

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CENTRAL OREGON CELLULAR, INC. dba)

5 CELLULAR ONE,)

6)

7 Petitioner,)

8)

9 vs.)

10) LUBA No. 96-190

11 DESCHUTES COUNTY,)

12) FINAL OPINION

13 Respondent,)

14) AND ORDER

15)

16 and)

17)

18 INDIAN RIDGE, INC. and BARCLAY)

19 ROAD IMPROVEMENT ASSOCIATION, INC.,)

20)

21 Intervenors-Respondent.)

22
23 Appeal from Deschutes County.

24
25 John Blackhurst, Medford, filed the petition for review
26 on behalf of petitioner. With him on the brief was
27 Kellington, Krack, Richmond & Blackhurst. Matthew Sutton
28 argued on behalf of petitioner.

29
30 Bruce W. White, Assistant County Counsel, Bend, filed a
31 response brief and argued on behalf of respondent.

32
33 Ken Brinich, Bend, filed a response brief and argued on
34 behalf of intervenors-respondent. With him on the brief was
35 Hendrix Chappell & Brinich.

36
37 Bill Kloos, Eugene, filed an amicus brief on behalf of
38 Western PCS I Corp.

39
40 HANNA, Chief Referee; LIVINGSTON, Referee, participated
41 in the decision.

42
43 AFFIRMED 07/03/97

44
45
46 1. **LUBA Jurisdiction - Exhaustion of Remedies.**

1 The notice of decision advising the parties that there was no further
2 local remedy by right indicated all local administrative remedies had been
3 exhausted under ORS 197.825(2)(b), and under these facts LUBA had
4 jurisdiction.

5
6

7 **2. Administrative Law - Interpretation of Law - Effect of Local**
8 **Government Interpretation.**

9 An interpretation by a hearing officer is instructive and may be
10 considered in the determination of whether the county's interpretation
11 satisfied the reasonable and correct standard.

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's denial of its request
4 for site plan approval to construct a communications
5 facility consisting of a 35-foot-high pole and an equipment
6 shelter in the Rural Residential (RR-10) zone and Airport
7 Height (A-H) combining zone.

8 **MOTION TO INTERVENE**

9 Barclay Road Improvement Association, Inc. and Indian
10 Ridge, Inc. (intervenors) move to intervene in this
11 proceeding on the side of the respondent. There is no
12 opposition to the motion, and it is allowed.

13 **MOTION TO FILE AMICUS BRIEF**

14 Western PCS Corporation submitted a motion to file an
15 amicus brief. An amicus brief accompanied the motion.
16 There is no opposition to the motion, and it is allowed.

17 **FACTS**

18 Petitioner proposes to construct a communications
19 facility consisting of a 35-foot-high monopole and antenna
20 and a 10- by 20-foot electronic equipment shelter in a
21 ponderosa pine grove on an 8/10-acre rural residential lot
22 located near the top of a butte. The RR-10 zone comprises
23 approximately six square miles and is located approximately
24 two miles northeast of the City of Sisters. The hearings
25 officer describes the range of improved service as follows:

26 "The proposed facility would provide and/or

1 improve cellular telephone service to a large area
2 of northern and northwestern Deschutes County
3 including McKinney Butte, the Sisters urban area,
4 the area northwest of Sisters along US Highway 20
5 West, the area southwest of sisters along US
6 Highway 20 West toward Bend, and the area east of
7 Sisters along US Highway 126 toward Redmond."
8 Record 7.

9 The planning division sent a notice of administrative
10 action to area property owners requesting comments. In
11 response to opposition to the proposal, the division set the
12 matter for public hearing. The hearings officer conducted
13 the hearing, visited the site, and then issued a decision
14 denying the application on September 24, 1996. The notice
15 of decision included the following statement:

16 "The decision of the Hearings Officer on SP-96-53
17 for Cellular One, Central Oregon Cellular, Inc.,
18 Applicant, dated and mailed on September 24, 1996,
19 became the final decision of Deschutes County on
20 September 26, 1996, pursuant to Deschutes County
21 Code [DCC] 22.32.035 and Deschutes County Board of
22 County Commissioners Order No. 96-085 (Exhibit
23 1)."

