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

THE CITY OF MCMINNVILLE,
Petitioner,

vs.

YAMHILL COUNTY,
Respondent,

and

CELLCO PARTNERSHIP,
DBA VERIZON WIRELESS,
Intervenor-Respondent.

LUBA No. 2021-078

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Amanda R. Guile-Hinman filed the petition for review and reply brief and argued on behalf of petitioner.

E. Michael Connors and Christian Boenisch filed the joint response brief. E. Michael Connors argued on behalf of intervenor-respondent. Also on the brief were Hathaway Larson LLP and Colton Totland.

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

AFFIRMED 02/11/2022

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioner appeals a county board of commissioners decision approving a wireless communication facility (the facility) on land zoned Exclusive Farm Use (EFU).

BACKGROUND

The subject property is approximately 119.05 acres, zoned EF-80, and predominately used for farming grass seed and hay. The subject property is within the city's urban growth boundary and adjacent to city limits to the north and east. Adjacent land uses to the north and the east within city limits are urban residential. Adjacent properties to the south and west are within the county and used for farming activities. Intervenor applied to the county for approval to develop the facility on the subject property to address a coverage gap and capacity deficiency in the west side of the city and the surrounding county area. Record 350-53.[1] The facility includes a 100-foot monopole tower, 12 panel antennas, and associated equipment. Record 350, 438.

In March 2021, the planning director approved the application. Petitioner appealed the director's decision. On May 27, 2021, the board opened an initial evidentiary hearing. At the conclusion of that hearing, petitioner requested that the board continue the hearing to facilitate discussion of alternative sites within

[1] All record citations in this decision are to the amended record.

city limits. Intervenor agreed to the continuation of the hearing until July 1, 2021, at which time the board considered additional testimony and evidence. Record 17. On July 22, 2021, the board adopted the challenged decision approving the application. This appeal followed.

SECOND ASSIGNMENT OF ERROR

State law restricts the uses that are allowed on agricultural land to farm uses and specified nonfarm uses. *See* ORS 215.203(1) (generally requiring that land within EFU zones be used exclusively for "farm use"); ORS 215.203(2)(a) (defining "farm use"); ORS 215.283 (identifying permitted uses on EFU land). A "utility facility necessary for public service," including wireless communication facilities, may be established in an area zoned EFU as provided in ORS 215.275. ORS 215.283(1)(c)(A). ORS 215.275(2) requires an applicant to prove that a wireless communication facility proposed on EFU-zoned property is necessary by demonstrating

> "that reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:
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> "(a) Technical and engineering feasibility;
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> "(b) The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;
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> "(c) Lack of available urban and nonresource lands;

"(d) Availability of existing rights of way;

"(e) Public health and safety; and

"(f) Other requirements of state or federal agencies."

According to petitioner, two locations within the city provide reasonable alternatives for the facility: (1) collocation on a yet-to-be-constructed flagpole on the Church on the Hill (Church) property or (2) installation as an attachment on a future replacement transmission pole installed by McMinnville Water & Light (MW&L) near the intersection of Hill Road and 2nd Street. The board concluded that neither of those suggested options provides a reasonable alternative for multiple reasons, discussed further below.

Petitioner argues that the Church flagpole and a MW&L transmission pole are technically feasible and available alternative sites and the county's contrary conclusion is not supported by substantial evidence. ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). 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).

The board found multiple reasons that the Church flagpole and MW&L transmission pole are not reasonable alternative sites for the facility. Since each

one of these reasons provides an independent basis for the county's conclusion that the Church flagpole and MW&L replacement transmission pole are not reasonable alternatives, petitioner must challenge all of the supportive findings and demonstrate that each challenged finding is not supported by substantial evidence. For the reasons explained below, we deny this assignment of error.

