BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CENTRAL KLAMATH COUNTY
COMMUNITY ACTION TEAM,
Petitioner,

vs.

KLAMATH COUNTY,
Respondent,

and

AMERICAN TOWER CORPORATION,
Intervenor-Respondent.

LUBA No. 2001-043

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.

J. Richard George, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief were Marnie Allen and Preston Gates and Ellis, LLP.

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 185-foot wireless communication facility on land zoned for exclusive farm use (EFU).

MOTION TO INTERVENE

American Tower Corporation (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. Petitioner received those briefs on April 26 and 27, 2001. On May 2, 2001, petitioner filed a motion requesting permission to file a reply brief, accompanied by the proposed 17-page reply brief. Oral argument was conducted on the following day, May 3, 2001, at 1:30 p.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 the circumstances of its filing prejudiced intervenor's substantial rights to a full and fair hearing. *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).

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. 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 within the time required by OAR 661-010-0039, *i.e.*, "as soon as possible." Nor has intervenor

established that personal service of the proposed reply brief the day before oral argument failed to provide adequate time for intervenor to prepare for oral argument.

Intervenor also argues that portions of the reply brief are directed at matters anticipated in the petition for review, and which are therefore not "new matters" raised in the response briefs, as required by OAR 661-010-0039.[1] *See Casey Jones Well Drilling v. City of Lowell*, 34 Or LUBA 263, 265 (1998) (reply brief not allowed where it merely embellishes on 20 pages in the petition for review thoroughly addressing issues regarding jurisdiction and standing). The disputed portion of the reply brief addresses arguments in intervenor's response brief that petitioner's assignments of error involve issues that were not raised before the county, and are therefore waived pursuant to ORS 197.763(1). Assertions of waiver are among the matters that, if raised for the first time in a response brief, warrant a reply brief. *Caine v. Tillamook County*, 24 Or LUBA 627, 627 (1993). Nonetheless, intervenor argues that a reply brief is not warranted to address intervenor's waiver challenges. Intervenor notes that the third assignment of error in the petition for review includes an argument, based on ORS 197.835(4)(a), that alleged omission of criteria from the county-provided notice of hearing allows petitioner to raise issues regarding those criteria before LUBA. Intervenor argues that the petition for review anticipates intervenor's waiver challenges, and thus waiver is not a "new matter raised in the respondent's brief" that would warrant a reply brief in this case. OAR 661-010-0039. We disagree. The petition for review does little if anything to anticipate intervenor's waiver challenges. Nor does the reply brief merely embellish matters thoroughly addressed in the petition for review, as was the case in *Casey Jones Well Drilling*. The motion to file a reply brief is allowed.

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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. * * *"

FACTS

In August 2000, intervenor filed five separate applications with the county for permission to site a linear network of communication towers along Highway 97, including a site on a large parcel zoned EFU (the subject property). The other towers were proposed for land zoned other than EFU.

A hearing on the applications was conducted before a hearings officer on September 1, 2000. Petitioner received notice of the hearing and submitted written testimony in opposition. On November 19, 2000, the hearings officer issued a decision approving the applications, including the subject application for a 185-foot tower on the subject property.[2]

Petitioner appealed the hearings officer's decision to the county board of commissioners (commissioners). At the January 24, 2001 hearing before the commissioners, the chairperson questioned whether petitioner had standing. The commissioners voted to deny the appeal, and thus affirm the hearings officer's decision, on January 30, 2001. This appeal followed.

STANDING

The county moves to dismiss this appeal on the grounds that petitioner lacks standing to appeal the county's decision to LUBA. The county raised an identical challenge, on the same facts, in a companion decision decided this date. *Central Klamath County CAT v. Klamath County*, ___ Or LUBA ___ (LUBA No. 2001-042, June 6, 2001).[3] For the reasons described in that decision, we reject the county's challenge to petitioner's standing.

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[2]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. 2001-042, 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).

