BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WKN CHOPIN, LLC,
Petitioner,

vs.

UMATILLA COUNTY,
Respondent,

and

BLUE MOUNTAIN ALLIANCE,
DAVE PRICE, RICHARD JOLLY,
and UMATILLA ELECTRIC COOPERATIVE,
Intervenors-Respondents.

LUBA No. 2012-016

FINAL OPINION
AND ORDER

Appeal from Umatilla County.

Douglas E. Hojem, Pendleton, filed the petition for review and argued on behalf of petitioner. With him on the brief was Corey, Byler, Rew, Lorenzen & Hojem.

No appearance by Umatilla County.

Daniel Kearns, Portland, filed a response brief and argued on behalf of intervenors-respondents Blue Mountain Alliance, Dave Price and Richard Jolly.

Peter Livingston, Portland, filed a response brief and argued on behalf of intervenor-respondent Umatilla Electric Cooperative. With him on the brief was Schwabe, Williamson and Wyatt, PC.

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

REVERSED 07/11/2012

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a board of county commissioners' decision that denies its request for county approval to construct a 12-mile long 69 kilovolt (kV) transmission line to connect its wind turbine electrical generation facility to a 230 kV transmission line owned by PacifiCorp.

MOTION TO INTERVENE

Blue Mountain Alliance, Dave Price and Richard Jolly (collectively BMA) and Umatilla Electric Cooperative (UEC) move to intervene on the side of respondent. There is no opposition to the motions, and they are allowed.

FACTS

Petitioner submitted two applications for land use approval. In the first application, petitioner sought conditional use approval to construct and operate a 99 megawatt wind turbine electrical generation facility (wind turbine facility). In the second application, petitioner sought land use approval to construct a 12-mile long 69 kV transmission line to connect the wind turbine facility to a PacifiCorp 230 kV transmission line located some distance to the east.[1] The PacifiCorp 230 kV transmission line provides the connection petitioner needs to the electric power grid. The 12-mile long route would meander along several existing road rights-of-way and all but the final one half mile of the 12-mile route would be located entirely within existing rights-of-way.[2] Both the wind turbine facility and the transmission line would be located in the county's exclusive farm use (EFU) zone.

Both applications were considered at a September 29, 2011 planning commission hearing. The September 29, 2011 hearing was continued to November 17, 2011, and

[1] Petitioner initially sought approval of a 230 kV 12-mile transmission line, but altered the request to a 69 kV line to reduce visual impacts.

[2] A map showing the proposed transmission line route appears at Record 266.

petitioner agreed to explore three shorter transmission line alternative alignments. In a November 9, 2011 message to the county, petitioner explained why it believed the three alternatives were not acceptable. Record 194. The message explained that connecting via a nearby UEC transmission line (UEC alternative) would have undesirable visual impacts and require significant rebuilding and upgrading of UEC's transmission line. A second alternative, the PacifiCorp 69 kV alternative, would connect with an existing PacifiCorp 69 kV transmission line that passes near the wind turbine facility.[3] Petitioner took the position that the PacifiCorp 69 kV line is older and not suitable for upgrades that would be necessary to make its project work. The third alternative, the Bonneville Power alternative (BP alternative), would require a short transmission line to connect the wind turbine facility with an existing BP transmission line that is located a short distance north of the wind turbine facility. In rejecting that alignment, petitioner cited BP's current surplus of wind power, BP's lack of interest in acquiring additional wind power, and existing litigation between BP and other wind energy companies regarding alleged BP actions to favor its own hydro power over wind power.

Shortly prior to the November 17, 2011 public hearing before the planning commission, petitioner provided additional explanations for why it believes the UEC, PacifiCorp 69 kV and BP alternatives are unsuitable. Record 183-86. At the conclusion of the November 17, 2011 public hearing, the planning commission voted to deny the requested approval for the 12-mile long alignment. The planning commission's written decision was approved on November 23, 2011. The record does not appear to include a copy of the planning commission's separate decision granting conditional use approval for the wind power facility. However, that decision was not appealed and is not before us in this appeal.

[3] The PacifiCorp 69 kV alternative is not the same transmission line as the PacifiCorp 230 kV transmission line that petitioner's 12-mile long alternative would connect with. The PacificCorp 69 kV transmission line is located approximately one mile from the site where petitioner's wind turbine facility would be located.

In its November 23, 2011 decision denying land use approval for the 12-mile long alignment, the planning commission concluded petitioner had not established that the application complies with Umatilla County Comprehensive Plan Public Facilities and Services Policy 19 (Policy 19) and Umatilla County Development Code (UCDC) 152.617(11)(7). Policy 19 provides, in part, that "transmission lines should be located within existing corridors as much as possible." UCDC 152.617(II)(7) duplicates ORS 215.275(2) and requires an applicant to demonstrate that there are not alternatives to locating a utility facility on EFU-zoned land. In reaching those conclusions, the planning commission found that the UEC, PacifiCorp 69 kV and BP alternatives would only require transmission lines of two, one and three miles respectively, rather than the 12 mile long transmission line that petitioner proposes, and that petitioner failed to establish that those alternatives are not feasible. Record 138-42.

