BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GEORGE HARSHMAN, PAT HARSHMAN,
F. ELIZABETH EATINGER, ALLEN ANDRE,
BRYAN FRAZIER, STEVEN GUNTER,
KATHIE BEWICK, JULIE DAVIS,
JACK DAVIS, JEAN FRAZIER,
ALBERT GRAY, CAROL GRAY,
FRAN HAYMOND, ELIZABETH COLBERT,
ED COLBERT, DENISE FRAZIER,
DOUG HOXMEIER, PHEBE KIMBALL,
KEITH KIMBALL, SUSAN MILES, ROSS MILES,
ED ONOFRIO, BOBBYE KIZER,
KAREN O'ROURKE, ERIK RUNQUIST,
DOUG HORMEL, MYLES OAKLEY,
JOHN SAGER, R.F. SCHEUERMAN,
ALDENE SCHEUERMAN, ANN SMITH,
BEV SWEET, LORETTA WRIGHT,
BEV KRASNER, ANA DELFOSSE,
TODD STEELE, DONNA STEELE,
JUDITH SOCKMAN, HERBERT SOCKMAN,
RANDY WARREN, WILLIAM SKILLMAN
and DENA MATTHEWS,
Petitioners,

vs.

JACKSON COUNTY,
Respondent.

LUBA No. 2001-166

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Allen E. Eraut, Medford, filed the petition for review and argued on behalf of petitioners George Harshman and Pat Harshman. With him on the brief was Frohnmayer, Deatherage, Pratt, Jamieson, Clark, and Moore, PC.

No appearance by Jackson County.

HOLSTUN, Board Chair; BASSHAM, Board Member; BRIGGS, Board Member,

participated in the decision.

REMANDED 02/08/2002

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

Petitioners appeal a county hearings officer decision that grants approval for a 125-foot cellular communication tower on land zoned for exclusive farm use (EFU).

FACTS

The proposed cellular communication tower would be located on a 50-foot by 50-foot leased portion of a 7.17-acre EFU-zoned parcel that is located two to three miles south of the City of Ashland and a short distance east of Interstate Highway 5. The proposed cellular tower would work in conjunction with the applicant's existing tower on top of the Marc Anthony Hotel in Ashland to extend seamless coverage to its cellular customers.

Four existing towers were considered as alternatives to the proposed new tower, but were rejected. Two additional alternative sites were proposed during the hearing before the hearings officer in this matter, but those alternative sites were not considered. Among the conditions that the hearings officer imposed in approving the application was a condition that the tower be painted "with earth-tone colors and all lighting fixtures must be directed away from surrounding development." Record 201. An additional condition requires that the applicant provide emergency access to the subject property in accordance with Jackson County Land Development Ordinance (LDO) requirements for emergency vehicle access.

FIRST ASSIGNMENT OF ERROR

Cellular transmission towers, such as the one at issue in this appeal, are allowed in EFU zones under ORS 215.283(1)(d).[1] However, under ORS 215.275(1), such facilities may

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[1]ORS 215.283(1) lists "uses [that] may be established in any area zoned for exclusive farm use[.]" ORS 215.283(1)(d) lists the following uses:

> "Utility facilities necessary for public service, including wetland waste treatment systems but not including commercial facilities for the purpose of generating electrical power for public use by sale or transmission towers over 200 feet in height. *A utility facility necessary for public service may be established as provided in ORS 215.275*." (Emphasis added.)

be sited in the EFU zone only "if the facility must be sited in an exclusive farm use zone in order to provide the service, based on a number of factors that are set out at ORS 215.275(2)."[2] The county hearings officer considered and rejected four existing cellular

[2]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.

"(3) Costs associated with any of the factors listed in subsection (2) of this section 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. The Land Conservation and Development Commission shall determine by rule how land costs may be considered when evaluating the siting of utility facilities that are not substantially similar.

"(4) The owner of a utility facility approved under ORS 215.213(1)(d) or 215.283(1)(d) shall be responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility. Nothing in this section shall prevent the owner of the utility facility from requiring a bond or other security from a contractor or otherwise imposing on a contractor the responsibility for restoration.

