

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A conclusion that it is not practicable for an applicant to commence development within the time allowed by a decision for reasons that are “beyond the reasonable control of the applicant” is not supported by substantial evidence where the applicant’s delay results merely from the applicant’s financial difficulties and the resulting internal prioritization of investments, considering competing customer needs. *Diephuis v. City of Beaverton*, LUBA No 2020-101 (Jan 25, 2021).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A governing body plausibly interprets the code definition of “public facility” to include a proposed natural gas pipeline delivering gas to an export terminal, notwithstanding that the pipeline will not provide gas the local public, where nothing in the definition requires that the gas serve the local populace. *McLaughlin v. Douglas County*, LUBA No 2020-004 (Apr 13, 2021).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. The fact that a zoning ordinance specifically permits low-impact public utility facilities in the subject property’s base zone and specifically permits high-impact public utility facilities in other base zones does not compel the conclusion that high-impact facilities are prohibited on the subject property where the subject property’s overlay zone and the comprehensive plan specifically provide for the development of high-impact facilities on the subject property. *Royal Blue Organics v. City of Springfield*, 81 Or LUBA 723 (2020).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A finding that tree removal is permissible to prevent “interference with utility services” under one local tree felling criterion does not compel a conclusion that the applicant’s tree felling plan retains mature vegetation and healthy trees “to the maximum extent practicable” under another criterion. *Royal Blue Organics v. City of Springfield*, 81 Or LUBA 723 (2020).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. The fact that a substation and transmission line are planned for in the comprehensive plan does not negate a requirement that the local government protect significant clusters of trees and shrubs where the comprehensive plan does not prescribe the exact location of the substation and line and, instead, provides a general location and contemplates that exact locations will be determined through subsequent land use actions, including site plan review. *Royal Blue Organics v. City of Springfield*, 81 Or LUBA 723 (2020).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. The fact that a substation and transmission line are planned for in the comprehensive plan does not negate a requirement that the local government avoid development of unsuitable areas, including wetlands and riparian areas, where the comprehensive plan provides a general location for the substation and does not specify that the substation must be sited in a wetland area. *Royal Blue Organics v. City of Springfield*, 81 Or LUBA 723 (2020).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where the county planning director processed a similar use determination under the county’s Type II review to determine whether an electrical transmission line is allowed in a particular zone, the board of county commissioners reviewed the director’s similar use determination in a consolidated appeal under a

Type III process, and petitioners argue that the county erred by not providing an intermediate decision by a decisionmaker other than the county governing body, that alleged procedural error provides no basis for reversal or remand because that alleged error does not prejudice petitioner's substantial rights. *Tilla-Bay Farms, Inc. v. Tillamook County*, 79 Or LUBA 235 (2019).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where a county determines an electrical transmission line is a “similar use” authorized in a particular zone pursuant to the county’s “similar use determination” process, which allows a similar use “[w]here a proposed use is not specifically identified by [the code], or [the code] is unclear as to whether the use is allowed in a particular zone,” petitioners’ argument that the county may make a similar use determination only if the proposed use is not specifically identified anywhere in the county’s code is without merit. A similar use determination is not necessary or appropriate where the use is specifically permitted or prohibited in the subject zone. In adopting the similar use determination process, the county contemplated instances where a use is specifically identified as an allowed use in some zones but not specifically identified as an allowed use in the subject zone. *Tilla-Bay Farms, Inc. v. Tillamook County*, 79 Or LUBA 235 (2019).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where petitioners argue that the county made inadequate findings that a proposed electrical transmission project is consistent with general use priorities for estuary zones because the county did not address certain code provisions addressing estuary zones, LUBA is not required to remand the decision to the county for it to interpret its local code provisions in the first instance; LUBA may make its own determination of whether the local government decision is correct. ORS 197.829(2). Where the county determined that the code provision in question is a general priority statement, which does not constitute mandatory approval criteria, LUBA will uphold the county’s decision where the provision provides an inclusive list of general use priorities for estuarine resources and value, and where, in the alternative, the county addressed those impacts to the estuarine resources and values in other applicable parts of the county’s code. *Tilla-Bay Farms, Inc. v. Tillamook County*, 79 Or LUBA 235 (2019).