BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

STACEY MCLAUGHLIN, JOHN CLARKE,
PAMELA ORDWAY and BARBARA BROWN,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

PACIFIC CONNECTOR GAS PIPELINE LP,
Intervenor-Respondent.

LUBA No. 2014-049

FINAL OPINION
AND ORDER

Appeal from Douglas County.

William H. Sherlock, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hutchinson Cox Coons Orr & Sherlock PC.

No Appearance by Douglas County.

Richard H. Allan, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief were Daniel L. Timmons and Marten Law PLLC.

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

AFFIRMED 11/12/2014

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a county decision modifying the alignment of a previously approved natural gas pipeline, and removing a condition of approval that limited use of the pipeline to importing natural gas, facilitating the applicant's proposal to use the pipeline to export natural gas.

MOTION TO FILE REPLY BRIEF

Petitioners move to file a reply brief to address new matters raised in the response brief. There is no opposition to the motion, and the reply brief is allowed.

FACTS

Intervenor-respondent Pacific Gas Connector Pipeline, LP (intervenor) proposes to build a 232-mile, 36-inch diameter natural gas transmission pipeline between an existing interstate natural gas pipeline near Malin, Oregon, to an approved terminal located in Coos Bay. The terminal is owned by a separate corporate entity, Jordan Cove Energy Project, L.P. (Jordan Cove). While most of the length of the proposed pipeline is outside county jurisdiction or preempted from county regulation by federal law, federal law requires county approval of an eight-mile long portion of the pipeline located within the county's Coastal Zone Management Area (CMZA). The eight-mile long portion of the pipeline crosses lands zoned Timber Resource (TR), Farm Forest (FF) and Exclusive Farm Use-Grazing (FG). The TR and FF zones allow pipelines as conditional uses, while the FG zone allows a "utility facility necessary for public service" implementing ORS 215.283(1).

Intervenor obtained approval from the Federal Energy Regulatory Commission (FERC) for the 232-mile pipeline. In 2009, the county approved

conditional use permits for the pipeline and also approval as a "utility facility necessary for public service" for the eight-mile portion of the pipeline within the CMZA (the 2009 decision). At that time, the Jordan Cove terminal was intended to import natural gas, and had obtained federal approvals as an import terminal. Intervenor's pipeline was intended to transmit imported natural gas from Jordan Cove's terminal at Coos Bay to the interstate pipeline at Malin. In its 2009 decision, the county imposed Condition 12, which provided that "[t]his Conditional Use Permit/Utility Facility authorization is limited to the import of natural gas only." Record 968. Subsequently, in 2011, 2012, and 2013, intervenor sought and obtained extensions to the 2009 decision.

Due to radical changes in the national and international gas markets, Jordon Cove decided to change its import terminal to an export terminal. The change to an export terminal required new FERC approvals for both the terminal and intervenor's pipeline. It also required removing Condition 12. Accordingly, intervenor applied to the county for a major amendment to the 2009 conditional use permit and utility facility approval, to remove Condition 12. Intervenor also sought to re-align a 1.7 mile long portion of the eight-mile long pipeline within the CMZA, within an area known as Weaver Ridge, in order to avoid difficult terrain. The Weaver Ridge area is zoned TR.

On October 17, 2013, the county planning commission conducted a hearing on the application, continued to December 12, 2013. On January 9, 2013, the planning commission met to deliberate. One of the seven commissioners, Brosi, decided not to participate because he had not reviewed the complete record. The remaining commissioners voted 3-3 on a motion to deny the request to remove Condition 12, with Commissioners Hawks, Duckett and Murphy voting in favor of denial, and Commissioners Ware, Seonbuchner

and Gorigolzarri voting nay. Immediately after that tie vote, the commissioners voted on a motion to approve the request to remove Condition 12, which also resulted in a 3-3 tie. Planning staff advised the commissioners that under Douglas County Land Use and Development Ordinance (LUDO) 2.300.3.j, a tie vote generally results in denial of the application.[1] Accordingly, the commissioners voted 6-0 on a motion to declare that due to lack of a majority, the application failed.

