

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21

BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

MARK E. LUEDTKE,  
*Petitioner,*

and

SUSAN SHAWN,  
*Intervenor-Petitioner,*

vs.

CLACKAMAS COUNTY,  
*Respondent.*

LUBA No. 2001-194

FINAL OPINION  
AND ORDER

22 Appeal from Clackamas County.

23  
24 Mark E. Luedtke, Estacada, filed the petition for review and argued on his own  
25 behalf.

26  
27 Susan Shaw, Oak Grove, represented herself.

28  
29 Michael E. Judd, Assistant County Counsel, Oregon City, filed the response brief and  
30 argued on behalf of Clackamas County.

31  
32 BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member,  
33 participated in the decision.

34  
35 REMANDED

03/11/2002

36  
37 You are entitled to judicial review of this Order. Judicial review is governed by the  
38 provisions of ORS 197.850.  
39

**NATURE OF THE DECISION**

Petitioner appeals county approval of a conditional use permit for a radio communications tower.

**MOTION TO INTERVENE**

Susan Shawn moves to intervene on the side of petitioner. There is no opposition to the motion, and it is allowed.

**FACTS**

The subject property consists of two adjacent tax lots with combined dimensions of approximately 139 feet by 200 feet. The subject property and all adjoining properties are zoned Low Density Residential (R-10). The property is currently developed with two 2.8-million gallon water storage tanks, and with a number of communication antennae operated by various public service and telecommunications service providers.

In August 2001, the county submitted a conditional use application to construct a 150-foot tall lattice tower and accessory equipment shelter immediately adjacent to one of the water tanks on the property. The proposed tower would support equipment that would be part of a two-way radio communication system for county emergency services providers. A hearings officer conducted a hearing October 31, 2001, at which petitioner and other opponents argued that the proposed tower did not comply with criteria governing conditional uses in the R-10 zone, and that the tower was subject to and did not comply with the setback applicable to “radio and television transmission and receiving towers,” at Clackamas County Zoning and Development Ordinance (ZDO) 813.01(C).

On November 21, 2001, the hearings officer issued the challenged conditional use permit, concluding that the proposed tower complied with applicable conditional use criteria and was not subject to the setback set forth in ZDO 813.01(C). This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioner challenges the adequacy of and evidentiary support for the county’s  
3 findings of compliance with ZDO 1203.01(B), (D) and (E).<sup>1</sup>

4 **A. ZDO 1203.01(B)**

5 Petitioner contends that the subject property is not suitable for the proposed use,  
6 because the site is already crowded with existing structures and there is not room to  
7 accommodate all the elements of the proposed tower. In particular, petitioner argues that in  
8 addition to the tower and equipment shed, the proposal will require an emergency generator,  
9 fuel tank, and turnaround area. Petitioner argues that there is no evidence that the generator,  
10 fuel tank and turnaround area can fit onto the site.

11 The hearings officer found that there is sufficient area on the site to allow placement  
12 of the proposed generator and fuel tank consistent with applicable setback requirements. The  
13 hearings officer conditioned approval on obtaining final design review showing “adequate  
14 on-site turnaround areas.” Record 19. Petitioner does not challenge the hearings officer’s  
15 finding regarding the generator and fuel tank, or cite to any evidence contradicting that  
16 finding. With respect to the turnaround area, the county argues that no issue regarding the

---

<sup>1</sup>ZDO 1203.01 provides in relevant part:

“The Hearings Officer may allow a conditional use, \* \* \* provided that the applicant provides evidence substantiating that all the requirements of this Ordinance relative to the proposed use are satisfied, and demonstrates that the proposed use also satisfies the following criteria:

“\* \* \* \* \*

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

“\* \* \* \* \*

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

“E. The proposal satisfies the goals and policies of the Comprehensive Plan which apply to the proposed use.”

1 ability of the site to accommodate the turnaround was raised below, and thus that issue has  
2 been waived. ORS 197.763(1). In any case, the county argues, there is no evidence in the  
3 record indicating that the site cannot accommodate an adequate turnaround.

4 Petitioner does not respond to the county’s waiver argument, or identify any place in  
5 the record where any issue regarding the turnaround was raised. We agree with the county  
6 that the issue is waived. Petitioner’s other arguments under this subassignment of error  
7 provide no basis for reversal or remand.

8 **B. ZDO 1203.01(D)**

9 Petitioner argues that the proposed 150-foot tall tower will alter the character of the  
10 surrounding area in a manner that will substantially limit surrounding residential uses, in  
11 violation of ZDO 1203.01(D), and that the hearings officer’s finding to the contrary is not  
12 supported by substantial evidence.

