BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CENTRAL KLAMATH COUNTY
COMMUNITY ACTION TEAM,
*Petitioner,*

vs.

KLAMATH COUNTY,
*Respondent,*

and

MERICOM DEVELOPMENT, INC.,
*Intervenor-Respondent.*

LUBA No. 2001-042

FINAL OPINION
AND ORDER

Appeal from Klamath County.

Christine M. Cook, Portland, filed the petition for review and argued on behalf of petitioner.

Michael P. Rudd, Klamath Falls, filed a response brief on behalf of respondent. With him on the brief was Brandsness, Brandsness and Rudd.

Daniel J. Drazan, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Dunn, Carney, Allen, Higgins and Tongue.

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

REMANDED 06/06/2001

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

Opinion by Bassham.

**NATURE OF THE DECISION**

Petitioner appeals county approval of a conditional use permit to site a 200-foot wireless communication facility on land zoned for exclusive farm use (EFU).

**MOTION TO INTERVENE**

Mericom Development, Inc. (intervenor), the applicant below, moves to intervene on the side of the county. There is no opposition to the motion, and it is allowed.

**MOTION TO FILE REPLY BRIEF**

Respondent and intervenor filed their response briefs on April 24 and 25, 2001, respectively. On May 2, 2001, petitioner filed a motion requesting permission to file a reply brief, accompanied by the proposed 23-page reply brief. Oral argument was conducted on the following day, May 3, 2001, at 11:00 a.m. Petitioner personally served a copy of the proposed reply brief on intervenor before 5:00 p.m. on May 2, 2001.

Intervenor objects to the proposed reply brief, on the grounds that it was not filed "as soon as possible after respondent's brief is filed," as required by OAR 661-010-0039.[1] Intervenor argues that if petitioner had chosen to draft a more concise reply brief, it could have been filed sooner than the day before oral argument. Intervenor contends that the late filing of a lengthy reply brief prejudiced intervenor's ability to respond to the motion or the brief. *See Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317, 322 (1999) (32-page reply brief filed 30 days after the response brief was filed and two days before oral argument was not filed "as soon as possible" after the response brief was filed, and the late timing and length of the reply brief prejudiced other parties' substantial rights).

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[1]OAR 661-010-0039 provides:

> "A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent's brief is filed. A reply brief shall be confined solely to new matters raised in the respondent's brief. * * *"

In petitioner's motion, petitioner explained that its attorney received the response briefs on April 26 and 27, 2001, and that the reply was filed as soon as possible thereafter, given press of other business and the "unrealistic appeal schedule." Motion Requesting Permission to File Reply Brief 2. Petitioner submits that any violation of OAR 661-010-0039 is technical and did not prejudice intervenor's substantial rights, because personal service of the proposed reply brief the day before oral argument provided adequate time for intervenor to prepare for oral argument. OAR 661-010-0005.

We agree with petitioner that the proposed reply brief was filed "as soon as possible" after the response briefs were filed. The tight schedule imposed by LUBA's statutory deadlines makes it difficult for any party to file a reply brief much more than a day or two prior to oral argument.[2] In the present case, petitioner had three working days to draft and file the motion to allow a reply brief and the proposed reply brief. We cannot say that petitioner failed to file the reply brief "as soon as possible" after the response briefs were filed. Nor can we fault petitioner for filing a 23-page reply brief; as discussed below, the response briefs raise a number of complex issues regarding standing and jurisdiction that warrant extended discussion.[3] Petitioner's motion to file a reply brief is allowed.

**FACTS**

Intervenor filed eight applications with the county for permits to construct eight communication towers for a linear network along Highway 97. Intervenor selected the site of each tower after conducting a variety of radio frequency and other analyses to determine the optimum locations for each tower. Intervenor proposed that a 200-foot tower be sited on

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[2]For a number of years LUBA has labored under a backlog of cases that in most cases effectively delayed oral argument for many weeks past the date necessary to comply with LUBA's statutory deadlines. LUBA has recently eliminated that backlog, and has returned to scheduling oral arguments approximately four to five weeks after receiving the petition for review, which allows the Board sufficient time to issue its final opinion and order consistently with the 77-day deadline imposed by ORS 197.830(14).

