Dayton-Lafayette Wellfield, Land Use Approvals & Orders

Appendix H

The following land use documents are organized in chronological order.

Dayton-Lafayette Wellfield, Land Use Approval

3/13/99 Yamhill County Planning Director Approval (SDR-01-99)

Yamhill County

DEPARTMENT OF PLANNING AND DEVELOPMENT

401 NE EVANS STREET • McMINNVILLE, OREGON 97128-4523 • (503) 434-7516

NOTICE OF PLANNING DIRECTOR DECISION

Notice is hereby given that the Director of the Yamhill County Department of Planning and Development has approved, with conditions, the request described below. The conditions of approval are noted on the following page.

DOCKET NO.:	SDR-01-99
REQUEST:	Site design review for the cities of Dayton and Lafayette to establish a municipal water source to be shared by both cities consisting of five wells, treatment facilities, storage, pumping stations and distribution lines.
APPLICANT:	The cities of Dayton and Lafayette.
TAX LOT:	4319-2100, 4435-100, 4436-1000 4436-1100, 4425-400
LOCATION:	The five wells will be located west of Airport Road and south of Cruickshank Road. Each well site will contain a small pump house along with the necessary electrical service to power the pump. The treatment/storage facilities will be located South of the PGE substation near the intersection of the Amity-Dayton Highway and the Lafayette Highway.
ZONE:	EF-80, Exclusive Farm Use
CRITERIA:	Sections 402 and 1100 of the *Yamhill County Zoning Ordinance*, It has also been argued that the following sections of the *Yamhill County Comprehensive Plan Revised Goals and Policies* also apply: Section I D, Policy a.; Section II A Summary; and Section II A Goal 1, Policy d.

Any aggrieved person(s) wishing to appeal the decision to a hearing before the Board of County Commissioners must file an appeal, together with a $250.00 fee, stating the ordinance, statute or rule provisions which have not been satisfied. In the event that an appeal is not filed by an affected party, such party waives the right to further appeal. Dated March 13, 1999.

AN APPEAL MUST BE FILED NO LATER THAN
5:00 p.m., March 31, 1999.

For further information, contact Ken Friday at 434-7516.

NOTICE TO MORTGAGEE, LIENHOLDER, VENDOR, OR SELLERS: ORS Chapter 215 requires that if you receive this notice, it must be promptly forwarded to the purchaser.

F:\PLANNING\SHARE\SDR\SDR01-99.SPO

CONDITIONS OF APPROVAL FOR DOCKET SDR-01-99
Dayton and Lafayette Municipal Water System

1. All permits required by Yamhill County for building construction and electrical installation shall be obtained.

2. Any wells in addition to the five proposed will need a new site design review and compliance with the appropriate zoning ordinance standards.

3. The cities of Lafayette and Dayton may not sell or transfer water from the approved wells to any other municipality or rural residential use located outside of the cities' Urban Growth Boundaries except in the following circumstances:

    A. Where the applicant's available water supply is contaminated to the point that it does not meet American Public Health Association Standards;
    B. Where it is necessary to allow an extension of water service to obtain a right-of-way or easement needed by the cities.
    C. To serve an agricultural use.

4. The cities shall maintain the well sites and related facilities by mowing them monthly during the growing season to curtail weeds and seed from spreading.

5. Water rights shall be obtained from the Oregon Water Resources Department (OWRD) prior to use of the water. The applicant shall abide by the conditions of approval required by the OWRD. The Planning Director shall recommend to OWRD to include the draft conditions in their Proposed Final Order as the minimum conditions of approval for applications G-14385 and G-14386. These proposed conditions include the following:

    Before Use of Water Takes Place
    Initial and Annual Measurements
    The Department requires the permittee to submit an initial water level measurement in the month specified above once well construction is complete and annually thereafter until use of water begins; and

    After Use of Water has Begun
    Seven Consecutive Annual Measurements
    Following the first year of water use, the user shall submit seven consecutive annual reports of static water level measurements. The first of these seven annual measurements will establish the reference level against which future annual measurements will be compared. Based on an analysis of the data collected, the Director may require that the user obtain and report additional annual static water level measurements beyond the seven year minimum reporting period. The additional measurements may be required in a different month. If the measurement requirement is stopped, the Director may restart it at any time.

All measurements shall be made by a certified water rights examiner, registered professional geologist, registered professional engineer, licensed well constructor or pump installer licensed by the Construction Contractors Board and be submitted to the Department on forms provided by the Department. The Department requires the individual performing the measurement to:

(A) Identify each well with its associated measurement; and
(B) Measure and report water levels to the nearest tenth of a foot as depth-to-water below ground surface; and
(C) Specify the method used to obtain each well measurement; and
(D) Certify the accuracy of all measurements and calculations submitted to the Department.

The water user shall discontinue use of, or reduce the rate or volume of withdrawal from, the well(s) if annual water level measurements reveal any of the following events:

(A) An average water level decline of three or more feet per year for five consecutive years; or
(B) A water level decline of 15 or more feet in fewer than five consecutive years; or
(C) A water level decline of 25 or more feet; or
(D) Hydraulic interference leading to a decline of 25 or more feet in any neighboring well with senior priority.

The period of non or restricted use shall continue until the annual water level rises above the decline level which triggered the action or until the Department determines, based on the permittee's and/or the Department's data and analysis, that no action is necessary because the aquifer in question can sustain the observed declines without adversely impacting the resource or senior water rights. The water user shall in no instance allow excessive decline, as defined in Commission rules, to occur within the aquifer as a result of use under this permit. If more than one well is involved, the water user may submit an alternative measurement and reporting plan for review and approval by the Department.

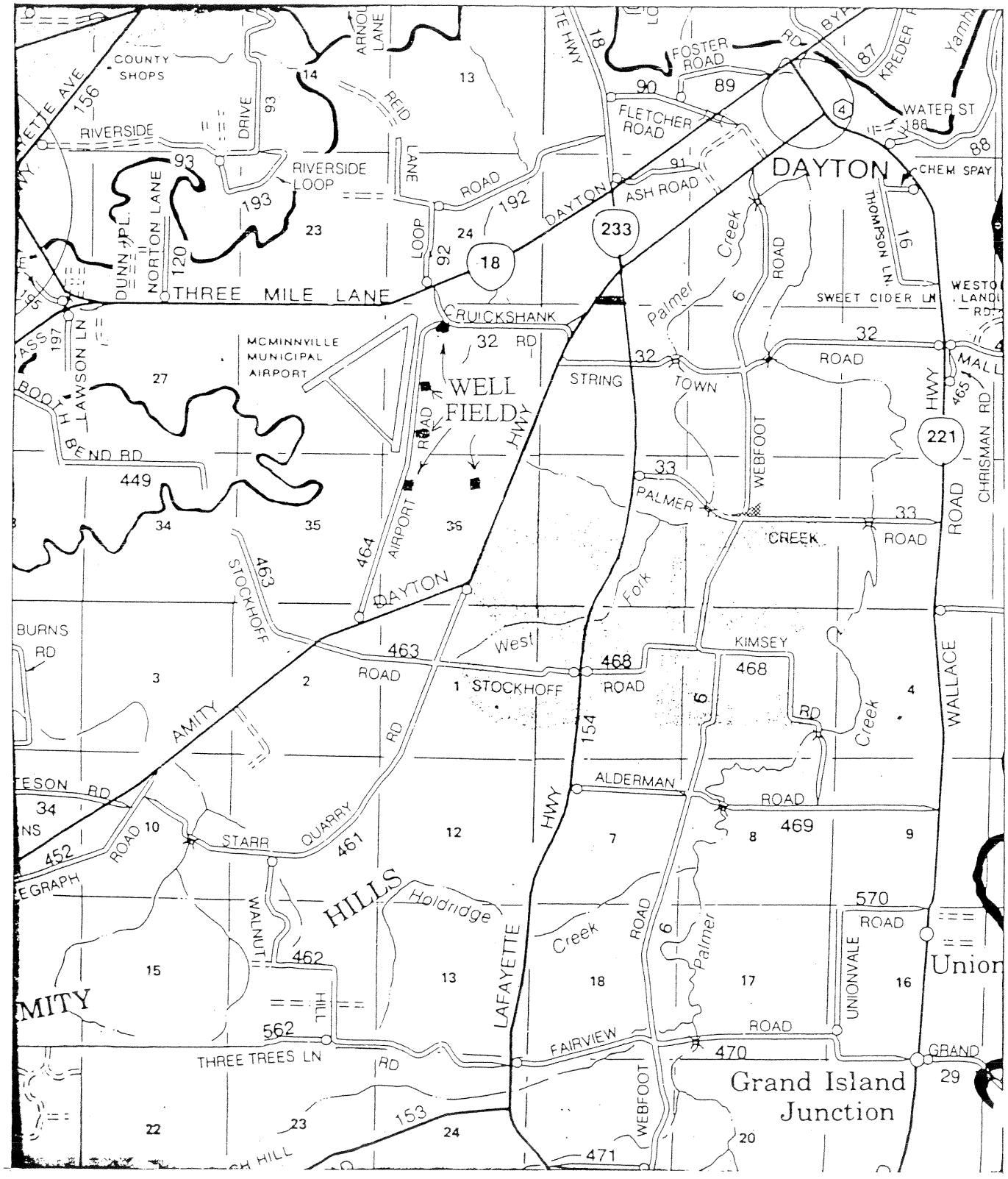
If the number, location, or construction of any well deviates from that proposed in the permit application or permit conditions, the conclusions of the Technical Review, Initial Review or Proposed Final Order under which this permit was granted may be revised, conditions may be appropriately revised, or this permit may not be valid.

Ground water for use under this permit shall be produced from no shallower than 100 feet below land surface. In addition, water from well 10 shall be produced from a confined groundwater reservoir between 100 and 250 feet below land surface.

In addition to other conditions in this permit, the Director may require the preferential use of certain wells and their times of operation to reduce interference with existing water uses. The permittee shall still obtain the quantity of water needed or permitted, whichever is less.

