BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

McCAW COMMUNICATIONS, INC. and CELLULAR ONE,

Petitioners,

v.

MARION COUNTY,

Respondent,

and

BARBARA HANNEMAN,

Intervenor-Respondent.

LUBA No. 88-068 Corrected #

FINAL OPINION AND ORDER

Appeal from Marion County.

Timothy V. Ramis and Kenneth M. Elliott, Portland, filed the petition for review and Timothy V. Ramis argued on behalf of petitioners. With them on the brief was O'Donnell, Ramis, Elliott & Crew.

Jane Ellen Stonecipher, Salem, filed a response brief and argued on behalf of respondent county.

Wallace W. Lien, Salem, filed a response brief and argued on behalf of intervenor-respondent.

SHERTON, Referee; HOLSTUN, Chief Referee; participated in the decision.

REVERSED 12/12/88

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

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Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal Marion County Board of Commissioners Administrative Review Order AR 88-1 denying permission to locate a transmission tower and related equipment building on a 21 acre parcel in the Special Agriculture (SA) zone.

MOTION TO INTERVENE

Barbara Hanneman moves to intervene on the side of respondent in this proceeding. There is no opposition, and we allow the motion.

MOTION TO STRIKE

Oral argument in this appeal was held on October 26, 1988. On November 7, 1988, the Board received a letter from petitioners, dated November 4, 1988. The letter asserts that during oral argument intervenor's attorney relied on facts outside of the record to support his claim that citizens band (CB) radio is an adequate alternative to cellular telephone communications. The letter asks us to review an attached copy of Federal Communications Commission (FCC) rules regarding CB radio service. Based on these rules, petitioners list several reasons why CB radio communication is not an adequate alternative to cellular telephone communication.

Respondent county and intervenor-respondent (intervenor) move to strike petitioners' November 4, 1988 letter. They argue the letter should not be considered by LUBA because it (1) contains information not in the record; and (2) constitutes

an improper reply brief, not filed in compliance with OAR 661-10-039. They dispute petitioners' contention that intervenor's attorney went beyond his brief or introduced facts not in the record during oral argument. Respondent and intervenor also request, pursuant to ORS 197.830(13)(b),[1] that they be awarded reasonable attorney fees and expenses with regard to filing the motion to strike. They argue that petitioners' letter can only be viewed as an improper attempt to influence the Board and such improper filings should be discouraged by awarding attorneys fees and expenses to the opposing parties.

Petitioners reply that their letter merely cites federal regulations of which the Board may take official notice under Oregon Evidence Code (OEC) Rule 202(4). Petitioners argue the letter responds to the presentation of new evidence regarding ability to "patch" communications with CB radio which intervenor's attorney presented during oral argument. Petitioners assert the letter is not a reply brief because it responds to comments by intervenor's attorney which went beyond what is contained in intervenor's brief. Finally, petitioners argue attorney fees and expenses should not be awarded because submission of their letter was justified by the extra-record comments made at oral argument and petitioners believed their position was well-founded and would secure appropriate action by the Board.

We will treat petitioners' November 4, 1988 letter as

including a request that we take official notice of the attached FCC regulations. It is legislative policy that LUBA's decisions be made consistently with sound principles governing judicial review. ORS 197.805. Thus, it is within LUBA's authority to take official notice of judicially cognizable law, as provided by OEC Rule 202. Faye Wright Neighborhood Planning Council v. Salem, 6 Or LUBA 167, 170 (1982). Section (4) of that rule provides that notice may be taken of federal regulations. We, therefore, take official notice of the portions of the Code of Federal Regulations attached to petitioners' letter.

The remainder of petitioners' letter consists of argument in response to statements made by intervenor's attorney either at oral argument or in intervenor's brief. Such argument could have been presented by petitioners in rebuttal at oral argument or in a reply brief responding to new matter raised in intervenor's brief. OAR 661-10-039. Therefore, we grant respondent's and intervenor's motion to strike with regard to the remainder of the letter's content.[2]

FACTS

Petitioner McCaw Communications, Inc. (McCaw) is in the business of providing cellular telephone services. Cellular telephones provide mobile telephone communication by transmitting telephone messages via FM radio waves. The FM radio waves can be interrupted by structures or topography. The messages to and from mobile telephones are transmitted and

received by towers such as the one McCaw wishes to construct on a hilltop south of Salem. The system uses an array of overlapping "cells," each containing such a tower, to provide a continuous mobile telphone communications link. At present, McCaw has a gap in its communications network in the area south of Salem.

