BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

McCAW COMMUNICATIONS, INC., and CELLULAR ONE,	)	
Petitioners,	)	LUBA No. 88-083
vs.	)	FINAL OPINION AND ORDER
POLK COUNTY,	)	
Respondent.	)	

Appeal from Polk County.

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

Robert W. Oliver, Dallas, filed the response brief and argued on behalf of respondent.

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

REMANDED 02/25/91

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners challenge a Polk County Board of Commissioners order denying a conditional use permit for a cellular communication facility in the Exclusive Farm Use (EFU) zone.

FACTS

On December 23, 1987, the county adopted Ordinance No. 87-27, amending the Exclusive Farm Use chapter of the Polk County Zoning Ordinance (PCZO).[1] PCZO 136.020 (1987) ("Uses and Review") included a table which listed the uses potentially allowable in the EFU zone and classified them as "Permitted," "Type I Review," "Type II Review," "Type III Review" or "C.U." (conditional use). PCZO 136.020.M (1987) listed "utility facilities necessary for public service * * *," as Type I Reviews. In addition, PCZO 136.020.L (1987) listed transmission towers over 200 feet in height as conditional uses.[2] However, in a subsequent section of the EFU chapter, "utility facilities necessary for public service * * *" were described as allowable "subject to the decision criteria specified in [PCZO] 119.070" for conditional uses. PCZO 136.060.16 (1987).

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[1]Provisions of the PCZO, as amended by Ordinance No. 87-27, shall be cited as PCZO ____ (1987).

[2]Conditional use approval criteria for transmission towers over 200 feet in height were set out in a subsequent section of the EFU chapter. PCZO 136.060.21 (1987).

On April 7, 1988, the county planning director received a letter from petitioners' agent requesting permission to construct a cellular communication facility on a parcel of land in the EFU zone. Record 120. The letter states:

> "The facility consists of a monopole tower 180 feet in height and an unmanned equipment building 12 X 32 feet in size. The tower and equipment are used to transmit and receive telephone calls to and from mobile telephones and regular telephones." Id.

On April 20, 1988, the county adopted Ordinance No. 88-11, amending PCZO 136.020.L and M to list "utility facilities necessary for public service * * *" and "transmission towers" (of all heights) as conditional uses in the EFU zone. Record 149. In addition, PCZO 136.060.21 was amended, making the conditional use approval criteria previously applicable only to transmission towers over 200 feet in height, applicable to approval of all transmission towers.

Also on April 20, 1988, a county planning department staff member telephoned petitioners' agent and told him that conditional use approval of the proposed cellular communication facility would be required. Record 148. On April 21, 1988, the planning director wrote petitioners' agent regarding the agent's letter received April 7, 1988. The planning director's letter provides in relevant part:

> "County Counsel has advised me the proposal you discussed [in the April 7, 1988 letter] should be placed on 'hold' status pending the outcome of the County's * * * action on the ordinance amendment.

> * * * Your proposal will need to be submitted in the form of an appropriate application to qualify under the County's ordinances.
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> "* * * I have enclosed within this letter copies of a Conditional Use application so you may transform your plan into that form. Then we will process it in as timely fashion as our agenda allows. Please be sure the property owner where the tower is proposed signs or authorizes the application. Under Section 119.020 of the [PCZO], the owner (defined in [PCZO] 110.425) of the property must sign the application, or authorize in writing its signing by a contract purchaser, lessee or agent. The letter you submitted did not evidence the property owner's authorization." (Emphasis in original.) Record 147.

On May 6, 1988, petitioners submitted to the county planning department an application for a conditional use permit for a cellular communication facility located on an approximately 3,500 sq. ft. portion of a 262 acre EFU-zoned parcel. Record 121, 138-142. This application is on a planning department form, bears the authorization of the property owner, and was accompanied by a $175.00 filing fee. Id.

A public hearing was held before the county hearings officer on June 21, 1988. On July 25, 1988, the hearings officer issued an order denying the application. Petitioners appealed the hearings officer's decision to the board of commissioners. On September 14, 1988, the board of commissioners adopted an order denying the appeal and

affirming the hearings officer's decision.[3] This appeal followed.