"(5) The governing body of the county or its designee shall impose clear and objective conditions on an application for utility facility siting under ORS 215.213(1)(d) or 215.283(1)(d) to mitigate and minimize the impacts of the proposed facility, if any,

tower sites as alternatives to the proposed site, in order to comply with ORS 215.275. The hearings officer's decision includes the following findings:

> "Prior to applying for the proposed use, [the applicant] modeled a radio frequency 'search ring' to determine the best location for the facility. Properties included in the search ring included lands zoned Rural Residential ('RR') and Farm Residential ('F'). Neither of these zoning districts is a resource district. Based upon geographic and topographic considerations, tree canopy, buildings, mountains and bodies of water, *the subject property was selected and approved by the radio frequency engineers as the site best suited to provide adequate coverage and signal strength for seamless cellular communication.*" Record 38-39 (emphasis added).

> "Exhibit 22 consists of an analysis of four alternative sites for the proposed facility. *Each of the alternative sites was 'reasonable' in that each could conceivably provide service to the desired area. However, due to technical and engineering feasibility and the locationally dependent nature of the facility, none of the alternative sites can function as well as the proposed site for providing service to applicant's customers.* I find applicant has shown, by a preponderance of the evidence, it considered reasonable alternatives to locating the proposed use on EFU land and that the facility must be sited on EFU land due to technical and engineering feasiblility and the location-dependent nature of the facility. Based upon the foregoing findings of fact, I conclude the proposed use is a utility facility necessary for public service." Record 41 (emphasis added).

As we noted in *City of Albany v. Linn County*, 40 Or LUBA 38, 46 (2001), under ORS 215.275, an applicant who wishes to site a utility facility on EFU-zoned land must show that it is infeasible to locate the facility on land that is not zoned EFU. While the statute is somewhat ambiguous concerning how difficult development of a non-EFU-zoned site for the intended purpose must be before it can be found to be infeasible, it is quite clear that a finding that the proposed site is the *best* of the available sites is inadequate. 40 Or LUBA at 47. Although the above-quoted findings include unexplained conclusions that use of the four

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> on surrounding lands devoted to farm use in order to prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on the surrounding farmlands.
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> "(6) The provisions of subsections (2) to (5) of this section do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by the Federal Energy Regulatory Commission."

non-EFU-zoned sites that were examined by the applicant to provide the desired service would be infeasible, the findings also suggest that the hearings officer believed the approved site should be approved because it is the *best* of the alternatives that were examined. Based on those findings, we conclude the hearings officer misinterpreted the requirement of ORS 215.275 and failed to adequately explain why the four alternative sites that were considered are infeasible.

A second problem with the hearings officer's decision under ORS 215.275 is the failure of the applicant or the hearings officer to consider two additional alternative sites that were identified at the September 17, 2001 hearing before the hearings officer or explain why those two additional alternative sites need not be considered. We agree with petitioners that with the identification of those potential alternative sites, the county was obligated to either consider those alternatives or explain why they need not be considered. As far as we can tell, the county did neither.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

LDO 280.100(2) imposes "mandatory standards for all new construction * * * in * * * resource and rural zoning districts." LDO 280.100(2)(C) imposes the following fire safety requirements:

> "Emergency Vehicle Access: For the purposes of public safety, the following emergency vehicle access standards are required when new construction or other significant buildings are proposed. The County may impose additional standards, conditions, or require technical information as needed to assure compliance.
>
> "(i) Driveways shall be constructed to within 50 feet of all habitable structures and other significant buildings.
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> "(ii) In accordance with Section 05.070, driveways shall be constructed to the following standards:
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> "(a) Minimum surface width shall not be less than 12 feet. Width shall be increased to a minimum of 14 feet in curves with a

> centerline radius of less than 150 feet to ensure emergency vehicles remain on an all weather surface.
>
> "* * * * *
>
> "(c) Driveways shall be designed and constructed to maintain a minimum 50,000 pound load carrying capacity or if not designed by an engineer, the driveway shall be constructed of a minimum of 6 inches of base rock or equivalent.
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> "* * * * *
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> "(e) Driveways shall be designed such that the curves have a minimum centerline radius of 55 feet. This includes driveway approaches of public roads for both directions.
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> "* * * * *" (Emphases omitted.)

