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January 3, 2024

City of Port Orford and
Port Orford Planning Commission
222 W. 20th Street
Port Orford, Oregon 97465

By email only

Re: Extension of Pipeline CUPs for Elk River Development, LLC
CUP 16-02 and 16-03

Attn: Crystal Shoji

Dear Crystal:

Thank you for your attention to this matter in recent weeks.

On behalf of my client Elk River Development, LLC, I would like to do two things with this letter:

1. Apply for a precautionary, one-year extension of the Conditional Use Permits, and
2. Request that the City hold up on processing this extension until the procedural status of the 2023 extension can be clarified and resolved.

A bit more on both of these topics follows:

1. Precautionary application for one-year extension of CUP permits:

These permits have been extended annually since they were first issued by a City Council Order signed on June 16, 2017. The extensions have been defended when they have been appealed, and, in the one most recent appeal to LUBA by Penny Suess, that Board determined in 2020 that the City Council was legally correct that the city code allows successive annual extensions.

With that as the essential background, as attorney for the permit holder, I request another one-year extension. However, for the reason explained below, this request should not be scheduled for consideration by the Planning Commission – not yet at least.

2. Request that the City hold up on processing this extension until the procedural status of the 2023 extension can be clarified and resolved.

As best we can determine, with your help, the City Council never signed an order in 2023 memorializing its decision to approve the 2023 extension request. The Planning Commission issued its order of approval on January 10, 2023, but that was appealed to the City Council by

Penny Suess; the Council held a hearing on the appeal on April 20, 2023 and voted to deny the appeal and approve the extension. However, no signed Order was entered or sent to the parties.

The absence of a signed decision by the City Council, mailed to the parties (most importantly the appellant Penny Suess and others in opposition like ORCA), leaves us without a final, appealable order by the City extending the permit as requested in early 2023.

Not having a signed order, with notice of that order to the parties, means that the appeal period to LUBA for the 2023 extension has not begun to run. It will begin to run as soon as the City signs an order confirming the 2023 extension. Once the order is signed and no appeal to LUBA is filed within 21 days, then we can all be confident that the 2023 extension is secure.

Given all of the above, I recommend that an order resolving the 2023 appeal and extending the permit as requested in 2023 be signed by someone with authority at the City, and notice be given to the parties. In the meantime, the Planning Commission should hold up on deciding this 2024 extension request until the sorting out of the 2023 extension is complete. That would be after the order is signed, notice is given, and no appeal to LUBA is filed.

My suggestion above is based on LUBA's administrative rules about what can be appealed and when. Only a "final decision" may be appealed, and that term is defined in LUBA's rules at OAR 661-010-0010(3):

(3) "Final decision": A decision becomes final when it is **reduced to writing and bears the necessary signatures** of the decision maker(s), unless a local rule or ordinance specifies that the decision becomes final at a later date, in which case the decision is considered final as provided in the local rule or ordinance.
[Emphasis added]

Based on that rule, any opponent of the 2023 decision to extend the permit should be biding their time, awaiting a signed and dated order memorializing the City Council decision to extend. Then they would file their LUBA appeal within 21 days.

All of the above are the essentials for this letter at this moment. There is a related question, which is not so urgent and that I will look into. That is, when does the one-year extension period run from? Is it the date that the existing permit expires? Or is it the date of the new extension approval becomes final? If it is the former, then this request for an extension has been timely filed. If it is the latter then it is a year from the new permit is approved and reduced to writing, which will happen when the City gives notice of the 2023 extension order. I will look into this question and offer my best thoughts. However, for the moment I request that the City attend to the two points listed above.

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City of Port Orford

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Again, thank you for your cooperation on this.

Sincerely,

Bill Kloos

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Cc: client