

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 JODY MCCAFFREE, JONATHAN HANSON,
5 and DANA GAAB,
6 *Petitioners,*
7

8 vs.
9

10 COOS COUNTY,
11 *Respondent,*
12

13 and
14

15 PACIFIC CONNECTOR GAS PIPELINE LP,
16 *Intervenor-Respondent.*
17

18 LUBA No. 2014-022
19

20 FINAL OPINION
21 AND ORDER
22

23 Appeal from Coos County.
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25 William H. Sherlock, Eugene, filed the petition for review and argued on
26 behalf of petitioners. With him on the brief was Hutchinson Cox Coons Orr &
27 Sherlock PC.
28

29 No appearance by Coos County.
30

31 Seth J. King, Portland filed the response brief and argued on behalf of
32 intervenor-respondent. With him on the brief was Perkins Coie LLP.
33

34 RYAN, Board Chair; BASSHAM, Board Member; HOLSTUN, Board
35 Member, participated in the decision.
36

37 AFFIRMED

07/15/2014
38

39 You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a decision by the county approving a modification of a condition of approval of a conditional use permit that was approved in 2010.

FACTS

In September, 2010 the county approved intervenor’s application for a conditional use permit for an approximately 50-mile pipeline that would connect to intervenor’s proposed liquefied natural gas (LNG) terminal located in Coos Bay. The 2010 decision included the following condition, referred to by the parties as Condition 25:

“The conditional use permits approved by this decision shall not be used for the export of liquefied natural gas.” Record 276.

The county’s 2010 decision was appealed to LUBA, and it was remanded in March, 2011. *Citizens Against LNG, Inc. v. Coos County*, 63 Or LUBA 162 (2011). In 2012, the county held proceedings on remand, and at the conclusion of the remand proceedings, in March, 2012, reapproved the pipeline with Condition 25 included again. Record 291.

In 2013, intervenor applied to the county to delete or modify Condition 25 to remove the prohibition on use of the pipeline for export of LNG. A hearings officer held a hearing on the application and recommended approval of the modification to the board of county commissioners. The board of county commissioners adopted the hearings officer’s findings and conclusions and approved the application. Condition 25 was modified to provide:

“The conditional use permits approved by this decision shall be used for the transportation of natural gas.” Record 37.

This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 The pipeline is proposed to cross several Coos Bay Estuary Management
3 Plan (CBEMP) management units. Petitioners’ first assignment of error
4 includes two subassignments of error related to CBEMP Policies that
5 petitioners argue apply to the application. We address each subassignment of
6 error.

7 **A. CBEMP Policy 5(I)(b)**

8 CBEMP Policy 5(I)(b) requires that for “dredge and/or fill” activities in
9 some estuarine management units, a “need (i.e. substantial public benefit)
10 [must be] demonstrated [.]” CBEMP Policy 5(I)(b).¹ Coos County Zoning and

¹ CBEMP Policy 5 provides:

“#5 Estuarine Fill and Removal

“I. Local government shall support dredge and/or fill only if such activities are allowed in the respective management unit, and:

“a. The activity is required for navigation or other water-dependent use that requires an estuarine location or, in the case of fill for non-water-dependent uses, is needed for a public use and would satisfy a public need that outweighs harm to navigation, fishing, and recreation, as per ORS 541.625(4) and an exception has been taken in this Plan to allow such fill.

“b. A need (ie., a substantial public benefit) is demonstrated and the use or alteration does not unreasonably interfere with public trust rights.

“c. No feasible alternative upland locations exist; and

“d. Adverse impacts are minimized.

1 Land Development Ordinance (LDO) 4.5.150 implements the CBEMP Policies
2 and specifies “where, and under what circumstances, development may occur”
3 in the various estuarine zones. LDO 4.5.150 sets out a process to “determine
4 whether or not a proposed use or activity is, or may be, allowed at any specific
5 site within the Coos Bay Estuary Shoreland Boundary.”

6 In the first subassignment of error, petitioner argues that the county’s
7 decision to remove Condition 25’s prohibition on using the pipeline for export
8 of LNG improperly construes the applicable law. ORS 197.835(9)(a)(D). We
9 understand petitioners to argue that the county imposed Condition 25 to ensure
10 compliance with CBEMP Policy 5, and therefore the county may not modify
11 Condition 25 without demonstrating that CBEMP Policy 5 continues to be
12 satisfied. Petition for Review 13.

13 Intervenor responds that the findings in support of the challenged
14 decision conclude that Condition 25 was not adopted to ensure compliance
15 with any provision of the CBEMP or LDO, and that “the applicant agreed to a
16 condition of approval limiting the use of the pipeline to import use.” Record
17 10, 19. The findings quote the county’s 2010 decision at length, which
18 concluded that Condition 25 was not being imposed to ensure that the pipeline

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- “e. Effects may be mitigated by creation, restoration, or enhancement of another area to ensure that the integrity of the estuarine ecosystem is maintained.
 - “f. The activity is consistent with the objectives of the Estuarine Resources Goal and with other requirements of state and federal law, specifically the conditions in ORS 541.615 and Section 404 of the Federal Water Pollution Control Act (P.L.92-500).”