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where the county makes a finding that an electrical transmission project “will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands,” and “forest practices” are defined pursuant to the Oregon Forest Practices Act, petitioners’ argument that the proposed transmission line will remove 36 acres from forest production is not sufficient to explain why the development will result in “a significant change in * * * forest practices * * * on * * * forest lands.” OAR 660-006-0025(5). OAR 660-006-0025(5) contemplates the approval of limited non-forest uses on forest land, including the removal of some forest land from production to accommodate a use that is allowed as a conditional use on forest land, including clearing a 100-foot right-of-way with 25 feet of clearance from the ground to the lines, for the purpose of constructing electric transmission lines on forest lands. *Tilla-Bay Farms, Inc. v. Tillamook County*, 79 Or LUBA 235 (2019).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A county is not required to apply the federal “least intrusive” standard under the Telecommunications Act of 1996 to a permit

request under the county’s zoning ordinance, where the county’s zoning ordinance does not impose that standard. *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. In *Pete’s Mountain Homeowners Assn. v. Clackamas Cty.*, 227 Or App 140, 204 P3d 802, *rev den*, 346 Or 589 (2009), the Court of Appeals held that Ballot Measure 49, which was approved to replace previously approved Ballot Measure 37, must be given effect and replaces Ballot Measure 37 which would otherwise apply to a particular permit application, notwithstanding the ORS 215.427(3)(a) goal post statute that requires that a permit application be subject to the standards in effect when the permit application was filed. *Pete’s Mountain* case of conflicting statutes—Ballot Measure 49 conflicted with and applied in place of the goal post statute. The holding in *Pete’s Mountain* does not mean that new county cell tower regulations apply to a permit application that was submitted before the new cell tower regulations were adopted. In that circumstance the goal post statute applies and the new cell tower regulations do not apply, because there is no statutory conflict. *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A board of commissioners correctly interprets a zoning standard that requires that a “project’s” public benefits outweigh expected adverse impacts to (1) limit consideration to the pipeline for which county permit approval is sought and (2) exclude any public benefits that may be generated by the LNG terminal that would be located in, and require the separate approval of, a city located in the county. The permit applicant’s position that the county should consider the benefits of the LNG terminal but not the LNG terminal’s expected adverse impacts is incorrect, because “project” cannot mean one thing when considering benefits and something else when considering expected adverse impacts. *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A utility facility authorized in an EFU zone under ORS 215.283(1)(c) is not limited to facilities that provide utility services to local or county residents, but includes a natural gas transmission line that connects an interstate natural gas pipeline to an export terminal. *McLaughlin v. Douglas County*, 70 Or LUBA 314 (2014).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. LUBA will reject an argument that a county erred in failing to deny a proposed natural gas transmission line allowed as a utility facility in an EFU zone under ORS 215.283(1)(c) based on comprehensive plan language that the petitioner argues limits utility facilities to those that serve county residents, because even if the county’s comprehensive plan is interpreted to limit utility facilities, application of those limits to deny a use allowed outright under ORS 215.283(1) would exceed the county’s authority, under the reasoning in *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995). *McLaughlin v. Douglas County*, 70 Or LUBA 314 (2014).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where a county’s decision modifies the alignment of a portion of a transmission pipeline that was approved in 2009, the county’s findings need not address challenges raised by a landowner regarding impacts of a different portion of the pipeline, the alignment of which is not modified. Because the modification

decision approves no modification of that portion of the pipeline, such challenges are collateral attacks on the 2009 decision. *McLaughlin v. Douglas County*, 70 Or LUBA 314 (2014).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Under ORS 215.283(1)(c), “[u]tility facilities necessary for public service” are permitted in EFU zones. ORS 215.283(1)(c) operates in conjunction with ORS 215.275(1), which provides that the utility facilities authorized by ORS 215.283(1)(c) are “necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service,” and ORS 215.275(2), which sets out the alternatives analysis that must be used to demonstrate that a proposed utility facility is the type of utility facility authorized by ORS 215.283(1)(c) and 215.275(1). *WKN Chopin LLC v. Umatilla County*, 66 Or LUBA 1 (2012).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Transmission towers over 200 feet in height are allowed under subsection (2) of ORS 215.283. ORS 215.283(2)(m). Transmission towers that are not taller than 200 feet are allowable as “utility facilities necessary for public service” under subsection (1) of ORS 215.283. ORS 215.283(1)(c); 215.275. *WKN Chopin LLC v. Umatilla County*, 66 Or LUBA 1 (2012).