BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CAROL WILLIAMS AND JODY MCCAFFREE,
Petitioners,

vs.

COOS COUNTY,
Respondent,

and

PACIFIC CONNECTOR GAS PIPELINE, LP,
Intervenor-Respondent.

LUBA Nos. 2018-141/142

FINAL OPINION
AND ORDER

Appeal from Coos County.

Tonia L. Moro, Medford, filed the petition for review and argued on behalf of petitioners.

No appearance by respondent.

Seth J. King and Steven L. Pfeifer, Portland, filed the response brief and Seth J. King argued on behalf of intervenor-respondent. With them on the brief was Perkins Coie LLP.

RYAN, Board Chair; RUDD, Board Member; ZAMUDIO, Board Member, participated in the decision.

AFFIRMED 04/25/2019

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a board of commissioners' decision granting one-year extensions of two conditional use permits to develop segments of a natural gas pipeline.

REPLY BRIEF

Petitioners move for permission to file a reply brief to respond to waiver arguments raised in the response brief. There is no opposition to the motion and the reply brief is allowed.

BACKGROUND

This appeal involves extensions granted by the county of two previously-issued conditional use permits for a pipeline to serve the proposed Jordan Cove liquefied natural gas (LNG) export facility in the county. We set out the history of the two conditional use permit approvals and subsequent extensions below.

A. 2010 CUP

In 2010, intervenor-respondent (intervenor) applied for a conditional use permit to develop and operate a LNG pipeline in connection with the proposed Jordan Cove LNG terminal in Coos Bay (2010 CUP). The pipeline is proposed to be developed on both resource and non-resource land in the county. We discuss the significance of the difference in classification of land on which the pipeline is proposed to be developed as resource or non-resource later in this opinion.

The county approved the application, and the decision was appealed to LUBA. We remanded the county's decision in *Citizens Against LNG, Inc. v. Coos County*, 63 Or LUBA 162 (2011). Thereafter, the county again approved the application, and that decision became final. In 2013, intervenor applied to the county to modify the 2010 CUP to delete a condition that prohibited use of the pipeline "for the export of LNG." Record 49. The county granted that approval, the county's decision was appealed to LUBA, and we affirmed. *McCaffree v. Coos County*, 70 Or LUBA 15 (2014), *aff'd*, 267 Or App 424, 341 P3d 252 (2014).

In March 2014, intervenor applied for an extension of the 2010 CUP for two additional years. The county approved that request, but limited its approval to a one-year extension. In March 2015, April 2016, and March 2017, intervenor sought and the county approved additional one-year extensions.

In March 2018, intervenor sought and received a fifth one-year extension to April 2, 2019. That decision is the subject of LUBA No. 2018-142.

B. 2013 CUP

In 2013, intervenor applied for and the county approved a conditional use permit for two alternative alignments of the proposed pipeline route, the Brunschmid and Stock Slough alignments (2013 CUP). The original approval was valid for two years.

In April 2016 and May 2017 the county approved additional one-year extensions of the 2013 CUP. In February 2018, intervenor applied for a third one-

year extension of the 2013 CUP, and the county approved the extension request. That decision is the subject of LUBA No. 2018-141.

C. Amendments to the Coos County Zoning and Land Development Ordinance

Since the county's original approvals of the 2010 CUP and the 2013 CUP, the county has amended various provisions of the Coos County Zoning and Land Development Ordinance (LDO). In 2015, the county amended LDO 5.0.175, adding a provision expressly authorizing transportation agencies, public utilities, and certain private entities with a private right of condemnation to apply for a permit without landowner consent. Also in 2015, the county amended LDO 5.2.600, which governs the expiration and extension of conditional use permits, to add two new subsections, subsections 2 and 3.

In 2017, the county adopted LDO Article 5.11, which includes special regulations for development and uses in hazard areas identified on the county's Natural Hazards Map, and LDO 4.11.125, which includes special development considerations for areas of concern, including hazard areas.

We discuss those LDO provisions later in this opinion.

