BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BRUCE R. MELAND and Neighbors Near Hamehook & Pioneer Loop Roads in Rural Bend Area,	)	
Petitioners,	)	LUBA No. 83-086
vs.	)	FINAL OPINION AND ORDER
DESCHUTES COUNTY,	)	
Respondent.	)	

Appeal from Deschutes County.

Paul J. Speck, Bend, filed the Petition for Review and argued the cause on behalf of Petitioner Meland.

Robert S. Lovlien, Bend, filed the response brief and argued the cause on behalf of Applicant/Participant, KBND, Inc. With him on the brief were Gray, Fancher, Holmes & Hurley.

No response by Deschutes County.

DUBAY, Referee; BAGG, Chief Referee; KRESSEL, Referee; participated in this decision.

AFFIRMED 01/25/84

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1983, ch 827.

Opinion by DuBay.

NATURE OF THE DECISION

Deschutes County approved a site plan for location of three radio transmission towers, and a neighbor[1] appeals that decision.

FACTS

The applicant wants to place three towers, each 230 feet high, on land zoned for exclusive farm use, designated EFU-20. The zoning ordinance does not list radio transmission towers as allowed uses in the EFU-20 zoning district but does allow a "utility facility necessary for public service" as a permitted use. The ordinance defines a "utility facility" as follows:

> "Any major structure owned or operated by a public, 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 byproducts, and including power transmission lines, major trunk pipelines, power substations, dams, water towers, sewage lagoons, landfills and similar facilities, but excluding local sewer, water, gas, telephone and power distribution lines, and similar minor facilities allowed in any zone." §1.030(134) Deschutes County Zoning Ordinance No. PL-15.

The county found radio towers were intended to be included within the definition of a "utility facility necessary for public service" and thus were permitted within the EFU-20 zone.

FIRST ASSIGNMENT OF ERROR

Petitioner Meland claims the county misconstrued its own zoning ordinance. He asserts radio towers are not a "utility facility" on two bases. First, petitioner argues a radio tower

is neither listed in the definition above nor similar to the facilities that are listed. He relies on the rule of statutory construction that states a term denoting a general class, preceded or followed by a list of specific items illustrating the class includes only members of the class similar to the listed items.[2]

Petitioner's second argument is that radio towers are specifically named as allowed uses in one zone in the county ordinance, the Rural Service Center zone, but are not listed as allowed uses in the EFU-20 zone. This fact, he contends, implies radio towers were not intended to be allowed in the EFU-20 zone.

The findings[3] note the definition problem in Section 1.030 of the ordinance and address the question by reliance on case law and an opinion of the Oregon Attorney General. The findings also refer to the holding in Pruzan v. Redmond, 374 P2d 1002 (Wash. 1962), that a radio transmission tower was a public utility within the meaning of a county zoning ordinance. The Court there stated:

> "The term public utility, with which we are here concerned, does not include the distinction between public ownership and private ownership of a utility. The question is whether the privately owned facility, in the instant case, is so impressed with a public interest that it comes within the field of public regulation and, as such, is a public utility within the broad meaning of that term." Pruzan v. Redmond, supra, 374 P2d at 1004 - 1005.

The opinion of the attorney general relied on in the

findings, (Opinion No. 8056, dated August 19, 1981) answered the question "(i)s a radio transmission tower a 'utility facility necessary for public service,' which is a permitted non-farm use under ORS 215.213(1)(d) in an area zoned for exclusive farm use?" After consideration of the Pruzan case as well as cases from other jurisdictions holding a radio transmission tower is not a public utility, the opinion concluded a "radio transmission tower is clearly a utility facility." 42 Op. Att'y Gen. 77, 80 (1981).

The county's findings note the applicant's radio station is the primary radio station for emergency broadcasting services and linked to the county's civil defense communications system. The county found the radio station to be conducted in such a manner as to affect the community at large, supplying the public "with a commodity or service, a public consequence or need." Record at 12. The findings conclude it was the legislative intent to include a radio tower as a utility facility necessary for public service.

An interpretation by a local governing body of its own ordinances is ordinarily given some weight and will be accepted by this Board and the courts, unless clearly contrary to the express language of the ordinance. Brady v. Douglas County, 7 Or LUBA 251, 262 (1983). Alluis v. Marion County, 7 Or LUBA 98, 102 (1982). See also Cascade Broadcasting v. Groener, 51 Or App 533, 626 P2d 386 (1981); Bienz v. City of Dayton, 29 Or App 761, 776, 280 P2d 171 (1977).

