

1                   BEFORE THE LAND USE BOARD OF APPEALS  
2                   OF THE STATE OF OREGON

3  
4                   SOUTH SUBURBAN SANITARY DISTRICT,  
5                                   *Petitioner,*

6  
7                                   vs.

8  
9                   KLAMATH COUNTY,  
10                                   *Respondent.*

11  
12                                   LUBA No. 2020-082

13  
14                                   FINAL OPINION  
15                                   AND ORDER

16  
17                   Appeal from Klamath County.

18  
19                   Gregory S. Hathaway, Portland, filed the petition for review and reply brief  
20 and argued on behalf of petitioner. With him on the briefs was Hathaway Larson  
21 LLP.

22  
23                   No appearance by Klamath County.

24  
25                   RUDD, Board Chair; RYAN, Board Member; ZAMUDIO, Board  
26 Member, participated in the decision.

27  
28                   REVERSED                                   12/10/2020

29  
30                   You are entitled to judicial review of this Order. Judicial review is  
31 governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner challenges a county board of commissioners decision denying petitioner’s request for approval to apply reclaimed water to land zoned Exclusive Farm Use-Cropland (EFU-C).

**FACTS**

Petitioner is a municipal corporation providing sanitary service to residents of the area south of the City of Klamath Falls. Since 1959, petitioner has discharged its reclaimed water into the Klamath River. The State of Oregon has, however, adopted new Total Maximum Daily Load requirements for nutrients in the Klamath River, prompting petitioner to look for a new location for the discharge of its reclaimed water. Rather than continuing to discharge into the Klamath River, petitioner seeks to treat and reclaim sanitary wastewater at its facility located on Maywood Drive and then transport the reclaimed water via a 6-mile, 18-inch-diameter pipeline to a 95-acre reservoir located south of OC&E Trail and west of Reeder Road (the Reeder site), where the water will be used to irrigate approximately 550 acres of crops. Record 741-68.<sup>1</sup>

In January 2020, petitioner applied for county approval of the project. *Id.* As explained in the county’s staff report,

“[i]n 2001, Senate Bill 212 was passed by the Oregon Legislative

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<sup>1</sup> The project’s pipeline will follow OC&E Trail from the treatment facility to the reservoir.

1 Assembly to allow the land application of reclaimed water,  
2 agricultural process water and biosolids for agricultural,  
3 horticultural or silvicultural productions. Upon passage of Senate  
4 Bill 212 [the Department of Land Conservation and Development  
5 (DLCD)] revised [Statewide Planning Goal 3 (Agricultural Lands)]  
6 Oregon Administrative Rule (OAR) 660-033 to incorporate these  
7 amendments into the state wide program for land use planning.

8 “There are several steps the applicants go through prior to receiving  
9 approval for land application:

10 “1) Obtain the required [Oregon Department of Environmental  
11 Quality (DEQ)] application and Land Use Compatibility  
12 Statement (LUCS) Form[;]

13 “2) Submit the completed LUCS to the County planning office  
14 for review and approval[;]

15 “3) *County conducts it[s] land use review process in accordance*  
16 *with requirements of law and returns the LUCS to the*  
17 *Applicant with any findings[;]*

18 “4) The applicant submits the DEQ application and the approved  
19 LUCS to DEQ for processing[;]

20 “5) DEQ processes the application and conducts a technical  
21 review in accordance with its rules and requirement of the  
22 law[; and]

23 “6) The applicant receives final approval from DEQ to conduct  
24 land application operation.” Record 281 (emphasis in  
25 original).

26 On June 23, 2020, the planning commission and board of commissioners  
27 conducted joint public hearings on the application. Record 621. The planning  
28 commission recommended denial of the application. The board of commissioners  
29 adopted the planning commission’s findings and denied the application.