FIRST ASSIGNMENT OF ERROR

LDO 5.2.600 governs extensions of previously issued conditional use permits. As relevant here, for resource-zoned lands, LDO 5.2.600.1(b)(iii) and (iv) allow the county to grant "one extension period of up to 12 months if;"

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

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

LDO 5.2.600(1)(c) provides that "[a]dditional one-year extensions may be authorized where applicable criteria for the decision have not changed." LDO implements OAR 660-033-0140, an administrative rule adopted by the Land Conservation and Development Commission (LCDC).

In several subassignments of error under the first assignment of error, petitioners argue that the board of commissioners "[i]mproperly construed the applicable law," and that the county's findings are inadequate to explain why the county determined that the extension requests satisfied LDO 5.2.600.1(b)(iii) and (iv). ORS 197.835(9)(a)(C) and (D).

A. LDO 5.2.600.1(b)(iii) – "States the Reasons"

The application stated that the "reason[]" that prevented intervenor from beginning development of the pipeline is "because the Pipeline has not yet obtained federal authorization to proceed." Record 1501. The board of commissioners found that the reason for the delay in beginning development is that a certificate issued by the Federal Energy Regulatory Commission (FERC) is required in order to begin development, and intervenor has applied for a certificate but it has not been issued. Record 28, 70.

In a portion of their first subassignment of error and in their second subassignment of error, petitioners argue that the county's decision that the application met the requirement to "state[] reasons" that prevented intervenor from beginning development is not supported by substantial evidence in the record, and improperly construes the provision. ORS 197.835(9)(a)(C) and (D). Petition for Review 17, 19-20. That is so, according to petitioners, because the pending FERC application proposes alignments for the pipeline that differ from the alignments approved in the 2010 CUP and the 2013 CUP. Petitioners also argue that there is not substantial evidence in the record that the reason for the extension is able to be "cured within the extension period." Petition for Review 20. We also understand petitioners to argue that the evidence in the record is that intervenor is not seeking a FERC certificate to build the pipeline in the exact location where it was approved by the county in the 2010 CUP and the 2013 CUP, and therefore the lack of FERC approval is not a valid "reason[]" that prevented intervenor from beginning development. Petitioners also argue that the board of commissioners improperly construed LDO 5.2.600.1(b)(iii) when it failed to interpret that provision to require an applicant for an extension to "demonstrate[e] a sufficient causal relationship between the * * * statement of reason and the delay." Petition for Review 17.

We reject petitioners' arguments. First, the board of commissioners found that the uncertainty of the final alignment does not undercut the reason stated for the delay under LDO 5.2.600.1(b)(iii). Record 33-34. In essence, we understand

the board of commissioners to have interpreted LDO 5.2.600.1(b)(iii) as not being a particularly demanding standard, and that it may be satisfied where the reason for the delay is that additional state or federal approvals have been applied for, but not yet secured. That interpretation of the requirement to "state the reasons" is not inconsistent with the express language of the provision, and we affirm it. ORS 197.829(1)(a).

In addition, we reject petitioners' argument that the board of county commissioners' decision that LDO 5.2.600.1(b)(iii) is met is not supported by substantial evidence in the whole record. The board of commissioners' decision is supported by evidence in the record that one of the alignments proposed in the pending application to FERC is nearly identical to the route approved by the county in the 2010 CUP.[1] Record 33, 75, 342.

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[1] The county's findings explain:

> "[Petitioners'] argument does not reflect a correct understanding [of] the permitting process. It is true that Coos County can only approve or deny whatever pipeline route that is requested by the applicant in a formal land use application. FERC is different, however. FERC has the regulatory authority under NEPA to approve routes that are different from the applicant's 'preferred' route. In this regard, it is important to understand a pipeline applicant does not select the actual approved route of the pipeline. Rather, the route is selected by FERC via the NEPA process. The fact that [intervenor] has sought – at great expense – approval for alternative alignments that deviate from the original alignment approved in 2010 is testament to the fact that [intervenor] is not in control of the route selection process. It also demonstrates that