24 Petitioners appeal the hearings officer's decision.

25 **JURISDICTION**

26 Intervenors move to dismiss this appeal, arguing that
27 LUBA does not have jurisdiction to review the hearings
28 officer's decision because petitioner failed to exhaust its
29 administrative remedies:

30 "Petitioner relies on the application of Order 96-
31 085 of the Deschutes County Board of Commissioners
32 to establish LUBA Jurisdiction herein. * * * In
33 the absence of an appeal to the Deschutes County
34 Board of Commissioners, Order 96-085 is

1 inapplicable to this case. Order 96-085 is
2 applicable only in cases where 'there is [an]
3 appeal of a land use action and the Board of
4 Commissioners is the Hearings Body.'
5 DCC § 22.32.035. There was no appeal taken from
6 the Hearings Officer's decision to the Board of
7 Commissioners. Order 96-085 was not effective to
8 make the decision of the Hearings Officer a final
9 decision." Intervenors' Brief 5.

10 The county responds that LUBA does have jurisdiction to
11 consider this appeal because no appeal to the county
12 commissioners of the hearings officer's decision was
13 required. The county argues that DCC 22.32.035 allows the
14 commissioners to decline to review appeals of land use
15 actions.¹

16 Order 96-085 states, in relevant part:

¹DCC 22.32.035 states:

"Except as set forth in 22.28.030, when there is an appeal of a land use action and the Board of County Commissioners is the Hearings Body:

"A. The board may on a case-by-case basis or by standing order for a class of cases decide at a public meeting that the decision of the lower Hearings Body of an individual land use action or a class of land use action decisions shall be the final decision of the County.

"B. If the Board of County Commissioners decides that the lower Hearings Body decision shall be the final decision of the County, then the board shall not hear the appeal and the party appealing may continue the appeal as provided by law. In such a case, the County shall provide written notice of its decision to all parties. The decision on the land use application becomes final upon mailing of the board's decision to decline review.

"C. The Decision of the Board of County Commissioners not to hear a land use action appeal is entirely discretionary.

** * * * * (Emphasis added.)

1 "WHEREAS, the Board of County Commissioners has
2 authority under DCC 22.32.035 to decline review of
3 appeals of land use actions, either on a case-by-
4 case basis or categorically by standing order; and

5 "WHEREAS, the Board has determined that it does
6 not wish to violate ORS 215.428 and therefore
7 should categorically by standing order decline to
8 hear on appeal cases that are close to the 120-day
9 deadline imposed by ORS 215.428;

10 "THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES
11 COUNTY, OREGON ORDERS as follows:

12 "1. Hearing Officer Decision Final as to Certain
13 Class of Cases. That pursuant to DCC
14 22.32.035(A), the Hearing Officer's decision
15 shall be the final decision of the County for
16 that class of land use permit applications
17 for which:

18 "(a) [No appeal has been received prior to
19 the 100th day after the application was
20 deemed complete]; and

21 "(b) [The applicant has not waived the 120-
22 day requirement of ORS 215.428].

23 "Accordingly, the Board of County Commissioners
24 shall not consider the notice of appeal of any
25 land use action decision for the above class of
26 cases, because the Hearing Officer decision
27 constitutes the final decision of the County.

28 "* * * * *" (Emphasis in original.)

29 The county contends that it is not necessary for an
30 appellant to file an appeal of a hearings officer's decision
31 with the commissioners for Order 96-085 to become applicable
32 to that decision. According to the county, once it provides
33 notice as required by DCC 22.32.035, the hearings officer's
34 decision becomes a final decision of the county that is not
35 subject to appeal to the commissioners.

1 We review the question of jurisdiction to determine if
2 petitioner has exhausted all local administrative remedies
3 under ORS 197.825(2)(b). Our discussion of jurisdiction and
4 exhaustion in Reeves v. Tualatin, 31 Or LUBA 11, 13-14
5 (1996) instructs:

6 "Jurisdiction of this Board is limited 'to those
7 cases in which the petitioner has exhausted all
8 remedies available by right before petitioning the
9 board for review.' ORS 197.825(2)(a). In Lyke v.
10 Lane County, 70 Or App 82, 688 P2d 411 (1984), the
11 Court of Appeals discussed the exhaustion
12 requirement of ORS 197.825(2)(b), stating:

13 'The exhaustion requirement, as interpreted,
14 requires that the petitioners use all
15 available local remedies before invoking
16 state jurisdiction, furthering the
17 legislative goal of resolving land use issues
18 at the local level whenever possible.' 70 Or
19 App at 86.

