

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

Jun 19 6 08 PM '85

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2
3 JUANITA CARR, LORI GERRITZ,)
 GEORGE GUST, ROBERT C.)
 4 HEMPHILL, DENNIS JAMES,)
 MICHAEL LIEBERMAN, ELEANOR)
 5 PEYTON, JOHN RYAN, ART)
 WILLIAMS and ROGER YUNKER,)
 6)
 Petitioners,)
 7)
 vs.)
 8)
 WASHINGTON COUNTY, OREGON,)
 9 and GTE MOBILNET, INC.,)
)
 10 Respondents.)

LUBA No. 84-104

FINAL OPINION
AND ORDER

11 Appeal from Washington County.

12 DeMar L. Batchelor, Hillsboro, filed the Petition for
13 Review and argued the cause on behalf of Petitioners. With him
14 on the brief were Schwenn, Bradley, Batchelor, Brisbee and
Stockton.

15 Dan R. Olsen, Hillsboro, filed the response brief and
argued the cause on behalf of Respondent County.

16 Susan M. Quick and Jack L. Orchard, Portland, filed the
17 response brief and Susan M. Quick argued the cause on behalf of
Respondent GTE Mobilnet, Inc. With them on the brief were
18 Ball, Janik and Novack.

19 BAGG, Chief Referee; DuBAY, Referee; participated in this
decision.

20 KRESSEL, Referee; Concurring.

21
22 REMANDED 06/19/85

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioners appeal approval for a cellular telephone
4 transmitter/receiver and antenna "monopole."¹

5 FACTS

6 The site of the structure is an 18 acre parcel near the
7 crest of Cooper Mountain in eastern Washington County. The
8 area is zoned RR-5 (Rural Residential-5 Acre Minimum Lot Size)
9 under the Washington County Comprehensive Plan and zoning
10 regulations. The property is outside any urban growth
11 boundary, but there are residential uses in the area.

12 The tower is to be 150 feet high. There is a mixture of
13 fir, maple and cedar trees in the vicinity, and the highest
14 tree stands approximately 75 feet above ground level. There
15 are two other communication towers in the area, each 110 feet
16 high.

17 The application was processed pursuant to the Washington
18 County Community Development Code, Section 202-2, et seq, as a
19 "Type II" proceeding. A Type II proceeding is one involving
20 uses or development "for which review criteria are reasonably
21 objective, requiring only limited discretion." Washington
22 County Development Code (hereinafter cited as CDC), Section
23 202-2.1. A Type II proceeding allows the imposition of
24 conditions of approval as necessary to minimize impacts on
25 nearby uses or insure compliance with the code.

26 The county's Director of Land Use and Transportation

1 approved the application on July 26, 1984. His approval
2 included conditions about site development. The approval was
3 appealed to the county's hearings officer who upheld the
4 approval with minor amendments to the conditions imposed by the
5 Director. The hearings officer's approval was appealed to the
6 county board of commissioners, and the board upheld the prior
7 decisions subject to the same conditions. This appeal followed.

8 ASSIGNMENT OF ERROR NO. 1

9 "The Findings and Conclusions adopted by the Board of
10 Commissioners relating to compliance with applicable
11 Development Review criteria violate Section 207-3 of
12 the Community Development Code."

13 Under this assignment of error petitioners complain there
14 are no findings supported by substantial evidence to show
15 compliance with CDC Section 410 (controlling slopes and
16 grading) and Section 411 (controlling screening and
17 buffering). Petitioners advise that Section 410-2.2 of the
18 ordinance requires that applications for development permits
19 include a grading plan and further that Section 411-6 of the
20 ordinance requires a screening and buffering plan. No such
21 plans were submitted, according to petitioners.²

22 The Washington County Development Code is somewhat
23 difficult to follow. There are development standards for rural
24 and urban areas throughout various sections of the code. The
25 key to utilizing the code, however, is found at Section 403
26 entitled "Applicability of Development Standards (Article
IV)." At Section 403-2, standards for development in urban

1 areas are listed. At Section 403-3, standards for development
2 in rural areas are listed. While there is some overlap of
3 standards, it is clear that the standards applicable to rural
4 developments are different from and, to a degree, less rigorous
5 than the development standards applicable to urban areas. Of
6 importance to this first assignment of error is CDC Section
7 403-3.9. This section makes applicable certain portions of
8 Section 410, Slopes and Grading, when developing in rural areas.

