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## BEFORE THE KLAMATH COUNTY BOARD OF COMMISSIONERS

IN THE MATTER OF FILE NUMBER CUP 36-10

FINAL ORDER

WHEREAS, the Falcon Heights Water and Sewer District, applicant, requested approval of Wastewater Treatment Facility and Recycled Water Irrigation System on approximately 75 acres within the Exclusive Farm Use – Crops (EFU-C) zone (Map No. R-3909-03300-01000); and

WHEREAS, on June 21, 2011 the Board of County Commissioner's denied the application and accepted the appeal filed by appellants dated February 7, 2011. The denial of the application was appealed to the State Land Use Board of Appeals ("LUBA") by the applicant. LUBA remanded the denial decision (Falcon Heights Water and Sewer District vs. Klamath County (LUBA No. 2011-068) to the county to address two assignments of error: (1) that the County improperly denied the application by finding that Falcon Heights only considered cost when applying for the new facility; and (2) that the County improperly relied on the speculative testimony of an organic farmer regarding potential spray drift when there was competing expert testimony evidence that the spray drift would not pose a problem to agriculture; and

WHEREAS, the Klamath County Planning Department provided proper notice of a public hearing held on April 2, 2012 before the Board of County Commissioners; and

WHEREAS, the Board of County Commissioners conducted a public hearing on April 2, 2012 to address the two assignments of error on remand; and

WHEREAS, based on testimony and evidence entered at the public hearing and consideration of the whole record, the Board of County Commissioners concluded that the application was in conformance with State Law, Klamath County Land Development Code and Comprehensive Plan, and granted Approval of CUP 36-10; and

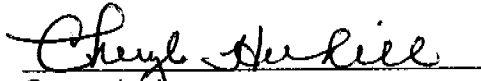
WHEREAS, Opponents of CUP 36-10 have attempted to submit evidence and/or testimony after the close of the public hearing and the Board of County Commissioners is not able to accept such evidence and/or testimony since the record is closed and has rejected those attempts;

**HEREBY ORDERS that CUP 36-10 is APPROVED, based on the findings of fact and conclusions of law in attached Exhibit A, and with the conditions of approval contained in attached Exhibit B.**

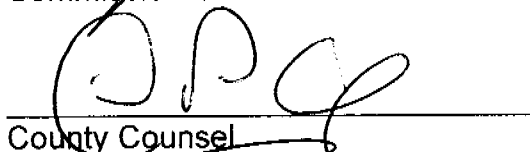
**Dated this 11th day of April, 2012**

**FOR THE BOARD OF COMMISSIONERS**

  
Chairman

  
Commissioner

  
Commissioner

  
County Counsel  
Approved ~~as to form~~

**NOTICE OF APPEAL RIGHTS**

This decision may be appealed to the Oregon Land Use Board of Appeals (LUBA) within 21 days following the date of the mailing of this order. Contact LUBA for information as how to file this appeal (LUBA by phone 1-503-373-1265 or mail at 550 Capitol Street NE, Suite 235, Salem, Oregon 97301-2552). Failure to do so in a timely manner may affect your rights.

## EXHIBIT A – Finding of Facts and Conclusions of Law

### **I GENERAL FINDINGS**

The 75 acre subject site is zoned Exclusive Farm Use – Crops (EFU-C). The treatment system is allowed as a conditional use pursuant to Klamath County Land Development Code Article 54.030 (O) – “Utility facilities necessary for public service,” and further supported by ORS 215.283 (1)(c) – “Utility Facilities necessary for public service,” and ORS 215.246 (1-4) “Approval of application of certain substances.” Conditional uses in the EFU Zone are subject to the conditional use criteria in Article 54.040 in place of the standard conditional use criteria.

The relevant approval criteria, as set out in the Klamath County Land Development Code (KCLDC) and state law, have been satisfied either outright or with conditions of approval as follows:

### **II FINDINGS FOR LAND DEVELOPMENT CODE ARTICLE 54.040 - CONDITIONAL USE CRITERIA, ORS 215.275(2 & 3), OAR 660-033-0130(16) AND ORS 215.275(5)**

- A. *The proposed use will not create conditions or circumstances that the County determines would be contrary to the purposes or intent of its acknowledged comprehensive plan, its policies or land use regulations;***

#### Finding

*“The proposed use is agricultural related. Treated effluent is to be land applied to grow fodder crops as per Article 54.020. The use is also necessary to provide sanitation facilities to the existing Falcon Heights Development per 54.030.”* (From application received November 15, 2010 and Letter from Anderson Engineering and Surveying, Inc. dated December 1, 2010.)

The Board of County Commissioners (BOCC) concludes that the proposed facility is allowed by the Klamath County Land Development Code, ORS 215.283(1)(c) and OAR 660-033-0120(16)(a) which are consistent with the acknowledged comprehensive plan, policies and land use regulations.

