

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 RICHARD CLARK, YOKO CLARK,
5 BEVERLY PETITT and
6 DOUGLAS DUNHAM,
7 *Petitioners,*

8
9 vs.

10
11 COOS COUNTY,
12 *Respondent,*

13
14 and

15
16 VERIZON WIRELESS, LLC,
17 *Intervenor-Respondent.*

18
19 LUBA No. 2006-180

20
21 FINAL OPINION
22 AND ORDER

23
24 Appeal from Coos County.

25
26 Michael R. Stebbins, North Bend, filed the petition for review and argued on behalf
27 of petitioners. With him on the brief was Stebbins and Coffey.

28
29 No appearance by Coos County.

30
31 E. Michael Connors, Portland, filed the response brief and argued on behalf of
32 intervenor-respondent. With him on the brief was Davis Wright Tremaine LLP.

33
34 HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN, Board Member,
35 participated in the decision.

36
37 AFFIRMED

02/07/2007

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

NATURE OF THE DECISION

The challenged decision grants administrative conditional use approval for a 120-foot cellular communication tower (cell tower).

FACTS

The subject 1.1-acre property is located near the top of a hill. That hill lies on the east side of Coos Bay. The subject property and the properties around it have scenic western views across Coos Bay and of the City of Coos Bay beyond. The property immediately uphill to the east of the subject property is a large forested parcel owned by Weyerhaeuser Company. Some nearby properties, particularly nearby properties to the north and west, are developed with single family dwellings. The 120-foot cell tower that is approved by the appealed decision will be visible from these nearby dwellings. Record (Volume II) 418-21.

The subject property is located in the county Rural Residential 5 (RR-5) zone. Communication structures are allowed as an administrative conditional use in the RR-5 zone, subject to the review standard set out at Coos County Zoning and Land Development Ordinance (CCZLDO) 4.2.900(7). CCZLDO 4.400 (Table 4.2c). CCZLDO 4.2.900(7) imposes the following review standard for cell towers in the RR-5 zone:

“The proposed use must be found compatible with surrounding uses or may be made compatible through the imposition of conditions.”

The challenged administrative conditional use permit was first approved by the planning director. That planning director decision was appealed to the county planning commission, which also approved the administrative conditional use permit. Petitioners appealed the planning commission’s decision to the county board of commissioners (hereafter BOC), which also approved the permit with conditions. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In approving the disputed permit, the BOC adopted the following interpretive finding:

1 “* * * CCZLDO 4.2.900(7) requires the applicant to demonstrate that the
2 proposed use is ‘compatible with surrounding uses or may be made
3 compatible through the imposition of conditions.’ The [BOC] interprets the
4 term ‘compatible’ under CCZLDO 4.2.900(7) to mean that the proposed use is
5 *capable of existing together with the surrounding uses without discord or*
6 *disharmony.* The test is whether the proposed use is compatible with the
7 *existing surrounding uses, and not potential or future uses* in the surrounding
8 area.” Record (Volume 1) 14 (emphasis added).

9 As the above-emphasized words make clear, the BOC’s “without discord or
10 disharmony” interpretation of the compatibility standard is limited to “existing surrounding
11 uses.” We do not understand petitioners to challenge the “without discord or disharmony”
12 part of the BOC’s interpretation.¹ However, petitioners do challenge the BOC’s limitation of
13 its application of the CCZLDO 4.2.900(7) compatibility standard to existing uses and its
14 refusal to consider potential or future uses. Petition for Review 12. Petitioners also contend
15 that they could not have anticipated this aspect of the BOC’s interpretation and the BOC
16 therefore erred in failing to remand this matter back to the planning commission so that
17 petitioners could be given an opportunity to expand their evidentiary presentation with the
18 knowledge that application of the CCZLDO 4.2.900(7) compatibility standard would be
19 limited to existing uses. Finally, petitioners also contend that the BOC’s interpretation and
20 application of the CCZLDO 4.2.900(7) compatibility standard is inconsistent with the
21 requirement in ORS 215.416(8) for clear and objective approval criteria. We address each of
22 petitioners arguments separately below, as subassignments of error.