9 CDC Section 403-3.9 requires compliance with Section
10 410-2.1, 2.3, and 2.4 and 410-5. Section 410-2.1 simply
11 requires conformity with the uniform building code. It is not,
12 therefore, a criterion which the county commission must find
13 the applicant to have fulfilled. Section 410-2.3 lists
14 exceptions to the requirement of a grading permit for certain
15 uses, and under certain conditions. While we understand the
16 county and the applicant to argue that the exceptions listed
17 under CDC Section 410-2.3 make it clear that no grading permit
18 is required for the proposed use, there are no findings in the
19 county's order tying this use to one of the enumerated
20 exceptions in Section 410-2.3.³ Also, we are cited to no
21 facts in the record which would make it obvious that other
22 listed criteria did not apply. For example, Section 410-2.4
23 requires a geologic study. The study is not required if the
24 development will occur on slopes of less than 20 percent.
25 While we understand the county and the applicant to argue the
26 slopes here are less than 20 percent, we are cited to nothing

1 in the county's record to show this fact.⁴ Because the
2 record does not demonstrate this development is exempt from
3 applicable provisions of Section 410, we believe a remand is
4 appropriate.

5 With respect to petitioners' challenge about compliance
6 with Section 411, we note that CDC Section 403-3 does not list
7 Section 411 (controlling screening and buffering) as applicable
8 in a rural area. Therefore, we decline to adopt petitioners'
9 view that the county was required to address the standards
10 included in CDC Section 411.⁵

11 Assignment of Error No. 1 also includes a claim that the
12 county violated CDC Section 404-4 by failure to show compliance
13 with certain listed sections of the county code. Section 404-4
14 is a "matrix" checklist which notes portions of the code
15 applicable under given circumstances.

16 We do not agree with petitioners. We agree with Washington
17 County that Section 404 does not apply to this proceeding. CDC
18 Section 403-3.4 provides:

19 "404 - Future - Matrix for uses outside UGB"

20 We understand this provision to mean that Section 404 is now
21 blank and that a checklist for criteria applicable outside the
22 UGB will be enacted in the future.

23 The first assignment of error is sustained, in part.

24 ASSIGNMENT OF ERROR NO. 2

25 "The Board of Commissioners erred in not addressing
26 and requiring compliance with applicable, required

1 Development Review Standard pursuant to Section 404-4
2 of the Community Development Code."

3 In this assignment of error, petitioners rely again on
4 Section 404-4, and the "matrix" therein requiring conformity
5 with various provisions of the county code. As discussed under
6 Assignment of Error No. 1, however, Section 403-3.4 makes it
7 clear that any matrix or separate checklist of criteria
8 applicable to development in a rural area will exist (if at
9 all) in the future.

10 Included in this assignment of error, however, is reference
11 to other code sections.⁶ Petitioners acknowledge the county
12 did address some of these sections, but insist the standards in
13 code Sections 405, 412 and 417 should have been addressed but
14 were not.⁷

15 Section 405 is a provision calling for a master plan or
16 analysis for a particular development. CDC Section 403-3.5
17 makes master planning applicable "only as required to meet the
18 applicable standards of 406 and as provided in 405-6, Rural
19 Plan Development (RPD)." Section 406 is the building siting
20 and architectural design section. Only parts of Section 406
21 are applicable to developments in rural areas.

22 CDC Section 403-3.6 makes Sections 406-4.2(C) and
23 406-4.2(C)(a) apply to the permit on review here. Section
24 406-4.2(C) is under a subsection entitled "Compatibility With
25 Surroundings" and provides as follows:

26 "Arrangement of structures and use areas for

1 compatibility with adjacent developments and
2 surrounding land uses, using the following design and
siting techniques:

3 "Locate and design structures and uses not to
4 obscure or degrade identified scenic views or
5 vistas from adjacent properties and public
thoroughfares, considering setbacks, building
height, bulk and landscaping...."

