BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

T-MOBILE USA,
Petitioner,

vs.

YAMHILL COUNTY,
Respondent,

and

JERRY SEEBERGER, ELIZABETH SEEBERGER, RICK LIPINSKI, BARBARA LIPINSKI, GILBERT RINARD, JANET RINARD, MARC DOCHEZ, SHAUNA ARCHIBALD, PETER HALE, JEAN HALE, ANN LEISY, PRUDENCE A. MORI, K. DON KNIGHT, ELIZABETH KNIGHT, BRUCE DICKSON, KATHLEEN HORGAN, FERENC STOHR, CHRSITL STOHR, STEVE MIKAMI, MARTHA MARESH, DAVID WEIL, HERB C. KUHN, RON MCGUAVAN, MARYJO MCGUAVAN, GEOFFREY BERGLER, PATRICIA MICHAELIAN, ELEANOR HUFF, JOHN FOLEY, LINDA FOLEY, MARVIN LETTEER, DIANE LETTEER, VIVIAN WEBER, ROGER D. FOUTS, CHRIS LESIEUTRE, LIZ LESIEUTRE, NANCY J. ALLEN, TIM RAMSEY and DONNA RAMSEY,
Intervenors-Respondent.

LUBA No. 2007-105

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Carrie A. Richter, Portland, filed the petition for review and argued on behalf of petitioner. With her on the brief were Edward J. Sullivan and Garvey Schubert Barer.

Fredric Sanai, Assistant County Counsel, McMinnville, filed a response brief and argued on behalf of respondent.

Jerry C. Seeberger, Dundee, filed a response brief and argued on behalf of intervenors-respondent.

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

REMANDED 10/01/2007

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals the county's denial of a site design review application for a 120-foot cellular tower.

MOTION TO INTERVENE

The persons named in the caption (intervenors) move to intervene on the side of the respondent. In the petition for review, petitioner challenges intervenors' standing to intervene, arguing that intervenors' motion fails to establish that each intervenor appeared during the proceedings below. ORS 197.830(7).

Intervenors and the county respond by citing to minutes of the hearing before the county board of commissioners indicating that each intervenor appeared below. Record 66-67, 71-75. The motion to intervene is allowed.

FACTS

Petitioner applied to the county for approval to site a 120-foot tall cellular tower and associated equipment on a parcel zoned for exclusive farm use (EF-20). The preferred location is on a wooded hill approximately 993 feet above mean sea level (AMSL). Petitioner's stated objective is to provide and improve service to Highway 240 and to neighborhoods near Worden Hill Road, for both "in-building" and "in-vehicle" coverage. Highway 240 travels east and west and connects the cities of Yamhill to the west and Newberg to the east. The City of Dundee lies southwest of the City of Newberg on Highway 99. Approximately five miles west of the City of Newberg on Highway 240, Worden Hill Road travels south from Highway 240 approximately four miles and then turns east and travels approximately three miles to the City of Dundee.

Petitioner's engineers generated a propagation map identifying what petitioner believes to be the optimum location to site the facility to fulfill petitioner's objectives, known as a search ring. Almost all of the property within the search ring is zoned for exclusive farm

use. The exception is one area zoned AF-10, a non-resource designation. Petitioner considered locating a tower on the highest point in the AF-10 zoned area, but concluded that that site could not meet its objectives. Petitioner also concluded that if the highest point within the AF-10 zone could not meet its objectives, lower altitude sites within the AF-10 zoned area also could not meet its objectives. Finally, petitioner considered four other alternatives located outside the search ring, an additional AF-10 zoned parcel, and co-location on three existing electrical towers owned by the Bonneville Power Administration (BPA). Each of the alternatives examined are located at or below 430 AMSL, and petitioner concluded that each alternative was too low in elevation to serve its objectives.

