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Information Report on Siting Locally Undesirable Regional Facilities

City Club of Portland (Portland, Or.)

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Report on

SITING LOCALLY UNDESIRABLE REGIONAL FACILITIES

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The City Club membership will vote on this report on February 16, 1990. Until the membership vote, the City Club does not have an official position on this report. The outcome of the membership vote will be reported in the City Club Bulletin (Vol. 70, No. 40) dated March 2, 1990.

Table of Contents

EXECUTIVE SUMMARY	169
I. INTRODUCTION	170
II. BACKGROUND	171
A. Historical Perspective	171
B. Current Siting Process	172
1. The Standard Process	172
2. The Supersiting Process	173
III. CASE STUDIES	174
A. Solid Waste Sites	174
1. Wildwood	174
2. Bacona Road	175
3. Oregon City Garbage Burner	176
4. St. Helens Garbage Burner	176
5. West Side Transfer Station	176
B. Correctional Facility Sites	177
1. Sheridan Prison	177
2. Portland Restitution Center	177
3. Emergency Correctional Facilities	178
C. Lessons Learned From The Case Studies	179
IV. DISCUSSION	181
A. Introduction	181
B. Government Initiative	181
1. Leadership	181
2. Amending State Law	181
3. Private Siting	183
C. Improving Procedures In The Siting Process	183
1. Enhanced Public Involvement	183
2. Contested Hearings	183
3. Negotiation/ Conflict Resolution	184
4. Minimizing Adverse Effects	184
5. Accelerated Siting Procedures	185
V. CONCLUSIONS	186
VI. RECOMMENDATIONS — A Proposed Solution	187
1. Amend State Land Use Law	187
2. Establish a "Facility Siting Council"	187
3. Amend the Process For Siting Specific Major Public Facilities	188
4. Judicial Review	189
APPENDIX A — Witness List	191
APPENDIX B — Bibliography	192

EXECUTIVE SUMMARY

Almost everyone accepts the need for certain important but undesirable major facilities to serve the public interest. Solid waste disposal sites, correctional facilities, airports, convention centers and sports complexes are examples of such facilities. Our ability to ensure an adequate supply of these facilities is being challenged by the public's aversion to locating such facilities near home or work sites.

Oregon has been lauded for its pioneering efforts in land use planning and legislation. Now, continuing problems in siting controversial public facilities raise the issue of whether current state law is adequate to the task. Several recent attempts to establish landfill and correctional facilities have encountered delays, disruptions, and, all too often, defeat. These efforts to site have ignited controversy and generated fierce opposition from communities. The tack of opponents often narrows to a simple philosophical statement: "Not in My Back Yard." Complicated siting procedures and the absence of a structure to fully involve public participants are part of the problem.

Your Committee concludes that the solution will require changes in Oregon's land use law, in local comprehensive land use plans, and in the attitudes of Oregonians toward these facilities. **The Committee recommends that the Oregon Legislature:**

- **Amend state land use law** by directing the Land Conservation and Development Commission to amend its regulations to require localities to plan for locally undesirable facilities;
- **Establish a permanent Facility Siting Council** responsible for identifying the process for siting specific facilities and resolving siting issues; and
- **Establish a process for siting these facilities** that is streamlined, facilitates public involvement, enables timely siting, encourages negotiation over litigation, and limits the judicial review of siting decisions.

The model process recommended by your Committee will alleviate the need to use the supersiting process, and accelerate siting procedures while protecting the rights of citizens.

Report on SITING LOCALLY UNDESIRABLE REGIONAL FACILITIES

To the Board of Governors,
City Club of Portland:

I. INTRODUCTION

Society must have certain important but undesirable major facilities. Solid waste disposal sites, correctional facilities, airports, convention centers and sports complexes are good examples of major facilities of regional significance. Attempts to site these have generated considerable controversy in Oregon for many years.

The attempt to locate a new general-purpose landfill in the Portland metropolitan area to replace the St. Johns Landfill is one recent and unfortunately typical example of the frustration and fury that accompany most siting decisions. For over a decade, the issue has cycled through planning, siting, litigation, re-planning, re-siting, and renewed litigation.

Controversy more often is about where to locate such facilities, rather than whether they are needed. The issue may be labeled "Siting Undesirable Facilities," although "Undesirable Siting of Facilities" better describes public reaction. More descriptive yet are the popular acronyms for these facilities: LULUs (Locally Undesirable Land Uses) or NIMBYs (Not in My Back Yard).

A City Club Committee was formed to study Siting of Undesirable Facilities and was directed to 1) examine case histories of successful and unsuccessful sitings; 2) identify common causes of failure and success; and 3) recommend changes in existing siting procedures. The Committee was to include in its recommendations a model procedure for evaluating the need for a public facility and guiding its siting, construction, and operation.

Your Committee examined eight siting cases: five for solid waste disposal facilities and three for correctional institutions. Each case study included reviews of written material and interviews with persons directly involved in the siting controversy. Your Committee also reviewed written materials which focused on siting similar and different types of facilities.

Limiting the inquiry to solid waste disposal facilities and correctional institutions does not mean that siting other types of facilities, such as airports, convention centers and sports complexes, will not raise similar issues and problems. Your Committee believes the issues raised by the siting of those facilities, and addressed in this report, are representative of the issues and problems attendant with the siting of such major public facilities.

Similarly, your Committee does not believe the conclusions and recommendations discussed in this report are limited to solid waste disposal facilities and correctional institutions. With some modifications tailored to the particular type of facility, your Committee believes its conclusions and recommendations may be applied to many types of major public facilities of regional significance.

The remainder of this report is divided into six sections. Section II describes the history of Oregon's land use law and describes the current siting processes and some of their deficiencies. The eight case studies mentioned above are then

described in some detail in Section III, which concludes with a synopsis of the lessons learned from each. In Sections IV, V, and VI, your Committee discusses its research and sets forth a number of conclusions regarding the present system and recommendations for improvement.

II. BACKGROUND

A. Historical Perspective

Oregon is a pioneer in comprehensive land use planning. In part, this pioneer role results from the inherent conflict between the state's farming and forest industries and development of urban areas. The loss to urban development of lands traditionally dedicated to farming and forestry was viewed in the late 1960s as having a potentially harmful effect on the state's economy.

Legislative involvement in the land use planning process began in 1969 with the passage of Senate Bill 10. Although that bill required cities and counties to develop land use plans, it provided little financial support, few technical guidelines, and no effective way to coordinate local planning efforts.