23 **A. Refusal to Consider Future or Potential Uses in Applying the CCZLDO**
24 **4.2.900(7) Compatibility Standard**

25 We have little difficulty agreeing with petitioners that the county could have
26 interpreted CCZLDO 4.2.900 to allow consideration of uses beyond those that currently

¹ This part of the BOC definition of “compatible” is consistent with the generally understood or dictionary definition of the term. Webster’s Third New International Dictionary includes the following definition of the word “compatible:” “capable of existing together without discord or disharmony.” Webster’s Third New Intern’l Dictionary, 463 (unabridged ed 1981).

1 exist. Although as a practical matter that would require the city to interpret CCZLDO
2 4.2.900(7) to allow a limited departure from existing surrounding use, since without at least
3 some time limit the entirety of all future uses of surrounding properties is simply unknowable
4 at any given point in time. However, we reject petitioners' suggestion that it was error for
5 the city to limit its consideration of "the surrounding uses" under CCZLDO 4.2.900(7) to the
6 "existing surrounding uses."

7 Petitioners' argument that the city must consider future or potential uses in applying
8 the CCZLDO 4.2.900(7) compatibility standard seems to be based entirely on the CCZLDO
9 2.1.200 definition of "use," which is "the end to which a land or water area is ultimately
10 employed." Whatever that definition of "use" means, it has the same ambiguity that the
11 unqualified reference to "the surrounding uses" in CCZLDO 4.2.900(7) has. Is the
12 referenced "use" the end to which land or water is ultimately employed today? Or is it the
13 end to which land or water will be ultimately employed in 100 years? Or is it the end to
14 which land or water will ultimately be employed at some unspecified point in the future
15 based on unspecified factors or considerations? The county's decision to limit its application
16 of the CCZLDO 4.2.900(7) compatibility standard to existing surrounding uses is at least as
17 consistent with the text of CCZLDO 4.2.900(7) and the text of the CCZLDO 2.1.200
18 definition of "use" as petitioners' contention that CCZLDO 4.2.900(7) should be applied to
19 include future or potential use. ORS 197.829(1)(a).²

² Under ORS 197.829(1), LUBA is required to affirm the BOC's interpretation of CCZLDO 4.2.900(7) unless the BOC's interpretation is:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

1 This subassignment of error is denied.

2 **B. The BOC’s Failure to Remand to the Planning Commission After it**
3 **Announced its Interpretation of CCZLDO 4.2.900(7)**

4 Petitioners contend that they could not have anticipated that the BOC would limit its
5 application of CCZLDO 4.2.900(7) to existing surrounding uses and that the BOC erred by
6 refusing to remand this matter to the planning commission after it interpreted CCZLDO
7 4.2.900(7) to allow it to limit application of the compatibility standard in that way.

8 There is no dispute that BOC’s interpretation of CCZLDO 4.2.900(7) was adopted in
9 its final written decision, after the last public hearing in this matter was closed. The Court of
10 Appeals’ decision in *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998), sets out
11 the analysis that is applied to determine whether it is error for a local government decision
12 maker to adopt an interpretation of a relevant approval standard for the first time in the final
13 written decision, after public hearings have concluded, without providing an additional
14 opportunity for the parties in a land use proceeding to expand on their evidentiary
15 presentation after learning that interpretation.

16 “We * * * agree with LUBA that, in certain limited situations, the parties to a
17 local land use proceeding should be afforded an opportunity to present
18 additional evidence and/or argument responsive to the decisionmaker’s
19 interpretations of local legislation and that the local body’s failure to provide
20 such an opportunity when it is called for can be reversible error. We also
21 agree with LUBA, however, that *at least* two conditions must exist before it or
22 we may consider reversing a land use decision on that basis. First, the
23 interpretation that is made after the conclusion of the initial evidentiary
24 hearing must either significantly change an existing interpretation or, for other
25 reasons, be beyond the range of interpretations that the parties could
26 reasonably have anticipated at the time of their evidentiary presentations.
27 Second, the party seeking reversal must demonstrate to LUBA that it can
28 produce specific evidence at the new hearing that differs in substance from the
29 evidence it previously produced and that is directly responsive to the
30 unanticipated interpretation.” *Gutoski*, 155 Or App at 373-74 (emphasis in
31 original; citations and footnote omitted).

