BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SPRINT PCS,
Petitioner,

vs.

WASHINGTON COUNTY,
Respondent,

and

JOHN FRITZ and SHARON FRITZ,
Intervenors-Respondent.

LUBA No. 2002-042

FINAL OPINION
AND ORDER

Appeal from Washington County.

Kelly S. Hossaini, Portland, filed the petition for review. With her on the brief was Miller Nash LLP. Kelly S. Hossaini and Phillip Grillo argued on behalf of petitioner.

Alan A. Rappleyea, Senior Assistant County Counsel, Hillsboro, and Edward J. Sullivan, Portland, filed a joint response brief and argued on behalf of respondent and intervenors-respondent. With them on the brief was Preston Gates & Ellis, LLP.

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

REMANDED 08/28/2002

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a denial of its application to site a telecommunications tower on land zoned for exclusive farm use.

MOTION TO INTERVENE

John Fritz and Sharon Fritz (intervenors) move to intervene on the side of the county. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is a small leased portion of a 24.69-acre parcel zoned Agriculture/Forestry 20-acre minimum (AF-20), an exclusive farm use (EFU) zone. Highway 219 runs nearby to the west. Surrounding lands include a number of parcels zoned Agriculture/Forestry 10-acre minimum (AF-10) adjacent to Highway 219. The AF-10 zone is a rural residential zone, subject to a 100-foot height limitation for towers.

Petitioner determined that its wireless communication service suffers from a coverage gap along Highway 219 between the cities of Newberg and Hillsboro, and in the rural area on either side of Highway 219. Based on studies by its engineers, petitioner determined that it required a facility with an antenna height between 825 and 875 feet above mean sea level (AMSL), to achieve the desired coverage. Petitioner then identified a search ring encompassing the area in which the facility could be located and serve its intended purpose. The search ring included 63 properties, 26 zoned AF-10 and the remainder zoned for agricultural uses. Petitioner then conducted an alternatives analysis, as required by ORS 215.275.[1] Petitioner rejected 17 of the 26 sites zoned AF-10, apparently because the

[1] ORS 215.275 provides, in relevant part:

> "(1) A utility facility established under ORS 215.213 (1)(d) or 215.283 (1)(d) is necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service.

elevation of those sites was too low (below 650 feet AMSL) to site a 100 to 150-foot tower to achieve an antenna height of 825-875 feet AMSL. Petitioner then sent letters to each of the owners of the remaining nine AF-10-zoned parcels in the search ring, and followed up with phone calls, where possible. Four owners did not respond, while three expressly declined to lease or sell their property to petitioner. Two owners expressed initial interest. Negotiations with these two owners failed to reach agreement, because the elevation of the specific locations on the properties the owners were willing to lease was too low. Because 17 of the non-EFU sites in the search ring were too low in elevation, and the remainder were unavailable, petitioner concluded that all non-EFU sites were not reasonable alternatives, pursuant to ORS 215.275(2)(a) (technical or engineering feasibility) or (c) (lack of available urban or nonresource lands). Thereafter petitioner submitted the instant application with the county, proposing to site a 154-foot tower on the subject property.

> "(2) To demonstrate that a utility facility is necessary, an applicant for approval under ORS 215.213 (1)(d) or 215.283 (1)(d) 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;
>
> "(e) Public health and safety; and
>
> "(f) Other requirements of state or federal agencies.
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> "(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."

County planning staff initially recommended denial of the application, on the grounds that petitioner had failed to justify its coverage needs and the search ring as the starting point of the alternatives analysis required under ORS 215.275. A county hearings officer conducted a hearing December 20, 2001, at which petitioner submitted additional information regarding its coverage needs and the search ring. At the same hearing, the opponents presented the testimony of an engineer, Weber, who questioned petitioner's assertions regarding the needed elevation, tower height, search ring size and location, and the possibility of collocating on existing towers. Petitioner requested that the record be held open until February 8, 2002, to provide rebuttal evidence.

On January 18, 2002, petitioner submitted a rebuttal of Weber's testimony. The opponents responded February 1, 2002, with additional written testimony from Weber and a memorandum from the opponents' attorney urging the hearings officer to accept the staff recommendation and deny the application. On February 1, 2002, county staff issued an addendum to the staff report that changed the staff recommendation to approval, based on the additional information submitted by petitioner. On February 8, 2002, petitioner submitted further information, including an analysis of an additional 15 sites outside the search ring suggested by opponents.

On March 13, 2002, the hearings officer issued a decision denying the application. The hearings officer did not offer an analysis of his own, but instead adopted parts II, III and IV of the opponents' February 1, 2002 memorandum. This appeal followed.

ASSIGNMENT OF ERROR

A. Introduction

Petitioner argues that the hearings officer's decision, *i.e.*, the memorandum adopted by the hearings officer, misconstrues the applicable law in five particulars. Petitioner contends that these five alleged misapplications of law so permeate the county's decision that no purpose would be served by challenging the decision on evidentiary grounds.