In December, 1987, McCaw applied for and received county building permits to construct a 140 foot transmission tower and related equipment storage building on a 62x40 foot leased portion of a 21 acre parcel in the SA zone. McCaw began construction. However, on January 9, 1988, the county issued a stop work order, requiring construction to halt while the county conducted an administrative review to determine whether the proposed structures are a permitted use in the SA zone under the Marion County Zoning Ordinance (MCZO).

The county planning department determined that the proposed structures are a permitted use in the SA zone. That decision was appealed by intervenor, who resides on property she owns adjacent to the proposed tower site. On appeal, the county hearings officer determined that the proposed structures are not a permitted use in the SA zone. That decision was appealed by petitioners to the board of commissioners. On July 28, 1988, the board of commissioners issued an order affirming the decision of the hearings officer and adopting additional findings. This appeal followed.

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FIRST ASSIGNMENT OF ERROR

> "The County has misconstrued the applicable law by interpreting MCZO 137.020(d) to exclude cellular broadcast towers from the S.A. zone."

MCZO 137.020(d) lists the following as an outright permitted use in the SA zone:

> "Utility facilities necessary for public service, except commercial facilities for power generation"

The sole basis for the county's denial of permission to construct the proposed cellular telephone transmission tower and related equipment building is the county's interpretation of the above-quoted provision as not including the proposed tower. The county's interpretation of this ordinance provision is based on three different lines of reasoning. Each of the county's lines of reasoning is challenged by petitioners and is discussed separately below.

A. All Transmission Towers are Prohibited in the SA Zone

In 1979, when the county initially adopted MCZO 137.020(d), quoted supra, the following virtually identical language was contained in ORS 215.213:

> "(1) The following uses may be established in any area zoned for exclusive farm use:
>
> " * * * * *
>
> "(d) Utility facilities necessary for public service, except commercial facilities for the purpose of generating power for public use by sale."

Oregon Laws 1983, chapter 827, section 27b amended ORS 215.213(1)(d) to read as follows:

> "Utility facilities necessary for public service, except commercial facilities for the purpose of generating power for public use by sale and transmission towers over 200 feet in height." (Amended language emphasized.)

Based on the county's failure to duplicate the state's 1983 amendment to ORS 215.213(1)(d), the county's order interprets MCZO 137.020(d) as not including any transmission towers under 200 feet high as permitted uses in the SA zone:

> "Marion County has not amended its original ordinance. The local land use ordinance is controlling in this matter. The state has specifically allowed transmission towers under 200 feet as a permitted use. However, Marion County by not amending the ordinance in the wake of the state revision has chosen not to include transmission towers under 200 feet in height as a permitted use in the SA zone."[3] Record 115-116.

Petitioners argue that the county's above interpretation is based on the erroneous belief that, prior to the 1983 amendment, ORS 215.213(1)(d) did not allow any transmission towers to be located in an exclusive farm use (EFU) zone. Petitioners maintain the exact opposite was true. According to petitioners, prior to the 1983 amendment, the statute's definition of "utility facilities necessary for public service" included transmission towers of any height. Furthermore, because the county adopted the operative statutory language verbatim in MCZO 137.020(d), the ordinance provision also includes transmission towers of any height.

Petitioners rely on a 1981 attorney general's opinion that a radio transmission tower is a permitted use specified in ORS 215.213(1)(d). 42 Op Att'y Gen 77, 78 (1981). Petitioners

also rely on legislative history of the 1983 statutory amendment demonstrating that the legislature's intent was to restrict the height of transmission towers otherwise allowed in the EFU zone.

The county replies that an attorney general's opinion interpreting a statute is not binding on a local government interpreting its own ordinance. The county also argues that reasonable minds may differ in interpreting a statute and amendments to it.