On December 6, 2011, petitioner appealed the planning commission's decision regarding its proposed transmission line to the board of county commissioners. In that appeal, petitioner for the first time took the position that petitioner is not legally obligated to consider any of the three alternatives. Petitioner's wind turbine facility site is surrounded by EFU-zoned land, as is the area of the proposed connection with the PacifiCorp 230 kV transmission line. Therefore, all alternatives for connecting the wind turbine facility with the PacifiCorp 230 kV transmission line must cross EFU-zoned land. Petitioner took the position that ORS 215.275(2) only requires consideration of alternatives that do not require use of EFU-zoned land. Record 132. In its December 6, 2011 notice of appeal, petitioner took the position that the three alternative alignments, like the 12-mile long alignment that petitioner favors, all cross EFU-zoned lands. Therefore, petitioner argued, the three alternatives are not alternative alignments that must be considered under ORS 215.275(2), and the planning commission erred by relying on those alternatives to deny its application.

On appeal, the board of commissioners affirmed the planning commission's decision and this appeal followed.

INTRODUCTION

Under ORS 215.283(1)(c), "[u]tility facilities necessary for public service" are permitted in EFU zones. *See* n 9. ORS 215.283(1)(c) operates in conjunction with ORS 215.275. ORS 215.275(1), (2) and (5) are potentially relevant in this appeal and the complete text of those subsections is set out in the margin.[4] ORS 215.275(1) provides that the utility facilities authorized by ORS 215.283(1)(c) are "necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service." ORS 215.275(2), which is at the heart of petitioner's first five assignments of error, sets out the alternatives analysis that must be used to demonstrate that a proposed utility facility is the type of utility facility authorized by ORS 215.283(1)(c) and 215.275(1). ORS 215.275(5),

---

[4] ORS 215.275(2) and (5) provide as follows:

> "(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:
>
> "(a) Technical and engineering feasibility;
>
> "(b) The proposed facility is locationally dependent. * * *;
>
> "(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."
>
> "(5) The governing body of the county or its designee shall impose clear and objective conditions on an application for utility facility siting under ORS 215.213 (1)(c) or 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."

which is cited by intervenors in response to petitioner's sixth assignments of error, authorizes counties to impose conditions of approval to minimize utility facility impacts on farm uses.

The county analyzed petitioner's request as a request for approval of the 12-mile long transmission line alignment as a "utility facilit[y] necessary for public service" under ORS 215.275 and UCDC 152.617(II)(7). UCDC 152.617(II)(7) is substantively identical to the statutory language. The central dispute in this appeal therefore presents a question of statutory interpretation, rather than a question of interpretation of local land use law, and in this opinion we focus on the statute. *Forster v. Polk County*, 115 Or App 475, 478, 839 P2d 241 (1992). Specifically, the statutory question is whether ORS 215.275 and its local law analogue UCDC 152.617(II)(7) require that petitioner must demonstrate it is not feasible to use EFU-zoned alternative alignments to the 12-mile long EFU-zoned proposed alignment, where the alternatives are much shorter and therefore likely will utilize less EFU zoned land.[5] The county found that petitioner is required to consider such alternatives and that petitioner inadequately explained why it is not feasible to use the shorter, less disruptive alternatives. Petitioner contends that it does not have to consider other EFU-zoned alternatives. A related dispute is whether Policy 19 can also be applied in this case to require that petitioner establish that it is infeasible to co-locate its proposed transmission line within the existing UEC, BP or PacifiCorp 69 kV transmission line corridors. A final issue, which is raised for the first time in intervenors' response briefs, is whether petitioner's request should have been analyzed as a "[c]ommercial utility facilit[y]," which is authorized by a

[5] We understand petitioner to contend it is improperly simplistic to assume that its proposed 12-mile long transmission line will use 12 times as much EFU-zoned land as a one-mile long alternative. The 12-mile long proposal will be complete when the connection is made with the PacifiCorp 230 kV transmission line. The three shorter alternatives, with the possible exception of the BP alternative which presumably would require that petitioner sell its power to BP rather than PacifiCorp, would all require reliance on other intermediate transmission lines to complete the connection with the PacifiCorp 230 kV transmission line. Petitioner contends that upgrades may be required to some or all of those transmission lines with a requirement for additional right-of-way that could require use of additional EFU-zoned land.

different section of the EFU zone, ORS 215.283(2)(g), and is subject to different approval standards.

Because the eighth assignment of error is potentially dispositive and would require that we affirm the county's decision without regard to the merits of the remaining assignments of error, we turn first to that assignment of error.

EIGHTH ASSIGNMENT OF ERROR

As noted earlier, Policy 19 provides in part that "transmission lines should be located within existing corridors as much as possible."[6] The board of commissioners found that Policy 19 was identified as a "separate and independent basis" for the planning commission's decision and that petitioner's failure to challenge that aspect of the planning commission's decision in its December 6, 2011 notice of appeal "is fatal to its appeal to the [board of commissioners] in light of the requirement of UCDC 152.766 that an appellant state the specific 'reasons for the appeal pursuant to the criteria for review.'" Record 13.

