BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES R. DIERKING,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

SBA TOWERS, Inc., and
SPRINT SPECTRUM, L.P.,
Intervenors-Respondent.

LUBA No. 99-174

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

James R. Dierking, Oregon City, filed the petition for review and argued on his own behalf.

No appearance by respondent.

Steve P. Hultberg, Portland, filed the response brief and argued on behalf of intervenor-respondent, SBA Towers, Inc. With him on the brief was Perkins Coie, LLP.

Steven W. Abel, Portland, represented intervenor-respondent Sprint Spectrum, L.P.

HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member, participated in the decision.

REMANDED 05/31/2000

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county land use hearings officer's decision that grants conditional use approval for a wireless communications tower and related equipment cabinets in an exclusive farm use (EFU) zone.

MOTION TO INTERVENE

SBA Towers, Inc. and Sprint Spectrum, L.P. separately move to intervene on the side of respondent. There is no opposition to the motions, and they are allowed.[1]

INTRODUCTION

One of the central issues in this matter concerns which of two arguably applicable statutory provisions establishes the approval criteria for the challenged decision. We briefly discuss that issue before setting out the relevant facts.

As relevant in this appeal, the statutory EFU zoning provisions at ORS 215.283(1) and (2) establish two different categories of nonfarm uses that may be authorized in EFU zones.[2] The Oregon Supreme Court's decision in *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995), established that the uses in the first category (ORS 215.283(1)) are permitted outright, whereas the uses in the second category (ORS 215.283(2)) may be subject to locally adopted approval criteria. *Id*., at 496.[3]

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[1]Only intervenor-respondent SBA Towers, Inc. filed a respondent's brief in this matter. All references to intervenor in this opinion are to intervenor-respondent SBA Towers, Inc.

[2]ORS 215.213(1) and (2) establish a similar two-category scheme for marginal lands counties. Clackamas County is not a marginal lands county and, therefore, ORS 215.283(1) and (2) apply to Clackamas County.

[3]The scope of the Supreme Court's holding in *Brentmar* was clarified in *Lane County v. LCDC*, 325 Or 569, 942 P2d 278 (1997), where the court held that the Land Conservation and Development Commission (LCDC) retained its rulemaking authority to require that counties limit or prohibit certain uses under ORS 215.213(1) and 215.283(1) that would otherwise qualify as outright permitted uses exempted from supplemental local land use legislation under *Brentmar*. The Supreme Court's holdings in *Brentmar* and *Lane County v. LCDC* are not directly at issue in this appeal.

A. Utility Facilities Necessary for Public Service

Among the uses listed under ORS 215.283(1) are "utility facilities necessary for public service."[4] Under *Brentmar*, applications for "utility facilities necessary for public service" must be reviewed by the county exclusively under the provisions of ORS 215.283(1), as uses permitted outright. However, the Oregon Court of Appeals has interpreted the "necessary for public service" language in ORS 215.283(1)(d) as imposing a statutory requirement that public utility facilities not be sited on EFU-zoned sites unless "the county [finds] that it is necessary to situate the facility in the agricultural zone in order for the service to be provided." *McCaw Communications, Inc. v. Marion County*, 96 Or App 552, 555-56, 773 P2d 779 (1989). LCDC has adopted rules that codify this requirement.[5] We recently explained that *McCaw Communications, Inc.* and OAR 660-033-0130(16) require that a county demonstrate it is not feasible to locate a proposed utility facility on a site that is not zoned EFU, before approving such a facility on an EFU-zoned site.

> "[O]nce the decision is made to construct a particular kind of utility facility to respond to an identified need, that facility may only be located on EFU-zoned lands if there are no feasible sites for the proposed facility that are not zoned

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[4]ORS 215.283(1) provides, as relevant:

> "The following uses may be established in any area zoned for exclusive farm use:
>
> "* * * * *
>
> "(d) Utility facilities necessary for public service, * * * but not including * * * *transmission towers over 200 feet in height*." (Emphasis added.)

[5]OAR 660-033-0120 duplicates the statutory language in ORS 215.213(1)(d) and 215.283(1)(d) and refers to a table that lists the following use as allowed, subject to OAR 660-033-0130(16):

> "Utility facilities necessary for public service, except * * * transmission towers over 200 feet in height."

Codifying the Court of Appeals' holding in *McCaw Communications, Inc.*, OAR 660-033-0130(16) provides:

> "A facility is necessary if it must be situated in an agricultural zone in order for the service to be provided."

EFU." *Dayton Prairie Water Association v. Yamhill County*, ___Or LUBA ___ (LUBA No. 99-123, May 11, 2000), slip op 6.

In this opinion, we refer to the statutory requirement under ORS 215.283(1)(d) that utility facilities be sited on non-EFU-zoned sites, if such sites are feasible alternative sites, as the "necessary test."

In summary, if a utility facility is to be approved as a "utility facility necessary for public service" under ORS 215.283(1), it is a use permitted outright. However, in allowing a "utility facility necessary for public service" under ORS 215.283(1), the county must demonstrate that the application complies with the "necessary test."

