



1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner asks this Board to review a height limitation  
4 included in the grant of a conditional use permit for amateur  
5 radio (ham) antennas on petitioner's property. Petitioner asks  
6 that we reverse the decision, delete the height limitation and  
7 order the conditional use permit be granted. In the  
8 alternative, petitioner asks that we remand the decision.

9 FACTS

10 Petitioner has two amateur radio antennas on his property.  
11 Antenna A is 65 feet high, but can be lowered to 35 feet when  
12 not in use. Antenna B is a wire stretching from a fir tree to  
13 a metal pole some 60 feet in height. The pole is fixed and  
14 cannot be lowered.

15 A hearing was held on the conditional use permit  
16 application by the Curry County Planning Commission in July,  
17 1987. The planning commission granted the request with respect  
18 to antenna A subject to the condition that it be lowered to 35  
19 feet when not in use. The planning commission also granted a  
20 permit for placement of antenna B on the property. However,  
21 the commission required antenna B to comply with the county's  
22 35 foot height limitation for structures in this area.<sup>1</sup>

23 Petitioner appealed to the Curry County Board of  
24 Commissioners that portion of the planning commission order  
25 limiting antenna B to a height of 35 feet. At the county  
26 commission proceeding, the commissioners considered the

1 applicant's appeal and issued an order limiting the height of  
2 both antennas to 35 feet. This appeal followed.

3 FIRST ASSIGNMENT OF ERROR

4 "The County Commissioners erred in reversing the  
5 Planning Commission's prior decision to allow Antenna  
6 A at 65 feet, where that matter was not on appeal and  
7 Petitioner had no notice that the issue would be  
8 considered."

9 Petitioner argues that his appeal to the county board  
10 limited the issue on appeal to consideration only of antenna  
11 B. We do not agree. Section 9.0030(4)(d) of the Curry County  
12 Zoning Ordinance provides that the county commissioners may  
13 consider an appeal "de novo or limit the appeal to a specific  
14 issue requested or unrequested." We believe this provision  
15 clearly provides the county commissioners with the authority to  
16 consider whatever issues it wishes, whether petitioner requests  
17 the issue be considered or does not so request.<sup>2</sup>

18 The first assignment of error is denied.

19 SECOND ASSIGNMENT OF ERROR

20 "The Board of commissioners erred in application of  
21 PRB-1 by failing to accommodate the reasonable needs  
22 of the radio amateur."

23 THIRD ASSIGNMENT OF ERROR

24 "The Commissioners erred in construing Ordinance  
25 6.0040(5) as an absolute height limit which could not  
26 be exceeded unless antennas were compatible with the  
27 scenery."

28 In these two assignments of error, petitioner argues that a  
29 Federal Communication Commission (FCC) declaratory ruling  
30 entitled "PRB-1," published September 25, 1985, declares that  
31 local regulations involving the placement and height of

1 antennas based on health, safety or aesthetic considerations

2 "must be crafted to accommodate reasonably amateur  
3 radio communications, and to represent the minimum  
4 practical regulation to accomplish the local  
5 authorities' legitimate purposes."

6 Petitioner argues this ruling preempts local regulation, and  
7 the county erred in interpreting the ruling to allow it to  
8 limit petitioner's use of his amateur radio equipment.

9 According to petitioner, the county is obliged to ensure the  
10 reasonable needs of amateur radio communications are met, and  
11 only then may the county go on to determine the best location,  
12 design or installation of equipment which permits such  
13 reasonable needs to be met. In this case, according to  
14 petitioner, the county placed a higher priority on aesthetics  
15 than on the needs of the amateur radio operator.

16 Petitioner introduced commentary in the record stating that  
17 amateur radio is international in nature and that the antennas  
18 used by petitioner must be at a particular height (the 65 and  
19 60 feet heights requested for antennas A and B, respectively).  
20 Without these antenna heights, international communication is  
21 difficult, and the equipment is almost useless, according to  
22 petitioner.

23 Petitioner cites 47 USC Sec. 151, The Communications Act of  
24 1934, which states as its purpose that there be "rapid,  
25 efficient, nationwide, and worldwide wire and radio  
26 communication service with adequate facilities \* \* \*." PRB-1,  
according to petitioner, is a statement that municipalities can

1 regulate amateur radio only so long as the local regulations  
2 meet the requirement for "rapid, efficient, nationwide, and  
3 worldwide \* \* \* communication \* \* \*."