**Oregon Revised Statutes - 215.275(2 & 3) & OAR 660-033-0130(16)** (Identical standards to those in ORS 217.275)

***“(2) To demonstrate that a utility facility is necessary, an applicant for approval under ORS 215.213 (1)(c) or 215.283 (1)(c) must show that reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:***

***(a) Technical and engineering feasibility;***

***(b) The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;***

***(c) Lack of available urban and nonresource lands;***

**(d) Availability of existing rights of way;**

**(e) Public health and safety; and**

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

**(3) Costs associated with any of the factors listed in subsection (2) of this section may be considered, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service."**

#### Finding

The BOCC concludes that the applicant has demonstrated that reasonable alternatives have been evaluated as described in the Preliminary Engineering Report (PER), the Supplemental Evidence and Response to Appellants' Statement of Appeal submitted May 11, 2011, the letter from Anderson Engineering dated March 29, 2012, the letter from Andrea Rabe dated March 15, 2012 (Issues Associated with Pump to City Alternatives) submitted by the applicant and the testimony presented by the applicant at the remand hearing. The BOCC further concludes that the project must be sited on EFU land for each of the factors stated in a-f above and that cost was considered, but was not the only consideration in determining which alternative was preferred. In support of these conclusions, the BOCC makes the following findings:

Section 3 (on Pages 9 through 15) of the PER describes the current deteriorating condition of the existing sewer system and concludes that the infrastructure is at the end of its useful life and poses an imminent and significant public health hazard. The primary concerns are summarized on page 3 of the PER as follows: *"The primary concerns for the District according to the Waste Water Master Plan prepared by Anderson Engineering and Surveying, Inc. (AES) in October 2009 are issues related to the force main and the direct discharge to the City of Klamath Falls System. According to the Waste Water Master Plan and the District, the existing force main is creating hydrogen sulfide issues associated with the discharge to the City, and the hydrogen sulfide build-up in the existing concrete force main is rapidly deteriorating the crown or top portion of the existing force main pipe."*

The existing system is no longer functional. The "do-nothing alternative" of leaving the existing pumps and force main in place would cause adverse environmental and health hazards by releasing untreated raw sewage to the environment and would continue the high levels of hydrogen sulfide which puts existing city infrastructure and work force crews at risk. It is no longer technically feasible to keep the old system up and running. There have been numerous incidents of breaks in the old force main and parts are no longer available for the old pumps.

The existing force main is susceptible to failing at any point along its 15,600 foot length due to its 50 plus year age, deteriorating condition, and high levels of hydrogen sulfide build up which make it difficult for City inspectors to inspect confined spaces, and also the increased chlorine residual required to try to control hydrogen sulfide buildup. The high levels of hydrogen sulfide build up also rapidly deteriorates steel and concrete infrastructure components (refer to Section 3.3 of the PER). The Oregon Department of Environmental Quality issued the Falcon Heights Condominium Association a Notice of NON-COMPLIANCE (Bend Eastern Regional Office) on January 1st, 2002 due to a break in the force main causing a raw sewage spill into the Lost River diversion channel.

The applicant evaluated options related to repairing the existing force main or replacing the 3 plus miles of force main pipe from the Falcon Heights development to the City of Klamath Falls system—also known as the Pump to City options.

It has been suggested that the pipe just needs to be repaired to provide reasonable service to Falcon Heights. However, based on the applicant's personal inspection as well as information from witnesses who have worked on the existing line, it is the applicant's engineer's professional opinion that the entire line needs to be replaced due to the fact that hydrogen sulfide gas has corroded the crown or top of the pipe over the 50 plus years that the existing line has been in service. The hydrogen sulfide gas has been created as the result of the length of the line, the small amount of sewage flowing through the line and the topography of the line that does not allow the line to drain— simply put, it sits too long in the pipe causing hydrogen sulfide gas build-up. The existence of this gas has corroded the cement pipe to the point that repairs are not possible in our opinion because it has deteriorated the pipe to the extent that repairs are not sufficient to preserve the integrity of the existing pipe. Also, the existence of this sulfide gas poses significant safety issues in repairing the existing line. It is Anderson Engineering's opinion that even if the line is repaired, it is going to continue to deteriorate for the reasons stated above. Additionally, making extensive repairs to the existing pipe will require the service to Falcon Heights to be suspended for long periods of time resulting in no sewage service to Falcon Heights' residents as well as the School District, especially since there is no storage capability for the sewage over a short period of time. The line cannot be taken out of service for any appreciable amount of time because it would leave Falcon Heights and the School District without sewer service. As a result, the repair option is not feasible in providing reasonable service to Falcon Heights.

Replacement is not feasible due to design constraints, environmental issues, health risks, and cost. The following reasons why the replacement option is not a feasible alternative is summarized below:

- (1) Long force main lines are conducive to hydrogen sulfide build up that has currently deteriorated the crown or top of the existing pipe making it un-repairable. In other words, replacing the existing line will only result in the same problems described above under the current condition. As described in the PER, long force mains are conducive to hydrogen sulfide build up. Delivering the high levels of hydrogen sulfide to the City of Klamath Falls sewage treatment facility is detrimental to the treatment facility and causes a harmful working environment. To reduce the hydrogen sulfide buildup, Falcon Heights must place large amounts of chlorine into the sewage pipeline. If the pipeline breaks, there is a chlorine contamination issue in addition to the sewage.
- (2) Large volumes of chemicals are needed to reduce the hydrogen sulfide buildup that will occur with a replaced line. Large volumes of water create more treatment for the City and large volumes of chlorine are hard on treatment equipment and the environment. These engineering challenges make this alternative less feasible. Some have mentioned that other systems pump long distances. Other long distance pumping does occur but they have more hookups that make it more conducive to pumping because they can keep the flow moving so it doesn't go septic. The Falcon Heights development has a set amount of static hookups making it very difficult to purge the flow volumes in the force main.