On January 10, 2014, county staff sent a notice of public meeting stating that the planning commission would hold a meeting solely to adopt findings to memorialize its action resulting from a lack of a majority decision on the

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[1] LUDO 2.300.3.j provides, in relevant part:

> "At the conclusion of the hearing, the Approving Authority shall either make a decision and state findings (which may incorporate findings proposed by any party, or by the Director), or may take the matter under advisement. *If a majority of the quorum fail to agree, and there is no lower decision, the matter shall be deemed denied, unless the members present at the hearing vote to reschedule the deliberation.* The Approving Authority may request proposed findings and conclusions from any party to the hearing. The Approving Authority, before finally adopting findings and conclusions, may circulate the same in proposed form to the parties for written comment. All actions taken by the Approving Authority pursuant to adopting findings and conclusions shall be made a part of the record. The decision and findings and conclusions which support the decision of the Approving Authority shall not be final until reduced to writing and signed by the Approving Authority. Within forty-five (45) days of the date of public hearing the Approving Authority shall grant, deny or, in appropriate cases, pursuant to §2.120.3, attach such conditions as may be necessary to carry out the Comprehensive Plan in approving the proposal being heard. The Director shall notify parties of the decision by mail." (Emphasis added.)

application. However, on January 24, 2014, staff sent another notice stating that the meeting was rescheduled to February 5, 2014, and that the purpose was to either (1) adopt findings memorializing the tie vote decision of January 9, 2014, or (2) to reschedule deliberations pursuant to LDI 2.300.3.j.

At the February 5, 2014 meeting, commissioner Murphy, who had previously voted against removing Condition 12, was not present. After a presentation of options by the planning director, the five then-present commissioners voted 4-1 to re-schedule deliberations, in order to allow Commissioner Brosi to participate in the decision and break any deadlock. On February 20, 2014, all seven commissioners met to deliberate, Commissioner Brosi having now read the record. After new deliberations, the commissioners voted 5-2 to approve the request to remove Condition 12. The commissioners requested that intervenor draft findings for planning commission approval at the March 20, 2014 meeting, and on that date the planning commission adopted a written decision approving the application.

Petitioners appealed the planning commission decision to the county board of commissioners. On April 30, 2014, the board of commissioners declined review, and summarily affirmed the planning commission decision as the county's final decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

LUDO 3.39.200 provides that a conditional use permit becomes invalid if the permit is not exercised within two years of the date of approval. LUDO 3.39.300 provides that a conditional use permit may be extended for one year "if it is determined that a change of conditions, for which the applicant was not responsible, would prevent the applicant from commencing his operation within the original time limitation."

As noted, the county granted extensions to the conditional use permit in 2011, 2012, and 2013, finding in each decision that an extension was warranted under LUDO 3.39.300, because intervenor had not yet obtained all local, state and federal approvals needed to construct the pipeline. Each extension decision was issued administratively, with no notice to persons other than intervenor. None were challenged or appealed.

During the proceedings on intervenor's modification application, petitioners argued that the extension decisions were wrongly decided, and in fact the reason why intervenor failed to construct the pipeline within the original two year period was solely due to its intent, in conjunction with its partner Jordan Cove, to convert the import facility to an export facility. Because the extension decisions were wrongly decided, petitioners argue, the 2009 conditional use permit expired in 2011, and the county therefore erred in approving a modification of the invalid 2009 permit.

The planning commission rejected that argument, concluding that intervenor's request for a major amendment does not afford opponents the opportunity to challenge the prior extensions of the 2009 conditional use permit. Record 13. Petitioners do not challenge that finding in the petition for review, but go directly to the issue of whether the extension decisions were wrongfully decided. Intervenor responds, and we agree, that petitioners' arguments under the first assignment of error are impermissible collateral attacks on final extension decisions that were not appeals and were not before the county and are not before LUBA in this appeal.

In the reply brief, petitioners argue that the county was required, in processing intervenor's request for a major amendment, to determine whether the 2009 conditional use permit had been validly extended. Petitioners contend

that the 2011, 2012, and 2013 extension decisions were not land use decisions that could have been appealed to LUBA, and therefore those decisions must be viewed as "intermediate" decisions that can be challenged in the appeal of the county's decision on the request to modify the 2009 conditional use permit.

Petitioners do not cite to any code provision or other authority that requires the county to determine, in the present proceeding, that the 2009 permit had been validly extended. Regardless of whether the three extension decisions qualified as land use decisions potentially appealable to LUBA, there is no question that they were *final* decisions, not intermediate or interlocutory decisions. Nothing cited to us authorizes or requires the county to revisit the merits of those final extension decisions in the course of the present proceeding. The county did not err in rejecting petitioners' arguments to the contrary.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

As noted, LUDO 2.300.3.j provides in part that "[i]f a majority of the quorum fail to agree, and there is no lower decision, the matter shall be deemed denied, unless the members present at the hearing vote to reschedule the deliberation." *See* n 1. Petitioners argue that LUDO 2.300.3.j allows the planning commission to reschedule deliberations after a tied vote only if all of the members who were present at the hearing at which the tie vote occurred are also present at the vote to reschedule deliberations. As explained, the planning commission voted to reschedule deliberations at the February 5, 2014 meeting, but Murphy—one of the commissioners who was present at the January 9, 2014 meeting at which the tie vote occurred—was not present at the February 5, 2014 meeting. According to petitioners, the county's "failure to ensure that the

deliberation vote included Commissioner Murphy is [a] jurisdictional defect" that requires reversal or remand. Petition for Review 27. We understand petitioners to argue that, having failed to comply with LUDO 2.300.3.j., the planning commission lacked authority to reconsider the application, and only possessed authority to deny the application based on the tie vote.