In turn, the county and intervenors-respondent (together, respondents) dispute that the county misconstrued the applicable law. In addition, respondents contend that petitioner, in seeking remand of the county's denial, must challenge *every* basis for denial. *Jurgenson v. Union County Court*, 42 Or App 505, 513, 600 P2d 1241 (1979). According to respondents, the petition for review fails to challenge certain grounds for denial stated in the decision and, therefore, even if petitioner has demonstrated error in other bases for denial, the decision must be affirmed.

At the outset we confess some difficulty in identifying the precise bases for the county's denial. As noted, the hearings officer's decision is based entirely on an incorporated memorandum prepared by the opponents' attorney. That memorandum, found at Record 9-17, advocates that the hearings officer deny the application for a number of legal and evidentiary reasons. The memorandum is not drafted as proposed findings, and presumably was not intended to be used as findings. Its wholesale adoption by the hearings officer complicates the task of resolving the parties' contentions regarding the bases for denial and the extent to which alleged misapplications of law affect those bases for denial. Consequently, before turning to those contentions, we first attempt to describe the challenged decision.

B. The Decision

As noted, the hearings officer's decision incorporates Parts II, III and IV of the opponents' memorandum. Part II of the memorandum provides a "legal overview" discussing ORS 215.275 and several Court of Appeals and LUBA decisions that involved the siting of utility facilities in EFU zones under ORS chapter 215. In discussing ORS 215.275, the memorandum appears to suggest that the factors in ORS 215.275(2) must be applied in a manner that "balances" the degree of technical effort necessary to site the facility on non-EFU-zoned land against the state policy to preserve farmland in ORS 215.243:

> "[I]mpacts on farm uses must be considered in evaluating an application for the provision of public utilities in EFU zones. That position is consistent with the state's long standing policy of preservation of farmland in ORS 215.243, which was the basis for [*McCaw Communications, Inc. v. Marion County*, 96 Or App 552, 773 P2d 779 (1989)], as well as ORS 215.275. Indeed, the very drafting of the various 'factors' in [ORS 215.275] requires a balancing of just how much 'technical and engineering feasibility' will, in a given case, be sufficient as a tradeoff for the loss of farmland. Similarly, just how much investment must be made to avoid the loss of such farmland by use of other available nonresource lands or techniques is also relevant. Such a balancing must exist, for there is no quantum of value in the words 'technical and engineering feasibility.' * * *" Record 9A (footnote omitted).[2]

Part III of the memorandum discusses the evidence regarding coverage needs, elevation, tower height, search ring size and location, and the possibility of collocating the proposed antenna on existing towers or utility poles, among other matters. Part III generally criticizes the sufficiency of petitioner's evidence, and argues that the hearings officer should accept the view of the opponents' expert, Weber, over petitioner's evidence.[3]

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[2] The second page of the memorandum, found between record pages 9 and 10, is not Bates-stamped. We follow the parties in citing it as "Record 9A."

[3] Part III of the memorandum states, in relevant part:

> "The applicant [attempts] to isolate its peculiar brand of technology from other specific versions of cellular technology. That effort is irrelevant to the statutory requirement that the cell tower be sited on EFU-zoned land in order to provide *the* service (as opposed to *Sprint's* service). As with the search rings that must be used to make such a case, the decision-maker is not obliged to approve every EFU cell tower application because of the specific technology used.
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> "Regarding site elevation, the applicant describes * * * the site selection process in terms of the 'most desirable' elevation 'to meet our coverage objectives.' Again, this is not the test demanded by ORS 215.275(1), which requires an applicant to demonstrate the need to fill a coverage gap for cell service, as well as an alternatives analysis which must result in EFU-zoned property being the only viable alternative. That has not been done in this case.
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> "Regarding collocation, the applicant denies that possibility, then discusses an American Tower alternative near the county line with Yamhill County, then discounts that possibility without adequate explanation. * * *
>
> "Regarding ring size and location, the applicant states that the opponents must provide a list of alternative sites. This would be the case if there were adequate and demonstrable search rings provided. In this case, those rings are not present. Even so, the opponents have provided a number of alternative sites. They noted 17 sites that had incorrectly been omitted for elevation reasons, some AF-5 and AF-10 sites [considered in a different application], and the

Part IV of the memorandum is entitled "Conclusion," and states in relevant part:

"ORS 215.275 establishes a rigorous process for locating utility facilities on agricultural lands, a process reflected in similar statute allowing nonfarm uses on farmland, all of which requires that other alternatives be negated. The case

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AF-5 and AF-10 properties included in the intermediate search ring in Attachment 4 of the application. Notwithstanding these other properties, the applicant limited its consideration to two sets of AF-10 lands. The first of these lands in the north of the search ring the applicant pronounces too low. Mr. Weber's testimony indicates that the applicant is mistaken. The others are said to have been disposed of in the application. They are not so disposed of, however.