A. Church Site

The board found that T-Mobile, a competitor of intervenor, is currently operating a rooftop wireless communication facility on the Church property, and the lease agreement for that facility includes a noncompete clause that prohibits the Church from leasing to a competitor. The noncompete clause provides:

> "Landlord covenants that during the terms of this Lease, Landlord will not lease any real property or tower space to any person or entity in direct or indirect competition with Tenant, including but not limited to, providers of cellular service, SMR service, PCS service, paging service, or any other form of telecommunications service provided to the public within a three (3) mile radius of the Property." Record 778.

The board concluded that the Church is not a reasonable alternative based on the noncompete clause. Record 25.

We conclude that substantial evidence supports the board's finding that the T-Mobile noncompete clause is an independent basis for the county to conclude that the Church location is not a reasonable alternative. Petitioner mischaracterizes the noncompete clause as requiring T-Mobile's "prior consent." Petition for Review 22. However, the noncompete clause prohibits the Church

from leasing the Church property to any T-Mobile competitor, including intervenor. Petitioner argues that the record shows that T-Mobile never specifically refused to consent to the Church entering a lease with intervenor. However, the board found that "T-Mobile has not agreed to remove the non-compete clause from the lease after multiple attempts by the city." Record 25. Petitioner does not dispute that finding, which we conclude is dispositive on this issue.[2]

We also conclude that the board's additional bases for its conclusion that the Church property is not a reasonable alternative are supported by substantial evidence. The board found that city code restrictions prohibit the facility from meeting its coverage and capacity objectives at any location at the Church property. The board found that the Church property is within the city and is zoned Multi-Family Residential (R-4), which prohibits new wireless communication structures and limits additional height for collocating on existing structures to 20 feet subject to conditional use permit approval. Record 24, McMinnville Municipal Code (MMC) 17.55.040. The Church suggested that intervenor could install the facility on the roof of the Church building or on a parking lot light post. Based on intervenor's evaluation, the board concluded that none of those options is a reasonable alternative because the maximum antenna height for those options

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[2] The first assignment of error, analyzed below, also concerns the T-Mobile noncompete clause.

under the city code is not sufficient to satisfy intervenor's coverage and capacity objectives. Record 24.

Petitioner does not challenge the board's conclusions that the Church rooftop or parking lot light posts are not reasonable alternative sites. As another alternative, petitioner suggested that the Church could erect a 50-foot flagpole and intervenor could thereafter submit an application to collocate the facility on the flagpole and extend it 20 feet subject to conditional use approval. Record 25.

The board found that the flagpole option is not a reasonable alternative for multiple reasons. The board found that several city code restrictions would prohibit intervenor from obtaining city approval for a flagpole collocation. The board found that the flagpole is an "antenna support structure," which is prohibited in the R-4 zone. MMC 17.55.040(C), (D). In residential zones, the city code requires that collocation on "alternative support structures" be completely screened from view with a "stealth design." MMC 17.55.050(A)(1); MMC 17.55.060(A)(6). The board found that no design for collocating the facility on a flagpole could completely screen the facility. Finally, the board found that a yet-to-be-constructed flagpole is not a reasonable alternative site because it is too speculative whether the flagpole will be constructed. Record 26.

Intervenor responds that petitioner does not specifically challenge the board's finding that a yet-to-be-constructed flagpole is not a reasonable alternative site because it is too speculative whether the flagpole will ever be permitted or constructed. We must affirm a decision when the decision is justified

on alternative grounds and the petitioner does not challenge all of those grounds on appeal. *Hard Rock Enterprises v. Washington County*, 36 Or LUBA 106, 119, *aff'd*, 161 Or App 198, 984 P2d 958 (1999) ("Where a local government's approval rests on independent alternative grounds, petitioner must successfully challenge each of those alternative grounds in order to obtain reversal or remand of the decision, notwithstanding that petitioner demonstrates error in one of the alternative bases.").

