BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CITY OF ALBANY,
Petitioner,

and

LINN COUNTY FARM BUREAU and
FRIENDS OF LINN COUNTY,
Intervenors-Petitioner,

vs.

LINN COUNTY,
Respondent,

and

CITY OF MILLERSBURG,
Intervenor-Respondent.

LUBA No. 2001-011

FINAL OPINION
AND ORDER

Appeal from City of Albany.

James V. B. Delapoer, Albany, filed the petition for review and argued on behalf of petitioner. With him on the brief was Long, Delapoer, Healy, McCann and Noonan.

Michael K. Collmeyer, Portland, joined in the petition for review on behalf of intervenors-petitioner.

No appearance by Linn County.

Wallace W. Lien, Salem, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Wallace W. Lien, PC.

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

REMANDED 05/10/2001

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioner appeals a county decision to approve a permit to site a water treatment facility and reservoir on land zoned Farm Forest (F/F).

MOTIONS TO INTERVENE

Linn County Farm Bureau and Friends of Linn County move to intervene on the side of petitioner. The City of Millersburg moves to intervene on the side of respondent. There is no opposition to the motions, and they are allowed.

FACTS

For many years, the City of Millersburg (Millersburg or city) obtained its municipal water supply from the City of Albany (Albany or petitioner). In the 1980s, Millersburg began exploring options to obtain its own municipal water supply. In 1996, Millersburg received a water right to draw water from the North Santiam River.[1] In 1999, after considering various siting options, Millersburg applied to Linn County to site a water intake pipe, a pump station and finished water pipes on property zoned Rural Residential (RR). In addition, Millersburg applied for a permit to construct a treatment facility, a water storage reservoir and waste backwash facilities on a 7.4-acre site located within the county's F/F zone.[2] Millersburg proposes to pump untreated water from the Santiam River intake pipe to the Scravel Hill site, where the water will be treated using membrane microfiltration technology.[3] After the water

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[1]For reasons unrelated to this appeal, the location of the water right was later changed to the South Santiam River, approximately 200 feet from the original permit location.

[2]The proposed location of the water treatment facility and holding reservoir is known as the "Scravel Hill site."

[3]The decision explains that "membrane microfiltration technology" works "by forcing the raw water through * * * membranes under low pressure, removing particles by straining. The membrane modules contain bundles of 0.2 micron nominal pore sized hollow fiber membranes. Chlorine * * * is added for disinfection of the finished water. The filtered water is stored in a steel finished water reservoir prior to delivery by gravity to the City's distribution system. Filter backwash along with a membrane cleaning solution make up the waste

is treated, it will be stored in a reservoir and piped by a gravity system to Millersburg's main water distribution lines located within city limits.

Millersburg also applied to partition the 7.4-acre site from a 201-acre parcel used for gravel mining.[4] The 7.4-acre site is part of an operating rock quarry and contains predominately Class VI and Class VII soils.

In proceedings before the county, petitioner and intervenors-petitioner opposed the siting of the reservoir and filtration facility on F/F-zoned land, arguing that the city should consider using land within its urban growth boundary before selecting a resource-related site. Petitioner and intervenors-petitioner also testified that other options were available to provide adequate municipal water that would avoid the need for a separate water system solely for Millersburg's benefit.

The county approved Millersburg's applications. This appeal followed.

PRELIMINARY MATTER

Millersburg argues that the statutory and administrative rule provisions governing the siting of a utility facility in exclusive farm use zones do not apply in this case, because the subject property (1) is zoned F/F, not exclusive farm use; (2) does not contain agricultural soils; and (3) is a reclaimed portion of a Statewide Planning Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources) inventoried gravel pit. The city contends that the statute applies only if the land on which the utility facility is to be located is zoned "exclusive farm use."

The county's comprehensive plan explains that:

> "The Farm/Forest (F/F) zone is administered in the same manner as the Exclusive Farm Use (EFU) zone. The uses permitted outright and

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stream from this facility. The majority of the waste stream [(99 percent)] is filter backwash and only includes concentrated particulate obtained from the source water, the Santiam River." Record 10.

[4]Petitioner does not appeal the portions of the county's decision pertaining to the siting of facilities on RR-zoned land. Nor does petitioner appeal the county's partition approval.

