

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

3 G. BERNHARD FEDDE,)
MELVIN Y. ZUCKER, ROUL)
4 ROHLSSON, and the AD HOC)
NEIGHBORHOOD COMMITTEE,)

5 Petitioners,)

6 vs.)

7 CITY OF PORTLAND,)

8 Respondent.)
9

LUBA No. 83-023

FINAL OPINION
AND ORDER

10 Appeal from the City of Portland.

11 G. Bernhard Fedde, Portland, file the Petition for Review
and argued the cause on behalf of Petitioners.

12 Kathryn Beaumont Imperati, Portland, filed a brief and
13 argued the cause on behalf of Respondent City of Portland.

14 Timothy V. Ramis, Portland, filed a brief and argued the
cause on behalf of Participant McClanathan. With him on the
15 brief were O'Donnell, Sullivan & Ramis.

16 BAGG, Board Member.

17 AFFIRMED

07/22/83

18
19 You are entitled to judicial review of this Order.
Judicial review is governed by the provisions of Oregon Laws
20 1979, ch 772, sec 6(a), as amended by Oregon Laws 1981, ch 748.

1 BAGG, Board Member.

2 NATURE OF THE DECISION

3 Petitioners appeal the grant of a permit to construct a 90
4 foot high radio transmission tower and associated building.

5 STANDING

6 Respondent-Participant McClanathan challenges petitioners'
7 standing. Participant argues the individual petitioners have
8 alleged no facts indicating in what way they have been
9 aggrieved by the city's decision. Participant further alleges
10 petitioners' allegations of lack of notice are not sufficient
11 to establish standing because those complaining live outside
12 the 400 foot notice area established in the Portland City Code.

13 Participant attacks the standing of the Ad Hoc Neighborhood
14 Committee on the ground the petition for review does not
15 explain the theory showing standing for the committee.

16 Participant argues the statement must include the following
17 information:

18 "1. Is the organization incorporated, and capable of
19 legal action under its own name?

20 "2. Did the organization exist before the
21 controversy, or was it formed for the specific
22 purpose of contesting the specific governmental
23 action?

24 "3. Can the organization demonstrate membership
25 support of its positions?

26 "4. Does the organization claim standing by virtue of
the interests of one member?" Respondent
Participant's Brief at 4.

1 Participant urges these questions must be answered before
2 standing for the committee may be established, citing Benton
3 County v Friends of Benton County, 294 Or 79, 653 P2d 1249
4 (1982). Participant closes by saying "the Committee should be
5 required to make a further showing regarding its rules, by-laws
6 and organizational structure before being admitted as a
7 petitioner in this proceeding." Brief of Participant at 4.
8 See Clark v Dagg, 38 Or App 71, 588 P2d 1298 (1979).¹

9 Respondent City of Portland does not challenge petitioners'
10 standing.

11 In order to have standing to bring an appeal to the Land
12 Use Board of Appeals, the "person" must show that he

13 "a. Appeared before the local government or special
14 district governing body or state agency orally or
in writing; and

15 "b. Was a person entitled as of right to notice and
16 hearing prior to the decision to be reviewed or
was a person whose interests are adversely
17 affected or who was aggrieved by the decision."
1979 Or Laws, ch 772, sec 4(3)(a)(b).²

18 The Board finds the petition as a whole contains sufficient
19 allegations to establish standing for Petitioners Fedde, Zucker
20 and Rohlsson. On page 8 of the petition for review, it is
21 stated that "Rohlsson, Zucker and Fedde" have "views directly
22 onto the site...." The Board has consistently held that
23 persons within sight or sound of a proposed development have
24 shown the requisite adverse effect or aggrievement. Van
25 Volkinburg v Marion County, 2 Or LUBA 112 (1980), Merrill v Van
26 Volkinburg, 54 Or App 873, 636 P2d 466 (1981); Casey v Dayton,

1 5 Or LUBA 96 (1982). Petitioners Fedde, Zucker and Rohlsson
2 have standing to bring this appeal.³

3 As to the standing of the Ad Hoc Neighborhood Committee, it
4 is clear from the closing page of the petition that the Ad Hoc
5 Committee includes in its membership Petitioners Fedde, Zucker
6 and Rohlsson. However, there is no allegation of fact as to
7 how it is that the committee is adversely affected or
8 aggrieved, and there is no claim of adverse effect or
9 aggrievement for the committee through one of its members
10 having standing. Jefferson Landfill v Marion County, 6 Or LUBA
11 1 (1982). See also Oregon Electric Sign Association v
12 Beaverton, 6 Or LUBA 428 (1982). The Ad Hoc Neighborhood
13 Committee does not have standing in this proceeding.⁴

14 FACTS

15 On February 2, 1981, a Multnomah County hearings officer
16 approved Robert A. McClanathan's application for a community
17 service designation to construct a 95 foot radio transmitting
18 tower on his property. The County Board of Commissioners
19 affirmed the hearings officer's decision after an appeal by
20 Petitioner Fedde and others. That decision was appealed to the
21 Land Use Board of Appeals and remanded to the county at the
22 request of the parties. Record 84, 104, 215.