Petitioner replies that petitioner challenges that finding at pages 21 and 25 of the petition for review. Reply Brief 5 n 3. We have reviewed those pages and do not find that argument. Instead, on those cited pages, petitioner argues that the county's findings that the Church site is unavailable for the facility are based on speculation and ignore contrary evidence in the record.[3] Petitioner's argument that the findings are based on speculation is not the same as a challenge to the county's finding that whether a flagpole will ever be permitted or constructed at the Church is speculative. Accordingly, we affirm the county's conclusion that the Church site is not a reasonable alternative based on that unchallenged finding.

Finally, we also conclude that substantial evidence supports the board's finding that a flagpole with a collocated antenna could not be fully screened from

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[3] For example, petitioner points to evidence in the record that the McMinnville City Council adopted advisory findings at a city council regular meeting interpreting the MMC to allow for the antenna height that petitioner's radio frequency expert had determined was needed at the Church to meet intervenor's coverage and capacity objectives. Petition for Review 19; Record 171-73.

view, as required by the city code. Petitioner does not point to any affirmative evidence that the proposed flagpole collocation facility can be fully screened. Instead, petitioner points to intervenor's statement that, even if the Church constructed "a wider pole that hides the antennas inside," it would be even more obvious that the structure is not a flagpole, which may be allowed in the R-4 zone as an "alternative antenna support structure," but, instead, is an "antenna support structure" "specifically designed to accommodate the antenna," which is prohibited in the R-4 zone. Record 213. That comment is not an admission or evidence that a collocated flagpole facility could be completely screened from view. Rather, that comment explains how the city code restrictions make the Church an infeasible option that is not resolved by the city's flagpole suggestion.

The board's conclusion that the Church flagpole is not a reasonable alternative is supported by an unchallenged finding and substantial evidence in the record.

B. MW&L Replacement Transmission Pole

The board concluded that the MW&L replacement transmission pole option is not a reasonable alternative because (1) MW&L's standards prohibit wireless attachments on transmission poles; (2) the overall height of an antenna and pole is limited to 60 feet, which is insufficient to meet intervenor's coverage and capacity objectives; (3) antenna attachments on transmission poles are limited to one attachment per pole, and the facility includes 12 panel antennas;

and (4) intervenor does not have a franchise agreement with the city, which is required to install the facility within the city.

Petitioner argues that the board erred by relying on intervenor's characterization of the limits imposed by MW&L's construction standards. According to petitioner, those standards pose "no serious barrier" to intervenor attaching the facility to a replacement transmission pole. Petition for Review 26. Petitioner argues that the record demonstrates that the 60-foot height limit applies only to wood transmission poles, and the future replacement poles will be metal. Petitioner contends that the limit of one attachment per pole does not necessarily limit the number of antennas because, according to petitioner, all 12 antennas and any auxiliary equipment would constitute one "attachment" under MW&L's standards. Petitioner argues that evidence in the record demonstrates that a 60-foot antenna could meet intervenor's service objectives, based on petitioner's expert's opinion. Finally, petitioner argues that the lack of a present franchise agreement is not a sufficient reason for the board to determine that an MW&L transmission pole is not a reasonable alternative.

The board's conclusion that the MW&L replacement transmission pole option is not reasonable alternative site for the facility because the MW&L standards prohibit wireless antennas on transmission poles is supported by substantial evidence in the record. MW&L Standard 9.4.3 lists the types of poles from which "wireless attachments" are excluded and includes "transmission poles." Standard 9.4.3.5, Record 245. A "wireless attachment" is defined as "a

facility emitting a radio frequency and includes any equipment or ground equipment serving the antenna facility." Record 240. There is no dispute that the MW&L replacement pole is a transmission pole and that the facility is a wireless attachment. MW&L confirmed via emails in the record that "transmission poles are not eligible for wireless installations" and "the entirety of S. Hill Road is transmission poles."[4] Record 249, 253-54. Petitioner has pointed to no contrary evidence.