"The applicant further denigrates the use of AF-10 lands because of a 100-foot height limitation. The 100 feet may be adequate and appropriate according to Mr. Weber's testimony and, in any event, could be the subject of a variance that could weigh the height change against the loss of farmland otherwise. * * *

"Regarding the use of utility poles, they may certainly be usable in the non-resource zones at certain heights and even those in the AF-20 zone may be used, as they are committed to non-resource uses. * * *

"Regarding tower height, the 100- versus 150-foot height has been discussed above with respect to elevation. In the final analysis, the applicant is just plain wrong as to the ability of the county to deal with specific tower height. * * *

"Another issue raised by the applicant is the effect of ORS [215.275(5)]. The applicant denies that the concern for aerial spraying gives rise to any use of those conditions. Opponents believe, consistent with their point on 'balancing' above, that interference with agricultural activity may give rise to denial or conditioning of the application. * * *

"The applicant never deals with ORS 215.275(5) because it denies there is any effect on agricultural practices * * *. The applicant's planner states there is no accepted farming practice, such as aerial spraying, on the site to prevent changes in accepted farming practices or significant increases in the costs thereof, on surrounding lands devoted to farm uses. The following letters indicate that aerial spraying is used on the subject site, on the adjacent Gregory parcel (which has a cherry orchard), in a vineyard and elsewhere in the area: [citing letters].

"A final overarching concern of the opponents is the applicant's lack of transparency in its attempt to show compliance with ORS 215.275. For example, before it can assert there are no nonresource properties that can accommodate its proposed facility, the applicant should be required to disclose the lease terms it discussed with other property owners with whom it negotiated and the terms of the [challenged] lease. The applicant must provide information on the alternatives it could use to provide its services without using EFU-zoned property. For example, it could increase signal strength, the number of channels, power per channel per antenna, gain, radiation pattern or maximum power input per antenna; it could utilize collocation alternatives; it could document the other facilities Sprint has in the area and consider alternatives of upgrading those facilities, including use of repeaters or indirect services; finally, it could meet its needs by providing a specific level of service or a long-term plan for service, instead of incremental tower additions. Without addressing these alternatives, the applicant cannot say that its tower must be located on EFU-zoned land to provide the service." Record 13-16 (footnotes omitted; emphasis in original).

> law on the statute bears out this point. The applicant has not appeared in this case with a transparent process to show that the goals of the statute have been met. Opponents have also shown that the 'must approve' approach of the applicant is not mandated or even suggested by federal law.
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> "Instead, the applicant has used a 'black box' approach, weaving and shifting its explanations as to why the land it wants to use for this proposed facility is the only land available and not providing transparency for its process of elimination of nonresource alternatives. It has ignored other nonresource alternatives and established baseless criteria (the 825-875 feet AMSL level), which even it has ignored on previous occasions. The applicant refuses to deal with the effects of its proposal on agricultural practices. Its approach to alternative sites has been to send a letter and ignore any follow-up. The applicant denies there are alternative sites or methodologies it may use to avoid taking up farmland with nonfarm uses, notwithstanding the statute that mandates a different approach. * * * This application must be denied." Record 16-17.

C. Bases for Denial

While it is fairly plain from the decision that the hearings officer concluded that petitioner failed to demonstrate that the proposed cell tower "must be sited" in the AF-20 zone in order to provide the service, the exact reasons for that conclusion are less clear. Part III of the decision lists a dozen or so criticisms of petitioner's evidence. Most if not all of those criticisms involve the application of the law to the evidence in the record. As far as we can tell, no discrete criticism is obviously independent of the five legal challenges petitioner advances in this assignment of error. For example, several paragraphs in Part III expressly invoke the "balancing" view of ORS 215.275 advanced in Part II, which petitioner challenges. Although other paragraphs do not expressly invoke that view, it seems likely that that view permeates the decision's analysis of the evidence. For another example, the challenged decision apparently regards various alternative methods of providing cellular service as "reasonable alternatives" that must be considered under ORS 215.275, a view of the statute that petitioner disputes. Without further assistance from respondents, we cannot identify any discrete basis for denial that is unaffected by the alleged misapplications of law

cited by petitioner. Accordingly, we have no grounds to affirm the county's decision, as respondents urge us, without addressing the merits of petitioner's assignment of error.

D. Petitioner's Challenges

1. Balancing Test

Petitioner argues that ORS 215.275 contains no "balancing test" that requires the county to "balance" the technical difficulty of using alternative facilities or sites against the policy to retain agricultural land for farm use, or any other policies. To the extent the county interprets ORS 215.275 or any other statute to impose such a balancing test, petitioner argues, it misconstrues the applicable law. According to petitioner:

> "* * * If an applicant can show that at least one of the six enumerated factors [in ORS 215.275(2)] is present to disqualify each reasonable non-EFU alternative, the applicant has shown the requisite necessity to site the utility on EFU land. *See, e.g., City of Albany v. Linn County*, 40 Or LUBA 38 (2001). There is no second step in which the decision-maker then weighs the evidence submitted for each factor to determine if it is heavy enough to override a generalized policy directive to preserve farmland." Petition for Review 8.