It is clear that where, as here, a land use regulation requires that the issues to be raised in a local appeal must be stated in the notice of local appeal, those issues must be adequately identified in the local notice of appeal or the issues are not preserved for review. *Miles v. City of Florence*, 190 Or App 500, 510, 79 P3d 382 (2003) (a party may not raise an issue at LUBA if no party specified the issue as a basis for appeal before the local appeal body). Therefore, if Policy 19 is a separate basis for the planning commission's finding that petitioner failed to adequately consider the three alternative alignments, and petitioner failed to preserve its right to challenge the planning commission's reliance on Policy 19 for review by the board of county commissioners, the board of county commissioners could affirm the

---

[6] The complete text of Policy 19 is set out below:

> "Where feasible, all utility lines and facilities shall be located on or adjacent to existing public or private rights-of-way so as to avoid dividing existing farm or forest units; and transmission lines should be located within existing corridors as much as possible."

planning commission's decision based on that failure alone, without regard to the merits of the issues that petitioner did preserve for review by the board of commissioners.

In its November 23, 2011 decision, after quoting the text of Policy 19, the planning commission found:

> "The proposal could be found to comply with a part of Policy 19 only in so far as the proposed route was located primarily within public rights-of-way. [See first part of Policy 19 at n 6] However, the Planning Commission found that the application did not comply with the second part of Policy 19 in that the new line could have co-located within one of the three existing transmission corridors. [The] Planning Commission requested that the applicant provide additional information about the feasibility and impacts of co-locating within the three existing transmission corridors in the vicinity. * * * The applicant provided a brief response for each of the three co-location options. [The] Planning Commission recognized the applicant's reasoning for not co-locating and for requesting approval of a new transmission line corridor but did not concur that co-location was not feasible." Record 137.

In a later portion of its decision addressing the alternatives analysis required by ORS 215.275(2) and UCDC 152.617(II)(7), the planning commission also referred to Policy 19 twice.[7]

We agree with the board of commissioners that Policy 19 appears to constitute a separate and independent basis for the planning commission's findings that petitioner's application should be denied because petitioner failed to establish that the three co-location alternatives are infeasible. The board of commissioners also seems to have relied on Policy 19, at least in part, in rendering its decision in this matter. To be clear, the issue under the eighth assignment of error is not whether the planning commission or board of

---

[7] Those references appear at page 8 of the planning commission's decision and are set out below:

> "* * * Co-locating within the UEC corridor would comply with * * * Policy 19 * * *.
>
> "* * * * *
>
> "* * * Co-locating within [the] PacifiCorp transmission corridor would comply with * * * Policy 19 * * *."

commissioners erred by relying on Policy 19 to deny petitioner's application. Petitioner's fifth assignment of error challenges the county's reliance on Policy 19 and we consider that challenge below. The only issue to be resolved under the eighth assignment of error is whether petitioner's December 6, 2011 notice of appeal was adequate to preserve that issue for review by the board of commissioners. If not, the board of commissioners' decision must be affirmed.

When the issue of shorter alternatives for the needed transmission line first arose before the planning commission during the September 29, 2011 hearing, as far as we can tell all parties assumed the source of authority for requiring consideration of those alternative was ORS 215.275(2) and UCDC 152.617(II)(7). The notice that preceded the September 29, 2011 planning commission hearing identified UCDC 152.617(II)(7) as an approval criterion, but did not mention Policy 19 or any other comprehensive plan policies. Record 226; 242. In the staff presentation to the planning commission there were references to UCDC 152.617 and ORS 215.275, but no mention of Policy 19. As far as we can tell the first reference to Policy 19 was in the planning commission's November 23, 2011 decision itself.

The issue of whether petitioner needed to consider the three shorter EFU-zoned alternatives, and the adequacy of petitioner's consideration of those alternatives, arose first out of ORS 215.275 and only belatedly was based in part on Policy 19. Petitioner's December 6, 2011 notice of appeal clearly preserved the issue of whether petitioner could be required under ORS 215.275(2) to demonstrate that the three identified alternatives are feasible alternatives.[8] It is true that petitioner's December 6, 2011 notice of appeal only

[8] Petitioner's December 6, 2011 notice of appeal includes the following text:

> "At pages 7 through 9 of the Planning Commission's Final Findings and Conclusions significant analysis was devoted to alternatives to the transmission line route proposed by [petitioner]. Consideration of these alternatives was an error by the Planning Commission and should not affect the analysis of the application because prior LUBA decisions explicitly indicate that consideration of alternatives also zoned EFU are not within the scope of the

explicitly mentions ORS 215.275 and LUBA and appellate court decisions interpreting the statute, and the notice of appeal does not explicitly challenge the planning commission's apparent reliance on Policy 19 as an additional basis for requiring consideration of the three alternatives. But the notice of appeal does explicitly challenge the planning commission's analysis at pages "7 through 9" of its decision. *See* n 8and, as noted, Policy 19 is mentioned twice on page eight of the planning commission's decision. *See* n 7. Given the planning commission's late and relatively obscure and minor reliance on Policy 19 as a basis for imposing an alternatives analysis, as opposed to its reliance ORS 215.275(2) and UCDC 152.617(II)(7), we do not believe petitioner was required to more precisely identify Policy 19 in its December 6, 2011 notice of local appeal. That notice of appeal was adequate to preserve petitioner's right to challenge the planning commission's and board of commissioners' reliance on Policy 19, in part, to require that petitioner demonstrate that the three alternative alignments are infeasible. Petitioner's explicit reference to the planning commission's analysis on pages "7 through 9" of its decision, where Policy 19 was mentioned twice, was sufficient to preserve petitioner's right to challenge the planning commission's reliance on Policy 19. *See Hilliard v. Lane County Commrs*, 51 Or App 587, 595, 626 P2d 905 (1981) (LUBA may not invoke "technical requirements of pleading having no statutory basis"). The board of county commissioners erred by concluding that petitioner failed to preserve its right to challenge the planning commission's reliance on Policy 19.