- (3) The pipeline cannot be purged of its volume in a timely manner to prevent septic conditions in accordance with DEQ design guidelines because of its length. DEQ also requires the lines to be purged of their volume over a set rate of time. In order to accomplish this line pumping, it would require pumping large volumes of water into the system or installing multiple pump stations along the pipeline route, since gravity draining is not an option. It also requires large volumes of chlorine to kill the gas build up, due to the amount of time the waste is in the pipeline.
- (4) Cost is also a factor in this alternative. As the PER shows there is the cost of a construction project to fund over time, as well as continuing to pay sewage fees to the City. In addition damage to the City's receiving facilities will result in costs. The City paid for damage that has already occurred but noted any future problems could result in costs for Falcon Heights. Construction funding coupled with monthly sewer fees to the City, and possible unknown costs in the future makes this a less than feasible alternative. Unlike other developments that can grow and develop to adjust their rates there is a set amount of homes with no future expansion available to spread the cost out to the home owners.

The Applicant also provided testimony from Andrea Rabe, a local environmental consultant, that there was a low likelihood of acquiring the necessary environmental permits to either repair or replace the existing line. She also provided reasons why these alternatives were not feasible in her opinion. Ms. Rabe identified the issues with the pump to city option: (1) the risk of further contaminating the water quality impaired Lost River and (2) the impacts to the wetlands and fish habitat during and after construction:

- 1) The water quality in the Lost River could be further degraded if the new or repaired pipe fails where it crosses the Lost River Diversion Channel. Sewage would directly enter the river increasing nutrient loading to the already impaired river.

Additionally, the topography of the existing pipeline is not conducive to wastewater pipeline placement. The center portion of the pipeline is lower, due to topographic constraints, compared to the ends of the pipeline. Therefore the sewage pools in the lower portions of the pipeline route, leading to a buildup of hydrogen sulfide. Delivering the high levels of hydrogen sulfide to the City of Klamath Falls sewage treatment facility is detrimental to the treatment facility and repaired and new pipes, and causes a harmful working environment. To reduce the hydrogen sulfide buildup, a large amount of chlorine is added to the sewage pipeline. If the pipeline breaks in the area of the Lost River Diversion Channel crossing, chlorine contamination will occur in addition to the sewage contamination. This will further degrade the water quality within the Lost River.

- 2) The Lost River is considered a Water of the State and has associated jurisdictional wetlands. Klamath County considers the Lost River a Goal 5 resource which should be protected by additional planning and development ordinances.

In order to replace or repair the existing pipe, fill-removal permits and approval would need to be obtained from Klamath County, Oregon Department of State Lands (DSL), and Army Corps of Engineers (ACOE) to impact the waterway and its associated wetlands. The fill-removal permit requires an alternative analysis. The analysis would select for alternatives which avoid impacts to the Water of the State and associated

wetlands. Therefore, replacing or repairing the existing pipe would not be the preferred alternatives, since both alternatives requires impacts to the Water of the State and associated wetlands. If the alternative analysis does not support either of the Pump to City alternatives for the Falcon Heights Wastewater Treatment Facility, the likelihood of the permit being approved by the ACOE and DSL is very low. Without approval of this permit neither of the Pump to City alternatives could not be implemented.

In addition, in order to implement one of the Pump to City alternatives, an in-stream work permit would need to be obtained from Oregon Department of Fish and Wildlife (ODFW) and a Section 7 consultation with US Fish Wildlife Service (FWS) regarding the potential impacts from the chosen Pump to City alternative on the endangered suckers and their habitat. This permit and consultation would also select an avoidance project alternative over an alternative which could have potential impact on the endangered fish and therefore require mitigation. The likelihood of obtaining the in-stream permit is very low. Without the approval of ODFW and FWS, the Pump to City alternative could not be implemented.

Due to the environmental issues associated with the Pump to City alternatives, the likelihood of obtaining necessary permits to allow for implementation of one of these alternatives is very low.

The PER identified two alternative treatment systems to replace the existing system: A package treatment plant and a facultative pond system. The package treatment plant requires a higher degree of maintenance and expertise to run than a facultative pond system. A facultative pond system is a common and an acceptable way to dispose of wastewater without discharging into public waters. Both systems require a secondary treatment pond or lagoons and subsurface absorption or irrigation to dispose of the final effluent by product. As a result, these two alternative systems require enough land to accommodate the ponds and areas for irrigation. The applicant evaluated whether these systems were feasible either on Falcon Heights property or on nearby non-resource land.

Neither alternative system is feasible on Falcon Heights property because there is insufficient land to accommodate these alternative systems.

The package treatment plant requires secondary treatment ponds and an irrigation area large enough to dispose of the final effluent byproduct. DEQ will not allow discharging into any Klamath River Basin Waterway so irrigation is the only option for disposal. In addition to the 5-acre site for the package treatment plant itself, the secondary treatment ponds require approximately 5 acres and the irrigation area requires approximately 20 acres. There is not sufficient space on site to accommodate the ponds and the area for irrigation.

Additionally, the Falcon Heights' property is within the Kingsley airport overlay and the airport overlay prohibits ponds and lagoons due to their potential to attract migratory birds. Therefore, Falcon Heights would not be able to site ponds on the property due to the airport overlay.