Respondent's contention that the legislature adopted the 1983 amendment to ORS 215.213(1)(d) to allow transmission towers under 200 feet high for the first time, by simply excluding towers over 200 feet high, is rejected. Absent some convincing legislative history, which respondents have not supplied, we will not assume the legislature pursued such an awkward course to achieve the legislative purpose asserted by respondent. We believe the 1983 amendment to ORS 215.213(1)(d) was clearly intended to limit the transmission towers previously allowable in EFU zones as "utility facilities necessary for public service." The amendment excluded transmission towers over 200 feet high; it did not, for the first time, include transmission towers under 200 feet high.

Based on our understanding of ORS 215./213(1)(d) and the 1983 amendment, we conclude it is unreasonable to interpret the county's failure to duplicate that amendment in MCZO 137.020(d) as indicating an intent to prohibit all transmission towers in

the SA zone.[4]

B. Telephone Communication Facilities are Specifically Allowed in Other Zoning Districts

The county also concluded it could not interpret the general term "utility facilities necessary for public service" in MCZO 137.020(d) as including the proposed cellular telephone transmission tower because the MCZO specifically allows "telephone communication facilities" as permitted or conditional uses in certain nonresource zoning districts.[5] The county specifically relied upon the court of appeals' decision in Clatsop County v. Morgan, 19 Or App 173, 526 P2d 1393 (1974) (where a zoning ordinance expressly provides for a "commercial amusement establishment" as a conditional use in a commercial zone, it by necessary inference reflects an intent that such activities not be carried on in any other zone). Record 6-7.

Petitioners claim that the county's interpretation is illogical. They argue the fact that specific utilities are enumerated in certain zones does not mean that such utilities are not also allowed in zones where utility facilities are permitted uses. Petitioners assert the correct interpretation of the MCZO is that all "utility facilities necessary for public service" are permitted in the SA zone, while only specifically enumerated utility facilities are allowed in other zones.

Petitioners also argue the county's interpretation of

MCZO 137.020(d) is inconsistent with its treatment of other types of utilities. Petitioners note that the county's order recognizes that commercial radio and television towers are utility facilities which are permitted uses in the SA zone. Record 7. Petitioners point out, however, that radio and television towers are specifically enumerated as permitted or conditional uses in the Commercial Office (CO), Commercial Retail (CR), Commercial General (CG) and Interchange District (ID) zones. MCZO 140.020(b); 141.010(c)(2); 142.010(a); 150.040(b).

Petitioners also argue that Clatsop County v. Morgan, supra, does not support the county's interpretation. According to petitioners, in that case none of the permitted or conditional uses listed for the zoning district in which the court concluded a "commercial amusement establishment" was not allowed even remotely resembled such a use. On the other hand, in this case, the "utility facilities" provision of the SA zone is broad enough to encompass cellular broadcast towers, according to petitioners. Therefore, explicitly providing for various types of communication facilities in other zones does not indicate an intent that such facilities not be permitted in the SA zone. Petitioners further note that in Meland v. Deschutes County, 10 Or LUBA 52, 56 (1984), we concluded that a radio transmission tower was a "utility facility necessary for public service" permitted in an EFU zone, even though the county's ordinance specifically listed radio towers as a permitted use in its Rural Service Center zone.

The county and intervenor reply that the MCZO's specific provision for telephone communication facilities in other zones supports the county's interpretation that the general provision of MCZO 137.020(d) is not intended to include such facilities. They also argue that our decision in Meland v. Deschutes County, supra, is not applicable to this case because it relied upon a detailed definition of "utility facility" found in Deschutes County's zoning ordinance.

In Clatsop County v. Morgan, supra, the court of appeals stated that a statute is to be construed as a whole and effect given to its over-all policy, and said this rule is especially applicable when interpreting a comprehensive zoning ordinance.[6] 19 Or App at 178. When we look at the MCZO as a whole, we do not find that it evidences an intent to exclude telephone communication facilities from the SA zone.

The MCZO lists the following as a permitted use in all of the county's residential and commercial zoning districts and as a conditional use in the ID district:

> "Public utility structures and buildings such as pump stations and reservoirs, electric substations, when they comply with all yard and setback requirements."