[3]Intervenor does not dispute that the response briefs raise "new matters" within the meaning of OAR 661-010-0039 and that the proposed reply brief is confined to those new matters.

a 6,400-square foot section of a large parcel zoned EFU (the subject property). The other towers were proposed for land zoned either Forestry or Nonresource.

Planning staff prepared a report stating that each application must consider, as applicable, the criteria in Klamath County Land Development Code (LDC) Articles 44, 54 and 55. The county scheduled a hearing before a hearings officer, and provided notice of that hearing to petitioner. Petitioner is a "Community Action Team" formed under the federal Northwest Forest Plan.[4] Petitioner submitted comments opposing the applications, and suggested alternatives that would not require siting the tower on the subject EFU-zoned property.

On November 19, 2000, the hearings officer issued a decision approving the application to site a tower on the subject property.[5] Petitioner appealed that decision to the county board of commissioners (commissioners). The commissioners held a public hearing on January 24, 2001, limited to the record before the hearings officer, and voted to affirm the hearings officer's decision on January 30, 2001. This appeal followed.

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[4]One of petitioner's representatives described petitioner as follows:

> "Community Action Teams were formed as a result of the adoption of the Northwest Forest Plan. The purpose was to offer timber impacted communities the opportunity to address their Socio-economic problems and to provide some financial support to projects they developed. These projects are coordinated through County, regional and state committees. Some have endured and developed into viable action teams assisting the residents of their area in addressing community concerns and creating solutions. They have become a useful source of support to county administrations for those officials who choose to support them as a focus of interest within their jurisdiction." Record 130.

[5]The county mistakenly inserted in the record of this appeal the hearings officer's decision with respect to a different tower proposed by a different applicant that is the subject of LUBA No. 2001-043, and failed to insert a copy of the hearings officer's decision at issue in this appeal. Petitioner attaches a copy of the hearings officer's decision in this appeal to the petition for review, and requests that we consider it to be part of the local record in this appeal. No party objects to its request. In these circumstances, we consider the hearings officer's decision to be a part of the local record in this appeal, even though no objection to the record was filed pursuant to OAR 661-010-0026. OAR 661-010-0025(1)(b).

## JURISDICTION

The county and intervenor move to dismiss this appeal on the grounds that petitioner lacks standing to appeal to LUBA. In addition, intervenor argues that this appeal should be dismissed because petitioner failed to serve the notice of intent to appeal on intervenor.

### A. Standing

The county argues that, during the January 24, 2001 hearing before commissioners, the chairperson questioned whether petitioner had representational standing to bring the local appeal.[6] The county argues that petitioner failed to rebut that challenge, and cannot now seek to assert representational standing. Further, the county contends that petitioner cannot establish that it meets the test for representational standing as described in *1000 Friends of Oregon v. Multnomah Co.*, 39 Or App 917, 923, 593 P2d 1171 (1979), specifically the requirement that the land use interests petitioner seeks to protect by appealing the county's decision are "germane" to its organizational purpose.[7] According to the county, community

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[6]The county cites to the following colloquy:

> "[Chairperson]: As this is an appeal hearing, there are some specific procedures and rules we'll need to follow. There will be no new testimony allowed this morning. Only those with standing will be allowed to give testimony. (Read list of those with standing). Legal counsel has advised us that under the federal laws establishing community action teams (CATs), there is no standing for the CAT under that law. They may have standing based on their articles of incorporation if such exist. Now, we have not had a chance to review those, but what I am going to do this morning is I will allow one representative of the CAT to provide testimony. Would you like to take a minute to decide who will represent the CAT?
>
> "* * * * *
>
> "[CAT Representative]: Yes, I think we're satisfied that we'll be adequately represented.
>
> "[Chairperson]: With the individuals that already have standing? Okay, that's fine, thanks. How this will proceed is the first to testify will be the appellant. The next to testify will be the opponents to the appeal which is the applicant. * * *" Record 13.