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

B. LDO 5.2.600.1(b)(iv) – "Reasons for which the applicant was not responsible"

In the third subassignment of error, we understand petitioners to argue that there is not substantial evidence in the record to support the county's conclusion under LDO 5.2.600.1(b)(iv) that intervenor "was unable to begin or continue development during the approval period for reasons for which [intervenor] was not responsible." Petitioners repeat the argument made in their first subassignment of error that intervenor is responsible for its inability to begin development because intervenor has failed to apply for a FERC approval to build the pipeline in the exact alignments that the county approved in the 2010 CUP and the 2013 CUP. The evidence in the record is that in 2017 intervenor applied for a FERC certificate, and that application is pending. Record 317-320. While the new FERC application proposes largely the same alignment that was

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> FERC does not place much, if any, weight on the fact that County approved the original route in 2010. [Intervenor] cannot be faulted [for] wanting to keep the county permits alive while FERC determines the route that has the least environmental impact. In fact, it is quite possible that FERC could approve the original alignment, perhaps as modified by the County-approved alternatives, or something close thereto." Record 33, 75.

approved in the 2010 CUP and the 2013 CUP, approximately 6 or 7 miles of the pipeline differ from what was originally proposed and approved in 2010 and 2013. After rejecting petitioners' proposed interpretation of LDO 5.2.600.1(b)(iv), the board of commissioners adopted findings that:

> "In this case, the Board continues to find that 'it is sufficient to conclude that because [intervenor] has thus far been unsuccessful in obtaining permits from FERC despite its reasonable efforts, [intervenor] is therefore *not at fault* for failing to begin construction on the pipeline.'" Record 30 (emphasis in original.)

We understand the board of commissioners to have interpreted LDO 5.2.600.1(b)(iv) to mean that as long as intervenor has in fact applied for the FERC certificate, a difference in the alignment proposed in the application to FERC from what was approved in the 2010 CUP and the 2013 CUP does not alter that fact and intervenor is not "responsible" for the lack of an approved FERC certificate. That interpretation is not inconsistent with the express language of the provision, and we affirm it. ORS 197.829(1)(a). Under that interpretation, we also agree with intervenor that the FERC application in the record is substantial evidence that the criterion is satisfied.

C. Collateral Attack

The board of commissioners adopted alternative findings that the doctrine of "collateral attack" applies to decisions on an application for an extension of a permit, to preclude a party challenging an extension application from raising issues "actually decided in [the county's] previously issued extension decisions."

Record 27. According to the board of commissioners, the extension application is part of the "same case." Record 25-26. Petitioners challenge those findings and argue that the doctrine of collateral attack does not apply to a decision to extend a previously issued permit, and does not provide a basis for rejecting petitioners' challenges to the extensions.

Intervenor responds that the even if the county's alternative findings that petitioners were precluded under the collateral attack doctrine from raising issues "actually decided" in the previous extension decisions are legally incorrect, the county also adopted findings that LDO 5.2.600.1(b)(iii) and (iv) were met, and therefore, petitioners' arguments provide no basis for reversal or remand of the decision. We agree.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

LDO 5.2.600.1(c) provides that, for an extension on resource lands "[a]dditional one-year extensions may be authorized where applicable criteria for the decision have not changed." In their second assignment of error, petitioners argue that provisions of the LDO adopted between 2015 and 2017 apply to the 2010 CUP and the 2013 CUP, and that therefore the applicable criteria for the decision have changed.

A. Hazard Review

As explained above, in 2017 the county adopted the special development considerations for hazard areas identified on the Natural Hazards Map.

Petitioners take the position that some areas where the pipeline was approved are located in areas identified on the Natural Hazards Map.

LDO 4.11.125.7 provides that "[h]azard review shall not be considered applicable to any application that has received approval and is [sic] requesting an extension to that approval[.]" The parties refer to this provision using the colloquial phrase "grandfather clause." The board of commissioners relied on the grandfather clause to conclude that "applicable criteria for the extension have not changed," LDO 5.2.600.1(c), because both the 2010 CUP and the 2013 CUP "ha[ve] received approval." Record 33.