MOTION FOR EVIDENTIARY HEARING

Petitioners request an evidentiary hearing, pursuant to OAR 661-10-045(1), to present evidence supporting the allegation in the petition for review that an application for the proposed cellular communication facility was filed with the county planning department on April 7, 1988.[4] Petitioners argue this allegation is disputed in the response brief, in that the response brief states that an application for the proposed use was not filed until May 6, 1988. Petitioners further argue that the disputed allegation concerns a procedural irregularity which, if proved, would warrant reversal or remand. ORS 197.830(13)(b). According to petitioners, if the application was filed on April 7, 1988, it is not subject to

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[3]The board of commissioners' order (Record 14-15) incorporates by reference the findings and conclusions of the hearings officer's order (Record 42-51).

[4]Petitioners state they will present testimony by their agent concerning oral statements made by the planning director on April 5 and 6, 1988 regarding (1) the requirements for an application for the proposed use, and (2) the adequacy of petitioners' April 7, 1988 letter to satisfy those requirements. Petitioners' motion is supported by an affidavit by the agent. The county challenges the reliability of the agent's affidavit and moves to strike handwritten notes by the agent allegedly made on April 5 and 6, 1988, which petitioners submitted to demonstrate the accuracy of the affidavit. Because we decide below, independent of the affidavit and supporting notes submitted by petitioners, that an evidentiary hearing in this case is not warranted, we do not further consider respondent's motion to strike.

the PCZO 136.060.21 standards for transmission towers, which were made applicable to towers 200 feet or less in height by Ordinance No. 88-11, adopted on April 20, 1988. ORS 215.428(3).

As explained under the third assignment of error infra, based on the record of the proceeding below, we agree with petitioners that an application for the proposed cellular communication facility was filed on April 7, 1988. Therefore, there is no need to conduct an evidentiary hearing to allow petitioners to present additional evidence in support of this point.

The motion for evidentiary hearing is denied.

INTRODUCTION

A local government's denial of a land use development application will be sustained if the local government's determination that any one approval criterion is not satisfied is sustained. Forest Park Estate v. Multnomah County, ___ Or LUBA ___ (LUBA No. 90-070, December 5, 1990), slip op 32 n 21; Van Mere v. City of Tualatin, 16 Or LUBA 671, 687 n 2 (1988); Weyerhauser v. Lane County, 7 Or LUBA 42, 46 (1982). Therefore, if a local government's denial is based on independent determinations of noncompliance with more than one approval standard, petitioners must successfully challenge every determination of noncompliance. Garre v. Clackamas County, ___ Or LUBA ___ (LUBA No. 89-131, February 27, 1990), slip op 6-7; Baughman v. Marion County,

17 Or LUBA 632, 636 (1989).

In this case, the appealed order relies on two independent bases for denying petitioners' application.[5] First, the order concludes that the proposed cellular communication facility is not a "utility facility necessary for public service," as that term is used in PCZO 136.060.16. Record 47-48. Second, the order finds that the proposed tower does not meet the standards for transmission towers found in PCZO 136.060.21(a), (b) and (c).[6] Record 49, 50. In order to obtain reversal or remand of the challenged order, petitioners must demonstrate error in both bases for the denial.

THIRD ASSIGNMENT OF ERROR

> "Petitioners' application is only subject to the general conditional use criteria applicable to uses under PCZO § 136.060(16)."
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> ORS 215.428(2) and (3) provides:
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> "(2) If an application for a permit or zone change is incomplete, the governing body or its designate shall notify the applicant of exactly what information is missing within 30 days of receipt of the application and allow

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[5]The order also states "the applicant has failed to show how this application will comply with" four listed comprehensive plan policies. Record 49. However, the order does not state that the listed plan policies are approval standards for the subject application. Further, the county does not argue in its brief that these four plan policies are approval standards for the subject application, or that noncompliance with these policies constitutes an independent basis for denial of petitioners' application.

[6]These standards were made applicable to transmission towers 200 feet or less in height by Ordinance No. 88-11, adopted April 20, 1988.

the applicant to submit the missing information. * * *

"(3) If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

Petitioners argue that their application was first submitted in the form of a letter on April 7, 1988. Record 120. Petitioners maintain that on that date the county's comprehensive plan and land use regulations were acknowledged under ORS 197.251, with the exception of several rural exception areas not at issue in this appeal. Record 167. Petitioners contend the planning director's April 21, 1988 letter requested additional information, and they submitted that requested additional information on May 6, 1988, within 180 days of when the application was first submitted.[7] According to petitioners, under ORS 215.428(3), the county's decision on their application should have been based solely on the criteria applicable on

[7]Petitioners additionally point out that their May 6, 1988 application does not address the criteria for transmission towers 200 feet or less in height adopted by the county on April 20, 1988 and, therefore, does not demonstrate acquiescence to the application of those standards.