[7]In *1000 Friends of Oregon v. Multnomah Co.*, the court applied within the land use context the test for representational standing set out in *Hunt v. Washington Apple Advertising Comm'n*, 432 US 333, 343, 97 S Ct 2434, 53 L Ed 2d 383, 394 (1977). The *Hunt* test allows an association standing to bring suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right; (2) the interests the association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

action teams organized under federal law are intended to help timber-dependent communities diversify their economic base, not assert land use interests.

Petitioner responds that it appeared before the hearings officer and the commissioners below, and thus established standing to appeal the county's decision to LUBA under ORS 197.830(2).[8] Petitioner explains that it is a "person" as that term is used in ORS 197.830(2). *See* ORS 197.015(18) (defining "person" for purposes of ORS chapter 197 to include public or private organizations of any kind). According to petitioner, its appearances before the hearings officer and commissioners suffice, without more, to establish standing to appeal to LUBA under ORS 197.830(2), and petitioner need not also establish that it meets the requirements for representational standing. Petitioner further disputes that its standing was challenged before the commissioners in a manner that required rebuttal or that otherwise affects the issue of standing before LUBA.

The county fails to appreciate that petitioner asserts standing based on its appearance before the hearings officer and the commissioners. Petitioner does not assert representational standing. Several cases have recognized a distinction between *representational* standing, where an organization that did not appear before the local government seeks to represent its members before LUBA, and *organizational* standing, where members of an organization appear on the organization's behalf before the local government. *Jefferson Landfill Comm. v. Marion Co.*, 297 Or 280, 287, 686 P2d 310 (1984); *Wilbur Residents v. Douglas County*, 33 Or LUBA 761 (1997); *Tuality Lands Coalition v. Washington County*, 21 Or LUBA 611,

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[8]ORS 197.830(2) provides:

> "Except as provided in ORS 197.620 (1) and (2), a person may petition the board for review of a land use decision or limited land use decision if the person:
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> "(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and
>
> "(b) Appeared before the local government, special district or state agency orally or in writing."

618 (1991). In the latter circumstance, the organization need only establish that it meets pertinent statutory requirements to file an appeal to LUBA, and need not satisfy the test for representational standing described in *1000 Friends of Oregon v. Multnomah Co.*[9] The county does not cite us to any authority that would impose a requirement that the matter appealed be germane to the organization's purpose, where an organization otherwise meets the statutory requirements for appeal to LUBA.

Further, we agree with petitioner that, to the extent its standing was challenged before the commissioners, it was not done in a manner that requires reaching a different conclusion. The county retains a limited ability to act as a gatekeeper to judicial review, and can, in appropriate circumstances, constrain the participation of persons before it in a manner that precludes those persons from seeking local appeal or LUBA's review. *Jefferson Landfill Comm.*, 297 Or at 284-85 (stating principle that participants determined by the county to be only disinterested witnesses are not aggrieved by the county's decision and do not have standing to appeal); *League of Women Voters v. Coos Co.*, 76 Or App 705, 711, 712 P2d 111 (1985) (organization with interest in application of land use laws and which appeared in opposition to the county's decision was aggrieved and had standing to appeal); *Friends of Douglas County v. Douglas County*, ___ Or LUBA ___ (LUBA No. 2000-086, November 27, 2000) (same). However, the county in the present case did not purport to exercise the gatekeeping function described in *Jefferson Landfill Comm.* The commissioners made no determination that petitioner is a disinterested witness or otherwise not aggrieved by the hearings officer's decision. Instead, as described above, the chairperson questioned whether

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[9]As the Oregon Supreme Court has cautioned repeatedly, standing is not a matter of common law but is instead conferred by the legislature. *Local No. 290 v. Dept. of Environ. Quality*, 323 Or 559, 566, 919 P2d 1168 (1996); *People for Ethical Treatment v. Inst. Animal Care*, 312 Or 95, 99, 817 P2d 1299 (1991); *Benton County v. Friends of Benton County*, 294 Or 79, 82, 653 P2d 1249 (1982). Analysis of standing issues in a particular case must turn on the statutes governing that case, and care must be exercised in drawing parallels from other statutory contexts. *Local No. 290*, 323 Or at 566. The case on which the county relies, *1000 Friends of Oregon v. Multnomah Co.*, is a case under *former* ORS 197.300(1)(d), and therefore may not be controlling in resolving standing issues under current statutes governing LUBA's review.