In 1973, the Legislature attempted to correct these shortcomings through Senate Bill 100 (SB 100). Among its more important provisions, SB 100 created the Land Conservation and Development Commission (LCDC). LCDC's charge was, and is, to "prescribe planning goals and objectives for state agencies, cities, counties and special districts throughout the state," ("Goals"). SB 100 also created the Department of Land Conservation and Development (DLCD), which provides staff support to LCDC.

One of the primary objectives of the legislation was to avoid centralized state control of land use planning. Designating land uses was explicitly reserved for counties and cities. Local governments develop "comprehensive plans," which they implement after LCDC acknowledges the plans comply with land use goals. LCDC also reviews and acknowledges subsequent changes in local plans, whether to meet new circumstances or to comply with goal amendments. Originally, LCDC had jurisdiction to review local, regional and state agency decisions to assure conformity with the LCDC Goals. In 1979, the jurisdiction to review land use and zoning matters was delegated to the newly created Oregon Land Use Board of Appeals ("LUBA"). LUBA's decisions are subject to review by the Oregon Court of Appeals and the Oregon Supreme Court.

Some problems associated with siting controversial public facilities were apparent when the Legislature first considered SB 100. A major debate at the time was whether to give the state authority to issue permits for facilities that had significance beyond local boundaries. Prisons and landfills were examples of such facilities.

The Legislature declined to give the state this authority because of concerns that the state would exert excessive influence over local land use decisions. Instead, except in limited circumstances, state agencies must comply with LCDC goals and acknowledged comprehensive plans. State agencies may act contrary to acknowledged local comprehensive plans only if the state plan or program is mandated by state or federal law, is consistent with LCDC goals, and has objectives inconsistent with the comprehensive plan then in effect. In addition, the state, acting through LCDC and the Legislature, may designate areas of critical state-wide concern.

B. Current Siting Process

1. The Standard Process

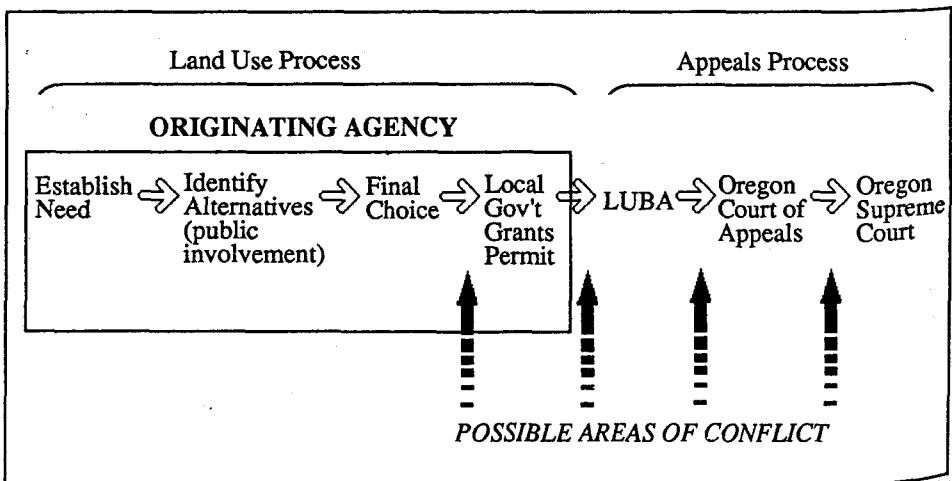
Current law establishes requirements for siting any facility that is not permitted outright by the site's zoning designation. Localities need not, and typically do not, establish zones where landfills, correctional facilities, and similar facilities are permitted outright, although they may be allowed as conditional uses in some zones. As a result, the siting agency or proponent must apply either for a variance from the requirements of the existing zoning designation, a change in zoning designation to allow the facility outright, or a conditional use permit.

As part of the process for obtaining a variance or zone change, the proponent must develop a plan for the facility and identify suitable parcels. The proponent also submits an application, which demonstrates that the facility satisfies criteria established for the variance, zone change, or conditional use.

Submitting the application to the local government with jurisdiction over the site initiates a quasi-judicial process. The proponent submits information supporting the application. The planning staff of the local jurisdiction submits a report supporting or opposing the application. Interested citizens also may submit information that supports or opposes the application. An independent hearings officer usually reviews the submitted information and renders an initial decision.

The losing side may appeal the hearing officer's initial decision to the appropriate local governing body which reviews the decision and listens to testimony of the planning staff, the proponent and opponents. The losing side may then appeal the governing body's decision to the Land Use Board of Appeals. LUBA may remand the issue back to the local governing body for further proceedings, after which LUBA may again see the issue on appeal. LUBA's decision ultimately may be appealed to the Oregon Court of Appeals and the Oregon Supreme Court. At any stage of the proceeding, one or more of the parties may introduce a referendum which, if passed, negates the decisions of this quasi-judicial and judicial process.

Chart I presents a graphic illustration of the Standard Contested Process.

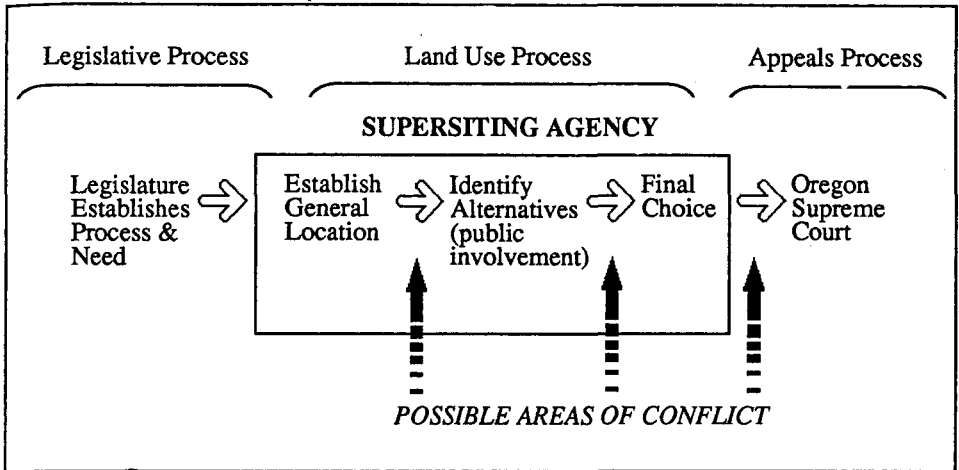


The Standard Process

Because of the complexity of the contested process, and the attendant delays and disruption, there is no assurance that proponents can find sites for locally undesirable facilities within a reasonable time, or at all. The case studies in Section III illustrate this.