“(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

1 One of the petitioners argued that the county should consider whether the proposed
2 cell tower is consistent with future development on currently undeveloped properties in the
3 area. Record (Volume II) 410. Intervenor argued to the contrary that CCZLDO 4.2.900(7)
4 only required consideration of existing surrounding uses. Record (Volume II) 23. Therefore,
5 the interpretation that the BOC adopted was not “beyond the range of interpretations that the
6 parties could reasonably have anticipated at the time of their evidentiary presentations.” The
7 first of the *Gutoski* standards is not met. Further, petitioners do not allege that the second of
8 the *Gutoski* standards is satisfied here. In fact, petitioners did present evidence that the
9 proposed tower would not be compatible with existing structures. Petitioners make no
10 attempt to argue how that evidentiary presentation would have changed if they had earlier
11 known that the BOC would limit its application of the CCZLDO 4.2.900(7) compatibility
12 standard to existing surrounding uses.

13 This subassignment of error is denied.

14 **C. CCZLDO 4.2.900(7) is not a Clear and Objective Standard**

15 ORS 215.416(8) requires that permit approval standards be set forth in the county’s
16 land use regulations and that any permit approval standards that are applied to needed
17 housing be clear and objective.³ Petitioner contends that the CCZLDO 4.2.900(7)
18 compatibility standard is not clear and objective, in contravention of ORS 215.416(8)(b).

³ ORS215.416(8) provides:

- “(a) Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole.
- “(b) When an ordinance establishing approval standards is required under ORS 197.307 to provide only clear and objective standards, the standards must be clear and objective on the face of the ordinance.”

1 Intervenor responds, and we agree, that ORS 215.416(8)(b) does not apply in this
2 case. ORS 215.414(8)(b) and 197.307 require that approval standards that are applied to
3 permits for “needed housing” must be clear and objective. The cell tower at issue in this
4 appeal is not “needed housing,” as ORS 197.703 defines that term, and ORS 215.416(8)(b)
5 does not appeal.

6 Although petitioners do not argue that the CCZLDO 4.2.900(7) compatibility
7 standard violates the general requirement in ORS 215.416(8)(a) that permit standards be set
8 forth in the county’s land use regulations, they do cite a case that concerned ORS 227.173(1),
9 which imposes a nearly identically worded requirement on cities. *Lee v. City of Portland*, 57
10 Or App 798, 646 P2d 662 (1982). In *Lee*, the Court of Appeals explained that the permit
11 approval standards referenced in ORS 227.173(1) must be “reasonably clear standards” or
12 “clear enough for an applicant to know what he must show during the application process.”
13 57 Or App at 801-02.

14 We agree with intervenor, that petitioners’ reference to *Lee*, without any reference to
15 ORS 215.416(8)(a), is not enough to raise any issue with regard to whether CCZLDO
16 4.2.900(7) violates ORS 215.416(8)(a). Even if it was, we would reject the argument. In
17 *Spiering v. Yamhill County*, 25 Or LUBA 695, 715 (1993) we rejected an argument that a
18 similarly worded Yamhill County permit approval criterion violated the statutory
19 requirement that now appears at ORS 215.416(8)(a).⁴ We see no reason why our reasoning
20 in *Spiering* would not support the same conclusion regarding CCZLDO 4.2.900(7).

⁴ Our reasoning in *Spiering* is set out below:

“ORS 214.416(8) requires that permit approval standards and criteria set out in local regulations inform interested parties of the basis on which an application will be approved or denied. See *Lee v. City of Portland*, 57 Or App 798, 802-03, 646 P2d 662 (1982) (interpreting parallel provisions of ORS 227.173(1) applicable to cities). The use of ‘compatibility’ as an approval standard is widespread in state land use statutes, statewide planning goals and local land use regulations. We recognize that the determination of compatibility between uses is an inherently subjective determination. *Corbett/Terwilliger/Lair Hill Neigh. Assoc. v. City of Portland*, 25 Or LUBA 601, 617