In considering whether the proposal satisfies the above-quoted emergency vehicle access requirements, the hearings officer noted testimony from holders of servient estates subject to the easement in which those testifying argued the applicant could not, under certain restrictions imposed on the easement, make the required improvements to comply with LDO 280.100(2)(C)(ii)(a), (c) and (e). The hearings officer concluded that "[w]hether or not applicant must or can obtain permission from others who use the road is not before the hearings officer." Record 43. The hearings officer then simply imposed a condition of approval that requires the property be inspected to ensure compliance with LDO 280.100 prior to issuance of a building permit for the proposed tower. Record 201-02.

Where, as is the case here, driveway improvements are required to ensure emergency vehicle access as mandatory approval criteria for permit approval, the hearings officer was required to find that the required improvements exist or that it is feasible to construct them. Once those findings are adopted, it is entirely appropriate to impose a condition, such as the condition that was imposed, to ensure that the driveway improvements are made. *Highland Condominium Assoc. v. City of Eugene*, 37 Or LUBA 13, 30 (1999). However, in this case there was focused testimony during evidentiary hearings that raises legitimate questions concerning whether the applicant can make the required driveway improvement. In that

circumstance, it is not adequate for the hearings officer to ignore such legitimate questions and simply impose a condition that the necessary improvements be constructed. Rather, the hearings officer must address those legitimate questions in his findings and demonstrate that notwithstanding those questions, it is nevertheless reasonable to assume the required improvements can be made. The hearings officer's failure to do so is error.[3]

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Interstate 5 and Greensprings Highway are both designated as protected scenic roadway corridors, which are regulated pursuant to LDO 280.110(3)(M). LDO 280.110(3)(M)(iii) provides as follows:

> "Within the scenic resource areas of special concern, any land use action subject to review by the Department shall include findings demonstrating that the proposal will have a minimal impact on identified scenic views, sites, stream and roadway corridors either by nature of its design, mitigation measures proposed, or conditions of approval.
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> "* * * * *
>
> "It is recognized that land use changes in a landscape will likely create contrasts; however, under minimal impact objectives, land use activities shall not attract undue attention, and shall visually harmonize with the existing scenic resources. This can be accomplished through design by repeating the form, line, colors, or textures typical of subject landscape, and designing the land use activity to blend into the existing landscape.
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> "* * * * *

[3]An issue that no party raises and that we have decided not to raise on our own motion is whether the hearings officer correctly assumed that the driveway improvement standard can be applied to a use that is allowed "outright" under ORS 215.283(1). *See Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995) ("legislature intended that the uses delineated in ORS 215.213(1) be uses 'as of right,' which may not be subjected to additional local criteria"). As the Court of Appeals explained in *Neighbors for Livability v. City of Beaverton*, 168 Or App 501, 507, 4 P3d 765 (2000), LUBA does not review land use decisions *per se*; it reviews "the arguments that the parties make about land use decisions." However, because we do not consider whether the hearings officer was correct to apply LDO 280.100 to the disputed cellular communications tower, if the county decides to reconsider this matter following our remand, it may address that question in its decision on remand.

"(b) Siting Standards: Any land use actions that require removal of native vegetation and/or topographic modifications shall be unobtrusively sited when within view of an identified scenic roadway, stream, view, or site. Unobtrusive siting means the development is located where topography or vegetation offers some shielding of the use, and the development in terms of scale, form, and color is consistent with the surrounding landscape.

"Hilltop siting is generally inappropriate for structures in a scenic area, as are excessive cut and fill operations for the placement of roadways or structures. Clustering of housing and structures for use of common access, increased setbacks from roadways and water areas, and landscaping shall be considered appropriate methods of minimizing adverse scenic impacts.

"* * * * *

"(c) Development Standards: Structures and other permanent facilities shall be unobtrusively designed in terms of scale and form. Colors used shall be earth tones indicative of the surrounding landscape.

"* * * * *" (Emphases omitted.)