2. The Supersiting Process

The uncertainty and actual failure to site many major facilities of regional significance led the Oregon Legislature to authorize a "supersiting" process on a selective basis. Using this process, the proponent of a facility need not obtain a local land use permit. Recent examples are DEQ's attempted siting of a regional landfill in the Portland metropolitan area and the siting of emergency correctional facilities throughout the state. Chart II illustrates the supersiting process.



The Supersiting Process

The objectives of the supersiting process are to: 1) reduce the number of steps; 2) constrain the opportunity for non-specific opposition; and 3) limit the time required for each step.

The basic steps of the supersiting process are:

- The Legislature establishes the need for a particular type of facility and the existence of an emergency. The Legislature then grants supersiting authority to an agency.
- An agency (e.g., DEQ) identifies the general area for siting the facility.
- A siting group may be selected to identify potential locations within this general area, commission technical studies, and identify the specific choices. The initiating agency holds public hearings and produces a final report upon which its decision is based.
- The final choice is made.
- Opponents have a single opportunity to appeal to the Oregon Supreme Court. They also may undertake a referendum vote to stop the facility.

As discussed more fully below, your Committee believes this process has a number of defects. These defects are substantial enough to warrant further investigation of alternatives and attempts to improve the process.

In the next section, we discuss eight case studies and their associated problems. As will become apparent, most witnesses described situations in which the current processes, both standard and supersiting, were deficient and unacceptable.

III. CASE STUDIES

A. Solid Waste Sites

1. Wildwood

It was apparent as early as 1975 that the St. Johns Landfill was approaching its maximum capacity and that the Portland metropolitan area needed a replacement site. The Metropolitan Service District (Metro) has the landfill siting responsibility in this area and had the initial task of finding a replacement site.

After vigorous opposition, Metro withdrew its first preliminary site proposals in 1979 and decided to broaden the search. Metro and the State Department of Environmental Quality (DEQ) subsequently created a Citizen Advisory Solid Waste Strategy Task Force, to which Metro and DEQ delegated the landfill site selection process. In June 1980, the task force selected Wildwood as its choice. Wildwood is a partially wooded area on a hillside above the road to St. Helens, overlooking Sauvie Island. The choice was made over anguished protests from the affected neighborhood association, West Hills and Island Neighbors.

Despite protests, Wildwood remained the chosen site. By May 1981, the task force completed and distributed final feasibility reports. Opponents criticized the reports and vowed to stop the landfill. Nonetheless, in June, Metro decided to proceed at Wildwood. Although many attended the meeting at which Metro made this decision, no public testimony was allowed. Opponents subsequently complained they had not received a fair hearing.

Metro needed a zone change and a conditional use permit from Multnomah County to site the landfill at Wildwood. At the application hearing in June 1982, approximately 140 people testified against the proposal and four supported the proposal. Opponents argued that the landfill was unsafe, impractical, and would adversely affect land values.

In September 1982, the Multnomah County Planning Staff endorsed the Wildwood site with several conditions. These conditions included regular "before" and "after" comparisons of air and water quality and noise levels in the neighborhood, geological mapping of suspected landslide areas, and an approved system to manage liquids seeping from the site. In addition, Metro would be required to purchase any wells polluted by the landfill or to provide a constant supply of potable water if needed. Staff also recommended that a board of professional appraisers be authorized to award damages to property owners if properties were sold at depressed prices.

Despite this endorsement, the hearings officer found the site an inappropriate use of prime forest land and denied Metro's application. He found that Metro had failed to show both that the landfill would be environmentally safe and consistent with the character of the area, its agricultural uses, and the county's comprehensive land use plan.

In November 1982, Metro appealed the hearings officer's decision to the Multnomah County Board of Commissioners. The Commissioners overruled the hearings officer and approved the site, subject to the conditions recommended previously by staff. Opponents appealed to LUBA.

In June 1983, LUBA overturned Multnomah County's approval because the project violated the county's land use ordinances. LUBA found that more liberal siting standards allowing "mitigation of adverse impacts might be more appropriate, since dumps are both unpopular and necessary." The decision was affirmed by the Oregon Court of Appeals and the Oregon Supreme Court.

Metro continued its efforts to site the landfill at Wildwood. In December 1984, however, Multnomah County Commissioners voted to set standards for a landfill ordinance but specifically excluded Wildwood from the list of potential sites.

2. Bacona Road

After Metro lost the prolonged battle to site Wildwood, and critics openly questioned whether it could ever site a landfill, the agency deferred further consideration of the issue. The 1985 Legislature revived the issue with passage of "supersiting" legislation, which made two major changes to the process. First, the legislation shifted responsibility for siting a Portland metropolitan area landfill from Metro to DEQ. Second, it made the process ostensibly easier by decreeing that a land use permit was not necessary.

DEQ accumulated a list of 142 potential sites, reduced it to 19 by June 1986 and to three by October. In June 1987, DEQ announced its final choice: Bacona Road in northwestern Washington County.

Opponents of the Bacona Road site raised a number of issues, including protection of groundwater supplies, establishment of buffer zones, preservation of site appearances, and compensation for lowered property values. They repeatedly challenged DEQ's findings of fact and the Legislature's avoidance of the land use permit process. DEQ responded that its facility would be "state of the art," that it would be more concerned about environmental effects than cost, and that it would not change the rules during the game. DEQ said little about demands for property value compensation.

Despite DEQ's statements, Bacona Road neighbors contended DEQ based its choice on economic rather than environmental factors. Opponents claimed Bacona Road was simply the least expensive site to develop.

The opponents also demanded more conditions, including purity tests of water sources, development of an alternative water supply in case of contamination, construction of a fire station nearby, and road improvements. They suggested strongly that Portland — not DEQ or Metro — should solve its own garbage problems.

Bacona Road residents and others petitioned for a contested case hearing before DEQ selection of the site. They were joined by Washington County and other local governments. The hearings officer found that DEQ had not done adequate technical work, including protection of ground water quality, to support its selection of the site. As a result of the hearings officer's recommendation, DEQ postponed making a final decision to allow further analysis.

Eventually Bacona Road joined Wildwood as a non-issue when Metro turned its attention to a new idea — shipping the metropolitan area's solid waste to the City of Arlington in Gilliam County.

3. Oregon City Garbage Burner

In 1979, Metro proposed to reduce the region's landfill load by burning garbage in an incinerator in Oregon City. At the time, Metro believed area landfill capacities would last 15 years, and that burning solid waste would extend capacity 10 years. The burner would be a cooperative venture with Publishers Paper Co., which planned to use steam produced by the burner.