If we understand them correctly, respondents argue that ORS 215.275 is itself a balancing test, in that it requires the county to make discretionary judgments regarding, for example, whether a reasonable alternative is disqualified for "technical or engineering" infeasibility. In exercising that discretionary judgment, respondents argue, the county will necessarily "balance" the need for the proposed utility, or the technical difficulty of alternatives, against the legislative policy that favors preservation of agricultural land for farm use.

We do not agree with respondents' view of the statute. It almost certainly is accurate to say that, 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. We see no support in ORS 215.275 for requiring direct consideration of agricultural

land preservation policies, external to the statute, in applying its terms.[4] While respondents are correct that applying the terms of ORS 215.275(2) requires some judgment, in the sense that the county must determine whether the evidence demonstrates, for example, that alternative non-EFU sites are infeasible or unavailable for purposes of ORS 215.275(2)(a) and (c), exercise of that judgment does not require the county to also engage in an exercise of "balancing" the technical difficulty of alternatives against farmland preservation. The county erred to the extent it construed ORS 215.275 otherwise.

This subassignment of error is sustained.

2. Affirmative Responses; Disclosing Terms

The challenged decision notes the opponents' argument that "the process used to contact non-resource property owners was flawed because it treated non-response as a refusal and no terms offered to prospective landlords were revealed." Record 14 n 12. Another portion of the decision contends that "the applicant should be required to disclose the lease terms it discussed with other property owners with whom it negotiated * * *." Record 16. Petitioner argues in the second and third subassignments of error that nothing in ORS 215.275(2)(c) requires any particular process to determine whether urban and nonresource alternative sites are available. Specifically, petitioner argues, the statute does not require an affirmative response of "no interest" from a landowner before the applicant, and the county, can conclude that nonresource property is unavailable. Similarly, petitioner argues that nothing in ORS 215.275(2)(c) requires disclosure of proposed lease terms where

[4] It is true, as all parties point out, that the courts and LUBA have sometimes looked to statutory policies such as that at ORS 215.243 as a contextual guide in interpreting ambiguous provisions for nonfarm uses in ORS chapter 215. *See, e.g.*, *Warburton v. Harney County*, 174 Or App 322, 329, 25 P3d 978 (2001) (relying in part on ORS 215.243 to narrowly interpret the scope of "public and private schools" allowed in the EFU zone under ORS 215.283(1) to exclude adult vocational schools). However, in such an interpretative exercise, statutory polices such as ORS 215.243 would have relevance only to the issue of what an ambiguous term in ORS 215.275 means, and would not provide a basis to import into ORS 215.275 a legal requirement not found in the statute. As explained above, we see no textual basis in ORS 215.275 to apply a "balancing test" as part of or in addition to consideration of the ORS 215.275(2) factors.

negotiations fail to reach agreement. To the extent the county concluded otherwise, petitioner argues, it misconstrues ORS 215.275(2)(c).

Respondents deny that the above-quoted comments show that the county interpreted ORS 215.275(2)(c) to require that the applicant (1) obtain a response from every landowner of alternative sites or (2) disclose the proposed lease terms, where initial interest is expressed but negotiations are unsuccessful. If we understand respondents correctly, they both dispute petitioner's characterization of the county's interpretation and deny that the above-quoted comments were intended as bases for denial.

It is not clear to us whether the above-quoted comments represent interpretations of ORS 215.275(2)(c), much less interpretations that were intended and applied as bases for denial. As noted, the memorandum adopted as the county's decision was drafted as an advocate's brief, not as proposed findings, and it contains a diverse array of arguments, only some of which can be reasonably construed as bases for denial. Given respondents' apparent concession that the challenged language does not form part of any basis for denial, we agree with respondents that any misconstruction of law therein is harmless error, and therefore these subassignments of error provide no basis for reversal or remand.

These subassignments of error are denied.

3. Reasonable Alternatives

Fairly read, the challenged decision finds that petitioner failed to demonstrate that no "reasonable alternatives" exist to siting the proposed facility on land zoned EFU. Petitioner argues that the scope of "reasonable alternatives" for purposes of ORS 215.275 and 215.283(1)(d) is limited to a search for alternative *locations* for the *proposed* facility on land that is not zoned EFU. According to petitioner, the county erred in regarding as "reasonable alternatives" different *methods* or *types of facilities* for providing the proposed service. Petitioner contends that, under *Dayton Prairie Water Association v. Yamhill County*, 38 Or LUBA 14, *aff'd* 170 Or App 6, 11 P3d 671 (2000), ORS 215.283(1)(d) and, by extension,

ORS 215.275, only require consideration "of where a facility should be located once a decision to use a particular type of facility has been made." 170 Or App at 9. *See also Jordan v. Douglas County*, 40 Or LUBA 192, 200 (2001) (collocation of wireless facilities on existing towers is not a "reasonable alternative" that must be considered under ORS 215.275(2), where collocation would not satisfy the utility provider's defined objectives). Therefore, petitioner argues, once it made its decision to use a particular type of tower facility to meet its defined coverage objectives, the only remaining question is whether that particular facility must be located in the EFU zone or not. The county has no basis, petitioner argues, to require petitioner to consider a different type of facility, or other changes to its business model or defined objectives, as a "reasonable alternative" under the statute.