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Under ORS 215.275, an applicant proposing to site a utility facility on EFU zoned land must consider alternatives that do not utilize EFU-zoned land. Such an applicant need not consider alternatives that do utilize EFU-zoned land and need not establish that there are not other EFU-zoned alternatives that would have fewer adverse impacts on the county’s EFU zone. *WKN Chopin LLC v. Umatilla County*, 66 Or LUBA 1 (2012).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. The general legislative farmland preservation policies set out in the statutory EFU zone play no role in applying the alternatives analysis required for utility facilities necessary for public service under ORS 215.275. *WKN Chopin LLC v. Umatilla County*, 66 Or LUBA 1 (2012).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. LUBA will reject an argument that the alternative site study for a transmission tower proposed in an EFU zone erred in rejecting an alternative site in a light industrial area, where the petitioner cites to no evidence that the industrial area has a vacant location of the size necessary to prevent damage to other structures if the tower collapsed. *Hamilton v. Jackson County*, 63 Or LUBA 156 (2011).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Under ORS 215.275, the alternative sites analysis for a utility facility proposed on EFU land evaluates alternative sites on land that is zoned other than EFU. The analysis is not required to evaluate alternative EFU-zoned sites. *Hamilton v. Jackson County*, 63 Or LUBA 156 (2011).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where the county code requires the signature of all owners of the property, and to ensure compliance with respect to a proposed pipeline crossing multiple properties the county imposes a condition requiring that the approval becomes effective only when the utility provider supplies all required signatures, an ambiguity in the condition regarding whether all signatures of all property owners are required for the approval

to become effective is not a basis to remand the decision, where it is reasonably clear from the condition and findings that the county intended that all signatures of all owners be obtained before the approval becomes effective and building permits for any part of the pipeline can be obtained. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. OAR 660-006-0025(4)(q) authorizes a 50-foot right-of-way for gas pipelines in forest zones. It is not inconsistent with OAR 660-006-0025(4)(q), and is expressly authorized by ORS 772.510(3), for a utility provider to obtain a temporary construction easement for stockpiling, storage, etc., in addition to the 50-foot permanent right-of-way authorized under the rule. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A finding that impacts of a proposed underwater pipeline on aquatic species will be “temporary and insignificant” is consistent with the Goal 16 obligation to “protect” estuarine resources. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where the applicant’s expert assumed that a particular species of native oyster is not found near a pipeline crossing, but opponents raised the issue below, based on a 2009 scientific article, that that species of oyster has recently repopulated the crossing area and may be impacted by the pipeline, the findings do not address that issue, and LUBA cannot tell from the record or findings whether additional measures may be necessary to protect the native oysters beyond those in place to protect other aquatic species, remand is necessary for more adequate findings. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. That there is conflicting evidence in the record regarding whether an existing cell tower has capacity for co-locating the applicant’s cellular antennas is not a basis for reversal or remand, where the decisionmaker could reasonably conclude based on substantial evidence in the record that the existing tower does not have capacity. *Oberdorfer v. Deschutes County*, 62 Or LUBA 296 (2010).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where a local government approves a cell tower based on the demonstrated coverage needs of a particular cellular provider, a finding suggesting that the tower could also serve the needs of another provider who did not submit evidence of coverage needs is an extraneous finding, and at most harmless error. *Oberdorfer v. Deschutes County*, 62 Or LUBA 296 (2010).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. An applicant for approval of a cell tower may rely on letters from a school district director of communications and facilities and a special district property manager to establish that school district and special district property is not available as a site for a proposed cell tower. The applicant need not inquire beyond the districts’ professional staff or contact the governing boards of the school district and special district. *McLaughlin v. City of Springfield*, 59 Or LUBA 275 (2009).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where an applicant for approval of a cell tower is required by local law to make a good faith effort to locate the cell tower on a site where the cell tower is allowed outright or with only site plan review, before seeking approval of a site that requires a discretionary land use permit, the applicant is obligated to make a reasonable effort to locate a feasible site that does not require a discretionary land use permit and to consider any other potential sites that are identified with reasonable specificity by other parties. *McLaughlin v. City of Springfield*, 59 Or LUBA 275 (2009).