BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FALCON HEIGHTS WATER
AND SEWER DISTRICT,
Petitioner,

vs.

KLAMATH COUNTY,
Respondent,

and

RYAN KLIEWER, TALLIE THOMPSON,
LAURINE GRAHAM, BRUCE THOMPSON,
DENA HADWICK, BARRY J. FRANK,
DAYLE ROBNETT, DAN C. RAJNUS
and BEVERLY L. RAJNUS,
Intervenors-Respondents.

LUBA No. 2011-068

FINAL OPINION
AND ORDER

Appeal from Klamath County.

Gregory S. Hathaway, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief were E. Michael Connors and Hathaway Koback Connors LLP.

No appearance by Klamath County.

Justin E. Throne, Klamath Falls, filed the response brief and argued on behalf of intervenors-respondents.

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

REMANDED 12/22/2011

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by the county denying an application for a conditional use permit to site a wastewater treatment system on land zoned exclusive farm use.

FACTS

Petitioner is a water and sewer district that operates the wastewater treatment system for the Falcon Heights housing development, a housing development located approximately seven miles to the south of the city of Klamath Falls and three miles south of the Klamath Falls airport. The development was constructed in the 1950s as military housing and was acquired and rehabilitated in the 1990s for use as low income housing. The development is designated as an exception area in the county's comprehensive plan and is zoned Non-Resource. The existing sewer system that serves the development consists of a force main pipeline that connects to a vault on the airport property, which then gravity feeds the wastewater from the vault through pipes into to the City of Klamath Falls' wastewater treatment plant.[1] Record 269-70. The major components of the existing treatment system

[1] Petitioner's engineer's report includes the following description of the current wastewater collection system:

> "The sewage is collected via laterals at each individual unit and is transported to the 8 inch trunk main lines. * * * All mainline piping was installed when the development was constructed in the late 1950s. The mainline pipe diameters are 8 inch pipe and the laterals are 4 inch and 6 inch. * * * The mainlines follow the local topography and generally flow from north to south and are interconnected with standard concrete manholes with steel frames and lids. The sewerage is then discharged into the sewer lift station which is located near the entrance of the development.
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> * * * * *
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> "The District has approximately 15,600 lineal feet of 8 inch concrete force main * * * [that] runs along the north right of way of Old Midland Road approximately 2,800 feet east and then makes a 90 degree turn at Spring Lake Road and continues along the east side of Spring Lake Road for approximately 12,800 feet and discharges [in]to a vault located on the Kingsley Field Air Base property at the old City Sewer Treatment Plant location." Record 275-79.

are at the end of their useful life, and the condition of the system has created levels of hydrogen sulfide gas and sulfuric acid within the existing pipes that are significantly beyond acceptable limits set by the Oregon Department of Environmental Quality (DEQ).

Due to the deterioration of the existing system, petitioner retained an engineer and an environmental consultant to provide it with an analysis of its options for providing wastewater treatment in the future. The engineer's report identified three alternatives. First, petitioner could replace the existing system's components and continue transporting wastewater into the city's wastewater treatment plant. Second, petitioner could construct a package treatment plant with secondary treatment ponds.[2] Third, petitioner could construct a facultative pond system without a treatment plant.[3]

Petitioner applied to the county for a conditional use permit to site a facultative pond system on a 75-acre parcel zoned Exclusive Farm Use (EFU), located approximately 1 mile west of the housing development. Treated wastewater would be applied to the surface of a 20-acre portion of the 75-acre parcel. *See* n 3. The planning commission recommended that the board of commissioners deny the application, and the board of commissioners subsequently denied the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

ORS 215.283(1)(c) provides that "[u]tility facilities necessary for public service" may be established on EFU-zoned land. ORS 215.275(2) provides that to demonstrate that a utility facility is "necessary for public service," the applicant must show that "reasonable

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[2] As explained by petitioner's engineer, a package treatment plant treats wastewater using a chemical treatment process that results in an effluent that must be disposed of in a secondary treatment pond with subsurface disposal or surface irrigation, and requires a five-acre site for the package treatment plant, an additional 5 acres for the secondary treatment ponds, and a 20-acre site for irrigation. Record 286.