MCZO 131.010(f), 132.010(a), 133.010(a), 134.010(a), 135.010(a), 140.010(a), 141.010(a), 142.010(a), 150.040(a), 151.010(a). Also, each of the county's industrial zoning districts lists "public utilities" as a permitted use. MCZO 160.010(b)(5), 161.010(a), 162.010(a). Some of the commercial and industrial districts additionally list as

permitted or conditional uses "telephone and telegraph communications facilities" (MCZO 140.020(c), 141.010(c)(3), 142.010(a), 150.040(a), 151.010(a)), "radio and TV transmitter stations [and] towers" (MCZO 140.020(b), 141.010(c)(2), 142.010(a), 150.040(a), 151.010(a)), and other utility facilities, such as solid waste disposal sites and heliports.

Thus, for residential, commercial and industrial zoning districts it is clear that the MCZO does take the approach of specifically enumerating the utility facilities to be allowed as permitted or conditional uses. However, for the county's resource zoning districts, the MCZO employs a different approach. In these districts, the MCZO follows the language of ORS 215.213(1)(d) or 215.283(1)(d) and simply lists "utility facilities necessary for public service, except commercial facilities for power generation" as a permitted use (EFU and SA zones) or conditional use (Timber Conservation (TC) and Farm/Timber (FT) zones). MCZO 136.020(d), 137.020(d), 138.030(h), 139.030(h).[7]

The county's interpretation that utility facilities specifically listed in other zoning districts are not allowed in the SA zone (or, presumably, in other resource zones) as "utility facilities necessary for public service" would produce an unreasonable result. Not only would the SA zone prohibit telephone communication facilities such as that proposed by petitioner, it would also prohibit public utilities serving the SA zone itself, such as power substations and water pumping

stations and reservoirs, as well as radio and television transmitters and towers, which the county concedes are allowed in the SA zone.

We conclude that the correct interpretation of MCZO 137.020(d) is that "utility facilities necessary for public service" are permitted uses in the SA zone, regardless of whether a particular utility facility is specifically listed as a permitted or conditional use in another zone.

C. Cellular Telephone Facilities are not "Utility Facilities Necessary for Public Service"

The county's decision also finds that the proposed cellular telephone transmission tower does not, in any case, qualify as a "utility facility necessary for public service" under MCZO 137.020(d). The county distinguishes between commercial radio and television facilities and the proposed cellular telephone facility. The county recognizes the former as "utility facilities necessary for public service" under MCZO 137.020(d) on the ground that the radio and television facilities provide "general public service, as compared to individual private service for a fee." Record 7. The county also states that a radio or television facility "provides a service to the general public and is heavily regulated by the FCC concerning the operation and control of use of the public airways." Record 5.

The county also notes in its order that cellular telephone facilities and services were not available on the commercial

market when the "utility facilities necessary for public service" provisions of MCZO 137.020(d) and ORS 215.213(1)(d) were drafted. The county states "[a]s in any zoning ordinance, the original intent must be examined to ensure that new technology requiring new 'land uses' be placed in the appropriate land use zone." Record 7-8.

Petitioners argue that a cellular telephone transmission tower is a "utility facility necessary for public service" under MCZO 137.020(d) and ORS 215.213(1)(d). Petitioners again rely on the 1981 attorney general's opinion interpreting ORS 215.213(1)(d). 42 Op Att'y Gen 77 (1981). According to petitioners, in interpreting "utility facility necessary for public service" the attorney general relied on definitions of public utilities found in cases from other jurisdictions.

Petitioners specifically cite a New York case's definition of "public utility" as "a business or service which is engaged in regularly supplying the public with some commodity or service which is of public consequence or need, such as electricity, gas, water, transportation or telephone or telegraph service." Staminski v. Romeo, 62 Misc2d 1051, 310 NY2d 169, 171 (1970). Petitioners also cite a Washington case's definition of "public utility" as not depending on the distinction between public and private ownership, but rather including a privately owned facility which "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 the term." State ex rel Pruzman v. Redman, 60 Wash 521, 374 P2d 1002, 1004-1005 (1962).