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A hearings officer does not err by relying on a cell tower applicant's engineer's testimony that a suggested alternative site would be too close to the applicant's existing cell towers, and would cause interference with those towers, as a basis for rejecting the alternative site as a feasible alternative. *McLaughlin v. City of Springfield*, 59 Or LUBA 275 (2009).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Utility facilities that are necessary for public service are a permitted use on EFU-zoned land. However, reasonable non-EFU-zoned alternative sites must be considered, and only if one or more of the factors listed at ORS 215.275(2) make the non-EFU-zoned sites infeasible can the utility facility be developed on EFU-zoned land. *Getz v. Deschutes County*, 58 Or LUBA 559 (2009).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. To comply with ORS 215.275(2), before approval for a utility facility on EFU-zoned land may be granted, an applicant must (1) make a reasonable effort to identify reasonable non-EFU-zoned sites, (2) consider any reasonable non-EFU-zoned sites that are identified by other parties and (3) demonstrate that all identified non-EFU-zoned alternative sites are not feasible based on one or more of the factors set out in ORS 215.275(2). Where an applicant generally describes how alternative sites were selected, opponents may not fail to suggest any additional alternative non-EFU-zoned sites and on appeal of a decision approving the utility facility argue that the applicant's failure to provide a more detailed explanation for how the applicant selected alternative sites provides a basis for remand. *Getz v. Deschutes County*, 58 Or LUBA 559 (2009).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. It is not error for an applicant for approval of a utility facility on EFU-zoned land to change the focus of its analysis of whether alternative non-EFU-zoned sites are a feasible alternative, so long as the analysis that is ultimately accepted by the local government is legally defensible. *Getz v. Deschutes County*, 58 Or LUBA 559 (2009).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. An unappealed LUBA decision holding that a county cannot deny a proposed cell tower for noncompliance with county site design standards necessarily resolves the issue of whether the county can apply the site design standards at all, even in approving the tower. *Seeberger v. Yamhill County*, 56 Or LUBA 656 (2008).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where there is no evidence in the record that a proposed cell tower will have any impact on farm or forest practices, a county may simply find that, and need not conduct a *pro forma* analysis of impacts on farm and forest practices. *Seeberger v. Yamhill County*, 56 Or LUBA 656 (2008).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. LUBA will remand a decision approving a broadcast tower that relies in part on a “safe harbor” approach the hearings officer adopted in a different permit proceeding, where LUBA has remanded that other permit decision to resolve an issue under that approach but the county has taken no action on remand and the challenged decision does not resolve the issue. *Curl v. City of Bend*, 56 Or LUBA 746 (2008).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. LUBA will remand a decision approving a broadcast tower that requires an above-ground water storage tank but does not require that the tank be screened as required by site design approval criteria. *Curl v. City of Bend*, 56 Or LUBA 746 (2008).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A local government is not obligated to impose a condition of approval requiring that a broadcast tower operator comply with federal radio frequency exposure limitations that the applicant must comply with in any event. *Curl v. City of Bend*, 56 Or LUBA 746 (2008).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Absent some basis in the city code, a city does not have the authority to approve or deny a broadcast tower application based on the terms of the current lease agreement between the tower owner and the property owner. *Curl v. City of Bend*, 56 Or LUBA 746 (2008).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A federal statute prohibiting local governments from prohibiting the provision of wireless telephone service does not authorize local governments to condition approval of a broadcast tower to require filters to reduce radio frequency interference with nearby wireless facilities. Even if a local code provision authorized such a condition, federal law would preempt the local government from applying it. *Curl v. City of Bend*, 56 Or LUBA 746 (2008).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A hearings officer may rely on undisputed expert testimony that compliance with federal radio frequency exposure limits depends on whether non-employees at the site are aware of occupational exposure levels and have the ability to remove themselves from the site, combined with the fact that the site is fenced and signed to warn of occupational exposure levels, to conclude that a proposed broadcast tower complies with federal exposure limits. *Curl v. City of Bend*, 56 Or LUBA 746 (2008).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A county cannot apply local site design standards to deny a proposed cellular tower in an exclusive farm use zone, a permitted use under ORS 215.283(1), because as explained in *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995), state law generally prohibits local governments from imposing approval criteria on ORS 215.283(1) uses other than those authorized by statute. *T-Mobile USA v. Yamhill County*, 55 Or LUBA 83 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A county errs in denying a proposed cellular tower under ORS 215.275 for failure to evaluate opponents’ claims that the tower could be located on alternative sites on non-agricultural land, when none of the alternative sites