23 After the remand from LUBA, the city annexed property
24 including that of the applicant. Record 215. The effect of
25 the annexation, according to the city, was to terminate the
26 applicant's request for a community service approval. Record

1 84, Brief of Respondent at 3.

2 On July 1, 1982, Applicant McClanathan applied to the city
3 to construct the same 95 foot radio transmitting tower. The
4 tower would contain a maximum of 10 antennas, and space on the
5 tower would be leased to public and private radio users.
6 Record 364-365.

7 The city hearings officer heard the request on August 30,
8 1982, and issued a decision on September 1, 1982 approving the
9 request for a community service designation, under provisions
10 of the Multnomah County Code and a conditional use and a
11 variance under the city code. Record 214-245.

12 Petitioners herein appealed that decision to the city
13 council, and the city council conducted a hearing on the matter
14 on October 20, 1982. Record 79-121. The hearing was continued
15 to November 17, 1982, December 2, 1982, December 8, 1982 and
16 January 19, 1983.

17 During the course of the January 19 proceeding, the
18 applicant modified the height of the requested tower from 95 to
19 90 feet, and the council accepted that modification. Record
20 36. At that same hearing, the council voted to deny
21 petitioners' appeal, accept the hearings officer's findings and
22 affirm his decision. A written order approving the use was
23 signed by Mayor Ivancie on January 20, 1983. Record 7-10,
24 214-245. This appeal followed.

25 The property has not yet been zoned by the City of
26 Portland. The city planning commission had recommended FF

1 zoning (Farm and Forest with a 2 acre minimum lot size) for the
2 property and an R-10 (Single Family Residential, 10,000 square
3 foot minimum lot size) comprehensive plan designation for the
4 property on the east side of Skyline Boulevard. Record 14, 85,
5 216, 342. There were hearings held in the fall of 1982, and
6 the city council referred the zoning of this property to the
7 Bureau of Planning for an analysis. This analysis has not been
8 completed. Record 14-15.

9 The zoning designation applicable on the property is
10 Multnomah County MUF-19 (Multiple Use Forest - 19 Acre Minimum
11 Lot Size). This zone is applicable because Portland City Code
12 Section 33.102.050, "Zoning Annexed Areas," provides in part:

13 "Any area annexed to the City after July 1, 1959,
14 shall retain the zoning regulations of its former
jurisdiction until changed by the City Council."

15 The property consists of 6 acres on the east side of
16 Skyline Boulevard between N.W. Reed Drive and N.W. Thompson
17 Road. The property is near the ridge at the crest of the
18 Tualatin Mountains, is wooded and is surrounded by some
19 undeveloped and some partially developed property. The city's
20 urban growth boundary limit lies to the east of the subject
21 property. Record 215-216, 229, 246.

22 ASSIGNMENT OF ERROR NO. 1

23 "I. THIS AREA CAN ONLY BE ZONED R-10."

24 As the Board understands this assignment of error,
25 petitioners say the city council, the hearings officer and the
26 city staff regard the area as R-10 even though it bears the old

1 county MUF-19 zoning. Petitioners say the county staff report
2 recognized the property to be subject to residential
3 development. Petitioners argue the forest designation, whether
4 MUF-19 or FF (a city forest designation) would not be
5 appropriate. Further, only land outside the urban growth
6 boundary can be maintained for a forest purpose or designation,
7 according to petitioners. The Board takes this argument to be
8 the city was in error in applying the old county zone.

9 Respondent City first argues the city council did not
10 change the zone of the property or enact a comprehensive plan
11 amendment. Any argument about the merits of city zoning should
12 be directed to the city council whenever the council applies a
13 city zone to the property, according to the city.

14 Next, the city asserts it correctly applied the county code
15 to this proposal. The city cites its own code Section
16 33.102.050, quoted supra, providing zoning regulations of the
17 county are to be applied until changed by the city. The city
18 advises county code Section 11.15.7020 permits a radio tower as
19 a community service use in any zoning district.