1 complies with ORS 215.275, or any other provision of state or local law.
2 Record 10, 19, 240, 266. Petitioners do not challenge the portion of the
3 findings that conclude that Condition 25 was adopted because intervenor
4 agreed to it rather than to ensure compliance with the CBEMP or the LDO.
5 Given those unchallenged findings, petitioners must do more than assert that
6 Condition 25 was imposed to ensure compliance with CBEMP Policy 5 or the
7 LDO.

8 We also understand petitioners to argue that CBEMP Policy 5(I)(b)
9 applies directly to intervenor’s application to modify Condition 25, and the
10 county erred in failing to apply it. Petition for Review 12. However, for two
11 reasons, we reject petitioners’ argument. First, in 2010 the county concluded
12 that the pipeline application did not propose “dredge and/or fill,” because any
13 dredging or fill from installation of the pipeline is incidental and allowed in
14 connection with the pipeline installation and use. Record 175-185. Petitioners
15 do not acknowledge those previous conclusions, and to the extent petitioners’
16 argument is a collateral attack on the county’s 2010 decision, we reject it.
17 *Butte Conservancy v. City of Gresham*, 47 Or LUBA 282, 296, *aff’d* 195 Or
18 App 763, 100 P3d 218 (2004) (assignments of error that collaterally attack a
19 decision other than the decision on appeal do not provide a basis for reversal or
20 remand).

21 Second, the application proposes to delete the prohibition on exporting
22 LNG. Petitioners do not explain why that is an application that proposes
23 “dredge and/or fill” or why CBEMP Policy 5(I)(b) is implicated by the
24 application, where no ground disturbing activity of any kind is proposed
25 beyond the ground-disturbing activity that was authorized in the 2010

1 decision.² Absent any developed argument regarding why CBEMP Policy
2 5(I)(b) applies to an application to modify a condition of approval of the CUP
3 for the pipeline, petitioners’ arguments under this subassignment of error
4 provide no basis for reversal or remand of the decision.

5 Finally, in footnote 3, petitioners appear to argue that there is not
6 substantial evidence in the record to demonstrate that a different CBEMP
7 Policy, CBEMP Policy 5(II), is satisfied:

8 “There is no evidence in the record indicating that a significance
9 determination has been made by the Army Corps as required by
10 Policy 5(II). If language in agency rule that implies the
11 determination is supposed to be part of the initial decision-making
12 process then the determination cannot be put off with the use of
13 conditions. *Willamette Oaks, LLC v. City of Eugene*, 232 Or App
14 29, 220 P3d 445 (2009). Thus, both Condition 25 and the
15 underlying decision are premature in the absence of the required
16 finding by the Corps.” Petition for Review 11-12.

17 OAR 661-010-0030(4)(d) requires that a petition for review include
18 assignments of error that are set forth under separate headings. LUBA has
19 refused to consider arguments in footnotes that set out a different legal theory
20 than presented in the assignment of error. *Frewing v. City of Tigard*, 59 Or
21 LUBA 23, 45 (2009); *David v. City of Hillsboro*, 57 Or LUBA 112, 142 n 19

² According to intervenor, in all of the estuarine zones in which the pipeline will be located, the pipeline is classified as a “Utilit[y]-Low Intensity” that is permitted only subject to general conditions that do not require consideration of CBEMP Policy 5. Response Brief 5-6 provides a detailed explanation of how the LDO specifies which CBEMP policies apply to each use specified in each estuarine zoning district. Briefly, for each CBEMP zone, a LDO code section lists each use and states whether it is allowed; if it is allowed, the LDO identifies applicable CBEMP Policies.

1 (2008); *Falls v. Marion County*, 61 Or LUBA 39, 46 (2010). We decline to do
2 so here.

3 The first subassignment of error is denied.

4 **B. CBEMP Policy 5a**

5 In their second subassignment of error, petitioners argue that the county
6 improperly construed the applicable law in failing to determine whether the
7 application satisfies CBEMP Policy 5a. CBEMP Policy 5a allows “[t]emporary
8 alterations to the estuary” provided that the county adopts findings that
9 “[a]dverse impacts are minimized.” CBEMP Policy 5a.II.b. We understand
10 petitioners to argue that the application proposes “temporary alterations” to the
11 estuary and that as a consequence, CBEMP Policy 5a applies and the county
12 erred in failing to adopt findings that adverse impacts are minimized.

13 Intervenor responds, and we agree, that an application that proposes to
14 remove a prohibition on exporting LNG does not propose a “temporary
15 alteration” of the estuary, or an alteration of any kind. Response Brief 16-17.
16 Accordingly, petitioners have not demonstrated that CBEMP Policy 5a applies
17 to the application.