[3] As explained by petitioner's engineer, a facultative pond system uses lagoons to dispose of wastewater. The system pumps wastewater into a primary pond, then into a secondary pond, through a chlorine contact chamber, and into a storage pond, where it is stored until it is irrigated onto an approximately 20 acre land area. Record 288-89.

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 * * *."[4] Those factors include, as relevant here (1) technical and engineering feasibility, (2) lack of available urban and nonresource lands, (3) public health and safety and (4) state and federal requirements.[5] However, ORS 215.275(3) provides that in considering the factors listed in ORS 215.275(2):

> "[c]osts 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." (Emphasis added.)

The planning commission concluded that petitioner had not established that the facility is "necessary" on EFU-zoned land and recommended that the board of commissioners deny the application. The planning commission concluded that petitioner selected its preferred

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[4] OAR 660-033-0130(16) provides identical standards to those set out in ORS 215.275.

[5] ORS 215.275 provides, in relevant part:

> "(1) A utility facility established under ORS * * * 215.283(1)(c) 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 for approval under ORS 215.213 (1)(c) or 215.283 (1)(c) 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;
>
> "(c) Lack of available urban and nonresource lands;
>
> "(d) Availability of existing rights of way;
>
> "(e) Public health and safety; and
>
> "(f) Other requirements of state or federal agencies."

alternative, a facultative pond on EFU-zoned land, solely on the basis that that alternative was the least expensive system for petitioner to construct and operate and that in so doing it impermissibly considered "cost alone" as "the only consideration" in determining that its facility must be sited on EFU-zoned land. According to the planning commission, petitioner failed to demonstrate that it considered reasonable alternatives to siting its facility on EFU zoned land, namely repairing or replacing the existing three-mile sewer line to the vault located on the airport property that gravity feeds to the city treatment plant.[6] The Board of Commissioners adopted the planning commission's recommendation and denied the application.

In its first assignment of error, petitioner argues that the county's findings fail to explain why the county concluded that petitioner limited its consideration to the cost of

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[6] The planning commission found in relevant part:

> "The Planning Commission was not convinced that the alternatives were considered on anything other than costs, and, because of that, other reasonable alternatives were not given due consideration.
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> "* * * [A] utility facility may be sited on EFU land if it is necessary to site the facility on agricultural land in order to provide the utility service. State law requires a utility facility applicant to consider 'reasonable alternatives' to a proposed facility on EFU land. In evaluating alternatives, an applicant may consider cost, <u>but may not reject an alternative based on cost alone</u>. Rather, the applicant must show that cost, in combination with technical or other practical considerations makes the alternative infeasible. *See* ORS 215.275.
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> "The Planning Commission finds that the applicant did not adequately demonstrate that the proposed facility is consistent with ORS 215.275 because the preferred alternative was based on cost along so that other reasonable alternatives were not adequately considered.
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> " * * * * *
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> "The Planning Commission stated that they did not think that the facility <u>must</u> be located on EFU land because other alternatives, such as replacing the existing sewer line, are available which the applicant has not demonstrated would be unreasonable.
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> " * * * * *
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> "The Planning Commission found that the applicant only considered cost when picking the preferred alternative and did not adequately demonstrate that other alternatives were unreasonable or not economically viable." Record 36-37 (underlining in original.)

constructing the facility on EFU-zoned land. ORS 215.275(3). Petitioner argues that the county's findings fail to address the non-cost-related explanations in the record for why petitioner chose the alternative of constructing a facultative pond on EFU-zoned land. Petitioner argues that its engineering report and testimony from its environmental expert identified technical and engineering feasibility issues, public health and safety issues, and other state and federal regulatory and permitting requirements that created challenges related to the three alternatives, all of which are unrelated to the cost of the various alternatives.

