

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county order granting a
4 conditional use permit and a variance for a 200 foot
5 communications tower.¹

6 **FACTS**

7 Transmission towers are conditional uses in the
8 county's Exclusive Farm Use (EFU) zone. The challenged
9 order grants conditional use approval for a 200 foot high
10 communications tower and a structure to house related
11 electronics equipment on a 196 acre EFU zoned parcel.

12 The subject property is located at the top of a hill.
13 In order to maximize the effectiveness and minimize the
14 height of the tower, the applicant seeks to place the tower
15 near the crest of the hill. However, if the tower is
16 located near the crest of the hill, the tower will be 30
17 feet from one of the subject parcel's property lines. Under
18 applicable Polk County Zoning Ordinance (PCZO) provisions,
19 the property line setback for a transmission tower is the
20 same as the tower's height, in this case 200 feet. The
21 challenged order grants a variance from this setback
22 requirement.

23 **FIRST ASSIGNMENT OF ERROR**

24 "Respondent's approval of a 200 foot transmission

¹This appeal previously was consolidated with LUBA No. 91-197. In a separate opinion issued this date, we dismiss LUBA No. 91-197.

1 tower in an Exclusive Farm Use Zone is prohibited
2 by ORS 215.283."

3 Exclusive Farm Use zoning in this state is established
4 both by statute and county regulation. ORS 215.203 through
5 215.237 establish minimum standards that must be
6 incorporated into county EFU zones. Although counties may
7 adopt EFU zones that are more restrictive than statutory EFU
8 zoning requirements, counties may not adopt EFU zones that
9 are less restrictive than the statutory requirements.
10 Kenagy v. Benton County, 112 Or App 17, 20 n 2, ___ P2d ___
11 (1992); Von Lubken v. Hood River County, 104 Or App 683,
12 687, 803 P2d 750 (1990), adhered to 106 Or App 226, rev den
13 311 Or 349 (1991). To the extent a county's EFU zone
14 contains provisions less restrictive than those of the EFU
15 zoning statute, the statutory provisions control. Id. The
16 statutory EFU zone provisions control in such circumstances,
17 even if the county's EFU zone has been acknowledged under
18 ORS 197.251 as complying with the Statewide Planning Goals,
19 notwithstanding our statements to the contrary in Kola
20 Tepee, Inc. v. Marion County, 17 Or LUBA 910, 920, aff'd 99
21 Or App 481 (1989), rev den 309 Or 441 (1990).² See Newcomer

²Acknowledgment certifies that a comprehensive plan or land use regulation complies with applicable statewide planning goals, but does not constitute certification of compliance with applicable state statutes.

"'Acknowledgment' means a [Land Conservation and Development Commission] order that certifies that a comprehensive plan and land use regulations, land use plan or regulation amendment complies with the [statewide planning] goals." ORS 197.015(1).

1 v. Clackamas County, 92 Or App 174, 186 n 5, 758 P2d 369,
2 modified 94 Or App 33 (1988).

3 ORS 215.283(1) identifies various uses that may be
4 allowed in an EFU zone outright. ORS 215.283(2) identifies
5 additional nonfarm uses that may be allowed in an EFU zone
6 with "the approval of the governing body or its designate *
7 * * subject to ORS 215.296 * * * [.]"³ Under ORS
8 215.283(2)(L), "[t]ransmission towers over 200 feet in
9 height" may be allowed. The disputed transmission tower is
10 exactly 200 feet in height. Petitioner argues that because
11 the tower is not over 200 feet in height, it is not
12 allowable under ORS 215.283(2)(L). Petitioner further
13 argues respondent erred by failing to apply the standards
14 set forth at ORS 215.296(1).

15 As noted above, ORS 215.283(1) lists uses that may be
16 allowed outright. Those uses include the following:

17 "Utility facilities necessary for public service,
18 except * * * transmission towers over 200 feet in
19 height." (Emphasis added.) ORS 215.283(1)(d).