County planning staff approved the application. Opponents appealed the staff decision to the board of county commissioners. After a hearing, the commissioners voted to deny the application on the grounds that (1) petitioner had failed to demonstrate that it was necessary to site the proposed facility in an agricultural zone and (2) the proposed tower would change the visual character of the area. This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Yamhill County Zoning Ordinance (YCZO) 402.02(F) lists utility facilities as a permitted use in EFU zones and provides:

> "Utility facilities necessary for public service * * *. The applicant will also be subject to Section 1101, Site Design Review. A facility is 'necessary' if it satisfies the requirements of ORS 215.275."

YCZO 402.02(F) implements ORS 215.283(1)(d), which provides that "[u]tility facilities necessary for public service" may be established in any area zoned for exclusive farm use. ORS 215.283(1)(d) further provides that a "utility facility necessary for public service may be established as provided in ORS 215.275." ORS 215.275 provides standards to be applied in determining whether a utility facility is "necessary for public service."[1]

[1] ORS 215.275 provides, in relevant part:

A. Site Design Review

The county found, apparently as one basis to deny the application, that:

> "The proposed height of the antenna will radically change the visual character of the surrounding rural area. The surrounding vegetation will not be adequate to mitigate the visual impacts of the proposed 120' tower." Record 9.

That finding appears to be based on the site design standards at YCZO 1101.02, which require in relevant part that the county consider "[p]rovisions for adequate noise and/or visual buffering from noncompatible uses," and "[c]omments and/or recommendations of adjacent and vicinity property owners whose interests may be affected by the proposed use." With respect to the latter criterion, the county also found that

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> "(1) A utility facility established under ORS 215.213(1)(d) or 215.283(1)(d) is necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service.
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> "(2) To demonstrate that a utility facility is necessary, an applicant for approval under ORS 215.213(1)(d) or 215.283(1)(d) must show that reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:
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> "(a) Technical and engineering feasibility;
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> "(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;
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> "(d) Availability of existing rights of way;
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> "(e) Public health and safety; and
>
> "(f) Other requirements of state or federal agencies.
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> "* * * * *
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> "(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, 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."

petitioner "has attempted to minimize impacts by placing the monopole near a stand of trees which will lessen visual impacts on the general community. The [county] finds this attempted mitigation will be inadequate, however." Record 8.

Petitioner argues because the proposed utility facility is a permitted use under ORS 215.283(1), state law generally prohibits local governments from imposing approval criteria other than those authorized by statute. *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995); *Shadrin v. Clackamas County*, 34 Or LUBA 154, 161 (1998). According to petitioner, the only statute that authorizes imposition of additional approval criteria or conditions on utility facilities is ORS 215.275(5), which is specifically limited to conditions necessary to mitigate and minimize impacts on farm and forest practices. Petitioner contends that no statute authorizes the county to limit or deny utility facilities based on visual impacts.

Neither the county nor intervenors respond to this argument, or attempt to defend the county's denial of the application based on the YCZO 1101.02 site design standards. We agree with petitioner that as described in *Brentmar* state law precludes the county from applying the YCZO 1101.02 site design standards to deny the proposed utility facility.

B. Necessary for Public Service

The county's findings do not explicitly address the standards for determining whether a utility facility is necessary for public service under ORS 215.275. Instead, the county found, essentially, that petitioner had failed to demonstrate that its existing cell phone coverage for the Highway 240 area is inadequate, and further failed to demonstrate that alternative sites cannot provide adequate coverage.[2]

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[2] The county found, in relevant part:

> "The subject parcel is zoned EF-20, which allows utility facilities on EFU land if it is 'necessary' for the facility to be located in an agricultural zone. The applicant provided contradictory evidence on this topic. For example, the applicant first provided a map (BB) purporting to show a lack of adequate cell phone coverage in the relevant area. The applicant