There is also nothing in the record to support petitioner's assertion that the restrictions in MW&L Standard 9.4.3 apply only to wood transmission poles. Standard 9.4.3 precludes wireless attachments on transmission poles and does not distinguish between wood and metal poles. The board found: "The Board disagrees with the City's claim that these MW&L Standards only apply to wooden poles, and not metal poles, as there is nothing in the MW&L Standards to support that interpretation and there is no evidence that [MW&L] adopted or agrees with that interpretation." Record 27. Petitioner has not challenged that finding or pointed to any evidence in the record that supports its assertion that the standard does not apply to metal poles, other than petitioner's own assertion in written testimony. Petition for Review 26 (citing Record 57).

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[4] The findings, parties, and evidence in the record refer to "Hill Road" and "S. Hill Road." We understand that the disputed MW&L alternative involves a replacement transmission pole at the intersection of SW Hill Road and NW 2nd Street within the city, as depicted on a map at Record 250.

We conclude that the board's determination that the facility is prohibited on the MW&L replacement transmission pole is supported by substantial evidence. We need not and do not reach or decide petitioner's remaining challenges to the board's findings that the MW&L replacement transmission pole is not a reasonable alternative site.

C. Costs

Cost alone may not be the only consideration in determining that a utility facility must be sited in an EFU zone. ORS 215.275(3). The board found that intervenor did not rely solely on the costs associated with the various alternative options that it considered and rejected. Record 29.

Petitioner argues that intervenor and the county impermissibly ruled out the Church flagpole and MW&L transmission pole sites based on costs. Specifically, petitioner argues that the Church location would require a lease and consent from T-Mobile and the MW&L alternative would require a city franchise agreement, all with associated costs to intervenor. Petitioner argues that, "when [intervenor's] assertions and the corresponding unsupported findings are peeled away, the only remaining reason why intervenor would oppose a feasible and available non-EFU alternative is money." Petition for Review 30.

Intervenor responds, and we agree, that ORS 215.275(3) does not prohibit intervenor and the county from considering costs, so long as cost is not the only consideration in considering alternatives. Petitioner's argument is premised on LUBA determining that the county's findings not directly related to costs are

unsupported. We agree with intervenor that the board relied on non-cost-based reasons for determining that the two disputed alternatives are not reasonable. Accordingly, petitioner's argument that the county's decision violates ORS 215.275(3) provides no basis for reversal or remand.

The second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

In the first assignment of error, petitioner argues that the county failed to keep the record open at the conclusion of the continued hearing to allow petitioner to submit additional evidence. We will remand a land use decision if we find that the decision is flawed by procedural errors that prejudice the substantial rights of the petitioner. ORS 197.835(9)(a)(B); OAR 661-010-0071(2)(c).

The initial evidentiary hearing opened on May 27, 2021, and was continued to July 1, 2021. On June 30, 2021, petitioner submitted a letter to the county regarding the facility and summarizing petitioner's communications with intervenor, the Church, and T-Mobile. Petitioner attached to that letter an email from a T-Mobile representative to petitioner, dated June 30, 2021, stating that "I would imagine that T-Mobile might at least consider the proposal, though I cannot speak for the likelihood of either decision," and explaining that another T-Mobile representative "will be back next week and will be able to give you a little more direction." Record 180. Petitioner testified at the July 1, 2021, board hearing that T-Mobile representatives "said that they would consider looking at

that lease issue." Audio Recording, Yamhill County Board of Commissioners, July 1, 2021, at 4:05:46. According to petitioner, after the record was closed and the board had commenced deliberation, Commissioner Berschauer inquired about keeping the record open to allow petitioner to continue conversations with T-Mobile regarding the noncompete clause and share the status of those communications with the board. According to petitioner, county counsel erroneously advised Commissioner Bershauer that the record cold not be left open.