13 The hearings officer acknowledged that the proposed tower would be “visually  
14 incongruous” and have “adverse visual and aesthetic impacts because of its great height,  
15 lighting that will be required atop the tower, and industrial character.” Record 13.  
16 Nonetheless, the hearings officer found as mitigated by conditions of approval the proposed  
17 tower will not *substantially* limit, impair or preclude use of surrounding properties, and thus  
18 the proposal complies with ZDO 1203.01(D). Although petitioner obviously disagrees with  
19 that conclusion, he offers no focused challenge to the hearings officer’s extensive findings,  
20 nor makes any effort to demonstrate that the hearings officer’s finding of compliance with  
21 ZDO 1203.01(D) is not supported by substantial evidence. Accordingly, this subassignment  
22 of error is denied.

23 **C. ZDO 1203.01(E)**

24 Petitioner contends that the proposed tower does not comply with comprehensive  
25 plan goals and policies that apply to the proposed use, as required by ZDO 1203.01(E).  
26 Specifically, petitioner asserts that the proposed tower is not safe, and that it is therefore

1 inconsistent with the comprehensive plan. However, petitioner does not identify any  
2 comprehensive plan goals or policies that relate to safety and apply to the proposed use.

3 Petitioner advanced a similar argument before the hearings officer, again without  
4 identifying any comprehensive plan goal or policy that relates to safety and applies to the  
5 proposed use. The hearings officer adopted findings of compliance with ZDO 1203.01(E),  
6 concluding that even if there exists a comprehensive plan goal or policy regarding safety that  
7 applies to the proposed use, there is no evidence that the tower will fail or will be unsafe.  
8 Petitioner offers no challenge to that finding. This subassignment of error is denied.

9 The first assignment of error is denied.

## 10 **SECOND ASSIGNMENT OF ERROR**

11 ZDO 301.08 sets forth minimum lot size, setbacks and structure design requirements  
12 for primary structures in the county's urban residential zones, including the R-10 zone. ZDO  
13 301.08(A) describes the purpose of these requirements.<sup>2</sup> Petitioner argues that the hearings  
14 officer failed to address ZDO 301.08(A) and that the proposed use is inconsistent with five of  
15 the listed purposes in that section.

---

<sup>2</sup>ZDO 301.08(A) provides:

“The setback, coverage, depth, and structure height requirements of these districts are intended to:

- “1. Provide consistent standards insuring a stable pattern and intensity of development for new and existing neighborhoods;
- “2. Provide for fire safety and protection of all structures;
- “3. Protect the privacy and livability of dwellings and yard areas;
- “4. Provide for adequate light and air circulation between structures;
- “5. Provide for, and protect the unique character and livability of each district;
- “6. Ensure suitable access to each lot with minimum impact on adjacent lots or dwellings;
- “7. Ensure consistency in the scale of structures, both vertically and horizontally.”

1 The hearings officer found that the purpose statements in ZDO 301.08(A) are not  
2 approval criteria. Record 17. Petitioner does not challenge this finding, or offer any reason  
3 to believe that the purpose statements in ZDO 301.08(A) must be applied as approval criteria  
4 to uses allowed in the R-10 zone. Accordingly, the second assignment of error is denied.

5 **THIRD AND FOURTH ASSIGNMENTS OF ERROR**

6 In these assignments of error, petitioner argues that the hearings officer  
7 misinterpreted the county’s development code in a manner that allowed the county to avoid  
8 the setback requirements of ZDO 813.01(C).

9 ZDO 301.05(A)(10) lists “service recreational uses” as a permitted conditional use in  
10 the R-10 zone, subject to the requirements of ZDO 813. ZDO 813 describes uses permitted  
11 as “service recreational uses,” and sets forth various limitations and standards applicable to  
12 some of the listed uses.<sup>3</sup> The hearings officer found that the proposed use is a county use or

---

<sup>3</sup>ZDO 813.01 in relevant part describes the following “service recreational uses”:

- “A. Private commercial, noncommercial or nonprofit recreational areas, uses and facilities, including country clubs, lodges, fraternal organizations, swimming pools, golf courses, riding stables, boat moorages, parks and concessions. The setback requirements for principal buildings and swimming pools shall be as follows:
  - “1. Single Family and Rural Districts: Forty-five (45) feet from any other lot in a residential or rural district.
  - “2. Multifamily/Resort Districts: Thirty (30) feet from any other lot in a residential district.
- “B. City, county, state, federal or municipal corporation uses or buildings.
- “C. Telephone exchanges, railroad right of way, and public utility structures without shops, garages or general administrative offices. Radio and television transmission and receiving towers and earth stations, provided the base of such towers shall not be closer to the property line than a distance equal to the height of the tower.
- “D. Recreational Vehicle Camping Facilities.  
“\* \* \* \* \*
- “E. Any other use similar to the above mentioned, as determined by the Hearings Officer.”

