BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

STACEY MCLAUGHLIN and
PAMELA BROWN ORDWAY,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

PACIFIC CONNECTOR GAS PIPELINE, LP,
Intervenor-Respondent.

LUBA No. 2020-004

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Tonia Moro filed the petition for review and reply brief and argued on behalf of petitioners.

No appearance by Douglas County.

Seth J. King filed the response brief and argued on behalf of intervenor-respondent. Also on the brief were Steven L. Pfeiffer and Perkins Coie LLP.

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

REMANDED 04/13/2021

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

Opinion by Rudd.

NATURE OF THE DECISION

Petitioners appeal a county board of commissioners decision determining that a 7.5-mile subsurface natural gas transmission pipeline and associated facilities comprise a utility facility necessary for public service and approving a conditional use permit (CUP) authorizing their development and construction.

MOTION TO FILE OVERLENGTH REPLY BRIEF

OAR 661-010-0039 provides that a "reply brief shall not exceed 1,000 words, exclusive of appendices, unless permission for a longer reply brief is given by [LUBA]." On October 28, 2020, petitioners filed a conforming reply brief; a proposed overlength, 2,680-word reply brief; and a motion requesting that we accept the overlength reply brief. Petitioners argue that they require the extra pages to ensure that we understand their position and that the overlength reply brief will be useful to our resolution of the appeal.[1] We do not agree with petitioners that the length of the local decision and the number of assignments of error and issues raised by intervenor justify an overlength reply brief. The motion is denied. LUBA will consider petitioners' conforming reply brief.

---

[1] The petition for review utilizes 9,536 and the response brief utilizes 10,942 of the 11,000 words that each of those briefs are allowed by our rules. OAR 661-010-0030(2)(b); OAR 661-010-0035(3)(a).

MOTIONS TO TAKE OFFICIAL NOTICE

LUBA may take official notice of items subject to judicial notice under ORS 40.090.[2] *Blatt v. City of Portland*, 21 Or LUBA 337, 341, *aff'd*, 109 Or App

---

[2] Under ORS 40.090, law that is judicially noticed includes:

> "(1) The decisional, constitutional and public statutory law of Oregon, the United States, any federally recognized American Indian tribal government and any state, territory or other jurisdiction of the United States.
>
> "(2) Public and private official acts of the legislative, executive and judicial departments of this state, the United States, any federally recognized American Indian tribal government and any other state, territory or other jurisdiction of the United States.
>
> "(3) Rules of professional conduct for members of the Oregon State Bar.
>
> "(4) Regulations, ordinances and similar legislative enactments issued by or under the authority of the United States, any federally recognized American Indian tribal government or any state, territory or possession of the United States.
>
> "(5) Rules of court of any court of this state or any court of record of the United States, of any federally recognized American Indian tribal government or of any state, territory or other jurisdiction of the United States.
>
> "(6) The law of an organization of nations and of foreign nations and public entities in foreign nations.
>
> "(7) An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived

259, 819 P2d 309 (1991), *rev den*, 314 Or 727 (1992). We address the motions to take official notice below.

A. March 2020 FERC Order

Intervenor asks that we take official notice of a March 19, 2020 Federal Energy Regulatory Commission (FERC) order authorizing the pipeline under section 7(c) of the Natural Gas Act (March 2020 FERC Order). FERC is a federal agency and LUBA may take official notice of official acts of the executive department of the federal government. ORS 40.090(2). Petitioners object to our taking notice of the March 2020 FERC Order "on the basis that [it] is not final, because the merits of the decision can and are being challenged by these same petitioners and because it is not relevant to the state criteria issue before LUBA and neither does it even establish the related federal law question." Petitioners' Response to Intervenor's Motion to Take Official Notice 1.

In *Pete's Mtn. Home Owners Assoc. v. Clackamas County*, we took notice of an Oregon Water Resources Department order granting a water company's application for a change in place of use to allow it to provide domestic water to a larger geographic area, an order that petitioners stated they intended to appeal. 55 Or LUBA 287, 291-93 (2007). We explained that, while we would not take notice of adjudicative facts, the order was an official act of an executive agency

---

therefrom. As used in this subsection, 'comprehensive plan' has the meaning given that term by ORS 197.015."

establishing the law that governs the water company's access to and distribution of groundwater. *Id.* at 292-93.

Similarly, here, although petitioners have challenged the March 2020 FERC Order in federal court, that challenge does not negate the fact that the order is a decision of the executive department of the federal government establishing the currently applicable law and is therefore subject to official notice. Intervenor's motion to take official notice is granted.

B. DLCD CZMA Decision

Petitioners ask that we take official notice of the Department of Land Conservation and Development's (DLCD's) February 19, 2020 decision objecting to intervenor's certification of compliance with the federal Coastal Zone Management Act (CZMA). We take notice of executive actions of the state pursuant to ORS 40.090(2) and the motion is granted.

C. CZMA Override Application and CWA Bypass Application

Petitioners also ask that we take official notice of intervenor's notice of appeal of the DLCD CZMA Decision to the United States Department of Commerce (CZMA Override Application) and a petition that intervenor filed with FERC, seeking a waiver of the federal requirement to obtain a Clean Water Act (CWA) permit (CWA Bypass Application). Petitioners ask that we take official notice of intervenor's CZMA Override Application and CWA Bypass Application because they are judicial admissions. "LUBA has never held that it has authority to take official notice of adjudicative facts, as set out in [ORS

40.060 to 40.085]." *Blatt*, 22 Or LUBA at 342. Intervenor's CZMA Override Application and CWA Bypass Application are not members of a class of documents identified as eligible for official notice in ORS 40.090. The motion is denied.

MOTION TO TAKE EVIDENCE

LUBA may "take evidence not in the record in the case of disputed allegations in the parties' briefs concerning * * * procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision." OAR 661-010-0045(1). Petitioners request that we take the (1) DLCD CZMA Decision, (2) CZMA Override Application, and (3) CWA Bypass Application as "evidence of procedural irregularities corroborating those disclosed in the record and others not disclosed by the record." Petitioners' Motion to Take Official Notice and Motion to Take Evidence 4. These are the same three documents of which petitioners requested that we take official notice. Petitioners argue that the CZMA Override Application and CWA Bypass Application establish procedural irregularities because they show that intervenor failed to inform the county of its legal option or intent to "avoid state or local criteria" and thereby manipulated the "local land use process and the state permitting process to avoid a merits decision on the county's criteria in and of themselves but also those tied to the state's water quality and Oregon[] Coastal Management [Program (OCMP)] criteria." *Id.* at 11.

Only the local government is capable of committing "procedural irregularities" within the meaning of OAR 661-010-0045(1) and, accordingly, actions by an applicant cannot give rise to procedural irregularities supporting a motion to take evidence. *ODOT v. Coos County*, 34 Or LUBA 805, 807 (1998). We also agree with intervenor that our consideration of evidence not in the record requires, at the outset, disputed factual allegations. Intervenor does not dispute the following facts:

> "• Intervenor[] withdrew its state-level wetland removal-fill permit application and its applications for proprietary easements;
>
> "• The [CZMA Override Application] initiates proceedings at the United States Department of Commerce by intervenor[] to override the DLCD [CMZA D]ecision; and
>
> "• In the [CWA Bypass Application], intervenor[] seeks FERC's ruling that the State of Oregon waived the requirement that intervenor[] obtain a CWA permit for the project." Intervenor's Response to Petitioners' Motion to Take Official Notice and Motion to Take Evidence 7.

The motion to take the CZMA Override Application and CWA Bypass Application as extra-record evidence is denied.

We denied similar motions regarding the same two documents in *Citizens for Renewables v. Coos County*, ___ Or LUBA ___, ___ (LUBA No 2020-003, Feb 11, 2021) (slip op at 6-8), and *Oregon Shores Conservation Coalition v. Coos County*, ___ Or LUBA ___, ___ (LUBA Nos 2019-137/2020-006, Dec 22, 2020) (slip op at 6-9). We concluded that, because no party disputed the bare facts

outlined above, the parties could cite those facts in support of their arguments, even in the absence of a successful motion to take evidence. Similarly, in this appeal, we consider references to those undisputed circumstances in the parties' arguments.