Respondents disagree, arguing that the "technical and engineering feasibility" factor at ORS 215.275(2)(a) supports consideration of alternative technical *methods* for providing the proposed service, such as collocation of facilities on existing facilities, as part of the reasonable alternatives analysis. Respondents argue that such a view of ORS 215.275(2) is more consistent with the statutory policy to preserve farmland than the view espoused by petitioner. Respondents urge us to revisit our determination in *Jordan* that collocation of wireless facilities is not a reasonable alternative under the statute, and to hold that similar technical alternatives to petitioner's preferred facility must be considered.

We addressed, to some extent, the scope of "reasonable alternatives" under ORS 215.275 in *City of Albany v. Linn County*, 40 Or LUBA 38 (2001). In that case, the City of Millersburg proposed to cease drawing its municipal water from the City of Albany's system and establish its own independent supply. The city considered and rejected the options of (1) improving the City of Albany's system to provide extra capacity, and (2) treating polluted water from the Willamette River. Instead, it proposed to draw water from the Santiam River, build pipelines that crossed EFU-zoned land to an EFU-zoned hilltop site

outside of town, where it would construct a treatment facility and an open reservoir, and then use gravity to pipe the water from the hilltop to the city. As we understood the city's objectives, the "essential features" of the proposed facility included an independent source of relatively clean water, with an elevated reservoir to allow gravity distribution. Because neither the option of improving the current system nor drawing from the Willamette River met the city's first objective, we held that those options were not "reasonable alternatives" that must be considered under either *Dayton Prairie* or ORS 215.275(2). However, we held that the city erred in rejecting outright, without consideration under the ORS 215.275(2) factors, the alternative of siting the treatment facility and elevated reservoir (*i.e.*, a water tower) within the city, rather than on the EFU-zoned hilltop outside the city. Unless the city could disqualify that alternative under one or more of the ORS 215.275(2) factors, we held, the city had not demonstrated that the treatment facility and reservoir "must be sited" in the EFU zone.[5]

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[5] We also examined in *City of Albany* the relationship between cases interpreting ORS 215.283(1)(d), specifically *Dayton Prairie*, and ORS 215.275. We concluded that the "reasonable alternatives" requirement in ORS 215.275 is substantially equivalent to the "infeasibility" standard articulated in *Clackamas Co. Svc. Dist. No. 1 v. Clackamas County*, 35 Or LUBA 374 (1998) and *Dayton Prairie*. In adopting ORS 215.275, we stated, "the legislature elaborated on the infeasibility standard without significantly altering that standard." 40 Or LUBA at 47.

We then discussed whether, and if so how, the county should apply both *Dayton Prairie* and ORS 215.275. We stated, in relevant part:

> "* * * As noted above, *Dayton Prairie* interprets [ORS 215.283(1)(d)] 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) types of facilities or solutions to providing a public service that are different from 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." 40 Or LUBA at 48.

In *Jordan*, the applicant proposed to site a cellular tower on EFU-zoned land, next to two existing cellular towers. The applicant's objectives were to (1) provide its own telecommunication services to a defined coverage area and (2) provide space on its own tower to lease to other telecommunication providers. We rejected an argument that the applicant and county were required to consider, as a reasonable alternative, collocating the applicant's antenna on one of the existing towers on the site. We held that "collocation would serve only one of the purposes of the requested cellular tower and therefore is not a reasonable alternative that must be considered." 40 Or LUBA at 200.

Reading these cases together with *Dayton Prairie*, it is clear that a utility provider has a considerable amount of discretion in choosing the general type of facility or solution to providing a utility service. The utility provider also has some discretion in defining the essential features of the chosen facility type, for example, to provide telecommunication services to a defined coverage corridor or area. The utility provider and local government are not required to consider under either *Dayton Prairie* or ORS 215.275(2) any alternative that requires a different type of facility (*e.g.*, groundwater wells versus river intake), or that would not meet the essential features of the chosen facility, as defined by the utility provider. However, as *City of Albany* indicates, the applicant 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 (*e.g.*, water tower versus reservoir on a hill).[6]

Respondents have given us no compelling reason to overrule *Jordan*. However, we note that ORS 215.275(3) refers to "substantially similar utility facilities" and "utility

[6] As we noted in *City of Albany*, such an alternative may ultimately be disqualified under one or more of the factors at ORS 215.275(2), but, we held, it must be considered as a reasonable alternative under those factors and may not be summarily rejected under the rationale in *Dayton Prairie*. 40 Or LUBA at 51 n 10.