Petitioners argue that the board of commissioners improperly construed LDO 5.2.600.1(c) and the grandfather clause when it concluded that the provision does not apply to the 2010 CUP and the 2013 CUP. In particular, petitioners argue that the 2010 CUP and 2013 CUP proposed, and the county approved, above ground block valve stations that qualify as structures, to which firebreak standards in LDO 4.11.125.7.f apply. Petition for Review 26.

Petitioners also argue that the grandfather clause is inconsistent with LCDC's administrative rule at OAR 660-033-0140(1)(c), which LDO 5.2.600.1(c) implements word for word. According to petitioners, OAR 660-033-0140(1)(c) "directly prevents 'grandfathering' of un-executed permitted uses beyond that first-year extension. Said another way, the rule imposes a three-year statute of repose on a resource permitted use." Petition for Review 30.

Intervenor responds that the time for petitioners' challenge to the grandfather clause as being inconsistent with OAR 660-033-140(1)(c), the administrative rule that implements Statewide Planning Goal 3 (Agricultural Lands), was when the provision was adopted in 2017. We agree. LDO 4.11.125.7 is acknowledged to comply with the statewide planning goals, including administrative rules that implement the goals. ORS 197.625(1); *Gould v. Deschutes County*, 67 Or LUBA 1, 5 (2013) (the time to challenge an ordinance as inconsistent with OAR 660-033-0140 was prior to acknowledgement).

However, even if we assume for purposes of this opinion that in this appeal, petitioners could challenge the grandfather clause as inconsistent with the administrative rule that implements Goal 3, we would reject that argument. The grandfather clause is not inconsistent with the rule. Nothing in the rule prohibits a local government from adopting new criteria and exempting existing issued permits from those new criteria. Accordingly, the board of commissioners correctly concluded that, pursuant to the grandfather clause, the standards at LDO 4.11.125.7., including the fuel break standards at LDO 4.11.125.7.f., do not apply to the extension requests.

B. LDO 5.11.100-.300

As noted above, in 2017, the county adopted amendments to the LDO to add LDO Article 5.11, Geologic Assessment Reports. LDO 5.11.300.1 provides in relevant part that "the review and approval of a conditional use in a Geologic Hazard Special Development Consideration area shall be based on the

conformance of the proposed development plans with the following standards. * * *." The remainder of LDO 5.11.300 contains the requirements for the contents of a geologic assessment, and additional standards for oceanfront development not relevant here. We understand petitioners to argue that LDO 5.11.300 is a new criterion that applies to the 2010 CUP and the 2013 CUP and accordingly, the extensions are prohibited pursuant to LDO 5.2.600.1(c).

Relying on context provided in LDO 4.11.125.7, the board of commissioners interpreted LDO 5.11.100 to .300 to apply only when a landowner proposes to build a "structure" in a Geologic Hazard Special Development Consideration area, and concluded that the 2010 CUP and 2013 CUP do not authorize a structure.[2] Petitioners argue that the board of county commissioners improperly construed LDO 5.11.300 to only apply when a landowner proposes to build a structure.

Intervenor responds that, based on context provided in LDO 4.11.125.7.b., d., and e., the board of commissioners properly construed LDO 5.11.300 as

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[2] The board of commissioners found:

> "[Petitioners' counsel] cites to new requirements for geologic assessments, including new reporting requirements. See LDO 4.11.125(7), LDO 5.11.100, 5.11.200. and LDO 5.11.300(1). The requirement to perform these geologic reviews applies when a landowner proposes to build a 'structure,' and the Board has previously determined that the Applicant is not proposing to build a structure in these areas. * * *" Record 36, 78.

applying only when a landowner proposes to build a "structure" in a Geologic Hazard Special Development Consideration area. Those provisions state generally that the county may allow construction of "new structures" in known areas potentially subject to landslides, earthquakes, and erosion, "subject to a geologic assessment review as set out in Article 5.11." LDO 4.11.125.7.b., d., and e. Absent any developed argument by petitioners as to why we are not required to affirm the board of county commissioners' interpretation under ORS 197.829(1)(a), we agree with intervenor that the board of county commissioners' interpretation is not inconsistent with the express language of LDO 5.11.300 or LDO 4.11.125.7.