6
7 We find the county did address this issue in the findings
8 under a general discussion of Sections 406-3 and 406-4.2. The
9 findings rely on adequate landscaping and buffering to lessen
10 visual impacts on adjacent areas. The findings conclude that
11 the evidence provided by the applicant "along with the foliage
12 on the site will provide sufficient buffering when combined
13 with conditions of approval herein to meet the requirements of
14 Section 406-4.2." The findings conclude that while the antenna
15 can be seen from off site, there was no evidence that property
16 values would be affected or the use or enjoyment of nearby
17 residences would be affected. Because we do not understand the
18 petitioners to attack the findings under Section 406-4 in the
assignment of error, we do not find error.⁸

19 With respect to petitioners' challenge based on failure to
20 address CDC Section 412, we note first that Section 403-3.10
21 makes Section 412 applicable to this proceeding. The county
22 findings include no discussion of drainage as required by
23 Section 412. We therefore agree with petitioners that the
24 county has omitted a required analysis.

25 We are not impressed with Respondent Mobilnet's contention
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1 that Section 412 is inapplicable because the proposal does not
2 meet five criteria which trigger applicability of Section 412.
3 See CDC Section 412-2.1 - 2.5. It is correct that the
4 provisions of Section 412 do not apply where a development does
5 not meet certain minimal soil disturbance standards, but there
6 are no findings stating that the development is of a kind which
7 falls outside the minimum standards. GTE Mobilnet attempts to
8 introduce evidence submitted after the close of the county's
9 proceedings to show that slopes and soil disturbance are
10 outside the minimum standards in Section 412-2.1, et seq. As
11 discussed under Assignment of Error No. 1, our review of this
12 case is of the record of the county's decision, not a record
13 generated after the county concluded its deliberations and
14 reached a decision. ORS 197.835(8). What is missing from the
15 record is proof that otherwise apparently applicable sections
16 of the code do not apply because of the particular
17 characteristics of this development. Absent such proof or
18 facts making criteria obviously inapplicable, we must sustain
19 the challenge.

20 Petitioners' challenge based on CDC Section 417 is
21 misplaced. Section 417 of the county's ordinance requires a
22 discussion of irrigation only when Section 407 applies.
23 Section 407 applies to rural developments only in certain
24 instances. In this case, Section 407 only applies where listed
25 in the special use standards included at Section 430 of the
26 ordinance. See CDC Section 403-3.7. The special use standards

1 of Section 430 do not, as we understand them, make Section 407
2 applicable to this proceeding. CDC Section 430-109.5(B)
3 requires landscaping to "be consistent with that required by
4 the District...." The "District" is the Rural Residential-5
5 Zone. The Rural Residential-5 Zone does not require
6 landscaping. Therefore, we do not believe Section 417 is
7 applicable to this development as alleged by petitioners, and
8 the county's failure to address the standard is not a ground
9 for reversal or remand.⁹

10 The second assignment of error is sustained in part.

11 ASSIGNMENT OF ERROR NO. 3

12 "The Board of Commissioners erred in making its land
13 use decision in violation of Section 207-4 of the
Community Development Code."

14 In this assignment of error, petitioners complain that
15 particular sections of the code were inadequately addressed in
16 the county's findings. We understand petitioners to say the
17 findings fail to show compliance with all applicable
18 standards. First, petitioners complain that Section 406,
19 concerning building siting and architectural design is not
20 adequately addressed. The only portion of Section 406
21 applicable to this proceeding is Section 406-4.2(C) and
22 (C)(1). These sections provide:

23 "Arrangement of structures and use area for
24 compatibility with adjacent developments and
25 surrounding land uses, using the following design and
siting techniques:

26 "Locate and design structures and uses not to

1 obscure or degrade identified scenic views or
2 vistas from adjacent properties and public
3 thoroughfares, considering setbacks, building
4 height, bulk and landscaping;"¹⁰

5 The county's findings under Section 406-4.2(C) and (C)(1)
6 are as follows:

7 "In order to comply with Section 406-4.2 the request
8 must be compatible with surrounding areas. Of most
9 concern to the Hearings Officer would be the
10 residences close to the site, including the
11 residential development to the northwest which
12 encompasses the Fallatin Subdivision. The essential
13 question is whether adequate landscaping and buffering
14 will ameliorate visual impact on said areas. The
15 Hearings Officer finds that the evidence provided by
16 the applicant as to the type of structure involved,
17 along with the foliage [sic] on the site will provide
18 sufficient buffering when combined with conditions of
19 approval herein to meet the requirements of Section
20 406-4.2. There is no doubt that the antenna can be
21 seen from off site, however, there is no evidence that
22 this will affect the property values in the area or
23 the use and enjoyment of the residences nearby.