4 Petitioner characterizes the county zoning ordinance  
5 provision regulating radio antennas as an "absolute height  
6 limitation." As such, petitioner argues it is in violation of  
7 PRB-1, which petitioner says preempts local regulations, and is  
8 not permissible. Petitioner cites Bodony v. Village of Sands  
9 Point, No. CV 86-3967 (E.D. N.Y., September 21, 1987), in which  
10 the District Court of the Eastern District of New York struck  
11 down a local radio antenna height limitation finding the  
12 limitation was not supported by evidence showing that the  
13 proposed antenna height would endanger the health, safety and  
14 welfare of the residents or be detrimental to the character of  
15 the neighborhood. The court found the zoning board did not  
16 make a reasonable accommodation for the amateur radio use.

17 The county zoning ordinance at Section 6.0040(5) provides  
18 standards for communications antennas or towers. The standards  
19 are as follows:

- 20 "a) In any residential zone, all equipment storage on  
the site shall be within an enclosed building.
- 21 "b) The use shall be fenced and provided with  
22 landscaping.
- 23 "c) the minimum lot size for a public utility  
24 facility may be waived on finding by the Planning  
Commission that the waiver will not result in  
25 noise or other detrimental effect to adjacent  
property.
- 26 "d) As far as possible, transmission towers, poles,

1 overhead wires, pumping stations, and similar  
2 gear shall be so located, designed, and installed  
as to minimize their conflict with scenic values."

3 The federal regulation, PRB-1, simply requires that local  
4 regulations must be crafted to accommodate reasonably amateur  
5 radio communications and must represent the minimum regulation  
6 to accomplish legitimate local purposes. We believe the  
7 county's ordinance is consistent with PRB-1. The ordinance  
8 provision requires the county to find that a proposed  
9 communications antenna, tower, pole or overhead wire will be  
10 located, designed and installed so as to minimize conflict with  
11 scenic views "as far as possible." The provision places a  
12 burden on the person seeking to install such facilities to show  
13 that the facilities proposed result in the least conflict with  
14 scenic values necessary to reasonably accommodate his amateur  
15 radio communications. In other words, the applicant must show  
16 that his amateur radio communications needs could not  
17 reasonably be met with transmission facilities which would  
18 cause less impairment to scenic values.

19 In this case, the county found, among other things, the  
20 following:

21 "15. Amateur radio operations use various types of  
22 antennas to transmit and receive radio signals on  
23 a wide range of radio frequencies assigned to  
24 amateurs by the FCC. The applicant wants towers A  
and B to optimize the range of frequencies  
available to him. Other frequencies would still  
be available with a 35 foot tower.

25 "16. Other amateur radio operators in the area have  
26 the ability to transmit to far away lands  
including China with much shorter antenna

1 structures.

2 "21. The applicant's antenna tower and wires stand in  
3 an area subject to strong winds and fierce storms.

4 "22. Antenna tower B obstructs the ocean and mountain  
5 views of some of the adjacent property owners.

6 "23. Approximately ten neighbors have produced  
7 evidence that, based upon their standards, the  
8 antenna towers are architecturally and  
9 aesthetically incompatible with the residential  
10 and natural setting of the neighborhood."

11 The county found that the applicant's amateur radio  
12 communication needs could reasonably be accommodated with the  
13 use of towers limited to 35 feet in height and frequencies  
14 other than those proposed by the applicant, and that the  
15 antennas proposed by the applicant would conflict with the  
16 scenic values of the neighborhood. The county concluded that  
17 this case involves resolution of a conflict between the  
18 applicant who wishes to "optimize" his radio capabilities and  
19 his neighbors who believe the antennas are not compatible with  
20 the residential nature of the neighborhood.

21 The county also found that the antennas present a potential  
22 hazard because of their height, the existence of high winds in  
23 the area and their proximity to adjacent properties. The  
24 county specifically noted that antenna A is "situated next to  
25 the house and an accessory building on the Knudsen property  
26 \* \* \*."<sup>3</sup> Record 8. While not entirely clear, we understand  
the county finding to express concern about the antenna falling  
and striking the house and accessory building. But see our  
discussion under the fifth assignment of error, infra. The

1 county also found the radio transmissions cause interference  
2 with television and radio transmission in the neighborhood.