The eighth assignment of error is sustained.

'reasonable alternatives' analysis under ORS 215.275(2). *See Hamilton v. Jackson County*, LUBA No. 2010-112; *T-Mobile USA v. Yamhill County*, 55 Or LUBA 83 (2007). As all of those alternative routes are also located in land zoned EFU the Planning Commission should not have considered the alternatives in deciding whether to grant or deny WKN's application." Record 132.

FIRST THROUGH SIXTH ASSIGNMENTS OF ERROR

A. Preliminary Issue

In responding to petitioner's first through sixth assignments of error, we understand intervenors-respondents to argue initially that the county should have analyzed petitioner's proposed transmission line as part of petitioner's proposed wind turbine facility (a "commercial utility facility for the purpose of generating power for public use by sale"), rather than as a "utility facility necessary for public service." Had the county done so, intervenors argue, different approval criteria would have applied and in intervenors' view the county would have or could have denied the application under those criteria. For the reasons that follow, that response is not well taken.

The statutory EFU zone that has evolved over the years has become lengthy and quite complex. As relevant here, the statutory EFU zone distinguishes between "[u]tility facilities necessary for public service," which are permitted uses under ORS 215.283(1)(c), and "[c]ommercial utility facilities for the purpose of generating power for public use by sale," which are nonfarm uses under ORS 215.283(2)(g) that are allowed subject to county approval and the statutory approval standards set out at ORS 215.296.[9] For purposes of this

---

[9] As relevant, ORS 215.283 provides

> "(1) The following uses may be established in any area zoned for exclusive farm use:
>
> "* * * * *
>
> "(c) Utility facilities necessary for public service, including wetland waste treatment systems but not including commercial facilities for the purpose of generating electrical power for public use by sale or transmission towers over 200 feet in height. A utility facility necessary for public service may be established as provided in ORS 215.275.
>
> "* * * * *
>
> "(2) The following nonfarm uses may be established, subject to the approval of the governing body or its designee in any area zoned for exclusive farm use subject to ORS 215.296:

appeal there is one important difference between the uses that are allowed under subsection (1) of ORS 215.283 and the uses that are allowed under subsection (2) of 215.283. As the Oregon Supreme Court has interpreted those statutes, the uses allowed under subsection (1) are permitted outright and are only subject to *statutory* standards. Subsection (1) uses may not be subject to additional regulation under local law. *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995) (The legislature "intended to create two categories of use. * * * Subsection (1) uses were 'uses as of right,' or uses that a local governing body could not prevent. [S]ubsection (2) uses were 'conditional uses,' or uses that were 'subject to approval of the governing body of the county'").[10]

There are a number of problems with intervenors' intitial response to the first six assignments of error. First, ORS 197.835(3) provides that in an appeal to LUBA "[i]ssues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable." This proceeding was governed by ORS 197.763. No question was raised below concerning whether the county should have analyzed the proposed transmission line as part of the wind turbine facility and subject to ORS 215.283(2)(g) rather than as a utility facility subject to ORS 215.283(1)(c) and 215.275.

"* * * * *

"(g) Commercial utility facilities for the purpose of generating power for public use by sale.

"* * * * *

"(m) Transmission towers over 200 feet in height.

"* * * * *."

[10] The Supreme Court subsequently clarified that the legislative prohibition against additional regulation of Subsection (1) uses extends only to counties and was not intended to prohibit additional regulation of subsection (1) uses by the Land Conservation and Development Commission. *Lane County v. LCDC*, 325 Or 569, 583, 942 P2d 278 (1997).

That issue may not be raised for the first time on appeal to LUBA. *Boldt v. Clackamas County*, 21 Or LUBA 40, 47, *aff'd* 107 Or App 619, 813 P2d 1078 (1991).

Second, it is not clear what relief intervenors seek if LUBA were to agree with their position regarding the applicability of ORS 215.283(2)(g) to the transmission line. If they request LUBA to assume the county could have and would have denied the application under ORS 215.283(1)(g) and any applicable local law that might have applied in that circumstance, and ask that LUBA affirm the decision on that basis, we decline to engage in such speculation. If intervenors' request LUBA to remand the county's decision for reconsideration under ORS 215.283(2)(g) and any applicable local law, such a request is, in effect, an assignment of error or cross-assignment of error. However, intervenors did not file a cross petition for review. OAR 661-010-0030(7). [11] Neither do intervenors clearly attempt to raise this issue as a cross assignment of error in their response brief, as was permitted under our rules prior to their amendment in 2010. *Young v. Jackson County*, 49 Or LUBA 327, 344 (2005); *Copeland Sand & Gravel, Inc. v. Jackson County*, 46 Or LUBA 653, 667 (2004), *aff'd* 193 Or App 822, 94 P3d 913 (2004). The issue is therefore not properly presented in this appeal.

