BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RICHARD OBERDORFER and WESTERN
RADIO SERVICES COMPANY, INC.,
Petitioners,

vs.

HARNEY COUNTY,
Respondent,

and

NEW CINGULAR WIRELESS PCS, LLC,
Intervenor-Respondent.

LUBA No. 2011-043

FINAL OPINION
AND ORDER

Appeal from Harney County.

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

No appearance by Harney County.

Richard J. Busch, Issaquah, Washington, filed the response brief and argued on behalf of intervenor-respondent.

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

AFFIRMED 08/17/2011

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a decision of the county court upholding a planning commission decision to approve an application for a wireless telecommunication facility on property zoned for exclusive farm use (EFU).

FACTS

Intervenor-respondent (intervenor) applied to the county for a conditional use permit to construct a 150-foot tall tower on an 80-acre parcel on Burns Butte, to provide cell-phone coverage to its customers in the area and along Highway 20. The immediate vicinity includes several other cell-phone towers, also located on land zoned EFU, including a tower owned by petitioners. Intervenor currently relies on other cellular providers in the area to provide coverage, via roaming arrangements. Burns Butte and all nearby lands in the area are zoned EFU, except for a small area zoned Rural Residential (R-1), located a mile to the southwest of the subject property.

On January 21, 2011, the county planning director approved the application, and petitioners appealed the planning director's decision to the planning commission, which held a hearing at which petitioner Richard Oberdorfer appeared. On March 28, 2011, the planning commission issued its decision upholding the planning director's approval. The planning commission decision appears to adopt the planning director's January 21, 2011 decision as the basis for its decision. Petitioners appealed the planning commission decision to the county court, which held a hearing at which intervenor submitted additional evidence regarding the necessity of siting the proposed tower on EFU-zoned land. On April 20, 2011, the county court issued its decision, upholding the planning commission decision and approving the application. The county court decision adopts the planning commission decision as its findings. This appeal followed.

JURISDICTION

Intervenor moves to dismiss this appeal, arguing that petitioners failed to exhaust all local remedies before petitioning LUBA for review. ORS 197.825(2)(a). According to intervenor, petitioners failed to perfect an appeal of the planning commission decision to the county court. Intervenor argues that petitioner's April 4, 2011 Appeal Notice to the county court incorrectly identifies the January 21, 2011 planning director decision as the subject of the appeal, rather than the planning commission's March 28, 2011 decision. Based on this erroneous reference to the planning director's decision, intervenor reasons that the March 28, 2011 planning commission decision was never appealed to the county court, petitioners failed to exhaust their local appeal of the planning commission decision, and LUBA therefore lacks jurisdiction over petitioners' appeal of the county court's April 20, 2011 decision affirming the March 28, 2011 planning commission decision.

The county's Appeal Notice form includes check boxes for "Appeal of a Planning Department Decision" and "Appeal of Planning Commission Decision," and a space for the date of the decision. Intervenor is correct that on the April 4, 2011 Appeal Notice petitioners checked the box for "Appeal of a Planning Department Decision" rather than the box for "Appeal of Planning Commission Decision." Record 47. Further, for the date of decision petitioners entered "01/21/2011," the date of the planning director's initial decision, not the date of the March 18, 2011 planning commission decision. *Id*.

Despite that error, the county clearly understood that petitioners intended to appeal the March 18, 2011 planning commission decision, because the March 18, 2011 planning commission decision was the subject of the staff report to the county court, the hearing before the county court, and the county court's final decision that is before LUBA. Petitioners' apparent error in filling out the April 4, 2011 Appeal Notice did not prevent petitioners from seeking, and the county from providing, all remedies available by right before petitioning LUBA for review. Intervenor does not explain why failure to accurately

identify the planning commission decision in the local appeal document means that the petitioner failed to exhaust all local appeals for purposes of ORS 197.825(2)(a), where the county in fact provided a local appeal of the planning commission decision. The exhaustion requirement at ORS 197.825(2)(a) was met. The motion to dismiss is denied.

FIRST ASSIGNMENT OF ERROR

ORS 215.283(1)(c) provides that "[u]tility facilities necessary for public service" may be established on EFU-zoned land, as provided in ORS 215.275. In turn, ORS 215.275(2) provides that to demonstrate that a utility facility is "necessary," the applicant must show that "reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors," including (1) technical and engineering feasibility, (2) meeting unique geographical needs that cannot be satisfied on other lands, and (3) lack of available urban and nonresource lands.[1]

Petitioners argue that intervenor failed to demonstrate that it is "necessary" to site the proposed tower on EFU-zoned land, in order to meet intervenor's coverage objectives. According to petitioners, intervenor failed to demonstrate that the proposed tower could not be located on lands zoned R-1.