Petitioner argues that the county erred in failing to apply ORS 215.275 and in erroneously denying the application based on considerations other than those listed in ORS 215.275. According to petitioner, it demonstrated that the proposed facility must be located in an EFU zone considering technical and engineering feasibility, lack of available urban and nonresource lands, and public health and safety (*e.g.*, improving ability to make and receive emergency calls). In addition, petitioner argues that ORS 215.283(1) and 215.275 do not permit a county to second-guess a utility provider's geographic service objectives. *Sprint PCS v. Washington County*, 186 Or App 470, 480-81, 63 P3d 1261 (2003) (A utility's decision about its service needs should be respected, and a site that does not meet those needs is not a reasonable alternative). Further, petitioner argues that a utility provider is required to demonstrate only that it is necessary to site the facility on EFU-zoned lands in order to meet those service objectives. In other words, the provider is not required to demonstrate the absence of alternative EFU-zoned or other resource-zoned lands that could satisfy those objectives. *Dayton Prairie Water Assn. v. Yamhill County*, 170 Or App 6, 11, 11 P3d 671 (2000). While the provider must demonstrate that non-resource lands in the area cannot satisfy the identified service objectives, and must address alternative non-resource

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later supplied a different map based on a drive test (CC) showing that there is adequate coverage. [An opponent], a T-Mobile customer, drove around the relevant area calling a relative on her T-Mobile cell phone and stated the coverage and reception were adequate. [Another opponent] stated she visited the T-Mobile website, typed in addresses along Highway 240, and was informed T-Mobile had coverage in that area. Opponent Danny Ross, a licensed radio engineer, disputed T-Mobile's claims of inadequate coverage and stated T-Mobile could get the desired coverage by locating some antennae on already-existing nearby towers owned by the [BPA]. [Another opponent] pointed out that the applicant only visited three or four sites and made even fewer inquiries—as soon as they found an owner willing to lease to them, they stopped looking for any alternative sites, whether in or out of the EFU zone. [Another opponent] also maintained there were alternative sites off EFU land that the applicant failed to consider. Opponents * * * maintained the applicant could not adequately mitigate the visual impact on the surrounding area. In sum, the applicant failed to meet its burden of showing that the relevant land use criteria were satisfied by substantial evidence in the whole record. The applicant did show some evidence supporting its claim that it is 'necessary' for the monopole to be located on the proposed site, but this evidence was not substantial. The applicant's search for alternative sites was brief, haphazard and desultory. The applicant failed to provide the Board with additional requested evidence. The applicant failed to meet its evidentiary burden." Record 8.

sites specifically identified by opponents, the provider need not address alternative non-resource sites that are not identified with reasonable specificity. *Jordan v. Douglas County*, 40 Or LUBA 192, 201-202 (2001).

Here, petitioner argues that its stated objectives are to improve its existing coverage in both the Highway 240 and Worden Hill Road area, for both in-building and in-vehicle reception. Thus, petitioner argues, alternatives that improve reception only in the Highway 240 corridor, or that improve only in-vehicle reception but not in-building reception, are not reasonable alternatives. Petitioner cites to a series of propagation maps in the record, showing existing in-building and in-vehicle reception in the area, coverage for the preferred site, and coverage for each of the five identified alternatives. Supplemental Record 9-16. According to petitioner, constructing the tower at the preferred site significantly improves the in-building and in-vehicle coverage for the area, particularly in the Worden Hill Road area. *Cf.* Supplemental Record 9 and 11. Petitioner contends that none of the identified alternative sites, which are located at much lower elevations than the preferred site, come close to improving coverage to the same extent. Supplemental Record 12-16.

Turning to the county's specific criticisms of its evidence, petitioner argues that the evidence it submitted is consistent, and the fact that a drive-by test of vehicle reception along the Highway 240 corridor and the Worden Hill Road area found some reception says nothing about whether that in-vehicle reception can be improved, and further indicates nothing about in-building reception. Similarly, petitioner argues that the fact that opponents who are T-Mobile customers were able to receive signals while driving down the Highway 240 corridor and in the Worden Hill Road area says nothing about whether that reception can be improved or about in-building reception.

