BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KENNETH JORDAN, BRUCE PIPER,
MARK STERNER, JAMES WILLIAMS
and DENNIS YEO,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

EDGE WIRELESS, LLC,
Intervenor-Respondent.

LUBA No. 2001-045

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Kenneth Jordan, Bruce Piper, Mark Sterner, James Williams and Dennis Yeo, Roseburg, filed the petition for review and Kenneth Jordan, James Williams and Dennis Yeo argued on their own behalf.

No appearance by Douglas County.

Matthew Sutton and Erik J. Glatte, Medford, filed the response brief. With them on the brief was Kellington, Krack, Richmond, Blackhurst and Sutton. Matthew Sutton argued on behalf of Intervenor-Respondent.

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

AFFIRMED 6/15/2001

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioners appeal a county decision to approve a cellular tower on land zoned for exclusive farm use (EFU).

MOTION TO INTERVENE

Edge Wireless, LLC (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

Intervenor filed an application with the county planning commission to construct a 120-foot steel cellular tower on EFU-zoned land. The proposed site already contains two other cellular towers. The proposed purpose of the cellular tower is to provide cellular coverage for the unincorporated communities of Melrose, Cleveland, Riverdale, and other rural areas west of Roseburg. The planning commission approved the application, and opponents appealed the decision to the board of county commissioners (commissioners). No new evidence was submitted to the commissioners, but intervenor agreed to construct the tower of wood rather than steel and to reduce the height of the tower to 90 feet. The commissioners approved the modified application, and this appeal followed.

PETITION FOR REVIEW

Intervenor argues that the county's decision must be affirmed because the petition for review fails to set forth adequate assignments of error, fails to supply legal reasoning or argument in support of the assignments of error, and fails to specifically challenge any of the county's findings. The petition for review contains a section designated "Assignment of Errors" that contains six separate subheadings as well as an introduction and conclusion. To the extent we are able to discern petitioners' allegations of error from the argument presented in the petition for review, we will consider those alleged errors. *Freedom v. City of Ashland*, 37 Or LUBA 123, 124-25 (1999). Although the petition for review does not provide any

citations of authority and often devolves into mere expressions of disagreement with the county's decision, we understand petitioners to allege that the county committed procedural errors, that the proposed cellular tower is not a "utility facility necessary for public service," and that the county's decision is not supported by substantial evidence. We believe that those allegations are stated clearly enough to afford intervenor an opportunity to respond. *Silani v. Klamath County*, 22 Or LUBA 734, 736 (1992). We now turn to those assignments of error.[1]

FIRST ASSIGNMENT OF ERROR

We understand petitioners to allege three procedural errors on the part of the county: (1) the county was biased because it approves *all* cellular tower applications; (2) intervenor was improperly allowed to submit additional evidence after the public hearing closed; and (3) the county improperly relied on expert testimony it did not understand.[2]

We will reverse or remand a local government decision if the local government failed to follow applicable procedures in a manner that prejudiced a petitioner's substantial rights. ORS 197.835(9)(a)(B); *Bradbury v. City of Independence*, 22 Or LUBA 783, 785 (1991). The substantial rights referred to by ORS 197.835(9)(a)(B) include the right to an adequate opportunity to prepare and submit a case and the right to a full and fair hearing. *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988). A biased decision maker substantially impairs a party's ability to receive a full and fair hearing. *1000 Friends of Oregon v. Wasco Co. Court*, 304 Or 76, 742 P2d 39 (1987). Evidence of bias, however, must be shown in a clear and unmistakable manner. *Schneider v. Umatilla County*, 13 Or LUBA 281, 284 (1985). Although intervenor does not respond to petitioners' challenge to the county's alleged

[1] Petitioners challenge the decision on both procedural and substantive grounds. Both challenges can be broken down into three additional components. For convenience, we will treat the procedural and substantive challenges as separate assignments of error with related subassignments of error.

[2] Petitioners bring these subassignments of error under a subsection entitled "Flawed Process." Petition for Review 6.

practice of approving all cellular tower applications, such unsubstantiated charges do not show bias in a clear and unmistakable manner.

Petitioners next allege that the county improperly allowed intervenor to provide information regarding its consideration of reasonable alternatives *after* the close of the public hearing with the planning commission. The planning commission, however, specifically left the record open to receive additional evidence after the close of the public hearing as permitted by ORS 197.763(6)(c).[3] Record 114-15. We find no error.

Finally, petitioners allege that the county improperly relied on technical expert testimony that the county did not understand. Although this subassignment of error is more properly characterized as a substantial evidence challenge, we will address it along with petitioners' procedural challenges. Petitioners' assertion is apparently based on the alleged testimony of one of intervenor's "presenters" that neither he nor anyone at the public hearing could understand the technical nature of the information. Petitioners cite to a tape recording of a public meeting, but do not provide a transcript. We will not conduct an unassisted search of the record for evidence supporting petitioners' substantial evidence challenge. *Calhoun v. Jefferson County*, 23 Or LUBA 436, 439 (1992). In any event, even if one of intervenor's agents did make such a comment, petitioners cite no authority for the proposition that a decision maker's inability to understand the technical details of expert testimony precludes the decision maker from relying on that testimony, in concluding that applicable criteria are satisfied or not.