VICINITY MAP

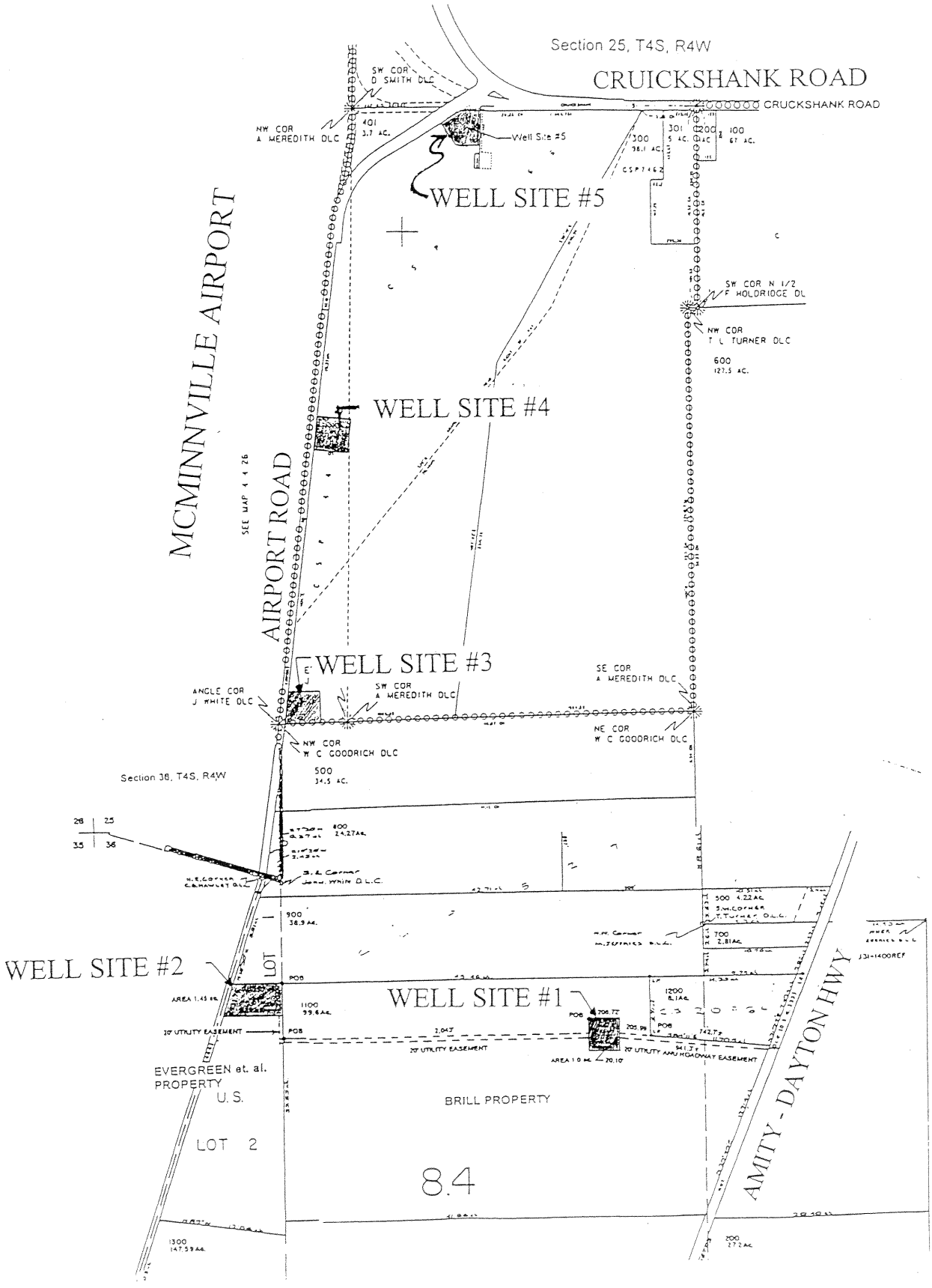
LOCATION OF PROPERTY



DOCKET NO: SDR-01-99

APPLICANT: DAYTON / LAFAYETTE

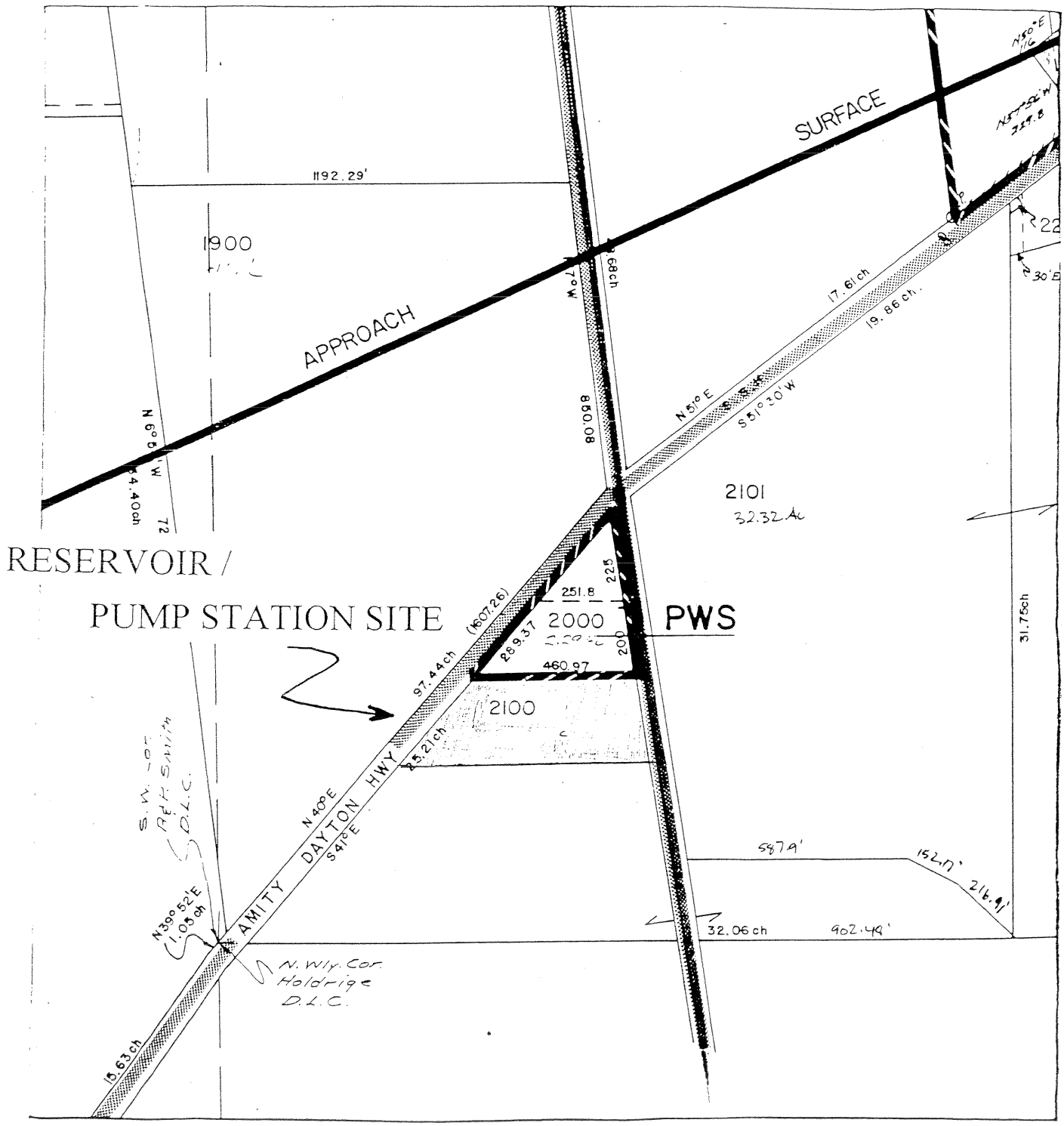
TAX LOT NO: 4319-2100, 4435-100, 4436-1000 4436-1100, 4425-400

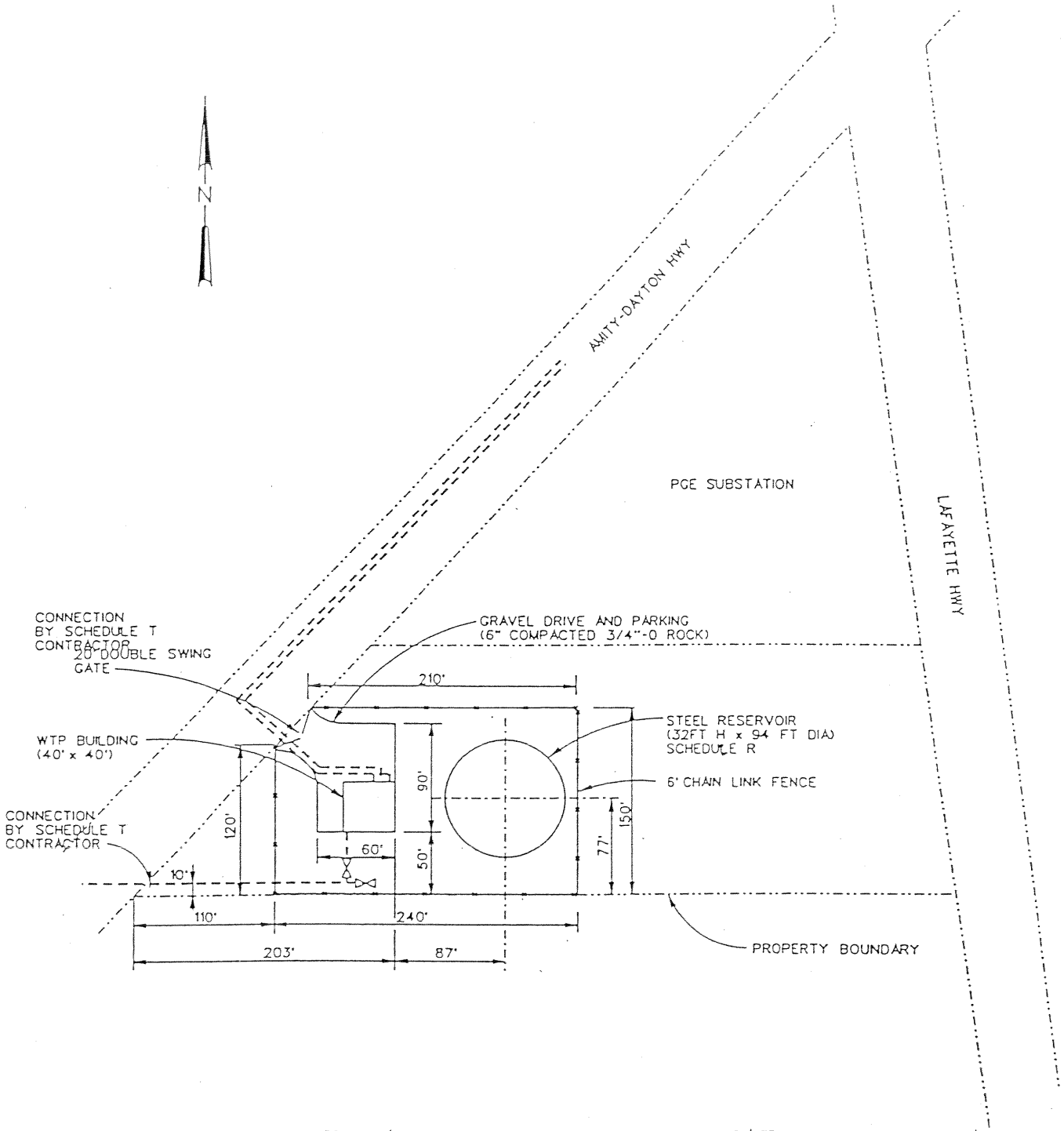


DOCKET NO: SDR-01-99

APPLICANT: DAYTON / LAFAYETTE

TAX LOT NO: 4319-2100, 4435-100, 4436-1000 4436-1100, 4425-400





RESERVOIR, WTP AND BOOSTER PUMP STATION SITE PLAN

1"-60'

PRELIMINARY

NOT FOR CONSTRUCTION

DESIGN X B. TAVERNA						VERIFY SCALE
DR B. TAVERNA						BAR IS ONE INCH ON ORIGINAL DRAWING. 0 1"
CHK X CHECKED-BY						IF NOT ONE INCH ON THIS SHEET, ADJUST SCALES ACCORDINGLY.
APVD APPROVED-BY	NO.	DATE	REVISION	BY	APVD	

Dayton-Lafayette Wellfield, Land Use Approval

7/8/99 Yamhill County Commissioners affirmation of Planning Director Approval

(Board Order 99-522, SDR-01-99)

'99 JUL 12 P2:57

IN THE BOARD OF COMMISSIONERS OF THE STATE OF OREGON

FOR THE COUNTY OF YAMHILL

SITTING FOR THE TRANSACTION OF COUNTY BUSINESS

In the Matter of a Request for Site Design Review for the Cities of Dayton and Lafayette to Establish a Municipal Well Source To Be Shared By Both Cities Consisting of Five Wells, Treatment Facilities, Storage, Pumping Stations and Distribution Lines	)))))))	BOARD ORDER 99-522 ORDER DENYING APPEAL AND APPROVING APPLICATION FOR SDR-01-99

THE BOARD OF COMMISSIONERS OF YAMHILL COUNTY, OREGON (the Board) sat for the transaction of county business on July 8, 1999, Commissioners Robert Johnstone, Thomas E.E. Bunn and Ted Lopuszynski being present.

IT APPEARING TO THE BOARD that in November of 1998, the Cities of Dayton and Lafayette filed an application with the Planning Department for approval of Site Design Review to establish water intake facilities (wells), treatment facilities, storage, pumping stations and related distribution lines for a municipal water system serving both communities on property located in the Exclusive Farm Use (EF-80) District under the applicable provisions of the Yamhill County Zoning Ordinance (Docket SDR 99-01). On January 29, 1999, after requesting additional information, the Planning Department deemed the application complete and continued processing the request.

IT FURTHER APPEARING TO THE BOARD that on March 12, 1999 the Planning Director approved the request subject to conditions. On March 25, 1999, the Dayton Prairie Water Association ("DPWA") filed an appeal of that decision.

IT FURTHER APPEARING TO THE BOARD that on May 13, 1999, the Board conducted a de novo review on the appeal of SDR 99-01, received evidence and testimony, and left the record open until 5:00PM on May 20, 1999. Commissioner Thomas E. Bunn recused himself from the consideration of SDR 99-01 based on a potential conflict of interest. Commissioners Ted Lopuszynski and Robert Johnstone participated in the hearing. The Board further received rebuttal and final arguments and set a date for a final decision on June 17, 1999.

IT FURTHER APPEARING TO THE BOARD that on June 17, 1999 the Board held a public meeting to consider SDR 99-01, deliberated and determined by a vote of 2 to 0 to deny the appeal and affirm the Planning Director's decision; Now, Therefore

IT IS HEREBY ORDERED BY THE BOARD that the decision of the Planning Director to approve the request for approval of Site Design Review SDR 99-01 allowing establishment of water intake facilities (wells), treatment facilities, storage, pumping stations and related distribution lines

for a municipal water system serving both applicants on property located in the Exclusive Farm Use (EF-80) District is affirmed and the application is hereby approved based on the findings contained in Exhibit "A" attached hereto and incorporated herein by reference, with the following conditions:

1. All permits required by Yamhill County for building construction and electrical installation shall be obtained.

2. Any wells, in addition to the five proposed, will need a new site design review application and must comply with the appropriate zoning ordinance standards.

3. The cities shall maintain the well sites and related facilities by mowing them monthly during the growing season to curtail weeds and seed from spreading.

4. Water rights shall be obtained from the Oregon Water Resources Department (OWRD) prior to the use of the water. The applicant shall abide by the conditions of approval required by the OWRD.

5. The Planning Director shall recommend to OWRD to include the draft conditions in its Proposed Final Order as the minimum conditions of approval for the applications G-14385 and G-14386. This is a recommendation only. The County recognizes that the Proposed Final Order may be changed or modified based on evidence presented to the OWRD. These proposed conditions include the following:

Before Use of Water Takes Place
Intitial and Annual Measurements
The Water Resources Department requires the permittee to submit an initial water level measurement once well construction is complete and annually thereafter until use of water begins;

After Use of Water has Begun
Seven Consecutive Annual Measurements
Following the first year of water use, the user shall submit seven consecutive annual reports of static water level measurements. The first of these seven annual measurements will establish the reference level against which future annual measurements will be compared. Based on analysis of the data collected, the Director of the Water Resources Department may require that the user obtain and report additional annual static water level measurements beyond the fifteen year reporting period. The additional measurements may be required in a different month. If the measurement requirement is stopped, the Director may restart it at any time.