1 building under ZDO 813.01(B), and therefore a permitted service recreational use. The  
2 hearings officer rejected arguments that the proposed use is subject to the setback applicable  
3 to “radio and television transmission and receiving towers” at ZDO 813.01(C).<sup>4</sup> Because the  
4 proposed use is a government use or building, the hearings officer found, the appropriate  
5 setbacks are those generally applicable to structures in low density rural residential zones at  
6 ZDO 301.08(B).<sup>5</sup> ZDO 301.08(B)(4) prescribes a maximum building height of 35 feet.  
7 However, the hearings officer found that the proposed use is exempt from the ZDO

---

<sup>4</sup>The hearings officer’s decision states in relevant part:

“\* \* \* ZDO 813.01(B) lists ‘City, county, state, federal or municipal corporation uses or buildings’ as examples of service recreational uses. ZDO 202 defines ‘building’ as ‘any structure used or intended for supporting or sheltering any use or occupancy.’ [The county] will operate the facility. The proposed tower and equipment shelter constitute ‘buildings’ as defined by the ZDO. The tower is a ‘structure \* \* \* intended for supporting [a] use’—emergency communications antennas and equipment operated [by the county]. Therefore the hearings officer finds that the proposed facility is a county use or building which is permitted as a conditional use in the R-10 zone.

“\* \* \* \* \*

“\* \* \* Because the use qualifies as a government use or building pursuant to ZDO 813.01(B), the proposed facility is not subject to the setback requirements applicable to ‘radio and television transmission and receiving towers and earth stations’ listed in ZDO 813.01(C). It is unnecessary to address the scope of the term ‘radio or television transmission towers,’ whether that term is limited to commercial broadcast towers, as part of this application.

“\* \* \* The hearings officer finds that the facility is subject to the standard setback requirements of the R-10 zone listed in ZDO 301.08(B). \* \* \*” Record 12.

<sup>5</sup>ZDO 301.08(B) provides in pertinent part:

“The minimum design requirements for primary structures (except Single Family Attached Dwellings) in these urban Low Density Residential Districts shall be as follows:

- “1. Minimum front yard setback: 20 ft.
- “2. Minimum rear yard setback: 20 ft.
- “3. Minimum side yard setback: 5 ft.
- “4. Maximum building height: 35 ft[.]”

1 301.08(B)(4) building height limitation pursuant to ZDO 904.01.<sup>6</sup> The hearings officer  
2 reasoned that the proposed use was a “transmission tower” or a “mast” or “antennae” under  
3 that provision.<sup>7</sup>

4 Petitioner challenges the hearings officer’s conclusion that the proposed use is not  
5 subject to the setback provided in ZDO 813.01(C). Petitioner contends that the proposed use  
6 is a “radio \* \* \* transmission and receiving tower” within the meaning of ZDO 813.01(C),  
7 and thus subject to the setback applicable to such towers. The county responds that the  
8 hearings officer correctly interpreted ZDO 813.01(B) and (C). According to the county, if  
9 the proposed facility qualifies as one type of service recreational use under ZDO 813.01,  
10 there is no need to determine whether it qualifies as another.

11 If the pertinent question were simply whether the proposed facility was a use  
12 permitted at all in the R-10 zone, we might agree with the county’s limited scope of analysis.  
13 However, the question before the hearings officer was also what standards, particularly  
14 setbacks, apply to the proposed facility. ZDO 813.01 sets forth a list of permitted service  
15 recreational uses, and also sets forth various standards to some of the listed uses. Most  
16 pertinently here, “radio and television transmission and receiving towers” are subject to a

---

<sup>6</sup>ZDO 904.01 provides:

“Height limitations stipulated elsewhere in this Ordinance shall not apply to:

- “A. Barns, silos or other farm buildings or structures on farms; church spires, belfries, cupolas and domes, monuments, water towers, fire and hose towers, observation towers, transmission towers, windmills, chimneys, smokestacks, flag poles, radio and television towers, masts and antennae, and solar collection apparatus.”

<sup>7</sup>The hearings officer’s decision states in relevant part:

“\* \* \* The hearings officer finds that the proposed tower is not subject to the 35-foot height restriction in ZDO 301.08(B)(4). It is expressly exempt from the height limitations of ZDO 301.08(B)(4) as a ‘transmission tower, \* \* \* mast [or] antennae \* \* \*.’ ZDO 904.01. The fact that the proposed structure is a building as defined by ZDO 202 is irrelevant. The exemptions of ZDO 904.01 expressly apply to a variety of buildings or parts of buildings including: ‘barns, silos, or other farm buildings, \* \* \* church spires, belfries, cupolas and domes, \* \* \* fire and hose towers, observation towers \* \* \*.’” Record 17 (emphasis deleted).