> conditionally are the same * * *." Linn County Comprehensive Plan, Land Development Code 905.300(D).

OAR 660-006-0050 permits counties to adopt mixed farm/forest zones to satisfy the requirements of both Statewide Planning Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands). In those circumstances, uses authorized in exclusive farm use zones in ORS chapter 215, subject to the restrictions contained within the chapter and administrative rules implementing ORS chapter 215, may be allowed in the mixed farm/forest zone. OAR 660-006-0050(2). The county's farm/forest zone is a mixed zone that allows uses listed in ORS chapter 215, subject to the restrictions provided in that chapter. Therefore, the county must apply the standards found in ORS 215.275 for siting a utility facility in an exclusive farm use zone to the city's application.[5]

FIRST ASSIGNMENT OF ERROR

Petitioner contends that Millersburg's decision to site a water treatment facility on F/F-zoned land is not fully articulated in any decision made by its governing body. Therefore, according to petitioner, the application to the county for approval of the South Santiam River intake facilities and the Scravel Hill site option was not properly authorized. Millersburg argues that petitioner failed to raise the issue of the city's authority to submit its application before the county and, therefore, pursuant to ORS 197.763(1), that issue is waived.

ORS 197.763(1) requires that an issue raised in a brief before LUBA must have been raised with sufficient specificity below to allow the local government an opportunity to respond to the issue. Here, petitioner does not cite to any portion of the record to show that any issue was raised concerning the city governing body's authorization of its permit

[5]For the purposes of this review, it is legally irrelevant that the subject property has not been used for agricultural purposes and its soils are not "agricultural soils" as that term is defined in Goal 3 and OAR 660-033-0020(1). It is the zoning of the property that implicates the provisions of ORS 215.283(1) and 215.275, not the soil characteristics or use of the property for agricultural purposes.

application. Therefore, that issue is waived.

The first assignment of error is denied.

SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR

Petitioner's remaining assignments of error challenge the legal and evidentiary support for the county's decision to site a "utility facility necessary for public service" in the F/F zone, as provided for in ORS 215.283(1)(d).[6]

ORS 215.275 provides, in relevant part:

> "(1) A utility facility * * * is necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service.
>
> "(2) To demonstrate that a utility facility is necessary, an applicant * * * must show that reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:
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> "(a) Technical and engineering feasibility;
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> "(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;
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> "(c) Lack of available urban and nonresource lands;
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> "(d) Availability of existing rights of way;
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> "(e) Public health and safety; and
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> "(f) Other requirements of state or federal agencies.

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[6]ORS 215.283(1) provides, in relevant part:

> "(1) The following uses may be established in any area zoned for exclusive farm use:
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> "* * * * *
>
> "(d) Utility facilities necessary for public service * * *. A utility facility necessary for public service may be established as provided in ORS 215.275."

> "(3) Costs associated with any of the factors listed in [ORS 215.275(2)] 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. * * * "[7]

In the second assignment of error, petitioner argues that the county failed to adopt findings to support its conclusion that "the facility must be sited in an exclusive farm use zone in order to provide the service," or that the findings the county did adopt are not supported by substantial evidence. ORS 215.275(1). In the third assignment of error, petitioner argues that the county and Millersburg have not shown why water from the Willamette River, which is located within city limits, is not a feasible alternative water supply. In the fourth assignment of error, petitioner argues that the county failed to adequately consider the testimony of petitioner's engineer regarding the feasibility of alternatives to siting the proposed facility on F/F or EFU-zoned lands. Petitioner contends that if it is possible to choose the preferred source of a municipal water supply outside of the land use context, then at least the determination of the location of facilities to support the use of the chosen water supply is a land use decision. *See Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14, 20, *aff'd* 170 Or App 6, 11 P3d 671 (2000) (*Dayton Prairie*) (the choice of facility providing public service is not a land use decision; however, once the type of facility is chosen, the siting of the facility is subject to review as a land use decision).