24 "The applicants shall be required to submit final
25 landscape plans for review conforming to Section 407
26 as a Type I process. With that provision, the request
27 is consistent with Section 407."

28 We understand compliance with this standard to be based
29 upon a condition that the applicant submit a Section 407
30 landscape plan. As noted in our discussion earlier, Section
31 407 is not directly applicable. However, the county is free to
32 require compliance with Section 407 as a condition of approval.

33 The county findings say that the type of structure or
34 foliage on the site, along with conditions of approval, will
35 show compliance with the compatibility criteria at Section
36 406-4.2(C)(1). The standards included at Section 407 are

1 detailed. Among other things, they provide a formula for the
2 amount of land to be devoted to landscaping and the kind of
3 landscaping which will meet county standards. Section 407 does
4 not, however, explain the method used to place various kinds of
5 landscaping (whether trees, shrubs, or ornamental structures),
6 nor is there a standard included in the ordinance by which one
7 might objectively measure the effectiveness of landscaping
8 techniques to buffer a particular use or structure.

9 We do not find the county's method of showing compliance
10 with compatibility criteria to be adequate. Without a
11 landscape plan showing the kind of landscaping to be used and
12 how it will provide "for compatibility with adjacent
13 developments and surrounding land uses," we do not believe the
14 county was in a position to make a finding that compatibility
15 will be achieved merely by providing for a landscape plan. The
16 county was required, then, to measure compatibility against a
17 plan for landscaping rather than simply through a reference to
18 an ordinance section controlling landscaping generally.

19 Petitioners' next challenge is to the findings made under
20 Section 410. This issue has been adequately discussed under
21 Assignment of Error No. 1.

22 Petitioners also challenge compliance with Section 411.
23 This challenge appears to be misplaced. CDC Section 411 is
24 about screening and buffering. There is no screening and
25 buffering requirement (at least in code Section 411),
26 applicable to rural developments. See, CDC Section 403-3. We

1 therefore decline petitioners' challenge based on Section 411
2 of the county's code.

3 Petitioners last challenge compliance with Section 413 of
4 the code controlling parking and loading. This section is made
5 applicable to developments in rural areas under CDC 403-3.11.
6 The provisions of Section 413 are applicable to "commercial and
7 industrial uses" only. However, parking requirements for
8 business and commercial uses are specifically listed in Section
9 413. CDC Section 413-3 requires a development permit for
10 parking. CDC Section 413-4.1 provides that off street parking
11 is to be provided "in an amount specified for the particular
12 use." CDC Section 413-11 provides that the minimum number of
13 off street parking places is to be determined in accordance
14 with specifically listed uses, such as "auto wash" or "bowling
15 alleys." There is no provision requiring parking for radio
16 transmission towers. We conclude, therefore, that Section 413
17 is not applicable to this development.

18 Assignment of Error No. 3 is sustained in part.

19 ASSIGNMENT OF ERROR NO. 4

20 "The Board of Commissioners erred by interpreting the
21 relevant, unambiguous provisions of the Community
22 Development Code by reference to past administrative
23 practice."

24 Under this assignment of error, petitioners again allege
25 the county violated CDC Section 406-2, 410 and 411. Of
26 specific concern to petitioners is the apparent reliance by the
county on its past administrative practice of excusing the

1 requirement that the developer submit all of the required
2 information with the application. Petitioners allege the
3 county improperly allows a developer to delay submittal of
4 plans and other required documents until the time of
5 application for a final building permit. Petitioners claim
6 this practice, followed in this case, excuses the applicant
7 from meeting all required criteria.

8 We believe we have already discussed the issue of the
9 adequacy of the county's findings showing compliance with
10 criteria applicable to this radio tower project. We do not
11 believe it necessary to consider again petitioners' general
12 argument that compliance with a particular criterion must be
13 shown prior to the issuance of the development permit.

14 The decision of Washington County is remanded for further
15 proceedings not inconsistent with this opinion.

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1 Kressel, Concurring.