Petitioners argue that the DLCD CZMA Decision, of which we have taken official notice, corroborates evidence in the record. Petitioners' Motion to Take Official Notice and Motion to Take Evidence 4. Providing additional evidentiary support to that already in the record is not a basis for granting a motion to take evidence. Petitioners also argue that the DLCD CZMA Decision supports its position that the county's conditions of approval are inadequate but, even if that were true, the decision would not reflect a *procedural* irregularity requiring the consideration of additional facts. Petitioners have not established the existence of disputed facts related to procedural irregularities which, if proved, would warrant reversal or remand. The motion to take the DLCD CZMA Decision as extra-record evidence is denied.

FACTS

The subject property is a corridor crossing land zoned Timberland Resource (TR), Exclusive Farm Use-Grazing (FG), and Farm Forest (FF) and located within the county's Coastal Zone Management Area. Intervenor seeks to develop and operate within that corridor

> "a 36-inch diameter natural gas pipeline that extends approximately 229 miles between an existing metering hub where two existing interstate natural gas pipelines intersect in Malin, Oregon and the

> Jordan Cove natural gas liquefaction facility and related terminal on the North Spit in Coos County [(Jordan Cove LNG Facility)]. * * * In order to install and operate the Pipeline as a whole, [intervenor] must obtain a certificate of convenience and necessity from [FERC]. * * * Within the Coastal Zone (which includes Douglas County between mileposts ["MP"] 45.72 and 53.20), [intervenor] must also demonstrate compliance with enforceable state and local Coastal Zone policies to site the Pipeline (in this case, the Douglas County [Land Use and Development Ordinance (LUDO)]), which prompted this application to Douglas County." Record 27.

The county has previously approved a pipeline to serve the Jordan Cove LNG Facility. In 2009, the county issued a decision (1) determining that a segment of such a pipeline proposed to be located within the county was a "utility facility necessary for public service" and, thus, a conditional use in the applicable zones under the LUDO and (2) approving a CUP for the use. In 2014, the county approved an amendment to the prior authorization, removing a condition barring the exportation of natural gas and approving an alternative pipeline alignment in the Weaver Ridge area. The 2014 approval was unsuccessfully appealed to LUBA and the Court of Appeals. *McLaughlin v. Douglas County*, 70 Or LUBA 314 (2014), *aff'd*, 269 Or App 598, 346 P3d 668 (2015). Intervenor obtained county extensions of both the 2009 and 2014 approvals while it sought state and federal permits for the project. After the circuit court determined that the 2009 and 2014 approvals had expired, intervenor submitted the application that led to the decision on appeal, consolidating the previously approved alignments with subsequent route adjustments. The planning director referred the application to

the hearings officer to avoid potential issues of bias related to the planning commission.

Surface improvements to be constructed within the county include a communications tower and block valve. The pipeline segment within the county will traverse 2.08 miles and, during construction, impact 33.13 acres of land zoned FG; traverse 4.23 miles and, during construction, impact 61.57 acres zoned TR; and traverse 1.22 miles and, during construction, impact 16.34 acres zoned FF. Record 28.

On October 3, 2019, the hearings officer conducted a public hearing on the application. On December 6, 2019, the hearings officer issued their decision approving the application. Petitioners appealed the hearings officer's decision to the board of commissioners. On December 23, 2019, the board of commissioners declined review of the appeal and affirmed and adopted the hearings officer's decision as its own.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners' first assignment of error is that the county misconstrued the law and made inadequate findings regarding its approval of the pipeline in the FG zone. As noted, the pipeline segment within the county will traverse 2.08 miles and, during construction, impact 33.13 acres of land in the FG zone.

A. First Subassignment of Error

As relevant here, LUDO 2.040(1)(f) provides that applications for development approval may be initiated by "[a] public utility or transportation agency, when dealing with land involving the location of facilities necessary for public service." The county found that intervenor is a public utility as defined in LUDO 1.090(2). Record 42-43.

Petitioners' first subassignment of error is that the county misconstrued the law and made inadequate findings unsupported by substantial evidence in determining that intervenor is a "public utility" authorized to submit a land use application pursuant to LUDO 2.040(1)(f). Petition for Review 13-14.

LUDO 1.090(2) defines "public utility" as

> "[*a*]*ny corporation, company, individual, association of individuals, or its lessees, trustees or receivers, that owns, operates, manages or controls* all or *any part of any plant or equipment* for the conveyance of telegraph, telephone messages with or without wires, *for the transportation as common carriers, or for the production, transmission, delivery or furnishing of heat, light, water or power, directly or indirectly to the public*." (Emphases added.)

Petitioners argue that intervenor is not a public utility because the pipeline will not deliver heat, light, water, or power to the public. Petitioners argue that the county's decision therefore improperly construed LUDO 2.040(1)(f).

Petitioners also argue that the county's decision is not supported by substantial evidence in the record because there is no evidence in the record that there is a need or plan to provide additional heat, light, water, or power service to the public from the gas moving thorough the line or that any capacity reserved

for local use ("retained capacity") will not also be exported. Petition for Review 14. Lastly, petitioners argue that intervenor and foreign consumers are not "the public" within the meaning of the LUDO definition of "public utility."

Where a governing body adopts a decision as its own, interpretations of local provisions contained in the decision are afforded the same deference as a governing body's own interpretations. *Derry v. Douglas County*, 132 Or App 386, 391, 888 P2d 588 (1995). Thus, we will review the county board of commissioners' interpretation of its own regulations under ORS 197.829(1) and affirm that interpretation so long as it is not inconsistent with the express language of the regulation or the regulation's underlying purposes and policies. "[W]hen a local government plausibly interprets its own land use regulations by considering and then choosing between or harmonizing conflicting provisions, that interpretation must be affirmed * * * unless the interpretation is inconsistent with *all* of the 'express language' that is relevant to the interpretation, or inconsistent with the purposes or policies underpinning the regulations." *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010) (emphasis in original).

LUDO 1.090(2) recognizes as "public utilities" companies owning or operating equipment "*for the transportation as common carriers, or for the production, transmission, delivery or furnishing of heat, light, water or power, directly or indirectly to the public*." (Emphasis added.) The county determined that "[intervenor] is a 'company' as that term is used in the []LUDO." Record 46.

The county also determined that intervenor would employ equipment for the transportation of natural gas as a common carrier:

> "[Intervenor] owns, operates, manages and/or controls the Pipeline. The Pipeline will convey natural gas from an existing metering hub where two existing interstate natural gas pipelines intersect in Malin, Klamath County, Oregon. From there, the pipeline will connect with the Jordan Cove [LNG Facility]. Thus, the Pipeline is equipment for the transportation of natural gas as a 'common carrier.'" *Id.*

The county found that the natural gas would provide power to the Jordan Cove LNG Facility and to the public before and after export based on substantial evidence in the record.

> "[Intervenor] has made available capacity in the Pipeline to the public through a noticed open season, and there are currently approximately 50,000 dekatherms per day that are available to the public. The pipeline will also furnish fuel to the gas turbine electrical power generators at the [Jordan Cove LNG Facility]. Moreover, Jordan Cove Energy will export the natural gas conveyed by the Pipeline to end users. In this way, the Pipeline will transmit, deliver, or furnish a heat and power source directly or indirectly to the public. Therefore the hearings officer finds that the Pipeline satisfies the Code definition of 'public utility.'" *Id.* (citation omitted).

The county rejected petitioners' argument that being a public utility requires delivery of gas utility services to local users but nonetheless found that there will be delivery to a local member of the public, the Jordan Cove LNG Facility itself. The county also concluded that retained capacity will be reserved for local residents and workers. Lastly, the county acknowledged that some of the natural gas will be exported and used by the public in Asia.

As we held in *McLaughlin*, those served by the utility do not have to be local to the project. 70 Or LUBA at 323. The county's interpretation of its code is consistent with the text and context. The pipeline constitutes equipment for the transportation of natural gas as a common carrier and, as substantial evidence shows, that natural gas will be used for the production of power. We agree with intervenor that the county did not misconstrue the law, that the county applied each element of the LUDO definition of public utility, and that the county's interpretation is consistent with the text and context of that definition.

The first subassignment of error is denied.