Eliminating the inapplicable words in the county's definition of a utility facility in Section 1.030 leaves:

> "Any major structures owned or operated by a...communication...company for the transmission, (or) distribution...of its products...."

It is possible to interpret that definition to include radio transmission towers without resort to any rules of construction. The rule of ejusdem generis urged by petitioner as mandating an interpretation different than the county is not an absolute rule. It is only a tool to help arrive at the basic question of legislative intent. Moore v. Schermerhorn, 210 Or 23, 31, 307 P2d 483 (1957). Moreover, there is another reason the rule is not helpful here. The rule comes into play when there is a listing of specific items as representative of a class described only in general terms. One of the general terms in the county's definition is a major structure of a communication company. The specific items listed as included in the general class are "power transmission lines, major trunk pipelines, power substations, dams, water towers, sewage lagoons, landfills and similar facilities." None of those specific items are representative of the general class of communication facilities, nor do they give examples to help determine the type of facilities intended to be described in the general category of communication facilities. The rule, therefore, does not help interpretation under these circumstances.

With regard to petitioner's second argument, the findings

state there is no discernable reason for specific inclusion of radio towers in the Rural Service Center zone and not in any other. The county seems to be saying the provision expressly permitting radio towers is mere surplusage. We agree. In light of the broad definitional language in Section 1.030, which reasonably can be interpreted to include radio transmission towers, the board of commissioners' ruling will be upheld here. This assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner contends that even if a radio tower is considered to be a utility facility, it must also be found to be "necessary for public service." The county failed to make the required finding, petitioner says, of a necessity to place the towers in the EFU zone. The proper findings, according to petitioner, require a showing of a substantial hardship, not a mere inconvenience, without the towers in the proposed location and lack of other suitable locations.

The phrase "utility facility necessary for public service" in Section 1.030 is ambiguous because of the difficulty in determining what it is that must be necessary. At least three interpretations are possible.

Petitioner ascribes two different meanings to the phrase, either of which requires findings missing from the county's order. The first is that the facility must be found to provide a necessary public service. That meaning would require a finding that, without the service, there would be substantial

hardship or difficulty. The second meaning proposed by petitioner is that the term requires a finding that it is necessary to locate the facility in the EFU zone to serve the residents there.

Respondent county, on the other hand, asserts a third meaning. It contends the phrase means a facility that is necessary in order for an entity to provide a public service. That meaning is expressed in the findings:

> "It supplies the public with a commodity or service, a public consequence or need. The transmission tower and maintenance building are facilities which are necessary to provide that service." (emphasis added) Record at 5.

This latter meaning was the interpretation of the Oregon Attorney General relied upon by the county. That opinion considered the statutory term "utility facilities necessary for public service," as used in ORS 215.213(1), and rejected the second interpretation urged by petitioner.[4] The county zoning ordinance does not indicate an intent that permitted uses are to be located in EFU zones only if they cannot be located elsewhere. Petitioner says that intent is implied or else the word "necessary" is superfluous. However, if the word is deemed to describe a facility as the county has interpreted the phrase - i.e., a facility which is necessary to provide the public service of radio transmission - the word is not superfluous or redundant. It is there to distinguish necessary facilities from unnecessary ones, such as advertising signs or possibly storage yards.[5]

The interpretation by the county is not, therefore, contrary to the express terms of the ordinance. It is also reasonable. This assignment of error is denied.

The decision is affirmed.

FOOTNOTES

[1] Bruce Meland is the only petitioner. Emil Lohrke filed a Statement of Intent to Participate and did appear at oral argument in this matter. There was no appearance by or on behalf of any association of neighbors.

[2] See the discussion of "ejusdem generis" in 2A Sands, Sutherland Statutory Construction, §47.17. 1973.

[3] The findings were those of a hearings officer, adopted by the county commissioners upon appeal.

[4] 42 Op. Att'y Gen. 77, 81 (1981).

[5] Whether signs or storage yards are facilities necessary for the provision of services is not before LUBA, and this opinion does not decide that issue.