Even if intervenors' ORS 215.283(2)(g) issue had been properly raised below and had been properly presented in a cross petition for review, it is without merit. A transmission line

---

[11] OAR 661-010-0030(7) provides:

> "Cross Petition: Any respondent or intervenor-respondent who desires reversal or remand of an aspect of the decision on appeal regardless of the outcome under the petition for review may file a cross petition for review that includes one or more assignments of error. The cross petition for review may also include contingent cross-assignments of error, clearly labeled as such, that the Board will address only if the decision on appeal is reversed or remanded under the petition for review. The cover page shall identify the petition as a cross petition and the party filing the cross petition. The cross petition shall be filed within the time required for filing the petition for review and must comply in all respects with the requirements of this rule governing the petition for review, except that a notice of intent to appeal need not have been filed by such party."

is a type of "utility facility." ORS 215.276(1)(c).[12] As defined by ORS 215.283(1)(c), "[u]tility facilities necessary for public service" expressly do not include "commercial facilities for the purpose of generating electrical power for public use by sale or transmission towers over 200 feet in height." As noted earlier, electrical generation facilities and transmission towers over 200 feet in height are subject to approval under subsection (2) of ORS 215.283. ORS 215.283(2)(g) and (m); *see* n 9.[13] The clear implication of the exclusion of electrical generating facilities and taller transmission lines from the ORS 215.283(1)(c) definition of "[u]tility facilities necessary for public service" is that transmission lines that are shorter than 200 feet, such as the ones proposed here, are subject to approval under ORS 215.275. Otherwise, as far as we can tell, transmission lines shorter than 200 feet could not be approved in EFU zones at all.

Finally, intervenors suggest that a transmission line should be viewed as part of an electrical generating facility if all the transmission line does is transmit electrical energy from a single electrical generating facility to the electric grid. Under that suggestion a transmission line could only be viewed as a utility facility necessary for public service if it served more than one generator of electricity. We can think of no reason why the legislature could have intended to make such a distinction, and there is simply no textual or contextual support for such a distinction in the relevant statutes.

We reject intervenors' ORS 215.283(2)(g) argument.

---

[12] ORS 215.276(1)(c) provides:

> "'Transmission line' means a linear utility facility by which a utility provider transfers the utility product in bulk from a point of origin or generation, or between transfer stations, to the point at which the utility product is transferred to distribution lines for delivery to end users."

[13] ORS 215.438 also provides that "[t]he governing body of a county or its designate may allow a transmission tower over 200 feet in height to be established in any zone subject to reasonable conditions imposed by the governing body or its designate."

B. The County Erred by Relying on ORS 215.275(2) and UCDC 162.617(II)(7) to Require that Petitioner Demonstrate that the Identified EFU-Zoned Alternatives are Infeasible (First and Third Assignments of Error)

Before the legislature adopted ORS 215.275, the Court of Appeals interpreted the EFU-zone authorization for"[u]tility facilities necessary for public service" to require that an applicant for a utility facility in the EFU zone must establish that it is "necessary to situate the facility in the [EFU] zone in order for the service to be provided." *McCaw Communications, Inc., v. Marion County*, 96 Or App 552, 556, 773 P2d 779 (1989). Under *McCaw Communications*, an applicant for a utility facility necessary for public service was required to examine non-EFU-zoned alternatives. ORS 215.275 was adopted by the legislature to codify and explicate that requirement. *City of Albany v. Linn County*, 40 Or LUBA 38, 46-47 (2001). But both before and after ORS 215.275 was enacted, all of the appellate court and LUBA decisions that considered the meaning of those statutes came to the conclusion that the alternatives that must be considered are alternatives that do not utilize EFU-zoned land and that an applicant for a utility facility on EFU zoned land need not examine multiple EFU-zoned alternatives and select the EFU-zoned alternative that has the least impact on EFU-zoned land. *Friends of Parrett Mountain v. Northwest Natural*, 336 Or 93, 110-11, 79 P3d 869 (2003); *Dayton Prairie Water Assn. v. Yamhill Cty.*, 170 Or App 6, 10-11 (2000); *Hamilton v. Jackson County*, 63 Or LUBA 156, 159-60 (2011); *Getz v. Deschutes County*, 58 Or LUBA 559, 562 (2009); *T-Mobile USA v. Yamhill County*, 55 Or LUBA 83, 91 (2007). Petitioner argues the county erred by interpreting ORS 215.275(2) to require that petitioner consider other EFU-zoned alternatives and to select the one that the county believes will have fewer adverse impacts on the county's EFU zone.

