

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 MARY McDOLLE,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 LANE COUNTY,)
11)
12 Respondent,)
13)
14 and)
15)
16 PACIFICORP, dba PACIFIC POWER &)
17 LIGHT COMPANY,)
18)
19 Intervenor-Respondent.)

LUBA No. 92-076

FINAL OPINION
AND ORDER

20
21
22 Appeal from Lane County.

23
24 Larry O. Gildea and Nickolas Facaros, Eugene, filed the
25 petition for review. With them on the brief was Gildea &
26 Facaros. Larry O. Gildea argued on behalf of petitioner.

27
28 No appearance by respondent.

29
30 Steven L. Pfeiffer and Michael R. Campbell, Portland,
31 filed the response brief. With them on the brief was Stoel,
32 Rives, Boley, Jones & Grey. Steven L. Pfeiffer argued on
33 behalf of intervenor-respondent.

34
35 Meg Reeves, Assistant Attorney General, Salem, filed a
36 state agency brief pursuant to ORS 197.830(7) and argued on
37 behalf of the Energy Facility Siting Council. With her on
38 the brief were Charles S. Crookham, Attorney General; Jack
39 Landau, Deputy Attorney General; and Virginia L. Linder,
40 Solicitor General.

41
42 SHERTON, Referee; HOLSTUN, Chief Referee; KELLINGTON,
43 Referee, participated in the decision.

44
45 AFFIRMED 07/21/92

1
2
3
4

You are entitled to judicial review of this Order.
Judicial review is governed by the provisions of ORS
197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county decision approving a permit
4 to allow the replacement of a 230 kilovolt (kV) electric
5 power transmission line with a 500 kV transmission line.

6 **MOTION TO INTERVENE**

7 PacifiCorp, dba Pacific Power & Light Company, moves to
8 intervene in this proceeding on the side of respondent.
9 There is no objection to the motion, and it is allowed.

10 **FACTS**

11 Construction of the existing 230 kV transmission line
12 was completed in 1962, prior to the initial zoning of the
13 affected property. Within Lane County, the 230 kV
14 transmission line extends from south of Eugene to the
15 Douglas County border, and consists of 60 to 80 feet tall
16 wood poles bearing a single line with a capacity of 230,000
17 volts. The line is located on lands now zoned Exclusive
18 Farm Use (EFU), Impacted Forest Land (F-2) and Rural
19 Residential (RR).

20 The proposed 500 kV transmission line will use the
21 existing right-of-way of the 230 kV transmission line. In
22 addition, the northernmost 3.8 miles of the existing
23 right-of-way will be widened by 50 feet. The proposed
24 500 kV transmission line will consist of 120 to 130 foot
25 tall free-standing metal towers, with an average spacing of
26 4.3 towers per mile, bearing an overhead line with a

1 capacity of 500,000 volts.

2 On August 19, 1982, the Energy Facility Siting Council
3 (EFSC) issued a final order approving the issuance of a site
4 certificate for the proposed 500 kV transmission line
5 pursuant to ORS 469.300 to 469.570. Record 1021-95. The
6 order finds that the proposed 500 kV transmission line is
7 either a permitted or conditional use under the provisions
8 of the relevant zoning districts in the Lane County Code
9 (LC). Record 1081. The order concludes the proposed 500 kV
10 line is consistent with the county's comprehensive plan and
11 ordinances.¹ Id. This order was not appealed.

12 On December 21, 1992, EFSC and intervenor entered into
13 a Site Certification Agreement (site certificate), as
14 described in ORS 469.300(22). Record 1096.² The site
15 certificate contains the following provisions concerning
16 "Approvals":

17 "The following approvals, permits, licenses, or
18 certificates by governmental agencies are
19 considered necessary to construct and operate this
20 transmission line. Each appropriate state agency
21 and local government [listed below] shall issue
22 the permits identified below consistent with the
23 conditions in this Agreement and not later than 90
24 days from the time of filing of a complete

¹The order also concludes that the proposed 500 kV transmission line is consistent with the Statewide Planning Goals. Id.

²The site certificate has been amended three times, and currently contains warranties by intervenor that construction of towers and stringing of conductors will not begin before January 1, 1991 and that construction of the transmission line will be completed by December 31, 1994. ORS 469.400(4); Record 1146.

1 application for such permit by [intervenor].
2 * * *

3 " * * * * *

1 "7. Lane, Douglas and Jackson Counties[:]

2 "Any necessary building permits, county road-
3 crossing permits, conditional use or other
4 comparable land use permits and
5 right[s]-of-way across county lands.

6 "* * * * *" (Emphases added.) Record 1113-14.