20 "The court focused its inquiry in Lyke upon
21 whether or not there was an additional procedure
22 available for review at the local level. Thus,
23 exhaustion in this context required a petitioner
24 to utilize all available levels of local review.
25 * * *.

26 "The Lyke holding was refined in Portland Audubon
27 Society v. Clackamas County, 77 Or App 277, 712
28 P2d 839 (1986). At issue in that case was whether
29 the exhaustion requirement in ORS 197.825(2)(a)
30 required an applicant to seek a rehearing of a
31 county decision before LUBA had jurisdiction.
32 Acknowledging that the phrase 'all remedies
33 available by right' was 'inherently ambiguous',
34 the court indicated that it should be read to mean
35 'all remedies from a higher decision-making level
36 for which there is a right to ask.' Id. at 280. *
37 * *

38 "In Colwell v. Washington County, 79 Or App 82,
39 91, 718 P2d 747, rev den 301 Or 338 (1986), the

1 Court of Appeals further explored the exhaustion
2 requirement and held that the doctrine does not
3 require an applicant to seek a rehearing or pursue
4 local remedies which are unlikely to serve any
5 purpose except redundancy."

6 **1** The notice of decision clearly advised all parties
7 that, pursuant to DCC 22.32.035 and Order 96-085, there was
8 no further local remedy allowed by right. In the case
9 before us, petitioner appealed the county's decision to the
10 hearings officer, the highest decision maker available at
11 the local level. Accordingly, we find that LUBA has
12 jurisdiction to hear the appeal because petitioner has
13 satisfied the exhaustion requirement of ORS 197.825(2)(a).

14 The motion to dismiss is denied.

15 **FIRST ASSIGNMENT OF ERROR**

16 Petitioner argues that the hearings officer erred when
17 she concluded that the proposed cellular telephone facility
18 is not a utility facility "necessary to serve the area"
19 under DCC 18.60.020.² Petitioner argues that the hearings

²DCC 18.60.020 states, in relevant part:

"The following uses and their accessory uses are permitted
outright.

"* * * * *

"B. Utility facilities necessary to serve the area
including energy facilities, water supply and
treatment and sewage disposal and treatment.

"* * * *" (Emphasis added.)

DCC 18.04.1315 states:

1 officer's interpretation of "area" is unnecessarily
2 restrictive and narrow.³

3 The hearings officer included in a preliminary finding:

4 "* * * I find Section 18.060.020(B), allowing
5 'utility facilities necessary to serve the area',
6 was intended to permit the siting of community
7 utility facilities designed to serve the rural
8 residents of the RR-10 Zone. It was not intended
9 to permit siting of 'major' utility facilities
10 including [those] -- such as major electric or gas
11 transmission lines, transmission towers, water
12 towers, sewage lagoons, and cellular telephone
13 facilities -- which are designed to serve a large
14 population and geographic area outside of the RR-
15 10 Zone." Record 12.

16 The hearings officer concluded that

17 "the proposal does not constitute an outright
18 permitted use in the RR-10 Zone subject to site
19 plan review because it is not a 'utility facility
20 necessary to serve the area' as required in
21 Section 18.60.020(B). Specifically, I have found

"'Utility facility' means any major structures, excluding hydroelectric facilities, owned by or operated by a public or private or cooperative electric, fuel, communication, sewage or water company for the generation, transmission, distribution or processing of its products or for the disposal of cooling water, waste or by-products, and including power transmission lines, major trunk pipelines, power substations, water towers, sewage lagoons, but excluding local sewer, water, gas, telephone and power distribution lines, and similar minor facilities allowed in any zone."