The facultative pond system is not feasible onsite for the same reasons. The facultative pond system also requires similarly sized treatment ponds and approximately 20 acres for the irrigation area. There is insufficient land on site to accommodate the ponds and the area for irrigation and the airport overlay prohibits the ponds. Therefore, the lack of sufficient land to accommodate

these systems and the airport overlay restrictions are fatal flaws for both of these alternative systems on Falcon Heights' property.

The applicant evaluated whether these alternative systems could be located on non-resource land and the feasibility due to technical and engineering limitations and locational dependency. The alternative system is locationally dependent in that it must be reasonably close to the Falcon Heights' property. The only sufficiently sized non- resource property within reasonable proximity is on Miller Hill.

The applicant determined that Miller Hill is not a feasible alternative. Miller Hill is too steeply sloped. The base of Miller Hill lies at an elevation of 4,180 feet and rises 325 feet in 1,200 feet to its peak creating a steep slope of 27%. This terrain is too steep for either a package treatment plant or a storage pond. Miller Hill is within the airport overlay. Further, the soils are not conducive to these types of systems. The soils are very limited and are not recommended for use in growing crops, constructing lagoons, or infiltration treatment of waste water. Therefore, neither alternative system is feasible on the only available non- resource property. The base of Miller Hill lies at a mean sea level elevation of 4,180 feet and rises 325 feet in 1,200 feet to its peak creating a steep slope of 27%. The USDA-NRCS Soils report shows the material on Miller Hill to consist of 60% Lorrella very stony loam with slopes from 2% to 35%. The remaining 40% consists of Lorrella-Calimus with steep North Slopes. This type of soil stratification lends itself very poorly to lagoon construction, slow rate infiltration of wastewater treatment, and growing fodder crops.

The preferred alternative system can be built on the preferred EFU site. There is good site geography (flat ground) for building Lagoons and irrigating crops. Beneficial use can be made of the recycled waste water. The Environmental Quality Commission (EQC) encourages the land application of treated domestic wastewater biosolids, biosolids derived products, and domestic septage which are managed in a manner which protects the public health and maintains or improves environmental quality. These beneficial recyclable materials improve soil tilth, fertility, and stability and their use enhances the growth of agricultural, silvicultural, and horticultural crops. The proposed alternative is technically and economically feasible and is easy to construct, inexpensive and simple to operate, long life cycle with minimal maintenance involved.

Based upon the above, the Applicant has demonstrated that the existing wastewater treatment system is failing, cannot be repaired or replaced, and alternative systems cannot be accommodated on Falcon Heights property or on non-resource land. Therefore, there is a necessity for siting the preferred alternative system on EFU land pursuant to the Klamath County Land Development Code and State law.

***B. The proposed use is in conformance with all standards and criteria of this Code, notably Article 57 (Significant Resource Overlay if applicable);***

Finding

*"The use complies with both permitted and conditional uses in accordance with Article 54 for EFU Zones. ORS 215.283(1)(c) allows treated effluent to be land applied. ORS 215.275(4) allows related buildings and equipment with land owner's written consent. The use also complies with Article 57. The property is located in an EFU Zone and the proposed use is agriculture related. Therefore, no conflict in use occurs." (From application received November 15, 2010 and Letter from Anderson Engineering and Surveying, Inc. dated December 1, 2010.)*



The BOCC concludes that the proposed facility is in conformance with all standards and criteria of the Klamath County Land Development Code.

Article 57 is not applicable as the site is not within any significant resource overlay.

- C. ***The location, size, design, and operating characteristics of the proposed use will not force a significant change in, or significantly increase the cost of, accepted farm or forestry practices on nearby agricultural or forest lands;*** (This language is substantially the same as in ORS 215.296(1))

Finding

*"The proposed use will not adversely affect adjacent or nearby agricultural lands. The proposed use is agricultural related and effluent will be used to grow fodder crops. The use relies on traditional irrigation wetlands and will not be out of place in an agricultural area."* (From application received November 15, 2010 and Letter from Anderson Engineering and Surveying, Inc. dated December 1, 2010.)

The BOCC finds that expert evidence and testimony was provided by Andrea Rabe of Rabe Consulting to show that spray drift will not have an impact on an adjoining organic farming operation that would force a significant change in, or a significantly increase the cost of, accepted farming practices. Permits will be required from Oregon Dept. of Environmental Quality (DEQ) that ensure that the design and construction of the facility will be such that no wastewater will leave the site through surface runoff or airborne spray or drift. Testimony submitted by Anderson Engineering and Surveying, Inc. shows the kind and level of testing that DEQ requires to monitor water quality. The applicant also testified at the remand hearing that its irrigation system would include a downward style irrigation head and tree buffering to minimize spray drift and was willing to install an automatic system to shut off the irrigation system when the wind speed exceeds 20 mph.

Farmer Tim Parks of Parks-Hickey Hay Sales, LLC, which has a 2000 acre organic alfalfa farm some of which is adjacent to the City of Merrill wastewater irrigation system, submitted a letter dated March 26, 2012 stating that because of measures required by Oregon DEQ, the city's wastewater irrigation system has not affected their organic certification. Mr. Parks also stated that because of the measures required to be implemented by DEQ including the required buffer zone and the irrigation system to be installed, the proposed facility would not force a significant change in the farming practices to the organic farm located to the south of this proposed project, nor would this proposed project force a significant increase in the cost of that organic farming operation.