1 special setback requiring that the base of the tower be no closer to the property line than a  
2 distance equal to the height of the tower.<sup>8</sup> The hearings officer did not find that the proposed  
3 facility is *not* a radio and television transmission and receiving tower. Instead, the hearings  
4 officer simply concluded that because the facility fell within the broad category of  
5 government uses and buildings described at ZDO 813.01(B), it is therefore not subject to the  
6 requirements of ZDO 813.01(C), even if it is also properly viewed as a “radio and television  
7 transmission or receiving tower.” We do not believe that that interpretation of ZDO 813.01  
8 is reasonable or correct.<sup>9</sup> Where a regulatory scheme lists as permitted uses in a zone both a  
9 general category of uses and a specific category of uses, with different sets of requirements,  
10 and the proposed use fits within the specific category, the specific category and its  
11 requirements apply exclusively. *Keicher v. Clackamas County*, 39 Or LUBA 521, 536, *aff’d*  
12 175 Or App 633, 29 P3d 1155 (2001); *see also* ORS 174.020(2) (particular statutory  
13 provision controls inconsistent general provision). Accordingly, *if* the proposed facility is a  
14 “radio and television transmission and receiving tower,” it is subject to the special setback  
15 described in ZDO 813.01(C).

16 As noted, petitioner contends that the proposed tower is among those described by the  
17 term “radio and television transmission and receiving towers” in ZDO 813.01(C). Before the  
18 hearings officer, planning staff apparently took the position that the term “radio and  
19 television transmission and receiving towers” refers to radio or television *broadcast* towers,  
20 for example an AM or FM radio station, and does not include two-way radio communication

---

<sup>8</sup>We note also that recreational vehicle camping facilities are subject to a number of specific standards at ZDO 813.01(D)(1) through (10). Under the county’s approach to determining the applicable standards, if the county operated a county park that included a recreational vehicle camping facility, that facility would not be subject to the special standards at ZDO 813.01(D)(1) through (10), because it arguably falls within the broader category of “[c]ity, county, state, federal or municipal corporation uses or buildings” at ZDO 813.01(B).

<sup>9</sup>Our standard of review of the hearings officer’s interpretation is whether the interpretation is reasonable and correct. *Gage v. City of Portland*, 319 Or 308, 316-17, 877 P2d 1187 (1994); *McCoy v. Linn County*, 90 Or App 271, 275-76, 752 P2d 323 (1988).

1 towers, such as that proposed.<sup>10</sup> Petitioner disputes that position, arguing that  
2 ZDO 813.01(C) is broadly phrased and not limited to broadcast towers. Further, petitioner  
3 argues, broadcast facilities transmit but do not receive, and ZDO 813.01(C) includes both  
4 “transmission and receiving” towers. Petitioner also cites to ZDO 904.01(A), which exempts  
5 from any height restrictions a number of structures, including “transmission towers” and  
6 “radio and television towers.” Petitioner argues that the term “transmission towers” as used  
7 in ZDO 904.01(A) refers to towers supporting powerlines or telephone lines, and that the  
8 term “radio and television towers” refers to all other types of towers transmitting or receiving  
9 radio or television signals, not limited to radio and television broadcast towers. According to  
10 petitioner, ZDO 904.01(A) supports his view that “radio and television transmission and  
11 receiving towers” referenced in ZDO 813.01(C) are not limited to broadcast towers and  
12 include the subject radio communication tower.

13 The hearings officer did not adopt planning staff’s position, but as noted above  
14 interpreted ZDO 813.01 in a manner that made whether the proposed tower is a “radio and  
15 television transmission and receiving tower” legally irrelevant. Petitioner urges us to  
16 interpret ZDO 813.01(C) in the first instance, and determine whether the terms “radio and  
17 television transmission and receiving towers” include the proposed radio communication  
18 tower. We decline to do so. *Opp v. City of Portland*, 153 Or App 10, 14, 955 P2d 768  
19 (1998) (under ORS 197.829(2), LUBA may either interpret local legislation in the first  
20 instance or remand to the local government for necessary interpretation). The meaning and  
21 scope of the term “radio and television transmission and receiving towers” in

---

<sup>10</sup>The rationale for that position is not expressed in planning staff testimony. In particular, there is no explanation why broadcast radio towers such as AM or FM radio towers are subject to the special setback in ZDO 813.01(C), but not two-way radio communication towers. The purpose of the special setback is unclear to us, but if it relates to the tower itself and not the type of radio transmission, it is difficult to see why the setback should apply to one type of tower but not the other.

1 ZDO 813.01(C) is subject to considerable doubt. The county should determine its meaning  
2 in the first instance.

3 The third and fourth assignments of error are sustained.

4 The county's decision is remanded.