C. LDO 5.0.175

LDO 5.0.175 took effect in 2015. LDO 5.0.175(1) provides that for an application for a permit "[a] transportation agency, utility company or entity with the private right of property acquisition pursuant to ORS Chapter 35 may submit an application to the Planning Department for a permit or zoning authorization required for a project without landowner consent otherwise required by this ordinance." Differently, LDO 5.0.150(1) provides that an application for a permit "shall include the signature of all owners of the property." Petitioners argue that LDO 5.0.175 is a new "approval criteri[on]" within the meaning of LDO 5.2.600.1(c), and that it applies to the 2010 CUP and the 2013 CUP.

The board of commissioners adopted findings that LDO 5.0.175 is not an "approval criteri[on]" but rather is an application submittal requirement. The

board of commissioners also adopted alternative findings that even if LDO 5.0.175 is an "approval criterion," it is not "applicable" to the 2010 CUP and the 2013 CUP, because it is an optional provision that allows certain entities to choose to apply for a permit without landowner consent. Petitioners argue that in its decision approving the 2010 CUP, the county concluded that LDO 5.0.150 is an "approval criterion," and accordingly, the county must also conclude that LDO 5.0.175 is an approval criterion, and not merely a submittal requirement.

As intervenor points out, petitioners' argument does not address the board of commissioners' alternative finding that, even if LDO 5.0.175 could constitute an "approval criterion," it is not an "applicable" approval criterion within the meaning of LDO 5.2.600.1(c) because it merely provides an alternative, optional pathway for certain entities to apply for a permit. We agree with intervenor that absent any challenge to that finding, petitioners' argument provides no basis for reversal or remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

As noted, the pipeline routes authorized in the 2010 CUP and the 2013 CUP are located on both resource and non-resource land. LDO 5.2.600.2 (subsection 2) governs extensions on non-resource lands and provides:

> "2. Extensions on all non-resource zoned property shall be governed by the following.

"a. The Director shall grant an extension of up to two (2) years so long as the use is still listed as a conditional use under current zoning regulations.

"b. If use or development under the permit has not begun within two (2) years of the date of approval and an extension has not been requested prior to the expiration of the conditional use then that conditional use is deemed to be invalid and a new application is required.

"c. If an extension is granted, the conditional use will remain valid for the additional two years from the date of the original expiration.

"3. Time frames for conditional uses and extensions are as follows:

"a. All conditional uses within non-resource zones are valid four (4) years from the date of approval; and

"b. All conditional uses for dwellings within resource zones outside of the urban growth boundary or urban unincorporated community are valid four (4) years from the date of approval.

"c. All non-residential conditional uses within resource zones are valid (2) years from the date of approval.

"d. For purposes of this section, the date of approval is the date the appeal period has expired and no appeals have been filed, or all appeals have been exhausted and final judgments are effective.

"e. Additional extensions may be applied."

As noted above, subsection 3 was added to LDO 5.2.600 in 2015. Relying on LDO 5.2.600.3.e, the board of county commissioners approved the extensions of the 2010 CUP and the 2013 CUP for the portions of the pipeline located on non-

resource land. The board of commissioners interpreted subsection 3 as modifying subsection 2 to allow for additional extensions:

> "If [LDO] 5.2.600(3)(e) does not modify [LDO] 5.2.600(2)(b) then subsection (3)(b) is rendered 'superfluous' and is not given effect. ORS 174.010 provides that 'where there are several provisions or particulars such construction is, of possible, to be adopted as will give effect to all.' * * *
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> "Subsection (3)(e)'s provision that 'additional extensions may be applied' is rendered meaningless if it does not modify subsection (2) and allow for additional extensions of conditional uses on non-resource zoned property. The word 'additional' is defined by the Oxford English Dictionary as 'added, extra or supplementary to what is already present or available.' In order to give the work additional effect in subsection (3)(e) it must be read to provide for the 'added' or 'supplementary' extensions to those extensions already provided for in LDO 5.2.600 as a whole. The only subsection that could logically be modified by subsection (3)(e) is thus subsection (2), which standing along only provides for one extension.
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> "If the intent of subsection (3)(e) was merely to serve as a reminder that the extensions under subsections (1) and (2) may serve to modify the initial conditional use time periods specified in subsection (2), this intent could have been accomplished by providing that 'extensions may be applied' with the word 'additional' omitted altogether. Once again, the word 'additional' makes clear that subsection (3)(e) is intended to add to the limited extensions in subsection (2). While this is not an example of the most artful drafting, any other interpretation renders subsection (3)(e) meaningless." Record 41-42.