20 "(A) Except as otherwise provided in MCC 2012, the
21 following community services uses and those of a
22 similar nature, may be permitted in any district
when approved at a public hearing by the hearings
officer.

23 * * * *

24 "(15) Radio or television station or tower."
25 Multnomah County Code Section 11.15.7020.⁵

26 The Board agrees that the city applied the correct code

1 provisions to this proposed use. The city code clearly states
2 the "zoning regulations" of the former jurisdiction apply
3 "until changed by the city council." (Emphasis added). The
4 Board understands the term "zoning regulations" to include not
5 only the particular zone but also those other regulations which
6 control what may be done in the particular zone. The Board
7 finds the county's community service use standards in MCC
8 11.15.7020 to be zoning regulations that are applicable by
9 operation of the City of Portland's own code.

10 This assignment of error is denied.

11 ASSIGNMENT OF ERROR NO. 2

12 "II. THE CITY COUNCIL VIOLATED ITS ZONING ORDINANCE,
13 33.22.240, BY GRANTING A CONDITIONAL USE FOR A
14 TOWER IN AN AREA WHERE NO TOWER IS AUTHORIZED AT
15 ALL."

16 Petitioners' argument in this assignment of error is based
17 upon the proposition that the property will be zoned R-10. In
18 the R-10 zone, a radio and television transmitter is a
19 conditional use. City Code Section 33.22.240(23). Petitioners
20 say there is no mention made of any towers, and petitioners
21 cite to testimony in the record showing that there are types of
22 transmitters that need no towers. Record 181-183. Petitioners
23 add a comparison to the city's FF zone which specifically
24 provides for a "radio and television transmitter and
25 tower...." City Code Section 33.18.240(9). The Board
26 understands petitioners to argue the difference in language
shows a legislative intent to exclude radio and television

1 transmitter towers from the R-10 zone.

2 The city argues petitioners' second assignment of error
3 "ignores the fact that the County zoning regulations were the
4 operative standards for approving McClanathan's request to
5 construct a radio tower." Brief of Respondent City at 13. The
6 city did not misconstrue the provisions of its own code, but
7 properly applied the county code. See Record 217, 218, 238,
8 245 for county code provisions.

9 The Board believes this assignment of error is controlled
10 by its holding under the first assignment of error. The issue
11 is not the possible erroneous construction of the city's own
12 code, but the adequacy of the city's application of the
13 Multnomah County Code. Petitioners have not argued in this
14 assignment of error that the Multnomah County Code has been
15 applied improperly.

16 This assignment of error is denied.⁶

17 ASSIGNMENT OF ERROR NO. 3

18 "III. THE CITY COUNCIL DECISION FAILS TO MEET ZONING
19 CRITERIA."

20 A. Compliance with county community service criteria.

21 As the Board understands the first part of the third
22 assignment of error, petitioners complain the proposed tower
23 violates Section 11.15.7020 of the Multnomah County Zoning
24 Ordinance. Specifically, petitioners allege "the tower would
25 change the visual character of the area and violate one of the
26 zoning criteria." See Record 311, 313-314.

1 Multnomah County Zoning Ordinance Section 11.15.7020(A)
2 provides community service uses may be approved only upon
3 finding that the proposal, among other things, "is consistent
4 with the character of the area." The Board understands
5 petitioners to attack only this first of the six community
6 service approval criteria.⁷

7 The city's findings say the general topographical
8 characteristics of the area "may be described as steep and
9 heavily wooded." Record 239. The adjacent parcels immediately
10 north, south and east are wooded and undeveloped. The city
11 found no major trees would be removed as a result of erecting
12 the tower, and the city points to photographs showing that the
13 top of the tower will be barely visible above existing trees.
14 See Record 122-124, 274 275. Trees in the area are from 10 to
15 100 feet in height "and are dense, not only on the subject
16 site, but everywhere in the undeveloped area." Record 240.
17 The city found 99% of the site would "remain in its natural
18 state." Record 234. The tower would be in the approximate
19 center of the site. See drawing, Record 250. The city
20 findings also mention two residential subdivisions in the area
21 and note the presence, to the northeast, of a non-conforming
22 and "possibly illegal" antenna. Record 239.

23 The city found the tower would be "all but obscured from
24 view due to the southwest facing slope of the site along
25 Skyline and the amount of vegetation on the site." Record 239.
26 The city found a view of the tower from prime living areas to

1 be impossible because dwellings in the Pan Vista Subdivision
2 are generally situated "in a natural depression on the west
3 side of Northwest Skyline Boulevard" causing the dwellings to
4 be below the elevation of the proposed tower. Ibid 239. The
5 findings say, however, there is one dwelling about seven feet
6 from the subject site. The front of this house faces Skyline
7 "while its view and patio face to the west, thereby further
8 obscuring the proposed tower from view." Ibid. The findings
9 add that the tower may be briefly seen by motorists on Skyline
10 Boulevard at two locations. Ibid. The Board understands the
11 city to conclude from these facts and others that the tower
12 will not adversely affect the character of the area and
13 otherwise meets all the criteria listed for community service
14 uses in MCC 11.15.7020.