The core of petitioner's arguments under both assignments of error is that Millersburg has failed to demonstrate that reasonable alternatives, which would not require the use of EFU or F/F-zoned land, are not available. According to petitioner, the F/F-zoned land that Millersburg proposes to use for its proposed treatment facility and storage reservoir would not be needed for the proposed public service if the city instead utilized other feasible

[7]OAR 660-033-0130(16) essentially duplicates the provisions of ORS 215.275.

options. Petitioner contends such feasible options include (1) entering a joint venture with petitioner or some other municipality to develop a rural Santiam River water source, (2) using a Willamette River water source within the city, or (3) utilizing an elevated reservoir within the city. According to petitioner, the fact that the chosen source and siting may be preferred by Millersburg does not mean that the county should approve that option if other, reasonable options are available that do not site the reservoir and treatment facilities on EFU or F/F-zoned land. In petitioner's view, EFU or F/F-zoned land should be selected *only* if no other option is feasible. *McCaw Communications, Inc. v. Marion County*, 96 Or App 552, 773 P2d 779 (1989); *Clackamas Co. Svc. Dist. No. 1 v. Clackamas County*, 35 Or LUBA 374 (1998).

Millersburg responds that petitioner misunderstands the meaning of "necessary for public service" as used in ORS 215.283(1)(d) and ORS 215.275. According to the city, the cases petitioner relies upon to support its interpretation of "necessary for public service" were decided prior to the adoption of ORS 215.275 in 1999. The city contends that under ORS 215.275, all the city has to do to show that it is necessary to site the treatment facility and reservoir on the F/F-zoned parcel is to demonstrate the presence of one of the factors set out in ORS 215.275(2). The city argues that it considered other options, including the ones petitioner identifies, and the selected option satisfies *all* of the factors listed in ORS 215.275(2).

Prior to 1999, the only standard for siting a utility facility in an exclusive farm use zone was that it must be "necessary for public service." ORS 215.283(1)(d). In *McCaw Communications, Inc.*, the Court of Appeals interpreted the phrase to mean that

> "the applicant must establish and the county must find that it is necessary to situate the facility in the agricultural zone in order for the service to be provided." 96 Or App at 556.[8]

[8]The Land Conservation and Development Commission codified the court's holding in *McCaw Communications, Inc.* at OAR 660-033-0130(16) (1992).

In *Clackamas Co. Svc. Dist. No. 1*, we relied on the Court of Appeals' interpretation in *McCaw Communications, Inc.* to affirm a county hearings officer's denial of an application to site a storm water treatment and collection facility within an EFU zone. We agreed with the hearings officer that the service district failed to show that the alternatives to siting the utility on agricultural lands were infeasible. 35 Or LUBA at 380. We specifically agreed with the hearings officer that under the relevant prior statutory and administrative rule language, "an applicant seeking to site a utility facility on EFU-zoned land must demonstrate that there are no 'feasible alternatives' for constructing the utility facility on non-EFU-zoned lands." *Id*. at 386.

ORS 215.275 was adopted after we issued our decision in *Clackamas Co. Svc. Dist. No. 1*. However, the pertinent language in ORS 215.275 appears to retain essentially the same ultimate legal standard that was discussed in that case, while specifying the factors that may be relied on to demonstrate compliance with that ultimate legal standard. Before and after adoption of ORS 215.275, the ultimate legal standard was a requirement that the applicant demonstrate that "the facility must be sited in an EFU zone in order to provide the service." That legal standard, in turn, requires that an applicant explore non-EFU-zoned alternative sites.

The only arguably significant difference in wording in our description of the analysis that is required under *Clackamas Co. Svc. Dist. No. 1* and the required analysis that is described in ORS 215.275 is the express requirement that alternatives be shown to be "infeasible," under *Clackamas Co. Svc. Dist. No. 1* and the lack of any express, generally applicable requirement to consider the "feasibility" of alternatives under ORS 215.275. However, ORS 215.275 specifically requires that "reasonable alternatives" be considered and that examination of those reasonable alternatives lead to the conclusion that the proposed utility facility "must be sited" on EFU-zoned land, based on one or more of the six specified factors. If, in considering "reasonable alternatives," the applicant is unable to demonstrate

that such non-EFU-zoned alternatives are "infeasible," it is difficult to see how the applicant could demonstrate the proposed facility "must be sited" on EFU-zoned land.[9] As we noted in *Clackamas Co. Svc. Dist. No. 1*, it is somewhat uncertain how difficult development of a non-EFU-zoned site must be before it can be deemed to be infeasible. 35 Or LUBA at 386. In our view, the legislature elaborated on the infeasibility standard without significantly altering that standard.