According to petitioners, cellular telephone communication fits these definitions because it provides a service available and beneficial to the general public. Petitioners argue cellular telephone communication is a utility because it provides the public with a service of consequence -- now serving 1.2 million customers nationally, after first becoming available in 1983.

Petitioners also argue that the public interest in cellular telephone communication is evidenced by the fact that such communication is heavily regulated by the FCC. According to petitioners, the FCC (1) requires cellular service providers to demonstrate legal, financial and technical qualifications in order to obtain a license; (2) assigns a limited number of providers to specified service areas; (3) assigns frequencies for cellular communication operation in a given service area; and (4) requires subscriptions to mobile telephone service be available to the public. 47 CFR 22.900 to 22.921.

Petitioners recognize that cellular telephone subscription rates are not regulated by either the FCC or state Public Utility Commission (PUC), but point out that neither are subscription television rates. Petitioners also point out that the "equal time provision," referred to in the county's order as being imposed on commercial radio and television, has been repealed by the FCC. Petitioners contend that inclusion in the

emergency broadcasting system, mentioned by the county in its order, is not a general indicator of a utility.

Finally, petitioners argue that the fact McCaw will charge subscribers for its service is irrelevant in determining whether the proposed tower is a utility facility necessary for public service. Petitioners point out that virtually every business commonly accepted as a utility, including railroad, gas, electric and telephone companies charge for their services. Even some broadcast television is "pay for view."

The county replies that it has permitted commercial television, radio and long distance telephone transmission towers, water pumping stations and sewage pumping stations as "utility facilities necessary for public service" because these utilities provide a public service, not a private service.

According to the county, cellular telephone service is neither a utility nor a public service, but rather "a private business that seeks to be designated as a utility for the sole purpose of seeking access to resource lands." Respondent's Brief 9. Although cellular telephone service may be available to the general public, the county questions whether it is a "service of consequence" to the general public, since only 1.2 million of the country's approximately 246 million residents presently subscribe to it. Intervenor adds that in the Salem area the service is used only by approximately 200 small businessmen, and not by the general public. The county asserts that commercial radio and television, unlike cellular telephone

services, generally do offer some free service.

The county and intervenor also argue there is a significant distinction between the FCC's regulation of commercial radio and television and its regulation of cellular telephone communication. They contend that radio and television companies can be required to provide public services such as emergency broadcasting and equal access, whereas cellular telephone companies are not subject to such regulation. The county and intervenor also point out that the state legislature has specifically exempted cellular telephone communication services from the statutory definition of "public utility."[8]

Intervenor also argues that having the proposed tower at the subject location is not "necessary" to the working of the McCaw cellular telephone communication system. Intervenor points out that the system is already in operation and has customers in the Salem area. Intervenor also asserts that the same geographical area could be provided with cellular telephone service in other ways, such as by several smaller towers, rather than a single 140 foot tower atop the highest hill. According to intervenor, since there is no necessity for the tower at the proposed location, the proposed tower would not satisfy MCZO 137.020(d) even if it were considered to be a utility facility.

The meaning of local legislation is a question of law which must be decided by the court or other reviewing body to which it is presented. McCoy v. Linn County, 90 Or App 271, 275, 752

P2d 323 (1988). Therefore, we must determine, as a question of law, the correct interpretation of MCZO 137.020(d). Furthermore, if the county's interpretation of MCZO 137.020(d) in the appealed decision is incorrect, we must determine whether application of the correct interpretation to the facts of this case would result in a determination that the proposed tower is permitted in the SA zone as a "utility facility necessary for public service."

When we review a local government's interpretation of ambiguous terms in its own ordinance, we accord appropriate weight to that interpretation.[9] However, where the county ordinance provision was drafted to correspond to a state statute, it is appropriate to construe that ordinance provision consistently with the statute, in light of any existing authority analyzing or applying that statute. Goracke v. Benton County, 12 Or LUBA 128, 135 (1984).