1 This subassignment of error is denied.

2 The first assignment of error is denied.

3 **SECOND ASSIGNMENT OF ERROR**

4 The BOC gave five reasons for finding that the proposed cell tower will be
5 compatible with surrounding uses. Record (Volume 1) 14-15. First, the BOC found that
6 most of the surrounding properties are undeveloped and the cell tower will not be
7 incompatible with those undeveloped properties. Second, while the subject property has few
8 trees, there are large trees on many of the surrounding properties which will screen views of
9 the cell tower. Third, the application has been conditioned to require that the applicant plant
10 additional trees to further screen the tower. Fourth, a condition of approval requires that the
11 tower be painted green to match the color of screening trees and vegetation. Fifth, a
12 condition of approval requires that the applicant allow two additional users to use the tower,
13 making it less likely that additional towers will be needed in the area.

14 **A. Preliminary Matters**

15 Before turning to petitioners' individual challenges to each of the BOC's five
16 findings, we agree with intervenor concerning two preliminary matters. First, petitioners cite
17 the BOC's interpretation of compatibility as existing "without discord or disharmony."
18 Citing dictionary definitions, petitioners contend "[d]iscord is defined as a disagreement."
19 Petitioners further contend that "[d]isharmony is defined as lack of harmony [and] [h]armony
20 is defined as agreement." From these definitions, petitioners contend "[i]t is obvious from
21 this proceeding that there is disagreement with the surrounding uses, but nowhere in its
22 decision does Respondent reconcile this disagreement with its mandate that, '. . . the

(1993). However, an ordinance that imposes compatibility as a permit approval criterion, without additional explanatory standards to give specificity to the term, adequately informs interested parties of the basis on which an application will be approved or denied. *Marineau v. City of Bandon*, 15 Or LUBA 375, 378 (1987). Therefore, use of YCZO 1202.02(F) as a permit approval standard does not violate ORS 215.416(8)." 25 Or LUBA at 715.

1 proposed use is capable of existing together with the surrounding uses without discord or
2 disharmony.” Petition for Review 16.

3 If petitioners’ are trying to argue that because they disagree with the proposed cell
4 tower it necessarily follows that the cell tower is in discord or disharmony with surrounding
5 uses, we do not agree. As intervenor correctly notes, it is the BOC that must decide whether
6 the proposed cell tower is in “discord or disharmony” with surrounding uses, and the
7 surrounding property owners’ disagreement with the county’s decision to approve the tower
8 plays no direct role in the BOC’s decision regarding that standard.

9 As a second preliminary matter, we agree with intervenor that the CCZLDO
10 4.2.900(7) compatibility standard is an inherently subjective standard and the county is
11 entitled to appropriate deference in selecting the factors it chooses to consider and how it
12 weighs those factors. In *Knight v. City of Eugene*, 41 Or LUBA 279 (2002) we considered a
13 similarly worded compatibility standard and explained:

14 “The compatibility standard imposed by EC 9.688 is extremely subjective.
15 *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 25 Or LUBA 601, 617
16 (1993). Reasonable persons could easily draw different conclusions from the
17 record in this appeal about whether the proposed 80-foot tower and related
18 facilities will be compatible with their surroundings, depending on which
19 relevant factors the local decision maker felt deserved emphasis. In this case
20 petitioners would have emphasized the nearby residential uses and concluded
21 the facility is incompatible. Even if that emphasis is permissible and would
22 lead to the conclusion petitioners support, the hearings official’s decision to
23 instead emphasize the commercial or mixed use character of the larger
24 surroundings to reach a contrary ultimate conclusion is clearly permissible.
25 That any of the individual findings that petitioners challenge might not
26 provide a complete answer to the ultimate compatibility question is not
27 determinative. The hearings official’s findings, as a whole, respond to the
28 compatibility issues raised below. That petitioners would have reached a
29 different ultimate conclusion does not mean that the hearings official's
30 conclusion is legally incorrect or that her findings are inadequate.” 41 Or
31 LUBA at 287-88 (footnote omitted).

32 While we discuss below petitioners’ challenges to each of the five reasons the BOC gave for
33 finding the disputed cell tower is compatible with surrounding uses, we note here, as we did
34 in *Knight*, it is not necessary that each of the city’s findings individually support the BOC’s

1 ultimate conclusion regarding whether the proposed cell tower will be compatible with
2 surrounding uses. Those findings must be viewed as a whole, and the BOC is entitled to
3 appropriate deference in selecting the compatibility factors it wishes to emphasize.