were identified with sufficient specificity to allow evaluation. *T-Mobile USA v. Yamhill County*, 55 Or LUBA 83 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. ORS 215.283(1) and 215.275 do not permit a county to deny an application to site a proposed cellular tower in an exclusive farm use zone simply because there is already some existing cellular service in the area. A proposed cellular communication facility may be justified based on a need to improve existing service. *T-Mobile USA v. Yamhill County*, 55 Or LUBA 83 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where a zoning ordinance has chapters for individual zones that list some uses that are “permitted” and list other uses that require conditional use approval, and in a separate chapter lists uses that are “permitted in all zones,” those uses are permitted without a conditional use permit. *Skyliner Summit at Broken Top v. City of Bend*, 54 Or LUBA 316 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where a zoning district requires conditional use approval for structures that are more than 30 feet tall, absent a separate zoning provision that calls for a different conclusion, a 70-foot cellular tower would require conditional use approval. But where a separate chapter of the zoning code both authorizes cellular towers in all zones as a “permitted” use and expressly provides that such towers may exceed the height limits otherwise imposed by the zoning ordinance, a cellular tower does not require conditional use approval. *Skyliner Summit at Broken Top v. City of Bend*, 54 Or LUBA 316 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A hearings officer’s findings that a proposed cellular tower complies with a siting standard that requires the tower to minimize its effect on scenic values are adequate, where the findings note the developed nature of the butte where the cellular tower would be located and demonstrate that the hearings officer was persuaded that the standard was met by the applicant’s proposal to shorten the tower from 100 feet to 70 feet and to offer alternative designs that would make the tower look more like its surroundings. *Skyliner Summit at Broken Top v. City of Bend*, 54 Or LUBA 316 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. In determining whether a proposed cell tower is compatible with surrounding uses, a county does not err by taking into account the number of surrounding residences and the residential density. *Clark v. Coos County*, 53 Or LUBA 325 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. In applying a compatibility standard, a county may take into consideration the effect that existing trees will have in screening views of a proposed cell tower from adjoining properties, notwithstanding that there are no trees on the cell tower property itself and few trees to the west and north of the property. *Clark v. Coos County*, 53 Or LUBA 325 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. In applying a compatibility standard, a county does not err by taking into account the screening that will be produced by a condition that requires the applicant for a cell tower to plant vegetation and trees, even though the

vegetation and trees will not completely screen the tower for many years, if ever. *Clark v. Coos County*, 53 Or LUBA 325 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. In applying a compatibility standard, a county does not err by taking into account the effect that requiring a cell tower to be painted green may have in visually blending the tower with nearby trees, even though painting the tower green will have little or no effect on blocked views of a nearby bay. *Clark v. Coos County*, 53 Or LUBA 325 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. The preservation of local zoning authority provided in the Federal Communications Act does not extend to other federal laws if such local authority is preempted under such laws. *U.S. Cellular v. Klamath County*, 53 Or LUBA 442 (2007)

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Federal law preempts a local determination that a proposed cellular communications facility is unsafe where the Federal Aviation Administration (FAA) has issued a “Determination of No Hazard” under FAA rules. *U.S. Cellular v. Klamath County*, 53 Or LUBA 442 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. An undefined and subjective “public benefit” criterion need not be interpreted in conjunction with a tower sharing criterion to require that a tower applicant demonstrate a current market need for a tower, as opposed to a future market need. *Belluschi v. City of Portland*, 53 Or LUBA 455 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A broadcast tower approval criterion that requires a decision maker to determine whether identified “public benefits outweigh any impacts which cannot be mitigated” is subjective. In assessing a findings and evidentiary challenge to a decision maker’s weighing of public benefits, the question is whether that weighing is (1) inadequately explained (necessitating a remand for additional findings) or (2) unreasonable (and therefore not supported by substantial evidence). *Belluschi v. City of Portland*, 53 Or LUBA 455 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A broadcast tower approval criterion that limits total emission levels is not implicated by a request to remove a prior condition of approval to allow an existing tower to remain in place, where no additional emitting antenna are to be added to the tower by the request and all existing antenna were subject to the total emission limit criterion when they were placed on the tower. *Belluschi v. City of Portland*, 53 Or LUBA 455 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A code standard allowing an increased or reduced setback for cellular towers based on considerations such as topography, etc., that increase or reduce off-site impacts need not be interpreted to include an implicit “no net increase” in off-site impacts standard. *Tollefson v. Jackson County*, 51 Or LUBA 790 (2006).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A hearings officer errs in interpreting a code standard that allows a reduced setback for cellular towers based on listed