[3]At issue in LUBA No. 2001-042 is petitioner's appeal of the county's decision approving a communication tower proposed by a different applicant, but on the same property that is at issue in this appeal.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the county's findings are inadequate to demonstrate compliance with applicable criteria.[4] According to petitioner, the proposed communication tower is a "utility facility necessary for public service" authorized in an EFU zone under Klamath County Land Development Code (LDC) 54.030(O) and ORS 215.283(1)(d).[5] However, petitioner argues that the county's findings approve the proposed tower under inapplicable criteria at LDC 44.030, governing conditional use permits, 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.[6] LDC 54.040

The two applications, with others, were considered by the hearings officer in a combined proceeding. Petitioner's appeals of the pertinent hearings officer's decisions to the commissioners were also heard in a combined proceeding.

[4]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.

[5]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."

[6]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.
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> "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.[7] 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:

> "[i]. 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 utilities to be built subject to certain findings and conditions.
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> "ii. The proposed use is in conformance with all other required standards and criteria of the LDC.
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> "iii. That the surrounding properties are rural in nature and the residences are generally well removed from the proposed site.
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> "iv. 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."

[7]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 5.

Intervenor responds that petitioner failed to raise an issue below regarding the adequacy of the hearings officer's findings and whether LDC 54.040 provides applicable approval criteria and, therefore, those issues are waived. ORS 197.763(1); 197.835(3).[8]

Intervenor's waiver challenge is substantially similar to the one we addressed and rejected in *Central Klamath County CAT*, LUBA No. 2001-042, decided this date. In that case, the applicant's written submissions to the county asserted that LDC 54.040 supplied applicable approval criteria. We rejected the applicant's contention that *petitioner's* failure to raise issues below regarding LDC 54.040 precluded petitioner from raising issues regarding LDC 54.040 before LUBA. ORS 197.835(3) (LUBA's scope of review is limited to issues raised below "by any participant"); *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). We concluded that the applicant's written submissions to the county sufficed to raise the issue of whether LDC 54.040 provided applicable approval criteria and, therefore, ORS 197.763(1) and 197.835(3) were no impediment to petitioner raising that issue before LUBA.

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[8]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 197.835(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."

In the present case, as in LUBA No. 2001-042, intervenor's application addresses criteria at LDC 54.040 as applicable criteria and proposes findings of compliance with those criteria. Record 154. In our view, that suffices to raise an issue regarding whether LDC 54.040 provides approval criteria applicable to the proposed facility. That issue is one of the essential arguments in petitioner's first assignment of error. The purpose of the "raise it or waive it" rule is to prevent unfair surprise. *Boldt v. Clackamas County*, 21 Or LUBA 40, 46, *aff'd* 107 Or App 619, 813 P2d 1078 (1991). Neither intervenor nor the county should be surprised at the contention that LDC 54.040 provides applicable approval criteria, or the closely related contention that the county's decision is defective for failure to address those criteria.[9]

On the merits, the county and intervenor argue that the county's above-quoted findings suffice to demonstrate compliance with LDC 54.040. We rejected an identical argument in *Central Klamath County CAT*, LUBA No. 2001-042, and do so here for the same reasons. The county's findings clearly address LDC 44.030, and are insufficient to address the substantially dissimilar requirements of LDC 54.040.

There remains intervenor's argument that, notwithstanding the absence of findings addressing LDC 54.040, LUBA may affirm the county's decision, because evidence in the record "clearly supports" a decision that the criteria in LDC 54.040 are met in this case. ORS 197.835(11)(b).[10] The "clearly supports" standard at ORS 197.835(11)(b) is a

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[9]As we stated in *Boldt*, ORS 197.763(1) requires that a party raise an "issue" with sufficient specificity to afford the local government and other parties an adequate opportunity to respond, but does not require that the petitioner present the identical arguments regarding that issue during the local proceedings that are later presented in the petition for review. The distinction between raising an issue and presenting individual arguments regarding that issue is an imprecise and difficult distinction. *DLCD v. Tillamook County*, 34 Or LUBA 586 (1998) (applying the distinction); *DLCD v. Curry County*, 33 Or LUBA 728, 733 (1997) (same); *Schellenberg v. Polk County*, 22 Or LUBA 673 (1992) (same). In the present case, once the issue of whether LDC 54.040 provided applicable approval criteria was adequately raised below, we do not believe any participant was required to advance the logically concomitant argument that the county's decision must address those criteria, in order to preserve that particular argument on appeal to LUBA.

