3 39 300.

17 10.

18 Petitioners sought review of the 2016 extension decision at the Land Use Board of
19 Appeals (LUBA). LUBA transferred the case to the Circuit Court, however, initiating the writ of
20 review proceeding pending in case number 17CV32687. *McLaughlin v. Douglas County*,
21 LUBA No. 2017-008, Final Opinion and Order July 20, 2017.

22 11.

23 In the LUBA proceeding, petitioners argued 1) that the county committed procedural
24 error by processing the application as a ministerial action instead of administrative action; 2) that
25 the county committed procedural error when it failed to comply with statewide land use goal 1
26 and implementing LUDOs when it failed to provide notice, a sufficient opportunity to participate
and a Board of Commissioner's review of the decision; 3) that the county misconstrued the

1 applicable law and made a decision not supported by substantial evidence in concluding that the
2 applicant qualified for the extension because there was insufficient evidence that a change of
3 conditions, for which the applicant was not responsible, prevented PGCP from commencing
4 operations within the original time limitation; 4) that the county misconstrued the applicable law
5 in considering and granting the permit extension because the FERC denial constituted a change
6 in the applicable criteria because the permit was conditioned on PGCP obtaining the FERC
7 permit; 5) that the county misconstrued the applicable law, determining that an extension could
8 be granted after the permit expired by the terms of the prior extension and by the county's prior
9 interpretation of the applicable law and/or without a written application filed before the
10 expiration date; 6) that the county misconstrued the applicable law, determining that more than
11 one one-year extension may be granted. Those issues are pending before the Court.

12 12.

13 On Feb 10, 2017 FERC issued a Delegated Order accepting a Prefiling Application for a
14 different LNG export project application and different pipeline configuration which was filed
15 with the FERC on January 23, 2017. The pipeline alignment proposed in the 2017 FERC
16 application is different than the proposed pipeline alignment approved by the County in 2009.
17 The County was aware of the prefiling application and the change in the pipeline alignment
18 before its decision granting the 7th extension of the 2009 pipeline permit on December 8, 2017.
19 The 2017 pipeline project application is pending in FERC Docket No. CP 17-494-000.

20 13.

21 As understood, PGCP's 2017 newly proposed pipeline route has not been the subject of
22 an application or "major amendment" application for approval by the County. The 2017 pipeline
23 proposed continues to traverse petitioners' properties.

24 **The 2017 Extension Decision**

25 14.

26 On December 8, 2017, PGCP filed a written extension application. In it, PGCP states

1 that it has been prevented from beginning development. It states that what has prevented it from
2 beginning development within the 12-month approval period are two circumstances: 1) “as of
3 [December 8, 2017]” “the Pipeline” had not obtained federal approval from FERC; and 2)
4 petitioners’ appealed the 2016 extension.

5 15.

6 PGCP further stated that it was not responsible for those two circumstances. According
7 to PGCP, the first is solely caused by FERC:

8 Applicant is not responsible for the delay in FERC issuing its decision, and
9 FERC's lengthy review period is outside Applicant's control.”

10 Further, the delay in obtaining FERC approval of an alignment for the Pipeline
11 has caused other agencies to also delay their review and decision on
12 Pipeline-related permits.

13 The second circumstance was caused by pipeline opponents because they appealed - PGCP did
14 not - and PGCP did not cause delay in those proceedings.

15 16.

16 Despite making inquiries about whether PGCP had filed an extension application request
17 and making known petitioners’ desire to participate in any such proceedings, within hours of the
18 submission of PGCP’s application, the county approved it.

19 Claims for Relief

20 **Failure to Properly Construe and Apply the Relevant Applicable Law**

21 17.

22 Petitioners re-allege and incorporate the proceeding paragraphs.

23 18.

24 **Claim 1.** The county improperly construed and applied LUDO 3.39.300 (requiring the
25 permit holder to demonstrate that a change of conditions, for which the applicant was not
26 responsible, prevented the applicant from commencing his operation within the original time
limitation) and/or LUDO 2.800 (requiring a finding that the permit holder was not responsible
for the reason that prevented construction). By approving the extension application, the county

1 interpreted these criteria to mean that an applicant is not responsible when the applicant has been
2 deemed to cause the delay due to a lack of diligence. That interpretation of the criteria is
3 implausible and the county's decision should be invalidated.

4 Alternatively, an interpretation of the "not responsible" criteria allowing it to be satisfied
5 when the circumstance or reason is caused by the permit holder's requirement to file a wholly
6 new permit with a third party after denial, is an improper construction and application of the
7 criteria. PGCP was responsible for the situation because it had to file a new application for a
8 permit from FERC.

9 Finally and alternatively, an interpretation of the "not responsible" criteria allowing
10 satisfaction when the circumstance or reason is not likely to change during the extension period
11 because the permit holder filed a wholly new third party permit application which reasonably
12 takes more than a year to processes, is an improper construction and application of the criteria.