15 In an apparent effort to insure the project is in keeping
16 with the character of the area, the city imposed conditions.
17 The city limited the tower to 90 feet above ground. Record
18 003. The city prohibited removal of any trees greater than six
19 inches in diameter, and required visibility of the tower's
20 lower 50 feet and its associated building be minimized

21 "from any point along Northwest Skyline or along the
22 north property line. Supplementary landscaping or
23 screening may be required to meet this condition.
Existing vegetation should be retained to the greatest
possible extent." Record 009.

24 Further, the tower may not be lighted and must be painted green
25 "in order to blend with the vegetation on the site." The city
26 required that its noise regulations of residential zones be

1 met, that there be one off-street parking place only and that
2 it not be visible from Skyline or the north property line.

3 The Board believes the city findings as a whole adequately
4 show the proposed use will be consistent with the "character of
5 the area." The Board recognizes there is residential
6 development potential for this property, but the Board believes
7 the criterion calls for an analysis of the use against the
8 present "character of the area," not what the area may become.
9 Further, the Board notes the county found that "R-10
10 development is not possible now nor in the future without
11 several major regional and political changes in order to
12 provide an urban level of services." Record 218. The Board
13 declines to speculate, as petitioners appear to urge, that full
14 residential development is a foregone conclusion for this
15 immediate area.

16 B. Compliance with county comprehensive plan provisions.

17 The second part of petitioners' third assignment of error
18 challenges compliance with four policies in the Multnomah
19 County Comprehensive Plan. The first of these, Policy 2
20 controlling off-site effects, is alleged to have been broken
21 because the visual impact of the tower cannot be mitigated, and
22 when more houses are built, the tower will be even more
23 visible.

24 Policy 2, Off-Site Effects policy, of the County's
25 Comprehensive Framework Plan provides as follows:

26 "The county's policy is to apply conditions to its

1 approval of land use actions where it is necessary to:

2 "(A) Protect the public from the potentially
deleterious effects of the proposed use; or

3 "(B) Fulfill the need for public service demands
4 created by the proposed use.

5 The introduction to this policy states:

6 "Development proposals which meet all required
standards have 'off-site' effects on surrounding
7 properties or the community. Therefore, the county
may attach appropriate conditions to approval of all
8 the land use actions minimize these effects."

9 Respondent City argues the conditions are consistent with
10 this policy. The city notes the hearings officer and the
11 council identified two impacts of the tower on the
12 neighborhood. The first impact is a possible visual blight and
13 the second is a health hazard from radiation emission. The
14 council concluded the tower would have little negative visual
15 impact on the neighborhood, whether the neighborhood remains in
16 its current undeveloped state or in a fully developed state.
17 See Record 214-245. Further, the conditions imposed were
18 specifically designed to limit any visual impact the tower
19 might have.

20 As to radiation effects, the city found radiation emissions
21 from the tower equal one microwatt per square centimeter. That
22 amount is below the 100 and 200 microwatt levels established as
23 limits by the city and county respectively. See Record 219,
24 221-223, 232-233, 345. Further, conditions were imposed
25 establishing a five microwatt maximum emission level and the
26 submittal of annual reports showing compliance with this

1 condition. Record 226. The city concludes the council has
2 done precisely what Multnomah County Comprehensive Plan Policy
3 2 requires it to do.

4 Respondent City is correct. All Policy 2 does is require
5 the county (and in this case the city) to impose conditions
6 which will minimize off-site effects. The Board believes there
7 is substantial evidence in the record to show the conditions
8 imposed will perform that function. See also the discussion at
9 page 11-12, supra. The conditions protect the area from
10 possible visual blight, and they control radio emission to a
11 level the city found to "pose no hazards to human health." See
12 Record 226, 241, 298.

13 The next policy alleged to have been broken is Policy 12,
14 the Multiple Use Forest Area policy. Policy 12 provides only
15 land outside the urban growth boundary can be maintained as
16 forest land. Petitioners argue that "because this site is
17 inside the UGB and urbanization is imminent, it must be treated
18 as residential." Petition for Review at 13.