All measurements shall be made by a certified water rights examiner, registered professional geologist, registered professional engineer, licensed well constructor or pump installer licensed by the Department. The Department requires the individual performing the measurement to:

(A) Identify each well with its associated measurement; and
(B) Measure and report water levels to the nearest tenth of a foot as depth-to-water below ground surface; and
(C) Specify the method used to obtain each well measurement; and
(D) Certify the accuracy of all measreuments and calculations submitted to the Department.

The water user shall discontinue use of, or reduce the rate or volume of withdrawal from, the well(s) if annual water level measurements reveal any of the following events:

(A) An average water level decline of three or more feet per year for five consecutive years; or
(B) A water level decline of 15 or more feet in fewer than five consecutive years; or
(C) A water level decline of 25 or more feet; or
(D) Hydraulic interference leading to a decline of 25 or more feet in any neighborhing well with senior priority.

The period of non or restricted use shall continue until the annual water level rises above the decline level which triggered the action or until the Department determines, based on the permittee's and/or the Department's data and analysis, that no action is necessary because the aquifer in question can sustain the observed declines without adversely impacting the resource or senior water rights. The water user shall in no instance allow excessive decline, as defined in Commission rules, to occur within the aquifer as a result of use under this permit. If more than one well is involved, the water user may submit an alternative measurement and reporting plan for review and approval by the Department.

If the number, location, or construction of any well deviates from that proposed in the permit application or permit conditions, the conclusions of the Technical Review, Intitial Review or Proposed Final Order under which this permit was granted may be revised, conditions may be appropriately revised, or this permit may not be valid.

Ground water for use under this permit shall be produced from no shallower than 100 feet below land surface. In addition, water from well 10 shall be produced from a confined groundwater reservoir between 100 and 250 feet below land surface.

In addition to other conditions in this permit, the Director may require the preferential use of certain wells and their times of operation to reduce interference with existing water uses. The permittee shall still obtain the quantity of water needed or permitted, whichever is less.

6. The Cities of Dayton and Lafayette shall request that the Oregon Water Resources Department extend the annual measurements called for in applications G-14385 and G-14386 from seven consecutive years to fifteen consecutive years.

This decision is supported by findings and conclusions in the attached Exhibit "A", which is incorporated into this Board order by reference, and by substantial evidence in the record of these proceedings.

DONE this 8th day of July, 1999, at McMinnville, Oregon.

ATTEST

CHARLES STERN
County Clerk

By: Carol Ann White
Deputy Carol Ann White

FORM APPROVED BY:

JOHN C. PINKSTAFF
Assistant County Counsel

YAMHILL COUNTY BOARD OF COMMISSIONERS

Robert Johnstone
Chairman ROBERT JOHNSTONE

Not available for signature
Commissioner THOMAS E.E. BUNN

Ted Lopuszynski
Commissioner TED LOPUSZYNSKI

F:\ADMIN\PINKSTJ\ORDER.wpd

EXHIBIT "A"

BOARD ORDER 99-522

PLANNING DIRECTOR'S APPROVAL March 12, 1999

BOARD OF COMMISSIONERS' FINAL DECISION July 8, 1999

DOCKET NO: SDR-01-99

REQUEST: An appeal by the Dayton Prairie Water Association of the Planning Director's approval of a Site Design Review application to establish water intake facilities (wells), treatment facilities, storage, pumping stations and related distribution lines for a municipal water system serving both communities on property located in the Exclusive Farm Use (EF-80) District. The appeal centers on whether it is "necessary" to locate the proposed utility facility in an EFU Zone in order for the service to be provided.

APPELLANT: Dayton Prairie Water Association

APPLICANT: Cities of Dayton and Lafayette

TAX LOTS: 4319-2100, 4435-100, 4436-1000, 4436-1100, 4425-400

LOCATION: The five wells will be located west of Airport Road and south of Cruickshank Road. Each well site will contain a small pump house along with the necessary electrical service to power the pump. The treatment/storage facilities will be located South of the PGE substation near the intersection of the Amity-Dayton Highway and the Lafayette Highway.

ZONE: EF-80, Exclusive Farm Use District

REVIEW CRITERIA: Sections 402 and 1101 of the Yamhill County Zoning Ordinance

FINDINGS:

A. Background facts

1. Parcel Size: The treatment facility is proposed to be on approximately 2.5 acres. Each well site is proposed to be located on an individual site of approximately one acre. Well site #2 will be on an area of 1.45 acres.

2. Access: The treatment/storage facility has access from the Amity-Dayton Highway (Highway

233). Wells 2-5 will have access to Airport Road. Well site #1 will have access to the Amity-Dayton Highway (Highway 233).

3. On-site Land Use: The properties in question are in farm use for grass seed or grain production.

4. Surrounding zoning and land uses: Surrounding zoning is EF-80 Exclusive Farm use. Surrounding farm uses are generally characterized by large fields of over 80 acres that appear to be in grass or grain production. Other farm uses in the area include nurseries and a poultry farm. Rural residential and small farm uses also exist on parcels of less than 10 acres. Surrounding land uses include the McMinnville Airport to the west of well sites #3-5. The airport is inside the city limits of McMinnville. To the north of the proposed pump station/treatment reservoir is the PGE substation which is zoned PWS Public Works, Safety District.

5. Water: To be provided by five wells. Several times in the application there are references made to Phase II which consists of five additional wells. These are discussed as an option to meet future demands. However, only the five wells mentioned under Phase I are part of this application.

6. Sewage Disposal: None

7. Fire Protection: Dayton Rural Fire Protection District

8. Floodplain: The properties involved are not located within the 100-year flood plain.

B. Grounds for Appeal

1. The basis of the appeal filed by the Dayton Prairie Water Association is that the applicant, the Cities of Dayton and Lafayette, failed to meet their burden in meeting the requirements of the Yamhill County Zoning Ordinance ("YCZO") §402.02(F) which permits a utility facility in an Exclusive Farm Use District if it must be situated in an agricultural zone in order for the service to be provided.

2. In particular, the appellant alleges that the Cities failed to demonstrate that there are no feasible alternatives to locating the utility facilities on EFU land and therefore the application must be denied. Appellants presented evidence during the public hearing to support their contention that viable alternatives do exist.

3. The Board after reviewing the evidence in the whole record finds that the applicants have met their burden of establishing that it is necessary to locate the proposed utility facilities in an EFU District in order for the service to be provided.

C. Ordinance Provisions and Analysis

1. Section 402.02 of the Yamhill County Zoning Ordinance lists permitted uses in Exclusive

Farm Use Districts. In particular, §402.02(F) provides the following as a permitted use:

> "*Utility facilities necessary for public service, except commercial facilities for the purpose of generating power for public use by sale, and transmission towers over 200 feet in height. The applicant will also be subject to Section 1101, Site Design Review. A facility is "necessary" if it must be situated in an agricultural zone in order for the service to be provided.*"

This section of the Yamhill County Code codifies §215.213(1)(d) of the Oregon Revised Statutes ("ORS") and the holding in McCaw Communications, Inc. v. Marion County, 96 Or. App. 552, 773 P.2d 779 (1989). The Supreme Court in Brentmar v. Jackson County reviewed the legislative intent of this statutory provision and found that the listed uses under ORS §215.213 are uses that are permitted outright and that a County may not require additional criteria to supplement the existing statutory provisions. Brentmar v. Jackson County, 321 Or. 481, 900 P.2d 1030 (1995). As a result the County's analysis in the present case is limited to the requirements of the statutory provision, ORS §215.213(1)(d) and the County Code provision implementing it, YCZO §402.02(F).

2. A "utility" is defined under YCZO §202 as:

> "*Any area of land or any structure used for the generation, storage, conversion or transfer of energy or for communication facilities, such as telephone, telegraph, radio or television, or for municipal water or wastewater treatment.*"

This definition in the County Code clearly incorporates the proposed municipal water system as a "utility facility."

3. The Board adopts the following summary as the basis for the "necessary test" required under YCZO §402.02 and ORS 215.213(1)(d). To determine whether it is necessary to situate a facility in an EFU District, the County must determine whether the proposed municipal water system must be situated in an agricultural zone in order for the service to be provided. This analysis includes evaluating whether there are any feasible alternatives to the proposed project on non-EFU zoned lands ("necessary test"). Clackamas County Service District No. 1 v. Clackamas County, LUBA No. 98-047, p.12 decided on December 17, 1998. The applicant's burden is met when the evidence submitted establishes that there are no feasible alternatives to providing the service other than on agricultural lands. *Clackamas County* at 12. In deciding whether an alternative is feasible, the County may consider information on a case-by-case basis that is relevant given the nature of the project including factors such as cost and technology. Clackamas County at 12. Although cost and technological feasibility are not the only factors to consider, they are relevant to the final decision in deciding whether it is necessary to locate the proposed facility on EFU land.

3.1 The appellants argue that, in addition to the "necessary test," the applicants must also demonstrate that the service being provided is itself necessary. However, the Court of Appeals in *McCaw* clearly rejected this interpretation of the "necessary test." *McCaw* at 779-781. Although the County does not interpret the "necessary test" as including this component, the evidence in the

record clearly establishes that the Cities have met this standard.

Both cities have experienced rapid population growth. Both have also developed population estimates for the next 20 years. The Dayton Water System Predesign Report and the Lafayette Water System Master Plan lists a 4% growth rate for the purpose of their report. This is above the 2.72% for Dayton and 2.7% for Lafayette that occurred from 1940 to 1994. It appears the higher growth rate was used in the engineering reports to protect against under-designing the system. However, whichever growth rate is used does not appear to be a central issue since each city has documented its inability to meet current demand for water based on existing populations.

Neither water system for the cities of Lafayette and Dayton is capable of meeting the projected demand in the near future. In fact the adopted Master Plan for the City of Dayton indicates that daily water demand will exceed available supply by more than three times by the year 2012. Lafayette, similarly, will exceed existing capacity by nearly four times by the year 2017.

The City of Dayton is currently entering a water crisis. Inadequate water supply deprives residents of basic necessary utilities while decreasing the ability of each community to provide adequate fire suppression. The application states:

> "*These water systems are inadequate to meet both current and future needs of the cities. Without any additional sources of water, the communities will face estimated water deficits of 132 gpm to 279 gpm during average daily summer demand and 548 gpm to 673 gpm for maximum daily demand during the coming years. Some of the projected shortfall can be met through existing storage capacity. This has not, however, eliminated the need for strict rationing measures as witnessed by residents of both communities during the summer of 1997 (Dayton and Lafayette) and 1998 (Dayton). Current demand in Dayton is requiring the in-town wells to be pumped two to three months longer than in the past just to meet winter time daily demand. Finally, existing storage capacity does not begin to address the long-term needs of both communities.*"

The Cities of Lafayette and Dayton are required by the state land use planning framework to meet their legal obligation of providing adequate public facilities. ORS 197.250 requires cities and counties to adopt comprehensive plans in compliance with the statewide land use planning goals. Goal 11 requires cities and counties to determine their needs for public facilities and services based on development plans and population projections, and to assure through plan policies and facility plans that needed facilities and services are available in advance of or concurrent with development. Water is without a doubt one of the required key facilities. LCDC Goal 11, OAR 660, Division 11; Burghardt v. City of Molalla, 22 Or LUBA 369 (1991). In turn, ORS 197.505 to 540 strictly regulates a city's ability to declare a moratorium on growth, with tight time lines and an ultimate requirement that the public facilities be made available.

This information regarding immediate water system deficiencies and the legal obligations to accommodate growth under the state land use planning system clearly establishes a need for

expanding the existing sources of water in each city in order to meet demand.

3.2 In addition to establishing that the proposed water system improvements are necessary, the applicants also provided substantial evidence in the record as a whole establishing that there are no feasible alternatives to locating the project on EFU land. The applicants reviewed the feasibility of alternative solutions to the proposed project including (1) conservation of existing resources, (2) increased production from existing resources, (3) withdrawing water from the Willamette and/or Yamhill Rivers and (4) purchasing water from McMinnville Water and Light.

3.2a The City of Lafayette projected that they may be able to reduce average consumption by 9% over the next 20 years. In addition, Lafayette has reduced their water loss from the distribution lines from 14% to 3.8%. Neither of these efforts are enough to address the City's projected water demand. The Board finds that conservation is not a viable alternative to meeting the significant need for additional water sources in the cities of Dayton and Lafayette.

3.2b The Board finds that increasing system production is also not a feasible alternative in addressing the cities' immediate water demands. Existing system capacity for Lafayette and Dayton is based on a well and spring system located on the northern edge of the Troutdale formation. This area is believed to possess limited quantities of water and has production rates well below that needed by the cities. Due to limited quantities of water, the applicants believe that the Water Resources Department would not grant additional water rights. In addition, wells located in Dayton and between Dayton and Lafayette have poor water quality due to iron, manganese and sulfur contamination. Both cities have looked towards expanding the existing system in lands outside the city limits but have failed. Numerous wells have been drilled and abandoned due to inadequate water supply and water contamination. This approach to increasing the existing water supply has perpetuated a continual water crisis for both communities. Examples include recent declines in production for two wells near the City of Dayton's spring system and the abandonment or failure of most of 11 Lafayette wells due to loss of static head, contamination and declining productivity. The applicant states:

> "*The aquifer in both cities, however, will not support significantly increased pumping and will very likely fail in a short period if further developed. This combination of declining production, poor water quality and water rights limitations make expansion of the existing source locations unfeasible and inappropriate.*"

The existing water sources are within watersheds which feed tributaries to the Yamhill River. The Yamhill River currently has no available water rights. The State Water Resources Department has indicated that water rights will not be available in the future for any wells that may impact these drainage areas. This precludes the two cities from developing new production wells in the aquifers where the existing sources are located.