petitioner, the appellant, satisfied one of the requirements for representational standing. As far as we can tell, the commissioners made no final ruling on that point, and their written decision addresses the merits of petitioner's appeal and is silent on the issue of standing. Even if the commissioners had made a determination that petitioner lacked representational standing, for the reasons described above that determination would have no effect on our review, because petitioner's direct participation sufficed to grant it organizational standing. Consequently, we conclude that petitioner does not lack standing to appeal to LUBA, for any reason advanced by the county.

**B. Service of the Notice of Intent to Appeal**

Intervenor moves to dismiss this appeal on the grounds that petitioner failed to serve intervenor with a copy of the notice of intent to appeal (notice), as required by OAR 661-010-0015(2). Intervenor explains that petitioner inadvertently served intervenor with a notice from a different appeal, one that is at issue in LUBA No. 2000-043. Shortly after receiving that notice, intervenor contacted LUBA and obtained a copy of the notice from the present appeal. Intervenor argues that failure to serve the notice in this appeal is a jurisdictional defect that warrants dismissal, citing *Bruce v. City of Hillsboro*, 32 Or LUBA 382 (1997).

*Bruce* does not assist intervenor in this case. *Bruce* involved petitioners who refused repeated directions from LUBA to serve notices on the parties who were required to be served under the Board's rules. We noted in *Bruce* that, while service of the notice is jurisdictional, the 21-day deadline for service of the notice is not. 32 Or LUBA at 387. In the present case, when petitioner learned from intervenor's response brief that it had served the wrong notice, it immediately served intervenor with a copy of the correct notice. Late service of the notice is a technical violation of LUBA's rules that will not result in dismissal, unless the substantial rights of the parties are prejudiced. *Id.*; OAR 661-010-0005. Intervenor makes no attempt to demonstrate that late service of the notice affected its

substantial rights in this appeal. Accordingly, we conclude that we have jurisdiction over this appeal.

**FIRST ASSIGNMENT OF ERROR**

Petitioner argues that the county's findings are inadequate to demonstrate compliance with applicable criteria.[10] According to petitioner, the proposed communication tower is a "utility facility necessary for public service" authorized in an EFU zone under LDC 54.030(O) and ORS 215.283(1)(d).[11] However, petitioner argues that the county's findings approve the proposed tower under inapplicable criteria at LDC 44.030, rather than applicable criteria at LDC 54.040, 54.030(O), and ORS 215.275.

**A. LDC 54.040**

LDC 44.030 provides general criteria for conditional use permits.[12] LDC 54.040

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[10]No party disputes that the county's decision in this case is intended to include the hearings officer's decision, and therefore we assume, as petitioner does, that the county's findings include those found in the hearings officer's decision.

[11]LDC 54.030(O) authorizes in the EFU zone:

> "Utility facilities necessary for public service and which must be situated in an agricultural zone in order for that service to be provided."

LDC 54.030(O) implements ORS 215.283(1)(d), which authorizes in the EFU zone:

> "Utility facilities necessary for public service, including wetland waste treatment systems but not including * * * transmission towers over 200 feet in height. A utility facility necessary for public service may be established as provided in ORS 215.275."