1 This appeal followed.

2 **FIRST, SECOND, AND THIRD ASSIGNMENTS OF ERROR**

3 ORS 215.283(1)(v) identifies as an allowed use on EFU zoned land,  
4 “[s]ubject to the issuance of a license, permit or other approval by  
5 the [DEQ] under ORS 454.695, 459.205, 468B.050, 468B.053 or  
6 468B.055, or in compliance with rules adopted under ORS  
7 468B.095, and as provided in ORS 215.246 to 215.251, *the land*  
8 *application of reclaimed water, agricultural or industrial process*  
9 *water or biosolids, or the onsite treatment of septage prior to the land*  
10 *application of biosolids, for agricultural, horticultural or*  
11 *silvicultural production, or for irrigation in connection with a use*  
12 *allowed in an exclusive farm use zone under this chapter.”*  
13 (Emphases added).<sup>2</sup>

14 ORS 215.246(3) establishes the standards that apply to an application for an ORS  
15 215.283(1)(v) use, and limits the county’s and LUBA’s scope of review:

16 “*[T]he applicant shall explain in writing how alternatives identified*  
17 *in public comments on the land use decision were considered and,*  
18 *if the alternatives are not used, explain in writing the reasons for*  
19 *not using the alternatives. The applicant must consider only those*  
20 *alternatives that are identified with sufficient specificity to afford*  
21 *the applicant an adequate opportunity to consider the alternatives. A*  
22 *land use decision relating to the land application of reclaimed*  
23 *water, agricultural or industrial process water or biosolids may not*  
24 *be reversed or remanded under this subsection unless the applicant*  
25 *failed to consider identified alternatives or to explain in writing the*  
26 *reasons for not using the alternatives.”* (Emphases added.)

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<sup>2</sup> ORS 215.283(1)(v) is implemented by Klamath County Land Development Code (KCLDC) 54.030(L) and 54.010(V).

1 The county’s decision denied petitioner’s application for failure to comply with  
2 ORS 215.426(3). Specifically, the board concluded that “[t]he lack of thorough  
3 analysis and dismissing out of hand [three] alternative site location[s]” did not  
4 comply with ORS 215.246(3).” Record 30-31. Petitioner argues in its first,  
5 second, and third assignments of error that the board of commissioners  
6 misconstrued ORS 215.246(3). Petitioner also argues that the board of  
7 commissioners’ conclusion that petitioner did not perform the required  
8 alternative sites analysis is not supported by substantial evidence.

9 In an opinion issued this date in *South Suburban Sanitary District v.*  
10 *Klamath County*, \_\_\_ Or LUBA \_\_\_ (LUBA No 2020-090, Dec 14, 2020) (*SSSD*  
11 *I*), petitioner presented similar assignments of error related to county’s review of  
12 petitioner’s request to apply reclaimed water to a different property. We agreed  
13 with petitioner that the board of commissioners misconstrued ORS 215.246(3)  
14 because the board denied petitioner’s application despite the fact that petitioner  
15 considered the identified alternative sites and explained why they were not  
16 selected. We also agreed with petitioner that the board of commissioners’  
17 findings that petitioner dismissed the identified alternative sites “out of hand”  
18 was not supported by substantial evidence.

19 The alternative sites identified in *SSSD I* are the same alternative sites  
20 identified here, and petitioner offered identical analyses and explanations for why  
21 they were not selected. For the reasons explained in *SSSD I*, we also sustain the  
22 first, second, and third assignments of error here.

1 The first, second, and third assignments of error are sustained.

2 **FIFTH, SIXTH, AND SEVENTH ASSIGNMENTS OF ERROR**

3 Petitioner argues in these assignments of error that the board of  
4 commissioners improperly denied petitioner’s application because the board of  
5 commissioners found that (1) the project is located next to rural residential  
6 property, (2) the project is not a long-term solution, and (3) the project is a utility  
7 facility. In the alternative, petitioner argues that we should disregard all of these  
8 findings because they are not a basis for the board of commissioners’ ultimate  
9 conclusion that the application should be denied.