Little public opposition accompanied the Oregon City Planning Commission's approval of Metro's plans in June 1981. Voters had previously defeated a proposed city charter amendment to prohibit construction of a burner within city limits.

After the Planning Commission approval, however, substantial opposition developed. Among other concerns, opponents contended the plant would not meet air pollution standards. This argument was exacerbated by the subsequent discovery that Metro's analysis of plant emissions was incorrect.

Opponents prepared three local initiatives for the November 1982 election, any one of which would have effectively precluded construction of a burner. All three measures passed and Metro abandoned its efforts.

4. St. Helens Garbage Burner

In 1985, following a regional forum on waste disposal alternatives, Metro considered another proposal to site a garbage burner in St. Helens. By 1987, Metro had negotiated, but not signed a construction proposal with Combustion Engineering, a private company. The proposal expressly delegated responsibility for siting the burner to Combustion Engineering.

At the same time, Metro commissioned a health impact assessment, which ultimately recommended against the burner.

Columbia County Commissioners had expressed interest in the project but, in a subsequent referendum, voters rejected the project by a vote 1,109 to 953.

5. West Side Transfer Station

In September 1983, Genstar Waste Technology Group proposed a Washington County transfer station, a midway point where local haulers deposit solid waste for transportation to a landfill. Genstar was the private contractor that operated both the St. Johns Landfill and an existing transfer station at Oregon City.

Washington County Commissioners endorsed the idea. Metro created a site location committee with representatives from Washington County, its cities, Portland, and solid waste haulers. The committee proposed a transfer location on the northwestern edge of Beaverton in March 1985.

Neighboring businesses immediately objected. Nike threatened to move. The committee named ten alternative sites in its second attempt, and again encountered stern opposition to each.

Then-Governor Vic Atiyeh named another task force to study the problem. Its recommendation to site the facility was approved by the City of Beaverton and by the site owners, Sunset Highway Associates. Metro approved the selection of

the site and voted to initiate condemnation proceedings. After the Governor's office and the owners opposed condemnation and obtained a restraining order, the proposal ended.

Metro later considered another site, which a county hearings officer rejected. The proposal died.

B. Correctional Facility Sites

1. Sheridan Prison

Siting a correctional facility in Sheridan was first proposed in 1981 by the State of Oregon. Community leaders immediately supported the proposal and, concerned about economic factors, offered the Delphian School location if a state prison bond issue passed. The bond issue failed.

The Oregon State Corrections Division subsequently placed the Sheridan property on a list of sites for the state system, but chose a site at Pendleton instead.

Federal officials continued to consider the Delphian site and met with local leaders to assess community interest and acceptance. In the spring of 1982, the regional office of the Federal Bureau of Prisons recommended the facility as a federal correctional site.

A local group, Three Cities Community Development Corporation, originally formed to attract economic development to Sheridan, Willamina and Grand Ronde, became the advocate for the site. It held meetings with various agencies and groups, raised funds for preliminary appraisals of the site, and kept the community informed on the project.

In the spring of 1985, the Federal Bureau of Prisons rejected the Delphian School site. Nonetheless, community interest continued and a community task force formed to locate a different site in the Sheridan area that would meet the Bureau's requirements. The Development Corporation entered into purchase option agreements with the owners of three new sites.

Some community opposition existed. Residents who feared that a prison in their town would adversely affect its livability proposed a referendum on the issue. After residents voted against blocking the prison, the opposition withdrew.

Ultimately the Federal Bureau of Prisons purchased a 181-acre site. Construction began April 1986 and was finished in June of 1989.

2. Portland Restitution Center

The Portland Restitution Center is a minimum security facility operated by the Multnomah County sheriff's office in the former Rajneesh Hotel in downtown Portland. The siting process began in October 1985. From the beginning, the sheriff's office viewed the siting as a political campaign, and sought to build broad-based community support for the facility.

The sheriff's office advocated the need for the center because of a federal court order to reduce the inmate population in the Multnomah County Justice Center. The Restitution Center was envisioned as a highly structured environment where carefully-screened individuals would receive counseling, education and job training. It would also provide an opportunity for individuals to make restitution to victims, pay court-ordered fines and room and board, and work on projects beneficial to the community.

By December 1985, the sheriff's office had identified four potential sites in the downtown and near-eastside areas. Representatives met with local merchants' associations, the city, public and private service agencies, and other interested parties. Some of these meetings were emotional. Supporters noted the generally favorable experiences of other cities with downtown restitution centers.

None of the four sites was selected. Two were rejected because they would displace existing residents and because of City Council opposition. The sellers of the other two sites removed them from the market.

The Rajneesh Hotel came back on the market, however, and the owners were anxious to sell quickly. This presented a problem because of the time needed to obtain necessary land use permits. The sheriff convinced Multnomah County Commissioners to buy the site even though he was uncertain whether the permits would be issued.

In exchange for opponents' agreement not to contest the permits, the Sheriff's office agreed to substantial opportunities for community participation. It created a community advisory board to recommend work projects for prisoners and include community representatives on the committee that determined which prisoners would stay at the center.

3. Emergency Correctional Facilities

Acting on a request of Governor Neil Goldschmidt, the 1987 Legislature passed "supersiting" legislation that by-passed the state land use law and authorized the construction of up to 1,000 minimum security prison beds as an emergency condition.

To justify its action, the Legislature determined that: 1) a shortage of prison space existed, 2) the state land-use planning process did not adequately meet the needs of the criminal justice system, 3) the process of updating comprehensive plans to provide for additional prisons would take considerable time, and 4) further uncoordinated planning and development could significantly delay a solution. Accordingly, an emergency was declared.

The "super-siting" legislation, House Bill 3092, established an Emergency Corrections Facilities Siting Authority to make siting decisions, subject to approval of the Governor. The bill also required the appointment of a Governor's Task Force on Corrections Planning, charged with developing a plan for the siting of not more than 1,000 beds. The Task Force was to determine the nature of the need, identify geographic areas in the state for consideration and establish which facilities will serve each area. The emergency siting law includes a schedule for negotiations, public hearings and appeals.

The process started with a "certification of need" and was followed by designation of a nominating committee to identify three alternative sites in each area, which were sent to the Siting Authority for a final decision.

Three facilities have been sited under this legislation. The Powder River Correctional Center, a combination work camp and drug treatment facility in Baker, opened its doors in November 1989. The Columbia River Correctional Center, a 400-bed restitution center on Sunderland Road in Northeast Portland, is now under construction. A third facility, located at the abandoned Air Guard base in Hauser, is expected to open in January 1990 when the state acquires the property through the federal surplus process.