Petitioners do not explain the basis for their assertion that failure to include Commissioner Murphy in the February 5, 2014 vote to reschedule deliberations results in a "jurisdictional defect." Nothing cited to us in the LUDO or elsewhere provides that the failure of all commissioners who were present at a hearing at which a tie vote occurs to subsequently participate in a vote to reschedule deliberations results in a "jurisdictional defect" or divests the planning commission of jurisdiction to act on an application.

Assuming without deciding that the planning commission's February 5, 2014 vote to reschedule deliberations was conducted in a manner that violated LUDO 2.300.3.j, that violation appears to be a procedural error. ORS 197.835(9)(a)(B) provides that LUBA may remand a decision where the local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner." Petitioners contend that the planning commission's violation of LUDO 2.300.3.j denied petitioners "the outcome of the tie vote and the resulting denial of the request to remove Condition 12." Petition for Review 28.

However, the "substantial rights" referenced in ORS 197.835(9)(a)(B) include (1) an adequate opportunity for the petitioners to prepare and submit their case, and (2) a full and fair hearing. *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988). In *Muller*, the petitioners argued that the board of county commissioners improperly initiated a review of a planning commission

decision in petitioners' favor, and that petitioners' "substantial rights" included a right to the favorable decision rendered by the planning commission. We rejected that argument, holding that the scope of "substantial rights" does not include a right to a particular result. *Id*. In the present case, we reject petitioners' similar argument that their "substantial rights" include a right to the outcome of the tie vote and a denial of the request to remove Condition 12.

Petitioners do not argue that the planning commission's actions in the present case deprived them of an adequate opportunity to prepare and submit their case, or a full or fair hearing. Even if the planning commission's actions at the February 5, 2014 meeting violated LUDO 2.300.3.j, a question we need not and do not decide, petitioners have not demonstrated that any procedural error prejudiced petitioners' substantial rights. Therefore, petitioners' arguments under this assignment of error do not provide a basis for reversal or remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In an exclusive farm use zone, the county may approve a "utility facility necessary for public service," subject to standards at ORS 215.275. ORS 215.283(1)(c). However, ORS 215.275(6) provides that the standards in ORS 215.275(2) through (5) for determining whether a utility facility is "necessary" do not apply to interstate gas pipelines and associated facilities authorized by and subject to regulation under FERC.

A 2.1-mile portion of the pipeline runs through areas zoned FG, which is an exclusive farm use zone. In its application, intervenor proposed no changes to the portion of the pipeline within the FG zone, other than to remove

Condition 12, and thus change the direction of the natural gas flowing inside the pipeline.

Petitioners contend that the change in direction to facilitate export of natural gas rather than to import natural gas means that the pipeline no longer qualifies as a "utility facility" for purposes of ORS 215.283(1)(c) and LUDO 3.3.170, which implements that statute. According to petitioners, to qualify as a "utility facility necessary for public service," the pipeline must supply natural gas to the citizens of Douglas County. Because the pipeline delivers gas to a single entity (Jordan Cove) for export and eventual delivery to foreign customers, petitioners argue that the pipeline no longer qualifies as a "utility facility necessary for public service."

The board of commissioners rejected that argument, finding:

> "The Planning Commission determined in the 2009 approval that the [pipeline] is a 'utility facility necessary for public service,' and therefore a permitted use in the [FG] zone. Removal of the 'import only' condition does not alter that conclusion. Neither the term 'utility facility' nor the phrase 'necessary for public service' hinges on a determination whether the [pipeline] is 'necessary,' whether it serves the 'public,' or whether it serves a local or even a domestic market." Record 17.

In a footnote, the county noted that LUDO 1.090 defines "utility facility" in relevant part as "a facility constructed for a public utility, including but not limited to* * * utility lines * * * necessary for public service (electricity, gas water, telephone, cable) * * *."

On appeal, petitioners point out that LUDO 1.090 also provides a definition of "public utility," one of the terms included within the code definition of "utility facility." LDO 1.090 defines "public utility" in relevant part as: "Any corporation * * * that owns, operates, manages or controls all or

any part of any plant or equipment * * * for the production, transmission, delivery or furnishing of heat, light, water or power, directly or indirectly to the public." Under those definitions, petitioners argue, a "utility facility" must be a "public utility," and further the scope of a "public utility" is limited to entities that provide heat, light, water or power directly or indirectly to the public. While the LUDO provides no definition of "public," petitioners cite to several public facilities policies in the county comprehensive plan that refer to the "public" in ways that clearly denote the residents of the county. Based on the LUDO definitions and comprehensive plan policy references to the "public," petitioners argue that as a matter of law the pipeline can qualify as a "utility facility" only if it provides heat, light, water or power directly or indirectly to the residents of the county. Because the pipeline does not provide such services to the county's residents, petitioners contend that the county erred in concluding that the pipeline is a "utility facility" allowed in the FG zone.