[10]ORS 197.835(11)(b) provides:

demanding standard that allows LUBA to affirm a decision notwithstanding inadequate findings only where the relevant evidence is such that it is "obvious" or "inevitable" that the decision is consistent with applicable law. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101, 122 (1995). The criteria at LDC 54.040 are subjective conditional use criteria. We cannot say that the relevant evidence cited to us makes it "obvious" or "inevitable" that the proposed use complies with LDC 54.040.

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 written submittal to the county asserts that the proposed use is a utility facility that must be situated in the EFU zone in order to provide service, and is thus authorized by LDC 54.030(O). Record 155. We also reject, for the reasons expressed above, intervenor's contention under ORS 197.835(11)(b) that the county's decision can be affirmed notwithstanding failure to adequately address LDC 54.030(O). We cannot say the evidence in the record "clearly supports" a finding that

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> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

the proposed use is authorized by 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).[11] Petitioner argues that, even though the county has not yet implemented ORS 215.275, those standards are independently applicable, pursuant to ORS 197.646.[12] Therefore, petitioner argues, the county erred in

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[11]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.
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> "(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:
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> > "(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;
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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."

[12]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. * * *
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> "* * * * *
>
> "(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. * * *"

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 responds, as above, that the issue of compliance with ORS 215.275 was not raised below and thus is waived. However, intervenor's submittal to the county identifies ORS 215.275 as an applicable approval criterion and explains why intervenor believes the proposed use complies with the statute. Record 155. For the reasons expressed above, we conclude that the issue raised in this assignment of error regarding ORS 215.275 was raised below. Thus,ORS 197.763(1) and 197.835(3) are no impediment to our review.

On the merits, intervenor argues that the record "clearly supports" a finding that the proposed use must be sited in the EFU zone under the criteria at ORS 215.275. Again, we disagree that the record satisfies that demanding standard. ORS 215.275 elaborates on the necessity test at ORS 215.213(1)(d) and 215.283(1)(d). *City of Albany v. Linn County*, ___ Or LUBA ___ (LUBA No. 2001-011, May 10, 2001), slip op 8. At the core of the necessity test is the requirement that the local government determine that the utility facility cannot feasibly be located on non-EFU land, which in turn requires that the local government consider reasonable alternatives to siting the facility on EFU-zoned land. *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14, 20, *aff'd* 170 Or App 6, 11 P3d 671 (2000). In the present case, petitioner identified a number of alternative non-EFU sites and argued that the county must consider those locations. Intervenor cites to testimony at Record 155 to the effect that the subject property is located within a "search ring" that defines the optimal area for telecommunication coverage, and argues that "[i]mplicit in this evidence is the fact that other non-exclusive farm use sites were considered and rejected[.]" Intervenor-Respondent's Brief 13. We cannot say that an implicit alternatives analysis that does not in fact consider any alternatives, or explain why no alternatives need be considered, "clearly supports" a determination that the proposed facility must be sited on EFU-zoned lands under the ORS 215.275 factors.

The first assignment of error is sustained.

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.

In *Central Klamath County CAT*, LUBA No. 2001-042, we addressed and rejected petitioner's identical argument that the county's procedural error provides a basis for reversal or remand. Petitioner advances no reason in the present case to reach a different conclusion. Accordingly, 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.

For the reasons expressed above, we disagree with intervenor that issues regarding compliance with LDC 54.030(O) or ORS 215.275 are waived, or that the evidence "clearly supports" a determination that the proposed use complies with these criteria. As discussed in the first assignment of error, remand is necessary for the county to adopt findings addressing

these criteria. Therefore, it would be premature to resolve the parties' evidentiary disputes under LDC 54.030(O) and ORS 215.275.

The third assignment of error is denied.

The county's decision is remanded.