facilities that are not substantially similar." *See* n 1. The statute provides that costs may be considered in applying the factors in ORS 215.275(2), although such costs cannot be the only consideration. The next sentence provides an exception to the first sentence, stating that "[l]and costs shall not be included when considering alternative locations for substantially similar utility facilities." The third sentence then offers what appears to be an exception to that exception, directing the Land Conservation and Development Commission (LCDC) to "determine by rule how land costs may be considered when evaluating the siting of utility facilities *that are not substantially similar*."[7] (Emphasis added.) The parties do not discuss ORS 215.275(3), and it is not entirely clear to us how that subsection is intended to operate. Because neither facility costs nor land costs appear to be an issue in the present case, ORS 215.275(3) has no direct application. However, for present purposes, one implication that can be drawn from the above-quoted language in ORS 215.275(3) is that the legislature apparently believes that the "reasonable alternatives" that must be considered under ORS 215.275(2) potentially include "utility facilities that are not substantially similar." That implication provides some support for respondents' view of the statute. Accordingly, we consider it further.

We did not have occasion to consider ORS 215.275(3) in either *City of Albany* or *Jordan*. Arguably, the above-quoted language can be read to suggest that the applicant and local government must consider broadly dissimilar types of facilities or means to provide the

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[7] LCDC subsequently adopted a rule, OAR 660-033-0130(16), that implements ORS 215.275. In relevant part, OAR 660-033-0130(16)(b) provides that:

> "Costs associated with any of the factors listed in [OAR 660-033-0130(16)(a)] 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 and the siting of utility facilities that are not substantially similar."

LCDC has thus determined that land costs may not be considered even when considering the siting of utility facilities that are not substantially similar.

public service. If so, that calls into question whether the limitation on alternatives described in *Dayton Prairie*, and refined in *City of Albany* and *Jordan*, is properly extended to ORS 215.275. On the other hand, the statute requires only consideration of *reasonable* alternatives, and sets forth a closed set of factors that may be considered in disqualifying alternatives. Viewed in that context, it seems unlikely that the legislature intended ORS 215.275 to require applicants to consider broadly different *types* of facilities, or alternatives that cannot satisfy the utility provider's defined objectives.

Textual and contextual analysis of ORS 215.275 does not make the legislature's intent on this point clear to us. We have examined the available legislative history. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611-12, 859 P2d 1143 (1993). Nothing we find in the legislative history directly addresses this issue. However, it is useful to note that both the timing of ORS 215.275 and its legislative history suggest that the statute was a legislative response to our decision in *Clackamas Co. Svc. Dist. No. 1 v. Clackamas County*, 35 Or LUBA 374 (1998). *See* Record 18-20 (Staff Measure Summary of HB 2865). Understood as a response to the issues and holding in that case, the legislative intent regarding the scope of "reasonable alternatives" becomes somewhat clearer. In *Clackamas Co. Svc. Dist. No. 1*, the county denied a proposed stormwater treatment system on EFU-zoned land because, the county found, the applicant had failed to demonstrate that it was infeasible to locate the facility on an alternative non-EFU-zoned site. Apparently because of different conditions at the two sites, locating the facility at the non-EFU-zoned site would require a different and more expensive design. In addition, land costs at the non-EFU site were three times as expensive as the EFU site. 35 Or LUBA at 385 n 11. We noted that "at some point the non-EFU-zoned alternative sites for a utility facility could be so technically difficult or costly to develop that those alternative sites are not appropriately viewed as 'feasible alternatives.'" *Id.* at 386. Nonetheless, we held that the evidence in the case fell well short of demonstrating

that the technical difficulty or expense of the alternative site rendered it infeasible, and accordingly affirmed the county's decision.

Viewed in this light, it seems relatively clear that ORS 215.275 is intended to codify, with legislative modifications and elaborations, the holdings in *Clackamas Co. Svc. Dist. No. 1* and *McCaw Communications, Inc.* For example, the legislature clarified the circumstances under which costs between alternatives, including land costs, could be considered. As *Clackamas Co. Svc. Dist. No. 1* suggested, and ORS 215.275(3) implies, the scope of "reasonable alternatives" includes non-EFU-zoned sites with conditions that may require at least some design modifications to the facility, for example using more or less acreage, with the result that the comparison of alternatives will involve "utility facilities that are not substantially similar." However, nothing available to us indicates the legislature's view on how much "utility facilities that are not substantially similar" can differ before they are no longer "reasonable alternatives."