The cited cases clearly support petitioner's position. Intervenors struggle to distinguish the cited cases on the ground that the facility is a 12-mile long linear facility rather than an isolated facility such as a broadcast tower that can reasonably be assumed to

have similar impacts on agriculture no matter which EFU-zoned alternative is selected. Intervenors contend that while *Friends of Parrett Mountain* also concerned a linear utility facility (a natural gas pipeline) none of the other cases noted above concerned a linear utility facility that is many miles long. Interevenors' only attempt to distinguish or explain why they believe *Friends of Parrett Mountain* does not support petitioner's first and third assignment of error is to contend that in that case "the applicant considered a significant number of alternative alignments and provided expert evidence as to why each was not suitable or feasible under the factors listed in ORS 215.275(2)." Response Brief of Intervenors BMA 11.

The argument that intervenors advance in their briefs is materially indistinguishable from the argument the Supreme Court rejected in *Friends of Parrett Mountain.* At issue in that case was a 62-mile long natural gas pipeline located largely in the EFU zones of three counties. Petitioners argued the applicant should have been required to site the pipeline within EFU-zoned road and street rights-of-way, "as alternatives to routing the pipeline through actively farmed land." 336 Or at 109. Petitioners assigned error to the Energy Facility Siting Council's determination that "road or highway rights-of-way in EFU zones do not require consideration as siting alternatives under ORS 215.275(2). *Id*. at 109-110. The Supreme Court rejected that assignment of error, concluding "[w]e do not view such rights-of-way as alternatives to EFU zones when, in fact, they are part of such zones." *Id*. at 111. The argument that intervenors make in this appeal would similarly require that we interpret ORS 215.275(2) to allow the county to treat alternatives that will cross EFU zones "as alternatives to EFU zones when, in fact, they are part of such zones."

It may well be that had the legislature foreseen that there might be circumstances where there are short and feasible linear utility facility alternatives across EFU-zoned land (with limited adverse impacts on EFU zoned land) such short EFU-zoned alternatives would have to be selected before selecting a much longer EFU-zoned alternative (with potentially

significant adverse impacts on EFU zoned land).[14] But ORS 215.275(2) requires consideration of alternatives to siting the proposed facility "in an exclusive farm use zone." There are no such alternatives in this case. ORS 215.275 simply does not require that an applicant proceed through additional inquires that are designed to minimize impacts on EFU-zoned land, where non-EFU-zoned alternatives are not available. In other contexts, the legislature has drafted statutes and LCDC has drafted its administrative rules to impose a requirement similar to the one intervenors ask LUBA to read into ORS 215.275(2). For example in approving an exception to Goal 3 (Agricultural Lands) to allow development of a site for uses that are not permitted under Goal 3, it is not sufficient to demonstrate that there are no other sites that would not require an exception to Goal 3 that could accommodate the use. In addition, the adverse consequence of developing the proposed site must not be "significantly more adverse" than developing other sites that are also subject to Goal 3. ORS 197.732(2)(c)(C). Similarly, when designating urban reserves that will be available for future inclusion in an urban growth boundary, a priority system is applied to protect agricultural land that is best suited for continued agricultural use and requires that lower capability agricultural land be included first. OAR 660-021-0030(3). Intervenors ask that LUBA insert into ORS 215.275(2) a requirement that the legislature either did not think of or elected not to include. Under ORS 174.010, LUBA is not permitted to insert into a statute what the legislature has omitted.[15]

---

[14] That may or may not be the case here. Petitioner disputes that the three alternatives in this case are technically feasible and argues that because the proposed 12-mile alternative will be located almost entirely within existing highway rights-of-way, it will have little or no adverse impacts on any existing agricultural uses.

[15] ORS 174.010 provides:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

The first and third assignments of error are sustained.

C. The County Erred by Relying on General Statutory Policies Favoring Protection of Agricultural Land to Deny Petitioner's Application (Second Assignment of Error)

In its decision the county explained that it interpreted ORS 215.275 to require that the applicant select the alternative that is least disruptive to farm use, based on the following language from the Court of Appeals' decision in *McCaw Communications, Inc. v. Marion County*, 96 Or App at 555:

> "' … state and local provisions [allowing non-farm uses on farm land] must be construed, to the extent possible, as being consistent with the overriding policy of preventing 'agricultural land from being diverted to non-agricultural use.' … Therefore, when possible, the non-agricultural uses which the provisions allow should be construed as ones that are 'related to and [promote] the agricultural use of farm land.' … When no such direct supportive relationship can be discerned between agriculture and a use permitted by the provisions, the use should be understood as being as nondisruptive of farm use as the language defining it allows.' [Omissions, additions and underscoring are the county's; footnote omitted by LUBA]

> "* * * As we determine whether this use is 'necessary' within the meaning of UCDC 152.617 and the statute, we endeavor to make the use as nondisruptive of farm uses as these regulations allow." Record 7-8.

Petitioner argues under the third assignment of error that the county erred by relying on general legislative policies favoring retention of farm land for farm use to create a requirement that has no basis in the text of ORS 215.275(2)—that petitioner demonstrate that the proposed 12-mile alignment is the least disruptive to farm use when compared with the three other EFU-zoned alternatives. We agree with petitioner. Even before enactment of ORS 215.275, the Court of Appeals rejected reliance on those general legislative farm land protection policies to impose such a requirement. *Dayton Prairie Water Assn. v. Yamhill Cty*, 170 Or App at 11 ("it does not appear that the legislature intended to subjugate all other legitimate public policies to the legislative policy favoring protection of agricultural land").