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[1] ORS 215.275 provides, in relevant part:

> "(1) A utility facility established under ORS 215.213 (1)(c) or 215.283 (1)(c) is necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service.
>
> "(2) To demonstrate that a utility facility is necessary, an applicant for approval under ORS 215.213 (1)(c) or 215.283 (1)(c) must show that reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:
>
> "(a) Technical and engineering feasibility;
>
> "(b) The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands; [and]
>
> "(c) Lack of available urban and nonresource lands[.]"

The R-1 zone has a 75-foot height limit. Intervenor's expert submitted evidence and testimony below that a 75-foot tower located on the R-1 zoned lands one mile southwest of Burns Butte would not allow intervenor to meet its coverage objectives, which include providing coverage to an existing 17-mile "gap" in coverage along Highway 20. Record 19, 24-25, 31-32. Petitioners argue on appeal that there would be no significant difference in coverage between a 150-foot tall tower located on Burns Butte and a 75-foot tower located in the R-1 zoned area. However, petitioners' unsupported opinion on this point does not undermine the testimony and evidence the county relied upon to conclude that a 75-foot tower on R-1 zoned lands would not meet intervenor's coverage objectives and is not a reasonable alternative.

Petitioners also briefly argue that intervenor failed to demonstrate that its coverage objectives could not be met by using multiple shorter towers at lower elevations on two or more locations that are not zoned EFU. However, petitioners do not cite to anything in the record suggesting that intervenor's coverage objectives could be met with multiple shorter towers at different non-EFU-zoned locations. As noted, intervenor's expert submitted evidence that a 75-foot tall tower on the nearest R-1 zoned land southwest of Burns Butte would not meet intervenor's coverage objectives, which include providing coverage in the existing 17-mile "gap" along Highway 20 to the south and southwest. The next nearest R-1 zoned sites appear to be several miles away, to the northeast and east on the outskirts of the City of Burns. Record 20. Petitioners offer no reason to believe that a system of multiple 75-foot towers in those or any other locations not zoned EFU would provide coverage to the Highway 20 corridor.

Petitioners attempt to raise other issues under this assignment of error, but to the extent we understand those arguments, they do not provide a basis for reversal or remand.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that intervenor failed to demonstrate that it could not meet its coverage objectives by collocating its antenna on one of the existing cell-phone towers nearby on Burns Butte that are owned by other providers. The existing towers are 60 to 100 feet tall.

In response to this argument, intervenor's expert testified:

> "AT&T's competitors do not provide service in the significant gap from their existing antenna sites and AT&T would likewise not be able to provide service in the significant gap from those same sites. Please See **Exhibit 3** which shows the locations where our competitors' systems drop calls, based upon the findings during a drive test. AT&T desires to provide high quality service throughout all of these areas, even in those areas where AT&T's competitors' calls drop. It is not feasible for AT&T to use the same towers where our competitors are currently located because: (1) our competitors' towers do not allow them to provide high quality service throughout all of these areas, (2) AT&T's antenna mounting height would be lower than our competitors' antennas, resulting in worse quality of service than our competitors provide today from their existing towers, and (3) AT&T's system in Harney County uses the 1900 MHz spectrum which does not travel as far as our competitors' signals and AT&T would expect to provide a lower quality service than services provided by the 800 MHz systems. Therefore, the existing towers are not feasible options for AT&T's proposed site." Record 25 (emphasis original).

Exhibit 3 referenced above is a map that purports to show locations along Highway 20 in the "gap" where the competitors' systems dropped calls during a drive test. Record 28. Petitioners do not challenge the above testimony and evidence, and we agree with intervenor that petitioners' arguments regarding collocation fail to demonstrate that the county erred in concluding that collocation is not a reasonable alternative to the proposed tower.

Petitioners raise other issues under the second assignment of error, arguing that the proposed 150-foot tall tower would have disruptive "visual impacts," and the proposed antenna height might interfere with operation of petitioners' nearby tower. However, petitioners do not connect any of these issues to ORS 215.275 or any applicable state or local approval criteria.

The second assignment of error is denied.

The county's decision is affirmed.