

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

4 RICHARD OBERDORFER
5 and WESTERN RADIO CORPORATION, INC.,
6 *Petitioners,*
7

8 vs.
9

10 DESCHUTES COUNTY,
11 *Respondent,*
12

13 and
14

15 KEVIN MARTIN,
16 *Intervenor-Respondent.*
17

18 LUBA No. 2010-055
19

20 FINAL OPINION
21 AND ORDER
22

23 Appeal from Deschutes County.
24

25 Marianne Dugan, Eugene, filed the petition for review and argued on behalf of
26 petitioners.
27

28 No appearance by Deschutes County.
29

30 Peter Livingston, Portland, filed the response brief and argued on behalf of
31 intervenor-respondent. With him on the brief was Schwabe, Williamson & Wyatt P.C.
32

33 BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board Member,
34 participated in the decision.
35

36 AFFIRMED

12/02/2010
37

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

NATURE OF THE DECISION

Petitioners appeal a county decision approving a wireless telecommunication tower.

MOTION TO INTERVENE

Kevin Martin (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition, and the motion is granted.

FACTS

The subject property is a 159-acre parcel zoned Surface Mining (SM) and designated Agriculture, situated on the top of the northernmost of the three Cline Buttes (hereafter, North Butte). To the west and north of the North Butte lies a destination resort developed primarily with residential uses. The Middle Butte to the south is on land owned by the federal Bureau of Land Management (BLM), and is developed with two existing transmission towers that operate pursuant to leases with BLM. One of the existing towers is a 130-foot tall lattice-style tower owned and operated by petitioner Western Radio Corporation, Inc., which carries antennas for several wireless telecommunication providers. The second tower is 30-foot tower owned and operated by Bend Broadband. The South Butte is also owned by the BLM, and developed with a radio tower that is incompatible with wireless telecommunication transmissions.

On August 17, 2009, intervenor applied to the county for a conditional use permit to construct a 90-foot tall monopole tower (later reduced to 60-feet), with four 12-antenna wireless telecommunication arrays at various heights, four microwave dishes, and associated ground facilities. Under state and county law, to locate a utility facility such as a telecommunication tower on agricultural land there must be a finding that it is “necessary” to site the facility on agricultural-zoned land in order for service to be provided. The application justified the tower and one antenna array as necessary to accommodate the needs of New Cingular Wireless PCS, LLC/AT&T Mobility (AT&T). The other three antenna

1 arrays are intended for future tenants. The application included evidence from AT&T that
2 locating its antennas on a tower on North Butte is necessary in order to provide continuous
3 coverage service along Highway 126 and nearby rural areas. AT&T engineers stated that
4 there are no other existing towers or structures suitable for co-location that will achieve the
5 necessary coverage objective.

6 During the public comment period, petitioner Richard Oberdorfer sent the county an
7 e-mail stating that he has applied to the BLM for a second wireless tower on the Middle
8 Butte, and that if approved the tower would provide space suitable for AT&T's antennas.
9 The staff report recommended denial, in part because the applicant had not shown that
10 AT&T's needs could not be addressed by co-locating on petitioners' proposed second tower
11 under application to the BLM. At the initial hearing before the hearings officer, intervenor
12 testified that petitioners' BLM application for a second tower was on hold and that, under
13 applicable BLM policies, it was uncertain whether it would gain approval. BLM also
14 submitted an e-mail confirming that the application was on hold. On November 9, 2009, the
15 day before the second hearing, petitioner Oberdorfer sent an e-mail to the county stating that
16 AT&T had just signed a lease with petitioners to co-locate its antennas on petitioners'
17 existing tower on Middle Butte. Intervenor responded that, based on intervenor's
18 discussions with BLM, petitioners' existing tower on Middle Butte did not have sufficient
19 capacity to accommodate AT&T's antennas.

20 On January 15, 2010, the hearings officer issued a decision denying the application.
21 The hearings officer agreed with intervenor that co-locating AT&T's antennas on petitioners'
22 existing tower or the proposed second tower on the Middle Butte was not a suitable or
23 available alternative under the "necessary" standard, but concluded that intervenor had failed
24 to demonstrate that AT&T's needs could not be met by constructing two short towers on the
25 adjoining land zoned RR-10.

1 Intervenor appealed the hearings officer's denial to the board of county
2 commissioners (BCC), which held a *de novo* hearing. Prior to the BCC hearing, a different
3 wireless telecommunications provider, Verizon, submitted a letter in support of the
4 application, stating that it is interested in co-locating on intervenor's tower, if approved.
5 Intervenor submitted evidence at the BCC hearing that constructing two short towers on the
6 RR-10 zoned land could not meet AT&T's coverage needs. The board of commissioners
7 agreed with intervenor, and approved the application, adopting the hearings officer's
8 reasoning and conclusions with respect to alternative sites on BLM land. This appeal
9 followed.

10 **ASSIGNMENT OF ERROR**

11 Petitioners argue that the county's conclusion that co-location of AT&T's antennas
12 on petitioners' existing tower on Middle Butte or the proposed new tower on Middle Butte
13 are not available alternatives, and hence that it is "necessary" to site intervenor's proposed
14 tower on North Butte, is not supported by substantial evidence in the record.¹ ORS
15 197.835(9)(a)(C).