3.2c The Board finds that the Yamhill and Willamette Rivers are not feasible alternatives to addressing the cities' immediate water demands. Both communities considered withdrawing water from the Yamhill and Willamette Rivers. These sources would also require utility facilities in the

EFU Zone and are therefore not viable non-EFU alternatives. In addition, there appears to be limited availability of water rights for withdrawing surface waters during the summer months. Although the appellants indicate that water is available for appropriation, there is no indication that permitted water rights would be granted for that appropriation. The applicants submitted additional information from the final report of the Regional Water Supply Plan and the Willamette River Basin Water Quality Study. One excerpt of the Regional Water Supply Plan states on page 252:

> *"A number of citizens and stakeholders gave testimony expressing substantial concern and opposition to the proposed inclusion of the Willamette River in the package of future regional water sources. These concerns were raised primarily in hearings before the Portland City Council and the Metro Council. In response, Metro encouraged additional study and improvement of water quality prior to using the Willamette as a potable source in the region."*

The September 27, 1995 notes from the Multnomah County Public Workshop regarding the Regional Water Supply Plan ("RWSP") state:

> *"(Those testifying) feel that the public's probable fear of other sources should be taken into consideration, especially due to historical water quality problems on the Willamette. The recommended strategy should be delayed until we know more about the Willamette River's water quality. We should wait until the DEQ Willamette River Basin Water Quality Study is completed. In the recommended strategy, the Willamette would not be used as a source for another 40 years. This gives the region plenty of time to conduct additional studies, participate in efforts to enhance the quality of the river, and to learn more about improved treatment technologies. If the additional information suggests the Willamette should not be used, there is ample time to change direction, as contemplated in the RWSP, and turn to another source of water. During the course of the RWSP effort, water quality and treatment evaluation were conducted, including a pilot treatment plant on the Willamette River. From these analyses, a conservative treatment regime, with multiple treatment barriers, was developed such that the treated water would surpass state and federal standards. Finally, there are tradeoffs involved with any source. Development of the Willamette would create a relatively low impact on the environment, for example. Other sources may have better water quality but present a much greater impact on the environment."*

Compounding public concern over the Willamette River option is possible health concerns. Regional difficulties includes abnormalities found in juvenile Northern Squawfish near Newberg, approximately 10 miles downstream from Dayton and Lafayette. The DEQ has offered one possible explanation but to date the skeletal abnormalities have not been explained. The lack of explanation for these abnormalities has caused public concern for drinking water from the Willamette. The number of reports and articles submitted on each side regarding using the Willamette illustrates the complexity of the issue. Public confidence in the drinking water provided to a community is very important. As noted previously, additional study of the Willamette appears necessary before there

is broad public acceptance of the Willamette as a drinking water source. Even existing strategies contemplate such use being decades away.

In addition to real public policy concerns regarding the use of this source, the applicant conducted a detailed cost estimate indicating that the total project cost to appropriate Willamette river water would be around $11,404,000. The original project cost for the proposed water system is $5,050,0000. Available funding from each city to financially support this project is limited. Available funding from Dayton is $2,700,000 and $1,990,000 from Lafayette. With the exception of a $700,000 block grant obtained by Dayton and some $66,000 available through existing budgets, the remaining $3,940,000 must be raised entirely through bond sales. Bonds will be repaid through increased water rates. As a result Lafayette has the highest water rates in the county and Dayton faces similar increases. Even with the rate increase Lafayette still remains $1,900,000 short of completing the entire project. Cost was a significant factor in the design and implementation of the proposed water project and the Willamette River is simply beyond the financial capabilities of either community.

Opponents submitted an article from the 1/15/99 Oregon Insider, written by Kevin Hanway, Executive Director, Willamette Water Supply Agency. The article is titled The Willamette River as a Water Supply. The article reports on data collected from a pilot study that evaluated water samples from the river near the location of the treatment plant in Wilsonville, on the north side of the river about 1 mile west of the I-5 bridge. It reports on the use of the Willamette as a source of drinking water with a proper treatment facility.

Nothing in this report suggests that data from a single pilot study at one location along the Willamette River can be extrapolated into a broad sweeping generalization that the Willamette River is a clean water source. This information indicates at best, that communities willing to invest in the research and treatment of water in the long-run may benefit. However, as indicated above the applicants have significant immediate water concerns and the cost of a proper treatment facility would be approximately $6,000,000 greater, and consequently far beyond the financial capacity of the applicants. The potential for water rights is speculative.

3.2d The Board finds that purchasing water from McMinnville Water & Light ("MW & L") is not a feasible alternative. The applicant has requested purchasing water from MW & L in a letter dated April 17, 1992. However, the City of McMinnville passed a resolution placing a moratorium on water extensions outside of the Urban Growth Boundary, Resolution 1987-1. Recent requests by the applicant have been similarly met with reluctance on behalf of McMinnville to sell their water. In particular, Lafayette City Administrator, Bob Willoughby, testified at length regarding the potential of purchasing water from MW &L as evidenced in the minutes for the Public Hearing dated May 13, 1999:

> "Mr. Willoughby discussed at length his efforts to negotiate with the City of McMinnville and McMinnville Water & Light for surplus water. He stated that he talked with W & L board members as well as McMinnville's mayor, and was turned down. He stated that he was told by W & L's manager that its long-range plans

indicate it will need all the current supply for at least the next 20 years, and that there is no surplus. He stated that apparently W & L and the City of McMinnville intend to participate in regional planning but they won't be able to assist the smaller cities in the near future with actual supply."

3.2e Opponents of the project contend that the cities have the authority to condemn the McMinnville Airport property and therefore, a feasible alternative exists on non-EFU zoned land. The power to condemn property already devoted to a public use must be granted expressly or by necessary implication by the legislature. Little Nestucca Road Co. v. Tillamook Co., 31 Or 1, 48 P. 465 (1897); Emerald PUD v. PP & L, 76 Or.App. 583, 591, 711 P.2d 179 (1985), aff'd. 302 Or. 256, 729 P.2d 552 (1986). This is a long held principle of common law. Pacificorp v. City of Ashland, 88 Or. App. 15, 24-25, 744 P.2d 257 (1987). Opponents fail to cite to the specific authority granting the cities of Lafayette and Dayton the power to condemn *public* property being devoted to a public use. ORS 225.020 grants authority to condemn private property, not public property. Without specific authority, this Board finds that the cities of Dayton and Lafayette may not condemn property owned by another public entity for the purposes of developing a municipal water supply. Furthermore, because funds from the Federal Aviation Administration may be involved in the operation of the airport, the authority of the cities is cast in further doubt. As a result, the Board finds that condemning property owned by the McMinnville Airport is not a feasible alternative to the proposed project. The Board evaluated the analysis provided by both sides' legal counsel and finds the applicants' position to be correct.

3.2f During the Public Hearing on May 13, 1999 appellants presented evidence suggesting that a gravity flow storage system is a feasible alternative. The Board finds that a gravity storage system is not a feasible alternative. In order to address water demand in both cities a gravity flow system would require construction of a steel reservoir in each city given the distance between the two water sources supplying water to each city. Even if the costs of constructing two steel reservoirs were reasonable and available, a steel or concrete tank would supply less than 1 percent of the required summer storage. As a result, both cities would be required to create a dam or reservoir in each watershed for each city. To effectively use a dam or reservoir as a water source, surface water treatment plants and the transmission mains would be required. The costs of this infrastructure would effectively prohibit the viability of these sources given the limited budget constraints for each city. Even if the infrastructure and cost constraints are overcome, the resulting project would significantly impact EFU lands and is therefore not a feasible non-EFU alternative. An alternative is feasible only if it provides a municipal water source on non-EFU land. *Clackamas County* at 12.

3.2g In considering the location of the treatment facility/reservoir the applicant states that it is necessary to be located near the water source. The ability to easily provide water to both jurisdictions as well as being as nondisruptive as possible to farmland are further considerations regarding location. The site that was chosen is near the PGE substation. The applicant states:

> "The site was specifically designed to allow the maximum continued use of the available farmland while avoiding interference and safety concerns associated with the adjacent power transmission lines."

The applicant also submitted evidence concerning other sites for the reservoir within the city limits of Dayton. All appropriately zoned sites were discussed and information has been provided to explain why they were rejected. The Board finds that it is necessary for the combination treatment facility/reservoir to be located in the proposed location within an EFU District in order for the service to be provided.

3.2h Opponents mentioned the regional Intertie Study as an alternative water source. Commissioner Johnstone in his own words found this solution untenable, stating:

> "*...although the Board has authorized staff time to work on the intertie study, no money was allocated for the project. He said the funding was provided through a regional grant for the purpose of determining the feasibility of interconnecting municipal water systems but the study does not focus on identifying specific regional suppliers. He said McMinnville Water & Light will not be in a position to be a regional supplier for the foreseeable future. He stated the issues of water supply, construction of a delivery system and allocation will be much too complicated and time-consuming for the Board to consider asking local municipalities to delay their plans.*"

This Board finds that the regional Intertie Study is a policy paper intended to foster and facilitate development of solutions in the long-run and does not provide a practical alternative that can be funded to address the immediate needs identified in this case.

3.2i Opponents have asserted that the proposed utility facility must be as nondisruptive as possible to farm use as possible. The authority test they have cited is McCaw Communications Inc. v. Marion County, 96 Or. App. 552. Specifically the Court stated, "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." The language cited above was background for explaining why the "necessity test" was enacted by the legislature. It was not intended to add an additional restriction or criterion. However, if it is determined this is a required finding, it is addressed as a precautionary matter under Finding D-3 below.

4. Opponents spent a considerable portion of the public hearing discussing various policies and objectives of the Yamhill County Comprehensive Plan. The proposed application is to be measured against the relevant approval criteria under YCZO §402 and 1101. Relevant criteria do not include a requirement that the proposed development be consistent with the Comprehensive Plan. The County's Zoning Ordinance was adopted consistent with the Comprehensive Plan and State Land Use Goals. Application of those land use regulations after acknowledgment by the State eliminates the otherwise inefficient review of individual applications for consistency with the Comprehensive Plan.

D. Site Design Review

1. Section 1101.02 of the YCZO governs site design review. Section 1101.03 (B) states that the Director shall determine whether the application will be reviewed using the Type A or Type B application procedures. The Type A application procedure was used to process this request. There are two reasons for using the Type A process. The first is that utility facilities have historically been processed using this procedure. The second reason is that the Planning Commission has already received testimony regarding this application before there ever was a formal request. At the October 1, 1998 Planning Commission hearing, there was testimony taken on amending the zoning ordinance to add requirements for showing when a utility facility is necessary to be placed in the farm zone. Much of the testimony taken at that hearing was specifically directed at a potential application from Dayton and Lafayette for a municipal water system. The applicants feel they have reasons to challenge the Planning Commission's authority to hold a hearing based on the amount of testimony that was already received prior to their application. Therefore, in order to avoid a potential procedural problem and in keeping with the past practice in processing such applications, the Planning Director determined that the Type A procedure would be used.

In addition to the careful consideration given to process by both the County planning staff and Director, County Counsel aptly pointed out during the de novo hearing on appeal that no prejudice would result from any procedural error where all parties have ample opportunity to present new evidence and testimony. The Board finds that the process followed by the County staff and the Planning Director was appropriate, was authorized by the county Zoning Ordinance and that no prejudice would result where a new hearing was provided on appeal.

The Dayton Prairie Water Association through its legal counsel, had their attorney, David Van't Hof, send a letter in opposition to the application. The first point of his letter asserts that the Planning Department must provide notice and an opportunity to comment on the application. This argument is based on the site design review criterion 1101.02(7) which directs the county to consider, "Comments and/or recommendations of adjacent and vicinity property owners whose interests may be affected by the proposed use." The Board does not interpret that this requires notice to be mailed prior to a decision on this request for a variety of reasons. First, as stated above the site design review procedures clearly allow the Director to determine whether the application shall be reviewed under the Type A or B application procedures. Using Mr. Van't Hof's interpretation there would be no need for the Type A application procedure.

Secondly, the ability to process a site design review under Oregon Revised Statute 215.416(11)(a) allows the director to make a decision without a hearing. ORS 215.416(11)(a) states in part that, "The hearings officer or such other person as the governing body designates, may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for appeal of the decision to those persons who would have had a right to notice if a hearing had been scheduled or who are adversely affected or aggrieved by the decision." Through the Type A procedure the County is following this process. It was also suggested that the Planning Department hold a hearing before the Planning Director. This statute provides that a hearing is not necessary when proper notification procedures are followed. Furthermore, the Yamhill County Zoning Ordinance does not provide a process for a hearing before the Director.

Thirdly, comments submitted were considered in the staff report and in the final decision. As stated earlier there were numerous comments submitted related to this application at the October 1, 1998 Planning Commission hearing. The Planning Director attended that hearing and the minutes from the Planning Commission hearing have been made part of the record and those comments have been considered. Additionally there has been an opportunity to submit comments since the application was first submitted in November and then resubmitted in early February. Therefore, the Planning Department believed and the Board concurs that it is appropriate for the Director to make a decision on the request without a hearing.