April 7, 1988,[8] and not on the additional criteria of PCZO 136.060.21 which were adopted on April 20, 1988, for transmission towers 200 feet or less in height.

The county argues it did not err by applying to petitioners' application the additional criteria for transmission towers 200 feet or less in height, which were adopted on April 20, 1988. The county contends that the April 7, 1988 letter does not constitute an "application for a permit," as that term is used in ORS 215.428(3). The county argues that the letter does not comply with the requirements of PCZO 119.020 that a conditional use application be "on a form provided by the Planning Commission" and be filed by either the owner of the subject property or, with the property owner's written consent, a contract purchaser, lessee or agent of the owner. The county further argues that the April 7, 1988 letter cannot be considered an application because it was not accompanied by the fee required by PCZO 110.740 for conditional use applications.

Additionally, the county argues that petitioners should not be allowed to challenge in this appeal the applicability of the criteria adopted on April 20, 1988, because petitioners failed to raise this issue during the

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[8]Petitioners contend the only approval criteria applicable to the proposed cellular communication facility on April 7, 1988 were the general conditional use approval criteria of PCZO 119.070(a)-(c) (1987). PCZO 136.060.16 (1987).

proceedings before the county. According to the county, if it erred in failing to process the April 7, 1988 letter as an application, that was a procedural error. The county contends this Board has repeatedly held that if a party has opportunity to object to a procedural error during the local proceedings, but fails to do so, the issue cannot be raised on appeal. Dobaj v. City of Beaverton, 1 Or LUBA 237 (1980).

The county argues that petitioners were informed by the planning director that their letter was not an application, and acquiesced in the requirement that a conditional use permit application be filed, by filing such an application on May 6, 1988. The county further argues that petitioners had the opportunity to raise this issue in the hearing before the hearings officer, in their letter of appeal to the board of commissioners and at a board of commissioners meeting, but failed to do so. The county contends that petitioners' attorney represented to the board of commissioners that petitioner "McCaw did its best to present all the relevant evidence and legal arguments available to the Hearings Officer" and, therefore, petitioners should not be allowed to raise new issues before this Board. Record 20.

A. Waiver of Issue

The county is correct that this Board will not reverse or remand an appealed decision because of a procedural error

if petitioners had the opportunity to object to the procedural error during the local proceedings and failed to do so. However, we do not agree with the county's characterization of this assignment of error as one alleging procedural error. The essence of this assignment of error is that the county erred in applying the requirements of PCZO 136.060.21 to the subject application. Thus, petitioners claim the county "improperly construed the applicable law." ORS 197.835(7)(a)(D). Petitioners were not required to raise such claims of substantive error during the county proceedings in order to raise them in an appeal to this Board.[9]

B. April 7, 1988 Letter

In Territorial Neighbors v. Lane County, 16 Or LUBA 641, 646 (1988), we stated:

> "The plain meaning of [ORS 215.428(3)] is that, if a permit application was complete when filed (or made complete within 180 days), and a county's plan and regulations are acknowledged, the county

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[9]The appealed county decision was made prior to the legislature's 1989 enactment of ORS 197.763 and amendments to ORS 197.825 and 197.830, which provide that unless issues are raised before the local government decision maker in local quasi-judicial land use hearings, they cannot be raised before this Board. Or Laws 1989, ch 761, §§ 10a-12.

We further note that in Newcomer v. Clackamas County, 16 Or LUBA 564, aff'd 92 Or App 174, aff'd as modified 94 Or App 33 (1988), both we and the Court of Appeals found that an affirmative waiver of a substantive issue had occurred where petitioner's representation to the county that it was abandoning a previously raised legal issue induced the other parties and the county to forgo thoroughly addressing the issue in question. However, no such affirmative waiver of petitioners' rights under ORS 215.428(3) was made in this case.