In this case, there are no appellate court decisions interpreting or applying ORS 215.213(1)(d). However, although not binding, we find the attorney general's opinion interpreting this statutory provision persuasive; and we follow its analysis. See 42 Op Att'y Gen 77 (1981). The attorney general, using definitions of utilities found in court decisions from other jurisdictions, reasoned that a use was a "utility facility" under ORS 215.213(1)(d) if it "supplies the public with a commodity or service of public consequence or need" and "is impressed with a public interest" so that it

comes within the field of public regulation. Id. at 80. Applying these general definitions, we find that the proposed cellular telephone communication service does supply the public with a service of public consequence or need.

The parties do not dispute that telephone communications are generally recognized as being needed by the public and as a utility service. The mobile telephone communication service offered by McCaw is a relatively new form of telephone service. It is a service available to the general public, but not as yet being used by a large segment of the public. However, we do not find the fact that the service is not yet being used by a large portion of the public to be determinative of whether the proposed tower is a "utility facility." Presumably, when any service now generally recognized as a utility necessary to the public good was first offered, it was initially subscribed to by only a relatively small segment of the population. We do not believe the legislature intended the percentage of the population making use of a service necessarily to determine whether that service is a utility facility.

Similarly, we do not believe the fact a fee is charged for cellular telephone service prevents it from being a utility facility. We agree with petitioners that virtually all utilities charge users a fee.

We also find that cellular telephone communication is impressed with public interest so that it comes within the

arena of public regulation. As petitioners point out, cellular telephone communication providers are regulated and licensed by the FCC as to their qualifications and operations. The fact that cellular telephone communication may not be as heavily regulated as other forms of telecommunication does not mean it fails to meet this criterion. In particular, the fact that cellular telephone communication is excluded from the statutory definition of "public utility," see n 8, supra, does not mean it cannot be a "utility facility necessary for public service" under ORS 215.213(1)(d) and MCZO 137.020(d). Had the legislature, or the county, intended the statutory definition of "public utility" to be critical in determining whether a use is a "utility facility necessary for public service," it would have used the term "public utility" or cross-referenced the statutory definition in ORS 215.213(1)(d) or MCZO 137.020(d).

With regard to the "necessity" issue, we agree with the attorney general and adhere to our prior opinion in Meland v. Deschutes County, 10 Or LUBA at 56, that a facility "necessary for public service" means a facility that is necessary in order for the entity to provide a public service, not that it is necessary to locate the facility at the particular location proposed. In this case, the record establishes that a transmission tower to receive and broadcast telephone messages to mobile cellular telephones is necessary for McCaw to provide its service in the subject geographical area. Record 17, 55, 87. The ordinance does not require McCaw to demonstrate that

location of the tower at the proposed site in the SA zone is essential to the provision of its service.

In conclusion, we find the proposed cellular telephone communication tower is, as a matter of law, a "utility facility necessary for public service" and, therefore, is a permitted use in the county's SA zone.[10] We, therefore, must sustain the first assignment of error and reverse the county's decision.

SECOND ASSIGNMENT OF ERROR

> "The County's findings are unsupported by substantial evidence."

Petitioners argue that the record lacks substantial evidence to support the county's finding that cellular telephone communication facilities are a new technology and a new land use different from radio and television broadcast facilities. Petitioners claim the record contains no evidence that cellular telephone communication is a new technology, but rather shows that it is simply a new way of using existing technology. Petitioners also assert that the record contains no evidence that the proposed tower is physically different from or will have a different land use impact than radio and television broadcast towers.

Petitioners also argue that the record lacks substantial evidence to support the county's finding that the goal of preserving resource land will be impeded by the proposed tower. Petitioners argue there is no evidence in the record that the proposed tower site is or would be used for

agricultural production if the tower were not constructed.

The intervenor argues that neither of the findings whose evidentiary support is challenged are essential to the county's decision. However, the county and intervenor also argue that there is substantial evidence in the record to support the challenged findings. They claim that if property is designated and zoned SA by the county's acknowledged plan and ordinance, it is presumed to have resource potential and the burden shifts to anyone claiming otherwise.