As discussed above, petitioner's engineering report identified as a potential alternative repairing or replacing the existing system and continuing to pump wastewater into the city of Klamath Falls' wastewater treatment system. The report explained that the current system is not reparable and would need to be replaced. Record 284. The report identified technical and engineering challenges and public health and safety issues related to this alternative, due to the flat grade of the land that in part is responsible for excessive levels of hydrogen sulfide gas and sulfuric acid. Record 284-85. Petitioner's environmental consultant further explained the complex permitting requirements for replacing the existing system and concluded that it was unlikely that all of the necessary permits could be obtained. Record 22-23, 29-30. The report estimated the cost of this alternative at approximately $7.5 million, making it the most expensive alternative of the three identified in the report. Record 293. The report also identified building a package treatment plant with secondary treatment ponds as an alternative. Record 286-87. The estimated cost for that system is approximately $4.5 million. Record 293. Finally, the report identified the alternative of constructing a facultative pond system, and estimated the cost of that treatment option to be approximately $3.5 million. Record 288-90, 293.

Petitioner then evaluated the alternative of locating a package treatment plant or a facultative pond system on Falcon Heights housing development property, but concluded that that location was not a reasonable alternative due to technical and engineering as well as

public safety challenges associated with the property, namely the lack of a large enough site to accommodate the package treatment plant and required treatment ponds, and the fact that treatment ponds are prohibited on the property because it is subject to airport overlay restrictions. Petitioner also identified an available parcel of land designated in the comprehensive plan as exception land and zoned Non Resource, located approximately 500 feet to the northeast of Falcon Heights on Miller Hill, for construction of a package treatment plant or facultative pond, but concluded that the property was not a reasonable alternative due to extremely steep slopes, poor soil types for infiltration treatment of wastewater, and its location within an airport overlay zone. Record 86-90. Finally, petitioner identified the subject EFU-zoned property as a location for a facultative pond system, and ultimately concluded that the facultative pond system in that location was the best alternative.

Intervenors respond by pointing to petitioner's engineer's testimony at the planning commission hearing.[7] According to intervenors, that testimony is evidence that supports the county's finding that petitioner considered only the lower cost of the package treatment or facultative pond system on land zoned EFU in ruling out the alternative of replacing the

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[7] During the planning commission petitioner's engineer, Darryl Anderson, provided the following testimony:

> "Ernie: Why not repair the existing system? You picked the option that would tick off the most people.
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> "Darryl: This was the cheapest alternative. We would have to replace the line which is a huge endeavor. The pipeline is pretty deteriorated. It will keep the water from going into the river, which the City is concerned about tonight.
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> " * * * *
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> "Joe: When you mentioned why you chose this option, you mentioned cost, but you didn't mention any others. Is this more feasible than replacing the system? We're trying to demonstrate technical and feasibility issues, and I haven't heard anything about that.
>
> "Darryl: There have been systems like this built, so it is feasible. The City's rates have a play into the cost, including liability issues. Is it feasible to replace the line? Yes. Its feasible to truck it away. But it comes down to what's cost effective." Record 159-60.

existing system. Record 159-60. While that testimony is some evidence that cost was an important consideration in petitioner's alternatives analysis, that testimony does not establish that the technical, engineering, and health and safety challenges that were identified in the engineering report and by petitioner's environmental consultant were not also important considerations as well. Although the testimony of petitioner's engineer is evidence that petitioner considered cost as a significant factor in ruling out the replacement pipeline alternative, the county's findings do not address the other evidence in the record that points out technical and engineering and other challenges associated with the other two alternatives, and in particular does not address the permitting challenges that petitioner would face if it sought to replace the existing system. ORS 215.275(3) does not prohibit consideration of cost *at all* in considering reasonable alternatives; it prohibits consideration of cost alone as the only consideration in applying the factors listed in ORS 215.275(2)(a) through (f).