Moreover, the city appears to view the ORS 215.275(2) factors as applying *only* to the proposed EFU location and to believe that, if the factors are present, the facility can be placed on the EFU site without further analysis. If that is the city's view, it is incorrect. The primary focus of the ORS 215.275(2) factors will frequently be on alternative non-EFU locations. Those factors, if present, act to disqualify potential alternative sites. Therefore, to approve location of a utility facility on EFU land under the statute, the county must consider reasonable alternatives on non-EFU lands, if any, and determine the proposed EFU-zoned site "must" be used because the non-EFU alternative sites cannot be used based on one or more of the ORS 215.275(2) factors. Those factors may also apply to the preferred EFU site, at least in the sense that alternative sites cannot be disqualified for reasons that apply also to the preferred site. For example, an alternative site cannot be disqualified solely because of the lack of existing rights-of-way or for public health and safety reasons, if the preferred EFU site also lacks existing rights-of-way or invokes similar health and safety concerns. Nor is a facility "locationally dependent" within the meaning of ORS 215.275(2)(b), if the linear components of that facility can achieve a reasonably direct route by crossing non-EFU land.

It is worth noting that the "utility facility" permitted under ORS 215.213(1)(d) and 215.283(1)(d) may have multiple components that require separate analysis and justification.

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[9]Indeed, for an applicant to rely on the first of the specified factors, "[t]echnical and engineering feasibility," it seems clear that the applicant must show that it is not feasible to locate a proposed utility facility on non-EFU-zoned land.

In *Dayton Prairie*, the proposed facility involved (1) wells on EFU land, and (2) a treatment facility and reservoir on EFU land. We held that the county had justified the necessity, *i.e.*, lack of feasible alternatives on non-EFU land, for locating the wells on EFU land, but that the county had not justified the necessity of locating the treatment facility and reservoir on EFU land. Specifically, we held that the county's findings failed to establish that potential sites for the treatment facility and reservoir within an urban growth boundary were infeasible. 38 Or LUBA at 27. In other words, justification for siting one component of a utility facility in an EFU zone does not necessarily justify siting other components in that zone. As we discuss below, the same considerations may be at issue in the present case.

One further point bears mention before turning to petitioner's challenges to the county's alternative sites analysis. As noted above, *Dayton Prairie* interprets the statute as it existed prior to adoption of ORS 215.275 in 1999, although the decision postdates that statutory amendment. Some question arises under these circumstances how the county should apply both *Dayton Prairie* and ORS 215.275. In our view, the county need not consider as a "reasonable alternative" under ORS 215.275(2) different types of facilities or solutions to providing a public service than the general type or solution selected by the service provider. For example, as we noted in *Dayton Prairie*, a public power provider, having chosen to generate power by means of wind-driven turbines, is not required to demonstrate that other modes of generation, such as fossil fuel, nuclear, or hydro, that might be sited on non-EFU land are disqualified under the ORS 215.275(2) factors. Rather, the provider need only demonstrate that wind-driven turbines cannot feasibly be located on non-EFU land for one or more of the reasons in the statute.

We now turn to petitioner's specific challenges. As noted above, petitioner argues that the county erred in rejecting as alternatives (1) a joint venture with petitioner or other cities to develop additional capacity within existing water systems; (2) using Willamette River water from within city limits to avoid piping water across EFU lands, combined with a

treatment facility and an elevated reservoir (*i.e.*, a water tower) within the city's urban growth boundary; or (3) using the proposed Santiam River intake but siting the treatment facility and elevated reservoir within the city. The county essentially rejected these alternatives under *Dayton Prairie*, without attempting to disqualify them under the ORS 215.275(2) factors. The county's findings state in relevant part:

> "A Willamette River source was investigated but the water intake would have to be located down-river from the Albany Sewage Treatment Plant and the industrial waste processing activities immediately upstream. This alternative provided questionable water quality although it was retained as a source of industrial process water. * * *
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> "* * * * *
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> "Many alternatives were raised during the course of this process, but all of those alternatives (continue to buy water from Albany, partner with Albany on a regional system, build a storage reservoir in town to better utilize the existing water supply, build a water tower, etc.) were essentially alternatives to the decision to obtain an independent source of water rather than siting alternatives. As the *Dayton Prairie* case advises, the initial decision of Millersburg to obtain an independent source of water is not a land use decision and is not the type of 'reasonable alternative' that comes into play in the land use decision making process. The distinction between the source decision and the implementing siting decision is clear, and Millersburg clearly met the mandates of the law in its siting decision." Record 22-23.