3 We find these reasons sufficient to permit the county to  
4 restrict the antenna heights. Petitioner has not demonstrated  
5 that he is not able to use other frequencies or that it is  
6 unreasonable for him to locate his antennas elsewhere. While  
7 petitioner cites us to evidence in the record showing that a 35  
8 foot high antenna would be very limiting to radio communications  
9 at petitioner's chosen frequency, we are not cited to evidence  
10 in the record explaining why the antennas may not be moved or  
11 other frequencies used.<sup>4</sup>

12 The third assignment of error is denied.

13 FOURTH ASSIGNMENT OF ERROR

14 "The Commissioners failed to follow the mandate of  
15 PRB-1 or Curry County Ordinance 6.0040(5), both of  
16 which provide for the least restrictive regulation of  
17 amateur radio antennas."

18 Under this assignment of error petitioner claims the record  
19 does not show evidence indicating petitioner's radio antennas  
20 could be placed anywhere other than where they are. There  
21 being no evidence that the antennas may be placed elsewhere,  
22 petitioner concludes that the antennas are in the only  
23 available location.

24 We think petitioner misses the point. As discussed under  
25 the third assignment of error, we believe petitioner was  
26 obliged to demonstrate to the county that no other locations  
causing less conflict with scenic values would reasonably

1 accommodate petitioner's amateur radio communication needs. We  
2 are cited to nothing in the record suggesting that petitioner  
3 has met this obligation. For this reason, we deny this  
4 assignment of error.

5 FIFTH ASSIGNMENT OF ERROR

6 "The commissioners erred in applying criteria which  
7 has [sic] been strictly preempted and solely reserved  
8 to the Federal Communications Commission."

8 Petitioner here challenges a conclusion by the county that  
9 the antennas are not compatible with the surrounding area  
10 because transmission from the antennas has interfered with  
11 television and radio reception and thereby detracted from the  
12 residential quality of the neighborhood. Record 8. According  
13 to petitioner, the FCC has exclusive power to regulate radio  
14 interference.

15 We do not conclude that the county is attempting to  
16 regulate radio interference. The county's comment has to do  
17 with compatibility of the use with the surrounding  
18 neighborhood. The fact that the county claims the  
19 transmissions from the antennas interfere with reception and  
20 thereby detract from the quality of the neighborhood is not an  
21 attempt to regulate the transmission, but is a statement about  
22 compatibility with the neighborhood.

23 We do not find the county to have committed error as alleged.

24 The fifth assignment of error is denied.

25 SIXTH ASSIGNMENT OF ERROR

26 "The decision of the county that the antenna

1 constitutes a hazard was not supported by substantial  
2 evidence on [sic] the record, and was therefore in  
error."

3 Here, petitioner claims the county's finding that the  
4 antennas presented a hazard because of local weather conditions  
5 and "because one of the antennas had previously caught fire" is  
6 not supported by substantial evidence. Petitioner points to  
7 evidence in the record that the county building inspector found  
8 the antennas meet standards for the uniform building code, and  
9 there is evidence in the record to show that antennas, if they  
10 fail, do not fall further than 40% of their height. Further,  
11 the petitioner testified that if the antenna fell, it would  
12 remain on his own property (presumably petitioner means the  
13 taller 65 foot antenna). Record 38. Petitioner concludes  
14 there is no substantial evidence in the record to support a  
15 conclusion that a hazard exists.

16 Because the county has chosen not to appear in this  
17 proceeding, we have been given no citation to evidence in the  
18 record which the county might rely upon to support its  
19 conclusion that the antennas present a hazard. There is  
20 mention in the record of antenna A's proximity to adjacent  
21 structures. See Record 8. The discussion is unclear as to the  
22 distance between antenna A and the adjacent structures.

23 Therefore, with respect to this portion of the county's  
24 order, we must sustain this claim of error. We note, however,  
25 that if the county's order contains other findings and reasons  
26 sufficient to support the county's imposition of a height

1 limitation, the fact that the county finding on the issue of a  
2 fire hazard and possible tower collapse is unsupported does not  
3 require reversal or remand. See, Chemeketa Industries v. City  
4 of Salem, 14 Or LUBA 159, 163 (1985). There are other bases  
5 found by the county to empower it to limit the antenna  
6 heights. See our discussion under the second and third  
7 assignments of error. Accordingly, the finding challenged in  
8 this assignment of error is surplussage.

9 The sixth assignment of error is sustained.

10 SEVENTH ASSIGNMENT OF ERROR

11 "County Ordinance 6.0040(5) is unenforceable as  
12 lacking sufficient standards to provide notice to  
applicants or to allow decision review."