One of the requirements to establish a procedural error is that a petitioner must identify the applicable procedure allegedly violated. *Vannatta v. City of St. Helens*, 79 Or LUBA 271, 275 (2019); *Stoloff v. City of Portland*, 51 Or LUBA 560, 563 (2006). Petitioner relies on ORS 197.763(6)(b), which applies to continued hearings such as the July 1, 2021 board hearing.[5] In order for the record to remain open after a continued hearing, ORS 197.763(6)(b) requires that (1)

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[5] ORS 197.763(6)(b) provides:

> "If the hearings authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence, arguments or testimony. If new written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence, arguments or testimony for the purpose of responding to the new written evidence."

new written evidence be submitted at the continued hearing, (2) a request be made to leave the record open, (3) the request be made prior to the conclusion of the continued hearing, and (4) the extended open record period be for the purpose of responding to new evidence submitted during the continued hearing.

As we understand it, petitioner argues that (1) petitioner's June 30, 2021 written testimony and July 1, 2021 oral testimony regarding petitioner's communications with T-Mobile constitute "new written evidence submitted at the continued hearing;" (2) Commissioner Berschauer's question constitutes a "request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence, arguments or testimony for the purpose of responding to the new written evidence;" and (3) the board erred by not keeping the record open, despite that request, based on county counsel's advice that the board could not leave the record open. Finally, petitioner argues that that procedural error prejudiced petitioner because petitioner "was deprived the opportunity to supplement the record to provide additional information regarding T-Mobile's willingness to work with [intervenor]" to enable intervenor to locate its facility at the Church. Petition for Review 12.

Intervenor responds initially that petitioner waived the procedural argument because petitioner failed to request that the record be left open before the close of the July 1, 2021, public hearing and failed to object during the board's deliberation after the exchange between Commissioner Berschauer and county counsel. In the alternative, and on the merits, intervernor responds that

Commissioner Berschauer's question did not constitute a request to leave the record open and county counsel did not advise the board that it was prohibited from reopening the record. Finally, intervenor argues, even if the county committed procedural error as petitioner alleges, petitioner has not demonstrated that its substantial rights were prejudiced.

"LUBA has long held that a party asserting a procedural error must demonstrate that the procedural error was objected to during the proceedings below, if there was opportunity to lodge an objection." *Eng v. Wallowa County*, 79 Or LUBA 1024, 1027 (2019) (citing *Mazeski v. Wasco County*, 26 Or LUBA 226, 232 (1993); *Dobaj v. Beaverton*, 1 Or LUBA 237, 241 (1980)). Petitioner does not assert that the county denied petitioner the right to request an extended open record period during petitioner's testimony at the July 1, 2021 hearing. Petitioner argues that petitioner had no opportunity to request that the board reopen the record *after* the exchange between Commissioner Berschauer and county counsel, because the July 1, 2021, hearing was held remotely, and petitioner had no technical ability to participate in the hearing after providing testimony. Reply Brief 2. In *Eng v. Wallowa County*, 79 Or LUBA 421, 430-35 (2019), we concluded that the petitioners were not precluded from assigning procedural error to the county's admission of new evidence with the applicant's final written argument merely because they failed to object during the local proceedings, where the opportunity to object was provided after the county had already considered evidence, deliberated, and made its oral decision, and where

the record was closed and no further testimony was allowed. We accept for purposes of this decision petitioner's unchallenged allegation that petitioner had no opportunity to object to the alleged procedural error during the board's deliberations. Thus, we proceed to address the merits of the first assignment of error.