10 The board of commissioners found:

11 “[Petitioner] proposes to irrigate lands with recycled water next to  
12 an area zoned for, and developed with, single family homes on 1 to  
13 2 acre lots. As stated in numerous exhibits, the ground water in this  
14 area is fairly shallow with wells only 50 feet deep. There is  
15 significant community concern about irrigating with recycled water  
16 in an area densely populated with rural residential properties with  
17 shallow wells.” Record 31.

18 The board of commissioners also found:

19 “In numerous exhibits, opponents of the recycled water proposal  
20 have stated that this project has a maximum lifespan of 20 years.  
21 [Petitioner] has not refuted this claim. The proposed site is located  
22 in an area of rural residential properties and small farms. It will be  
23 more difficult to expand the project at the subject site than  
24 [identified] alternative sites \* \* \*. [The identified alternative sites]  
25 are large open valleys with large commercial farms, and very low  
26 density of dwelling.” *Id.*

27 In addition, the board of commissioners found:

1 “The recycled water will be chlorinated shortly before it leaves the  
2 treatment facility. While in the pipeline the chlorine will continue to  
3 react with the various organisms in the water, killing the pathogens.  
4 Because the water will still be in continued treatment within the  
5 pipeline, the pipeline is a Utility Facility.

6 “If the water treatment fails and water reaches the reservoir without  
7 being disinfected, the disinfection would need to occur within the  
8 reservoirs, or treatment continues while in the reservoirs, the  
9 reservoirs into Utilities Facilities. [Petitioner] has not submitted the  
10 correct permits pertaining to approval of Utility Facilities for the  
11 pipeline or reservoirs.” Record 31-32.

12 The board of commissioners ultimately concluded:

13 “Based on the review of the record, the Planning Commission  
14 concluded [petitioner] has not met the criteria of ORS 215.246(3) or  
15 the standards of the [Federal Aviation Administration (FAA)]. The  
16 Board of County Commissioners reviewed both the record in its  
17 entirety and deliberation of the Planning Commission, and  
18 concluded the proposal has not met the criteria of ORS 215.246(3)  
19 or the guidance of the FAA. On July 21, 2020, the Board of County  
20 Commissioners with a[] unanimous vote, adopted these findings.”  
21 Record 32.

22 We agree with petitioner that the board of commissioners’ decision makes clear  
23 that the above quoted language regarding proximity to rural residential  
24 properties, project life span, and whether the project constitutes a utility facility  
25 is surplusage and is not a basis for the board of commissioners’ decision to deny  
26 petitioner’s application. Accordingly, petitioner’s argument provides no basis for  
27 reversal or remand of the decision.

28 The fifth, sixth, and seventh assignments of error are denied.

1 **FOURTH ASSIGNMENT OF ERROR**

2 The Reeder site is within five miles of the Crater Lake Klamath Regional  
3 Airport. On February 28, 2020, the Airport Director sent a letter to the county  
4 Planning Director, explaining that

5 “the [FAA] recently updated their Advisory Circular 150/5200-33C  
6 – Hazardous Wildlife Attractants on or near Airports, dated  
7 2/21/2020. Figure 1 of this Advisory Circular (AC) states, for our  
8 Airport and type of aircraft using the Airport, a 5-mile radius should  
9 be maintained to a degree that eliminates (to the greatest extent  
10 possible) wildlife attractants. Chapter 2 of the AC states in part that,  
11 ‘...Drinking water intake and treatment facilities, storm water and  
12 wastewater treatment facilities, [and] associated retention and  
13 settling ponds, \* \* \* often attract large numbers of potentially  
14 hazardous wildlife. Development of new open water facilities within  
15 the separation criteria identified in Paragraphs 1.2 through 1.4 (i.e.,  
16 5-mile radius for us) should be avoided to prevent wildlife  
17 attractants.’

18 “Additional chapters and sections of the AC go on to describe ways  
19 to mitigate wildlife attractants like physical barriers, such as bird  
20 netting, bird balls, wire grids, pillows, etc. to deter birds and other  
21 hazardous wildlife. When physical barriers are used, operators must  
22 evaluate their use, effectiveness and maintenance requirements.