2. Review of a site development plan shall be based upon consideration of the following:

(1) Characteristics of adjoining and surrounding uses;

(2) Economic factors relating to the proposed use;

(3) Traffic safety, internal circulation and parking;

(4) Provisions for adequate noise and/or visual buffering from noncompatible uses;

(5) Retention of existing natural features on site;

(6) Problems that may arise due to development within potential hazard areas.

(7) Comments and/or recommendations of adjacent and vicinity property owners whose interests may be affected by the proposed use.

3. Regarding criterion (1) above the surrounding area is in farm use. The farmers in the area have expressed great concern to staff with the establishment of this use. The majority of those concerns have centered on the potential loss of water from the establishment of these well sites. The Board finds that the allocation of water rights within the exclusive authority of the Oregon Water Resources Department (OWRD). The appropriation of groundwater is covered in ORS 537.505 to 537.795 and 537.992. The county does not have the authority to appropriate water. The granting (or denial) of water rights is done strictly by the OWRD. Therefore, the county's analysis must be limited to the "necessity test" and the site design review criteria.

However, opponents have argued that the facility must be as "nondisruptive of farm use as the language defining it allows." The Board finds that the "nondisruptive" factor is not part of the "necessary test" as indicated above. However, if this were an element of the "necessary test", the following findings establish that this "nondisruptive" test is clearly met. The site design review criterion regarding the characteristics of adjoining and surrounding uses also requires consideration of farm uses and is addressed as follows:

The applicants have demonstrated how they have designed the system to minimize the impacts on area farm activities. These design features include spacing the wells 1500 feet from

existing agricultural wells. The well sites will be surrounded by a one-acre site. They are located close to existing roads and property lines. This is to be as nondisruptive as possible to existing farm uses. The greatest concern expressed to date is that taking the groundwater will deplete the aquifer and prevent farmers from using water for irrigation. As stated above, Yamhill County does not have the authority to appropriate water. That responsibility is from the Water Resources Department (WRD). The applicants have applied to WRD for a water right (Application No. G-14385 and G-14386). The WRD has drafted a proposed final order approving the permit with conditions designed to protect senior water rights and, therefore, preserve the farm uses that rely on those water rights. Because the state law grants the WRD that authority, and they have the expertise to determine appropriate conditions, the Board believes this addresses the concerns regarding the characteristics of adjoining and surrounding land uses as to water use. Therefore, the Board finds that the modified conditions of approval requiring the applicants to obtain a water right from the WRD prior to use of the water address impacts to surrounding uses. Conditions of approval for that water right will then be required to be adhered to by the WRD. The Board also required the applicants to recommend to the Water Resource Department that the conditions listed in the Proposed Final Orders of G-14385 and G-14386 be the minimum necessary for use of these wells.

The site of the proposed treatment facility/pump station/reservoir is also located close to the PGE substation. The applicant states this location was selected to try and minimize the impact on adjacent farming activities. Siting the facility next to the existing substation, at the edge of a farm parcel, will cluster the utility uses. This will have less of an impact on farm use than if the facility was placed near the center of a farm parcel.

Much of the property involved with this request will be maintained in grass or a similar groundcover. The opponents have requested, and the applicants have not objected, to a condition to have each site mowed once a month. This is appropriate to curtail the spread of weeds onto neighboring farmland. Therefore, this will be made a condition of approval.

4. Regarding criterion (2) above, the Board finds that the costs of the project will be covered by grants and ratepayers from each jurisdiction. There is no evidence that the development could not be completed with the economic resources of each jurisdiction. In addition, as noted above, the cost of other identified potential water sources would be prohibitive. The selected alternative is consistent with this criterion.

As demonstrated in the application and public hearing, the applicant cities have an immediate need for water to supply current demand. In addition, this project will meet demands based on projected growth in both cities for the next fifteen to twenty years. State law requires cities to accommodate growth by providing public facilities including water. Maintaining a growing county population within urban areas achieves important state and county objectives of preserving farmland. Yamhill County in particular has an active, healthy agricultural base, as confirmed by testimony at the public hearing. The Board finds that preserving that agricultural base by assuring the provision of public facilities to a growing urban population meets the criterion requiring evaluation of economic consideration of the request.

5. Regarding criterion (3) above, each well site will have its own access. The number of trips generated and parking spaces required is anticipated to be very low. Each well site will be one acre in size which would provide enough area for parking. The treatment facility/pump station/reservoir has a graveled area that will measure 40'x50'. This will be adequate to provide parking and internal circulation for trucks and large vehicles to service the facility on the site.

6. Regarding criterion (4) above, each well site will contain a small structure for the well pump. The location of the treatment facility/pump station/reservoir is located close to the PGE substation to minimize the visual impact and noise impact on adjacent uses. Based on the design as submitted no conditions requiring greater noise or visual screening are recommended.

7. Regarding criterion (5) above, there are no significant natural features on-site that require preservation.

8. Regarding criterion (6) above, the wells and treatment facility/pump station/reservoir are not located within the 100-year flood plain or other designated hazard area.

9. Regarding criterion (7) above, Planning Department staff received comments from interested parties regarding this application. As stated in Finding D-3, the comments submitted focused on the appropriation of water which is not governed by the county but by the Water Resources Department. Additional comments were addressed during the public hearing on appeal and are addressed in this final decision.

10. Standards and Limitations.

Section 1101.02.B., notes all site design proposals are subject to the development standards of the underlying zoning district and may be modified pursuant to the satisfaction of the considerations in subsection 1101.02.A. "Standards and Limitations" within the Exclusive Farm Use District are found in Section 402.09. The relevant standards, and the accompanying findings, are as follows:

a. Section 4.02.09.A., addresses dwelling density.

FINDINGS: This section does not apply as the proposal does not, nor will, include the establishment of a dwelling.

b. Section 402.09.B., establishes parcel size and dimension requirements. Subsection 3., (Existing Lots) allows the establishment of any permitted or conditionally permitted use on an existing lot subject to the satisfaction of the requirements in the EF District.

FINDINGS: The proposal will utilize existing property. Site development must comply with the standards of the EF District which is the purpose of this review.

c. Section 402.09.C., requires a minimum of 30 foot setback for all uses.

FINDINGS: Based on the submitted site plan, the site containing the treatment facility, pump station and reservoir will comply with this requirement. The wells will also comply with this requirement. Compliance can be verified when building plans are submitted and reviewed.

d. Section 402.09.D., does not limit parcel coverage, except for parcels less than one acre which are limited to 15% coverage.

FINDINGS: The parcel containing the treatment facility, pump station and reservoir contains 2.5 acres; therefore, the coverage limitation does not apply.

e. Section 402.09.E., establishes access requirements for dwellings. The parcel must abut a public road for at least 20 feet, or by a private easement at least 30 feet in width which abuts a public road for at least 30 feet.

FINDINGS: None of the structures associated with the proposed use is a dwelling. Consequently, this standard does not apply. However, the parcel abuts two public roads for a distance greater than 20 feet - 260 feet along the Dayton Amity Highway and 200 feet along the Lafayette Hopewell Highway - thereby providing sufficient access.

f. Section 402.09.F., establishes clear-vision areas. A clear-vision area is required at the intersection of two or more of the following: county roads, public roads, private roads serving four or more parcels and railroads.

FINDINGS: The treatment facility, pump station and reservoir site will directly access a public road via a driveway. A clear-vision area is not required for this intersection combination. However, the entrance to the facility will be maintained to ensure safe entry and exit for all vehicles.

g. Section 402.09.G., establishes building heights. The maximum height for a non-residential structure is 45 feet.

FINDINGS: The treatment facility, pump station and reservoir will comply with this requirement with a maximum anticipated height of 35 feet. Compliance can be verified when building plans are submitted and reviewed.

h. Section 402.09.H., establishes requirements for accessory uses, including structures and fences.

FINDINGS: The pump buildings on the individual well site will be less than 15 feet in height and in each case will be greater than 3 feet from an adjacent property and 60 feet from an adjacent public road. Based on the submitted site plans, any accessory structures at the treatment facility, pump station and reservoir will comply with the setback provisions in this section. Compliance can be verified when building plans are submitted and reviewed.

i. Section 402.09.I., establishes standards for off-street parking and is subject to provisions in

Section 1007.

FINDINGS: Section 1007 states that its requirements apply only "to those uses specifically listed in this section." Section 1007 does not list a utility facility necessary for public service. Consequently, standard 402.09.I., does not apply. However, the submitted site plan provides sufficient parking for the maintenance vehicles. In addition, there is sufficient area on the property to ensure vehicles can maneuver on the site without interfering with traffic along the adjacent public road.

CONCLUSIONS:

1. This request is for site design review for the cities of Dayton and Lafayette to establish a municipal water source to be shared by both cities consisting of five wells, treatment facilities, storage, pumping stations and distribution lines.

2. The subject parcel is zoned EF-80, which allows utility facilities provided that it is necessary for the facility to be located in an agricultural zone. The evidence provided has shown valid reasons why it is necessary for this municipal water system to be located in the EF-80 Exclusive Farm Use District.

3. With conditions, the request is consistent with the site design standards of Section 1101 and the EF-80 Exclusive Farm Use District.

DECISION:

Based upon the above findings and conclusions, the request by the cities of Dayton and Lafayette for a Site Design Review to establish water intake facilities (wells), treatment facilities, storage, pumping stations and related distribution lines for a municipal water system serving both communities on property located with the Exclusive Farm Use (EF-80) District is approved subject to the following conditions.

1. All permits required by Yamhill County for building construction and electrical installation shall be obtained.

2. Any wells in addition to the five proposed will need a new site design review and compliance with the appropriate zoning ordinance standards.

3. The cities shall maintain the well sites and related facilities by mowing them monthly during the growing season to curtail weeds and seed from spreading.

4. Water rights shall be obtained from the Oregon Water Resources Department (OWRD) prior to the use of the water. The applicant shall abide by the conditions of approval required by the OWRD.

5. The Planning Director shall recommend to OWRD to include the draft conditions in their Proposed Final Order as the minimum conditions of approval for the applications G-14385 and G-14386. This is a recommendation only. The County recognizes that the Proposed Final Order may be changed or modified based on evidence presented to the OWRD.

6. The Cities of Dayton Lafayette shall request that the Oregon Water Resources Department extend the annual measurements called for in applications G-14385 and G-14386 from seven consecutive years to fifteen consecutive years.

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Dayton-Lafayette Wellfield, Land Use Approval

5/11/00 LUBA Final Opinion & Order (approving wells) (LUBA No. 99-123)

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To: Bob Willoughby, City Administrator, City of Lafayette
Sue C. Hollis, City Administrator, City of Dayton

From: Pamela J. Beery, City Attorney's Office

Subject: Water Project - LUBA Decision

Date: May 15, 2000

Confidential Attorney-Client Communication

Late on Friday afternoon, we received LUBA's decision on the appeal relating to the water project. I'm faxing a copy with this memorandum.

The case has been remanded to the County, but we are very happy with the Board's opinion. We have succeeded in overcoming most of the significant arguments, and the scope of the remand is very narrow. Following is a brief summary and highlights of the opinion, followed by our recommended strategy for addressing the remand.

Key Elements of LUBA's opinion

The wells are specifically approved. The Board accepted each of our arguments concerning the ability of cities to decide on the need for a municipal water project, and concerning the scope of the test to be applied when such facilities are to be sited on EFU land. The Board also agreed with our legal analysis concerning the requirement that we attempt to condemn municipal airport property.

The narrow basis for the remand relates to the findings and evidence on the need to site the treatment facility and the Dayton reservoir on EFU land. At pages 11 to 13, the Board notes that the County's findings, as prepared by the County planner, are not clear enough to show that there is no alternative to locating the reservoir and treatment facility on EFU land.

All the remaining assignments of error were denied.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal the county's approval of an application to place water intake facilities, treatment facility buildings, storage facility buildings, and pumping stations in an exclusive farm use district.

MOTION TO INTERVENE

The City of Dayton and the City of Lafayette, the applicants below, move to intervene on behalf of respondent. There is no opposition to their motion and it is allowed.

FACTS

In November 1998, the Cities of Dayton and Lafayette (intervenors) filed an application with the county planning department for site design review approval to establish water intake facilities (wells), treatment facilities, a 1.5 million gallon storage reservoir, pump stations and related distribution lines for a municipal water system serving both communities. The proposed development is on land zoned exclusive farm use (EFU) that is currently used for grass seed or grain production. The five wells will be located approximately 2,000 feet from each other with the closest well approximately two miles outside the City of Dayton urban growth boundary (UGB). Each well site will contain a small pump house along with the necessary electrical service to power the pump. The treatment facilities and storage reservoir will be located approximately one mile from the closest well and approximately one mile from the City of Dayton UGB. The treatment facility is proposed to be on approximately 2.5 acres. Four of the wells are proposed to be located on individual sites of approximately one acre, the other is proposed for a site of 1.45 acres.