We return, then, to our initial observation that at some point differences become so marked that the alternative can no longer be viewed as "reasonable." As we stated in *Dayton Prairie*, absent clear legislative intent on the matter, we see no reason to "require that all other legitimate public policy concerns that might be weighed in deciding what kind of facility would best respond to an identified utility need must be subjugated to the legislative policy favoring protection of agricultural lands, if it is feasible to do so." 38 Or LUBA at 20; *see also* 170 Or App at 10-11 ("[I]t does not appear that the legislature intended to subjugate all other legitimate public policies to the legislative policy favoring the protection of agricultural land."). Similarly, absent clearer expression of legislative intent, we see no basis in the statute to require that a utility provider consider alternatives that cannot satisfy the provider's defined objectives in providing the public service.[8]

[8] We recognize that giving deference to the utility provider's defined objectives (*e.g.*, providing its telecommunication service to a defined corridor or area) invites a results-oriented approach to defining

Our decision in *Jordan* is consistent with the foregoing view of the statute. Accordingly, we decline respondents' invitation to overrule *Jordan*. We turn now to evaluate those bases for denial we can identify in the challenged decision, to determine whether any constitute a valid basis for denial under our view of the statute.

a. Alternatives Not Considered

Respondents point to a number of statements in the challenged decision that fault petitioner for failing to demonstrate that certain methods or alternatives are not reasonable alternatives. These statements tend to fall into three discrete sets. The first set of criticisms involves challenges to the basic choices petitioner made regarding the type of facility and where it must be placed to satisfy petitioner's objectives. We understand those objectives to be to (1) provide coverage along Highway 219, and thus fill a coverage gap in petitioner's network, (2) provide coverage to the rural area on either side of Highway 219, and (3) establish its own tower in order to lease space to other telecommunication providers. Record 177, 268, 421, 423. To meet those objectives, petitioner determined that it needed a tower with an antenna height of 825 to 875 feet AMSL, located within the defined search ring.

As noted, the challenged decision suggests that petitioner has not demonstrated any "necessity" for the proposed facility, because the cited need is for a facility using petitioner's particular brand of wireless technology. Record 13. The decision appears to suggest that there is no "necessity" for the facility if comparable service in the area is already provided by others. Further, the decision suggests that petitioner has not justified the search ring and height criteria used, and that petitioner must therefore consider the feasibility of siting the

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objectives. However, a line between "reasonable" and "unreasonable" alternatives must be drawn somewhere, and a line that hinges on the applicant's defined objectives at least has the virtue of being a fairly bright line. In most cases, it will be clear whether or not a proposed alternative can meet the defined objectives. Any other approach would require second-guessing complex business and technological decisions. For example, at one point the challenged decision faults petitioner for insisting on using its particular type of cellular technology. Record 13. At another point the challenged decision faults petitioner for failing to demonstrate that it cannot meet its needs "by providing a specific level of service or a long-term plan for service, instead of incremental tower additions." Record 16. We see nothing in ORS 215.275 that would require a utility provider to reconsider its fundamental technology or its business plan as a "reasonable alternative."

facility on land outside the search ring, on multiple, shorter towers, or on lands higher or lower than the height criteria would dictate. Finally, the decision suggests that petitioner should consider improving its existing facilities (for example, increasing power output to provide more coverage from existing towers in petitioner's network).

However, as explained above, alternatives that require the utility provider to reassess fundamental business decisions are not the kind of "reasonable alternatives" that must be considered under ORS 215.275(2). Nor does the fact that other utility providers currently provide service to the area require that petitioner forego its own service or contract with other providers to cover the area. Any alternate locations outside the defined search ring or outside the height criteria would almost certainly result in a significantly different coverage area, and thus fail to satisfy one or more of petitioner's defined objectives. Similarly, petitioner is not required to consider improving the power or coverage provided by its existing towers in the cities of Newberg and Tigard. Even if that were possible, there is no evidence that improving the existing towers could provide the same or substantially similar coverage as that sought. We do not believe any of the foregoing are "reasonable alternatives" that must be considered and disqualified under ORS 215.275(2), prior to approving a utility facility in the EFU zone. The hearings officer erred to the extent he found otherwise.

A second set of criticisms involves alternatives that ostensibly would satisfy one or more of petitioner's defined objectives. These include (1) collocating antennas on existing structures or utility poles on AF-10-zoned land; and (2) obtaining a variance to site a tower taller than the 100 feet allowed in the AF-10 zone, and increasing tower height to more than 150 feet, in order to use lower elevation sites zoned AF-10 to achieve similar coverage as proposed.[9]

[9] We note that the challenged decision comments, in a footnote, that "[c]overage could also be provided with a series of lower towers in lieu of a tall tower on farmland." Record 12 n 8. That comment is in a discussion of the evidence and findings of a different county decision. It is not clear whether that comment was also directed at the present application. Arguably, the use of multiple, shorter towers on non-EFU-zoned land

As with *Jordan*, the provider in this case proposed its own tower because one of its objectives, apparently, is to lease space to other providers. Therefore, any collocation alternative fails to satisfy at least one of petitioner's objectives and need not be considered.[10]

With regard to the contention that petitioner should seek a variance from the tower height standards in the AF-10 zone, variance criteria are typically difficult to satisfy, and the county's variance criteria are no exception. To obtain a variance from the 100-foot height limitation, petitioner must demonstrate, among other things, that compliance with the limitation would create an "unnecessary hardship," due to "physical characteristics of the land [that are] not typical of the area." Community Development Code 435-4.1. It seems doubtful that petitioner could demonstrate that the low elevation of many of the AF-10-zoned lands within the search ring are "not typical of the area." We do not believe that ORS 215.275 requires petitioner to consider alternative locations on which the proposed facility would require a variance from applicable zoning standards. Such lands are either not

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could, theoretically, achieve petitioner's objectives by allowing petitioner to provide coverage within the selected area and allocate space for other providers to lease. However, respondents do not cite us to any argument or evidence to that effect. In the absence of some indication that multiple, shorter towers would provide the type and range of coverage that petitioner seeks, we do not believe that such an option must be addressed as a reasonable alternative.