¹ The BCC reviewed the e-mails and testimony of petitioners, intervenor and BLM staff regarding co-location on Middle Butte, and concluded:

"The Hearings Officer found and the Board agrees that [petitioners'] claims that AT&T could site its proposed BD57 facility on the middle butte are convincingly refuted by the testimony presented by [intervenor] and [BLM]. Therefore, the Board finds that the middle Cline Butte is not a suitable or available alternative site for AT&T's proposed facility." Record 15.

Later in the decision, the commissioners found:

"As discussed above, the record includes as Exhibit B to the applicant's burden of proof a letter from Karen Sullivan, one of AT&T's radio frequency engineers, stating 'there are no other existing towers or structures suitable for co-location that will achieve the necessary coverage object for the area as well as this location.' As also discussed above, the record indicates the existing 130-foot tall Western Radio lattice tower on the middle Cline Butte is at capacity structurally and is not capable of accommodating the applicant's proposed BD57 facility. The Hearings Officer found and the Board concurs that the applicant evaluated other alternative facility sites within the desired service area, and that the applicant properly rejected these alternative sites. * * *" Record 27.

1 With respect to the existing tower, petitioners argue that the record includes evidence,
2 in the form of petitioner Oberdorfer’s November 9, 2009 e-mail, that AT&T has agreed to
3 lease space on petitioners’ existing tower on Middle Butte. We understand petitioners to
4 argue that the lease between petitioners and AT&T suggests that there is capacity on the
5 tower to accommodate AT&T’s antennas. Intervenor responds, and we agree, that there is at
6 best conflicting evidence in the record concerning the capacity of the existing tower on
7 Middle Butte. AT&T’s engineer stated that no other towers are suitable for co-location, and
8 intervenor testified, based on his discussions with BLM, that the existing tower does not have
9 sufficient capacity.² While that evidence is certainly not overwhelming, neither is the
10 countervailing evidence. Other than petitioner’s November 9, 2009 e-mail at Record 394,
11 which states briefly and without explanation that “AT&T had accepted my company’s lease
12 terms to collocate on the Western owned tower at the Middle butte,” there is no evidence in
13 the record at all regarding the lease between petitioners and AT&T, or any evidence
14 indicating that the existing tower has sufficient capacity to host AT&T’s antennas. Indeed,
15 that petitioners have applied to BLM for a second tower on the same site suggests that the
16 existing tower lacks capacity. Based on the conflicting evidence in the record, the BCC
17 could reasonably conclude that the existing tower is not available for co-location for AT&T’s
18 antennas.³

19 With respect to the second tower application pending before the BLM, petitioners
20 argue that “[t]here is no evidence of how long the supposed ‘on hold’ status would last;
21 whether the supposed ‘on hold’ status would in fact be problematic for the applicant; and
22 what factors were involved in the supposed ‘on hold’ status.” Petition for Review 6.

² As quoted in the county findings, intervenor testified to a conversation with BLM staff in which staff informed him that BLM is “aware that existing tenants on the tower were unable to expand their facilities because of the lack of structural capacity.” Record 15.

³ Substantial evidence is evidence a reasonable person would rely on to support a conclusion. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993).

1 However, since the record indicates that it was petitioners who placed their application with
2 the BLM on hold, it is not clear how intervenor would be in a position to know why
3 petitioners did so or how long petitioners intended the hold to last. In any case, the county
4 concluded based on comments from intervenor and BLM that BLM policies discourage
5 development of new wireless telecommunication facilities on BLM-owned portions of the
6 Cline Buttes. Record 12, 307. The county concluded that under those policies it is far from
7 certain that intervenor could gain approval to site a new tower on BLM land, and that
8 conclusion would seem to apply equally well to petitioners' proposed tower. That
9 uncertainty, in addition to the hold of unknown duration placed on petitioners' application,
10 supports the county's finding that the second tower proposed by petitioners is not an
11 available alternative.

12 Finally, petitioners contend that the county erred in relying on Verizon's interest in
13 co-locating on intervenor's tower to approve that tower. Petitioners argue that there is no
14 evidence in the record regarding Verizon's coverage needs or explanation why it is
15 "necessary" to site Verizon's antennas on the North Butte property. According to
16 petitioners, Verizon is currently a tenant on petitioners' existing tower on Middle Butte, and
17 therefore obviously has an alternative site available to meet its coverage needs.

18 However, we do not understand the county to have approved the tower based on
19 Verizon's letter of interest. The only mention of Verizon in the county's findings is a
20 statement that "[t]he proposed facility would function as part of AT&T's (and/or Verizon's)
21 existing wireless network in the Redmond area, depicted on the applicant's submitted signal
22 propagation maps." Record 17. The signal propagation maps were submitted by AT&T to
23 show its coverage needs, and it is reasonably clear that the county approved the tower
24 application based on AT&T's needs. The parenthetical reference to Verizon appears to be an
25 extraneous, unnecessary finding, and any error in that reference would appear to be at most
26 harmless error.

- 1 The assignment of error is denied.
- 2 The county's decision is affirmed.