The first assignment of error is denied.

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[3] Petitioners also allege that the information regarding reasonable alternatives was merely a sham generated after the fact to justify intervenor's preferred location. Assuming that this would constitute a basis for reversal or remand, even though the information was *submitted* after the close of the public hearing, it is clear that the information was *generated* prior to the application being filed. Record 188-89.

SECOND ASSIGNMENT OF ERROR

We understand petitioners to challenge the county's decision that the proposed cellular tower is a "utility facility necessary for public service." Petitioners arguments can be grouped into three discrete arguments: (1) the proposed cellular tower is neither a "utility facility" nor "necessary"; (2) the decision was based solely on cost; and (3) the county did not consider all reasonable alternatives.

Initially, petitioners allege that cellular towers, unlike sewer systems and electricity generators, are not utility facilities. We disagree. The Douglas County Land Use and Development Ordinance (LUDO) includes a definition of "utility facility" that clearly encompasses cellular towers.[4] More to the point, since the question is ultimately one of statutory construction, we have previously concluded that cellular communication towers are "utility facilities" within the meaning of ORS 215.283(1)(d). *McCaw Communications, Inc. v. Polk County*, 20 Or LUBA 456, 467 (1991).

Petitioners also argue that even if cellular towers are considered utility facilities, intervenor is just one of many competitors providing cellular phone service and cannot be considered "necessary" to the general public. Although petitioners' interpretation of "necessary for public service" to mean that the facility must be found to provide a *necessary public service* is plausible, the Court of Appeals rejected that interpretation in *McCaw Communications, Inc. v. Marion County*, 96 Or App 552, 556, 773 P2d 779 (1989). Under *McCaw Communications, Inc.*, the ORS 215.283(1)(d) requirement that a utility facility be "necessary for public service" requires an applicant to show that it is necessary to situate the

[4] LUDO 1.090 defines "utility facility" as:

> "A communication facility or a facility constructed for a public utility, including but not limited to * * * utility lines, accessory facilities or structures not limited to an individual end user and not in a public right-of-way which are necessary for public service (electricity, gas, water, telephone, cable); and equipment for the production, transmission, delivery or conveyance of communications, with or without lines, including towers. * * *"

facility in the EFU zone in order for the service to be provided.[5] We discuss this requirement in more detail below.

Petitioners next challenge the county's findings that the proposed cellular tower is a utility facility necessary for public service pursuant to LUDO 3.3.170. Neither party appears to appreciate that LUDO 3.3.170 implements state law. The proposed site is zoned EFU. ORS 215.283(1) provides, in pertinent part:

> "(1) The following uses may be established in any area zoned for exclusive farm use:
>
> "* * * * *
>
> "(d) Utility facilities necessary for public service * * *. A utility facility necessary for public service may be established as provided in ORS 215.275."

ORS 215.275 provides, in pertinent part:

> "(1) A utility facility * * * 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 * * * 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;
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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

[5] This interpretation has been codified at ORS 215.275 and OAR 660-033-0130(16).

"(f) Other requirements of state or federal agencies.

"(3) Costs associated with any of the factors listed in [ORS 215.275(2)] may be considered, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service. Land costs shall not be included when considering alternative locations for substantially similar utility facilities. * * * "[6]

ORS 215.275 was adopted by the legislature in 1999. Prior to 1999, the only standard for siting a utility facility in an EFU zone was that it must be "necessary for public service." As discussed above, in *McCaw Communications, Inc.*, the Court of Appeals interpreted that phrase to require an applicant to show that "it is necessary to situate the facility in the agricultural zone in order for the service to be provided." 96 Or App at 556. In *Clackamas Co. Svc. Dist. No. 1 v. Clackamas County*, 35 Or LUBA 374 (1998), we relied upon the Court of Appeals' interpretation in *McCaw Communications, Inc.* to hold that "an applicant seeking to site a utility facility on EFU-zoned land must demonstrate that there are no 'feasible alternatives' for constructing the utility facility on non-EFU-zoned lands." *Id*. at 386.

We recently considered the effect of ORS 215.275 on the "no feasible alternative" test established in *Clackamas Co. Svc. Dist. No. 1*:

"ORS 215.275 was adopted after we issued our decision in *Clackamas Co. Svc. Dist. No. 1*. However, the pertinent language in ORS 215.275 appears to retain essentially the same ultimate legal standard that was discussed in that case, while specifying the factors that may be relied on to demonstrate compliance with that ultimate legal standard. Before and after adoption of ORS 215.275, the ultimate legal standard was a requirement that the applicant demonstrate that 'the facility must be sited in an EFU zone in order to provide the service.' That legal standard, in turn, requires that an applicant explore non-EFU-zoned alternative sites.