Only in the Powder River case did a majority of the community support the siting. In the Sunderland Road case, a group opposing the siting, Groups Against Sunderland Prisons (GASP), organized after a hearing with the Siting Authority. Although opponents did not appeal the siting decision, their testimony convinced the Siting Authority to include a provision in the final order protecting the area's wetlands. The Hauser site encountered opposition from nearby residents, however opponents did not appeal the siting decision.

The 1989 legislature continued the supersiting legislation with some changes to allow the state to site a major new medium-security prison. Due to time constraints, your Committee did not examine case studies under the 1989 legislation.

C. Lessons From The Case Studies

The case studies present a diverse picture of the processes of siting locally undesirable facilities. In nearly every case, opposition was vigorous and emotional. Except in two, or perhaps three situations, the opposition was sufficiently strong to cause proponents to abandon the siting process or consider other sites.

Among other things, your Committee was charged with identifying common causes of success and failure. Distinguishing success from failure is not easy. For example, there may be considerable disagreement over whether Wildwood was a success or a failure. Some would label it a failure because the proponent was unable to site the landfill at Wildwood. Others would consider the Wildwood siting process a success because it eventually became clear that Wildwood was an inappropriate site. Your Committee was unable to agree on a means to identify successes and failures in every case. For purposes of this report, however, your Committee defines a successful siting as one where the proponent was able to site the facility in the desired location. By this definition, all of the correctional facilities were successes; all the other attempted sitings were failures.

The case studies are diverse in their facts, policies and processes. Nonetheless, your Committee discerned a number of common themes or lessons:

- **Citizen involvement is necessary but will not guarantee a successful siting.** Despite substantial involvement by citizens and their government leaders in the Wildwood and West Side Transfer Station sitings, for example, vigorous opposition prevented the final selection of the preferred site. In the case of the West Side Transfer Station, some of those who originally supported the actions of the site selection committee ultimately opposed the selection.
- **Supersiting will not necessarily ensure a successful siting.** Bacona Road, an example of the supersiting process, was unsuccessful by almost every measure. On the other hand, the three minimum security correctional facilities, which also employed a supersiting process, were successful. The mixed success rate of supersiting demonstrates that, while it offers a number of components that a model process should employ, it is not the solution.
- **Individuals and businesses affected by the proposed site are likely to participate actively in the process and most often will oppose the selection of the site.** In Wildwood, Bacona Road, the Oregon City and St. Helens garbage burners, the West Side Transfer Station and the Columbia River Correctional Center on Sunderland Road, neighbors vigorously op-

posed the siting. This occurred despite the use of different processes: traditional land use, supersiting, and legislative siting. Even the Sheridan siting had substantial, albeit supportive, citizen participation. Participation by neighboring businesses and individuals is inevitable and appropriate and the process for siting such facilities should facilitate and channel such participation.

- **A significant correlation appears between 'he intensity of the opposition and the perceived fairness of the process.** For example, opponents to Wildwood complained that the Metro hearings unfairly excluded their views. Similarly, the opponents to Bacona Road felt that DEQ not only changed the selection criteria in mid-process but that the whole idea of siting a landfill in a rural area for garbage from the Portland area was unfair.
- **A process characterized by an honest effort to negotiate and compromise may be more successful.** The proponents of the Sheridan facility and the Restitution Center viewed the process as one of building a broad-based consensus and of responding to the opponents' concerns. The positive attributes of a strategy built around negotiation and compromise should be part of a model siting process.
- **Economic benefits of a site, whether perceived or actual and whether in the form of economic development or compensation, can be crucial to the success or failure of a site.** For example, the success at Sheridan and Baker/Powder River resulted in substantial part from the perception by most members of the community that economic benefits outweighed a prison's disadvantages. Similarly, the Multnomah County sheriff stressed economic benefits of the Restitution Center. Finally, although siting the landfill in Arlington (or Gilliam County) was not one of the case studies because it was looked at in the context of Bacona Road, the willingness of Eastern Oregon communities to accept Portland metropolitan area garbage relied in large measure on the willingness of the private developer to compensate the county through increased taxes and fees and to provide jobs. While it may be difficult to institutionalize the need to emphasize economic benefits of a facility, compensation strategies can be so institutionalized.
- **Including a private developer sector in the siting process, or at least having the proponent act as if he were a private developer, could be beneficial.** As indicated above, much of the success of the siting in Arlington of a solid waste facility for the Portland metropolitan area resulted from the private developer's willingness to compensate and negotiate with affected citizens. Similarly, although the proponents in the Sheridan and Restitution Center cases were not private developers, they were willing to negotiate and compromise rather than wield the power they may have had as public bodies.
- **A strong information base is important to a successful siting.** Opponents to the unsuccessful sitings repeatedly challenged technical findings and support for the site. In many cases, the proponents conceded information gaps that adversely affected their own credibility and strengthened the resolve of opponents.

In summary, the successful and unsuccessful sitings demonstrate both strengths and faults in the current siting process and the alternatives used to date. A more efficient and successful siting process would draw on these strengths and avoid the faults.

IV. DISCUSSION

A. Introduction

Based on analysis of case studies, a review of relevant literature, and discussions with witnesses, two general means to improve the current siting processes appear:

Government initiative including leadership, changes in state law, and selective use of private developers;

Procedure improvement including accelerating the siting process, enhancing public involvement, incorporating compensation strategies, and developing forums for resolving factual issues by a neutral party.

The discussion below explains these points in detail.

B. Government Initiative.

1. Leadership

Witnesses generally agreed that leadership is critical in successfully siting locally undesirable major public facilities, and many witnesses attributed the failure to site a facility to lack of leadership by proponents.

The effectiveness of leadership may be indicated in three areas. (1) Has the proponent correctly identified and analyzed the need for the proposed facility and the technical, economic and political issues that will arise? (2) Has the proponent made the appropriate contacts in the community affected by the siting? (3) Has the proponent made a true effort to coordinate all interested players and create a forum to resolve issues raised by the affected citizenry?

Case studies demonstrate that the siting process and the chances of a successful siting improve dramatically if a proposal is technically defensible and the proponent works constructively with government and citizens. The Sheridan siting was successful, in part, because the federal government established and relied on technically defensible standards, and operated the siting process as if its governmental powers were not material. Federal officials accommodated state and local conditions they could have preempted.