2 I agree with the results, but add these words to make a
3 point the majority opinion touches on with undue tact. The
4 ordinance we are called on to construe in this case is an
5 unbreachable swamp of cross references, exceptions, exemptions
6 and planning jargon. Computers may understand it; I sincerely
7 doubt many humans do.

8 In the time permitted by law, this Board has done its best
9 to pick its way through these Byzantine regulations to answer
10 the challenges presented. If we have overlooked a requirement
11 or found one where none exists, I hope we will be forgiven.

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FOOTNOTES

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4 We understand a monopole to be an antenna supported by
guywires but without additional supporting structure.

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6 Additionally, petitioners say that Section 406-2.1-5
7 requires site and building plans. We discuss this charge under
Assignment of Error No. 2.

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9 The stated purpose of Section 410 is:

10 "It is the intent and purpose of the slopes and
11 grading standards to provide a mechanism for
development while protecting lives and property from
12 natural or man-made geologic, hydrolic, or soils
hazards, and encourage site development practices
13 which protect and enhance the natural environment and
minimize soil erosion, sedimentation and drainage
problems."

14 It is not clear to us that compliance with grading permit
15 standards is required at this stage of the development
process. A grading permit may be issued as part of the
16 building permit procedure and not be subject to public review
and comment. However, by making portions of Section 410
17 applicable, the county has obligated itself at this stage of
the approval process to show the applicable slope and grading
18 standards can be achieved. With no finding or facts in the
record on this issue, there is no way for the public to know
19 that apparently applicable slope and grading standards for
development (1) apply and (2) will be met.

20 We note also in this regard that the findings call for the
21 applicant to submit a grading plan prior to the issuance of a
building permit. This call is somewhat at variance with the
22 stated positions that the project is of a kind exempt from
Section 410 requirements. See, Record 45.

23 4
24 The applicant attempts to include evidence in our record
25 consisting of drawings and engineering information showing
that, indeed, slopes on the property are far greater than 20
26 percent, and the use otherwise falls under one of the

1 exceptions in CDC Section 410-2.3. This information is not
2 available for our review. Our review, except in limited
3 circumstances, consists of review of the record generated by
4 the county when it made its decision.

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6 We recognize that the staff report makes reference to
7 Section 411. The fact the staff report makes reference to
8 Section 411 does not somehow change the terms of the Community
9 Development Code and make Section 411 applicable to situations
10 where it would otherwise is clearly not applicable.

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12 "405 MASTER PLANNING"
13 "406 BUILDING SITING AND ARCHITECTURAL DESIGN"
14 "407 LANDSCAPE DESIGN"
15 "409 CIRCULATION AND ACCESS"
16 "410 SLOPES AND GRADING"
17 "413 PARKING AND LOADING"
18 "414 SIGNS"
19 "417 IRRIGATION"

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21 We do not understand petitioners, in this assignment of
22 error, to challenge the findings made under Sections 406, 407,
23 410, 411, 413. Petitioners claim, however, that the findings
24 are inadequate in other assignments of error.

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26 We hasten to add, however, that the petitioners' assignment
of error claims the county failed to address the criteria. In
the next assignment of error, the petitioners claim applicable
criteria were inadequately addressed. The adequacy of the
discussion of Section 406-4.2 is not made an issue under this
assignment of error.

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28 We note, however, that landscaping is required. The
29 landscaping must meet standards set out at Section 411-7.3. We

1 do not understand petitioners to challenge the county's
2 compliance with Section 430-109.5(B). We note, however, that
3 the simple conclusion that the applicant submit a landscaping
4 plan consistent with Section 411.7.3 is not a finding of
5 compliance with landscaping requirements. There is no finding,
6 for example, that a landscaping sketch or preliminary landscape
7 plan will meet the requirements of the ordinance. With such a
8 preliminary scheme, the county might then be free to require a
9 final landscape plan to be submitted at a later stage in the
10 proceeding. See, for example, the discussion in Meyer v. City
11 of Portland, 67 Or App 274, 678 P2d 741 (1984); Fedde v. City
12 of Portland, 8 Or LUBA 220 (1983) and Ford v. Polk County, 7 Or
13 LUBA 232 (1983).

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11 CDC Section 403.3.6 makes Sections 406.4.2(C) and
12 406.4.2(C)(1) applicable to rural development.
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