[12]LDC 44.030 authorizes approval of a conditional use permit on findings that:

> "A. The use complies with policies of the Comprehensive Plan;
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> "B. The use is in conformance with all other required standards and criteria of this code; and
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> "C. The location, size, design and operating characteristics of the proposed use will not have a significant adverse impact on the livability, value or appropriate development of abutting properties and the surrounding area.
>
> "D. Conditions – The review body may grant a Conditional Use Permit subject to such reasonable conditions based on findings of fact that it deems necessary to ensure

provides a separate set of conditional use review criteria for conditional uses allowed in the EFU zone.[13] Petitioner argues that the county's findings are directed at LDC 44.030 rather than LDC 54.040. The county's findings consist, in relevant part, of the following:

> "a. That this application complies with the policies of the Comprehensive Plan. The placement of a communication tower is not included in the permitted uses for this zoning; however, LDC Section 52.430(D), 54.030(O) conditionally permits tower to be built subject to certain findings and conditions.
>
> "b. The proposed use is in conformance with all other required standards and criteria of the LDC.
>
> "c. That the surrounding properties are rural in nature and the residences are generally well removed from the proposed site.
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> "d. The location, size, design and operating characteristics of the proposed use will not have a significant adverse impact on the livability of

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compliance with the Klamath County Comprehensive Plan, Land Development Code, and sound land use planning principles."

[13]LDC 54.040 provides:

"Applications for a conditional use permit in an [EFU] zone shall be reviewed against the following criteria *in place of those enumerated in Section 44.030*:

"A. The proposed use will not create conditions or circumstances that the County determines would be contrary to the purposes or intent of its acknowledged comprehensive plan, its policies or land use regulations; and

"B. The proposed use is in conformance with all standards and criteria of this Code, notably Article 57;

"C. The location, size, design and operating characteristics of the proposed use will not force a significant change in, or significantly increase the cost of, accepted farm or forestry practices on nearby agricultural or forest lands;

"D. A written statement will be recorded with the deed which recognizes the rights of adjacent and nearby land owners to conduct farm or forest operations consistent with accepted farming practices and the Forest Practices Act, ORS 30.090 and Rules for uses authorized by this Code;

"E. The proposed use will not significantly increase fire hazards or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel;

"F. The use complies with other conditions as the review authority considers necessary." (Emphasis added.)

abutting properties in the surrounding area." Petition for Review App 4-5.

Intervenor responds that petitioner failed to raise an issue regarding compliance with LDC 54.040 before the county, and therefore that issue is waived. ORS 197.763(1); 197.835(3).[14] Petitioner replies that the notice of hearing fails to list LDC 54.040 as an applicable criterion and, therefore, it can raise issues regarding that provision before LUBA notwithstanding its failure to raise such issues below. ORS 197.835(4)(a).[15] Petitioner notes that the notice of hearing provided in this case lists only LDC Article 44 as applicable criteria. Record 218.

In turn, intervenor argues, albeit in another context, that ORS 197.835(4)(a) does not assist petitioner, because petitioner in fact was aware that LDC 54.040 provided applicable approval criteria. Intervenor notes that petitioner's written submittals to the commissioners mention LDC 54.040(A). Record 111, 116. Intervenor speculates that petitioner read intervenor's application and intervenor's written submittal to the commissioners, both of

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[14]ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

ORS 197.830(3) provides:

> "Issues [that may be raised before LUBA] shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

[15]ORS 197.835(4)(a) provides:

> "A petitioner may raise new issues to the board if:
>
> "(a) The local government failed to list the applicable criteria for a decision under ORS 197.195 (3)(c) or 197.763 (3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, the board may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government[.]"

which assert that LDC 54.040 provides applicable approval criteria. Record 120-21; 154-57. Because petitioner was apparently aware of LDC 54.040 and nonetheless failed to raise an issue regarding that provision, intervenor argues, LUBA should find that issues regarding

LDC 54.040 "could have been raised" before the county, and therefore ORS 197.835(4)(a) does not obviate petitioner's obligation to raise such issues.

Intervenor's argument proves too much. Intervenor fails to recognize that ORS 197.835(3) includes within LUBA's review not only issues raised by the petitioner, but also issues raised "by any participant," including the applicant. ORS 197.835(3); *Spiering v. Yamhill County*, 25 Or LUBA 695, 714 (1993) (petitioners did not waive right to raise an issue before LUBA where the issue was raised below by the applicant); *Reynolds v. City of Sweet Home*, 38 Or LUBA 507, 511 n 3 (2000) (petitioners may raise before LUBA an issue raised below by the city attorney). There seems little question that intervenor's assertion in its application and in its written submissions to the commissioners, that LDC 54.040 provides applicable approval criteria, would have sufficed to satisfy the requirements of ORS 197.763(1) if made by any other participant. Consequently, we conclude that the issue of whether LDC 54.040 provides applicable approval criteria was raised before the hearings officer and commissioners, and is not waived.