13 Petitioner argues that the ordinance is not enforceable  
14 because it lacks sufficient standards to provide notice to  
15 applicants. The ordinance simply requires that antennas be  
16 sited so as to minimize conflict with scenic values. As we  
17 understand petitioner's argument, this standard is vague and  
18 does not sufficiently apprise the applicant or the public  
19 generally of the standard to which an applicant will be held.

20 Petitioner's challenge does not articulate a legal theory.  
21 Petitioner does not explain whether his challenge is based upon  
22 the federal or state constitution or on some other source of  
23 law. It may be that petitioner is challenging the provision  
24 under ORS 215.416(8) requiring that a decision of the county  
25 board of commissioners be based on "standards and criteria" in  
26 the local ordinance. We will not speculate further, however,

1 on what petitioner means. Deschutes Development Co. v.  
2 Deschutes County, 5 Or LUBA 218, 220 (1982).

3 In addition, we note that the term "scenic values" is  
4 subjective. It requires analysis of aesthetic values in the  
5 community and whether or not a particular proposal meets those  
6 scenic values. The county order discusses the residential  
7 quality of the area and contrasts the residential quality with  
8 the affect of the radio towers. Petitioner does not explain  
9 how it is that the county's discussion is insufficient under  
10 this standard or "impermissibly vague."

11 The seventh assignment of error is denied.

12 EIGHTH ASSIGNMENT OF ERROR

13 "The County Ordinance allowing amateur radio antennas  
14 as a conditional use only is invalid, because amateur  
15 radio as a matter of law is an accessory use  
16 consistent with residential property."

17 Petitioner claims that amateur radio is an accessory and  
18 incidental use to residential zoning. As an accessory use, we  
19 understand petitioner to claim that the equipment used to  
20 support amateur radio is an accessory and therefore permitted  
21 use in the county. Petitioner then posits that the county is  
22 not permitted to claim that amateur radio antennas are not  
23 consistent with residential use. In particular, petitioner  
24 attacks the following county finding:

25 "6. The purpose of a residential zone is to protect  
26 the residential qualities of single family residences  
to the exclusion of other uses which may be  
detrimental to the orderly development of such an  
area. To the extent Mr. Graham's application for  
antennas A and B detracts from such orderly

1 development, his conditional use must be restricted  
accordingly" (Rec. 7).

2 Simply because amateur radio antennas might be considered  
3 an accessory or incidental use in a residential zone does not  
4 mean that such antennas may not be regulated as conditional  
5 uses if the county elects. To accept petitioner's argument  
6 would be to require that any kind of structure of any size and  
7 shape be allowed provided it could be shown to be accessory to  
8 the uses permitted within a particular zone.<sup>5</sup>

9 The eighth assignment of error is denied.

10 NINTH ASSIGNMENT OF ERROR

11 "Denial of a conditional use permit by the county  
12 constitutes discriminatory enforcement against amateur  
13 radio operation and a denial of equal protection under  
the law."

14 Here petitioner compares the radio transmission antennas,  
15 subject to regulation to minimize the conflict with scenic  
16 values, against telephone poles, satellite dishes and  
17 television antennas which petitioner says are not regulated.  
18 Petitioner argues that because of this disparity, the  
19 regulations are not made in furtherance of governmental  
20 interest of preserving residential quality or aesthetics at  
21 all, but simply discriminate against radio amateur operators.

22 Petitioner's argument is unclear. If petitioner is arguing  
23 the regulation itself is invalid because all structures should  
24 be lumped together but only radio antennas are regulated, we  
25 disagree. The fact a regulation may be applicable only to radio  
26 antennas does not mean the regulation itself is invalid. We are

1 cited to no law prohibiting regulation of amateur radio  
2 antennas.

3 If petitioner is arguing the regulation is improper in  
4 application because the county has not enforced the ordinance  
5 against other structures, we find petitioner has failed to  
6 develop an argument and demonstrate sufficient evidence to show  
7 how the county has misapplied the ordinance. That is,  
8 petitioner does not explain that the county has a duty to  
9 enforce the ordinance against the structures petitioner cites  
10 or that the county has failed to enforce any such duty.<sup>6</sup>

11 The ninth assignment of error is denied.

12 TENTH ASSIGNMENT OF ERROR

13 "Amateur radio communications are a form of  
14 association; Application of a regulation which  
15 infringes upon freedom of association is  
unconstitutional where such regulation lacks a  
compelling state interest."