We agree with petitioner that the county's findings do not adequately explain its conclusion that petitioner considered only the cost of the system in eliminating the other alternative facility options, and that conclusion seems to be at odds with the evidence in the record. While it is undisputed that replacing the current system is the most expensive of the three alternatives, petitioner's engineering report and petitioner's environmental consultant identified technical and engineering challenges and public health and safety issues associated with that alternative that are independent of costs. The county's findings do not recognize those challenges or otherwise explain how it concluded that petitioner's choice of alternatives was impermissibly based on "cost alone."

Also in its first assignment of error, petitioner argues that the county applied an incorrect legal standard under ORS 215.275(2) in requiring petitioner to demonstrate that the other alternatives to siting the facility on EFU land are "unreasonable." Citing *City of Albany v. Linn County*, 40 Or LUBA 38, 46 (2001), petitioner argues that the correct

standard is that the applicant for a utility facility under ORS 215.275 must demonstrate that non-EFU alternatives are "infeasible."

In *City of Albany* we paraphrased the "reasonable alternatives" language of ORS 215.275(2) as requiring that the applicant consider whether it is "feasible" to site the utility facility on alternative non-EFU sites, citing cases that predate the adoption of ORS 215.275(2). That may or may not represent an accurate paraphrase of ORS 215.275(2). *See Friends of Parrett Mountain v. Northwest Natural Gas Company*, 336 Or 93, 107-08, 79 P3d 869 (2003) (rejecting an argument that under ORS 215.275(2) a "reasonable alternative" is one that is "facially feasible" or "capable of realization"). In any case, we do not understand petitioner's apparent argument that the county should have applied a "feasibility" standard rather than the "reasonable alternative" standard. To the extent petitioner argues that there is a difference between those standards, so phrased, then it is obvious that the county correctly applied the "reasonable alternative" standard set out in ORS 215.275(2). To the extent petitioner argues that a "reasonable" alternative means a "feasible" alternative, in the sense that any alternative that is technically possible or "capable of realization" is a reasonable alternative, the Oregon Supreme Court rejected a similar argument in *Friends of Parrett Mountain*.

Finally in this assignment of error, petitioner argues that the evidence in the record overwhelmingly supports petitioner's assertion that it considered and could not find any reasonable alternatives to siting the facility on EFU land. However, because the county's findings do not recognize or otherwise address that evidence, we need not and do not address the argument. On remand, the county must address that evidence in the first instance.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

The county found that criteria set out at Klamath County Land Development Code (KCLDC) 54.040(C), as well as the requirements of ORS 215.296(1), were not met:

> "The applicable criteria in KCLDC Article 54.040(C) requires a finding that '*[t]he location, size, design, and operating characteristics of the proposed use will not force a significant change in, or significantly increase the cost of, accepted farm or forestry practices in nearby agricultural or forest lands.*'
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> "It is also a requirement that the project meet ORS 215.296(1)(a)(b) which states the following:
>
> "*(1) A use allowed under * * * ORS 215.283 (2) may be approved only where the local governing body or its designee finds that the use will not:*
>
> *"(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or*
>
> *"(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use*.
>
> "The Planning Commission found, in spite of testimony from the applicant regarding Oregon DEQ requirements to contain spray irrigation on site, that enough spray drift would occur during high winds to significantly impact the organic farming operation, which would be in violation of KCLDC 54.040(C) and similar language in Oregon Revised Statutes (ORS 215.296)." Record 38 (italics in original.)

As referenced in the findings quoted above, one of the intervenors (Kliewer) is an organic farmer with a farm adjacent to the subject property on the south. Kliewer testified about his concerns that irrigation spray would drift onto his farm during high winds and that it would cause the farm to be disqualified from organic production. That testimony led the county to conclude that spray drift would "significantly impact" Kliewer's farming operation.