20 Under ORS 215.283(1)(d) and 215.283(2)(L), transmission
21 towers are allowable in EFU zones as "[u]tility facilities
22 necessary for public service [.]"⁴ Such towers may be
23 allowed outright under ORS 215.283(1)(d), if they do not

³ORS 215.296(1) establishes certain standards that must be satisfied in order to approve the nonfarm uses "allowed under 215.283(2) * * *."

⁴Petitioner does not contend the challenged tower is not a utility facility necessary for public service.

1 exceed 200 feet in height. Such towers may be allowed under
2 ORS 215.283(2)(L), subject to the standards set forth at ORS
3 215.296(1), if they are over 200 feet in height. Therefore,
4 respondent did not violate ORS 215.283(2)(L) in allowing a
5 200 foot high transmission tower in its EFU zone or in
6 failing to apply the standards set forth at ORS 215.296(1)
7 to the approval of such tower.

8 In its brief, respondent goes further and argues that
9 because transmission towers qualifying under ORS
10 215.283(1)(d) may be allowed outright, the county could not
11 apply the standards of ORS 215.296(1) or any other county
12 approval standards to such transmission towers. As noted
13 above, the Oregon Court of Appeals has rejected that
14 argument. Von Lubken v. Hood River County, supra. Although
15 respondent need not impose approval standards for such
16 towers, it is free to do so. Id.

17 The first assignment of error is denied.

18 **SECOND ASSIGNMENT OF ERROR**

19 "Polk County misinterpreted the applicable law for
20 the granting of a variance, and entered a decision
21 based on inadequate findings, and without
22 substantial evidence in the record to support the
23 decision."

24 PCZO 136.060(U)(4) requires that transmission towers in
25 the EFU zone be set back from the property line a distance
26 equal to the height of the tower. Pursuant to PCZO 122.020,
27 the hearings officer granted a variance to allow the
28 challenged 200 foot tower to be placed 30 feet from the

1 property line separating the subject parcel from an
2 adjoining parcel. PCZO 122.020 provides, in part, as
3 follows:

4 "The Hearings Officer may permit and authorize a
5 variance when it appears from the application, and
6 the facts presented at the public hearing, and by
7 investigation:

8 "(A) That there are unnecessary, unreasonable
9 hardship[s] or practical difficulties which
10 can be relieved only [by] modifying the
11 literal requirements of the ordinance;

12 "(B) That there are exceptional or extraordinary
13 circumstances or conditions applying to the
14 land, buildings, or use referred to in the
15 application, which circumstances or
16 conditions do not apply generally to land,
17 buildings, or uses in the same zone * * *;

18 "* * * * *."

19 We have construed variance standards such as those
20 quoted above to create very limited authority to deviate
21 from applicable ordinance standards. The "practical
22 difficulties or unnecessary hardships" and the "exceptional
23 or extraordinary circumstances or conditions" standards are
24 demanding standards. Erickson v. City of Portland, 9 Or App
25 256, 496 P2d 726 (1972); Corbett/Terwilliger Neigh. Assoc.
26 v. City of Portland, 19 Or LUBA 1, 12 (1990) (Corbett II);
27 Corbett/Terwilliger Neigh. Assoc. v. City of Portland, 16 Or
28 LUBA 49, 60 (1987) (Corbett I); Bowman Park v. City of
29 Albany, 11 Or LUBA 197, 222 (1984); Patzkowski v. Klamath
30 County, 8 Or LUBA 64, 70 (1983). In applying the
31 "exceptional or extraordinary circumstances or conditions"

1 standard we have explained that a variance is not justified
2 under that standard simply to allow an applicant to maximize
3 the permissible use of property. Wentland v. City of
4 Portland, ___ Or LUBA ___ (LUBA No. 91-054, September 4,
5 1991), slip op 16; Corbett II, supra, 19 Or LUBA at 14.
6 Petitioner contends the facts in this case show the above
7 quoted variance standards of PCZO 122.020 are not met.