4 With the above understandings, we turn to petitioners' challenges to the BOC's five
5 reasons for finding the disputed cell tower will be compatible with surrounding uses.

6 **B. Few Developed Uses Will be Affected**

7 The BOC's first reason in finding the proposed cell tower will be compatible with
8 surrounding uses is set out below:

9 "The [BOC] concluded that the telecommunications facility is compatible
10 with the surrounding uses under CCZLDO 4.2.900(7) for one or more of the
11 following reasons. First, the surrounding area is not densely developed and is
12 in a fairly remote location. The large property to the east is undeveloped
13 timber land owned by Weyerhaeuser Company. A number of other
14 surrounding properties have not yet been developed. Therefore there are few
15 'surrounding uses' that will even be affected by the telecommunications
16 facility." Record (Volume I) 14.

17 Petitioners argue first that the record shows that there are surrounding uses that will
18 be affected by the cell tower.

19 We do not understand petitioners' first argument. The challenged finding does not
20 find that there are no uses in the area that are impacted by proposed tower. The challenged
21 finding simply finds that the area is remote and that it is not densely developed. As far as we
22 can tell, the finding is supported by substantial evidence.

23 Petitioners next argue that the analysis set out in the finding "is simply illogical."
24 Petition for Review 17. Petitioners contend that it does not matter if there are two
25 surrounding residential uses or two hundred surrounding residential uses, the test is whether
26 the disputed cell tower is compatible with surrounding residential uses. Petitioners contend
27 that if the cell tower is not compatible with residential uses, and they contend it is not, the
28 proposed cell tower must be denied. Petitioners contend it was error for the BOC to consider
29 the number or density of residential uses in the area.

1 We agree with petitioners that the BOC possibly could have analyzed the
2 compatibility issue in the way they argue it should have been analyzed above. Under that
3 analysis the BOC would first ask—is the proposed 120-foot cell tower compatible with any
4 residence in the surrounding area? If the answer to that question is no, the conditional use
5 permit would have to be denied no matter how many additional residences there may be in
6 the surrounding area. But we also agree with intervenor that the BOC did not err by finding
7 that the number or density of surrounding residential uses may be taken into consideration in
8 determining whether the proposed cell tower will be compatible with surrounding residential
9 uses in the area. We reject petitioners’ contention that it was error to take into consideration
10 the number and density of residences in the surrounding area.

11 **C. Trees and Dense Vegetation on Surrounding Properties Will Screen the**
12 **Cell Tower**

13 The BOC’s second reason is set out below

14 “Second, the surrounding area is a forested area with many large trees and
15 dense vegetation that will screen the telecommunications facility from the
16 surrounding uses. The applicant submitted several photographs that
17 demonstrate that the surrounding views of the telecommunications facility
18 will be significantly obscured by trees in the area. Although the property
19 owner has removed the trees and vegetation on the property itself to
20 accommodate the planned residential development, the surrounding properties
21 still have substantial trees and vegetation that will significantly mitigate the
22 visual impacts of the telecommunications facility.” Record (Volume 1) 14-
23 15.

24 Petitioners contend the above findings show the BOC was proceeding under the
25 erroneous understanding that trees on the subject property would screen views of the
26 property whereas the reality is that there are almost no trees on the subject property.
27 Petitioners point to the photographs that appear at Record (Volume II) 418-21 as showing
28 that the tower will not be screened by trees.

29 Intervenor contends that the BOC was not under any misapprehension that there are
30 trees on the subject property that will screen the proposed cell tower. In fact the BOC’s

1 finding expressly note that trees and vegetation have been removed from the subject
2 property. Intervenor contends the BOC was relying on trees and vegetation on properties in
3 the surrounding area. Intervenor contends that the photographs at Record (Volume II) 35-39
4 support that finding.