Thus, the county found that the city exercised its discretion under *Dayton Prairie* to limit the scope of alternatives to those that provide an "independent source of water." We agree with the city that such decisions need not be justified under ORS 215.213(1)(d), 215.283(1)(d) or 215.275. *See Dayton Prairie*, 38 Or LUBA at 21 (county need not consider, as alternatives to using wells as the source of water, the possibility of surface intake from the Willamette River, improving the existing water supply, or purchasing water from other cities). It follows that the county did not err in refusing to evaluate the feasibility of a joint venture with Albany or other cities to improve existing capacity, because such alternatives would not provide an independent source of water.

The second alternative, surface intake of Willamette River water, presents a closer question as to whether the county can exclude that alternative under *Dayton Prairie* without seeking to disqualify it under the ORS 215.275(2) factors. The Willamette River alternative provides an independent source of water and, like the preferred alternative, involves surface intake from a river. The county disqualified the Willamette River option solely because that source provides "questionable water quality." Record 22. Arguably, that consideration might properly be addressed under ORS 215.275(2)(e), public health and safety. However, we believe the county did not err in rejecting that option without applying the ORS 215.275(2) factors. There is no dispute in this case that the Willamette River is significantly polluted. The city's decision to develop an "independent source of water" contemplates replacing its current source (Santiam River water, supplied via Albany) with water of similar quality. We agree with the city that such decisions need not be justified under ORS 215.213(1)(d), 215.283(1)(d) or 215.275.

The third alternative, to use the Santiam River intake but site the treatment facility and any elevated reservoir (such as a water tower) within the city's urban growth boundary, presents a still closer question. As noted above, the separate components of a utility facility may require separate consideration and justification. The fact that piping must cross intervening F/F-zoned land in order to reach the city from the Santiam River intake site does not, in itself, also justify placing the treatment facility and reservoir within the F/F zone, if such components can feasibly be sited on non-EFU lands. *Dayton Prairie*, 38 Or LUBA at 27. The county finds, and there does not appear to be any dispute, that the treatment facility must be located near the water reservoir for maximum efficiency. The county also finds that an elevated reservoir "enhances the health and safety" of the city because it allows pressurized water flow for fire and water supplies even during power outages. We do not understand petitioner to contend that the county must consider as an alternative any water system that does not provide for an elevated reservoir. However, petitioner does argue that

the county's decision improperly dismisses the possibility of siting the elevated reservoir within the urban growth boundary under the *Dayton Prairie* rationale.

We agree with petitioner that the county erred in dismissing this alternative under the *Dayton Prairie* rationale, and in failing to address this alternative under the ORS 215.275(2) factors. The city proposes a utility facility with the essential features of a water treatment facility in close proximity to an elevated reservoir. However, nothing in the county's decision explains why Millersburg's preference for a surface reservoir on a hill rather than one or more reservoirs elevated on towers is necessary to that proposed facility so that the treatment facility and reservoir "must be sited" on an F/F-zoned site. We conclude that the alternative to site the treatment facility and elevated reservoir within the city's urban growth boundary is a "reasonable alternative" that the county must consider under the ORS 215.275(2) factors.[10]

The second, third and fourth assignments of error are sustained, in part.

The county's decision is remanded.

[10]It may be, of course, that the county can disqualify this alternative under one or more of those factors. Petitioner cites to a letter in the record from a professional engineer stating that a free-standing elevated reservoir (*i.e.*, a water tower) of the required elevation is a viable technical alternative. The city cites to evidence that a water tower would be less reliable, pose an increased safety risk, and cost more to construct and maintain than a reservoir on a hill. Such evidence might have a bearing on the county's evaluation of this alternative under the ORS 215.275(2) factors. The point is that the county's decision does not conduct that evaluation.