B. Transmission Towers over 200 Feet in Height

ORS 215.283(1)(d) specifically excludes "transmission towers over 200 feet in height" from the "utility facilities necessary for public service" that may be permitted outright (subject to the "necessary test"). *See* n 4. However, such transmission towers are specifically allowed under ORS 215.283(2).[6] Thus, "transmission towers over 200 feet in height" are not considered uses that the county must allow outright, and applications for such uses must comply with the approval standards set out at ORS 215.296 and any supplemental county land use legislation requirements. However, according to the county's interpretation of the relevant statutes, "transmission towers over 200 feet in height" are not subject to the "necessary test." Petitioner disputes this interpretation in his first assignment of error.[7]

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[6]As relevant, ORS 215.283(2) provides:

> "The following nonfarm uses may be established, subject to the approval of the governing body or its designee in any area zoned for exclusive farm use subject to ORS 215.296:
>
> "* * * * *
>
> "(L) Transmission towers over 200 feet in height."

[7]Petitioner's challenge of the county's interpretation of ORS 215.283(2)(L) is limited to the applicability of the "necessary test." We do not understand petitioner to dispute that the challenged wireless communications tower is properly viewed as a "transmission tower," as that concept is used in ORS 215.283(2)(L).

FACTS

Intervenor originally sought and received administrative approval from the county for "a Personal Communication Service (PCS) facility consisting of a 199' multi-user lattice tower and equipment * * *." Supplemental Record 97. The proposed tower would be located on EFU-zoned property and the administrative approval was granted under county legislation that implements ORS 215.283(1)(d). Petitioner recently purchased 80 acres southeast of the proposed tower site and, in a joint venture with his wife and a closely held corporation, is developing an organic herb farm and botanical garden on the 80 acres. Petitioner opposes the proposed tower and filed a local appeal challenging the county's administrative approval.

Following petitioner's local appeal, intervenor withdrew its original application and, on August 16, 1999, submitted a revised application. As far as we can tell the only relevant difference between the original and revised applications is that the revised application proposes a 250-foot lattice tower instead of a 199-foot lattice tower. The county approved the second application, under county legislation that implements ORS 215.283(2)(L).[8] In doing so, the county found that the "necessary test" does not apply to the revised application. Record 8. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues the county erred in concluding that applications for "transmission towers over 200 feet in height" under ORS 215.283(2)(L) need not demonstrate compliance with the "necessary test." In his argument under the first assignment of error, petitioner also includes a number of subassignments of error, some of which are only tangentially related to the first assignment of error. We address each of petitioner's arguments below.

[8]In this opinion we cite the relevant statutory provisions rather than the county legislation that was adopted to implement the statutory provisions.

A. The Necessary Test

As we have already explained, in *McCaw Communications, Inc.*, the Court of Appeals derived the "necessary test" from the "necessary for public service" language in ORS 215.283(1)(d). However, ORS 215.283(2)(L), which authorizes "transmission towers over 200 feet in height," does not include the "necessary for public service" language. See n 6. Therefore, a literal reading of ORS 215.283(2)(L), in isolation, supports the county's position that the "necessary test" does not apply to applications for "transmission towers over 200 feet in height" under ORS 215.283(2)(L).

Petitioner's strongest argument that the necessary test does apply to transmission towers authorized by ORS 215.283(2)(L) relies on reading ORS 215.283(1)(d) and ORS 215.283(2)(L) together. We understand petitioner to argue that ORS 215.283(1) and (2) together allow "utility facilities necessary for public service" in EFU zones. As relevant, ORS 215.283(1)(d) authorizes all utility facilities necessary for public service "not including * * * transmission towers over 200 feet in height." This excluded type of utility facility necessary for public service is allowed under ORS 215.283(2)(L). We understand petitioner to argue that if the statutes are read together it is clear that the transmission towers authorized by ORS 215.283(2)(L) are simply a subcategory of "utility facilities necessary for public service." Petitioner contends that the legislature's failure to duplicate the "necessary for public service" language in ORS 215.283(2)(L) does not mean that the transmission tower facility authorized by ORS 215.283(2)(L) is something other than a "utility facility necessary for public service." Therefore, according to petitioner, the proposed tower must comply with the "necessary test."

While the above argument has some facial appeal, we believe the county's contrary interpretation of the statutes is correct.[9] The current statutory authority for "transmission towers over 200 feet in height" did not originate as an exception to the ORS 215.283(1)(d) authorization for "utility facilities necessary for public service." In 1983, legislation was adopted to authorize counties to "allow a transmission tower over 200 feet in height to be established in *any zone* subject to reasonable conditions imposed by the governing body or its designate." Or Laws 1983, ch 827, § 23a (emphasis added). This 1983 legislation is codified at ORS 215.438. ORS 215.438 does not include the "necessary for public service" language that appears in ORS 215.283(1)(d). In 1983, ORS 215.283(1)(d) did not include an exception for "transmission towers over 200 feet in height," and there was no separate provision for such transmission towers in ORS 215.283(2). ORS 215.283(1) and (2) were not amended to include the current statutory language at ORS 215.283(1)(d) and 215.283(2)(L) until 1985. Or Laws 1985, ch 811, § 7. That 1985 amendment apparently was adopted to make ORS 215.283 consistent with the ORS 215.438 general grant of authority to counties to approve transmission towers over 200 feet in height in *any* zone. In view of this statutory history, we do not believe it is accurate to view the "transmission towers over 200 feet in height" that are allowed by ORS 215.283(2)(L) as simply a subcategory of the "utility facilities necessary for public service" that are otherwise allowed by ORS 215.283(1)(d). The relevant language in ORS 215.283(1)(d) and 215.283(2)(L) apparently was adopted to make the statutory EFU zone provisions consistent with ORS 215.438. Neither ORS 215.438 nor the amended language of ORS 215.283(2)(L) includes the "necessary for public