considerations that increase or reduce off-site impacts, to allow a reduced setback as long as the applicant has minimized off-site impacts “to the extent possible” given the dimensional constraints of the property, where considerations such as the shape of the property and whether the applicant has minimized off-site impacts to the extent possible are not among the permissible considerations. *Tollefson v. Jackson County*, 51 Or LUBA 790 (2006).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. While a code standard that allows a reduced setback for cellular towers based on listed considerations that increase or reduce off-site impacts does not require that the hearings officer assign equal weight to each of the listed considerations, it also does not allow the hearings officer to assign conclusive weight to one consideration while ignoring others. Where some considerations point toward increasing the setback, and others point to reduction, the hearings officer must adopt findings addressing all relevant considerations and explaining what weight is given to each and why weighing of all the circumstances supports the ultimate conclusion. *Tollefson v. Jackson County*, 51 Or LUBA 790 (2006).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A code standard requiring site design review where “proposed development” involves “projects with multiple principal structures on one tract” does not apply to a proposal for a cellular tower on a parcel already developed with a dwelling, because the application does not propose more than one principal structure. *Tollefson v. Jackson County*, 51 Or LUBA 790 (2006).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Federal law preempts local zoning conditions of approval that are imposed to regulate radio frequency interference. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. It does not matter whether conditions that are imposed to regulate radio frequency interference are imposed under general zoning conditional use criteria or local regulations that were adopted to regulate radio frequency interference directly. It is the purpose for imposing the condition that is important, and if the condition is imposed to regulate radio frequency interference, it is preempted by federal law. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Radio towers over 200 feet tall are allowed in exclusive farm use zones under ORS 215.283(2)(m) or ORS 215.438. Neither of those statutes requires that such radio towers must be allowed outright. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Although there is language in the Oregon Supreme Court’s decision in *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995), that suggests otherwise, the public utility facilities authorized by ORS 215.283(1)(d) are not allowed “as of right,” in the exclusive farm use zone, as that term is generally used in zoning parlance. The Supreme Court used that term as a shorthand description for uses that are not subject to additional county regulation rather than as a description of a use that is not subject to discretionary review, as shown by the fact that ORS 215.283(1)(d) itself subjects public facilities

in exclusive farm use zones to discretionary review. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Federal law does not preempt local laws that regulate the visual and aesthetic impact of radio towers and the antennas placed on those towers. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where a city is required to apply discretionary criteria in issuing a temporary approval decision, and that temporary approval decision is the only effective city decision that authorizes a broadcast tower and sets the stage for issuance of building permits to construct the tower, that temporary approval decision constitutes “discretionary approval of a proposed development of land” and is therefore a “permit,” within the meaning of ORS 227.160(2). The city must either provide a public hearing before issuing an ORS 227.160(2) permit, or provide the opportunity for a local *de novo* appeal of that permit decision after it is issued. *Curl v. City of Bend*, 48 Or LUBA 530 (2005).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Whether a local government decision is a “final” decision is primarily governed by the form of the decision and whether all local appeals have been exhausted. That an otherwise final temporary decision may ultimately expire or be replaced by another decision does not mean that the temporary decision is not a final decision subject to appeal to LUBA. *Curl v. City of Bend*, 48 Or LUBA 530 (2005).