And in *Sprint PCS v. Washington County*, 186 Or App 470, 474-76, 63 P3d 1261 (2003), the Court of Appeals squarely rejected the position that the general legislative farmland preservation policies play a role in applying ORS 215.275:

> "We begin with the Fritzes' first assignment of error—that LUBA erred in holding that local governments should not balance the need to preserve farmland in interpreting the terms of ORS 215.275. Two statutes are relevant. ORS 215.283(1)(d) provides that 'utility facilities necessary for public service' may be sited on EFU land. ORS 215.275(1) provides that a utility facility is necessary for public service within the meaning of ORS 215.283(1)(d) 'if the facility must be sited in an exclusive farm use zone in order to provide the service.' ORS 215.275(2) sets out what an applicant must prove in order 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 [six] factors.' ORS 215.275(2). Among those factors are "technological and engineering feasibility." ORS 215.275(2)(a).
>
> "Relying on *McCaw Communications, Inc. v. Marion County,* 96 Or App 552, 773 P2d 779 (1989), the Fritzes argued below that the terms 'reasonable alternatives' and 'feasibility' in ORS 215.275(2) and ORS 215.275(2)(a) should be interpreted in light of the goal of preserving farmland set out in ORS 215.243. LUBA disagreed with that argument, reasoning:
>
> > "'[I]n 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."
>
> "* * * * *
>
> "We agree with LUBA that the provisions of ORS 215.275 strike the balance between the need to site facilities on EFU land and the need to preserve farmland. * * *
>
> "ORS 215.275 codifies and gives further definition to our decision in *McCaw Communications.* Subsection (1) of that statute restates, almost verbatim, the standard that we announced in *McCaw Communications,* and subsection (2) identifies what an applicant must show to establish that it is necessary to site a facility on EFU land. An applicant must show that 'reasonable alternatives' to siting the facility on EFU land were considered but that, because of one of the

> six factors set out in paragraphs (2)(a) to (f), it was necessary to site the facility on EFU land. Textually, the factors set out in ORS 215.275(2) define when it is 'necessary' to reject reasonable alternatives. Having identified those six factors as the bases for rejecting otherwise reasonable alternatives, the legislature implicitly precluded consideration of additional factors in deciding when utility facilities must be sited on EFU land.
>
> "* * * When deciding whether it is necessary to site a public utility facility on EFU land, local governments must analyze any alternatives based on ORS 215.275. *They may not import additional policy considerations into their analysis*. (Emphasis added.)

As we have already concluded above, ORS 215.275(2) requires that an applicant consider non-EFU-zoned alternatives. ORS 215.275(2) does not require that an applicant separately analyze other EFU-zoned alternatives to establish that the EFU-zoned alternative is the least disruptive to agriculture. *Keicher v. Clackamas County*, 175 Or App 633, 638, 29 P3d 1155 (2001). The county erred by relying on general legislative policies favoring protection of agricultural lands to impose such a requirement.

The second assignment of error is sustained.

D. The County Erred by Relying on Policy 19 to Require that Petitioner Use Shorter EFU-zoned Alternatives if Possible (Fourth and Fifth Assignments of Error)

As we explained earlier in our discussion of the eighth assignment of error, the county relied in part on Umatilla County Comprehensive Plan Policy 19 to require that petitioner consider co-locating its proposed transmission line within one of three existing corridors and denied the application in part based on the county's finding that petitioner inadequately considered such co-location. In its fourth and fifth assignments of error, petitioner argues that because its proposed transmission line is a permitted use under ORS 215.283(1), the county erred in imposing its co-location requirement. As we have already noted, under *Brentmar v. Jackson County*, the county is not permitted to impose local land use standards on uses that are permitted under subsection (1) of ORS 215.283. The county erred in doing so here.

The fourth and fifth assignments of error are sustained.

E. The County Erred by Requiring that Petitioner Demonstrate it is Technically Feasible to Construct the Proposed Transmission Line Along the Proposed Alignment Where no Applicable Standard of Approval Requires Such a Showing for a Land Use Decision Request (Sixth Assignment of Error)

The county also denied the application because petitioner failed to establish that it is technically feasible to construct a transmission line along the proposed 12-mile alignment:

> "As a final deficiency with its preferred alternative, the applicant has failed to provide sufficient information that it will be feasible to construct this line along the proposed alignment. In particular, it does not seem to the Board [of Commissioners] whether or how it will be technically feasible to construct this transmission line along the Couse Creek Road and in the Couse Creek Canyon, given the creek, the road and steep slope. As such, the Board finds there is insufficient evidence from which it can conclude that the appicant's preferred alternative is feasible from a technical and engineering perspective. * * *." Record 12.

Petitioner argues there is no requirement under ORS 215.275 that it establish that it is technically feasible to construct the proposed transmission line within the proposed 12-mile alignment. We understand petitioner to contend that the statute imposes no such requirement and if the county is relying on some unspecified local law to impose that requirement, the local requirement is barred under *Brentmar v. Jackson County*. We agree with petitioner.