[9]Petitioner's argument also has some pragmatic appeal in that it avoids the apparently anomalous result that a 199-foot transmission tower is subject to the restrictive "necessary test" while an otherwise identical 250-foot transmission tower is not.

service" language upon which the "necessary test" is based.[10] In view of the legislature's failure to include such language, it would not be appropriate for this Board to read that language into ORS 215.283(2)(L). ORS 174.010; *Whipple v. Howser*, 291 Or 475, 479-80, 632 P2d 782 (1981); *1000 Friends of Oregon v. Benton County*, 20 Or LUBA 7, 12 (1990).

Legislative amendments to ORS 215.283(1) in 1999 also support the county's view that the "necessary test" does not apply to transmission towers authorized by ORS 215.283(2)(L). Oregon Laws 1999, chapter 816, section 3, codified at ORS 215.275, establishes several statutory factors that are to be considered in applying the "necessary test."[11] ORS 215.275 expressly applies to "[a] utility facility established under * * * ORS 215.283(1)(d)," but it does not apply to transmission towers approved under ORS 215.283(2)(L).

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[10]Indeed it is difficult to see how the "necessary test," as articulated in *McCaw Communications, Inc.*, could be applied to the transmission towers authorized by ORS 215.438, since that statute authorizes transmission towers over 200 feet in height in "any zone."

[11]ORS 215.275 provides as follows:

> "(1) A utility facility established under ORS 215.213(1)(d) or 215.283(1)(d) is necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service.
>
> "(2) To demonstrate that a utility facility is necessary, an applicant for approval under ORS 215.213(1)(d) or 215.283(1)(d) must show that reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:
>
> "(a) Technical and engineering feasibility;
>
> "(b) The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;
>
> "(c) Lack of available urban and nonresource lands;
>
> "(d) Availability of existing rights of way;
>
> "(e) Public health and safety; and
>
> "(f) Other requirements of state or federal agencies."

In summary we agree with the county that, in approving "transmission towers over 200 feet in height" under ORS 215.283(2)(L), the county is not required to apply the "necessary test." We reject petitioner's argument that the county erred in refusing to apply the "necessary test" in the challenged decision. In other words, the county did not err by failing to require that the applicant demonstrate that it is not feasible to locate the proposed facility on alternative, non-EFU-zoned sites.

We turn to petitioner's subassignments of error.

B. Utility Cabinets

Petitioner argues the approved facility includes both the 250-foot transmission tower and separate utility cabinets. We understand petitioner to argue that even if the transmission tower may be approved under ORS 215.283(2)(L), the utility cabinets may only be approved as a "utility facility necessary for public service" under ORS 215.283(1)(d), and the county erred by failing to consider the utility cabinets in that manner.

Intervenor responds:

> "The proposed transmission tower is comprised of a steel lattice tower structure, equipment cabinets and antenna arrays. The equipment cabinets house the communication equipment and are physically connected to the tower via co-axial cable. The co-axial cable runs the length of the tower and is connected to the antenna arrays on the tower. The equipment, cable and antennas are essential to the facility. Without such equipment, the 'transmission tower' would simply be a steel structure incapable of transmitting anything. Similarly, without the tower, the equipment has no independent utility. The equipment, therefore, is an intrinsic and essential part of a 'transmission tower.'" Intervenor-Respondent's Brief 6-7 (record citations omitted).

We agree with intervenor. This subassignment of error is denied.

C. Alternative Non-EFU-Zoned Sites

Petitioner argues the county erred by failing to consider the feasibility of siting the proposed transmission tower on non-EFU-zoned sites. However, we have already concluded that the county correctly determined that the "necessary test" does not apply to transmission

towers authorized by ORS 215.283(2)(L). Accordingly, the county was not required to consider the feasibility of locating the proposed transmission tower on non-EFU-zoned sites, and its failure to do so provides no basis for reversal or remand. This subassignment of error is denied.

D. No Reason for Increased Tower Height

Petitioner argues there is no functional reason for the tower to be over 200 feet tall and that the only reason the tower height was increased was to avoid the "necessary test." As far as we can tell from the record, petitioner appears to be correct. However, neither ORS 215.283(1)(d) nor 215.283(2)(L) require that an applicant justify its decision concerning proposed tower height. The statutes simply impose different approval standards for transmission towers, depending on whether the transmission tower exceeds 200 feet in height.

This subassignment of error is denied.