In a portion of its second assignment of error, petitioner argues that the county's findings are inadequate to explain what the "significant impacts" to the adjacent organic farm would be from the utility facility. We agree with petitioner that the county's findings are inadequate to explain how the proposed facility would either "force a significant change in" the adjacent farming practices or "significantly increase the cost of" the organic farming

operation under KCLDC 54.040(C) or ORS 215.296(1).[8] The county does not explain what the "significant impacts" to the organic farming operation would be, or explain how the potential for spray drift from the proposed facility would either "force a significant change in" Kliewer's farm practices or "significantly increase the cost of" his operation. In denying an application for land use approval based on a finding that the application does not comply with applicable criteria, the local government's findings must be sufficient to inform the applicant either what steps are necessary to obtain approval or that it is unlikely that the application will be approved. *Commonwealth Properties v. Washington County*, 35 Or App 387, 400, 582 P2d 1384 (1978); *Rogue Valley Manor v. City of Medford*, 38 Or LUBA 266, 272 (2000). The county's findings do neither.

Petitioner also cites ORS 215.275(5), which provides:

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

Petitioner argues that ORS 215.275(5) does not allow the county to deny a proposed utility facility that it determines would significantly change accepted farm practices or significantly increase the cost of farm practices on surrounding farm lands if the impacts could be minimized or mitigated through clear and objective conditions. Petitioner argues that the county erred in failing to consider whether any conditions could be imposed to mitigate or minimize the impacts of the proposed facility.

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[8] By its terms, ORS 215.296(1) applies to uses conditionally allowed under ORS 215.283(2), not a utility facility that is an allowed use under ORS 215.283(1), and it is not clear to us why the county believes ORS 215.296(1) applies to the proposed use. It is also unclear whether the county can apply KCLDC 54.040(C) to approve or deny a use listed in ORS 215.296(1). *See Brentmar v. Jackson County*, 321 Or 481, 487, 496, 900 P2d 1030 (1995) (for uses listed in ORS 215.283(1) counties may not enact local land use ordinances that are more restrictive than state law allows). However, no party disputes that ORS 215.296(1) and KCLDC 54.040(C) apply as approval criteria, and we assume for purposes of this opinion that they do apply.

We agree with petitioner that ORS 215.275(5) requires the county to consider whether the imposition of clear and objective conditions on the facility would prevent a significant change in accepted farm practices or prevent a significant increase in the cost of farm practices, and to approve the proposed facility with those clear and objective conditions if the conditions would minimize or mitigate the impacts. The county did not consider whether any clear and objective conditions would mitigate and minimize the impacts of the proposed facility. On remand, the county must determine whether the proposed facility would significantly change accepted farm practices on the organic farm or significantly increase the cost of farm practices on the organic farm, and consider whether any clear and objective conditions would mitigate the identified impacts.

Finally, petitioner argues that the county's conclusion that spray drift would occur during high winds and that it would significantly impact the adjacent organic farm is not supported by any evidence in the record. Petitioner argues that Kliewer's testimony is not substantial evidence where petitioner's environmental expert responded to the organic farmer's concerns by explaining that the irrigation area is far enough away from the organics farm to avoid spray drift from irrigation, that DEQ will require a recycled water use plan that will ensure that no impacts from spray irrigation drift onto neighboring properties, and that DEQ rules prohibit spray irrigation during high winds. Record 23-24; Supplemental Record 39-40.

Substantial evidence is evidence a reasonable person would rely on in making a decision. In reviewing the evidence, LUBA may not substitute its judgment for that of the local decision maker. Rather, LUBA must consider all the evidence to which it is directed, and determine whether based on that evidence, a reasonable local decision maker could reach the decision that it did. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988). We conclude that it was not reasonable for the county to rely on Kliewer's testimony that merely expressed concern about the possibility of spray drift causing impacts to his

farm, particularly where petitioner provided evidence from its environmental expert that spray drift to the organic farm would not occur because of its distance from the facility and because of DEQ rules. The county does not recognize or otherwise explain why it chose not to rely on that expert evidence and instead chose to rely on the fairly speculative testimony of the adjacent organic farmer.

The second assignment of error is sustained.

The county's decision is remanded.