8 The highest part of the subject 196 acre parcel is
9 located in the southeastern part of the parcel. There are
10 three existing towers and related buildings and structures
11 on three small parcels (tax lots 401, 403 and 601) which
12 adjoin the subject parcel and tax lot 402 in this area near
13 the crest of a hill. Record 226. The applicant proposes to
14 locate the proposed 200 foot tower 30 feet west of the
15 property line dividing the subject property from tax lot
16 402. The proposed tower site, while only 30 feet from the
17 property line, would be more than 200 feet from the existing
18 towers and buildings on tax lots 401, 403 and 601.

19 From maps in the record and from the findings adopted
20 by the hearings officer, it appears that moving the tower
21 further to the west to comply with the setback requirement
22 of PCZO 136.060(U)(4) would have two results. First, the
23 area to the west is planted in Christmas trees, and some of
24 those trees would have to be removed if the tower were moved
25 due west. Second, the property slopes downward to the west.
26 Therefore, if the 200 foot tower were moved further to the

1 west, the top of the proposed 200 foot tower would no longer
2 be at the optimal receiving and broadcasting elevation.
3 While this optimal receiving and broadcasting elevation
4 apparently could be maintained by increasing the height of
5 the tower, this in turn would necessitate a setback of more
6 than 200 feet to accommodate the additional tower height.

7 Although respondent suggests in its brief, and the
8 hearings officer suggests in the decision, that requiring
9 the tower to be relocated to comply with the setback
10 requirement of PCZO 136.060(U)(4) would be impossible, the
11 record does not show that is the case. The maps included in
12 the record show the subject parcel is approximately 1000
13 feet wide where the tower is proposed to be located, more
14 than wide enough to allow relocating the tower to the west
15 to accommodate setbacks of approximately 200 feet. The
16 topographic map at Record 205 does not show the slopes due
17 west of the proposed tower site. However, the map does show
18 the slopes range from approximately 2% to the southwest of
19 the proposed site to approximately 10% to the northwest.⁵
20 Therefore, as far as we can tell, the subject property is
21 easily wide enough to accommodate the setback requirement of
22 PCZO 136.060(U)(4) and maintain the desired elevation of the
23 tower.

⁵A negative slope of 2% loses 2 feet of elevation per 100 feet of horizontal distance; a negative slope of 10% loses 10 feet of elevation per 100 feet of horizontal distance.

1 Based on the above, we conclude the hearings officer
2 failed to demonstrate the standards of PCZO 122.020 are met.
3 As we explained above, under the applicable PCZO standards,
4 a variance is not permissible simply to allow the tower to
5 be placed on the part of the property where its operation
6 will be optimized. Moreover, it appears optimum operational
7 elevation can be achieved without the variance. While
8 locating the tower further to the west may require removal
9 of some existing Christmas trees, that, alone, does not
10 justify a variance. Neither does the hearings officer's
11 observation that the tower as proposed will be more than 200
12 feet from existing structures on tax lots 401, 403 and 601
13 justify the variance. Additional structures could be
14 constructed on any of the adjoining tax lots in the future
15 and, in any event, the setback is required to be measured
16 from the property line, not from other structures.

17 Because we agree the challenged decision fails to
18 demonstrate the requested variance is justified under
19 PCZO 122.020(A) and (B), the second assignment of error is
20 sustained.⁶

21 The county's decision is remanded.

⁶Petitioner argues other variance requirements of PCZO 122.020 are violated by the decision. Petitioner also makes two additional assignments of error. Resolution of petitioner's remaining arguments and assignments of error would require an additional extension of the deadline for issuing our final opinion and order. ORS 197.830(14). We therefore do not consider petitioner's remaining arguments under this assignment of error or her other assignments of error. ORS 197.835(9)(a).

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