Under the deferential standard of review set out at ORS 197.829(1), LUBA is required to affirm the board of county commissioners' interpretation of the LDO unless the interpretation is "(a) Is inconsistent with the express language of

the comprehensive plan or land use regulation;" or "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements." *Siporen v. City of Medford*, 349 Or 247, 252, 243 P3d 776 (2010) (LUBA must affirm a city council's code interpretation under ORS 197.829(1) unless the interpretation is "implausible"). Petitioners argue that LUBA is not required to affirm the board of county commissioners' interpretation of subsection 3 because the interpretation is inconsistent with the express language of subsection 2, and that there is no way to give effect to both provisions.

Intervenor responds, and we agree, that the board of commissioners' interpretation of subsection 2 and subsection 3 is not inconsistent with the express language of either provision. The board of commissioners' interpretation that subsection 3 modifies subsection 2 to allow for "additional" extensions beyond the single extension allowed by subsection 2 is supported by the plain meaning of the word "additional" as providing for supplemental extensions beyond the one allowed in subsection 2. Petitioners do not offer any other interpretation that harmonizes subsection 2 and subsection 3; rather, petitioners focus solely on subsection 2.

Petitioners also argue that LUBA is not required to affirm the board of county commissioners' interpretation because it is contrary to ORS 197.010(2), Statewide Planning Goal 1 (Citizen Involvement) and Statewide Planning Goal

1 2 (Land Use Planning).[3] Petition for Review 33; ORS 197.829(1)(d). We also
2 conclude that the board of commissioners' interpretation is not contrary to ORS

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[3] ORS 197.010(2) provides:

> "(a) The overarching principles guiding the land use program in the State of Oregon are to:
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> "(A) Provide a healthy environment;
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> "(B) Sustain a prosperous economy;
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> "(C) Ensure a desirable quality of life; and
>
> "(D) Equitably allocate the benefits and burdens of land use planning.
>
> "(b) Additionally, the land use program should, but is not required to, help communities achieve sustainable development patterns and manage the effects of climate change.
>
> "(c) The overarching principles in paragraph (a) of this subsection and the purposes in paragraph (b) of this subsection provide guidance to:
>
> "(A) The Legislative Assembly when enacting a law regulating land use.
>
> "(B) A public body, as defined in ORS 174.109, when the public body:
>
> "(i) Adopts or interprets goals, comprehensive plans and land use regulations implementing the plans, or administrative rules implementing a provision of ORS chapter 195, 196, 197, 215 or 227; or
>
> "(ii) Interprets a law governing land use.

197.010(2)(a), Goal 1, or Goal 2. First, ORS 197.010(2)(d) provides that the overarching principles set out in ORS 197.010(2)(a)(A)-(D) are not a legal requirement for a public body and are "not judicially enforceable." Second, petitioners do not develop any argument explaining why the board of commissioners' interpretation is contrary to the overarching principles guiding the land use program set out in ORS 197.010(2)(a), or otherwise explain how those overarching principles should be applied in interpreting LDO 5.2.600.2 and .3. For example, it is reasonably clear that application of the overarching principles would call for some type of balancing, and petitioners do not explain how the board of commissioners' interpretation is contrary to any balancing that the overarching principles require. Finally, petitioners do not develop any argument explaining why the board of commissioners' interpretation is contrary to Goal 1 and Goal 2. *Deschutes Development Co. v. Deschutes County*, 5 Or LUBA 218, 220 (1982).

The third assignment of error is denied.

The county's decision is affirmed.

"(d) Use of the overarching principles in paragraph (a) of this subsection and the purposes in paragraph (b) of this subsection is not a legal requirement for the Legislative Assembly or other public body and is not judicially enforceable.