B. Third Subassignment of Error

Oregon land use law preserves land for agricultural uses by restricting uses allowed in Exclusive Farm Use (EFU) zones to agricultural uses and certain non-farm uses listed in ORS 215.283. ORS 215.203.[3] "Utility facilities necessary for public service" are allowed in EFU zones. ORS 215.283(1)(c).[4] ORS 215.275 provides:

---

[3] ORS 215.203(1) provides, in part, "Zoning ordinances may be adopted to zone designated areas of land within the county as [EFU] zones. Land within such zones shall be used exclusively for farm use except as otherwise provided in ORS 215.213, 215.283 or 215.284."

[4] ORS 215.283(1) provides:

> "The following uses may be established in any area zoned for exclusive farm use:
>
> "* * * * *

"(1) A utility facility established under ORS 215.213(1)(c)(A) or 215.283(1)(c)(A) is necessary for public service if the facility must be sited in an [EFU] zone in order to provide the service.

"* * * * *

"(6) The provisions of subsections (2) to (5) of this section do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by [FERC]."[5]

"(c) Utility facilities necessary for public service, including wetland waste treatment systems but not including commercial facilities for the purpose of generating electrical power for public use by sale or transmission towers over 200 feet in height. A utility facility necessary for public service may be established as provided in:

"(A) ORS 215.275; or

"(B) If the utility facility is an associated transmission line, as defined in ORS 215.274 and 469.300."

[5] ORS 215.275(2)-(5) provide:

"(2) To demonstrate that a utility facility is necessary, an applicant for approval under ORS 215.213(1)(c)(A) or 215.283(1)(c)(A) must show that reasonable alternatives have been considered and that the facility must be sited in an [EFU] zone due to one or more of the following factors:

"(a) Technical and engineering feasibility;

"(b) The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;

"(c) Lack of available urban and nonresource lands;

"(d) Availability of existing rights of way;

"(e) Public health and safety; and

"(f) Other requirements of state or federal agencies.

"(3) Costs associated with any of the factors listed in subsection (2) of this section may be considered, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service. Land costs shall not be included when considering alternative locations for substantially similar utility facilities. The Land Conservation and Development Commission shall determine by rule how land costs may be considered when evaluating the siting of utility facilities that are not substantially similar.

"(4) The owner of a utility facility approved under ORS 215.213(1)(c)(A) or 215.283(1)(c)(A) shall be responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility. Nothing in this section shall prevent the owner of the utility facility from requiring a bond or other security from a contractor or otherwise imposing on a contractor the responsibility for restoration.

"(5) The governing body of the county or its designee shall impose clear and objective conditions on an application for utility facility siting under ORS 215.213(1)(c)(A) or 215.283(1)(c)(A) to mitigate and minimize the impacts of the proposed facility, if any, on surrounding lands devoted to farm use in order to prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on the surrounding farmlands."

As noted, a portion of the pipeline will be located within the FG zone, which is an EFU zone. The county found that, because the project is a FERC-regulated natural gas pipeline, ORS 215.275(6) applies and the provisions in ORS 215.275(2) to (5) do not apply. Record 49. We held in *Citizens for Renewables v. Coos County* that, "if the exemption in ORS 215.725(6) applies, then ORS 215.275(1) does not independently impose substantive requirements." ___ Or LUBA at ___ (slip op at 51). Accordingly, ORS 215.275(1) to (5) do not apply and the county did not err in concluding that those provisions are not applicable to the pipeline.

ORS 215.275 is implemented locally by LUDO 3.3.170. The county determined that the last paragraph of LUDO 3.3.170 provides that LUDO 3.3.170(1) and (2) do not apply to FERC-regulated natural gas pipelines and that ORS 215.275 preempts the application of the remainder of LUDO 3.3.170. Petitioners argue that that determination misconstrues the law and is based on inadequate findings.

Petitioners maintain that the county's decision improperly "finds that state law prevents the county from determining that it is not a 'utility facility necessary for public service' and from subjecting the pipeline to any criteria." First, petitioners argue that, for the reasons stated in their first and second subassignments of error, the project is not a utility facility necessary for public service. We reject this argument with respect to the first subassignment of error for the reasons set forth above. We reject this argument with respect to the second

subassignment of error for the reasons set forth in our resolution of the second subassignment of error below.

Petitioners also argue that the exemption in ORS 215.275(6)

> "does not apply in the context of the state's delegation of its CZMA authority to [the] County by its inclusion of the relevant LUDO chapters in [the OCMP]. Said another way, any intent to preempt by including public service utilities in the adoption of ORS 215.283(1) is supercede[d] by the state's intent and subsequent act of designating the * * * LUDO chapters in [the] OCMP and particularly because there is no indication that the state intended to waive or forfeit any jurisdiction it has or could delegate to deny a permit in the [Coastal Zone Management Area]." Petition for Review 16.

Petitioners do not develop this argument, and we do not understand it. Accordingly, we will not address it further. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

Lastly, petitioners argue that the pipeline is not an interstate pipeline subject to FERC's jurisdiction, and is therefore not exempted from ORS 215.275(1) to (5) by ORS 215.275(6), because it is located entirely within the state of Oregon and serves only the Jordan Cove LNG Facility. Petition for Review 16. We took official notice of the March 2020 FERC Order as an official act of an executive branch of the federal government establishing the currently applicable law. The March 2020 FERC Order issued a certificate of public convenience and necessity to construct and operate a new interstate natural gas pipeline system in Douglas, Klamath, Jackson, and Coos Counties under section 7(c) of the Natural Gas Act. The pipeline is authorized and subject to regulation

by FERC. Thus, ORS 215.275(6) exempts the pipeline and associated facilities from the provisions of ORS 215.275(1) to (5) and the corresponding provisions of LUDO 3.3.170. *Citizens for Renewables v. Coos County*, ___ Or LUBA at ___ (slip op at 46-53).

The third subassignment of error is denied.

C. Fourth Subassignment of Error

Petitioners' fourth subassignment of error is that the pipeline does not satisfy factors set out in LUDO 3.3.170. The county found that the majority of LUDO 3.3.170 was not applicable but, in the alternative, adopted findings of compliance with each LUDO 3.3.170 provision. To the extent that the county found that LUDO 3.3.170 is not applicable to the application because the pipeline is a FERC-regulated facility and because the county may not impose more stringent criteria than those allowed by state law, we agree and do not address the alternative findings of compliance.

As we explained in our resolution of the third subassignment of error discussing ORS 215.275(6), the facility is a FERC-regulated pipeline and is therefore exempt from compliance with ORS 215.275(1) to (5). Consistent with the exception found in ORS 215.275(6), LUDO 3.3.170 provides, in part, "Subsections 1 and 2 do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by [FERC]." LUDO

3.3.170(1) and (2) implement ORS 215.275(2).[6] ORS 215.275(6) provides, however, that ORS 215.275(3) to (5) are also inapplicable to pipelines regulated by FERC. ORS 215.275(3) to (5) address the consideration of costs, restoration obligations, and required conditions of approval—provisions found in LUDO 3.3.170(3) to (5). Although LUDO 3.3.170 only identifies LUDO 3.3.170(1) and (2) as inapplicable to FERC-regulated pipelines, the county found that the

---

[6] LUDO 3.3.170(1) and (2) provide that, in order to demonstrate that a utility facility is necessary for public service,

> "1. The applicant must show that reasonable alternatives have been considered[; and]
>
> "2. The applicant must show that the facility needs to be sited in an [EFU] zone due to one or more of the following factors:
>
> "a. Technical and engineering feasibility;
>
> "b. The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive fam use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;
>
> "c. Lack of available urban and nonresource lands;
>
> "d. Availability of existing rights of way;
>
> "e. Public health and safety; or
>
> "f. Other requirements of state and federal agencies."

remainder of LUDO 3.3.170 was preempted to the extent that it is inconsistent with state law. The county generally found that

> "[a]pplicable state law preempts the remainder of LUDO []3.3.170, which appears to be the County's implementation of ORS 215.275 ('Utility facilities necessary for public service criteria; rules; mitigating impact of facility.') Pursuant to *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995), counties may not subject uses allowed outright under ORS 215.283(1) to local criteria that are more stringent than those set forth by statute. *Id.* Utility facilities necessary for public service are allowed outright on farmland under ORS 215.283(1)(c). Therefore, the decision in *Brentmar* is applicable to the requested use. * * * Because the County may not regulate utility facilities necessary for public service more stringently than state law, and state law exempts FERC-regulated natural gas [pipelines] from ORS 215.275(2)-(5), the County is barred from applying the parallel LUDO provisions (LUDO []3.3.170[(1)-(6)]) to the Application. Accordingly, under applicable federal and state law as applied to these facts, the Hearings Officer finds that the Pipeline is exempt from LUDO []3.3.170." Record 48-49.