The appellants argued that spray drift would have an impact on an organic farming operation, but did not provide substantial evidence to show that the proposed use will force a significant change in farm operations or significantly increase the cost of accepted farming practices on nearby farm lands.

**ORS 215.275(5)**

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

Finding

The BOCC has included conditions of approval, as listed in Exhibit B, to mitigate and minimize possible spray drift and visual impacts from the proposed facility on surrounding land devoted to farm use in order to prevent a significant change in accepted farming practices and avoid a significant increase in the cost of farming practices on surrounding farmlands.

- D. A written statement will be recorded with the deed which recognizes the rights of adjacent and nearby land owners to conduct farm or forest operations consistent with accepted farming practices and the Forest Practices Act, ORS 30.090 and Rules for uses authorized by this Code.**

Finding

"The Falcon Heights Water and Sewer District will record a statement recognizing the rights of adjacent landowners to conduct farm or forest operations." (From application received November 15, 2010 and Letter from Anderson Engineering and Surveying, Inc. dated December 1, 2010.)

A condition to record the restrictive covenant has been included in Exhibit B.

- E. The proposed use will not significantly increase fire hazards or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel;**

Finding

"The proposed use will have no impact on fire hazards or fire suppression personnel." (From Letter from Anderson Engineering and Surveying, Inc. dated December 1, 2010.)

The BOCC concludes that the proposed facility and its operations are not expected to increase fire hazards and thus, not significantly increase fire suppression costs or significantly increase risks to fire suppression personnel. The site has a Wildfire Hazard Rating of Low. Klamath County Fire District No. 1 responded with "No Comment."

- F. The use complies with other conditions as the review authority considers necessary.**

Finding

The applicant will comply with all conditions of approval.

**III Findings to address issues in the Statement of Appeal from Attorney Justin Throne.**

- 1. Inadequate and incorrect findings were made in regard to the Conditional Use Criteria of the KCLDC.**

Appellants' Argument

The appellants argue that use of Article 54.030(O), which is "Utility facilities necessary for public service, and which must be situated in an agricultural zone in order for that service to be provided" should not have been used and that Article 54.030(R) which is "A solid waste disposal site..." should have been used instead. The argument goes on to say that Falcon Heights is not a city, and by existing land use law, is not capable of expansion.

#### Finding

*"Solid waste typically means domestic garbage, as opposed to human waste, so solid waste is not the category this project would be reviewed under. The County correctly used Article 54.030(O) – Utility facilities necessary for public service in reviewing the proposal."*

Falcon Heights is an "exception area" as identified in the Klamath County Comprehensive Plan - Atlas (Page IV-1). The BOCC agrees that Falcon Heights is not a city and the project does not propose to expand the exception area. The affect of the project is to provide sewer treatment only for the existing Falcon Heights exception area.

The Court of Appeals has held that a wastewater treatment facility is a utility facility necessary for public service under state law. See *Menges v. Board of County Commissioners of Jackson County*, 44 Or App 603, 606 (1980). This decision reflects the plain text of ORS 215.213(1)(c) and 215.283(1)(c) which state that utility facilities necessary for public service include waste treatment systems. The proposed wastewater treatment facility therefore is an allowed use in the EFU zone, meaning it is subject only to the siting standards found in state law. See *Brentmar v. Jackson County*, 321 Or 481 (1995). The County therefore may not legally apply its solid waste disposal standards to the proposed use. The County is allowed to apply Article 54.030(O) which is consistent with the siting standards found in state law.

### **2. The requirements of ORS 215.275 were incorrectly applied in the decision.**

#### Appellants' Argument

The appellants point out that ORS 215.275 contains a "requirement of necessity" that the facility "must be sited in an exclusive farm use zone in order to provide the service." They argue that such a circumstance is missing from the current situation.

#### Finding

*"ORS 215.275(1) provides that a utility facility is necessary for public service if the facility "must" be sited in an EFU zone in order to provide service. The proposed facility is necessary because the existing wastewater treatment system cannot reasonably be upgraded or replaced on site and there are no other feasible alternatives to siting a wastewater treatment facility either on site or on non-EFU land."*

Under *McCaw Communications, Inc. v. Marion County*, 96 Or App 552 (1998), a utility facility may be sited on EFU land if it is necessary to site the facility on agricultural land in order to provide the utility service. State law requires a utility facility applicant to consider "reasonable alternatives" to a proposed facility on EFU land. In evaluating alternatives, an applicant may consider cost, but may not reject an alternative based on cost alone. Rather, the applicant must show that cost, in combination with technical or other practical considerations makes the alternative infeasible. See ORS 215.275. The applicant has demonstrated in the Supplemental Evidence and Response to Appellants' Statement of Appeal submitted May 11, 2011 that the proposed facility is consistent with ORS 215.275.

### **3. Inadequate findings were made to satisfy the requirements of OAR 660-033-130(16).**

#### Appellant's Argument

The appellant argues that this OAR provision at (16)(a) requires that "[t]o demonstrate that a utility facility is necessary, applicant must show that reasonable alternatives have been

*considered and that the facility must be sited in an exclusive farm use zone due to one or more of [listed factors]."* Even though three alternatives were discussed, the applicant has stated no compelling reasons as to why the alternative of the facultative ponds (proposed project) *must* be the choice and that there are undoubtedly reasonable alternatives that should preclude a finding of necessity for the proposed project.