We agree with intervenor that Commissioner Berschauer's comment was not a request to leave the record open. Commissioner Berschauer's question arose in the context of a board discussion about *extending the board's deliberation* after the record was closed. The pertinent portion of the exchange is quoted below:

> Commissioner Berschauer: "[I]t seems to me that the Church on the Hill property has been elevated to the most likely alternative and, yet, it's not just the land use process that is in question; it is a contractual issue that the city really doesn't have control over. So, that's the part where I get hung up and I just say, if you can't guarantee the that most viable alternative is even possible, then it's kind of disingenuous to say that's the direction you should go. In the meantime, let's deny the current site. So, if we push this out another week, obviously that would give me more time to read the rest of the documents, but I would also add that that will give the city time to try to get that done with T-Mobile. I mean, that's what I would be doing if I had another week. I'd put the pedal to the metal and make sure that I could get the T-Mobile issue—the contractual issue—satisfied and, if not, if we come back in a week and it's not satisfied and there is still a big question mark there, then, unfortunately—I know that both sides are very passionate—but I would be inclined to grant [intevenor's] application."
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> County counsel: "Madam Chair, Commissioners, the record is closed. If something changes with regard to the Church, the record is closed. That would not be evidence that you could consider in your decision. So, if you want to delay to finish deliberation next

week, you could certainly do that, but not for the reason that was just stated."

> Commissioner Berschauer: "Thank you. Thanks for that clarification. I would say then that I feel like I've heard enough, a recap of the material, and it's been several weeks since we met the last time, so if the T-Mobile contractual issue truly was open for debate and could be changed, I feel like that is what would have happened, especially since the city feels so strongly about this. So, I would be willing to vote today." Audio Recording, Yamhill County Board of Commissioners, July 1, 2021, at 5:15:54 - 5:18:50.

That exchange shows that Commissioner Berschauer expressed their mistaken understanding that extending the board's deliberation may allow more time for petitioner to get an answer from T-Mobile about the noncompete clause and potentially remove a legal barrier to siting the facility at the Church. However, Commissioner Berschauer's statement did not constitute a request to leave the record open or to reopen the record after the public hearing had ended and the record had closed. Accordingly, ORS 197.763(6)(b) was not invoked because no person requested, prior to the conclusion of the continued hearing, that the record be left open to allow petitioner to supplement its evidence regarding the T-Mobile noncompete clause.

In essence, petitioner argues that ORS 197.763(6)(b) provides petitioner a substantial right to *supplement* petitioner's submitted evidence after a continued hearing. Petitioner is incorrect. ORS 197.763(6)(b) provides a right to *respond* to

new evidence submitted at a continued hearing.[6] ORS 197.763(6)(b) does not provide petitioner a right to an extended record period to supplement petitioner's submitted evidence. *See Friends of the Hood River Waterfront v. City of Hood River*, 67 Or LUBA 179, 195 (2013) ("[N]either ORS 197.763 nor any other authority we are aware of grants anyone 'endless' opportunities to submit new evidence or to respond to new evidence.") (citing *Wetherell v. Douglas County*, 56 Or LUBA 120, 127 (2008); *Rice v. City of Monmouth*, 53 Or LUBA 55, 60 (2006), *aff'd*, 211 Or App 250, 154 P3d 786 (2007)). Accordingly, petitioner has not established that the county violated any applicable procedure.

The first assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

With respect to the site design review criteria in Yamhill County Zoning Ordinance (YCZO) 1101, the board concluded the application must be approved for two alternative reasons. First, the board concluded that it could not deny the application based on the site design review criteria since the facility is a permitted use in the EFU zone under ORS 215.283(l)(c)(A). Record 31. Second, in the alternative, the board concluded that the facility complies with the site design review criteria in YCZO 1101 and adopted detailed findings addressing each approval criterion. *Id.*

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[6] Intervenor does not dispute that new evidence was submitted at the continued hearing that could support a request to leave the record open under ORS 197.763(6)(b). We express no opinion on that undisputed issue.

Petitioner argues that the county erred in finding that YCZO 1101 is inapplicable because intervenor did not appeal the planning director's application of the site review standards. Intervenor argued directly to the board that it could not apply those standards, and the board agreed. Petitioner does not acknowledge, let alone challenge, the board's alternative conclusion that the application complies with the site design review criteria in YCZO 1101. Accordingly, petitioner's third assignment of error provides no basis for reversal or remand.

The third assignment of error is denied.

The county's decision is affirmed.