With respect to LUDO 3.3.170(1) to (5), the county specifically found that

> "the Pipeline is an interstate natural gas pipeline authorized by and subject to regulation by FERC. Pursuant to ORS 215.275(6), *Brentmar*, and LUDO []3.3.170, this subsection does not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by * * * FERC. Consequently, this subsection does not apply to the pipeline." Record 49, 51-54.

Intervenor argues that, "even if the County erred in its analysis or findings of compliance in response to LUDO 3.3.170, it does not provide a basis to reverse or remand the Decision because these findings were adopted in the alternative to findings that these provisions are not applicable." Response Brief 26. We agree.

One provision of LUDO 3.3.170 is not preempted by ORS 215.275. LUDO 3.3.170(6) provides:

> "Where linear utility facilities (which transfer a utility product in bulk from a point of origin or generation, or between transfer stations, to the point at which the utility product is transferred to distribution lines for delivery to end users), are proposed to pass through high value farmland, the utility provider shall provide the Approving Authority with documentation of consultation notice to record owners of high value farmland, as provided in ORS 215.275, *prior to final approval of the utility facility*." (Emphasis added.)

LUDO 3.3.170(6) does not implement ORS 215.275, which does not reference or require consultation notice to record owners of high value farmland. The county's findings addressing LUDO 3.3.170(6) speculate that the code drafters intended to reference ORS 215.276 and not ORS 215.275, stating, "This provision is based on ORS 215.276; the reference to ORS 215.275 may be in error." Record 55. Like LUDO 3.3.170(6), ORS 215.276(2) requires contact with property owners.[7] The required property owner consultation in ORS 215.276(2),

---

[7] ORS 215.276(2) provides, in part:

> "If the criteria described in ORS 215.275 for siting a utility facility on land zoned for exclusive farm use are met for a utility facility that is a transmission line, or if the criteria described in ORS 215.274 for siting an associated transmission line are met, the utility provider shall, *after the route is approved by the siting authorities and before construction of the transmission line begins*, consult the record owner of high-value farmland in the planned route for the purpose of locating and constructing the transmission line in a manner that minimizes the impact on farming operations on high-value farmland." (Emphasis added.)

however, occurs prior to *construction*, as opposed to prior to the *final approval* referenced in LUDO 3.3.170(6). The county found that LUDO 3.3.170(6) was met:

> "Consistent with LUDO []3.3.170[(6)], [intervenor] agreed to consult with the record owners of the high value farmland identified in the Soils Maps *prior to beginning construction of the Pipeline*. [Intervenor] provided documentation of the consult notice required by this subsection. Thus the hearings officer finds that the Application satisfies this provision." Record 56 (emphasis added).

The county's decision conditions approval on intervenor providing "to the County certified documentation of consultation with the property owners of high value farmland identified along the proposed pipeline alignment within the [Coastal Zone Management Area] to ensure the standards of ORS 215.276 have been satisfied *prior to the commencement of construction*." Record 20 (emphasis added). This condition, however, does not address the requirement in LUDO 3.3.170(6) that communication with the property owners occur *prior to final approval*, and there is not substantial evidence in the record that the consultation referenced in LUDO 3.3.170(6) occurred. However, because the county found in an unchallenged finding that LUDO 3.3.170(6) is preempted because local governments may not impose more stringent criteria than those found in statute and because ORS 215.276 only requires property owner consultation *prior to construction*, this subassignment of error is denied.

The fourth subassignment of error is denied.

D. Second Subassignment of Error

Petitioners' second subassignment of error is that the county misconstrued the law when it found that (1) the pipeline is a utility facility necessary for public service and (2) the pipeline and the affiliated block valve and communications tower are all eligible for a CUP because those facilities will be constructed for a public utility.

The phrase "[u]tility facilities necessary for public service" is not defined in the LUDO, but that phrase is derived from ORS 215.283(1)(c) and the method for demonstrating that a utility facility is "necessary for public service" is generally prescribed in ORS 215.275. As we explained above, ORS 215.275(1) provides that a utility facility is necessary for public service if the facility must be sited in an EFU zone in order to provide the service, but we have held that ORS 215.275(1) places no substantive requirements on pipelines regulated by FERC. Accordingly, the county may not require intervenor to establish that the pipeline is "necessary for public service." Thus, petitioners' first argument under the second subassignment of error provides no basis for remand.

The county determined that the pipeline is a utility facility "because it is a facility constructed for [intervenor], which as explained above is a 'Public Utility.'" Record 46. We affirm the county's determination that intervenor is a public utility in our resolution of the first subassignment of error. Thus, the pipeline will, as the county found, be constructed for a "public utility." *Id.* The county also determined that, "[b]ecause the examples listed in the [LUDO

definition of 'utility facility'] are introduced by the phrase 'including but not limited to,' they are not an exclusive list of facilities that meet the definition of 'Utility Facility.'" *Id.* The communications tower is used to operate the block valve and block valves are used to stop the flow of gas in the pipeline. Record 3469, 4225. The block valve and communications tower are facilities associated with the pipeline and thereby tied to serving the public. Petitioners' challenge to the block valve and communications tower therefore fails for the same reasons that their challenge to the pipeline fails.

Petitioners argue that a utility facility necessary for public service must be linked to public service and there is no public service in this case. As we explained above, nothing requires that the pipeline serve local users and, in any event, the record demonstrates that the pipeline will serve users in Asia and also retain capacity for local users and the Jordan Cove LNG Facility.

The second subassignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

As noted, the pipeline will traverse 4.23 miles and, during construction, impact 61.57 acres zoned TR, and it will traverse 1.22 miles and, during construction, impact 16.34 acres zoned FF. Record 28. Petitioners' second assignment of error is that the county misconstrued the law and made inadequate findings regarding approval of the pipeline in the TR and FF zones, which are forest zones, not EFU zones.

A. First Subassignment of Error

1. The Pipeline is a Gas Distribution Line

LUDO 3.2.100(18) and 3.5.100(2) implement Statewide Planning Goal 4 (Forest Lands) and OAR 660-006-0025 in the TR and FF zones and provide that uses which may be allowed on forest land include "[n]ew distribution lines (e.g., electrical, gas, oil, geothermal) with rights-of-way 50 feet or less in width."[8] The county concluded that the pipeline is permittable as a new gas distribution line with rights-of-way 50 feet or less in width. Petitioners' first subassignment of error is that the pipeline is a transmission line rather than a distribution line.

Pursuant to 49 CFR section 192.3, a distribution line is a pipeline other than a transmission line or a pipeline that transports gas from a current production facility to a transmission line or main. ORS 757.039(3) authorizes the Oregon Public Utility Commission

> "to cooperate with, make certifications to and enter into agreements with the Secretary of Transportation of the United States of America

---

[8] Goal 4 is:

> "To conserve forest lands by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture." OAR 660-015-0000(4).

Uses authorized in forest zones include new natural gas distribution lines with rights-of-way 50 feet or less in width. OAR 660-006-0025(4)(q).

> and to assume responsibility for, and carry out on behalf of the Secretary of Transportation, safety jurisdiction relating to pipeline facilities and transportation of hazardous substances and materials in Oregon in any manner not otherwise subject to the jurisdiction of any other agency of this state."

Petitioners argue that, because ORS 757.039(3) authorizes Oregon to rely on a federal agency, the United States Department of Transportation (USDOT), to ensure the safe construction and operation of non-FERC pipelines, USDOT's classification of pipelines is relevant and the definition of "distribution line" at 49 CFR section 192.3 supports the conclusion that a transmission line is different from a distribution line.