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. In adopting ORS 215.275, the legislature struck a particular balance between the siting of utility facilities in EFU zones and the statutory policy to preserve farmland for farm uses. Once that balance is struck, however, the county’s task is to apply the terms of the statute. Nothing in ORS 215.275 requires direct consideration of agricultural land preservation policies, external to the statute, in applying its terms, or “balancing” the technical difficulty of alternatives against farmland preservation. *Sprint PCS v. Washington County*, 42 Or LUBA 512 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Under ORS 215.275, a utility provider and the local government are not required to consider under ORS 215.275(2) any alternative that requires a different type of facility or that would not meet the essential features of the chosen facility, as defined by the utility provider. However, the utility provider and local government must consider under ORS 215.275(2) an alternative that appears to satisfy the applicant’s defined objectives, even if the alternative is a facility in a non-EFU location that requires a different component design than the preferred EFU location. *Sprint PCS v. Washington County*, 42 Or LUBA 512 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. In addressing consideration of land costs in comparing “utility facilities that are not substantially similar,” ORS 215.275(3) implies that the scope of “reasonable alternatives” that must be considered under ORS 215.275(2) includes non-EFU-zoned sites with conditions that may require at least some design modifications to the facility. However, nothing in the statute requires that a utility provider consider alternatives that cannot satisfy the provider’s defined objectives in providing the public service. *Sprint PCS v. Washington County*, 42 Or LUBA 512 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A utility provider need not consider and disqualify as “reasonable alternatives” under ORS 215.275(2) alternatives that require reassessment of its fundamental technology or its business plan, or that involve sites or facilities that would fail to provide public services to the desired coverage area. *Sprint PCS v. Washington County*, 42 Or LUBA 512 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where a telecommunications provider defines as one of its objectives building its own wireless tower in order to lease space to other providers, any alternative such as collocation on existing telephone poles will not satisfy at least one of the provider’s defined objectives, and therefore need not be considered and disqualified as a “reasonable alternative” under ORS 215.275(2). *Sprint PCS v. Washington County*, 42 Or LUBA 512 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. ORS 215.275 does not require a utility provider to consider and disqualify as “reasonable alternatives” non-EFU locations on which the proposed utility facility would require a variance from applicable zoning standards. Such lands are either not “reasonable alternatives” or simply not “available” under ORS 215.275(2)(c), as a matter of law. *Sprint PCS v. Washington County*, 42 Or LUBA 512 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where a city code provision regarding the siting of a telecommunication tower does not require a showing that a particular tower height at a specific location is the only way an applicant for the telecommunication tower can achieve its coverage objectives, a city decision that does not require an alternatives analysis is not inadequate, in the absence of evidence that feasible alternatives exist. *Johnson v. City of Eugene*, 42 Or LUBA 353 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Findings demonstrating that a proposed wireless communication tower must be sited in an EFU zone in order to provide service are inadequate where the findings fail to identify or describe any alternative non-EFU sites, including five specific sites suggested by petitioner. *Central Klamath County CAT v. Klamath County*, 41 Or LUBA 524 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A proposed communication tower may be subject to code provisions governing “transmission and receiving towers,” even though it is county-owned and thus also arguably falls within a broad category of “municipal uses” allowed in the zone. Where a regulatory scheme lists as permitted uses in a zone both a general category of uses and a specific category of uses, with different sets of requirements, and the proposed use fits within the specific category, the specific category and its requirements apply exclusively. *Luedtke v. Clackamas County*, 41 Or LUBA 493 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. LUBA will decline to interpret a local provision in the first instance, to determine whether a proposed radio communication tower is a “radio and television transmission and receiving” tower and therefore subject to a special setback, where viewed in context the meaning and apparent purpose of the provision is subject to considerable doubt. *Luedtke v. Clackamas County*, 41 Or LUBA 493 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Under ORS 215.275, an applicant who wishes to site a utility facility on EFU-zoned land must show that it is infeasible to locate the facility on land that is not zoned EFU. *City of Albany v. Linn County*, 40 Or LUBA 38, 46 (2001). Findings that the site selected for a cellular communication tower is the best of the alternatives that were considered are inadequate to show that the non-EFU-zoned alternatives that were not selected are infeasible locations for the tower. *Harshman v. Jackson County*, 41 Or LUBA 330 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where two alternative non-EFU-zoned sites for a cellular communication tower that were not considered by the applicant are identified at the evidentiary hearing, a county may not grant approval for the tower on an EFU-zoned site without showing that use of those sites is infeasible