13 19.

14 **Claim 2:** The county's determination that the "changed circumstance" and/or the "reason
15 that prevented the construction for which the permit holder is not responsible" requirements to
16 be satisfied by the permit holder's failure to obtain a third party permit (the FERC permit) when
17 the third party permit for the county-approved project was denied by the third party, and/or when
18 the new permit application filed (and pending) proposes an alternative project and/or when it is
19 unlikely that the third party permit required would be granted within the extension period,
20 misinterprets the applicable criteria and the county's decision should be invalidated.

21 The time it would reasonably take the third party permitting entity to approve a wholly
22 new application filed only months before the applicant's extension application, is not an
23 authorized changed circumstance or reason preventing construction that is not caused by the
24 applicant. Neither is the new pipeline configuration presented in PGCP's FERC application filed
25 in 2017, a valid "changed circumstance" or a reason that "prevented construction" of the 2009
26 project approved by the county. In fact, changing the pipeline configuration in the FERC

1 application makes construction of the approved 2009 Pipeline an impossibility. The 2009
2 Pipeline is not pending approval by FERC; the 2017 Pipeline configuration is pending before
3 FERC. Therefore, the 2009 Pipeline will not be approved by FERC at any time. The county's
4 interpretation of these terms in such a way misconstrues the applicable law.

5 20.

6 **Claim 3.** The county misconstrued the applicable law when it failed to deem FERC's
7 denial of the 2009 Pipeline a change in the applicable criteria precluding an extension of the
8 county's permit pursuant to LUDO Section 2.800.

9 21.

10 **Claim 4.** The county misconstrued the applicable law when it determined that a
11 challenge to an extension decision constitutes a reason that prevented the construction when
12 PGCP did not seek a stay of any county decision or the relevant construction period of the
13 permit.

14 22.

15 **Claim 5.** The county misconstrued the applicable law when it granted the extension
16 when the permit was invalid pursuant to LUDO Section 3.39.200, as the 2009 Pipeline project
17 had been discontinued for over a year.

18 **The County's Decision is Not Supported by Substantial Evidence in the Whole Record**

19 23.

20 **Claim 6.** The county's decision purportedly finding that PGCP was not responsible for
21 the circumstances or for the reason that prevented construction is not supported by substantial
22 evidence in the whole record. The county was aware of the FERC denial of the 2009 Pipeline
23 and the bases for it. That denial determined that PGCP's lack of diligence in the FERC
24 proceeding was the reason PGCP could not obtain the FERC permit. There is no other evidence
25 in the record to find that PGCP was not responsible for FERC's failure to issue the permit
26 necessary for PGCP to begin construction.

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Claim 7. The county’s decision purportedly finding that PGCP was not responsible for the circumstances or for the reason that prevented construction is not supported by substantial evidence in the whole record. The 2017 FERC application demonstrates that the 2009 Pipeline was not pending approval or denial by FERC on December 8, 2017 or anytime after December 9, 2016 and PGCP’s statements otherwise are not credible. Moreover, the relevant facts are that the 2017 FERC application would not have been approved within the 2016 extension period and will not be approved within the 2017 extension period. PGCP’s statements and inferences to the contrary are not credible. The evidence submitted by PGCP does not support a finding of changed circumstances or reasons preventing construction that were not caused by PGCP. The evidence demonstrates that even if FERC approves the current application, the 2009 Pipeline will not be approved by FERC as required by the county permit.

The County Failed to Follow the Procedure Applicable to the Matter Before it and Improperly Construed the Applicable Procedural Law.

25.

Claim 8. The county failed to provide notice and employ the procedural safeguards for an “Administrative Action” as described in Chapter 2 of the LUDO. These procedures were required because the requested extension action concerned a conditional use permit and Coastal overlay zones and, alternatively, because the Douglas County Comprehensive Plan Goal 1 requires the county to provide for public participation in decisions in which the legal rights, duties or privileges of specific parties are determined. Alternatively, the county failed to exercise its discretion to provide a notice and conduct a hearing necessary to ensure a proper decision.

Grounds for Writ of Review

26

26.

The county’s order granting the extension of PD 09-045 was in error and the court

1 should permit the writ of review pursuant to ORS 34.040 for the following reasons:

2 (1) the county made an error of law when it interpreted either or both LUDO 3.39.300 and
3 LUDO 2.800 as requiring something more than the permit holder's lack-of-due-diligence-denial
4 of the necessary third-party permit to deem the permit holder responsible for the reason that
5 prevented the construction or the changed circumstance.

6 (2) the county made an error of law when it interpreted either or both LUDO 3.39.300 and
7 LUDO 2.800 as requiring something more than the permit holder's failure to obtain the third
8 party permit because it was denied and/or the permit holder's decision to submit a new third-party
9 permit application for a new project to deem the permit holder responsible for the reason that
10 prevented the construction or the changed circumstance.