19 The city posits petitioner must be contending that the city
20 will violate Policy 12 of the plan if it imposes a forest zone
21 on the annexed property. The city argues this allegation is
22 premature and not relevant to this appeal. The city has
23 applied no zone. Also, the city council addressed policy 12 in
24 the findings and found the policy was not applicable because
25 the property was within the urban growth boundary, according to
26 the city. See Record 242-243.

1 Petitioners have not adequately explained how Policy 12
2 applies to prohibit the city's action in this instance. While
3 Policy 12 may prohibit zoning the property for forest use,
4 nothing in the county plan cited to the Board mandates the
5 property be zoned residential.⁸ Moreover, as soon as the
6 city acts to zone the property, the city's comprehensive plan,
7 not the county plan, controls. This allegation requires the
8 Board to speculate on the future zoning of the property. The
9 Board will not speculate on the future city zone for the
10 subject property. The Board finds no violation of Policy 12.

11 Petitioners next claim Policy 20 controlling the
12 Arrangement of Land Uses is broken because the tower

13 "does not reinforce the residential identity of the
14 area or create a sense of pride. Quite the contrary,
15 it clutters the horizon, and would be a new use in
conflict with the dominant residential character of
the area." Petition for Review at 13.

16 Policy 20 provides as follows:

17 "The county's policy is to support higher densities
18 and mixed land uses within the framework of scale,
location and design standards which:

19 "(A) Assume a complementary blend of uses;

20 "(B) Reinforce community identity;

21 "(C) Create a sense of pride and belonging;

22 "(D) Maintain or create neighborhood long term
23 stability."

24 The stated purpose of this policy is to "achieve a community
25 which contains the services supportive of daily human
26 activities and needs." Multnomah County Comprehensive

1 Framework Plan at 7-11.

2 The city argues evidence was presented to the city council
3 showing this location to be optimal for radio and television
4 towers. See Record 134-175. The city says the fact the
5 county's zoning code permits a tower in the MUF 19 zone shows a
6 legislative determination that a tower would be compatible with
7 other uses in the zone. The Board understands the city to be
8 arguing that the tower does not break this policy because it
9 provides a service which is "supportive of daily human
10 activities and needs," and does not injure the character of the
11 surrounding neighborhood.

12 This policy is a declaration of policy and an encouragement
13 to the county to support high densities and mixed land uses so
14 long as the densities and uses complement community identity,
15 pride and neighborhood stability. Policy 20 is an admonition
16 to county planners and the county governing body (and, arguably
17 in this case, the city) to pay particular attention to the
18 county's policy of higher density when deciding what uses go
19 into what zones and where those zones are to be allowed. The
20 policy, therefore, seems of little value in considering a
21 specific development proposal. To the extent the petitioners
22 urge and the city agrees the policy applies to this specific
23 use proposal, the policy requires an analysis of how well the
24 use "fits into the community." The Board believes this test
25 has been met. See the discussion under assignment of error
26 3(A), supra.

1 The last comprehensive plan challenge is based on Policy
2 31. Policy 31, "Community Facilities and Services Locational
3 Criteria," is alleged to be violated because

4 "buffering cannot screen the tower completely from
5 adjacent uses, and further, the tower does not blend
6 into the residential character of the area but reaches
above it with a non-residential structure." Petition
for Review at 13.

7 Policy 31 provides:

8 "The policy of the county to provide for the location
9 of community facilities in the manner which accords
with:

10 "(A) The applicable policies in this plan;

11 "(B) The locational criteria applicable to the scale
12 and standards of the use." Comprehensive
Framework Plan at 8-53.

13 A radio transmitting tower is classified as a "community
14 service foundation" use. Comprehensive Framework Plan at
15 8-54. Included in the criteria for citing such uses are the
16 following:

17 "B. Impact of the Proposed Change on Adjacent Lands

18 "(1) Associated lights and noise will not
19 interfere with the activities and uses on
surrounding properties.

20 "(2) Large scale construction and parking lots
can be buffered from the adjacent uses.

21 "(3) Privacy of adjacent residential development
22 can be maintained.

23 "(4) Community identity can be maintained through
24 design and site layout which blends the
structure into the residential character of
the area.

25 "(5) Buffering can be used to screen the project
26 from adjacent uses.

1 "C. Site Characteristics

2 "(1) The unique natural features, if any, can be
3 incorporated into the design of the
4 facilities or arrangement of land uses.

5 "(2) The land intended for development has an
6 average site topography of less than 20%, if
7 it can be demonstrated that through
8 engineering techniques, all limitations to
9 development and the provision of services
10 can be mitigated.