We agree with intervenor that federal classification of gas lines does not provide relevant context for determining the meaning of the phrase "distribution line" in LUDO 3.2.100(18) and 3.5.100(2).

Petitioners also argue that the county erred because it did not rely on the definition of "transmission line" provided in ORS 215.276 and that, to the extent that we concluded in *McCaffree v. Coos County*, 70 Or LUBA 15, *aff'd*, 267 Or App 424, 341 P3d 252 (2014), *rev den*, 357 Or 299 (2015), that the definition in ORS 215.276 is not applicable, that case was wrongly decided. ORS 215.276(1)(c) provides that, "[a]s used in this section," "'[t]ransmission line' means a linear utility facility by which a utility provider transfers the utility product in bulk from a point of origin or generation, or between transfer stations, to the point at which the utility product is transferred to distribution lines for delivery to end users." As we explained above, LUDO 3.2.100(18) and

3.5.100(2) regulate uses in the TR and FF zones which implement Goal 4. In *McCaffree*, we held that

> "[t]he definition of 'transmission line' for purposes of the [EFU] statute is inapposite for purposes of determining whether, under the Goal 4 rule that regulates uses in the Forest zone, [a] pipeline is a 'new distribution line.'
>
> "* * * * *
>
> "* * * [E]ven if [a] pipeline could be characterized as a gas transmission line in some circumstances, that the Goal 4 rule allows new electric transmission lines but does not specifically allow new *gas* transmission lines is not conclusive. Rather, when the Goal 4 rule was first adopted in 1990, the rule classified all types of utility lines, including electric lines, as either 'local distribution lines' or 'distribution lines.' The rule was amended in 1992 to allow 'new electric transmission lines * * *' with larger right-of-way widths (100 feet) than the other types of utility lines are allowed (50 feet), consistent with ORS 772.210's specification of a 100 foot right-of-way for electrical transmission lines. The rule's history does not reflect an intent on the part of [the Land Conservation and Development Commission (LCDC)] to prohibit lines that could be, under some circumstances, characterized as transmission lines. Rather, the rule's text reflects that for purposes of conditional uses that are allowed in the Forest zone, all *non-electrical* lines with rights-of-way of up to 50 feet in width are classified as 'new distribution lines.'" 70 Or LUBA at 21-22 (emphases in original).

Consistent with our holding in *McCaffree*, intervenor's pipeline is a gas distribution line for purposes of Goal 4. To the extent that the pipeline will have a permanent right-of-way of up to 50 feet, it may be permitted as a conditional use in the TR and FF zones.

2. The Temporary Construction Area is Not Permanent Pipeline Right-of-Way

Petitioners argue that intervenor's pipeline right-of-way exceeds the 50-foot width conditionally allowed in forest zones under OAR 660-006-0025(4)(q) because the county approved, adjacent to the 50 feet, an additional 45 feet of right-of-way for construction. Intervenor explained in its application that "[t]he temporary construction right-of-way configuration is required to accommodate the necessary clearing and grading activities to prepare for construction, temporarily store spoil materials for construction and to provide a passing lane for movement up and down the construction areas." Record 4554. The county found that the temporary construction right-of-way was needed "to accommodate the necessary clearing and grading activities to prepare for construction, temporarily store spoil materials for construction, and to provide a passing lane for movement up and down the construction area." Record 29.

During pipeline construction, intervenor plans to utilize, in addition to the temporary construction right-of-way, areas it described in the application as "uncleared storage areas." "The [uncleared storage areas] are considered temporary disturbance because they will not be cleared and the materials (i.e., slash, stumps and downed and dead material, etc.) stored within them will be removed and scattered back onto the right-of-way during restoration activities, unless the landowner dictates otherwise." Record 4555.

Petitioners argue that, unlike the uncleared storage areas, the temporary construction right-of-way should be considered a permanent disturbance or

permanent right-of-way. "Merchantable timber will be cut and removed from the construction right-of-way * * * prior to construction." Record 4752. Petitioners argue that such a disturbance is not temporary because "[c]learing timber creates a permanent 20-year or longer break in the timber stands that will be necessary for [intervenor's] aerial surveillance." Petition for Review 21.

The county found that 30 feet centered over the pipeline will be maintained to allow for aerial surveillance.[9] The county did not find that clearing the 45-foot-wide area outside the 50-foot-wide permanent right-of-way is necessary to maintain aerial surveillance for 20 years, but rather that that area is needed for construction purposes. The findings state and evidence in the record supports the conclusion that only a 30-foot-wide cleared area located within the permanent right-of-way is needed or provided for aerial surveillance.

Previously planted areas of the temporary construction right-of-way, along with 20 feet of the 50-foot-wide permanent right-of-way, will be reforested. As we explained in *Citizens Against LNG v. Coos County*,

---

[9] With respect to aerial surveillance, the county concluded:

> "Although [intervenor] will obtain a 50-foot permanent right-of-way, only 30 feet centered over the pipeline will be maintained as a cleared corridor through forested areas to protect the pipe from potential root damage and allow for ground and aerial surveillance inspections of the Pipeline. The remaining 20 feet of the permanent right-of-way as well as the disturbed temporary construction easement will be reforested following construction in areas that were forested prior to construction." Record 58.

> "a temporary construction easement or area necessary to construct a new distribution pipeline is not a 'right-of-way' for purposes of OAR 660-006-0025(4)(q). 'Right-of-way' suggests a linear transportation or distribution system of some kind, not a temporary storage or construction staging area, and the focus of the rule is clearly the permanent right-of-way. As to whether a temporary construction area that is necessary to construct an authorized use is itself an authorized use in a forest zone under OAR Chapter 660, division 006, it is reasonable to presume that [LCDC] did not view such a temporary construction area to be a 'use' in itself, but rather an accessory function that is necessary to construct the authorized use. In any case, while the rule does not expressly authorize a temporary construction easement or area, neither does the rule expressly prohibit it, and ORS 772.510(3) appears to provide ample express authority for [a pipeline company] to obtain a temporary easement of the width necessary to accomplish construction of [a] pipeline. We see no necessary inconsistency between the statute and the rule that would preclude a pipeline company from obtaining a[] temporary easement necessary to construct a pipeline within the 50-foot wide permanent right-of-way authorized under the rule. To the extent there is a conflict between the statue and the rule, it goes without saying, the statute would control."[10] 63 Or LUBA 164, 172 (2011).

Our holding in *Citizens Against LNG* is equally applicable here, and a temporary construction right-of-way is not prohibited in the forest zones. Although a 30-foot-wide corridor will remain clear within the 50-foot-wide permanent right-of-way, "the remaining 20 feet of permanent right-of way, as well as the temporary construction areas[,] will be replanted in a manner consistent with [intervenor's]

---

[10] ORS 772.510(3) provides, "These pipeline companies may appropriate and condemn such lands, or easements thereon or thereover, in such width as is reasonably necessary to accomplish their pipeline company purposes, by proceedings for condemnation as prescribed by ORS chapter 35."

Erosion Control and Vegetation Plan." Record 97. Condition of Approval 10 provides:

> "Following construction of the pipeline, [intervenor] shall provide to the County an independent Oregon consulting forester's certification that all temporary right-of-way easements and staging areas created for the construction of the pipeline have been abandoned and those forested areas that existed prior to construction have been replanted and restored to timber production." Record 21.

We agree with intervenor that nothing in the Goal 4 rule supports the contention that a period of regrowth is inconsistent with forest use. After construction, intervenor is required to replant and then permanently exit the temporary construction right-of -way.

The first subassignment of error is denied.

B. Second Subassignment of Error

LUDO 3.2.150(1) and 3.5.125(3)(a) require a finding that, in the FF and TR zones, "[t]he proposed use will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on adjacent agriculture or forest lands." Petitioners argue that the county's findings of compliance with these criteria are inadequate because they do not explain why, absent a condition of approval or adequate assurances from intervenor, the maintenance of a permanent, 30-foot-wide visual right-of-way and restriction on the type of plantings allowed over the pipeline will not significantly change forest practices. We reject that portion of this subassignment of error. Consistent with the language in the code referencing practices on *adjacent* agriculture or forest

lands, the county determined that LUDO 3.2.150(1) and 3.5.125(3)(a) do not apply *within* the permanent right-of-way:

> "[I]f any tree removal required for the footprint of the conditional use itself could be interpreted as forcing a significant change, no use with a permanent tree removal footprint could ever be approved as a conditional use in a Forest zone. That is clearly not the intent of this review criterion. Instead the relevant analysis is whether the use contained within that footprint or impact area will force a significant change on forest practices adjacent to the impact area for the use itself." Record 98.