5 There does not appear to be any question that the eastern boundary of the property is
6 wooded and those trees will to some degree screen the tower from properties to the east. The
7 presence of existing trees and other vegetation to provide screening from other directions is
8 less clear. The photographs submitted by petitioners that appear at Record (Volume II) 418-
9 21 seem to show that there are relatively few trees that will provide screening for properties
10 to the west and north. The photographs cited by intervenor are black and white photocopies
11 of original photographs and it is difficult to determine how much screening the trees and
12 vegetation that are shown on those photos will provide. Nevertheless, we cannot say that the
13 BOC's finding that existing trees on surrounding properties will provide some screening of
14 views of the disputed tower is not supported by substantial evidence, *i.e.*, evidence that
15 "would permit a reasonable person to make that finding." *Dodd v. Hood River County*, 317
16 Or 172, 179, 855 P2d 608 (1993). We reject petitioners' contention that it was error to take
17 into consideration the screening that would be provided by trees on properties in the
18 surrounding area and that the BOC's findings in this regard are not supported by substantial
19 evidence.

20 **D. The Condition of Approval That Will Require Additional Screening on**
21 **the Subject Property**

22 The BOC's third reason is as follows:

23 "Third, the applicant agreed to provide screening trees around the
24 telecommunications facility that will further mitigate the visual impact. The
25 applicant's willingness to agree to this landscape screening is significant
26 given that the County code does not require any landscaping for this type of
27 facility. The [BOC] imposed a condition of approval that requires the
28 applicant to provide screening trees along the northeast and northwest border
29 of the lease area to further mitigate visual impacts to the residential properties
30 to the south and west." Record (Volume I) 15.

1 Petitioners contend that by requiring screening the BOC essentially concedes that
2 screening is needed to make the cell tower compatible with surrounding properties.
3 Petitioners contend that the BOC makes no attempt to explain how the required on-site
4 screening will make the cell tower compatible with surrounding properties.

5 Petitioners are undoubtedly correct that any new vegetation or trees that are planted
6 on the site are unlikely to completely screen the 120-foot cell tower for many years, if ever.
7 But intervenor contends that the CCZLDO 4.2.900(7) compatibility standard does not require
8 that the cell tower must be completely screened from surrounding properties before it can be
9 compatible with those properties. Intervenor contends that the BOC did not err in taking into
10 account the additional screening that complying with the condition will provide. We agree
11 with intervenor.

12 **E. The Condition Requiring that the Tower be Painted Green**

13 The BOC's fourth reason is set out below:

14 “Fourth, the Planning Commission imposed a condition of approval requiring
15 the applicant to paint the telecommunications facility green. The green color
16 will blend the telecommunications facility better with the surrounding trees
17 and vegetation, thereby mitigating the visual impacts.” Record (Volume I)
18 15.

19 Petitioners do not dispute that painting the tower green may to some small degree
20 make the tower blend in better with surrounding trees, where there are surrounding trees.
21 But petitioners argue that painting the tower green will not do much to mitigate visual
22 impacts on views of the bay.

23 It is not clear to us how many properties have views of the bay that will be impacted
24 by the cell tower. However, the disputed finding does not purport to address that impact.
25 While painting a 120-foot cell tower green may not do much to make it blend in with
26 surrounding trees, where there are surrounding trees, the green color of the tower presumably
27 will improve that visual blending. We do not understand petitioners to argue otherwise.
28 Petitioners' point that the green paint may not have any significant mitigating effect on

1 partially blocked views of the bay, while probably true, does not necessarily call into
2 question the BOC’s ultimate conclusion that the cell tower is compatible with surrounding
3 uses, based on all of the five reasons the BOC gave. As we have already explained, no single
4 reason need be sufficient in and of itself to result in compatibility. Also, as we already have
5 explained, compatibility does not necessarily require that all negative impacts of the cell
6 tower be eliminated.

7 **F. Condition Requiring Collocation**

8 “Fifth, the applicant designed the telecommunications facility to
9 accommodate two (2) additional users to avoid the need for additional towers
10 in this area. The applicant’s willingness to agree to allow for collocation is
11 significant given that the County code does not impose any collocation
12 requirements. The [BOC] encourages such collocation opportunities to
13 minimize the need for more towers in the area.” Record (Volume I) 15.