11 "(3) The site is of a size which can accommodate
12 the present and future uses and is of a
13 shape which allows for a site layout in a
14 manner which maximizes user convenience and
15 energy conservation." Comprehensive
16 Framework Plan at 8-55 - 8-56.

17 The city advises that petitioners have not demonstrated "in
18 what manner the council's findings and conditions are in
19 error," and urges this portion of the third assignment of error
20 be dismissed. In lieu of dismissal, the city argues the
21 comments applicable to Policies 2 and 20 of the county
22 Comprehensive Framework Plan are useful here. The city urges
23 that Policy 31 requires buffering of a project from adjacent
24 uses, not the absolute complete screening of the use as
25 apparently alleged. The city points out the tower will be
26 somewhere near the center of a six acre site and 99 percent of
27 the site will remain in its natural condition. Record 240, 250.

28 The Board finds no violation of Policy 31 as alleged. The
29 policy refers the reader to the plan for applicable policies
30 which control the use and to "locational criteria applicable to
31 the scale and standards of the use." The Board takes

1 "locational criteria" to be the criteria applicable to the
2 "community service foundation" uses. The criteria do not
3 require the use become invisible or undetectable. The impact
4 of the use on adjacent lands must not interfere with activities
5 on adjacent property, nor interfere with privacy or community
6 identity. See "B. Impact of the Proposed Change on Adjacent
7 Lands" quoted at page 17, supra. The Board believes the city
8 has adequately shown that the tower will blend with existing
9 features and will be sufficiently buffered from residential
10 uses so as to fulfill the cited plan policies and zoning
11 ordinance provisions. The Board does not believe more is
12 required by Policy 31. See also the discussion under
13 Assignment of Error III(A), supra.

14 This assignment of error is denied.

15 ASSIGNMENT OF ERROR NO. 4

16 "IV. THE CITY COUNCIL'S DECISION IN GRANTING THE
17 CONDITIONAL USE IS NOT SUPPORTED BY SUBSTANTIAL
18 EVIDENCE IN THE WHOLE RECORD."

19 In this assignment of error, petitioners first allege the
20 city made erroneous assumptions including the assumptions that
21 a tower is a conditional use in the R-10 and FF zones and that
22 urban services, including sewer and water, were not available
23 to the site. Petitioners point to evidence in the record
24 showing that services are available. Petitioners say there is
25 no basis in fact for considering the area as vacant unusable
forest land.

26 The Board notes it has already determined that the R-10 and

1 FF zoning criteria are not applicable here. See Assignment of
2 Error I, supra. As to the petitioners' concern that urban
3 services are indeed available to the site, the Board finds
4 whether or not urban services are available to be of little
5 consequence. Petitioners cite no provision in the county
6 regulations that requires residential zoning or prohibits
7 community service uses where urban services are present. The
8 tower is clearly an available conditional use in the County MUF
9 19 zone. The city has met the criteria required for siting the
10 tower in the MUF 19 zone.

11 Petitioners next assert the city made an erroneous
12 assumption the tower was desirable to the public convenience
13 and welfare as required by Section 33.106.010 of its zoning
14 ordinance. Petitioners allege the tower will serve private
15 radio telephone communications businesses. It is not a public
16 convenience, therefore, according to petitioners.

17 The city responds that petitioners ignore the "plain
18 language of the city's zoning code." The city argues the
19 zoning code does not limit conditional uses to those proposed
20 by governmental agencies. The Board understands the city to be
21 arguing that "public convenience and welfare" does not mean
22 "governmental convenience and welfare."

23 The Board finds compliance with Section 33.106.010 of the
24 city zoning ordinance unnecessary, since compliance with the
25 county code is the appropriate standard. The city's action in
26 granting a conditional use and variance, required by city

1 zoning ordinance, was anticipatory of future zoning. The Board
2 does not address whether or not the city could issue a
3 conditional use and variance in this manner. It is sufficient
4 that the city applied county zoning regulations and did so
5 correctly.

6 Last, petitioners say the city was wrong in concluding
7 there was a need for the tower because it was included as a
8 conditional use in the city's zoning ordinance. There is no
9 "tower" mentioned in City Code Section 33.22.240, the R-10
10 zone.⁹ Petitioners claim the city council ignored evidence
11 that there is no present need for the towers because a
12 Washington State Department of Natural Resources letter said
13 there are enough spaces on its towers for the next ten years,
14 Record 295, and because new technology exists to make towers
15 unnecessary and redundant. Record 191-183.

16 The Board will not review this proposal against City Code
17 Section 33.22.240, the R-10 zone provisions, for the reasons
18 stated in Assignment of Error No. 1. The Board will treat this
19 allegation as a claim that no "need" has been shown for the
20 tower.