³Because the decision under review is a hearings officer's decision and not that of the governing body, we do not defer under Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992). Gage v. City of Portland, 319 Or 308, 318, 877 P2d 1187 (1994). We review the hearings officer's application of its code to determine if that application is reasonable and correct. McCoy v. Linn County, 90 Or App 271, 275, 752 P2d 323 (1988). As in Gutoski v. Lane County, 141 Or App 265, 917 P2d 1048 (1996), the local governing body declined to review the lower decision. As required by Gutoski, we consider the parties' arguments concerning the meaning of the local code, ab initio.

1 the proposed facility is not a permitted use
2 because it is a type of utility facility designed
3 to serve a population and geographic area much
4 larger than the rural residential uses in the RR-
5 10 Zone within which the subject property is
6 located." Record 18.

7 Petitioner makes four arguments regarding the hearings
8 officer's interpretation of DCC 18.60.020.⁴

9 **A. Ordinary Meaning of "Area"**

10 Petitioner argues that "the ordinary meaning of the
11 word 'area' is not one that includes limitations or
12 restrictions" and that if the county had wanted to limit the
13 term as used in DCC 18.60.020(B) it could have done so.
14 Petitioner for Review 10. Thus, petitioner concludes "area"
15 should not be restricted to a particular zone.

16 **B. Consistency With Other Zoning Provisions**

17 Petitioner makes four points to support this
18 subassignment of error. First, petitioner argues that the
19 decision is inconsistent with the county's and city's zoning
20 provisions in general and the county's RR-10 zone in
21 particular. Petitioner contends that because the definition
22 of "utility facility" is limited to "major structures" and
23 excludes "minor facilities," "the term conveys the
24 impression that these structures may reach more than one
25 zone rather [than] be limited to one in particular."

⁴Intervenor does not respond separately to petitioner's subassignments of error. The county addressed only the jurisdictional question. Because petitioner's arguments are interrelated, we set them forth individually, but reserve our discussion to the end.

1 Petition for Review 12.

2 The second point petitioner makes is that the county
3 zoning map identifies 22 different zones, each of which "has
4 the potential need of service by various 'utility
5 facilities.'" Id. Petitioner argues that there are a
6 variety of zones in the vicinity and that many of these
7 zones do not allow for siting a utility facility.
8 Petitioner reasons that "if any 'utility facility' was
9 needed to serve one of these adjacent zones in addition to
10 the RR-10 zone, the flexibility to efficiently meet the
11 needs of both zones would be lacking." Petition for Review
12 13.

13 Petitioner's third point is contingent on its
14 interpretation of the hearings officer's decision, that the
15 utility service provided should not extend beyond the
16 parameters of the zone in which it originates. Petitioner
17 also argues that absent an indication otherwise, the same
18 word should be interpreted in the same manner throughout the
19 code. Petitioner contends that "area" is used in a similar
20 fashion in regulating conditional uses in another zone.
21 However, petitioner does not develop that contention other
22 than making factual observations.

23 In its fourth point, petitioner argues that a utility
24 facility is an outright use in the RR-10 zone rather than a
25 conditional use as it is in other zones. Petitioner
26 concludes "[t]his indicates an intention to make the siting

1 of [a] utility facility more readily available in the RR-10
2 zone." Petition for Review 14.

3 **C. Purpose and Policy of RR-10 Zone**

4 Petitioner contends that site approval would be
5 consistent with the purpose and policy of the RR-10 zone.

6 Petitioner argues that the unobtrusive location of the
7 proposed facility and its potential to advance
8 communications comport with the statement of purpose at DCC
9 18.60.010 for the RR-10 zone.⁵

10 **D. Effect of Efficiency**

11 Petitioner argues that the proposed provision of
12 service beyond the RR-10 zone should not be a basis to
13 disqualify the proposal. Petitioner reads the hearings
14 officer's use of "area" to be impermissibly restricted to
15 the immediate vicinity.

16 Based on these four subassignments of error, we
17 understand petitioner to argue that the hearings officer has
18 misapplied the DCC in denying petitioner's application for
19 site plan approval.

⁵DCC 18.60.010 states:

"The purposes of the Rural Residential Zone are to provide rural residential living environments; to provide standards for rural land use and development consistent with desired rural character and the capability of the land and natural resources; to manage the extension of public services; to provide for public review of nonresidential uses; and to balance the public's interest in the management of community growth with the protection of individual property rights through review procedures and standards."