Intervenor responds initially that the issue of whether the pipeline no longer qualifies as a utility facility for purposes of ORS 215.283(1)(c) and LUDO 3.3.170 was not raised during the proceedings below, and thus was waived under ORS 197.763(1). In addition, intervenor contends that the issue was not raised in the local notice of appeal to the county board of commissioners, and therefore petitioners failed to exhaust administrative remedies on that issue as required by *Miles v. City of Florence*, 190 Or App 500, 506, 79 P3d 382 (2003). In a reply brief, petitioners respond, and we agree, that the issue was sufficiently raised below for purposes of ORS 197.763(1) and that the issue was also raised in the local notice of appeal. Record 123, 706. As noted above, the board of commissioners adopted

findings responding to this issue, which suggests that the issue was raised with sufficient specificity to allow a response.

On the merits, intervenor argues that the county correctly concluded that a "utility facility" within the meaning of ORS 215.283(1)(c) and LUDO 3.3.170 is not limited to facilities that provide services to county residents. We agree. Nothing cited to us in ORS 215.283(1)(c) or ORS 215.275 suggests that a "utility facility" authorized by those statutes is limited to facilities that provide services to local or county residents. Indeed, as noted, ORS 215.275(6) specifically includes FERC-regulated interstate natural gas pipelines—which as interstate gas lines may not provide any service at all to any local residents—within the scope of "utility facilities necessary for public service."

Moreover, as intervenor points out, *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995), holds that a county may not apply more restrictive local criteria to a use that is allowed under ORS 215.213(1) or ORS 215.283(1). The gist of petitioners' argument is that two county code definitions, combined with usages of the undefined term "public" in the county's comprehensive plan, must be interpreted together to function as limitations on the scope of "utility facility" as that term is used in ORS 215.283(1)(c), effectively limiting such facilities to those that serve county residents. That interpretation is not compelled by the code definitions and comprehensive plan language that petitioners cite, but even if it were, any such local limitations applied to deny a use authorized by ORS 215.283(1)(c) would exceed the county's authority, under the reasoning in *Brentmar*.[2]

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[2] Petitioners also argue that the pipeline falls within an exclusion to the definition of "public utility" at ORS 757.005(1)(b)(F), for entities that supply "heat" to a single thermal end user. To the extent we understand the argument,

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

As noted, a natural gas pipeline is a conditional use in the TR zone. Intervenor proposed to realign a 1.7-mile long portion of the pipeline within the TR zone, referred to as the Weaver Ridge area. The rest of the alignment within the CMZA remains the same, with the only change being the removal of Condition 12.

LUDO 3.5.125(1) and (3) are conditional use standards that require a finding that the conditional use will not seriously interfere with farm uses or forest practices on adjacent lands, and further requires a finding that the use will not force a significant change in, or significant increase in the cost of, accepted farming or forest practices on adjacent farm or forest lands. The county adopted findings concluding that the Weaver ridge realignment complies with LUDO 3.5.125(1) and (3), incorporating similar findings from the 2009 decision. Record 38-43.

Petitioners argue that the county's findings of compliance with LUDO 3.5.125(1) and (3) are inadequate, because they do not address testimony from Neal Brown Family, LLC, which owns FF-zoned property that will be bisected by the pipeline alignment as approved in 2009. The testimony objected that the portion of the pipeline that crosses the Brown property would limit farm and forest uses on their property.

However, petitioners do not explain why the county was required to adopt findings addressing the Brown testimony. The 2009 decision approved

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it does nothing to demonstrate that the pipeline is not a "utility facility necessary for public service" within the meaning of ORS 215.283(1)(c) and LUDO 3.3.170.

the location of the pipeline on the Brown parcel, based on findings that addressed LUDO 3.5.125(1) and (3) and impacts of the pipeline on farm and forest use of the Brown property. The present decision does not approve any change to the portion of the pipeline that crosses the Brown property, other than the removal of Condition 12. However, petitioners do not argue that the removal of Condition 12 has any impacts on farm or forest use of the Brown property. Because the decision before us does not approve any changes that could impact farm or forest use of the Brown property, petitioners have not demonstrated that the county erred in failing to address the Brown testimony.

The fourth assignment of error is denied.

The county's decision is affirmed.