#### Finding

*"The proposed sewer treatment ponds and recycled water irrigation are not "necessary" if the existing force main is replaced, but the project does become "necessary" given such other factors as construction cost, operation and maintenance costs, anticipated longevity and reliability of the facility, and its ability to meet regulatory requirements, all identified as reasons for this alternative's selection in the Preliminary Engineering Report."* (Submitted with the application on November 15, 2010.)

The existing system is no longer functional. The "do-nothing alternative" of leaving the existing pumps and force main in place would cause adverse environmental and health hazards by releasing untreated raw sewage to the environment and would continue the high levels of hydrogen sulfide which puts existing city infrastructure and work force crews at risk. It is no longer technically feasible to keep the old system up and running. Based on the condition and as-built design of the existing force main, a public health hazard is imminent.

The two alternative systems require enough land to accommodate the ponds and areas for irrigation. There is not sufficient space on site to accommodate these alternative systems. It may be possible to fit the footprint of the packaged treatment plant on District Property, but an area to receive the treated wastewater is still required. The applicant's submittal entitled Supplemental Evidence and Response to Appellants' Statement of Appeal submitted May 11, 2011 details the land search for the new treatment facility and demonstrates that the only non-resource zoned property within a reasonable proximity to Falcon Heights is not suitable for such a facility nor growing the fodder crops to use the effluent. The proposed site, on EFU land, is the only reasonable alternative available.

Based upon the above, the applicant has demonstrated that the existing wastewater treatment system is failing, and cannot be repaired or replaced on site, and alternative systems cannot be accommodated on site or on non-resource land. Therefore, the BOCC finds that there is a necessity for siting the preferred alternative system on EFU land.

- 4. Any existing "exception area" for Falcon Heights is limited in scope and does not encompass the land on which the new sewer system is proposed.**

#### Appellant's Argument

The appellant argues that the Falcon Heights development is an "exception area" identified in the Comprehensive Plan, and does not include the land on which the new sewer system is proposed. The applicant did not submit any proposed exceptions with their application and the decision of the governing body failed to adequately address exceptions.

#### Finding

*"The proposed project is not within the existing Falcon Heights exception area and that the exception area was not proposed to be expanded to include the new facility. An exception to the statewide planning goals is only necessary if a landowner proposes a use that is inconsistent with*

the relevant statewide planning goals. The appellants imply that the proposed facility is inconsistent with Goal 3 (agricultural lands), Goal 11 (public facilities and services) and Goal 11 (urbanization). Appellants, however, offer no explanation as to why they believe this to be the case."

The proposed use is clearly consistent with Goal 3 because it is specifically authorized by the state statutes that define allowed uses in EFU lands. The proposed wastewater treatment facility is a utility facility necessary for public service authorized by ORS 215.213(1)(c) and 215.283(1)(c). Goals 11 and 14 are irrelevant here because the applicant is not proposing to expand public facilities for the purpose of further urbanizing the Falcon Heights development area.

It has been determined that an exception for the proposed facility is not necessary.

**5. OAR 660-011-0060 does not allow for a new sewage system as proposed by Applicant.**

Appellant's Argument

The appellant argues that applicant relied on ORS 215.275 and OAR 660-033-130(16)(a) as the basis for the proposition that no exception is required. However, as an additional component of that rule, OAR 660-033-130(16)(e) requires that establishment or extension of a sewer system on EFU zoned land is also subject to the provisions of OAR 660-011-0060, and that this provision would prohibit the proposed project.

Finding

*"The applicant did address the requirements of OAR 660-033-130(16)(a) in that they are a "Utility facility necessary for public service..." and did review the facility against items A-F as required.*

*The applicant has now also addressed OAR 660-011-0060 which states that "(2) Except as provided in sections (3), (4), (8), and (9) of this rule, and consistent with Goal 11, a local government shall not allow:*

*(a) The establishment of new sewer systems outside urban growth boundaries or unincorporated community boundaries:..."*

The applicant is not seeking to establish or extend a sewer system within the meaning of the LCDC rule. The rule referenced by appellants, by its own terms, is intended to govern sewer systems built to serve new development, not the replacement of a system that serves an existing development within an exception area.

The proposed project is not to create a new sewer collection system with additional or future residential sewer hookups. The proposed Falcon Heights Waste Water Treatment Plant will not increase the base residential density and will not promote any future development outside of the urban growth boundary. The Waste Water Treatment Plant is intended only to serve the pre-existing Falcon Heights Condominium Association and Klamath County School District Offices.