18 The second subassignment of error is denied.

19 The first assignment of error is denied.

20 **SECOND ASSIGNMENT OF ERROR**

21 The pipeline is proposed to cross lands zoned Forest. OAR 660-006-
22 0025(4)(q) allows “[n]ew distribution lines (e.g. gas * * *) with rights of way
23 50 feet or less in width” in the Forest zone. In its 2010 decision, the county
24 concluded that the pipeline is allowed in the Forest zone under OAR 660-006-
25 0025(4)(q) as a “new distribution line.” Record 200-211. In the challenged
26 decision, we understand the county to have concluded the pipeline remains an

1 allowed conditional use as a “new distribution line[]” under OAR 660-006-
2 0025(q), notwithstanding that after Condition 25 is modified to delete the
3 prohibition on exporting LNG, gas may flow both out of the terminal into the
4 pipeline and into the terminal from the pipeline. Record 27-28.

5 In their second assignment of error, petitioners argue that the county
6 improperly construed the applicable law. According to petitioners, because gas
7 may now flow into the terminal from the pipeline, the pipeline is now a “gas
8 transmission line” that is not specifically allowed as a conditional use in the
9 Forest zone. According to petitioners, OAR 660-006-0025(q) only specifically
10 allows new *electric* transmission lines as conditional uses in the Forest zone,
11 and does not allow new *gas* transmission lines.

12 Intervenor responds that petitioners have failed, as required by ORS
13 197.835(3), to preserve the issue of whether the pipeline is allowed as a “new
14 distribution line * * *” under OAR 660-006-0025(q). Intervenor points out
15 that under LUBA’s rules governing the contents of a petition for review at
16 OAR 661-010-0030(4)(d), “[e]ach assignment of error must demonstrate that
17 the issue raised in the assignment of error was preserved during the
18 proceedings below” or “shall state why preservation is not required.”
19 Petitioners have not responded to intervenor’s argument or otherwise specified
20 where the issue was preserved during the proceeding below, and have not
21 argued that preservation is not required. The second assignment of error fails
22 to comply with OAR 661-010-0030(4)(d) because it does not “demonstrate that
23 the issue * * * was preserved during the proceedings below.” Further, we
24 agree with intervenor that the issue presented in the second assignment of error
25 is waived.

1 However, even if the issue is not waived, we disagree with petitioner that
2 the pipeline is not allowed as a conditional use in the Forest zone. Petitioners
3 cite and rely on ORS 215.276(1)(c) to argue that the pipeline is no longer a
4 “new [gas] distribution line[]” because it will not distribute LNG to the
5 domestic public. Petitioners argue, then, that the pipeline is a gas transmission
6 line. ORS 215.276(1)(c) defines “transmission line” “[a]s used in this section
7 [ORS Chapter 215]” as “a linear utility facility by which a utility provider
8 transfers the utility product in bulk from a point of origin or generation, or
9 between transfer stations, to the point at which the utility product is transferred
10 to distribution lines for delivery to end users.” The definition of “transmission
11 line” for purposes of the Exclusive Farm Use statute is inapposite for purposes
12 of determining whether, under the Goal 4 rule that regulates uses in the Forest
13 zone, the pipeline is a “new distribution line.”

14 There is nothing in the text of OAR 660-006-0025(4)(q) that suggests
15 that LCDC was concerned with the direction that gas (or oil or geothermal
16 resources for that matter) flows when in the pipeline, or that LCDC intended to
17 allow or prohibit lines that carry gas, oil, geothermal, telephone, fiber optic
18 cable depending on the identity of the end user or the direction that the
19 resources flow when in the lines. Simply because LNG is no longer prohibited
20 from flowing from the pipeline into the terminal does not mean that the
21 pipeline is something other than a “new distribution line * * *.”

22 Second, even if the pipeline could be characterized as a gas transmission
23 line in some circumstances, that the Goal 4 rule allows new electric
24 transmission lines but does not specifically allow new *gas* transmission lines is
25 not conclusive. Rather, when the Goal 4 rule was first adopted in 1990, the
26 rule classified all types of utility lines, including electric lines, as either “local

1 distribution lines” or “distribution lines.” The rule was amended in 1992 to
2 allow “new electric transmission lines * * *” with larger right-of-way widths
3 (100 feet) than the other types of utility lines are allowed (50 feet), consistent
4 with ORS 772.210’s specification of a 100 foot right-of-way for electrical
5 transmission lines. The rule’s history does not reflect an intent on the part of
6 LCDC to prohibit lines that could be, under some circumstances, characterized
7 as transmission lines. Rather, the rule’s text reflects that for purposes of
8 conditional uses that are allowed in the Forest zone, all *non-electrical* lines
9 with rights-of-way of up to 50 feet in width are classified as “new distribution
10 lines.”

11 Finally, petitioners’ second assignment of error contains an argument
12 that the modification violates CBEMP Policy 50. Petition for Review 23. The
13 argument is insufficiently developed for our review. *Deschutes Development v.*
14 *Deschutes County*, 5 Or LUBA 218 (1982).

15 The second assignment of error is denied.

16 The county’s decision is affirmed.