or explaining why those sites need not be considered. *Harshman v. Jackson County*, 41 Or LUBA 330 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where reasonable persons could disagree about whether cellular tower mitigation measures will be sufficient, petitioners fail to demonstrate error in a hearing officer's findings that "native vegetation," the "flush-mounted antennae" and the proposed color scheme for a proposed cellular communication tower will diminish the visual impact of the tower so that the tower will be "relatively unobtrusive" and therefore meet the applicable mitigation requirements. *Harshman v. Jackson County*, 41 Or LUBA 330 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where a local "compatibility" standard is extremely subjective and reasonable persons could draw different conclusions from the record about whether a proposed 90-foot cellular tower would be compatible with its mixed residential and commercial surroundings, a hearing official's decision that the tower would be compatible will not be reversed on appeal simply because petitioners would reach the opposite conclusion. *Knight v. City of Eugene*, 41 Or LUBA 279 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Collocation of cellular telecommunication facilities is not a reasonable alternative to constructing a new telecommunications tower on EFU-zoned property, where the applicant's siting requirements include constructing a facility where space will be leased to other telecommunication providers and collocation with existing towers will not meet that requirement. *Jordan v. Douglas County*, 40 Or LUBA 192 (2001).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where a permit application identifies ORS 215.275 as a criterion applicable to the county's decision approving a cellular communications tower on EFU-zoned land and proposes findings of compliance with the statute, the issue of compliance with the statute was raised below and the county's failure to address the statute can be assigned as error, notwithstanding petitioners' failure to raise that issue below. *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 129 (2001).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Evidence that a proposed cellular communications tower on EFU land is within an optimal area for telecommunication

coverage is insufficient to allow LUBA to conclude, under ORS 197.835(11)(b), that the record “clearly supports” a finding of compliance with ORS 215.275, which requires that the local government consider reasonable alternatives to siting the tower on EFU-zoned land. *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 129 (2001).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Transmission towers that are less than 200 feet in height may only be approved on EFU-zoned land, under ORS 215.283(1)(d), where it is established that it is not feasible to locate the tower on non-EFU-zoned lands. *Dierking v. Clackamas County*, 38 Or LUBA 106 (2000).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Transmission towers that are more than 200 feet in height may be approved under ORS 215.283(2)(L) on EFU-zoned land, subject to the approval criteria set out at ORS 215.296 and any locally adopted approval criteria. It is not necessary to establish that it is not feasible to locate such transmission towers on non-EFU-zoned lands. *Dierking v. Clackamas County*, 38 Or LUBA 106 (2000).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. The utility cabinets that house the equipment that is needed to operate a wireless communication tower are properly viewed as part of the communication tower, rather than as a separate utility facility that must be separately approved. *Dierking v. Clackamas County*, 38 Or LUBA 106 (2000).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A land use decision maker commits no error by failing to require that an applicant for approval of a transmission tower justify the proposed height of the tower, where the relevant statutes impose different approval criteria depending on the height of the tower but do not require that the proposed tower height be justified. *Dierking v. Clackamas County*, 38 Or LUBA 106 (2000).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Subsequent changes in county ordinances do not affect an energy facility for which a site certificate has been approved by EFSC. Under ORS 469.400(5), a county is required to issue the “appropriate permits” for such an energy facility, regardless of whether a subsequent change in county ordinances makes the “appropriate permit” a type different from that which was appropriate when the site certificate was approved. *McDole v. Lane County*, 23 Or LUBA 500 (1992).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Under ORS 215.283(1)(d) and 215.283(2)(L), transmission towers are allowable in EFU zones as “[u]tility facilities necessary for public service.” Such towers may be allowed outright under ORS 215.283(1)(d), if they do not exceed 200 feet in height. Such towers may be allowed under ORS 215.283(2)(L), subject to the standards set forth at ORS 215.296(1), if they are over 200 feet in height. *Harris v. Polk County*, 23 Or LUBA 152 (1992).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where the local code explicitly provides that antennae are usually required to be above roof level, and the only function a tower serves is to elevate antennae sufficiently above roof level so they may receive and transmit signals in conjunction with ground-based processing equipment, the tower falls within the code exemption

from building height requirements for “appurtenances usually required to be placed above the roof level.” *Greenlees v. Yamhill County*, 22 Or LUBA 604 (1992).