We are authorized to reverse or remand the county's determination that the proposed tower is not a permitted use in the SA zone if the county's decision is not supported by substantial evidence in the whole record. ORS 197.835(8)(a)(C); Sellwood Harbor Condo Assoc. v. City of Portland, ___ Or LUBA ___ (LUBA No. 87-079 and 87-080; April 1, 1988), slip op 12. If a challenged finding is not critical to the county's decision, whether or not it is supported by substantial evidence is of no consequence. Territorial Neighbors v. Lane County, ___ Or LUBA ___ (LUBA No. 87-083; April 27, 1988), slip op 22; Bonner v. City of Portland, 11 Or LUBA 40, 52 (1984).

The sole issue in this case is whether the proposed tower is a "utility facility necessary for public service." Whether the proposed tower is a new technology or land use, or would have an adverse effect on protection of resource land, is irrelevant to determining whether it is a "utility facility necessary for public service." Therefore, no purpose would be

served by determining whether the challenged findings are supported by substantial evidence.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

> "The County's determination that a cellular broadcast tower is not a permitted use in the S.A. zone infringes on the First Amendment right of free speech because there are no alternative locations for the tower required by this mode of communication."

Petitioners argue that the county's interpretation of its own ordinance renders that ordinance unconstitutional. Petitioners claim the county's interpretation of its SA zone infringes on their First Amendment right of free speech because there are no suitable alternative locations for the proposed tower. According to petitioners, to be constitutional, an ordinance must (1) implement a substantial government interest, (2) directly advance that interest; and (3) be narrowly drawn to further that interest. Metromedia, Inc. v. City of San Diego, 453 US 490, 507 (1981). Petitioners argue the county's interpretation of MCZO 137.020(d) violates all three parts of the test.

The county and intervenor argue that the county's interpretation of MCZO 137.020(d) does not violate petitioners' First Amendment right of free speech. The county asserts that its interpretation of the ordinance provision leaves adequate means of communication. Intervenor argues that the county's interpretation is a legitimate and reasonable exercise of its duty to protect farm use areas. Intervenor also argues that

the ordinance does not regulate the content of speech and is appropriately drawn to protect legitimate land use concerns.

Under the first assignment of error we determined that the county's decision that the proposed tower is not a permitted use in the SA zone was based on incorrect interpretations of its ordinance. We also determined that application of the correct interpretation of MCZO 137.020(d) results in a determination that the proposed tower is a permitted use in the SA zone.

A determination of whether the county's incorrect interpretations of its ordinance would violate the First Amendment of the U.S. Constitution would be speculative and would serve no useful purpose.[11] Because we sustain the first assignment of error and reverse the county's decision, petitioners' First Amendment rights are not violated by the appealed decision. Accordingly, we need not and do not decide petitioners' third assignment of error.

The county's decision is reversed.

FOOTNOTES

[1] ORS 197.830(13)(b) provides:

"The board may also award reasonable attorney fees and expenses to the prevailing party against any other party who the board finds presented a position without probable cause to believe the position was well-founded, and primarily for a purpose other than to secure approproate action by the board."

[2] Although petitioners may have committed a procedural error by seeking to submit additional argument to us in their letter, petitioners' request for us to take official notice of federal rules was appropriate and submittal of the letter was not clearly prohibited by our rules. Therefore, we do not find that petitioners presented a position without probable cause to believe it was well-founded. Furthermore, we believe petitioners submitted the letter for the purpose of having us take notice of the FCC rules and consider additional argument which petitioners believed to be relevant and properly submitted, not to influence us in an improper manner. Therefore, we decline to award attorney fees and expenses with regard to the motion to strike.

[3] The quoted statements are found in the "Additional Findings of Fact and Conclusions of Law" section of the county hearings officer's decision. However, the board of commissioners adopted this portion of the hearings officer's decision as part of its order. Record 4.

[4] Even a transmission tower <u>over</u> 200 feet in height would appear to be allowable in the SA zone as a permitted use under MCZO 137.020(d). It also appears that under ORS 215.213(1)(d), or the identically worded ORS 215.283(1)(d), such a tower is <u>not</u> allowable as a permitted use in the SA zone. However, since the tower at issue in this case would be under 200 feet in height, we need not determine how such a conflict between statute and ordinance would be resolved.