On the merits, the county responds that the hearings officer's findings in fact address the criteria at LDC 54.040 or that, if misdirected, those findings nonetheless are sufficient to demonstrate compliance with the criteria at LDC 54.040. We disagree with both points. The county's findings are clearly directed at LDC 44.030 rather than 54.040. Although the two sets of criteria overlap to some extent, they are substantially different criteria, designed to protect different interests. For example, findings determining that the proposed use does not have significant impacts on livability under LDC 44.030 are insufficient to ensure that the proposed use will not force a significant change in, or significantly increase the cost of, accepted farm or forestry practices on nearby agricultural or forest lands, or significantly increase fire hazards, as required by LDC 54.040(C) and (E). Because the county's decision fails to address LDC 54.040, it fails to demonstrate compliance with applicable criteria.

**B. LDC 54.030(O)**

Petitioner also argues that the county's decision fails to address LDC 54.030(O), which authorizes in an EFU zone "[u]tility facilities necessary for public service, and which must be situated in an agricultural zone in order for that service to be provided." While the hearings officer's decision mentions LDC 54.030(O), petitioner argues, it does so in the context of addressing LDC 44.030, and fails to explain why the proposed utility facility is necessary for public service and must be situated in the EFU zone in order to provide that service.

Intervenor responds that the issue of compliance with LDC 54.030(O) was not raised below and is thus waived under ORS 197.763(1) and 197.835(3). We disagree, for the same reasons expressed above. Intervenor's application and its written submittal to the commissioners both assert that the proposed use is authorized by LDC 54.030(O). Record 120, 154. Neither the county nor intervenor contend that the county's findings adequately address LDC 54.030(O).

**C. ORS 215.275**

LDC 54.030(O) implements ORS 215.283(1)(d). ORS 215.275 sets forth standards for satisfying the necessity test in ORS 215.283(1)(d).[16] Petitioner argues that, even though

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[16]ORS 215.275 provides in relevant part:

> "(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;

the county has not yet implemented ORS 215.275, those standards are independently applicable, pursuant to ORS 197.646.[17] Therefore, petitioner argues, the county erred in failing to address ORS 215.275 in determining whether the proposed utility facility is a facility "necessary for public service" that "must be situated in an agricultural zone" in order to provide that service, as required by LDC 54.030(O) and ORS 215.283(1)(d).

Intervenor's response is again limited to waiver. However, intervenor correctly notes, albeit in another context, that ORS 197.763(3) requires only that the county's notice of hearing identify applicable criteria from the county's comprehensive plan or ordinance, and does not require that the notice identify applicable *statutory* requirements. Therefore, intervenor argues, petitioner cannot rely on ORS 197.835(4)(a) to avoid the obligation of raising an issue regarding ORS 215.275 before the county. *Van Dyke v. Yamhill County*, 35 Or LUBA 676, 684 (1999). Because no participant below raised an issue regarding compliance with ORS 215.275, intervenor contends, that issue is waived. We agree.[18]

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"(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."

[17]ORS 197.646 provides in relevant part:

"(1) A local government shall amend the comprehensive plan and land use regulations to implement new or amended statewide planning goals, Land Conservation and Development Commission administrative rules and land use statutes when such goals, rules or statutes become applicable to the jurisdiction. * * *

"* * * * *

"(3) When a local government does not adopt comprehensive plan or land use regulation amendments as required by subsection (1) of this section, the new or amended goal, rule or statute shall be directly applicable to the local government's land use decisions. * * *"

[18]Because the county on remand must address LDC 54.030(O), which implements the necessity standard in ORS 215.283(1)(d), the general issue of compliance with the necessity standard will be before the county on remand. Because ORS 215.275 essentially elaborates on the necessity standard, the substance of the county's

The first assignment of error is sustained, in part.