The planning director approved the request subject to conditions. Petitioners appealed that decision to the board of county commissioners (commissioners). On *de novo* review, the commissioners concluded that utility facilities are allowed in the EFU zone

provided that it is necessary to locate the proposed utility facility on EFU-zoned land in order for the service to be provided. The commissioners concluded that the evidence in the record demonstrates that it is necessary for the municipal water system to be located in the EFU zone. The commissioners also concluded that the request is consistent with the county's site design standards. Accordingly, the commissioners denied the appeal and approved the site design review with conditions. This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Petitioners contend that the county erred in determining that the alternatives to placing the proposed facilities on EFU-zoned land are not feasible. Petitioners contend that there exist four feasible alternatives to placing the facilities on EFU-zoned land. First, petitioners contend that wells drawing water from the Willamette River could provide water without using EFU-zoned land. Second, petitioners contend that more efficient use of existing sources would obviate some or all of the need for the cities to obtain new sources of water. Third, petitioners argue that, as an alternative to drilling wells on EFU-zoned land, the applicants could purchase water from the City of McMinnville. Finally, petitioners argue that the cities could drill their wells on non-EFU-zoned land at the McMinnville Airport.[1]

Because petitioners misread the alternatives analysis that is required by ORS 215.283(1)(d) and the Court of Appeals' decision in *McCaw Communications, Inc. v. Marion County*, 96 Or App 552, 555-56, 773 P2d 779 (1989), we turn to that issue first.

A. The Requirement that the County Consider Feasible Alternative Sites that are not Zoned EFU

As relevant, both ORS 215.213(1)(d) and 215.283(1)(d) allow "[u]tility facilities necessary for public service" to be sited on EFU-zoned land.[2] In *McCaw Communications,*

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[1] The county found that none of these alternatives are feasible, for a variety of reasons. The county also found that the first and second of these alternatives would also require use of EFU-zoned lands and, therefore, were not alternatives to siting the proposed facilities on EFU-zoned lands.

[2] Yamhill County is subject to ORS 215.283(1)(d).

Inc. v. Marion County, 17 Or LUBA 206, 222 (1988), LUBA held that these statutory provisions do not require that an applicant show "that it is necessary to locate the facility at the particular [EFU-zoned] location proposed." Rather, we held that "'necessary for public service' means a facility that is necessary in order for the entity to provide a public service[.]"[3] On judicial review, the Court of Appeals rejected our reading of the statute and explained:

> "In the abstract, LUBA's choice among the * * * interpretative options it described in *Meland* might have been as linguistically supportable as either of the others. Given the legislative purpose, however, we are unable to agree that the word 'necessary' has no relationship to the proposed location of the use on land zoned for agriculture. We conclude that, for a 'utility facility' to be permitted under [a land use regulation that implements ORS 215.283(1)(d)], *the applicant must establish and the county must find that it is necessary to situate the facility in the agricultural zone in order for the service to be provided.*" *McCaw Communications, Inc.*, 96 Or App at 555-56 (emphasis added, footnote omitted).

The Land Conservation and Development Commission (LCDC) has adopted rules that codify the above-emphasized language of *McCaw Communications, Inc.*[4]

The Court of Appeals' decision in *McCaw Communications, Inc.*, and the above-emphasized language in OAR 660-033-0130(16), is susceptible to more than one interpretation. Petitioners read the language broadly to require that the applicants and county explore all feasible approaches that might have the result of avoiding a need to use EFU-zoned lands for a utility facility. If that is the proper construction of OAR 660-033-0130(16)

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[3]In reaching this conclusion, we relied on our decision in *Meland v. Deschutes County*, 10 Or LUBA 52, 56-57 (1984), where we concluded the statute simply distinguishes "necessary facilities from unnecessary ones, such as advertising signs or possibly storage yards."

[4]OAR 660-033-0120 duplicates the statutory language in ORS 215.213(1)(d) and 215.283(1)(d) and refers to a table that lists the following use as allowed, subject to OAR 660-033-0130(16):

> "Utility facilities necessary for public service, except commercial facilities for the purpose of generating power for public use by sale and transmission towers over 200 feet in height."

Codifying the Court of Appeals' holding in *McCaw Communications, Inc.*, OAR 660-033-0130(16) provides:

> "A facility is necessary if it must be situated in an agricultural zone in order for the service to be provided."

and *McCaw Communications, Inc.*, the county would be required to demonstrate that none of the four alternatives that petitioners identify are "'feasible alternatives' for constructing the utility facility on non-EFU-zoned lands." *Clackamas Co. Svc. Dist. No. 1 v. Clackamas County*, 35 Or LUBA 374, 386 (1998).

Although there is language in our decision in *Clackamas Co. Svc. Dist. No. 1 v. Clackamas County* that also can be read to support petitioners' broad construction of the statutes and rules, the *need* for the proposed stormwater collection and detention facility (as opposed to some other solution to the stormwater problem) was not an issue in that case. The issue in *Clackamas Co. Svc. Dist. No. 1 v. Clackamas County* was whether the proposed facility needed to be sited on EFU-zoned land, as opposed to other available non-EFU-zoned land.

The ultimate question under these assignments of error is the meaning of ORS 215.213(1)(d) and 215.283(1)(d), because the Court of Appeals' decision in *McCaw Communications, Inc.* is based on the court's interpretation of those statutes and OAR 660-033-0130(16) codifies the court's interpretation of what the statutes require. *Clackamas Co. Svc. Dist. No. 1 v. Clackamas County*, 35 Or LUBA at 380. Petitioners' reading of the statutes would require that all other legitimate public policy concerns that might be weighed in deciding what kind of facility would best respond to an identified utility need must be subjugated to the legislative policy favoring protection of agricultural lands, if it is feasible to do so. For example, if an electrical power utility wished to develop wind-driven turbines on EFU-zoned lands, the utility would first have to demonstrate (1) that energy conservation measures are not a feasible way to address the identified need; (2) that fossil fuel, nuclear, hydro, solar or other alternative ways of generating power on non-EFU zoned lands are not feasible alternatives, and (3) that there are no other non-EFU-zoned sites that could feasibly accommodate the wind-driven turbine. We believe that ORS 215.213(1)(d) and 215.283(1)(d), as interpreted by the Court of Appeals in *McCaw Communications, Inc.* and

by LCDC in OAR 660-033-0130(16), impose the third requirement, but do not impose the first two requirements. As we interpret the statutes, the decision about what kind of facility is appropriate to respond to an identified utility need may be guided by a number of public policy concerns that have little or nothing to do with exclusive farm use zoning or the policies that underlie such zoning. However, once the decision is made to construct a particular kind of utility facility to respond to an identified need, that facility may only be located on EFU-zoned lands if there are no feasible sites for the proposed facility that are not zoned EFU.

In this case, intervenors' decision to respond to the identified water shortage by drilling wells and constructing related facilities to expand water production and storage capacity, as opposed to responding to that shortage in some other way, is not governed by ORS 215.213(1)(d), 215.283(1)(d), and OAR 660-033-0130(16). However, once the cities make a decision to respond to the identified water need in that way, the proposed facilities must be sited on non-EFU-zoned land, unless there is no feasible non-EFU-zoned site. We therefore reject petitioners' arguments that ORS 215.213(1)(d), 215.283(1)(d), and OAR 660-033-0130(16) require that the county demonstrate that (1) direct use of the Willamette River as a water source (without drilling wells), (2) making improvements or other additions to the existing water system, or (3) purchase of water from the City of McMinnville are not feasible alternatives to drilling new wells as a source of water. Although the cities' and county's decision to respond to the identified water shortage by constructing wells and related facilities rather than by pursuing other options is not governed by ORS 215.213(1)(d), 215.283(1)(d), and OAR 660-033-0130(16), the decision concerning the appropriate site to locate those wells and related facilities is.

With the above understanding of what ORS 215.213(1)(d), 215.283(1)(d), and OAR 660-033-0130(16) require, we must consider whether the county adequately demonstrated (1) that drilling wells that would be hydrologically connected to the Willamette River and

located on non-EFU-zoned land is not a feasible alternative to the cities' proposal; (2) that the McMinnville Airport site is not a feasible alternative site for the wells, treatment facilities, and reservoir; and (3) that the treatment facilities and reservoir cannot feasibly be located on non-EFU-zoned lands. However, before turning to those arguments, we first briefly note and reject one additional argument petitioners make, based on language in the Court of Appeals' decision in *McCaw Communications, Inc.*

Petitioners argue at several points in the petition for review that under *McCaw Communications, Inc.* non-agricultural use of agricultural land must be as "nondisruptive of farm use" as possible, based on the "overriding policy of preventing 'agricultural land from being diverted to non-agricultural use.'" 96 Or App at 555. We understand petitioners to argue that a local government approving a proposed utility facility necessary for public service in an EFU zone must compare alternative EFU-zoned sites for the proposed utility facility and ensure that the site that is least disruptive to agriculture is selected.

Petitioners' argument apparently is based on the following language in *McCaw Communications, Inc.*:

> "Section 137.020, like its statutory analog, defines non-farm uses which are permitted in farm zones. However, state and local provisions of that kind *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." 96 Or App at 555 (emphases added, citations omitted).

That language articulates the court's view of how EFU zoning statutes and land use regulations that implement those statutes should be interpreted, where they are capable of more than one interpretation. That language does not say there is a generally applicable "least suitable EFU-zoned land" requirement that must be applied in approving nonfarm uses on EFU-zoned land.

We now turn to the portions of the challenged decision that reject certain non-EFU-zoned lands as alternative sites for the proposed facilities.

B. Wells Drawing Water from the Willamette River

Petitioners argue that wells that would be hydrologically connected to the Willamette River, and thereby considered to be drawn from the river by the Water Resources Department, could provide a feasible source of drinking water. Petitioners contend that the county's determination that the Willamette River could not provide a practical source of water without using EFU-zoned land is not supported by substantial evidence.[5]

LUBA's review of the evidence is limited to determining whether a reasonable person could reach the decision the county reached, considering all of the evidence in the record. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992). If the evidence in the whole record is such that a reasonable person could reach the decision the county reached, LUBA will defer to the decision, notwithstanding that reasonable people could also draw different conclusions from the evidence. *Carsey v. Deschutes County*, 21 Or LUBA 118, 123, *aff'd* 108 Or App 339, 815 P2d 233 (1991); *Douglas v. Multnomah County*, 18 Or LUBA 607, 617 (1990).

The county found that drilling wells for withdrawal from the Willamette River was not a feasible alternative to the application and that use of the Willamette River water would require utility facilities in the EFU zone. Record 9-10. Petitioners contend that the record contains testimony that refutes this finding. Petitioners cite the testimony of petitioner Kreder at the May 13, 1999 hearing before the commissioners. Kreder testified "there is non-EFU land on the bend of the river next to Dayton. It's listed on some maps as a state park."

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[5]Although the parties treat this as a substantial evidence question, it is a question that could have easily been resolved in a much more straightforward manner had any party provided us with the relevant county zoning map. Because no party did so, we consider the parties' substantial evidence arguments as presented in their briefs.

Petition for Review, Appendix 3-33. Petitioners also argue that wells could be drilled in the Willamette River Greenway.

Intervenors cite the county staff report, which states:

> "The property between Dayton and the Willamette [River] is zoned EF-80 exclusive farm use, the same as that of the subject request. A system designed to take water from the Willamette, either by pumping directly from the river or drilling wells within close proximity to the river would be located in the exclusive farm use zone and would need to satisfy the same criteria as that of the subject request. Therefore, the opponents argument that the Willamette [River] can be used to meet the cities' water needs appears to contradict the argument that this facility should not be located in the exclusive farm use zone." Record 365.

We agree with intervenors that, notwithstanding the testimony cited by petitioners, the above staff report constitutes evidence that a reasonable person would rely on to support a finding that the use of the Willamette River as a water supply by drilling wells requires the use of EFU-zoned land, and thus is not a non-EFU-zoned alternative to the proposal.

C. The McMinnville Airport Site

Petitioners argue that the county's decision is not supported by law and must be remanded. The decision states:

> "Opponents of the project contend that the cities have the authority to condemn the McMinnville Airport property and therefore, a feasible alternative exists on non-EFU zoned land. The power to condemn property already devoted to a public use must be granted expressly or by necessary implication by the legislature. *Little Nestucca Road Co. v. Tillamook County*, 31 Or 1, 48 P 465 (1897); *Emerald PUD v. PP&L*, 76 Or App 583, 591, 711 P2d 179 (1985), *aff'd* 302 Or 256, 729 P2d 552 (1986). This is a long held principle of common law. *Pacificorp v. City of Ashland*, 88 Or App 15, 24-25, 744 P2d 257 (1987). Opponents fail to cite to the specific authority granting the cities of Lafayette and Dayton the power to condemn *public* property being devoted to a public use. ORS 225.020 grants authority to condemn private property, not public property. Without specific authority, [the county] finds that the cities of Dayton and Lafayette may not condemn property owned by another public entity for the purpose of developing a municipal water supply. Furthermore, because funds from the Federal Aviation Administration may be involved in the operation of the airport, the authority of the cities is cast in further doubt. As a result, the [county] finds that condemning property owned by the McMinnville Airport is not a feasible alternative to the proposed project. The [county] evaluated the analysis provided by both sides' legal counsel and finds the applicants' position to be correct." Record 12.

The county in its decision and both parties in their briefs rely on *Little Nestucca Road Co.* That case involved the proposed condemnation of a private toll road by the county for use as a county road. The court discussed the applicable law:

> "The appropriation of land to a public use is an exercise of the sovereign power, which the state may delegate to a municipal or private corporation, and land already appropriated and used by its trustee, under the authority delegated, may be taken by legislative enactment for other public uses, in which case it is always presumed that the new use is of more importance and greater value to the public than the original appropriation. It is a rule, however, of universal application that the subsequent delegation of power to appropriate land which has once been appropriated must be in express terms, or must arise from necessary implication." 31 Or at 5-6 (citations omitted).