21 The Board has not been cited to any "need" requirement in
22 the applicable Multnomah County regulations. The Board will
23 not review a proposal against a "need" or alternative site
24 requirement without a showing by petitioners that such
25 standards exist and where they are to be found in the county
26 land use regulations.

1 This assignment of error is denied.

2 ASSIGNMENT OF ERROR NO. 5

3 "V. THE APPLICANT'S CASE HAS BEEN FLAWED FROM THE
4 BEGINNING BY FAILURE TO GIVE DUE NOTICE OF
5 HEARING TO ONE OR MORE PETITIONER-NEIGHBORS,
THEREBY PREJUDICING THEIR RIGHTS TO OPPOSE
ADEQUATELY THE APPLICATION."

6 Petitioners allege the notice to neighbors within 400 feet
7 of the proposed use did not adequately advise of the date of
8 the hearing. Further, a property owner immediately to the
9 north of the site has still not received notice though the city
10 auditor certified that notice was sent by ordinary mail,
11 according to petitioners. Petitioner Fedde alleges he learned
12 of the August 30, 1982 hearing before the hearings officer only
13 through his own telephone call to the city. Petitioner Zucker
14 asked for notice but did not get it until "a random telephone
15 call to city hall on Friday, August 27, 1982, indicated there
16 was to be a hearing the following Monday." The Board
17 understands petitioners to argue the city violated petitioners'
18 right to due process of law and further prejudiced petitioners
19 by a procedure that did not allow petitioners to adequately
20 oppose this conditional use application.¹⁰

21 The city argues the record shows that all notices satisfied
22 applicable city code provisions. Property owners within 400
23 feet of the proposed site were sent notice. City Code
24 33.106.020. Only Petitioner Rohlsson lives within the 400 foot
25 limit. Record 362-363. Petitioners Fedde and Zucker live
26 outside of that area. Notice of the hearings officer's hearing

1 and the initial proceeding before the city council was sent to
2 Rohlsson. Record 201, 360, 362-363.

3 The city also argues that even if petitioners were not
4 properly notified, any error was cured at the hearings before
5 the city council because Petitioner Fedde, representative of
6 all the petitioners, was notified of all hearings before the
7 city council orally and by letter. See Record 59, 64, 69, 76,
8 201. Also, the record does not show petitioners to have
9 complained to the city that they had inadequate time to prepare
10 their case, according to the city.

11 The Board finds no prejudice to petitioners and no
12 violation of petitioners' due process rights as alleged. In
13 order for this Board to reverse or remand for a procedural
14 error, petitioners must have been prejudiced in some fashion.
15 See Oregon Laws 1979, ch 772, sec 5(4)(a)(B) as amended by
16 Oregon Laws 1981, ch 748. Here, the allegation of prejudice is
17 that petitioners were not afforded ample time to prepare their
18 case before the planning commission. There is no allegation
19 that the city council proceeding afforded inadequate notice or
20 opportunity to present and rebut evidence or make arguments.
21 The city council decision was de novo, and any errors occurring
22 before the planning commission passed out of existence with the
23 new city council proceeding. See City Code Section 33.114.070.

24 This assignment of error is denied.

25 ASSIGNMENT OF ERROR NO. 6

26 "VI. UPON OBJECTION BEING MADE, THE HEARINGS OFFICER

1 ERRED IN NOT DISQUALIFYING HIMSELF."

2 Petitioners allege as follows:

3 "The same hearings officer, who had heard the case
4 when it was before the County and was overruled, and
5 whose report was found to contain numerous errors,
6 appeared also as the hearings officer when it
7 reappeared before the City. Prior to the hearing
8 there were objections. He refused to disqualify
9 himself, stating that the other hearings officer was
10 on vacation. It was unethical for him to continue in
11 the face of objections."

12 The Board understands this assignment of error to allege
13 that petitioners were denied an impartial tribunal. See Fasano
14 v. Bd. of Co. Comm'rs., 264 Or 574, 507 P2d 23 (1975).

15 Participant McClanathan and Respondent City argue there has
16 been no claim that Mr. Norr, the hearings officer, had any
17 private pecuniary interest in the case which would cause him to
18 disqualify himself.

19 Petitioners have not cited this Board to any legal
20 authority to support the proposition that the facts alleged
21 result in any need for disqualification. The Board is unable
22 to find any reason for Mr. Norr to disqualify himself. The
23 fact that he heard the case twice does not give rise to any
24 prejudice. If hearing a case twice were to give rise to
25 prejudice, then courts, local governments and quasi-judicial
26 boards and officers would be unable to rehear cases. The
27 result of such a policy would be a needless shifting of cases
28 between individuals just to avoid the potential appearance of
29 bias.