14 We agree with petitioners that the condition requiring that the applicant allow other
15 users to collocate on the disputed cell tower has little or nothing to do with whether the
16 disputed cell tower is compatible with surrounding uses. That the condition might make it
17 unnecessary to site other towers that might or might not be compatible with surrounding uses
18 would not seem to have any direct bearing on whether the disputed cell tower is compatible
19 with surrounding uses. Nevertheless, this factor is only one of five cited factors. The other
20 four cited factors are sufficient to explain why the BOC ultimately concluded that despite the
21 impacts that the disputed cell tower will have on surrounding uses, as conditioned, the cell
22 tower will nevertheless be compatible with surrounding uses.

23 The second assignment of error is denied.

24 **THIRD ASSIGNMENT OF ERROR**

25 In their third assignment of error, petitioners argue that in applying the CCZLDO
26 4.2.900(7) compatibility standard, the BOC erred by failing to consider Covenants,
27 Conditions and Restrictions (CC&Rs) that petitioners contend apply to the subject property
28 and prohibit construction of cell towers. Petitioners also argue the BOC erred by failing to

1 consider evidence that the cell tower will reduce property values of surrounding properties in
2 applying CCZLDO 4.2.900(7).

3 **A. Failure to Consider CC&Rs**

4 Petitioners contend that the subject property is subject to the CC&Rs that appear at
5 Record (Volume II) 151. Petitioners contend that those CC&Rs do not permit construction
6 of a cell tower on the subject property. The record also includes amended CC&Rs which
7 provide that wireless communication facilities are *not* prohibited in the subject property.
8 Intervenor contends the amended CC&Rs apply and petitioners contend the original
9 (unamended) CC&Rs apply.

10 We do not see how the question of whether the CC&Rs allow or prohibit cell towers
11 on the subject property has any direct bearing on whether a cell tower is compatible with
12 surrounding properties. It may be that one of the purposes of the CC&Rs' limitations on
13 permissible uses is to ensure that the uses that are constructed on the properties that are
14 subject to the CC&Rs are compatible. However, the CC&Rs do not state that they were
15 imposed for that purpose and we do see that there is any basis for assuming that was their
16 purpose. Even if that was the purpose for the CC&Rs, the parties dispute which version of
17 the CC&Rs applies to the subject property. The BOC is in no position to determine whether
18 petitioners or intervenor is legally correct about the validity of the amended CC&Rs. The
19 BOC did not err by failing to consider the CC&Rs in determining whether the proposed cell
20 tower will be compatible with surrounding uses.

21 **B. Failure to Consider the Impact of the Cell Tower on Property Values**

22 The individual petitioners in this appeal, as well as another property owner, all
23 testified that the cell tower will reduce their property values. Record (Volume II) 340, 407,
24 408. An owner of property is competent to testify regarding his or her property's "fair
25 market values and diminution in value." *Lunda v. Matthews*, 46 Or App 701, 710, 613 P2d
26 63 (1980). However, a property owner's testimony regarding property value is not

1 competent, “where it is shown that the owner has no knowledge of the market value of the
2 property in spite of ownership.” *Id.* Petitioners invoke the rule, and intervenor attempts to
3 invoke the exception to the rule, although intervenor cites no evidence that the property
4 owners who testified had no knowledge of their property’s market value.

5 Intervenor submitted several studies to demonstrate that the cell tower would not
6 reduce property values. Petitioners contend that intervenor’s studies concern cell towers in
7 very different locations and for that reason are not reliable indicators of the effect this cell
8 tower will have on the surrounding property values.

9 As was the case with the CC&Rs, we do not see that the impact on property values
10 has any direct bearing on whether the cell tower will be “compatible” with surrounding
11 properties, within the meaning of CCZLDO 4.2.900(7). Neither the evidence submitted by
12 petitioners to demonstrate the cell tower will have a negative impact on property values nor
13 the evidence submitted by intervenor to establish that the cell tower will have no negative
14 impact is overwhelming. Given the nature of that evidence and given that CCZLDO
15 4.2.900(7) does not expressly require that the county consider alleged impacts on property
16 values in applying CCZLDO 4.2.900(7), we do not agree that it was error for the BOC to fail
17 to adopt findings specifically addressing the potential impact of the cell tower on property
18 values when it applied CCZLDO 4.2.900(7).

19 The third assignment of error is denied.

20 The county’s decision is affirmed.