Although neither LUBA nor Oregon courts have squarely addressed the applicability of OAR 660-11-0060 to a redesigned sewer system in an existing exception area, the Court of Appeals' and LUBA's general discussion of this rule and Goal 11 makes clear that it does not apply to Falcon Heights. The rule was adopted in 1998 to implement Goal 11. Last year, the Court of Appeals discussed the history and meaning of the rule in *Foland v. Jackson County*, 239 OR App 60

(2010). The issue in *Foland* was whether OAR 660-11-0060 prohibits the rural extension of a sewer system for a non-residential use without an exception to the statewide planning goals. In discussing the meaning of Goal 11 and the rule, the court stated:

*"In other words, by limiting facilities and services to the needs and requirements of the land to be served (i.e. urban, urbanizable, rural), Goal 11 helps prevent the proliferation of urban uses in rural area that might otherwise result from the extension of urban-level facilities and services outside an urban growth boundary (UGB) to rural land. See Foland, 239 OR App at 64 (emphasis added)."*

Later in the opinion, the court quoted LUBA's earlier opinion in the case regarding the meaning of OAR 660-11-0060 which concerns rural extensions of water service and is the companion rule to 0060 under Goal 11:

*"The rule [OAR 660-011-0065] does make clear that Goal 11 is concerned with the presence and availability of a sewer or water system facilitating increased residential density on rural land, presumably because that could lead to rural land being put to urban use in contravention of Goal 14. Id. At 69 (quoting LUBA) (emphasis added)."*

The rule prohibiting sewer service to rural lands without an exception to Goal 11 therefore does not apply to Falcon Heights because the redesign of Falcon's existing sewer system will not facilitate increased residential density.

The proposed project is found to be consistent with the requirements of OAR 660-033-130(16)(a) and OAR 660-011-060.

**6. An exception to Goals 3 and 11 should be required and was not made.**

Appellant's Argument

The appellant argues that the land slated for the project has not been already developed and built or "irrevocably committed" to the use in question, and as set forth previously, is a distinct area from the Falcon Heights exception area in the Comprehensive Plan. The proposed project is not a necessity since at least one reasonable alternative exists that would not require construction outside of the exception area. Due to the lack of necessity, the proposed project should not be a conditionally approved use under ORS 215.275. Removal from that category would necessitate an exception to the applicable goals as require by ORS 197.732.

Finding

*"The applicant has demonstrated that an exception to Goal 3 and 11 is not required since the existing exception area for Falcon Heights does not need to be expanded and the wastewater treatment facility is allowed on EFU zoned land."*

**7. Other reasonable alternative exists.**

Appellant's Argument

While the Applicant set forth three alternatives, and preferred the facultative ponds (proposed project), the two rejected alternatives are economically viable. OAR 660-033-130(16)(b) requires that while cost can be considered, cost alone cannot be the determining factor for necessity.

Finding

*"Cost was not the only factor in choosing the facultative ponds option on EFU land. As set forth above, other factors, included in evaluating other alternatives and selecting this option, were construction cost, operation and maintenance costs, engineering challenges, locational dependency, anticipated longevity and reliability of the facility, and its ability to meet regulatory requirements." (Submitted with application on November 15, 2010.)*

ORS 215.275(1) provides that a utility facility is necessary for public service if the facility "must" be sited in an EFU zone in order to provide service. The proposed facility is necessary because the existing wastewater treatment system cannot reasonably be upgraded or replaced on site and there are no other feasible alternatives to siting a wastewater treatment facility either on site or on non-EFU land. The applicant has demonstrated in their submittal, Supplemental Evidence and Response to Appellants' Statement of Appeal (Submitted May 11, 2011) and written and oral testimony for the remand proceedings that alternative options were appropriately considered and determined to be unreasonable

**8. Mischaracterization of existing facilities that would need to be removed.**

Appellant's Argument

The Appellant argues that the existing 8-inch sewage transport main referred to is characterized as being constructed of concrete, however, according to the official records of Klamath County, is constructed of asbestos cement. This fact will significantly affect the costs of removal of the old system, which is required as Condition No. 3 of the Final Order, and should also be weighed in favor of upgrading and/or replacement of the existing facility as the best alternative.

Finding

*"Condition No. 3 does not absolutely require that the existing transport main be removed. The condition states that the pipe "...shall be removed or dealt with as required by Klamath County Public Works, Klamath County Public Health, and/or the Department of Environmental Quality. If it is determined that leaving the pipe in place is an acceptable alternative, it might not be removed."*

The Asbestos Abatement Specialist with Oregon DEQ determined that the best course of action for the existing force main is to leave the pipe in place. He said that digging the pipe up and removing it would cause potential for release of friable particles into the atmosphere and that the best solution is to not disturb the pipe. Leaving the pipe in the ground would have a significantly reduced cost.

**9. Possibility for contamination.**

Appellant's Argument

The Appellant argues that land application of effluent can cause groundwater contamination. Not enough consideration was given to the downside of the proposed facility in regard to potential contamination of the land and groundwater. In its final decision, the governing body did not require as a condition that Applicant provide or obtain a bond or other undertaking for damage, repair, or restoration, as allowed by ORS 215.275(4).

Finding

No specific or conclusive evidence was placed in the record that the irrigation water would cause groundwater contamination.

In addition to the CUP approval from the County, a Water Pollution Control Facilities (WPCF) permit is required from the Oregon Department of Environmental Quality (DEQ) after the local approval has been granted. In an email from Jayne West (DEQ) dated April 1, 2011 she states the following:

*"Land application of treated effluent is covered under OAR 340-55, Recycled Water Use Rules. Essentially these rules require effluent to be applied at an agronomic rate, i.e., the rate at which the crop and surrounding soil can utilize the water and nutrients in the reuse water. The assumption is that if the effluent is applied correctly that the groundwater rules (OAR 340-50) are met. Having said that, however, site conditions may require further groundwater investigation. If the depth to groundwater is shallow the DEQ may require monitoring wells to be installed to monitor the discharge to prevent any groundwater contamination. Restrictive conditions could also be included in the permit describing how the effluent can be applied. At this time I do not have any current knowledge of the groundwater conditions at the site."*

The project will not contaminate the groundwater if the DEQ rules are followed correctly.