Trying to institutionalize an attitude or approach on siting is difficult. Nonetheless, each proponent of a facility should consider the leadership issues and address them as part of the siting process.

2. Amend State Law

a. Comprehensive Land Use Plans

The case studies also demonstrate that current state land use law does not adequately address the issues raised in siting major facilities of regional significance. A major impediment to siting these facilities is that a comprehensive land use plan typically does not include them as an allowed use. The proponent usually must obtain a change in zoning designation or allowed use of the land. This change application allows opponents to argue economic and non-economic reasons for the current zoning designation and claim that a change in use would be contrary to the letter and spirit of the comprehensive land use plan.

A change in state law could overcome this obstacle. Requiring LCDC to include in the comprehensive goals siting of major facilities of regional significance would allow LCDC, in the course of its normal review procedures, to see that the appropriate local comprehensive plans include areas for such facilities. This would not mean that every locality must plan for a regional landfill. Rather, LCDC would simply have the authority to require localities to plan for such facilities when it is technically and otherwise feasible and appropriate. Examples of facilities covered by this would include prisons, landfills, airports, convention centers, sports complexes, and other facilities with similar characteristics.

Under current state law, localities must update comprehensive plans every five years or whenever necessary to bring such plans into compliance with the LCDC goals. This review mechanism, which is already part of the land use planning process, could be used to implement the suggested changes in state land use law without creating undue havoc in the comprehensive planning process.

b. Centralized Decision-Making

In addition, the case studies demonstrate that the process for determining whether a particular facility is needed, and where, is haphazard, particularly when multiple jurisdictions are involved. Opponents often question the need for the facility, only to find that this decision has already been made. While your Committee believes any decision on the need for a particular type of facility should be left to the appropriate political process, changes in state law could centralize the implementation of these decisions, establish consistent standards and processes, and replace the current process of convening ad-hoc siting task forces.

c. Functional Planning

The case studies also revealed the deficiency of the current siting processes' focus on a particular facility at a particular site for a particular purpose. Often, no agency is in a position to resolve the issues across jurisdictional lines. This inability often produces the attitude that a specific facility should be sited anywhere but in the jurisdiction where it is proposed.

Many witnesses advocated the increased reliance on a functional plan, which is a set of detailed policies and standards that address some function of local government. Local governments routinely use functional plans to address capital improvements for public services such as municipal water supply, sewers, fire protection or transportation. Functional planning may be effective in siting locally undesirable major public facilities because such a process addresses a single need comprehensively and across jurisdictional boundaries. The functional planning process can develop broad and diverse constituencies, which in turn reduces the chances that opponents to a single site can defeat the entire plan. Amending state law to foster functional planning could help identify the need for many types of facilities.

Metro has authority to prepare and adopt functional plans for activities with "significant impact" on the metropolitan area. These activities might include corrections, solid waste, mental health, and housing facilities for the homeless. Although Metro has not yet completed any functional plan, it is working on a functional Solid Waste Management Plan. Metro intends to seek a consensus on planning and siting of solid waste facilities through a regional partnership of Metro, cities, counties, refuse haulers, citizens and other affected parties. The plan may or may not be site specific. Metro currently anticipates that it may only be

"zone specific." The jurisdictions would approve zoning for those facilities, with specific sitings to follow.

3. Private Siting

Increasingly, governments initiate the siting process by identifying the need for a facility but delegate the actual siting to a private developer. When used selectively, this approach has several positive attributes.

First, a private developer often has a lower profile in the early stages of the siting process. For example, a private developer may purchase options for the site and neighboring properties before proposing a particular use. This can reduce much of the controversy before it even arises.

Second, a private developer with no governmental powers must work within the political process, often with better sensitivity to local issues.

Third, a private developer often views local opposition from an economic perspective. Problems may be solved by compensating those who are damaged by the effects of the site. Governmental entities have shown reluctance to do this.

Free market approaches to public problems may be useful tools in the hands of a governmental agency. Granting power or delegating decision-making or development functions to private parties can raise serious policy questions however, and must be done judiciously. Private siting is best used in partnership with a comprehensive framework of public responsibility. Any proposed remedy for the current process should allow for the use of private siting as an element of an overall publicly responsible strategy.

C. Improving Procedures In The Siting Process

It is apparent from the case studies that current procedures for siting a particular facility suffer from inadequate and inefficient public participation, and from inordinate delays in making final decisions. Modification to the process could enhance effective public involvement and accelerate the decision-making process.

1. Enhanced Public Involvement

No siting process will work over the long run unless it involves local citizens meaningfully. Citizens do, and should, have the right to participate in the decision-making process on issues affecting their property and interests. The case studies demonstrate the public will often exercise this right negatively if it feels left out of the process, regardless of the proponent's effort and the apparent benefits of a project. Similarly, if an agency interprets the requirement for public involvement as simply holding endless public meetings, its efforts are likely to fail.

Effective public involvement results from viewing the public as a partner in the solution, rather than an adversary. Citizens should (1) have access to information that is easy to assimilate, (2) receive early and frequent notice of all material developments, (3) be allowed and encouraged to work with, rather than against, the proponent, and (4) be informed of clearly-defined criteria. Moreover, the process should be well understood and have specific milestones that, once reached, cannot be revisited.

2. Contested Hearings

One tool frequently used in Oregon to achieve public involvement is the contested hearing conducted outside of a court. A contested hearing is similar to

a trial. Witnesses provide sworn testimony and are cross-examined. A hearing officer presides over the proceedings and renders a documented decision which forms the basis for later review. The parties make the process as formal as they like.

This tool has both benefits and problems. The most important benefit is that it provides a place for affected parties to meet and discuss their problems openly. All sides may have a stronger incentive to identify critical issues and seek solutions.

A contested hearing, however, can also turn a public policy discussion into a lengthy adversarial process. Nonetheless, the use of a contested hearing, when combined with other existing and suggested tools, has the potential to improve the current process.

3. Negotiation/Conflict Resolution

Another technique holding promise for reform is multiparty negotiation and compromise designed to build a consensus for a controversial project. For example, several states require mandatory negotiation and conflict resolution for hazardous waste management issues. Proponents of a project must reach agreement with state or local governments and other interest groups before seeking permits or approvals.

Essential steps in building consensus are:

- All constituencies must agree that a problem exists for which some type of facility is the only logical solution.
- All participants must jointly identify the problems, consider the choices, and evaluate the consequences of alternatives.
- Technical participants must agree on a single set of facts and assumptions, or agree on a process to identify those facts. Clearly, such a process is not possible or desirable in every situation. Nonetheless, such a tool can be effective in the process of siting certain of these facilities.