With respect to alternative locations, petitioner argues that it analyzed the five alternatives that it and others identified during the proceedings below, and determined that none of them would satisfy its objectives regarding improving geographic coverage and in-

vehicle/in-building reception. Petitioner cites to evidence that some alternatives, for example collocating on the BPA towers along Highway 240, would improve coverage and reception along parts of that corridor, but would not improve coverage and reception in the Worden Hill Road area, due to lower elevations and intervening terrain. Petitioner disputes that any other alternative locations were identified with sufficient specificity to allow them to be evaluated.

The county responds that the commissioners reasonably concluded that petitioner failed to meet its evidentiary burden in showing that it is "necessary for public service" to locate the tower on EFU-zoned land.[3] The county first notes that petitioner failed to respond to the commissioners' request for a list of property owners that petitioner contacted in order to find an owner willing to sign a lease. The county cites to testimony indicating that petitioner contacted only three property owners within the search ring and discontinued the search as soon as it found a willing owner. However, the county fails to explain why petitioner was obligated to provide a list of contacts or to demonstrate that it had contacted every property owner within the search ring, in order to show that the facility is necessary for public service under ORS 215.275. As noted above, the service provider is not required to consider alternative EFU-zoned locations or justify its choice of a preferred EFU-zoned site over other EFU-zoned sites. *Dayton Prairie Water Assn.*, 170 Or App at 11.

The county and intervenors next argue that petitioner failed to evaluate alternative non-EFU sites identified by opponents. However, the record citations provided to us do not indicate that opponents identified the locations of alternative non-EFU sites with reasonable specificity, other than the five sites petitioner evaluated. *See, e.g.*, Record 67 (minutes of

[3] The county cites *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 129 (2001), for the proposition that the "necessary for public service" standard is a "demanding standard." However, the cited passage does not support that proposition. Our reference in that opinion to a "demanding standard" is to the "clearly supports" standard at ORS 197.835(11)(b), which authorizes LUBA to affirm a decision notwithstanding inadequate findings where the record includes evidence that "clearly supports" a finding of compliance with applicable approval standards.

commissioners' March 14, 2007 hearing, testimony of petitioner Jerry Seeberger that "there are alternative sites available which are not on EFU land"). We agree with petitioner that such non-specific testimony does not trigger an obligation to evaluate such alternative sites.

The county next cites to opponent testimony that co-location on the BPA towers along Highway 240 could "meet the majority of the coverage objectives." Record 66 (testimony of Danny Ross, licensed radio engineer). However, there seems no dispute that co-locating the antennae on the BPA towers would not meet petitioner's objective to improve coverage and reception in the Worden Hill Road area. *See* Supplemental Record 14-16 (propagation maps using the BPA tower sites). The county does not dispute that providing or improving coverage to the Worden Hill Road area is a legitimate service objective, or identify any alternative non-resource site that can provide that coverage.

Finally, the county and intervenors argue that petitioner's existing cell-phone coverage in the Highway 240 and Worden Hill Road area is adequate, citing to testimony by opponents who are T-Mobile customers and who drove along Highway 240 and Worden Hill Road making calls and finding the reception adequate. However, there seems to be no dispute that constructing the tower at the preferred location will at least improve existing geographic coverage and both in-vehicle and in-building reception in the desired geographic area, particularly the Worden Hill Road area. We agree with petitioner that ORS 215.283(1) and 215.275 do not permit the county to deny an application to site a utility facility in an EFU zone simply because there is already some existing service in the area that the proposed facility will serve. A proposed cellular communication facility may be justified based on a need to improve that existing service.

In sum, we agree with petitioner that the county erred in denying the application under the YCZO site design regulations, and in failing to apply the governing statutory approval standards. Petitioner requests that LUBA reverse the county's decision and order the county to approve the application. In the alternative, petitioner requests remand.

Because the county failed to apply the governing approval standards, ORS 215.275, we believe that remand is the more appropriate disposition, to allow the county to determine whether to approve or deny the application under a correct interpretation and application of the applicable statutory standards.

The first and second assignments of error are sustained.

The county's decision is remanded.