Petitioners do not challenge this finding and the findings are adequate with respect to limitations on the ability to conduct forest or farm practices within the right-of-way because LUDO 3.2.150(1) and 3.5.125(3)(a) do not require that forest practices continue unchanged within the right-of-way.

Petitioners also argue that the findings incorrectly conclude that intervenor has agreed to allow the erection of fences over the right-of-way and that the findings do not explain why the inability of adjacent landowners to erect fences over the right-of-way will not significantly change or increase the cost of forest practices on adjacent agricultural or forest lands. We agree with petitioners that the county erred in finding that intervenor agreed to allow fences over the right-of-way. Intervenor agreed to the replacement of fences *along*, not over, the right-of-way. We agree with petitioners that the findings do not adequately address impacts on activity on property adjacent to the right-of-way.

The county concluded that the only direct impact on forest practices

> "will be from the 30-foot operational corridor that will be maintained with vegetation no greater than 15 feet in height for safety purposes. Outside of that 30-foot corridor, *there will be no impacts on forest practices once the pipeline is installed.* To compensate for that unavoidable impact, [intervenor] will pay forest landowners for the long-term lost timber production over the 30-foot operation corridor where trees will not be allowed to grow over the Pipeline and within 15 feet of the centerline." Record 64-65, 95 (emphasis added).

As discussed above, impacts from not being able to conduct forest practices within the pipeline operational corridor are not the subject of LUDO 3.2.150(1) and 3.5.125(3)(a).

Petitioners challenge the county's findings that the use of land adjacent to the permanent right-of-way will not be significantly affected or subject to increased costs because intervenor has said that it will work with owners to develop a crossing plan. We agree that these findings are inadequate. The county determined that the pipeline would not force a significant change in or significantly increase the cost of accepted farming or forest practices on resource land surrounding the pipeline, in part, because,

> "although [intervenor] will obtain a 50-foot permanent right-of-way for the pipeline, only 30 feet centered over the pipeline will be maintained through forested areas to protect the pipe from potential root damage and allow for ground and aerial surveillance inspections of the pipeline. The remaining 20 feet of the permanent right-of-way as well as the disturbed temporary construction areas will be reforested following construction in areas that were forested prior to construction. Once the pipeline is installed, it will be underground and will not emit any noise or odors. The subsurface line will not impact continued forestry operations, including the growing and harvesting of tree species, or related activities, around

the right-of way." Record 64, 95.

During the local proceedings, intervenor maintained that "landowners will be able to access land on their property across the pipeline [right-of-way] through designated crossing areas with approved heavy vehicle/equipment" and that, "[i]f a landowner demonstrates a need to cross the Pipeline to conduct forestry operations, [intervenor] is committed to working with that owner to develop a Pipeline crossing plan that allows the access points to be constructed and used in a safe manner." Record 309, 65, 95. The findings do not indicate how the location of crossings will be determined or explain why the location or operation of crossings will not significantly increase the cost of or significantly impact forest operations. The county concludes that the pipeline will not have a significant influence or effect on farming and forest practices but does not evaluate the potential costs of restrictions on the ability to travel from one forested area to a formerly contiguous forested area. We agree with petitioners that the county failed to address impacts on forest operations and related cost increases based on limitations on right-of-way crossing locations.

The county also found that, "[t]o help mitigate any potential adverse impacts on forestry operations adjacent to the proposed pipeline and its right-of way, conditions will be required to ensure the reforestation of forested areas subject to potential impacts." Record 65-66. This finding indicates that reforestation will help mitigate potential adverse impacts but does not analyze

whether the reforestation will reduce any impact on costs or practices to an unsubstantial level.

Petitioners point to testimony that Seneca Jones Timber Company (Seneca) submitted in the FERC proceedings as providing examples of other unanalyzed impacts. Petition for Review 23-24. For example, Seneca argued that the construction of the pipeline will cause Seneca to incur additional costs in finding alternative sites for its equipment, that payment for trees does not adequately compensate Seneca as it needs trees to maintain mill operations, and that Seneca will be adversely impacted by having to compete with intervenor to purchase aggregate. Record 4236-37. We agree with petitioners that the county failed to perform the required analysis of identifying the changes in practices or increases in costs and evaluating whether the use will significantly affect the practices or costs. This analysis is a necessary first step to the county identifying appropriate conditions of approval.

Petitioners also contend that the county's findings are inadequate to support the conclusion that timber harvesting will not experience a significant increase in cost or significant change in practices, in part, because property owners will receive compensation for some impacts. Petitioners argue that the county "rel[ied] on an inferred intent that intervenor intends to provide such compensation and yet failing to impose a condition." Petition for Review 23. To the extent that the county relies on compensation, the county's findings must

explain why compensation provides sufficient relief and why compensation is assured.

Lastly, petitioners argue that

> "the Decision fails to address the potential changes to farming and forest uses due to the possible negative effects on groundwater and irrigation of the withdrawal of surface and well waters for use in the hydrostatic testing, and the complete loss of timber resources due to the increased fire hazard." Petition for Review 24.

The above is the full extent of petitioners' argument with respect to groundwater, irrigation, and fire hazard in the context of LUDO 3.2.150(1) and 3.5.125(3)(a). The argument is not sufficiently developed for our review in this context. We address petitioners' more developed arguments related to fire hazard and water impacts in our response to the third and fourth subassignments of error below.

The second subassignment of error is sustained, in part.

C. Third Subassignment of Error

LUDO 3.2.150(2) and 3.5.125(3)(b) require a finding that, in the TR and FF zones, "[t]he proposed use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel." The county found that these criteria were met for numerous reasons, including that the pipeline would be designed, constructed, operated, and maintained consistent with federal safety requirements, including

the development of an Emergency Response Plan.[11] Record 67-68, 99-100. The findings also rely upon intervenor's Hydrostatic Test Plan; a memorandum from intervenor's geotechnical engineer regarding landslide risk; intervenor's Air, Noise and Fugitive Dust Control Plan; intervenor's Fire Prevention and Suppression Plan; and intervenor's responses to comments on FERC's Draft Environmental Impact Statement. Record 76.

Petitioners argue that the findings are insufficient because they fail to address an Army Corp of Engineers (Corp) statement that sustained fire over the pipeline could compromise pipeline integrity. The record citation provided by petitioners shows a Corp *inquiry* as to whether FERC or intervenor had studied the potential impact of fire over the pipeline and a Corp statement identifying the potential that soil is an insufficient insulator. The findings set out in detail expert testimony, submitted by intervenor, concluding that the soil would provide adequate insulation, and they therefore respond to the issue raised by the Corp. Record 72-73, 100.

Petitioners argue that the county failed to address concerns related to ground movement and potential fire risk. The findings evaluating impacts on ground movement rely upon the memorandum from intervenor's geotechnical

---

[11] The Emergency Response Plan "identif[ies] the standards and criteria that [intervenor] would follow to minimize the hazards during pipeline operation resulting from a gas pipeline emergency in accordance with the Pipeline and Hazardous Materials Safety Administration's regulations in 49 CFR 192.615 and 192.617." Record 2204.

engineer, modern construction methods, and the routing of the pipeline to mitigate landslide risks. Record 75-76. The findings adequately address this issue.

Petitioners argue, in part, that the findings that LUDO 3.2.150(2) and 3.5.125(3)(b) are met are insufficient because state and federal agencies rejected intervenor's Emergency Response Plan. Petition for Review 24. Petitioners also argue that the Fire Prevention and Suppression Plan relied upon by the county was not submitted to and approved by state and federal agencies. Petitioners do not explain why state and federal agencies rejected the Emergency Response Plan or explain why the Fire Prevention and Suppression Plan had to be submitted to and approved by state and federal agencies in order to satisfy applicable county criteria. We will not develop petitioners' argument.