1 Intervenors respond that the challenged decision should
2 be affirmed because the hearings officer's interpretation of
3 the DCC is reasonable and correct, and state:

4 "Standards for a new use must be approved through
5 a change in zoning or through a text amendment.
6 DCC § 18.136.010. Authorizing this proposed use
7 by reading 'cell towers' into the definition of
8 'utility facilities necessary to serve the area'
9 denies residents of the RR-10 zone the opportunity
10 to be heard on the authorization of a
11 nonresidential use in the RR-10 zone."
12 Intervenors' Brief 9.

13 Intervenors rely on the reasoning in McCaw
14 Communications v. Marion County, 96 Or App 552, 773 P2d 779
15 (1989), arguing that:

16 "In arriving at an interpretation of this language
17 [necessary to serve the area] the Hearings Officer
18 followed the McCaw court's procedure of analyzing
19 the purpose of the underlying zone when an
20 interpretation of an ordinance is required. Id.
21 at 10.

22 McCaw was remanded for the county to make a finding
23 regarding the siting of cell towers in an exclusive farm use
24 zone where "utility facilities necessary for public service"
25 are allowed. McCaw addressed the question of the meaning of
26 "necessary" under the Marion County code. In the case
27 before us, DCC 18.60.020 requires that the utility facility
28 be "necessary to serve the area." It is the scope of "area"
29 that is the focus of our inquiry. Intervenors suggest that
30 the method of analysis applied by the court in McCaw is
31 applicable here.

32 Intervenors argue further that the hearings officer

1 made a reasonable decision when she allowed uses that serve
2 the zone but not the entire region. Intervenors contend:

3 "the facility is designed to serve an area that
4 greatly exceeds the surrounding RR-10 zone * * *.

5 "Petitioner's logic would result in authority for
6 siting of energy supply, sewage treatment and
7 water supply facilities in the RR-10 zone that
8 would serve the entire northern region of
9 Deschutes County." Id. at 13.

10 As an initial point, although petitioner repeatedly
11 casts the county's position as denying the application
12 because the proposed facility would extend service outside
13 the RR-10 zone, we do not understand the county's decision
14 to be that narrow. We understand the county to say that the
15 proposal was denied, in part, because it was designed to
16 serve an area larger than the RR-10 zone, not because it
17 incidentally serves residents outside the RR-10 zone.

18 In addressing the scope of the applicable "area," the
19 county properly relied on McCaw, and made a finding that
20 looks to the purpose of the underlying residential zone as
21 set forth in DCC 18.60.010. The county's decision properly
22 concludes that "utility facilities necessary to serve the
23 area" requires the utility facility to be designed to meet
24 the utility needs of the RR-10 zone and not of the county as
25 a whole.

26 **2** Petitioner has knit together a fabric that, based on
27 the DCC 18.60.010 purpose statement, could be used to
28 justify approval of the proposal. We find both petitioner's

1 and the county's construction of DCC 18.60.010 to be
2 possible. However, McCoy says that although our acceptance
3 or rejection of the county's interpretation must be
4 determined solely by whether we find it to be right or
5 wrong, the county's interpretation is "instructive" of its
6 own ordinance. McCoy, 90 Or App at 275-76. We find the
7 hearings officer's interpretation to be both reasonable and
8 correct, and we adopt it.

9 The first assignment of error is denied.

10 **SECOND ASSIGNMENT OF ERROR**

11 Petitioner argues:

12 "the denial of site approval for petitioner's
13 proposed cellular telephone facility is not
14 supported by substantial evidence in the record.
15 Applying a restrictive interpretation of the term
16 'area' effectively bypassed the evidence in the
17 record concerning the need for the proposed
18 facility." Petition for Review 16.

19 Petitioner's substantial evidence challenge is
20 predicated on petitioner's contention that "area" should be
21 more broadly construed. Petitioner does not support this
22 assignment of error by showing that there is not substantial
23 evidence in the record for the decision that the county did
24 make. There is substantial evidence in the whole record to
25 support the county's decision to deny the proposal.

26 The second assignment of error is denied.

27 The county's decision is affirmed.