E. Minimum Size Necessary for Use

Petitioner argues the county should have exercised its discretion under ORS 215.296(10) to require that the tower be reduced in size below 200 feet.[12] Petitioner cites Clackamas County Zoning and Development Ordinance (ZDO) 401.07 and the following passage from the Court of Appeals' decision in *McCaw Communications, Inc.* as additional sources of authority for the county to require that the tower be reduced in size.[13]

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[12]ORS 215.296(10) provides:

> "Nothing in this section shall prevent a local governing body approving a use allowed under ORS 215.213 (2) or 215.283 (2) from establishing standards in addition to those set forth in subsection (1) of this section or from imposing conditions to insure conformance with such additional standards."

[13]ZDO 401.07(B) provides:

> "Conditional Use Divisions: The Hearings Officer may approve a division of land in the EFU Zoning District for Nonfarm Uses, except dwellings, set out in ORS 215.283(2) if the

> "[The county EFU zoning provision] like its statutory analog, defines non-farm uses which are permitted in farm zones. However, state and local provisions of that kind must be construed, to the extent possible, as being consistent with the overriding policy of preventing 'agricultural land from being diverted to non-agricultural use.' *Hopper v. Clackamas County*, 87 Or App 167, 172, 741 P2d 921 (1987), *rev den* 304 Or. 680 (1988). Therefore, when possible, the non-agricultural uses which the provisions allow should be construed as ones that are 'related to and [promote] the agricultural use of farm land.' *Hopper v. Clackamas County*, *supra*, 87 Or App at 172. When no such direct supportive relationship can be discerned between agriculture and a use permitted by the provisions, the use should be understood as being as nondisruptive of farm use as the language defining it allows." 96 Or App at 555.

Petitioner apparently misreads the above-quoted language in *McCaw Communications, Inc.* to impose a general obligation that the county must find that the proposed transmission tower has a direct supportive relationship with agricultural uses. *McCaw Communications, Inc.* describes the appropriate approach to be taken when interpreting ambiguous EFU statutory provisions authorizing nonfarm uses; it does not impose a direct approval criterion that all nonfarm uses must be found to directly support agricultural uses.

Similarly we fail to see how ORS 215.296(10) supports petitioner. That statute authorizes the county to adopt approval criteria; it is not a general grant of authority to the county to require on a case-by-case basis that impacts of nonfarm uses be minimized.

Finally, ZDO 401.07(B) applies to land divisions and regulates parcel size. The challenged decision does not approve a land division. Even if ZDO 401.07(B) applied in this case, it would only authorize the county to require that any newly created nonfarm parcel be the "minimum size necessary for the use"; it does not provide a basis for the county to require that the tower height be minimized in the way petitioner suggests.

This subassignment of error is denied.

Hearings Officer finds that the parcel for the nonfarm use is not larger than the minimum size necessary for the use."

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Under this assignment of error petitioner argues the county erred in finding that the application complies with ORS 215.296(1)(a) and (b), which require:

> "A use allowed under * * * ORS 215.283(2) may be approved only where the local governing body or its designee finds that the use will not:
>
> "(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
>
> "(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use."

We consider petitioner's subassignments of error separately below.

A. Failure to Consider Accepted Farming Practices Associated with Petitioner's Planned Herb and Botanical Garden

Petitioner's property is a former rabbit and chicken farm. Petitioner and his wife are in the process of developing an organic herb farm and botanical education garden on the property.[14] Petitioner advised the county and the applicant of his plans while the disputed application was being reviewed by the county.[15] In his first and second assignments of error, petitioner argues the county erred in failing to consider the impact of the proposed tower on accepted farming practices that will be associated with his developing organic herb farm and botanical garden. In particular, petitioner argues the county failed to consider whether the

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[14]The record does not establish precisely how far petitioner's plans have progressed.

[15]At the September 29, 1999 hearing before the hearings officer, petitioner testified:

> "At no time has the applicant contacted us to obtain information on the farm practices we are implementing, nor have they given any consideration to the impact their proposed utility facility will have * * *. In fact, we have contacted the applicant on numerous occasions to discuss the conflicting uses, and they have not cared to consider the impact.
>
> "Our implementation of the organic herb farm and botanical gardens is not a pipe dream. It is funded in a joint venture with our closely held corporation, Liberty Natural Products, Inc., which has current annual sales of approximately $4 million. * * *" Record 124

proposed facility will force a significant change in or significantly increase the cost of his plans to employ on-site marketing techniques.[16]

Apparently, petitioner's plans have yet to result in any visible changes to petitioner's property. The challenged decision addresses the question of how to go about identifying the farm uses and accepted farming practices that must be considered under ORS 215.296(1) as follows:

> "Pertinent findings for purposes of ORS 215.296(1)(a) and (b) must at least: (1) describe the farm *practices* on surrounding lands devoted to farm use; (2) explain why the proposed use will not force a significant change in those *practices*; and (3) also explain why the proposed use will not significantly increase the cost of those *practices.* Farm 'practices' and farm 'uses' connote discrete elements for purposes of ORS 215.296(1); the former occurs on lands devoted to the latter.
>
> "* * * * *
>
> "Opponents urge–albeit without citation to any pertinent authority–that ORS 215.296(1) should be construed as encompassing not just *existing* farm uses but both possible *future* farm uses and farm uses 'in the process of being implemented' as well. The Hearings Officer declined to embrace that interpretation in [a prior decision] and also declines here as well. Not only would that expansive interpretation compel an applicant to, in effect, prove a negative for something that does not yet exist, but the grammatical context of the language in ORS 215.296(1) makes it fairly plain (at least to the Hearings Officer) that the phrases 'farm . . . *practices* on surrounding lands *devoted* to farm . . . use' * * * and 'cost of accepted farm . . . *practices* on land *devoted to farm . . . use'* necessarily envision a present-tense assessment of actual, implemented farming practices. The Hearings Officer observes that the statutory definition of 'farm use' in ORS 215.203(2)(a) likewise supports a present-tense interpretation: '. . . "farm use" means the *current* employment of land . . .[.]'" Record 17 (emphases in original; citations omitted).

We generally agree with the hearings officer's reasoning, but not with his conclusion that any accepted farming practices that may be associated with petitioner's developing organic herb farm and botanical garden need not be considered.

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[16]It is not entirely clear to us exactly how petitioner believes the disputed tower will force a significant change in or significantly increase the cost of on-site marking. However, petitioner apparently believes the visual impact of the tower will be such as to violate ORS 215.296(1)(a) and (b).

In applying ORS 215.296(1), it is entirely appropriate for the applicant and county to begin by visually surveying surrounding lands to identify the farm and forest uses to which those lands are devoted. Based on that survey, it is also appropriate to identify the accepted farming practices that are associated with the observed farm and forest uses. Unless some question is raised about the accuracy or completeness of the survey, the analysis required by ORS 215.296(1) may be limited to the farm uses and accepted farming practices identified through such a visual survey. However, once petitioner advised the county and applicant that he was in the process of changing the existing farm use of the property to an organic herb farm and botanical garden, the applicant and the county were no longer entitled to rely on the visual survey as the sole basis for determining the farm use to which petitioner's property is devoted.

We believe the relevant question is how far must petitioner proceed with his plans before his property is properly considered "devoted" to the proposed new farm use such that the accepted farm practices that may be associated with the herb farm and botanical garden must be considered by the county under ORS 215.296(1). Although it is not entirely clear, the county apparently assumed that the use of the property must be determined by visually inspecting the property and, unless that visual inspection discloses an existing herb farm and botanical garden use, the property is not devoted to such use. While a fully planted herb farm and botanical garden with plants that are mature enough to be visible would likely eliminate any doubt about the farm use to which the property is devoted, we see no reason why the conversion of petitioner's property from a chicken and rabbit farm to an herb farm and botanical garden necessarily must proceed to that point before the accepted farming practices that will be associated with petitioner's proposed use must be considered under ORS 215.296(1).

We agree with the county that it is not required under ORS 215.296(1) to anticipate and consider the accepted farming practices that might be associated with every possible

farm use to which surrounding lands may be put in the future. However, we see no reason why petitioner's property is not properly viewed as devoted to use as an herb farm and botanical garden by virtue of the expenditures that petitioner has already made and the plans that he is developing. Petitioner's planned use is much more than a hypothetical or possible use of the property. Petitioner's plans have developed to the point where petitioner is able to describe the planned herb farm and botanical garden in some detail. Perhaps more importantly, petitioner is able to identify the farming practices that will be employed on the property. Therefore, the county faces no practical difficulties in determining which of those farm practices qualify as "accepted farm practices," which must be considered under ORS 215.296(1). Where a party in the local proceedings advises the county that an existing or prior farm use on surrounding lands is in the process of being abandoned, and plans for the new farm use are sufficiently developed to allow the new farm use to be described in sufficient detail to allow the farm practices that will be associated with the new farm use to be identified, an applicant for a nonfarm use that is subject to ORS 215.296(1) must address the accepted farming practices that will be associated with that new farm use.[17]

We note that we agree with the hearings officer that organic farming is not properly viewed as either a "farm use" or an "accepted farm practice." However, organic farmers may employ accepted farming practices that are not normally associated with other types of farming. Petitioner's plans to employ on-site marketing may or may not constitute such an accepted farming practice. Regardless of the answer to that question, the county erred in failing to consider the question simply because the organic herb farm and botanical garden are not yet planted. On remand, the county must consider the farming practices that petitioner currently is employing or plans to employ in his organic herb farm and botanical

[17]While there could be some uncertainty about what accepted farming practices actually will be carried out in conjunction with a *new* farm use, identifying the accepted farm practices for *existing* farm uses can also be uncertain, in situations where there are a number of accepted farm practices that may be associated with any particular farm use.

garden and determine whether some or all of those farming practices constitute "accepted farm * * * practices," within the meaning of ORS 215.296(1).[18]

Finally, intervenor argues these subassignments of error should be denied because the Telecommunications Act of 1996 prohibits local governments from regulating the placement and construction of telecommunications facilities "on the basis of the environmental effects of radio frequency emissions[.]" 47 USC § 332(c)(7)(B)(iv). Assuming the Telecommunications Act of 1996 would preclude denial of the application based on environmental effects of radio frequency emissions, petitioner's arguments concerning the impacts of the tower are based on the visual impacts of the tower as well as his concerns about the emissions.