Petitioners also argue, however, that the decision fails to respond to concerns raised below that firefighting could be hindered by a lack of clarity about when and where fire equipment and fire suppression personnel could cross the pipeline. The county relied on testimony in intervenor's Resource Report on land use, recreation, and aesthetics that the Emergency Response Plan would require that intervenor coordinate with emergency responders to "confirm the location of the Pipeline easement, depth of ground cover and any precautionary measures to be undertaken if crossing the Pipeline with heavy load bearing equipment or vehicles." Record 68, 100. This coordination requirement does not ensure that crossings be accomplished in a manner which will not significantly

increase fire hazard, significantly increase fire suppression costs, or significantly increase risks to fire suppression personnel and, thus, the findings are inadequate to establish that LUDO 3.2.150(2) and 3.5.125(3)(b) are satisfied.

Petitioners also argue that the decision fails to address concerns from firefighters and timber owners that the corridor creates a break in the canopy and, as a result, will itself be a new fire hazard. We agree with petitioners that the county's conclusion that it is unaware of pipeline corridors creating fire hazards does not address the concern that vegetation within the corridor will promote fire spread and that the findings are therefore inadequate.

Petitioners also argue that the findings fail to adequately address evidence in the record related to the potential for increased fire suppression costs. The county relied on intervenor's Fire Prevention and Suppression Plan, which anticipates roles and responsibilities. Record 70-72. The county determined that LUDO 3.2.150(2) and 3.5.125(3)(b) are met by requiring intervenor to develop and comply with an emergency response plan which includes "establishing and maintaining communications with local fire officials and coordinating emergency response; emergency shutdown of the system and safe restoration of service; making personnel, equipment, tools, and materials available at the scene of an emergency; and protecting people and property from hazards." Record 67, 99. The findings quote testimony from the Milo Rural Volunteer Fire Department: "We cover all our operating expenses, which includes everything from light bulbs to vehicle maintenance, liability insurance, all from a small

budget of $25,000. Our two fire engines are a 1967 and 1969 vintage, which we bought, used years ago." Record 69. The findings also quote a statement in intervenor's Resource Report on land use, recreation, and aesthetics:

> "The Emergency Response Plan will require operations personnel to attend training for emergency response procedures and will require the Pipeline operator to meet with local emergency responder groups, including fire departments, to review plans and educate the responder groups on the specifics of the Pipeline facilities within the relevant service area. After the initial coordination with local responders, [intervenor] will also meet periodically with the groups to review plans and revise them when necessary. Finally, if requested by local response personnel, [intervenor] will participate in any simulated emergency exercises and post-exercise critiques. * * * The majority of *the training costs* will be borne by [intervenor]; therefore, the coordination requirements will not significantly increase fire suppression costs." Record 68, 99-100 (emphasis added).

The county's findings that the majority of the *training* costs would be borne by intervenor does not adequately explain why there will not be a significant increase in *fire suppression* costs. We agree with petitioners that a more detailed finding is required.

The third subassignment of error is sustained, in part.

D. Fourth Subassignment of Error

The county's CUP criteria include a requirement that "[t]he permitted use is or may be made compatible with existing adjacent permitted uses and other uses permitted in the underlying zone." LUDO 3.39.050(1). Petitioners assert that the findings addressing compatibility are insufficient, arguing that, "[f]or the

reasons stated [in the second and third subassignments of error] regarding the negative impacts on farming and forestry and the increased risk of wildfire which are incorporated herein, and for these additional reasons, the pipeline is not compatible and the Decision's findings otherwise—finding compliance with LUDO 3.39.050 and Article 39—are insufficient." Petition for Review 26. We agree with petitioners, in part.

First, the county found:

> "Some opponents argue that the Pipeline cannot be made compatible with existing adjacent permitted uses and other uses permitted in the TR zone, will adversely affect farm and forest practices, and will adversely affect fire suppression costs or personnel. Many of these concerns are a collateral attack on the legislative determination to make a pipeline a conditional use in the TR District. For example, Opponent Clarence Adams argues that the 95-foot clear cut and the [temporary extra work areas] are a 'visual impact on surrounding properties.' However, all pipelines would create a linear clearcut, and all pipelines would have [temporary extra work areas.] Therefore, that could not be the type of impact that the legislature and drafters had in mind. The same can be said of construction related impacts, such as trenching, blasting, power hammering etc." Record 80 (citation omitted).

Petitioners argue that their compatibility concerns are not a collateral attack on the LUDO and that compatibility must be evaluated at the time of application review. We already held that a gas pipeline with a 50-foot-wide right-of-way is within the class of uses allowed by Goal 4 and its implementing regulations, and we agree with the county that some impacts are unavoidably part of a pipeline use and that their existence does not require denial of the CUP. *See Davis v. Polk*

County, 58 Or LUBA 1, 7 (2008) (county findings denying a CUP for a race track due to a lack of harmony with other uses because the race track would be unable to prevent *any* dust from leaving the property were inadequate where numerous listed conditional uses would necessarily generate dust). The hearings officer concluded that some impacts are inevitably associated with pipelines and that the allowance of pipelines in the relevant zones as conditional uses reflects a legislative determination that those inevitable impacts are also allowed. Petitioners argue that the decision does not distinguish between a low-pressure distribution line and the higher-pressure transmission line under consideration and, therefore, any "presupposed legislative decision" to allow all pipelines fails. Petition for Review 26. We disagree. The county was not required to evaluate the comparative impact of a low-pressure distribution pipeline that intervenor did not propose to construct.

Second, the county evaluated pipeline compatibility with surrounding uses. In interpreting LUDO 3.39.050(1), the county explained that compatibility does not require elimination of all negative impacts from the use. Rather, it "preclude[s] such negative impacts that prevent the proposed and existing uses from existing in harmony or agreement with each other." Record 79. The county explained that "the sole use on TR zoned property surrounding the selected alignment is traditional forestry operations, including the growth and harvesting of forest tree species" and that permitted uses in the TR zone, "other than forest operations[,] include farm uses, temporary on-site structures, physical alterations

to the land, water impoundments, hunting and fishing operations, fire stations, caretaker residences, exploration for hydrocarbons and associated equipment, and replacement dwellings." Record 80. The county determined that forestry operations were the primary use adjacent to the pipeline in the FF zone, that the pipeline crosses a quarry in the FF zone, and that "[p]ermitted uses within the FF zone include forest uses, farm uses, buildings and accessory uses customarily provided in conjunction with farm use, limited home occupation, limited dwelling types, destination resorts and youth camps." Record 101-02. The county determined that

> "[i]nstallation of the Pipeline will not prevent or impede the current forest activities that occur on or adjacent to the Pipeline right-of-way. Except for the 30-foot maintained width over the Pipeline, all other disturbed areas during construction will be reforested. Once installed, the Pipeline will not have any noise, odor, or visual impacts on the surrounding properties." Record 80.

The county concluded that, given the lack of visual, odor, vibration, and noise impacts, the pipeline is

> "compatible with any of the above-listed uses which may be placed or conducted outside of the right-of-way. Furthermore, several of the permitted uses may continue to take place within the right-of-way, including farm uses and hunting or fishing activities. Therefore, the hearings officer finds that [the] Pipeline is compatible with other uses permitted in the TR zone that may be established in the future." *Id.*

Similar findings were made with respect to uses in the FF zone. Record 102.

Petitioners incorporate into this subassignment of error arguments from their prior subassignments of error that the pipeline would require changes in farm and forest practices, increase the cost of farm and forest practices, create fire hazards, and increase fire suppression costs. Petitioners refer to the nature of pipelines, the potential creation of a fire "corridor" via the right-of-way, and increased costs to local fire departments and conclude that "[t]he pipeline use is not compatible with uses permitted in the TR and FF zones." Petition for Review 26. The county found:

> "[T]he Pipeline itself is not a fire hazard. The natural gas transported through the Pipeline will burn if released and ignited at concentrations between 4 and 16 percent. However, [intervenor's Reliability and] Safety Report details the extensive construction, maintenance, monitoring and educational safety measures that will be implemented to significantly reduce the risk of a release. [Intervenor] and its contractors will also follow the fire prevention and suppression measures described in [intervenor's Fire Prevention and Suppression Plan].
>
> "Furthermore, forest fires on the surface are not a direct threat to underground natural gas pipelines because of the insulating effects of soil cover over the Pipeline. Therefore, the Pipeline will not increase the risk or alter the fire suppression activities or costs if a fire occurs on the surface within the vicinity of the Pipeline. For these reasons, the hearings officer finds the Pipeline will have a negligible impact [on] the existing fire hazard and will have no impact on fire suppression or risks to fire suppression personnel" Record 88.