[5] The relevant county findings state:

"(8) In the case at hand Marion County has an acknowledged comprehensive plan and comprehensive zoning ordinance. One of the primary intents of both documents is the preservation and protection of resource lands and resource uses. Marion County specifically provides for telephone communication facilities in CR (Commercial Retail) and IC (Industrial/Commercial) zones as permitted uses under MCZO 141.010(c)(3) and MCZO 151.010(a). Such facilities are also allowed as a conditional use in the ID (Interchange Development [sic District]) zone under MCZO 150.040(a).

" * * * * *

"(10) Marion County has specifically provided in its zoning ordinance for other types of telephone communication facilities as permitted uses or conditional uses in non-resource zones. * * * Under the facts of this case, Cellular One type technology is a permitted and conditional use in non-resource zones. It does not follow that the general language of MCZO 137.020(d) will apply to all towers and uses, simply by arguing that the tower represents a utility facility for public service. This is particularly true where the zoning code has recognized other zones as appropriate for permitted or conditional uses for the type of facility the applicant wishes to place in the resource zone.

"(11) The Cellular One type facility is a permitted use in the CR zone and the IC zone and is a conditional use in the ID zone. Marion County * * * has chosen to take Cellular One type telephone communication facilities and place them in specific zones, as compared to including them in the all-encompassing general definition of 'utility facilities necessary for public service' in resource zones. The legislative intent is clear. To argue that those uses which are permitted uses in specific zones are also permitted as a general use on resource land is not acceptable." Record 7-8.

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[6] We note, however, that we agree with petitioners that the result in Clatsop County v. Morgan, is distinguishable from this case. In Clatsop County v. Morgan, the court held that, where one zoning district specifically listed "commercial amusement establishment" as a conditional use, an intent not to allow such a use in other zoning districts that do not list

"commercial amusement establishment" was implied. However, in that case, the uses listed for another district which were claimed to include the amusement park in question were "open land recreation such as boating and fishing establishment" and "resort-type residential establishment." These uses bore little if any resemblance to a commercial amusement park. Clatsop County v. Morgan, 19 Or App at 180.

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7 The only utility facilities listed separately in these resource districts, as conditional uses, are personal use airports and solid waste disposal sites, following the language of ORS 215.213(2)(h) and (k) or 215.283(2)(g) and (j).

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8 A "public utility" is defined as including any corporation that owns, operates, manages or controls all or part of any plant or equipment in the state for the provision of "telecommunications service." ORS 757.005(1)(a)(A). "Telecommunications service" is defined as the two-way switched transport of voice communications, but does not include services provided by "radio common carrier." ORS 757.005(3)(g)(A). "Radio common carrier" is defined as including any corporation making available facilities to provide cellular communications service for hire. ORS 757.005(3)(e). Thus, a company providing cellular telephone communication service is a "radio common carrier" and, therefore, does not provide "telecommunications service" and is not a "public utility" under ORS chapter 757. Intervenor-Respondent's Brief 6.

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9 We give more weight to a local government's interpretation if that interpretation is based on legislative history to which the local government has peculiar access. McCoy v. Linn County, 90 Or App at 276. However, that is not the case here. None of the parties to this appeal have cited any county ordinance (or state statute) legislative history which could shed light upon the intent of the "utility facilities necessary for public service" provision.

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10 We do not imply that the county could not adopt an ordinance more restrictive than ORS 215.213(1)(d) and 215.283(1)(d), if it did so consistently with its acknowledged plan, the statewide planning goals and the U.S. and Oregon constitutions (see third assignment of error, infra). We agree

with the attorney general that ORS 215.213(1) establishes minimum standards for an EFU zone. 42 Op Att'y Gen at 82. However, there is no indication in the language of the MCZO or county comprehensive plan, or in legislative history of the adoption of MCZO 137.020(d), that the county did intend to adopt an ordinance provision more restrictive than the statute.

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11 In n 10 above, we indicated that under ORS 215.213(1)(d) a county could, if consistent with its plan and the statewide planning goals, adopt an EFU ordinance provision more restrictive than the statute. However, we also note that such an ordinance, as applied to communication facilities, would also have to be consistent with the U.S. and Oregon Constitutions. At this point we do not know whether or in what manner the county will amend its zoning ordinance or whether petitioners would be affected by such an amendment if it were adopted.