The first and second subassignments of error are sustained.

B. Impacts on Farm Residents and Workers

Petitioner argues under his third subassignment of error that "family farming is a farm practice * * * [a]s distinguished from large scale corporate farming * * *." Petition for Review 26. Petitioner argues that the impacts of the proposed transmission tower on "farm families, residents and workers" are impacts on accepted farming practices that must be considered under ORS 215.296(1). *Id.*

We do not agree that family farming is properly viewed as a "farm practice." Neither does petitioner explain how residents or workers themselves could constitute an accepted farm practice.

The third subassignment of error is denied.

C. Compliance with Federal Communication Commission Regulations

The Telecommunications Act of 1996 provides, in part, as follows:

[18]We express no view concerning the merits of petitioner's arguments that the proposed transmission tower will force a significant change in and significantly increase the cost of the farm practices he plans to employ.

> "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." 47 USC § 332(c)(7)(B)(iv).

If we understand petitioner's argument correctly, he contends the county erred by failing to demand that the applicant demonstrate that the proposed tower will comply with FCC regulations. Petitioner's argument appears to be that the county cannot demonstrate compliance with ORS 215.296(1) unless it requires that the applicant demonstrate that it will comply with FCC regulations.[19]

Without questioning the legitimacy of petitioner's concerns about possible health impacts of the proposed tower, we cannot see how the county's failure to require the applicant to prove it will comply with FCC regulations in the future, assuming the county could do so, violates ORS 215.296(1). Farm workers' *perceptions* of transmission towers, and any economic consequences that may flow from those perceptions, are not "farm practices," within the meaning of ORS 215.296(1). The county found:

> "[T]he very nature of the proposed use – a stationary, silent, passive, unattended use – virtually compels the common-sense conclusion that it could have no 'significant' impact on, and could not 'significantly' increase the cost of, existing farming practices on surrounding lands * * *." Record 20.

Petitioner does not specifically challenge the adequacy of or evidentiary support for the above findings. Petitioner's speculation about possible transmission tower impacts is not sufficient to demonstrate that the county's failure to condition its approval on the tower's future compliance with FCC regulations necessarily violates ORS 215.296(1).

The fourth subassignment of error is denied.

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[19]Petitioner states that "people who work in organic farming are of an environmental mindset, such that some will not regularly work in the presence of a facility such [as] the one being proposed." Petition for Review 28-29. Petitioner also argues that he is required to provide his workers a safe working environment, which petitioner argues he cannot do unless the proposed tower complies with FCC regulations.

D. Proximity of Tower to Petitioner's Property

Under this subassignment of error, petitioner argues the tower is located so close to petitioner's property that the tower fall zone extends onto petitioner's property. Petitioner argues the hearings officer erred in not requiring that the tower be set back further from petitioner's property line.

Although petitioner cites the Fourteenth Amendment to the United States Constitution, ORS 215.296(1) and ZDO 401.07(B), petitioner does not develop an argument that is sufficient for review to demonstrate that any of these constitutional, statutory or land use regulation provisions are violated by the county's failure to require that the transmission tower be set back further from petitioner's property line. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

The fifth subassignment of error is denied.

The second assignment of error is sustained, in part.

THIRD AND FOURTH ASSIGNMENTS OF ERROR

Under the third and fourth assignments of error, petitioner argues the proposal violates four of the county's conditional use criteria. We address petitioner's arguments concerning each of those criteria separately below.

A. Site Suitability

ZDO 1203.01(B) imposes the following approval criterion:

> "The characteristics of the site are suitable for the proposed use considering size, shape, location, topography, existence of improvements and natural features."

Petitioner does not directly challenge the adequacy of the hearings officer's findings concerning ZDO 1203.01(B). Petitioner does contend the county ignored evidence that raises "the issue of the questionable integrity of the site * * *." Petition for Review 35. Specifically, petitioner argues that the tower will be sited at the edge of a steep slope, slides have occurred on the site, the site lacks adequate provisions for guy support wire, access will

be through an existing drainage way, and the access will not be able to conform to Uniform Fire Code requirements. Finally petitioner argues that ZDO requirements for underground utilities and setbacks are ignored.