**SECOND ASSIGNMENT OF ERROR**

Petitioner argues that the county's failure to identify LDC 54.030(O) and 54.040 as applicable criteria in the notice of hearing violated ORS 197.763(3)(b). According to petitioner, the county's procedural error prejudiced petitioner's substantial rights, because it misled petitioner and prevented it from preparing evidence and testimony relevant to the actual criteria applicable to the proposed utility facility. ORS 197.835(9)(a)(B). Petitioner requests that the county's decision be remanded to allow petitioner and others to present evidence regarding whether the proposed use complies with LDC 54.030(O) and 54.040.

The county and intervenor respond that petitioner had an opportunity to object to the county's alleged violation of ORS 197.763(3)(b), but failed to do so, and thus that procedural error cannot be assigned as grounds for reversal or remand of the county's decision before the Board. *See Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312, 317-18 (1993) (a petitioner who is aware that the notice omitted applicable criteria must object during the proceedings below to preserve that procedural error as a basis for remand). LUBA has long held that procedural error does not provide a basis for reversal or remand unless the petitioner demonstrates that (1) a timely objection was made before the local government, so that corrective measures could be taken; and (2) the error was prejudicial to the petitioner's substantial rights. *Woods v. Grant County*, 36 Or LUBA 456, 469 (1999); *Simmons v. Marion County*, 22 Or LUBA 759, 773-74 (1992); *Mason v. Linn County*, 13 Or LUBA 1, 4 (1984), *aff'd in part, rev'd in part on other grounds* 73 Or App 334, 698 P2d 529 (1985); *Dobaj v. Beaverton*, 1 Or LUBA 237, 241 (1980). As noted above, intervenor argues that petitioner was aware or should have been aware of the applicability of LDC 54.040 and

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findings under LDC 54.030(O) may resemble those required by ORS 215.275. Nonetheless, because the issue of compliance with ORS 215.275 was not raised below and is thus waived, the county need not on remand adopt findings of compliance with the statute. On the other hand, we are aware of nothing that would preclude the county from including the issue of compliance with ORS 215.275 within the scope of its proceedings on remand.

54.030(O). Under these circumstances, intervenor argues, petitioner's failure to object to the county's violation of ORS 197.763(3)(b) bars petitioner from assigning error to it before LUBA.

Petitioner does not offer a reply to respondents' argument. We agree with respondents that, in order to assign error and obtain relief from the county's violation of ORS 197.763(3)(b), petitioner was required to bring the county's procedural error to its attention during the proceedings below. Petitioner apparently knew at some point during the proceedings below that LDC 54.030(O) and 54.040 applied to the proposed use and the notice of hearing omitted those criteria. It was incumbent on petitioner at that point to make a timely request that the county remedy its procedural error, *i.e.*, offer an opportunity for petitioner to prepare and present evidence regarding those omitted criteria. Petitioner never made that request. Consequently, petitioner cannot now seek remand based on the county's procedural error.

The second assignment of error is denied.

**THIRD ASSIGNMENT OF ERROR**

Petitioner argues that the record does not contain substantial evidence demonstrating that the proposed facility satisfies the necessity test at LDC 54.030(O), and ORS 215.275. Intervenor responds that petitioner waived any issues under these provisions by failing to raise them before the county. In the alternative, intervenor argues that the evidence in the record is sufficient to demonstrate that the proposed facility satisfies the necessity test, *i.e.* based on evaluation of reasonable alternatives, the facility must be placed in the EFU zone in order to provide the service. *See Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14, 20, *aff'd* 170 Or App 6, 11 P3d 671 (2000) (ORS 215.283(1)(d) requires a demonstration that no non-EFU zoned sites can feasibly accommodate the particular type of facility proposed).

For the reasons expressed above, we agree with intervenor that issues regarding compliance with ORS 215.275 are waived. However, as discussed in the first assignment of error, remand is necessary for the county to adopt findings addressing LDC 54.030(O) and 54.040. Therefore, it would be premature to resolve the parties' evidentiary disputes under LDC 54.030(O).

The third assignment of error is denied.

The county's decision is remanded.