[10] As far as we can tell, no other wireless tower exists within the search area. The collocation options discussed in the decision center around use of existing utility poles, presumably relatively short poles supporting telephone and power lines. Even if petitioner's objectives did not include leasing space on its own tower, it is questionable whether siting multiple antenna on existing utility poles could provide substantially similar coverage to Highway 219 and the desired rural area. Even if collocating on existing utility poles could provide similar coverage, it is probable that doing so would require collocating on utility poles within the EFU zone. If so, such facilities would also require analysis and approval under ORS 215.275. Although the challenged decision suggests otherwise, we agree with petitioner that a utility provider is not required to consider as a reasonable alternative under ORS 215.275(2) other EFU-zoned sites, even sites already occupied by nonfarm uses. *See Dayton Prairie*, 170 Or App at 11 (rejecting an argument that the utility provider must compare alternative EFU-zoned sites and choose the site that is least disruptive to agriculture). We note, however, that ORS 215.275(5) requires the local government to impose clear and objective conditions to mitigate and minimize the impacts of the facility on farm practices. Although we need not and do not determine here the meaning or scope of ORS 215.275(5), it is arguable that that subsection would authorize the local government to require a utility provider to locate its facility at a suitable site within the EFU zone in such a way that the facility will have the least impact on farm practices, for example, a site already occupied by a nonfarm use.

"reasonable alternatives" or simply not "available" under ORS 215.275(2)(c), as a matter of law.

b. Alternatives Considered

A third set of criticisms involves challenges to alternative sites that petitioner considered. As noted, petitioner considered and rejected 26 sites within the search ring zoned AF-10. The county's decision does not directly address any of these 26 sites, or dispute petitioner's reasons for rejecting them, with the following possible exceptions. As noted earlier, parts of the decision can be read to challenge petitioner's method for contacting landowners and the transparency of negotiations between petitioner and those landowners initially willing to consider leasing their land. However, it is not clear that these comments are bases for denial and we understand respondents to concede they are not. Other parts of the decision can be read to challenge the 17 sites zoned AF-10 that were rejected because their elevation is no greater than 600 feet AMSL. *See* Record 14. However, as noted above, locating a tower with an antenna height of 825 to 875 feet AMSL on any of these properties would require a variance, while we are cited to no evidence suggesting that a 100-foot tower on any of these properties would meet petitioner's coverage objectives.

Petitioner also considered and rejected 15 additional sites suggested by opponents, located outside the search ring. Record 33-38. The challenged decision did not address petitioner's response that rejects these 15 sites, because the response was submitted after the date the opponents' memorandum that forms the bulk of the hearings officer's decision was filed. It is not clear whether the challenged decision denied the application based on the view that any of the 15 alternatives located outside the search ring were "reasonable alternatives." If so, it does not appear that the county considered petitioner's response. On remand, if the hearings officer considers any of the 15 sites as alternatives, he should consider petitioner's response. We note only in this regard that almost all of these sites appear to be miles from the subject property and at lower elevations, which calls into

question whether they could provide substantially similar coverage as that provided by sites within the search ring. As explained earlier, sites that cannot meet petitioner's defined coverage objectives are not reasonable alternatives.

c. Aerial Spraying

Finally, the decision discusses ORS 215.275(5) and the issue of whether the tower will interfere with aerial spraying of farms in the area. Record 15; *see* n 3. We understand respondents to argue that the discussion of ORS 215.275(5) reflects the county's view that petitioner failed to demonstrate that the proposed tower can be conditioned so as to not interfere with farm practices, specifically aerial spraying, and therefore the application must be denied. We need not address that issue, because we do not believe that the issue of compliance with ORS 215.275(5) formed a basis for denying the challenged application. The hearings officer's decision cites to evidence that the proposed tower may have an impact on nearby farm activities, but does not address the legal question of whether that impact was sufficient to deny the application.

CONCLUSION

We agree with petitioner that the hearings officer's decision misconstrues ORS 215.275 in the ways discussed above. We also agree with petitioner that the hearings officer's misconstruction of the law is so pervasive that it is not clear whether the application was denied based on a proper application of the law. We conclude that a remand is appropriate to allow the hearings officer to apply the law to the evidence in a manner that is consistent with this opinion and, if necessary, to address the additional evidence petitioner submitted on February 8, 2002, to respond to opponents' evidence regarding alternative sites.

The county's decision is remanded.