4. Minimizing Adverse Effects

A number of witnesses also suggested minimizing the negative impact of locally undesirable public facilities. They suggested that the use of mitigation and compensation strategies would improve the siting process.

a. Mitigation

As used in this report, mitigation means "repairing" the damage a facility might impose on a community or area. It often focuses on potential damage to the environment, as well as intrusions on the serenity of neighbors from traffic, noise, odor or unsightly views. Examples include new roads, changed access points, devices to monitor and minimize effluents, physical space and other types of "buffers," and "beautification."

b. Compensation

Your Committee defines compensation as a direct payment to those to whom damage is not remediable by mitigation. Although Oregon land use law identifies a number of issues for the siting process, none of the issues directly concern economic interests of a site's neighbors. Because standards do not include these critical issues, siting agencies often fail to give them adequate attention.

Compensation tends to be part of a siting strategy when a private developer is the proponent. Such a developer, with vastly weaker political powers, is often more attuned to these issues. One proponent of private sector solutions observed, "You don't site where there are people, you don't site where the property has a high profile."

Compensation strategy creates a transaction between the proponent and the neighbors, and it is likely to preclude consideration of sites that may face possible hurdles. Compensation, however, has several drawbacks. First, the presence of compensation in the siting process may cause individuals to oppose a project simply to receive compensation. Second, some participants may view the idea of payment as disagreeable or a form of bribe. Structuring the compensation as a contribution to local taxes or public services may make it more palatable.

In summary, as with the other suggestions from the witnesses, mitigation and compensation are not goals in and of themselves. They are tools which, if more broadly used, would have advanced the siting process in the cases that your Committee studied.

5. Accelerated Siting Procedures

The current standard siting process is "appeal intensive." It allows multiple appeals that start with the local hearings officer, proceed through the planning commission, city or county government, then go to the Land Use Board of Appeals, the Court of Appeals, and finally the Oregon Supreme Court. At least one siting, Wildwood, passed through all of these steps, some more than once.

Admittedly, this full process extends rights to all parties. But a prolonged process shifts the focus from fundamental to procedural issues, and it increases the cost of participation to a point where some affected citizens can not afford to participate.

For example, the Wildwood case hinged on the precise wording of Multnomah County's standards for siting a landfill. The successful appeal of the siting to LUBA depended on whether the county's decision satisfied this standard. The appeal of the LUBA decision to the Court of Appeals was based on the procedural fitness of LUBA's decision. By the time the issue reached the Oregon Supreme Court, only procedural issues remained for decision.

Witnesses who appeared before your Committee did not agree on how to streamline the process. Restricting the number of appeals and the body by whom appeals are heard may interfere with *the rights* of those most concerned. It also may call into question whether the issue would be decided by experts in law or by experts in land use.

Moreover, unsatisfied litigants may attempt to change the rules when the rules do not satisfy their needs. In the Bacon Road case, advocates convinced the court to impose an adversarial hearing, even though the enabling legislation did not require one. In the Oregon City garbage burner case, opponents turned to the initiative process to accomplish their objectives.

Oregon presently uses selected accelerated siting procedures to site correctional facilities and has attempted to use them to site a regional landfill. The accelerated procedures, however, are only marginally acceptable even in an emergency situation. Implementing your Committee's recommendations would alleviate the need to use supersiting procedures.

V. CONCLUSIONS

A dominant theme in your Committee's research was that **any proposed changes to the process for siting locally undesirable major public facilities should not be made at the expense of Oregon's participatory land use process.** Public involvement and litigation are not the basic issue; the issue is that any solution which "speeds" siting by eliminating the democratic process brings with it many other faults.

Your Committee believes **Oregon can site controversial land uses without restricting the right of citizens** to plan locally, intervene in sitings that affect their interests, and contest the basic tenets of siting choices. These are important rights. Attempts to abrogate them will be at Oregon's cost.

Your Committee's recommendations focus on the need to plan for controversial land uses. Hard decisions about land use must be made at the local level, through local plans, if local governments are to have a voice in their own futures. This means that **the local planning process must explicitly address controversial land uses.** We believe, however, that **state government must initiate these changes.**

The process must protect the right of the individual citizen to intervene and participate meaningfully. Siting a landfill is not the same as siting a school. Landfills provide a public perception of widespread neighborhood damage. It is inappropriate to restrict the siting debate to engineering questions when the fundamental issues pertain to livability and economics.

It is also **important to establish a forum where the interested participants can meet and negotiate.** Perhaps the strangest feature of supersiting the Portland metropolitan area landfill was the absence of an explicit mechanism for meeting the concerns of interest groups, particularly West Hills and Island Neighbors, who had continuously acted to block previous siting efforts. Eventually, through political and legal intervention, open hearings were convened for the Bacon Road controversy, although supersiting legislation contained no provision for allowing citizen groups to participate actively.

While your Committee believes judicial review is an essential component in this process, your Committee also believes **the current system of review is excessive and should be substantially reduced.** Controversial facility siting is a test of the effectiveness of local government; authority alone will not make it effective. **Facilities must be planned, discussed, tested and then finally, sited.** Leaving any one of these steps out would constitute an abandonment of Oregon's land use planning philosophy.

Having heard the testimony and carefully weighed the materials presented in case studies, your Committee proposes a **modified process for siting locally undesirable major public facilities.** It follows:

- **Allow for private siting where appropriate.**
- **Establish a process for mitigation and compensation for affected parties.**
- **Accelerate the process by establishing realistic time-tables for action.**

- **Enhance public involvement.**
- **Provide for contested hearings** to clarify positions.
- **Incorporate a methodology for negotiation and conflict resolution.**

VI. RECOMMENDATIONS — A Proposed Solution

Your Committee recommends three steps which could enhance the ability to site locally undesirable major public facilities. These steps include a process by which local governments would identify potential sites in local comprehensive plans, achieve compromise between proponents and opponents, and select a specific site through negotiation. These steps also include a proposal for expeditious court review and a schedule to reach a timely decision. The proposed process, however, does not solve all of the issues. Because many of these decisions are acutely political such as whether there is a need for a regional correctional facility, their resolution must be left to the political process. The steps recommended below will provide a framework around which the Legislature can debate and resolve these issues.