23 “In addition, the AC requires \* \* \* airports, like the Crater Lake –  
24 Klamath Regional Airport, to have and maintain a Wildlife Hazard  
25 Assessment Plan—which the Airport maintains. This Airport plan  
26 also describes concerns for off-airport water retention areas and  
27 provides recommendations for dealing with the existing and  
28 potential future water retention areas. Providing education and  
29 communicating with local authorities is one recommendation.

30 “\* \* \* \* \*

31 “Therefore, given the aforementioned information, I would



1 encourage any proposed pond to include wildlife hazard mitigation  
2 to improve the safety of the facility to the flying public \* \* \*.”  
3 Record 584-85 (citation omitted, emphases in original).

4 The board of commissioners found:

5 “This site is within 5 miles of the City of Klamath Falls Regional  
6 Airport (Crater Lake Airport) where the construction of the storage  
7 reservoirs would violate [FAA] standards for new open waters near  
8 a regional Airport, and where the applicant used these FAA  
9 standards to help determine other sites were not feasible.” Record  
10 31 (citations omitted).

11 Petitioner argues in its fourth assignment of error that the board of  
12 commissioners misconstrued the AC. Petitioner also argues that the board of  
13 commissioners’ conclusion that the project violates the AC is not supported by  
14 substantial evidence. We understand petitioner to argue that the project actually  
15 complies with the AC. Petitioner’s argument assumes that the AC constitutes  
16 applicable approval criteria and that that the county’s decision that petitioner  
17 failed to satisfy the AC is an independent basis for denial.

18 We agree with petitioner that the board of commissioners erred with  
19 respect to its interpretation of the AC, but for a different reason. We need not  
20 decide whether the project complies with the AC, because we conclude that the  
21 AC does not constitute applicable approval criteria. The AC is by its own terms  
22 nonbinding:

23 “The [FAA] *recommends* the guidance in this AC for land uses that  
24 have the potential to attract hazardous wildlife on or near public-use  
25 airports. *This AC does not constitute a regulation, is not mandatory,*  
26 *and is not legally binding in its own right.* It will not be relied upon  
27 as a separate basis by the FAA for affirmative enforcement action

1 or other administrative penalty. Conformity with this AC is  
2 *voluntary*, and nonconformity will not affect rights and obligations  
3 under existing statutes and regulations, except as follows:

4 “\* \* \* \* \*

5 “4. The FAA *recommends* the guidance in this AC for land-use  
6 planners and developers of projects, facilities, and activities  
7 on or near airports.” FAA Advisory Circular No. 150/5200-  
8 33C at i-ii (emphases added).

9 The nonbinding nature of the AC is further evidenced by the language of the  
10 specific provision at issue here, quoted in the Airport Director’s letter:

11 “Development of new open water facilities within the [5-mile  
12 radius] *should* be avoided to prevent wildlife attractants. *If*  
13 *necessary*, land-use developers and airport operators may need to  
14 develop management plans, in compliance with local and state  
15 regulations, to support the operation of storm water management  
16 facilities on or near all public-use airports to ensure a safe airport  
17 environment.” *Id.* at 2-5 (emphases added).

18 The county does not explain why the AC, a nonmandatory, nonbinding guidance  
19 document setting forth uncodified, albeit recommended, standards, constitutes  
20 applicable approval criteria with respect to petitioner’s application. Nor does the  
21 decision explain how a violation of the AC informs the analysis under any  
22 approval criterion that does apply. That petitioner may have considered the AC  
23 in conducting its alternative sites analysis did not turn the AC into applicable  
24 approval criteria.

25 Because the AC does not constitute applicable approval criteria, the county  
26 may not use the AC as a basis to deny petitioner’s application.

27 The fourth assignment of error is sustained.

1    **DISPOSITION**

2           Petitioner requests that we reverse or remand the decision. We will reverse  
3 a decision when the decision violates a provision of applicable law and is  
4 prohibited as a matter of law. ORS 197.835(1); OAR 661-010-0073(1)(c). As  
5 explained above, the decision violates ORS 215.246.

6           The county's decision is reversed.