Intervenor UEC argues that even if ORS 215.275 does not require that petitioner show that construction of the proposed transmission line within the proposed alignment is technically feasible, "the record makes clear that the commissioners were not so much concerned with any particular code requirements as with the general requirement that a development application must be shown to be feasible." Response Brief of Intervenor-Respondent UEC 9. Intervenor appears to be suggesting that there is a common law or unspecified but generally applicable statutory requirement that an applicant for quasi-judicial land use approval may be required as a condition of receiving such land use approval, to

demonstrate that construction of the use for which land use approval is sought is feasible. We reject the suggestion.

Intervenor UEC attempts to find a demonstration of project feasibility requirement in the Court of Appeals' discussion of the concept of "feasibility" in multiple-step approval processes and the court's related discussion of public participation rights. *Gould v. Deschutes County*, 227 Or App 601, 206 P3d 1106 (2009); *Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007). Response Brief of Intervenor Respondent UEC 10. That suggestion is not sufficiently developed for review and we reject the suggestion for that reason alone. The Court of Appeals' discussion of "feasibility" in the *Gould* decisions is quite specific to multiple-step land use permit approval processes in circumstances where there is some uncertainty about whether permit approval criteria are satisfied and actions will be required in the future to ensure compliance with those criteria. Nothing in the *Gould* decisions comes close to supporting the proposition that an applicant always has a burden in seeking land use approval to establish that construction of the proposed use is feasible as proposed.

The other intervenors take a somewhat different approach. They note that "ORS 215.275(5) specifically authorizes the imposition of conditions to mitigate and minimize impacts on surrounding lands devoted to farm use." Response Brief of Intervenors-Respondents BMA 14. Intervenors contend that under ORS 215.275(5) the county could require adequate information to determine whether the proposed alternative will have impacts on lands devoted to farm use.

The text of ORS 215.275(5) was set out in full at n 4. Intervenors' summary of the substance of ORS 215.275(5) is accurate. We agree with intervenors that under ORS 215.275(5) the county could impose "clear and objective" conditions if the county determined that such conditions were necessary to "prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on the surrounding farm

lands." We further agree the county could almost certainly deny an application for land use approval if an applicant submitted insufficient evidence regarding possible impacts on farm practices or the cost of farm practices and refused to provide such evidence if the county requested it. But there is absolutely no suggestion in the board of commissioners' decision that it was concerned about the potential for significant changes in or increased cost of farm practices from the proposed transmission line alignment.[16] Rather, the board of commissioners' findings that petitioner challenges here address a very different concern, whether construction along the proposed alignment is technically feasible.

In conclusion, the county identified no legal requirement that petitioner must establish that construction of the proposed transmission line within the proposed 12-mile alignment is feasible. There does not appear to be any lack of clarity about the rights-of-way that the applicant proposes to construct the transmission line within. If it turns out that it is not feasible construct a transmission line within the proposed alignment, petitioner will have to return to the county to seek approval for different or modified alignment that is feasible. But the county has identified no legal basis for requiring that petitioner establish that construction of the proposed transmission line is feasible within the proposed alignment as part of this decision.

The sixth assignment of error is sustained.

SEVENTH ASSIGNMENT OF ERROR

Under the seventh assignment of error, petitioner challenges the sufficiency of the evidence the county relied on to find that petitioner failed to adequately demonstrate that the three alternatives are not feasible alternatives. Because we sustain petitioner's first six assignments of error, in which petitioner contends the county's findings that consideration of

[16] Petitioner contends there is no evidence in the record that constructing a transmission line within existing road rights-of-way will force any change in accepted farm practices or any increase in the cost of such practices, much less a significant change or increase.

those alternatives are based on a misconstruction of applicable law, we need not consider petitioner's evidentiary challenge to those findings.

We do not consider the seventh assignment of error.

CONCLUSION

The record in this appeal establishes that there are no alternatives for transmitting power from petitioner's wind turbine facility to the electric grid that do not require the use of EFU-zoned land. Therefore, as far as we can tell under ORS 215.283(1)(c), ORS 215.275 and *Brentmar v. Jackson* County, petitioner is entitled to county land use approval of its proposed 12-mile long transmission line. The only additional considerations that might be required under ORS 215.275 would arise out of the ORS 215.275(5) direction that the county "shall impose clear and objective conditions * * * to prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on the surrounding farm lands." *See* n 4. But as we have already noted, the county did not find that any conditions were necessary for the proposed alternative under ORS 215.275(5), and as far as we can tell no party took the position below that if the proposed 12-mile alternative is approved, the approval needed to be conditioned under ORS 215.275(5).[17]

The county's decision is reversed. ORS 197.835(9)(a)(D); OAR 661-010-0071(1)(c).[18]

---

[17] Intervenors BMA cited ORS 215.275(5). Record 24. But intervenorsBMA cited ORS 215.275(5) in support of its position that the county should require consideration of EFU-zoned alternatives petitioners proposed alignment and did not take the position that if the proposed 12-mile long alignment is approved it should be subject to clear and objective conditions of approval under ORS 215.275(5) to "to prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on the surrounding farm lands.".

[18] Under ORS 197.835(9)(a)(D) LUBA is authorized to reverse a decision that "[i]mproperly construed the applicable law." OAR 661-010-0071(1)(c) provides that LUBA is to reverse a decision that "violates a provision of applicable law and is prohibited as a matter of law."