1. Amend State Land Use Law

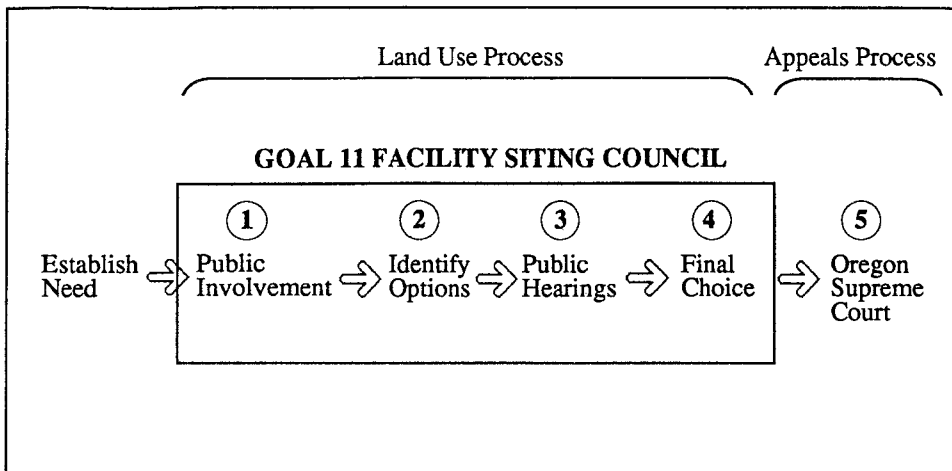
The State Legislature should amend the state's land use law to require inclusion of siting of "major facilities of regional significance" in the comprehensive goals established by LCDC through its normal rule-making procedures and in those local comprehensive plans where LCDC, again acting through its existing review procedures, deems it appropriate. Prisons, landfills, airports, convention centers, sports complexes, and other facilities which exhibit characteristics similar to those mentioned should be cited as examples.

In addition, the Legislature should amend state land use law to foster and encourage increased reliance on functional planning to determine the need for such facilities. Functional planning could be done at the local, regional or state level.

2. Establish a "Facility Siting Council"

The Legislature should establish a permanent Facility Siting Council (the "Council"). The Council will promulgate regulations covering such things as whether a particular facility should be subject to its jurisdiction, who may participate and intervene in the proceedings, and the hearings procedures. Factors influencing jurisdiction will include consideration of the significance and regional effect of the facility. The Council also would be responsible for identifying the process for siting specific facilities and resolving specific siting issues. Funding for this council could be permanent or on an "as-needed" basis. One example of this "as-needed" funding approach is the relationship between the Department of Energy and the Energy Facility Siting Council (EFSC), where staff are "loaned" from the department to the EFSC on an as-needed basis.

3. Amend the Process For Siting Specific Major Public Facilities



Recommended Siting Process

a. Initiate Public Involvement Process. A major focus of the Council's attention should be to develop a process designed to bring all potential interested parties to the discussion table very early in the process. The Council should develop regulations under which the Council will appoint an independent facilitator (the "Facilitator") to convene meetings, procure information, clarify positions, and encourage negotiation. The Facilitator should not be a decision maker nor an individual charged with a central policy role. The individual selected should be trained in facilitation and conflict resolution techniques.

The Council's regulations also should direct the Facilitator to hold one or more "Town Hall" meetings to hear from those with an interest in the facility. The Council should define in its rules who may participate in these hearings; the Committee believes the definition should be sufficiently broad to allow participation by those directly and indirectly affected. The primary purpose of these meetings would not be to identify potential sites. The primary purpose would be to identify the standards or processes used to determine whether any particular site is acceptable. Through these meetings, the Facilitator also would attempt to encourage and develop public support of such standards and processes. The secondary purpose of such meetings would be to identify potential sites for the facility.

These meetings should be completed and the standards and processes established within 120 days of the appointment of the Facilitator. These standards, processes, and the list of potential sites would become a part of the "Record of Decision," which is discussed below.

b. Identify and Narrow the List of Siting Options. Following the completion of the Town Hall Meetings, the Council should identify potential sites that will meet its criteria and the standards established in the Town Hall meeting. The Council should include sites identified by the siting agency and alternative

sites which may have been identified in the Town Hall meetings. The Council should proceed affirmatively to identify new sites and eliminate sites that do not meet these criteria and standards.

This step should be completed within 150 days of the end of the Town Hall meeting process.

c. Hold Hearings. The Council also should develop rules pursuant to which a qualified hearings officer (the "Hearings Officer") would be chosen to hold one or more hearings at which the characteristics of the potential sites would be debated by interested parties. The Hearings Officer would manage the proceedings to focus on the appropriateness of the site(s), mitigation (distance buffers, beautification, secondary facilities, access corridors), and compensation. The Hearings Officer would accept intervention by those persons or entities that establish an interest in the outcome of the siting decision in accordance with the Council's regulations.

The proponent of the facility would present the case for the proposed site(s). Intervenors would have the right to cross-examine and to present their own testimony. The Hearings Officer would develop a record of decision from the written and oral evidence received (the "Record of Decision") and recommend an action to the Council based on that Record of Decision. The Record of Decision would include findings of fact and recommendations on one or more of the potential sites.

The hearings should provide ample opportunity for the parties to negotiate a reasonable settlement of their differences. The Facilitator also would remain actively involved to encourage a negotiated settlement throughout the hearing process. This step should be completed within 60 days of the appointment of the Hearings Officer.

d. Make the Final Choice. The Council should issue a final administrative decision based upon the substantial evidence in the Record of Decision. The Council would then turn the siting over to an appropriate public or private siting agency for implementation. The implementation would include securing the necessary financing, letting contracts, and overseeing required mitigation and compensation.

This final choice should be made within 30 days of the close of the hearings.

4. Judicial Review

The final step in this process would be judicial review of the Record of Decision. The Oregon Supreme Court should be the first and only review forum. The Court's standard of review should be narrow. The Court should determine only whether the initial decision was arbitrary and capricious based on the evidence in the Record of Decision. The definition of what constitutes an "adequate record," whether narrow or sweeping, should be defined in the statute. The decision should be overturned only if the evidence in the Record of Decision could not, under any reasonable interpretation, support the decision of the Council.

Your Committee believes that the process outlined above protects the rights of citizens in the siting process while streamlining that process so that needed public facilities may be sited in a timely manner.

Respectfully submitted,
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Robert F. McCullough, Chair

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APPENDIX A

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Alice Propes, Real Estate Agent, Sheridan Federal Prison Siting Panel

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Jim Ross, Former Director, Department of Land Conservation & Development

Steve Schell, Attorney, Rappleyea, Beck, Helterline, Spencer & Roskie; Former Member, Land Conservation and Development Commission

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APPENDIX B

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