We have some difficulty seeing what bearing most of petitioner's arguments under this assignment of error have on the issue of compliance with ZDO 1203.01(B). Intervenor argues the record includes substantial evidence supporting the county's finding that the proposal complies with ZDO 1203.01(B):

> "The hearings officer relied on the staff report and the application in finding that the proposal satisfies ZDO § 1203.01(B). Intervenor's testimony and later submissions provide additional evidence regarding the suitability of the site. The proposed use will fit within a 100-foot by 100-foot leased area. With respect to the size of the property, the record indicates that the property is 12.65 acres and is large enough to accommodate the proposed use. With respect to the shape of the property, the record shows that the shape is generally triangular to rectangular and would not affect the proposed use. * * * With respect to location, intervenor chose the site specifically because of its location and the ability of the site to provide telecommunications coverage. With respect to topography of the site, the record shows that there are only slight slopes on the property and that the [topography] of the entire property is suitable for the proposed use. The applicant also testified that, given the small area needed for the use, the location could be moved elsewhere on the property if topography were an issue. There are a few improvements on the property, including a dwelling and a barn. These improvements do not affect the suitability of the property. Finally, with respect to natural features, the record shows that there are no features on the property that make the property unsuitable for the use. Again, even if natural features were problematic at the specific location, the applicant could move the proposed site elsewhere on the property. Thus, there is substantial evidence to support the county's conclusion on each and every factor in ZDO § 1203.01(B).
>
> "With respect to compliance with the Fire Apparatus Access Road Requirements, petitioner fails to explain how those standards relate to the suitability of the <u>site</u> with respect to the factors listed in ZDO § 1203.01(B). * * * ZDO § 1203.01(B) does not require the county to find that the access road to the proposed site meets the Fire Apparatus Access Road Requirements. * * *" Intervenor-Respondent's Brief 21-22 (emphasis in original; citations omitted).

We agree with intervenor that the county's finding of compliance with ZDO 1203.01(B) is supported by substantial evidence.[20] The first subassignment of error under the fourth assignment of error is denied.

B. Timeliness of the Site and Development

ZDO 1203.01(C) imposes the following criterion:

> "The site and proposed development is timely, considering the adequacy of transportation systems, public facilities and services existing or planned for the area affected by the use."

Once again, petitioner does not directly challenge the hearings officer's findings addressing this criterion. Petitioner first argues that the above criterion should be interpreted to be a "need" criterion, where the proposed use is itself a public facility.[21] We reject petitioner's argument that ZDO 1203.01(C) can be interpreted to require that the applicant demonstrate that it needs to site the proposed tower on the proposed EFU-zoned site, as opposed to other non-EFU-zoned sites.

Petitioner also argues the criterion is not met because the applicant lacks required utility easements and has not demonstrated compliance with fire access requirements.[22] Even if the applicant lacks utility easements and its ability to comply with fire access requirements were uncertain, petitioner fails to demonstrate how these alleged shortcomings have any bearing on the question of compliance with ZDO 1203.01(C).

The second subassignment of error under the fourth assignment of error is denied.

C. Alteration of the Character of the Surrounding Area

ZDO 1203.01(D) imposes the following criterion:

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[20]We also reject petitioner's argument that the county improperly deferred findings of compliance with ZDO 1203.01(B).

[21]Petitioner argues there is no "need" for the transmission tower at the EFU-zoned site proposed, because the facility could be located on non-EFU-zoned properties.

[22]Intervenor contends the applicant has the required utility easements and that applicable fire access requirements will be met.

> "The proposed use will not alter the character of the surrounding area in the manner which substantially limits, impairs, or precludes the use of surrounding properties for the primary uses listed in the underlying district."

Petitioner argues the county erred by failing to recognize dwellings on surrounding EFU-zoned properties as "primary uses listed in the underlying district." Although dwellings are not listed as "primary uses" in the EFU zone, ZDO 401.04(C)(17) lists "[a]lteration, restoration, or replacement of a lawfully established dwelling." From ZDO 401.04(C)(17) petitioner reasons that existing dwellings must be considered as "primary uses" within the meaning of ZDO 1203.01(D). We do not agree. Even if we did, the county adopted more than six pages of findings addressing ZDO 1203.01(D) and concluded that the proposed transmission tower "will not alter the character of the surrounding area in the manner which substantially limits, impairs, or precludes the use of surrounding properties for the primary uses listed in the underlying district." Those findings do not specifically address impacts on dwellings in the area. However, petitioner makes no attempt to explain why that failure renders the reasoning and conclusions in the findings inadequate.

The third subassignment of error under the fourth assignment of error is denied.

D. Comprehensive Plan Policies

Under the third assignment of error and the fourth subassignment of error under the fourth assignment of error, petitioner argues the county erred by failing to demonstrate that the proposal complies with certain comprehensive plan policies.

ZDO 1203.01(E) imposes the following criterion:

> "The proposal satisfies the goals and policies of the Comprehensive Plan which apply to the proposed use."

Clackamas County Comprehensive Plan Agriculture Policies 8.0 and 9.0 provide as follows:

> "8.0 Exclusive Farm Use zones shall be used to implement agricultural policies.
>
> "9.0 The Exclusive Farm Use (EFU) zoning district implements the goals and policies of this land use designation; this zoning district and any other Exclusive Farm Use zoning district developed in the future,

> which implements these goals and policies should be applied in agricultural areas."

The planning staff report takes the position that there are no plan policies that apply directly to the challenged decision, aside from Agriculture Policy 9.0 which requires that the approval criteria that are imposed by the EFU zone be satisfied. The hearings officer apparently adopted this view as well. Record 32.

Petitioner appears to dispute the county's position, and argues that other plan policies apply directly. In particular, petitioner argues the challenged decision violates Agricultural Policy 3.0, which provides "[l]and uses which conflict with agricultural uses shall not be allowed."