> must apply the standards and criteria of the plan and regulations that were in effect at the time the application was initially filed. * * *"

Furthermore, in Kirpal Light Satsang v. Douglas County, 96 Or App 207, 772 P2d 944, adhered to 97 Or App 614, 776 P2d 1312 (1989), the Court of Appeals held that once an "application" is filed, a county has no authority to require the applicant to submit a new "application" after the county has amended the applicable regulations. The Court further stated:

> "* * * The county could request additional information pursuant to ORS 215.428(2), but it then would be required to act on the initial application after the information was supplied and the application became 'complete.' ORS 215.428(1)." Kirpal Light Satsang v. Douglas County, 96 Or App at 212.

In this case, there is no question that petitioners submitted all necessary information for a complete permit application within 180 days after submitting the April 7, 1988 letter. The only dispute concerns whether the April 7, 1988 letter constituted an "application" pursuant to ORS 214.428(3). Therefore, if the April 7, 1988 letter did constitute an application for the necessary permit for the proposed cellular communication facility, the county (1) could not require petitioners to submit a different application after the adoption of Ordinance No. 88-11 on April 20, 1988, and (2) erred in applying the standards of PCZO 136.060.21 to the proposed 180 foot transmission tower and denying the application based on noncompliance with PCZO

136.060.21(a)-(c).

In Kirpal Light Satsang v. Douglas County, on remand from the Court of Appeals, we considered the issue of how to determine whether documents submitted to a county constitute an "application" under ORS 215.428(3):

> "Although ORS chapter 215 includes no definition of the term 'application,' we believe the meaning intended is apparent when the statute is read as a whole. The statute provides permit applicants protection from changing approval standards. In order for a person to qualify as a permit applicant, we believe it is necessary to initiate the county's permit approval process. A person initiates the permit approval process by making known to the county, with reasonable certainty, (1) what the person seeks approval for, and (2) that the person requests that the county take action to grant land use approval. Although we believe it is reasonable for a county to require a permit applicant to utilize whatever forms and procedures are made available by the county for making it known that a request for land use approval is being initiated, we do not believe the county may rely on its lack of forms or procedures to argue that an applicant, who has otherwise made its request for discretionary approval known, has failed to initiate a permit approval request." Kirpal Light Satsang v. Douglas County, ___ Or LUBA ___ (LUBA No. 88-082, January 22, 1990), slip op 12.

We also stated that whether a submittal was accompanied by an application fee did not have a significant bearing on whether that submittal is an "application" within the meaning of ORS 215.428(3). Id., slip op at 11-12.

We agree with the county that PCZO 119.020 requires an application for conditional use approval to be on a planning department form and to include written authorization by the

property owner. We also agree that PCZO 110.740 requires a fee to be paid at the time a conditional use application is filed. However, it is unclear whether, when petitioners submitted their April 7, 1988 letter, the proposed cellular communication facility required a conditional use application. At that time, the PCZO provisions regulating transmission towers in the EFU zone as conditional uses applied only to towers over 200 feet in height, and PCZO 136.020.M (1987) provided that "utility facilities necessary for public service" were subject to "Type I" administrative review procedures.

PCZO 136.030 (1987) ("Type I Farm Review (EFU) - Administrative Action") provided in relevant part:

> "The Type I review is used to decide land use actions for * * * certain uses. Type I land use actions are reviewed and determined by the Planning Director. Type I reviews are subject to public notice requirements. Appeals of Type I reviews are to the Polk County Planning Commission or Board of Commissioners.
>
> "* * * * *"

As far as we can tell, there were no other provisions in the PCZO (1987) establishing requirements for Type I applications or procedures for Type I reviews in the EFU zone.

Of course, there was an inconsistency in the EFU zone provisions at that time, in that "utility facilities necessary for public service" were also described in PCZO 136.060.16 (1987) as subject to the conditional use criteria

of PCZO 119.070 (1987). However, the record does not demonstrate and the county does not contend, that it informed petitioners, prior to the adoption of Ordinance No. 88-11 on April 20, 1988, that their proposal required conditional use approval. Apparently, the county first informed petitioners that conditional use approval was required by a telephone call from the planning staff on April 20, 1988. Record 148.

The April 7, 1988 letter describes the proposed cellular communication facility and its proposed location and clearly requests the county to take action to grant land use approval. Record 120. Given these facts, and that it is at best unclear whether the PCZO (1987) required that a conditional use application be filed for such a proposal, we conclude petitioners' April 7, 1988 letter constitutes an "application" under ORS 215.428(3). Therefore, the county erred in denying petitioners' application for noncompliance with PCZO 136.060.21.