11 (3) the county made an error of law when it interpreted either or both LUDO 3.39.300's
12 "changed circumstance" and LUDO 2.800's "reason that prevented the construction"
13 requirements to be satisfied by the permit holder's failure to obtain a third party permit (the FERC
14 permit): 1) when the third party permit for the county-approved project was denied by the third
15 party; and/or 2) when the new permit application filed (and pending) proposes a different project
16 precluding a third party permit for the project approved by the county; and/or 3) when it is was
17 impossible for the third-party permit to be approved during the prior extension period; and/or 4)
18 when it is unlikely that the third party permit required would be granted within the extension
19 period sought.

20 (4) the county made an error of law when it interpreted either or both LUDO 3.39.300's
21 "changed circumstance" and LUDO 2.800's "reason that prevented the construction"
22 requirements to be satisfied by a challenge to a prior decision to extend a permit when there was
23 nothing about that challenge that legally prevented the construction.

24 (5) the county made errors of law when it granted the extension and failed to determine
25 that the FERC denial was a change in criteria or that the proposed use had been discontinued for
26 over a year.

1 (6) the county failed to support its decision with substantial evidence in the record.

2 (7) the county failed to provide notice and a hearing on the application for the permit
3 extension which was contrary to the requirements of the applicable law; and the county's decision
4 not to exercise its discretion under the applicable law was error.

5 27.

6 Petitioners do not have a plain, speedy or adequate remedy other than the writ requested.
7 Petitioners respectfully request that the court order its clerk to issue a writ of review to
8 respondent, commanding respondent to return the writ with a certified copy of the record and
9 proceedings in this matter for review by the Court. Further, petitioners respectfully request that,
10 based on any one of claims set forth above, the court:

11 (1) Annul and vacate the county's decision granting the PD 09-045 permit extension; and

12 (2) Grant other relief as may be just and proper under ORS Ch. 34.

13 Finally, petitioners also respectfully request that upon this court's finding that the petitioner
14 prevails on the merits of any one of the claims set forth above, that the court at the time it issues
15 its decision designate the petitioner "prevailing party" and award the petitioner its costs pursuant
16 to ORAP 13.05(2) and as restitution pursuant to ORS 34.100.

17 Respectfully submitted this 5th day of February, 2018.

18 /s/ Tonia Moro
19 Tonia Moro, OSB 893160
20 Attorney for Petitioners
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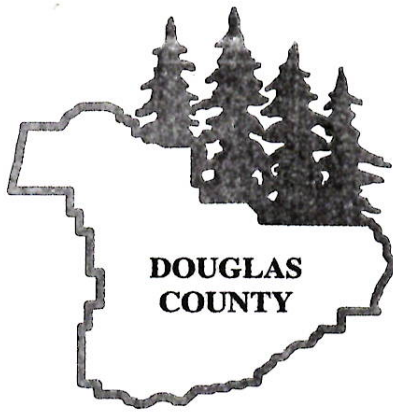
ATTORNEY CERTIFICATION (ORS 34.030)

I hereby certify that I have examined the record of the proceedings in this matter to the extent that it is now available to me and have examined the determination made in it and that the decision and determination are erroneous as has been alleged in this petition.

DATED: February 5, 2018.

Respectfully submitted

/s/ Tonia Moro
Tonia Moro, OSB 893160
Attorney for Petitioners



PLANNING DEPARTMENT

Room 106 • Justice Building • Douglas County Courthouse
Roseburg, Oregon 97470

Planning Services (541) 440-4289 Fax # (541) 440-6266	On-Site Services (541) 440-6183 Fax # (541) 464-6429	Environmental Health (541) 440-3574 Fax # (541) 957-2097
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“A Program With Great Spirit”

December 8, 2017

Seth King
Perkins Cole LLP
1120 NW Couch Street, Tenth Floor
Portland, OR 97209-4128

Re: Planning Department File No. 09-045, Extension Request

Dear Applicant:

This letter is to inform you that we have reviewed your request for an extension of time to complete the conditions of approval for a Conditional Use Permit and Utility Facility issued under Planning Department File No. 09-045 on December 10, 2009.

In accordance with the provisions of the Douglas County Land Use & Development Ordinance (LUDO), the Planning Department has granted a one-year extension of the approval period, which will now expire on December 10, 2018.

Please be aware, if the approval expires, any subsequent request will require an entirely new application and associated filing fees, in accordance with the land use regulations and fees in affect at the time of the new application.

Further extension opportunities may exist in accordance with LUDO §2.800.

If you have any questions you may contact me at 541-440-4289 or toll-free within Douglas County at 1-800-224-1619, ext 4289.

Sincerely,


Keith L. Cubic
Planning Director

c: Assessor's Office