7 Some time after the issuance of the EFSC order and the
8 execution of the site certificate, but prior to the filing
9 of the subject permit application, the county revised its
10 F-2 zone to prohibit transmission towers and lines.
11 LC 16.211.

12 On August 16, 1991, intervenor filed an application
13 with the county for a permit to replace the 230 kV
14 transmission line with the proposed 500 kV transmission
15 line. The application refers to the proposal as an
16 alteration of a nonconforming use, but also states that the
17 purpose of the application is "to obtain necessary land use
18 approval from Lane County" to remove the existing 230 kV
19 transmission line and replace it with the proposed 500 kV
20 transmission line, as authorized by the site certificate.
21 Record 1030. The county approved the application, and this
22 appeal followed.

23 **FIRST ASSIGNMENT OF ERROR**

24 "Contrary to legislative intent and preemption
25 analysis, the county improperly construed
26 ORS 469.400 to require issuance of a permit to
27 change a nonconforming use, even though
28 [intervenor] has never shown that the proposed
29 project will cause no greater adverse impact on

1 the surrounding neighborhood."

2 **SECOND ASSIGNMENT OF ERROR**

3 "The county's decision lack[s] critical findings
4 of fact and the support of substantial evidence in
5 the whole record."

6 The challenged county decision to issue a permit for
7 the proposed 500 kV transmission line is based on the
8 following conclusion:

9 "ORS 469.400(5) requires that counties must issue
10 'the appropriate permits * * * necessary [for]
11 construction and operation of the [energy]
12 facility.' Lane County has identified the
13 standards of Lane Code 16.251 [for alteration of
14 nonconforming uses] as being applicable. The
15 applicant has paid the necessary permit fee and
16 has formally made application for the necessary
17 permits. As these permits are required by 'local
18 ordinances,' the [county] concludes that * * * the
19 requested alteration to [the nonconforming
20 transmission] line must be granted." Record 41.

21 ORS 469.310 provides that "it is the declared public
22 policy of this state that the siting, construction and
23 operation of energy facilities shall be accomplished * * *
24 in compliance with the * * * land use * * * policies of this
25 state." (Emphasis added.) According to petitioner, the
26 state's "land use policies" for nonconforming uses are
27 codified in ORS 215.130(5) to (9). Petitioner points out
28 that ORS 469.300(3) mandates that site certificates require
29 the state and the applicant "to abide by state law * * * in
30 effect on the date the site certificate is executed * * *."
31 According to petitioner, there is nothing in the energy
32 facility siting statutes reflecting an intent that land use

1 permits be approved for facilities which do not comply with
2 applicable land use laws.

3 Petitioner contends the county erred by interpreting
4 ORS 469.400(5) (quoted infra) to require it to issue the
5 subject permit, and by issuing the subject permit without
6 finding compliance with ORS 215.130(9) and LC 16.251(11),
7 both of which require that an alteration to a nonconforming
8 use cause "no greater adverse impact to the neighborhood."
9 Petitioner points out the challenged decision determines
10 this standard is not satisfied. Record 40. Petitioner also
11 argues that the site certificate for the proposed facility
12 does not bind the county to approve the subject permit under
13 ORS 469.400(5), because EFSC never determined that the
14 proposal complies with the standard of ORS 215.130(9) and
15 LC 16.251(11).

16 Petitioner further argues it must be assumed that "the
17 legislature does not mean to displace local * * *
18 administrative regulation of local conditions by a statewide
19 law unless the intent is apparent." LaGrande/Astoria v.
20 PERB, 281 Or 137, 148-49, 576 P2d 1204, adhered to 284 Or
21 173 (1978). Petitioner contends the requirement of
22 ORS 469.400(5) that counties issue the "appropriate" permits
23 does not indicate an intent to preempt local land use
24 standards. According to petitioner, in this context,
25 "appropriate" simply means those permits which comply with
26 applicable land use standards.

1 At all times relevant to this appeal, the purpose of
2 EFSC and the energy facility siting system over which it
3 presides has been "to establish * * * a comprehensive system
4 for the siting, monitoring and regulating of the location,
5 construction and operation of all energy facilities in this
6 state." ORS 469.310. EFSC is required to establish a broad
7 spectrum of standards to govern its siting decisions.
8 ORS 469.510. EFSC conducts public hearings on site
9 certificate applications, and is required to invite comments
10 from affected state agencies and local governments.
11 ORS 469.350; 469.370.