In the present case, petitioners contend that ORS 225.020 provides the authority to condemn property. ORS 225.020 provides in relevant part:

> "(1) When the power to do so is conferred by or contained in its charter or act of incorporation, any city may build, own, operate and maintain waterworks, water systems * * * within and without its boundaries for the benefit and use of its inhabitants and for profit. To that end it may:
>
> "(a) Acquire water systems and use, sell and dispose of its water for domestic, recreational, industrial, and public use and for irrigation and other purposes within and without its boundaries.
>
> "* * * * *
>
> "(c) Acquire right of way, easements or real property within and without its boundaries for any such purpose.
>
> "(2) In exercising such powers, any city may bring actions for the condemnation or taking of *private* property for public use in the same manner as private corporations are now authorized or permitted by law to do." (Emphasis added)

ORS 225.020(2) provides a city the power to condemn private property for public use. It does not expressly provide a city the power to condemn public property for public use.

We agree with intervenors that ORS 225.020(2) does not provide the cities the express power to condemn the public property at the McMinnville Airport. *Little Nestucca Road Co.* clearly sets out the requirement that the authority to condemn land that is already put to public use must either be express or must arise from necessary implication. Petitioners

do not argue to this Board that the cities' authority to condemn the airport land arises from necessary implication in any manner, nor is the authority express in ORS 225.020(2).

D. Treatment Facility and Reservoir

As noted earlier, the approved treatment facility and a reservoir to serve the needs of the City of Dayton are to be located at an EFU-zoned site next to an existing power substation. That site is approximately one mile from the wells and approximately one mile from the City of Dayton. The treatment facility and reservoir are located at a point where the water lines connecting the proposed wells to the Cities of Lafayette and Dayton separate. Petitioners argue that the county failed to demonstrate that it is necessary to site the treatment facility and reservoir on EFU-zoned land rather than on lands located within the cities' UGBs. We understand petitioners to challenge the adequacy of the county's findings and the evidence supporting those findings.

The only county findings that we have been able to locate concerning this issue state:

> "In considering the location of the treatment facility/reservoir the applicant states that it is necessary to be located near the water source. The ability to easily provide water to both jurisdictions as well as being as nondisruptive as possible to farmland are further considerations regarding location. The site that was chosen is near the PGE substation. The applicant states:
>
> > "'The site was specifically designed to allow the maximum continued use of the available farmland while avoiding interference and safety concerns associated with the adjacent power transmission lines.'
>
> "The applicant also submitted evidence concerning other sites for the reservoir within the city limits of Dayton. All appropriately zoned sites were discussed and information has been provided to explain why they were rejected. The [county] finds that it is necessary for the combination treatment facility/reservoir to be located in the proposed location within an EFU District in order for the service to be provided." Record 12-13.

These findings are clearly inadequate to establish that potential sites inside the City of Dayton UGB are not feasible alternative sites for the reservoir needed by the City of Dayton or that it is not feasible for needed treatment facilities to be located inside the City of Dayton, the City of Lafayette or both. We agree with intervenors that cost and technical difficulties in constructing needed utility facilities on non-EFU-zoned lands may make use of such non-

EFU-zoned sites infeasible. *See Clackamas Co. Svc. Dist. No. 1 v. Clackamas County*, 35 Or LUBA at 386 (stating principle). However, the county's findings simply acknowledge certain statements made in the application. The findings do not explain what the county believes the relevant facts to be and do not explain why those facts lead the county to conclude it is not feasible to locate either the reservoir or the treatment facility or both those facilities on non-EFU-zoned lands. Such findings are inadequate. *See Le Roux v. Malheur County*, 30 Or LUBA 268, 271 (1995) (findings are adequate if they (1) identify the relevant approval standards, (2) set out the facts relied upon, and (3) explain how the facts lead to the conclusion that the request satisfies the approval standard).

Intervenors cite a portion of a memorandum in the record and a portion of the cities' application as evidence that the treatment facility and reservoir must be located together as proposed on EFU-zoned land. Record 160-61; 1415-17. We understand the cited memorandum and application to take the position that certain publicly owned sites that were considered for the reservoir for the City of Dayton present safety problems, are too small, have soils problems, or present technical and cost problems due to their location. The application does not dispute that treatment facilities could be located inside one or both cities. However, intervenors take the position that placing treatment facilities near the wells, rather than inside one or both of the cities, would "reduce potential corrosive effects from untreated water on the physical systems for each city." Record 1416. Intervenors also take the position that citing the treatment facilities inside one or both cities would require additional piping and pumps and would increase costs. Finally, intervenors identify certain other cost advantages that would be lost if the reservoir and treatment facilities are not located next to each other. Record 1417.

Under ORS 197.835(11)(b), we are authorized to affirm a land use decision, despite defective findings, where the evidence "clearly supports the decision." Although the cited evidence may provide a basis for the county to adopt adequate findings that demonstrate that

non-EFU-zoned sites for the proposed reservoir and treatment facilities are not feasible, in the absence of such findings, we cannot say that the evidence clearly supports that conclusion. *See Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101, 122 (1995) (interpreting ORS 197.835(11)(b) as allowing LUBA to affirm a decision notwithstanding inadequate findings only where the relevant evidence is such that it is "obvious" or "inevitable" that the decision is consistent with applicable law).

Accordingly, we sustain petitioners' challenge to this part of the county's decision.

E. Conclusion

For the reasons explained above, we affirm the portion of the county's decision that concludes that it is necessary to site the proposed wells on EFU-zoned lands. However, we conclude the county has not adequately demonstrated that it is necessary to site the proposed treatment facility and reservoir on EFU-zoned land.

The first and second assignments of error are sustained in part.

THIRD AND FOURTH ASSIGNMENTS OF ERROR

In these assignments of error petitioners challenged the county's findings that the proposal satisfies the Yamhill County Zoning Ordinance (YCZO) site design review criteria (third assignment of error) and its findings that certain Yamhill County Comprehensive Plan (YCCP) policies do not apply (fourth assignment of error). We do not agree with the reasons the county gives in the disputed decision for concluding that its comprehensive plan policies do not apply.[6] However, respondent advances an argument in its response to petitioners' third assignment of error that bears directly on the question of whether the comprehensive

[6]In the challenged decision, the county takes the position that the fact that the YCCP and YCZO are acknowledged *necessarily* means that the cited comprehensive plan policies *could not* apply to individual site design review decisions. The applicability or non-applicability of comprehensive plan policies to individual land use decisions generally depends on the language of the comprehensive plan and land use regulations themselves and the status that those documents assign to plan policies. *Eskandarian v. City of Portland*, 26 Or LUBA 99, 103-04 (1993); *Bennett v. City of Dallas*, 17 Or LUBA 450, 456, *aff'd* 96 Or App 645, 773 P2d 1340 (1989). The county's findings do not even discuss the language of the cited comprehensive plan provisions.

plan policies cited by petitioners could have been applied to deny the disputed facilities. We turn to that argument first.

Respondent argues that under *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995), the uses allowed by ORS 215.283(1) are uses "*of right* which counties may not abridge nor make conditional upon additional criteria." Respondent's Brief 8. In *Brentmar*, the Oregon Supreme Court held:

> "[U]nder ORS 215.213(1) and 215.283(1), a county may not enact or apply legislative criteria of its own that supplement those found in ORS 215.213(1) and 215.283(1)." 321 Or at 496.

We understand the county to argue that under *Brentmar*, the county may not deny applications for uses that are authorized by ORS 215.283(1), or impose conditions on such uses, based on criteria in local land use legislation that go beyond the inquiry required by ORS 215.283(1)(d) itself, *i.e.*, whether it is necessary to site the proposed facilities on EFU-zoned lands.

We note that the holding in *Brentmar* was clarified in *Lane County v. LCDC*, 325 Or 569, 942 P2d 278 (1997). In *Lane County v. LCDC*, the court held that LCDC rules or statewide planning goals may independently require that counties regulate the uses that must otherwise be allowed outright without county restriction under ORS 215.213(1) and 215.283(1) and *Brentmar*. 325 Or at 582. However, it does not appear that the cited plan policies fall within the principle articulated in *Lane County v. LCDC*, and petitioners do not argue that they do. Absent some reason to question respondent's argument, we agree with respondent that under *Brentmar* petitioners' arguments under the fourth assignments of error that certain YCCP policies should have been applied to deny the disputed application must be rejected.

The fourth assignment of error is denied.

Our conclusion regarding the effect of *Brentmar* on the county's comprehensive plan policies would appear to apply with equal force to bar application of the county's site design

review criteria and, therefore, require that the third assignment of error be denied for the same reason. Nevertheless, the county did adopt findings applying those criteria and concluded that the proposal satisfies those criteria. Therefore, we consider petitioners' challenge to the county's findings concerning the site design review criteria below.

The site design review criteria that the county applied in this matter appear at YCZO 1101.02.[7] Before turning to petitioners' arguments, we note that YCZO 1101.02 does not, as petitioners suggest, impose a requirement that the county must ensure that the challenged utility facilities have no adverse impacts on nearby agricultural uses. Rather, the site design review criteria require that "review of a site development plan shall be based upon consideration of" certain specified factors. The county argues, and we agree, that the county satisfies YCZO 1101.02 if its findings demonstrate that it reviewed the site development plan and considered the specified factors. YCZO 1101.02 does not require that the county ensure that the disputed facilities will have no adverse impacts on adjoining uses.

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[7]YCZO 1101.02 provides:

"A. The review of a site development plan shall be based upon consideration of the following:

"1. Characteristics of adjoining and surrounding uses;

"2. Economic factors relating to the proposed use;

"3. Traffic safety, internal circulation and parking;

"4. Provisions for adequate noise and/or visual buffering from noncompatible uses;

"5. Retention of existing natural features on site;

"6. Problems that may arise due to development within potential hazard areas;

"7. Comments and/or recommendations of adjacent and vicinity property owners whose interests may be affected by the proposed use.

"B. All development applications for site design review are subject to the development standards of the underlying zoning district and may be modified pursuant to satisfaction of the considerations provided in subsection 1101.02(A). The Director may waive submittal requirements consistent with the scale of the project being reviewed, upon determining that requirements requested to be waived are not necessary for an effective evaluation of the site development plan."

A. Characteristic of Surrounding Use

YCZO 1101.02(A)(1) requires that review of a site development plan be based upon consideration of the "[c]haracteristics of adjoining and surrounding uses." Petitioners first contend the county's findings are inadequate because they fail to acknowledge that "the placement of urban utilities in the middle of fields that are currently and actively devoted to agricultural production is entirely inconsistent with the characteristics of that current and active use." Petition for Review 25. Petitioners next argue that the county must impose "conditions that will minimize the depletion of water available for agriculture, as such depletion has the potential to make continued agricultural use of the affected properties difficult or impossible." *Id.* at 26. Petitioners also argue that the county's findings fail to address the issues of wellhead protection and the fact that a stream within the subject area is presently designated "water quality limited" by the state.

1. Impacts on Agricultural Uses and Wells

The county's findings address YCZO 1101.02(A)(1) as follows:

> "The applicants have demonstrated how they designed the system to minimize the impacts on area farm activities. These design features include spacing the wells 1500 feet from existing agricultural wells. The well sites will be surrounded by a one-acre site. They are located close to existing roads and property lines. This is to be as nondisruptive as possible to existing farm uses. The greatest concern expressed to date is that taking groundwater will deplete the aquifer and prevent farmers from using water for irrigation. * * * [The county] finds that the modified conditions of approval requiring the applicants to obtain a water right from the [Water Resources Department] prior to use of the water address impacts to surrounding uses. * * *
>
> "The site of the proposed treatment facility/pump station/reservoir is also located close to the PGE substation. The applicant[s state] this location was selected to try and minimize the impact on adjacent farming activities. Siting the facility next to the existing substation, at the edge of a farm parcel, will cluster the utility uses. This will have less of an impact on farm use than if the facility was places near the center of a farm parcel." Record 15-16.

The county's findings on the characteristics of adjoining and surrounding uses identify YCZO 1101.02(A)(1) as an approval criterion and interpret that criterion to require that impacts on adjoining or surrounding uses be minimized. Record 15. The county

characterizes the surrounding uses as farm uses in grass or grain production. Record 6. The county details facts from the application that lead the county to conclude that the proposal is designed to minimize the impact on surrounding uses. Record 15-16. The record supports that conclusion.

2. Wellhead Protection

Petitioners contend that the county erred in not making a finding on whether the wellhead protection program administered by the state Department of Environmental Quality (DEQ) would unduly restrict farming practices. Petitioners argue that DEQ suggests a large protection area and that the area required to protect the proposed wells would be substantial. As a result, petitioners argue "agriculture in the entire area could be markedly curtailed or lost as a result of wellhead protection." Petition for Review 27.

The county responds that wellhead protection is not a relevant issue in this case. The county argues that it has not adopted DEQ's voluntary wellhead protection program. The site design review application discusses the wellhead protection program as follows:

> "The State wellhead protection program is *voluntary*. There are no plans to make it mandatory. If the Cities decide to implement a wellhead protection program, they would work cooperatively with the DEQ, landowners, and farmers to promote land use practices that are consistent with best management practices. Typical farming practices would *not* be restricted. Any controls would likely involve limiting the storage of fuel and large quantities of pesticides within the wellhead protection area." Record 1324 (emphases in original).