LUDO 3.39.050(1) is a local provision that does not implement state law, and the county's interpretation of that criterion is entitled to deference. ORS 197.829(1); *Siporen*, 349 Or 247. The findings identify the criteria, the evidence relied upon,

and why the county found that the criterion is met. We conclude that the findings are sufficient, with the exception of the finding that fire suppression costs will not increase, for the reasons set forth above.

Petitioners also argue that the findings do not address the potential impact on irrigation from drawing water for hydrostatic testing performed "to verify the manufacturing and construction integrity of the pipeline before placing it in service to flow natural gas." Record 1795. The county found that the use is compatible with uses existing and permitted in the TR and FF zones based on the future implementation of best management practices outlined in the expert-prepared Groundwater Monitoring and Mitigation Plan (GMMP). The GMMP provides that landowners will be asked to identify their wells and the ways they utilize groundwater:

> "[Intervenor] states that it will contact landowners within 200 feet of the right-of-way prior to construction requesting their cooperation in identifying groundwater wells, spring, or seeps that could potentially be impacted by the project. [Intervenor] will request permission to take field measurements for baseline water quality and yield as well as for [various] parameters[.]" Record 83-84.

The GMMP provides that, if monitoring shows an impact on groundwater yield or quantity, intervenor will work with the landowner to ensure a temporary supply of water and, if necessary, a permanent water supply. There is therefore substantial evidence in the record that the pipeline is compatible with the uses that the county identified as existing and permitted in the TR and FF zones, considering groundwater.

With respect to the potential impact on river and irrigation water for farming, however, the findings are inadequate. The decision relies upon the GMMP to conclude "that the pipeline will not adversely impact groundwater supplies or any farm practices that rely thereon. In any event, * * * the risk of impacts to water supply is limited, as there are no public groundwater supply wells or springs within 400 feet of the proposed construction disturbance * * *." Record 84. This finding does not address an allegation that the construction method used to cross the Coquille River may permanently alter "the course and flow of the river, jeopardizing the ability to irrigate in the future." Record 4323.

Lastly, petitioners argue that the potential for ground movement or landslides make the pipeline incompatible with those uses allowed in the forest zones, maintaining that the findings fail to address (1) the higher risk of landslides in Oregon's Coast Range, (2) the argument that USDOT rules are modeled on risks in other parts of the county, (3) USDOT advice that lines built to its standards have not avoided ground shifting safety issues, and (4) the Oregon Department of Geology and Mineral Industries' conclusion that intervenor has not adequately analyzed these issues. We agree with intervenor that the relevant inquiry is whether the opponents' testimony "raises questions or issues that undermine or call into question the conclusions or supporting documentation that are presented by the applicant's experts." *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261, 276 (2006). Intervenor's expert analyzed the proposed route in its Geologic Hazards and Mineral Resources Report. Record 87, 1973-2063.

The county found that the landslide hazard risk would be managed by routing the pipeline to avoid hazardous areas, constructing the pipeline using best practices, and monitoring the pipeline. Record 86. The county's reliance on USDOT construction standards is an additional protection. Record 87. This is site-specific evidence on which a reasonable person would rely and it is not undermined by more general evidence.

The fourth subassignment of error is sustained, in part.

E. Fifth Subassignment of Error

Petitioners' fifth subassignment of error is that the county failed to apply Statewide Planning Goal 7 (Areas Subject to Natural Hazards) and LUDO 3.35.500 to the application. Goal 7 is "[t]o protect people and property from natural hazards." OAR 660-015-0000(7) After a local government's comprehensive plan and land use regulations are acknowledged, the statewide planning goals do not apply to development proposals. ORS 197.175(2)(d); *Byrd v. Stringer*, 295 Or 311, 666 P2d 1332 (1983). And while petitioners point to the Parks and Recreation Element of the Douglas County Comprehensive Plan (DCCP), which provides in part that "[c]ompliance with Goal 7 remains in place through the local planning and building process, as all local provisions for natural hazard mitigation (e.g. Zoning Overlays & Building Code)," petitioners do not explain why this provision of the DCCP applies to the development proposed. Accordingly, petitioners have not established that Goal 7 applies to the proposed development.

LUDO 3.35.500 governs the county's Geologic Hazards overlay zone. Petitioners do not explain why LUDO 3.35.500 applies to the development proposed. Absent any attempt to explain why this LUDO provision applies, the arguments in this subassignment of error provide no basis for reversal or remand.

The fifth subassignment of error is denied.

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

A. First Subassignment of Error

Petitioners make a variety of arguments that the county erred in relation to Condition of Approval 1, which provides:

> "This Approval is contingent upon [intervenor] obtaining a Certificate of Public Convenience and Necessity from FERC, as well as obtaining all required State-issued Permits. [Intervenor] shall provide the County with proof that FERC has issued a CPC&N and a Notice to Proceed that includes the route approved by this application." Record 20.

As discussed in our resolution of petitioners' motion to take evidence, intervenor has filed a CWA Bypass Application and a CZMA Override Application. Approval of these requests may result in intervenor not obtaining certain state and/or federal permits. Petitioners assert that a procedural error warranting reversal or remand occurred because intervenor did not advise the county of intervenor's legal option to seek the CWA Bypass or CZMA Override. Procedural irregularities forming the basis for reversal or remand are based on

actions by the local government and not by an applicant. This argument provides no basis for reversal or remand.

Petitioners also argue that the county had a duty to determine that intervenor would in fact seek state and federal permits. Petitioners have provided no legal basis to support its argument that the county had a duty to determine that state and federal permits would be sought or that the county has the authority to preclude an applicant from utilizing its legal options to request a determination by a branch of the federal government that these permits are not required.

We held in *Citizens for Renewables v. City of North Bend* that, where a general condition of approval requiring that an applicant obtain "necessary" state or federal permits is not imposed to support a finding of compliance with applicable local approval standards, the condition is not defective for failing to require that the applicant obtain a specific permit. ___ Or LUBA ___, ___ (LUBA No 2019-120, Jan 5, 2021) (slip op at 36-39). Here, Condition 1 provides that intervenor must obtain all "required" state permits. Petitioners argue that one or more findings rely on compliance with a "state permit requirement" but fail to develop their argument that intervenor was required to obtain a particular state permit in order to meet an applicable local approval standard. Rather, petitioners cite over 100 record pages with no discussion of how the content of those pages supports their argument.

The first subassignment of error is denied.

B. Second Subassignment of Error

LUDO 2.700(8) provides:

> "After a Notice of Review is filed, the Board may choose to either 1) allow review, in which case, the Board shall decide to either hear the matter itself and set a date for holding the review hearing, or the Board may, for any reason, appoint a Hearings Officer to review the matter and make a final local decision in the Board's place, or 2) decline to review the matter, so long as the appealed decision does not involve a Plan Amendment of land designated agricultural or forest land or a goal exception. If Board review of a matter is declined, the lower decision shall stand. If Board review of a matter is declined, the Board shall adopt an order so stating, but the order need not state any reason for the Board's decision to decline review."

Review by the board of commissioners is discretionary. The board declined review of the matter, and adopted the decision of the hearings officer as its own, but proceeded to make rulings addressing issues of waiver, bias, and other matters raised by petitioners. In this subassignment of error, petitioners argue that the LUDO does not authorize the adoption of additional findings and asks that we strike section two from the order or direct the county to do so.

Additional findings are not precluded by the plain text of LUDO 2.700(8). Moreover, LUBA's authority is limited to "affirming, reversing or remanding" a land use decision. ORS 197.835(1). Petitioners' request for LUBA to order the county to strike a section from its decision is not within LUBA's authority to grant.

The second subassignment of error is denied.

The county's decision is remanded.