1 This assignment of error is denied.

2 ASSIGNMENT OF ERROR NO. 7

3 "VI. THE CITY COUNCIL GRANT OF A CONDITIONAL USE
4 VIOLATED THE STATE-WIDE PLANNING GOALS UNDER THE
5 COMPREHENSIVE PLAN."

6 Under this assignment of error, petitioners do not claim
7 violation of statewide planning goals but claim once again that
8 the R-10 designation is the only reasonable designation that may
9 be applied to this property. Because the R-10 designation is
10 the only reasonable designation to be made, a use not compatible
11 with a residential use should not be allowed. Petitioners
12 allege "this is a residential area, not a commercial zone. To
13 permit a commercial use in a residential area violates the
14 Comprehensive Plan." Petition for Review at 19.

15 The Board held in Assignment of Error I, supra, that the
16 conditional use is to be tested against the MUF 19 county zone
17 and not the possible city R-10 zone. The Board believes it has
18 adequately discussed this issue.

19 This assignment of error is denied.

20 The decision of the City of Portland is affirmed.
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FOOTNOTES

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3 1

The Board does not understand the participant to challenge petitioners' standing on the grounds that petitioners have failed to allege the requisite appearance before the governing body.

6 2

"'Person' means any individual, partnership, corporation, association, governmental subdivision or agency or public or private organization of any kind." ORS 197.015(14).

9 3

Participant does not allege the petitioners failed to appear before the "local government...governing body."

11 4

The Board does not reach the matter of the four points regarding representational standing raised by participant and found in Footnote 1 in Benton County v Friends of Benton County, 294 Or supra at 81-82.

15 5

This section is cited as Section 7.030 of Multnomah County Ordinance No. 205, in the record.

17 6

The Board notes the county did evaluate this request under the provisions of its own zoning regulations. The city considered this request as if the property were zoned R-10 in order, according to the city attorney, "to avoid duplicative and unnecessary hearings by the City." Brief of Respondent City at 11, Footnote 4. The city considered R-10 zoning imminent and wished to avoid going through a new set of hearings in order to allow the tower. The city apparently believed the approval as a community service use under the county code "would be of questionable value once the city zoning was imposed on the property." Brief of Respondent City at 11, Footnote 4. The Board does not know why this approval would be of "questionable value" after city rezoning of the property.

It is not necessary to test the city's decision against its own R-10 criteria. The property has not yet been zoned R-10.

1 Facts and circumstances may arise that would cause the city to
2 zone the property in some other manner. Any comments about the
3 city's discussion of the request under R-10 zoning would have
no force or effect but would be in the nature of advice only.

4 The Board understands the city to have applied its own
5 procedural ordinances to this application.

6 7

The criteria are as follows:

7 "COMMUNITY SERVICE APPROVAL CRITERIA

8 "In approving a Community Service Use, the approval
9 authority shall find that the proposal:

10 "(A) Is consistent with the character of the area;

11 "(B) Will not adversely affect natural resources;

12 "(C) Will not conflict with farm or forest uses in the
area;

13 "(D) Will not require public services other than those
14 existing or program for the area;

15 "(E) Will not create hazardous conditions; and

16 "(F) Will satisfy the applicable policies of the
17 comprehensive plan." MCC 11.15.7020 cited in Petition
for Review as Section 7.027 of the Multnomah County
Ordinance No. 205.

18 8

19 The Board is not cited to any city policies about forest
20 use.

21 9

22 Petitioners again argue it is the R-10 zone and its
23 appropriate permitted and conditional uses that applies. See
Assignment of Error No. 1, supra.

24 10

25 Petitioners make reference to Goal 1. The Board does not
26 understand this reference to be an allegation Goal 1 has been
broken but a further support for the proposition that
petitioners were unable to become involved in this process

1 because they were given no notice. The Board notes the city
2 has proceeded under its own rules of procedure. The city's
3 (and the county's) comprehensive plan and implementing
4 ordinances have been acknowledged by the Land Conservation and
5 Development Commission, including those provisions controlling
6 procedures for hearing conditional uses. The Board will not
7 review the decision against the goals where an acknowledged
8 plan and ordinance are in effect. See Fujimoto v LCDC, 52 Or
9 App 875, 630 P2d 364; rev den, 291 Or 662 (1981) and Byrd v
10 Stringer, ___ Or ___ (SC 29107, Slip Opinion 19, 1983).

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