16 Petitioner argues that amateur radio communications are a  
17 form of association, and restricting amateur radio  
18 communications by limiting the height of the antenna so as to  
19 limit the range of transmission and reception inhibits freedom  
20 of association. Petitioner adds there is no compelling state  
21 interest in this limitation, and the regulation is therefore,  
22 at least in application here, prohibited by the First Amendment  
23 of the United States Constitution.

24 We do not believe the county's regulations of radio antenna  
25 height violates the First Amendment. The fact that petitioner  
26 may not be able to exercise his rights of association in the

1 exact manner he wishes or as widely as his proposed 65 foot  
2 antennas would allow does not mean that he is unable to enjoy  
3 association with other persons. There may be alternate means  
4 by which petitioner can transmit great distances. Therefore,  
5 if the county's restrictions legitimately further governmental  
6 interests, they will be sustained. Again, we note petitioner  
7 has not shown other locations for his antennas are not  
8 reasonably available or that he cannot use other transmission  
9 frequencies with 35 foot antennas.

10 The tenth assignment of error is denied.

11 ELEVENTH ASSIGNMENT OF ERROR

12 "Denial of the conditional use permit of Petitioner  
13 was invalid as an exercise of time, place, or manner  
14 regulation of freedom of speech."

15 Petitioner claims that the county's regulation of radio  
16 antenna height is not valid as a simple regulation of time,  
17 place and manner of communication because it does not leave  
18 open alternative channels for communication of information.  
19 Petitioner argues that there is sufficient evidence in the  
20 record to show petitioner's ability to transmit and receive is  
21 adversely affected by the height limitation. Indeed, according  
22 to petitioner, his communication efforts will be totally  
23 inadequate and not effective to transmit internationally if the  
24 height limitation is sustained.

25 We might agree that at the proposed location and  
26 frequencies, the antenna height limitation does limit the  
petitioner's ability to communicate. However, petitioner has

1 the burden of showing that reasonable alternatives are not  
2 available. We are not cited to any evidence in the record that  
3 petitioner has explored either alternatives for placement of  
4 his radio towers or antennas or alternative frequencies of  
5 transmission and reception. We are mindful of petitioner's  
6 claim that petitioner can communicate only on a severely limited  
7 basis at a particular frequency without a particular height of  
8 antenna, but we are not cited to any evidence in the record  
9 showing that petitioner has explored other possible  
10 alternatives.

11 The eleventh assignment of error is denied.

12 The city's decision is affirmed.

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FOOTNOTES

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The height limitation is from the city of Brookings Zoning Ordinance. By intergovernmental agreement, the city's height limitation and certain other provisions of the city's code are applicable in portions of the county. Petitioner does not suggest a variance to the height limitation is available, but seems to accept the conditional use procedure as solely applicable.

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We note in addition that petitioner had notice that the height of both antennas would be considered on appeal, as the published and posted notice of the appeal hearing before the county commissioners lists as the specific issues to be addressed:

"The crank-up tower antenna height to be lowered to 35 ft. when not in use, and that other existing antennas on the property comply with the other 35 ft. height limit."

Record 188, 192, 195, 196.

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With respect to the issue of safety, petitioner cites evidence in the record that an antenna will not fall more than 40% of its height, and the nearest property line is 30 feet from an antenna (Record 52), but there is no evidence as to whether the antenna would, as suggested by the county's finding, be in a position to strike a structure, whether the structure belongs to petitioner or some other individual.

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Petitioner does cite evidence that the 20 meter band is the "long haul" band. The evidence cited, however, does not illustrate that only the 20 meter band is suitable for long distance communication. As to the antenna location issue, petitioner responds that it would be difficult and expensive to move antenna B to another location. There is no mention of the difficulty or expense of moving antenna A.

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We note petitioner lists a number of cases from other jurisdictions suggesting that amateur uses are accessory and incidental to residential zoning. We do not believe we are

1 bound by these authorities, and, as discussed, we do not  
2 believe that the fact that a radio transmission tower may be  
3 termed an accessory use necessarily means that it may not then  
4 be subject to regulation.

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7 The evidence consists of a county staff person 's opinion  
8 as to whether the height limit is applicable to other  
9 structures. The staff person's discussion does not make it  
10 clear that the county does not believe the ordinance applies to  
11 other structures or whether the county's practice is not to  
12 regulate such other structures.  
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