Petitioner offers no reason to question the county interpretation and application of ZDO 1203.01(E). We understand that interpretation to be that the plan's agricultural goals and policies are fully implemented on lands zoned EFU by the standards and criteria in the EFU zone and that the agricultural goals and policies do not apply directly to individual quasi-judicial decisions authorizing uses in the EFU. That interpretation is not inconsistent with the language in Agriculture Policies 8.0 and 9.0, and petitioner fails to demonstrate that the interpretation is incorrect.

The third assignment of error and the fourth subassignment of error under the fourth assignment of error are denied.

FIFTH AND SIXTH ASSIGNMENTS OF ERROR

The parties dispute whether the planned access to the subject property crosses a small portion of Tax Lot 305. The owner of Tax Lot 305 has not joined in the application and petitioner contends that the applicant does not have authorization from the owner of Tax Lot 305 to cross that property for purposes of access. Petitioner argues the county erred by failing to require that the owner of Tax Lot 305 join in the application and by failing to identify Tax Lot 305 as being included in the property where the disputed transmission tower

is to be sited.[23]

The hearings officer acknowledged petitioner's arguments concerning the question of whether the planned access to the subject property will in fact cross Tax Lot 305. However, the hearings officer concluded that the applicant has legal access across intervening properties from a public right of way to the subject property based on a letter from Oregon Title Insurance Company. The hearings officer concluded that despite petitioner's evidence to the contrary, the letter constituted substantial evidence that the applicant has a legal right of access to the subject property. We agree with the hearings officer.

The fifth and sixth assignments of error are denied.[24]

SEVENTH ASSIGNMENT OF ERROR

Under the seventh assignment of error, petitioner argues the county violated ORS 197.763(5)(a) by failing to identify applicable comprehensive plan Agriculture policies.[25] We have already rejected petitioner's argument that the county erred by failing to apply the comprehensive plan policies that petitioner identifies. Therefore, the county did not err by failing to list those plan policies at the beginning of the evidentiary hearing in this matter.

The seventh assignment of error is denied.

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[23]Petitioner cites a number of ZDO provisions, which he claims require that all owners of property, for which a request for land use approval is submitted, must join in the application. The only ZDO provision that appears to impose that requirement is ZDO 1301.03(A), which is not cited by petitioner. ZDO 1301.03(A) provides:

> "An administrative action, unless otherwise specifically provided for by this Ordinance, may only be initiated by order of the Board of County Commissioners, or a majority of the whole Planning Commission or by the petition of the owner, contract purchaser, option holder, or agent of the owner, of the property in question."

[24]Petitioner includes under these assignments of error a number of other unrelated arguments that are not sufficiently developed to warrant review.

[25]ORS 197.763(5) requires, in part:

> "At the commencement of a hearing under a comprehensive plan or land use regulation, a statement shall be made to those in attendance that:
>
> "(a) Lists the applicable substantive criteria[.]"

EIGHTH ASSIGNMENT OF ERROR

Under this assignment of error, petitioner argues the county erred by failing to address Statewide Planning Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources) as well as administrative rule requirements for inventorying Goal 5 resources and developing a program to protect inventoried Goal 5 resources. OAR 660-016-0000; 660-016-0005; 660-016-0010.

Petitioner does not develop an argument under this assignment of error and makes no attempt to explain why the cited Goal 5 and Goal 5 administrative rule provisions apply to the challenged decision, which grants permit approval under an acknowledged comprehensive plan and land use regulations. *Byrd v. Stringer*, 295 Or 311, 316-17, 666 P2d 1332 (1983); *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 46, 911 P2d 350 (1996); *Urquhart v. Lane Council of Governments*, 80 Or App 176, 181, 721 P2d 870 (1986).

The eighth assignment of error is denied.

NINTH ASSIGNMENT OF ERROR

Under the ninth assignment of error petitioner argues that the county's approval of the disputed tower violates his and other nearby farmers' due process and property rights under the Fourteenth Amendment to the United States Constitution and Article I, Section 18 of the Oregon Constitution.[26]

Petitioner's arguments under this assignment of error fail to explain how the county's

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[26]As relevant, Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 18, of the Oregon Constitution provides, in part:

> "* * * Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation * * *."

approval of the applicant's request for land use approval "takes" petitioner's property or deprives petitioner of "due process." Petitioner makes no attempt to develop a due process argument and for that reason petitioner's due process argument is rejected. *Van Sant v. Yamhill County*, 17 Or LUBA 563, 566 (1989); *Chemeketa Industries Corp. v. City of Salem*, 14 Or LUBA 159, 165-66 (1985); *Mobile Crushing Company v. Lane County*, 11 Or LUBA 173, 182 (1984). Petitioner's apparent "taking" theory is that the county's approval of the disputed transmission tower constitutes a taking of petitioner's property and other farms in the area because the approved tower may have negative impacts on those adjoining properties and may preclude certain farm practices on those adjoining properties. However, like his due process argument, the taking argument is undeveloped and is not supported by any of the cases cited in the petition for review.

The ninth assignment of error is denied.

The county's decision is remanded.