In *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992), the Board held that "findings must address and respond to specific issues relevant to compliance with applicable approval standards that were raised in the proceedings below." We agree with the county that in considering the "[c]haracteristics of adjoining and surrounding uses" under YCZO 1101.02(A)(1), consideration of a voluntary wellhead protection program that the county has not adopted was not required, and the county was not obligated under YCZO 1101.02(A)(1) to adopt findings specifically addressing that program.

3. Palmer Creek

Petitioners state that the proposed wells are located in the west fork of the Palmer Creek basin and that DEQ identified Palmer Creek as a water quality limited stream. Petitioners argue that the county's findings "fail to address the fact that the characteristics of adjoining and surrounding uses have likely caused toxic contamination [of] the watershed where the applicants intend to develop their wells." Petition for Review 28.

As the county points out, the Water System Predesign Report generally discusses the issue of water quality in the well siting area. Record 856, 873, 881, 885, and 890-97. However, petitioners are correct that the county's findings do not specifically address the question of whether surrounding agricultural uses have produced the water quality problems DEQ identified in Palmer Creek or whether such problems may have consequences for the proposed wells. Nevertheless, petitioners do not explain why such specific findings are required by YCZO 1101.02(A)(1) and we do not believe that such findings are required.

This subassignment of error is denied.

B. Economic Factors

YCZO 1101.02(A)(2) requires that review of a site development plan shall take into consideration "[e]conomic factors relating to the proposed use." The decision states:

> "Regarding [YCZO 1101.02(A)(2), the county] finds that the cost of the project will be covered by grants and ratepayers from each jurisdiction. There is no evidence that development could not be completed with the economic resources of each jurisdiction. In addition, as noted above, the cost of other identified potential water sources would be prohibitive. The selected alternative is consistent with this criterion.
>
> "As demonstrated in the application and public hearing, the applicant cities have an immediate need for water to supply current demand. In addition, this project will meet demands based on projected growth in both cities for the next fifteen to twenty years. State law requires cities to accommodate growth by providing public facilities including water. Maintaining a growing county population within urban areas achieves important state and county objectives of preserving farmland. Yamhill County in particular has an active, healthy agricultural base, as confirmed by testimony at the public hearing. The [county] finds that preserving that agricultural base by assuring the provision of public facilities to a growing urban population meets the criterion requiring evaluation of economic consideration of the request." Record 16.

Petitioners argue that there is "no mention in the county's findings of the economic impact that the proposed wells will have on the farms where they will be located." Petition for Review 28. The county contends that, although the findings quoted above do not refer to the impacts petitioners identify, other portions of the decision address concerns about minimizing disruption to the surrounding farms and that those findings are adequate to comply with YCZO 1101.02(A)(2). Record 12, 13, 15, and 16. We agree with the county.

This subassignment of error is denied.

C. Adjacent and Vicinity Property Owners

YCZO 1101.02(A)(7) requires that review of a site development plan shall take into consideration "[c]omments and/or recommendations of adjacent and vicinity property owners whose interests may be affected by the proposed use." The decision states:

> "Regarding [YCZO 1101.02(A)(7)], Planning Department staff received comments from interested parties regarding this application. As stated in Finding D-3, the comments submitted focused on the appropriation of water which is not governed by the county but by the Water Resources Department. Additional comments were addressed during the public hearing on appeal and are addressed in this final decision." Record 17.

Petitioners argue that "[w]hile the county does not control the appropriations, it does have the power through the site design review process to approve or deny development applications where such development would deprive property in an EFU zone of a key resource needed for continued agricultural use of the property." Petition for Review 29. Assuming without deciding that petitioners are correct in their argument, their argument falls short of showing that the county failed to base its review, in part, upon consideration of comments of surrounding property owners, as YCZO 1101.02(A)(7) requires.

Petitioners also argue that the county did not consider comments regarding pesticide contamination of the Palmer Creek watershed in which the wells are proposed, or the impact of wellhead protection. Although the county did not adopt findings specifically addressing comments about Palmer Creek or wellhead protection, we do not believe that YCZO 1101.02(A)(7) requires that the county adopt findings that address every comment or

recommendation that the vicinity property owners made during the local proceedings. The finding quoted above is sufficient to demonstrate that the county's review was based on consideration of comments received by planning department staff. That is all that YCZO 1101.02(A)(7) requires.

This subassignment of error is denied.

D. Parcel Size and Dimension

YCZO 1101.02(B) provides that site design review applications "are subject to development standards of the underlying zoning district." Petitioners argue that the cities will partition land into lots smaller than allowed in the EF-80 zone and that the county erred in finding that "[t]he proposal will utilize existing property." Record 17. The county responds, and we agree, that the cities are not proposing new lots. Rather they propose to purchase easements on existing parcels for placement of the wells and the combination treatment/storage facility. Utility facilities necessary for public service are permitted uses on existing parcels in the EFU zone. ORS 215.283(1)(d).

This subassignment of error is denied.

The third assignment of error is denied.

The county's decision is remanded.

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 99-123 on May 11, 2000, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 11th day of May, 2000.

Kelly Burgess
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Dayton-Lafayette Wellfield, Land Use Approval

9/27/00 Court of Appeals Opinion (approving wells) (CA A110515)

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Number of Pages (including this cover page): 8

COMMENTS:

GOOD NEWS!!

We won at the Court of Appeals. Opinion attached. We will file for our award of costs (every little bit helps).

You can both be happy for all cities affected by this case, that the Court of Appeals let the LUBA decision on utility facilities in farm zones stand. Now we have left only our one issue on remand to the County.

Let me know if you have any questions.

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FILED: September 27, 2000

IN THE COURT OF APPEALS OF THE STATE OF OREGON

DAYTON PRAIRIE WATER ASSOCIATION
and TIMOTHY KREDER,

Petitioners,

v.

YAMHILL COUNTY, CITY OF DAYTON,
and CITY OF LAFAYETTE,

Respondents.

(LUBA No. 99-123; CA A110515)

Judicial Review from Land Use Board of Appeals.

Argued and submitted August 16, 2000.

Steven M. Claussen argued the cause and filed the brief for the petitioners.

Pamela J. Beery argued the cause for respondents City of Dayton and City of Lafayette. With her on the brief was Christopher A. Gilmore.

No appearance for respondent Yamhill County.

Before Linder, Presiding Judge, and Deits, Chief Judge, and Wollheim, Judge.

DEITS, C. J.

Affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondents

[x] No costs allowed to Respondent Yamhill County
[x] Costs allowed to Respondents City of Dayton and City of Lafayette, payable by: Petitioners
[ ] Costs allowed, to abide the outcome on remand, payable by:

DEITS, C. J.

Petitioners appealed to LUBA from Yamhill County's decision approving the application of the respondent cities (respondents) to install intake wells and other facilities for a water system in an exclusive farm use (EFU) zone. LUBA concluded that the county had not made adequate findings to support its decision that the reservoir and treatment facility for the project needed to be located on EFU land and remanded that portion of the decision to the county. However, LUBA affirmed the remainder of the county's decision, and petitioners seek our review of that portion of the decision. We affirm.

ORS 215.283(1)(d) allows, as a nonfarm use in EFU zones, "[u]tility facilities necessary for public service."[1] In *McCaw Communications, Inc. v. Marion County*, 96 Or App 552, 556, 773 P2d 779 (1989), we said that,

> "for a 'utility facility' to be permitted under [that statute], the applicant must establish and the county must find that it is necessary to situate the facility in the agricultural zone in order for the service to be provided."

Subsequent to our decision in *McCaw Communications*, the Land Conservation and Development Commission (LCDC) adopted an implementing regulation, codified as OAR 660-033-0130(16), that contains the following similar language:

"A facility is necessary if it must be situated in an agricultural zone in order

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[1] ORS 215.213(1)(d) contains an identical provision. Although ORS 215.283(1)(d) is the applicable statute here, the two statutes and the authorities construing or applying them are interchangeable for purposes of our discussion.

for the service to be provided."

According to LUBA, petitioners contended to it that the siting of the utilities in question in the EFU zone is contrary to ORS 215.283(1)(d) as interpreted in *McCaw Communications* and OAR 660-033-0130(16), because

> "there exist four feasible alternatives to placing the facilities on EFU-zoned land. First, petitioners contend that wells drawing water from the Willamette River could provide water without using EFU-zoned land. Second, petitioners contend that more efficient use of existing sources would obviate some or all of the need for the cities to obtain new sources of water. Third, petitioners argue that, as an alternative to drilling wells on EFU-zoned land, the applicants could purchase water from the City of McMinnville. Finally, petitioners argue that the cities could drill their wells on non-EFU-zoned land at the McMinnville Airport." (Footnote omitted.)

LUBA concluded that the statute, as construed in *McCaw Communications* and the LCDC rule, is pertinent only to the question of where a facility should be located once a decision to use a particular type of facility has been made. LUBA explained:

> "The ultimate question under these assignments of error is the meaning of ORS 215.213(1)(d) and 214.283(1)(d), because the Court of Appeals' decision in *McCaw Communications, Inc.* is based on the court's interpretation of those statutes and OAR 660-033-0130(16) codifies the court's interpretation of what the statutes require. *Clackamas Co. Svc. Dist. No. 1 v. Clackamas County*, 35 Or LUBA at 380. Petitioners' reading of the statutes would require that all other legitimate public policy concerns that might be weighed in deciding what kind of facility would best respond to an identical utility need must be subjugated to the legislative policy favoring protection of agricultural lands, if it is feasible to do so. For example, if an electrical power utility wished to develop wind-driven turbines on EFU-zoned lands, the utility would first have to demonstrate (1) that energy conservation measures are not a feasible way to address the identified need; (2) that fossil fuel, nuclear, hydro, solar or other alternative ways of generating power on non-EFU lands are not feasible alternatives,

and (3) that there are no other non-EFU-zoned sites that could feasibl[y] accommodate the wind-driven turbine. We believe that ORS 215.213(1)(d) and 215.283(1)(d), as interpreted by the Court of Appeals in *McCaw Communications, Inc.* and by LCDC in OAR 660-033-0130(16), impose the third requirement, but do not impose the first two requirements. As we interpret the statutes, the decision about what kind of facility is appropriate to respond to an identified utility need may be guided by a number of public policy concerns that have little or nothing to do with exclusive farm use zoning or the policies that underlie such zoning. However, once the decision is made to construct a particular kind of utility facility to respond to an identified need, that facility may only be located on EFU-zoned lands if there are no feasible sites for the proposed facility that are not zoned EFU.

"In this case [respondents'] decision to respond to the identified water shortage by drilling wells and constructing related facilities to expand water production and storage capacity, as opposed to responding to that shortage in some other way, is not governed by ORS 215.213(1)(d), 215.283(1)(d), and OAR 660-033-0130(16). However, once the cities make a decision to respond to the identified water need in that way, the proposed facilities must be sited on non-EFU-zoned land, unless there is no feasible non-EFU-zoned site. We therefore reject petitioners' arguments that ORS 215.213(1)(d), 215.283(1)(d), and OAR 660-033-0130(16) require that the county demonstrate that (1) direct use of the Willamette River as a water source (without drilling wells), (2) making improvements or other additions to the existing water system, or (3) purchase of water from the City of McMinnville are not feasible alternatives to drilling new wells as a source of water. Although the cities' and county's decision to respond to the identified water shortage by constructing wells and related facilities rather than by pursuing other options is not governed by ORS 215.213(1)(d), 215.283(1)(d), and OAR 660-033-0130(16), the decision concerning the appropriate site to locate those wells and related facilities is."

In their first assignment of error to us, petitioners argue that LUBA construed the statute and interpretive authorities too narrowly, and that, under a proper interpretation, "[i]f [alternative methods] are available to provide the needed public

service without placing utility facilities on EFU zoned land, the law precludes [that] use of EFU zoned land." Petitioners assert that LUBA thereby committed error in not requiring the county to consider the feasibility of alternative methods of providing water service that could occur on non-EFU-zoned land.

We agree with LUBA's conclusion and, in the main, with its analysis. As we recognized in *McCaw Communications*, the pertinent language of ORS 215.283(1)(d) is not entirely clear. However, as LUBA correctly concluded, relying on our holding in *McCaw Communications*, considering the text and context of the statute, it does not appear that the legislature intended to subjugate all other legitimate public policies to the legislative policy favoring the protection of agricultural land. Under the pertinent statutory schemes, ORS 215.283(1)(d) applies only to the need for the facility itself, and leaves decisions concerning the methods of providing particular public services to be made by local governments under other appropriate criteria and considerations.[2] We reject the argument in petitioners' first assignment that LUBA misconstrued the statute or, concomitantly, committed any resulting error.[3]

Petitioners' second assignment of error is that LUBA erred in its decision

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[2] A local government of course *may* consider the preservation of farm land for farm use in the latter connection.

[3] Through Oregon Laws 1999, chapter 816, section 3, the legislature enacted an extensive provision relating to the general subject of utility facilities in agricultural zones. *See* ORS 215.275. The application in this case was filed before that statute took effect.

by disregarding the "overriding state agricultural land use policy" of requiring "any nonagricultural land use policy" to be as "non-disruptive of farm use as possible." Petitioners argue that, in considering an application for a utility facility in an EFU zone, a local government must compare alternative EFU-zoned sites for the proposed facility and choose the site that is "least disruptive" to agriculture. Petitioners rely on language in our decision in *McCaw Communications* to support that proposition. However, as LUBA again correctly points out, neither the statute nor the case law imposes such a requirement on local governments.

Affirmed.