The hearings officer's findings can be read to suggest that he believed that under LDO 280.110(3)(M)(iii) he was not authorized to deny the request based on LDO 00.050.[4] Such an interpretation of LDO 280.110(3)(M)(iii) and 00.050 would be erroneous.[5] The relevant findings are as follows:

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[4]LDO 00.050 provides as follows:

> "Except as may be otherwise stated in Oregon Administrative Rules or Statutes, the Jackson County Comprehensive Plan, or its related implementing ordinances, the terms 'no adverse impact or effect,' 'no greater adverse impact,' 'compatible,' 'will not interfere,' and other similar terms contained in standards of this Ordinance are not intended to be construed to establish an absolute test of noninterference or adverse effects of any type whatsoever with adjacent uses resulting from a proposed land development or division action, nor shall it be construed to shift the burden of proof to the County. The terms are intended to allow the County to consider or require use of mitigating measures which would render any potential incompatibility or adverse consequences of development to a minimal level which the County finds to be acceptable in light of the purpose of the district and the reasonable expectations of the other people who own or use property for permitted uses in the zone."

[5]Although LDO 00.050 makes it clear that impact and compatibility standards are not to be applied in an absolute way, that code section nevertheless makes it clear that mitigation measures must reduce "adverse consequences of development to a minimal level which the County finds to be acceptable in light of the purpose of the district and the reasonable expectations of the other people who own or use property for

> "Having found the proposed use is a utility facility necessary for public use and is technically and locationally dependent, I find that it cannot be denied based solely on the fact that it will be visible from portions of I-5 and the Greensprings Highway. A condition of approval will require that the tower feature flush-mounted antennae and that it be painted in earth-tone colors. While these conditions will not render the facility invisible from the scenic roadway corridors, they will, along with the native vegetation, substantially diminish the visual impact of the tower and render it relatively unobtrusive within the reasonable expectations of travelers on I-5 and the Greensprings Highway." Record 44.

We read the hearings officer's findings to conclude that the "fact that [the tower] will be visible from portions of I-5 and Greensprings Highway" provides no basis for finding noncompliance with LDO 280.110(3)(M)(iii). We agree with the hearings officer on that point, and that interpretation is consistent with the requirement of LDO 00.050 that standards such as LDO 280.110(3)(M)(iii) not be applied in such an absolute way. The hearings officer went on to find that the "flush-mounted antennae" and painting the tower "earth-tone colors" in concert with native vegetation will have the result of diminishing the visual impact of the tower so that it will be "relatively unobtrusive" and meet the requirements of LDO 280.110(3)(M)(iii).

Although it is clear that petitioners disagree with the hearings officer's judgment on this question, we do not believe that disagreement is sufficient to demonstrate error in the hearings officer's decision. Reasonable persons can disagree about whether the cited mitigation measures and features will be sufficient to result in "minimal impact on identified scenic views" and "not attract undue attention," "visually harmonize with the existing scenic resources," result in a tower that is "unobtrusively sited," and "in terms of scale, form and color [result in a tower that is] consistent with the surrounding landscape." Like the more common "compatibility" standard that is frequently applied to land use permits, these are all highly subjective inquiries. See *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 25 Or

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permitted uses in the zone." If the county does not find that proposed mitigation will result in a minimal level of impacts that are acceptable, there is nothing in LDO 00.050 that would preclude denying an application on that basis.

LUBA 601, 617 (1993) ("determination of compatibility is an inherently subjective determination"). We cannot say the hearings officer committed legal error in deciding the proposed mitigation measures along with the existing native vegetation are sufficient to ensure compliance with LDO 280.110(3)(M)(iii).

The one possible exception to the conclusion we reach above is the provision of LDO 280.110(3)(M)(iii)(b) that states "[h]illtop siting is generally inappropriate for structures in a scenic area." The disputed tower apparently will be sited on a hilltop. The hearings officer does not specifically address this requirement in his decision. However, he cites and incorporates conditions from the July 31, 2001 planning staff report. That staff report explains that the reason the tower is "situated on a slight hilltop [is] to provide the necessary coverage." Record 201. LDO 280.110(3)(M)(iii)(b) only provides that "[h]illtop siting is generally inappropriate for structures in a scenic area," which leaves open the possibility that there may be cases where hilltop siting is appropriate, and the staff report specifies a reason why hilltop siting is appropriate here. Petitioners make no attempt to challenge that reasoning, and we therefore conclude that petitioners have not demonstrated that the hearings officer erred in concluding that the proposal is consistent with LDO 280.110(3)(M)(iii).[6]

The third assignment of error is denied.

The county's decision is remanded.

[6]The same question that we noted earlier under the second assignment of error could be raised in conjunction with LDO 280.110(3)(M)(iii). *See* n 3.