12 In order to approve issuance of a site certificate,
13 EFSC must find compliance with "state law," its own rules
14 and city ordinances.³ ORS 469.400(3) and (6). The statute
15 does not explicitly require EFSC to find compliance with
16 county ordinances.⁴ However, in this case, the 1982 EFSC
17 order approving issuance of the site certificate does find
18 that the proposed 500 kV transmission line is either a
19 permitted or conditional use under the then relevant zoning

³We note that EFSC is required to determine compliance with the Statewide Planning Goals, either under ORS 197.180(1), because the Goals are part of "state law," or by virtue of the EFSC rule (OAR 345-80-065(3)) requiring such a determination. Further, Goal 2 (Land Use Planning) requires that "state * * * agency * * * actions related to land use shall be consistent with the comprehensive plans of * * * cities and counties." (Emphasis added.)

⁴The parties are in disagreement with regard to whether the statute requires compliance with county ordinances. However, as explained in the text, EFSC did find compliance with county ordinances and, therefore, we need not resolve this issue.

1 districts of the Lane Code and complies with Lane County's
2 ordinances. Record 1081. Additionally, the site
3 certificate itself requires Lane County to issue "[a]ny
4 necessary building permits, * * * conditional use or other
5 comparable land-use permits * * *." Record 1114.

6 ORS 469.400(5) provides as follows with regard to the
7 effect of a site certificate:

8 "Subject to the conditions set forth therein, any
9 certificate signed by the chairman of [EFSC] shall
10 bind the state and all counties and cities and
11 political subdivisions in this state as to the
12 approval of the site and construction and
13 operation of the proposed energy facility.
14 Affected state agencies, counties, cities and
15 political subdivisions shall issue the appropriate
16 permits, licenses and certificates necessary to
17 construction and operation of the facility,
18 subject only to condition [sic] of the site
19 certificate. * * *" (Emphasis added.)

20 Under ORS 469.400(5) and the wording of the site
21 certificate there can be no doubt that had the county not
22 subsequently amended its code to make the proposed 500 kV
23 transmission line a prohibited use in the F-2 zone, the
24 county would have been required by the site certificate to
25 issue the building and conditional use permits necessary to
26 allow construction of the proposed line. Thus, the issue
27 which must be addressed here is the effect of a change in
28 county ordinances after EFSC approval of a site certificate.

29 ORS 469.400(3) and (6) contain the following provisions
30 sharply limiting the impact of subsequent changes in state
31 law and city ordinances after issuance of a site

1 certificate:

2 "(3) The site certificate shall * * * require [the
3 state and the applicant] to abide by state
4 law and rules of [EFSC] in effect on the date
5 the site certificate is executed, except that
6 upon a clear showing that there is a danger
7 to the public health and safety that requires
8 stricter laws or rules, the state may * * *
9 require compliance with such stricter law or
10 rules." (Emphasis added.)

11 "(6) Where a site certificate authorizes the
12 construction and operation of an energy
13 facility within the boundaries of an
14 incorporated city, the certificate shall be
15 conditioned upon compliance with lawful
16 [city] ordinances in effect * * * on the date
17 of filing of the notice of intent or [site
18 certificate] application, whichever is
19 earlier. If a city subsequently adopts
20 lawful ordinances that are stricter than any
21 ordinance in effect on the date of filing of
22 the notice of intent or application, upon a
23 clear showing that there is danger to the
24 public health and safety the state may
25 require compliance with such stricter
26 ordinances." (Emphasis added.)

27 Under the above quoted provisions, energy facility
28 compliance with subsequently adopted state laws and city
29 ordinances may only be required "upon a clear showing that
30 there is danger to the public health and safety." Nowhere
31 in ORS 469.400 or elsewhere in the energy facility siting
32 statutes is there a provision similarly requiring compliance
33 with county ordinances or addressing the impact of
34 subsequent changes in county ordinances on an approved site
35 certificate. We therefore agree with intervenor and EFSC
36 that the legislature intended that subsequent changes in

1 county ordinances not affect an energy facility for which a
2 site certificate has been approved.

3 Therefore, under ORS 469.400(5), the county was
4 required to issue the "appropriate permits" for the proposed
5 500 kV transmission line, "subject to the conditions set
6 forth" in the site certificate. Those conditions require
7 the county to issue "[a]ny necessary building, * * *
8 conditional use or other comparable land use permits * * *."
9 Record 1114. Accordingly, regardless of whether the
10 subsequent change in the LC made the "appropriate permit"
11 for the proposed 500 kV transmission line in the F-2 zone an
12 alteration of a nonconforming use permit, rather than a
13 conditional use permit, the county was obliged to issue it.

14 The first and second assignments of error are denied.⁵

15 The county's decision is affirmed.

⁵Petitioner's second assignment of error challenges the lack of findings and evidence in the record demonstrating compliance with the alteration of nonconforming use "no greater adverse impact to the neighborhood" standard of ORS 215.130(9) and LC 16.251(11). Because we determine, supra, the county is not required to determine compliance with this standard, any lack of supporting findings and evidence provides no basis for reversal or remand.