The third assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

> "Imposing conditional use approval on 'utility facilities necessary for public service' or transmission towers less than 200 feet in height violates ORS 215.213."

A. Definition of "Utility Facilities Necessary for Public Service"

The alternative basis for the county's denial of petitioners' application is that the proposed cellular

communication facility is not a "utility facility necessary for public service," as that term is used in PCZO 136.060.16, because it is not "so impressed with a public interest that it comes within the field of public regulations such as a public utility within the broad meaning of the term." Record 48.

Petitioners contend that the proposed use is as a matter of law a "utility facility necessary for public service," as that term is used in PCZO 136.060.16 and ORS 215.213(1)(d). Petitioners argue that this Board so concluded with regard to an identical ordinance provision and cellular communications facility in McCaw Communications, Inc. v. Marion County, 17 Or LUBA 206, 221-222 (1988):

> "* * * [T]he proposed cellular telephone communication service does supply the public with a service of public consequence or need.
>
> "* * * * *
>
> "[C]ellular telephone communication is impressed with public interest so that it comes within the arena of public regulation.
>
> "[A] facility 'necessary for public service' means a facility that is necessary for the entity to provide a public service, not that it is necessary to locate the facility at the particular location proposed. * * * The ordinance does not require McCaw to demonstrate that location of the tower at the proposed site in the [exclusive farm use] 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" [under] the county's [exclusive farm use] zone.'" (Emphasis in original.)

We agree with petitioners that the facility at issue in this case is substantially similar to, and the ordinance term "utility facilities necessary for public service" identical to, those at issue in McCaw Communications, Inc. v. Marion County. However, subsequent to the filing of the briefs in this appeal, the Court of Appeals reversed our decision in that case. McCaw Communications, Inc. v. Marion County, 96 Or App 552, 773 P2d 779 (1989). The court agreed with us that the proposed cellular communication facility was a "utility facility" and that it would provide a "public service." Id. at 554. However, the Court disagreed with our interpretation of the term "necessary." The Court concluded that for a "utility facility" proposed to be located in an exclusive farm use zone to be "necessary for public service," a county "must find that it is necessary to situate the facility in the agricultural zone in order for that service to be provided." Id. at 556.

We conclude that, as a matter of law, the proposed cellular communications facility is a "utility facility" which provides a "public service" and, therefore, the county erred by finding otherwise in the challenged decision. However, the requirement of PCZO 136.060.16 that the proposed facility be a "utility facility necessary for public service" is not satisfied unless the county finds that it is necessary to locate the proposed facility in the

EFU zone in order to provide that service. The county made no such finding. Therefore, the county's decision must be remanded to address this issue.

This subassignment of error is sustained.

B. Requirement that "Utility Facilities Necessary for Public Service" Must Be Permitted Use in EFU Zone

Petitioners argue that ORS 215.213 requires the county to allow "utility facilities necessary for public service" as a permitted use, not a conditional use, in its EFU zone.

Under the third assignment of error, supra, we agree with petitioners that the county cannot deny the subject application based on the standards of PCZO 136.060.21 for transmission towers as a conditional use in the EFU zone. The county's only other basis for denying the application is that the proposed use is not a "utility facility necessary for public service." Therefore, even if we were to agree with petitioners that the county cannot make "utility facilities necessary for public service" a conditional use in the EFU zone, that would provide no basis for reversal or remand of the county's decision.

This subassignment of error is denied.

The second assignment of error is sustained, in part.

FIRST ASSIGNMENT OF ERROR

> "The County's conditional use regulation of petitioners' proposed tower infringes on petitioners' right of free speech under the Oregon and federal constitutions."

Petitioners argue that the conditional use approval

standards for transmission towers established by PCZO 136.060.21 and the general conditional use approval standards established by PCZO 119.070, as applied to the proposed use, violate the First Amendment to the United States Constitution and Article I, Section 8 of the Oregon Constitution.

Under the third assignment of error, supra, we conclude the county cannot apply the conditional use standards of PCZO 136.060.21 to the subject application. Furthermore, the county did not deny the subject application based on noncompliance of the proposed cellular communication facility with the general conditional use standards of PCZO 119.070. Therefore, even if we were to agree with petitioners that reliance on these general conditional use standards to deny the proposed use would be unconstitutional, that would provide no basis for reversal or remand of the county's decision.

The first assignment of error is denied.

The county's decision is remanded.