#### **10. Community Considerations.**

##### Appellant's Argument

The appellant argues that consideration was only given to those residents that live within the Falcon Heights development, whom will benefit from the project, and not those many residents whom live nearby and will be affected by the project.

##### Finding

*"The Planning Division met the legal notification requirements by notifying property owners within the required 500-foot notification area and the Planning Commission heard testimony from both residents that live within the Falcon Heights project, as well as numerous people that live and own property potentially affected by the proposal."*

The applicable criteria in Article 54.040(C) only requires a finding that *"The location, size, design, and operating characteristics of the proposed use will not force a significant change in, or significantly increase the cost of, accepted farm or forestry practices on nearby agricultural or forest lands."* The criteria does not require a finding of consideration of the impacts on residents in the area. As described in the *Brentmar* case in the Applicant's Supplemental Evidence and Response to Appellants' Statement of Appeal (Submitted May 11, 2011), the County is prevented from evaluating the proposed utility facility under approval criteria other than the criteria specified for this use in state law. The County therefore does not have legal authority to consider any generalized opposition to the proposed use that is not grounded in the applicable state siting criteria.

In the email from Jayne West (DEQ) dated April 1, 2011, she states the following in regard to odor:

*"Odor can be a very difficult problem after the fact. The best way to deal with odor is to try and prevent them from happening in the first place. Sighting sewage lagoons up wind of close by residents is not recommended. Considering odor problems during design and construction of a lagoon system can also help prevent odors from becoming a problem. These would include sizing the lagoons large enough with plenty of buffer capacity for growth, including aeration, or installing up front solids removal. I have also heard of using carbon filters similar to what Sunriver has. Even with these preventative measures in place odors can still be a problem in the spring"*



*when "turnover" occurs. Turnover happens when the weather warms up and the material on the bottom of the lagoon rises to the surface because of temperature differences in the water column. I can't really speak to cost, that would be more for the consultant to tackle."*

Again, since the proposed use is allowed in an EFU zone and the criteria does not require that there be no odor, it is not a requirement of the approval.

In order to mitigate some of the visual impacts, a condition of approval has been included requiring a visual screen of trees along the northern and western boundary of the project.

#### **IV CONCLUSIONS OF LAW**

The County has correctly interpreted its Land Development Code and state law in regard to all applicable criteria and regulations for this application. The applicant has adequately addressed the criteria in the Klamath County Land Development Code, ORS 215.275, OAR 660-011-0060 and OAR 660-033-130(16)(a) and it has been found that the project is consistent with these requirements subject to the conditions contained in Exhibit B.

## EXHIBIT B – Conditions of Approval

1. Prior to any construction, all required final approvals and permits from Planning (including a Site Plan Review per Article 41 of the Land Development Code), Building, and the appropriate State and Federal agencies must be obtained.
2. Comply with the requirements of KC Public Works Department as follows:
  - a. An access permit is required for Tingley Lane.
  - b. Obtain USBR (United States Bureau of Reclamation) and KID (Klamath Irrigation District) permits for ditch and canal crossings, as necessary.
  - c. Submit detailed plans for review of road crossings, as necessary.
3. The existing sewer main lines that are to be abandoned, shall be removed or dealt with as required by Klamath County Public Works, Klamath County Public Health, and/or the Department of Environmental Quality.
4. Comply with all Department of Environmental Quality (DEQ) permitting requirements.
5. Wastewater treatment shall be limited to those properties within the Falcon Heights Water and Sewer District and the adjacent Klamath County School District property (Map No. R-3909-03400-01600).
6. Fifteen acres of EFU land associated with the ponds shall be withdrawn from the Farm Use special assessment program prior to Planning Division sign-off on the Land Use Compatibility Statement (LUCS).
7. The applicant shall plant 5 foot minimum height Austrian Pines or other acceptable evergreen trees in a staggered alignment along the entire north and west sides of the proposed ponds and spray field area to provide a visual screen and wind buffering. Whatever tree species are selected, the applicant and Planning Department shall determine the appropriate spacing (using landscape industry guidelines) to ensure the future health and sustainability of the trees. The applicant shall replace, as necessary, and maintain the trees for a minimum of four years to ensure the trees survive.
8. The applicant shall install a wrought iron fence along the north side of the ponds between the tree line and the pond areas.
9. The applicant shall place rocks on the exposed sides of the banks to help soften the view of the black plastic liner.
10. The irrigation system shall use a downward spray style head to minimize spray drift.
11. An automatic system shall be used to shut off the spray irrigation system when the wind speed exceeds 20 mph. The automatic system shall be inspected regularly to ensure that the shut off mechanism is working properly.
12. The applicant shall record a restrictive covenant with the deed recognizing the rights of adjacent and nearby landowners to conduct farm and forest operations consistent with accepted farming practices and the Oregon Forest Practices Act. A copy of the recorded covenant shall be provided to the Planning Department.