"* * * * *

[6] LUDO 3.3.170 is nearly identical to ORS 215.275 and OAR 660-033-0130(16). As the LUDO must implement state law, we will refer to the statutory version of the requirement throughout this opinion.

> "* * * As we noted in *Clackamas Co. Svc. Dist. No. 1*, it is somewhat uncertain how difficult development of a non-EFU-zoned site must be before it can be deemed to be infeasible. 35 Or LUBA at 386. In our view, the legislature elaborated on the infeasibility standard without significantly altering that standard." *City of Albany v. Linn County*, ___ Or LUBA ___ (LUBA No. 2001-011, May 10, 2001) slip op 8-9.

Therefore, intervenor was required to demonstrate, and the county was required to find, that there are no feasible alternatives to siting the proposed cellular tower on EFU land. Pursuant to ORS 215.275(3), cost may not be the only consideration in making this determination.

Petitioners argue that cost was the sole consideration for intervenor's desire to site the cellular tower on the proposed site and that collocation with the existing cellular towers should have been considered, even if it is more expensive.

In this case, collocation is not a reasonable alternative that must be considered under ORS 215.275(2). As we have already explained, a cellular tower is clearly a utility facility under LUDO 1.090 and ORS 215.283(1)(d). Because intervenor's application is to build a *cellular tower* that will allow intervenor to (1) provide telecommunication services and (2) provide space on the tower that may be leased to other providers of telecommunication services, collocation would serve only one of the purposes of the requested cellular tower and therefore is not a reasonable alternative that must be considered. Record 80.

Petitioners' final argument is that intervenor and the county did not consider all reasonable alternatives on non-EFU land. Intervenor submitted evidence demonstrating that the proposed site was chosen as the best of five potential sites considered for providing cellular telephone coverage to the target area. According to intervenor, the proposed site provides greater coverage than the other alternatives. Petitioners argue that intervenor and the county were required to consider additional non-EFU-zoned sites. The county rejected petitioners' argument:

> "We find that, while the requisite LUDO criteria for approving a Utility Facility Necessary for Public Service requires consideration of reasonable alternatives, the applicant is not required to consider <u>all</u> possible alternatives. Although the remonstrators may reasonably argue that there are additional

> potential tower sites in the surrounding area which the applicant failed to consider, *we do not believe the approval criteria set out in LUDO require the applicant to produce technical and engineering documentation for any and all alternatives that may be described by opposing parties*. To hold the applicant to such a standard would be unreasonable, and ultimately unattainable, since there may be literally hundreds of alternative sites within or surrounding the intended service area. * * *" Record 4 (underline in original, emphasis added).

As the emphasized language illustrates, intervenor and the county do not interpret the reasonable alternatives analysis to require the consideration of alternatives suggested by opponents. Intervenor asserts that this interpretation must be given deference under ORS 197.829 and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). Intervenor is wrong. A local government's interpretation of a local ordinance that implements a state statute or administrative rule is not entitled to deference. ORS 197.829(1)(d); *Holsheimer v. Columbia County*, 28 Or LUBA 279, 282 (1994). As discussed above, LUDO 3.3.170 implements ORS 215.275. Therefore, the county's interpretation is not entitled to deference.

In addition, the interpretation itself is wrong. The number of reasonable alternatives that an applicant for a utility facility must consider is necessarily a case specific inquiry based upon the nature of the project and the characteristics of the surrounding area. In the present case, we believe intervenor met the initial requisite threshold that is required under ORS 215.275 for consideration of reasonable alternatives. However, although an applicant for a utility facility need not consider every hypothetical possibility for siting the facility on non-EFU land, once an opponent identifies an alternative site with reasonable specificity to suggest that it is a feasible alternative, the local government must consider that site. The issue in the present case is whether petitioners suggested any reasonable alternative with sufficient specificity so that the county was obligated to consider the alternative as a feasible alternative.

Although intervenor and the county were apparently unaware of the proper legal standard, petitioners were close to the mark in asserting that "the system [can] be made to

work without converting valuable resource land." Petition for Review 10. Petitioners assert in their brief that they proposed equally advantageous alternative sites and that additional towers could be erected on non-EFU land to serve the same area as the proposed facility. However, petitioners did not specifically identify other feasible sites for the county to consider during the local proceedings other than a non-EFU site owned by one of the petitioners on the same ridge as the proposed site. Record 45. At oral argument, however, petitioners stated that the owner would never allow a cellular tower to be built on his property. We do not believe a site that an owner refuses to sell or lease to an applicant is a reasonable alternative that must be considered. Petitioners have failed to identify with reasonable specificity any feasible alternatives that the county failed to consider.

Turning to the reasonable alternatives that intervenor and the county did consider, the county found it necessary to locate the utility facility on the EFU site due to technical and engineering feasibility and locational dependence. Record 5. Those findings are supported by substantial evidence. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). In the absence of any specifically identified reasonable alternative that intervenor and the county failed to consider, or more focused challenge to the alternatives the county did consider, we cannot say that the county failed to consider reasonable alternatives.

The second assignment of error is denied.

The county's decision is affirmed.