

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 JERRY C. SEEBERGER,
5 *Petitioner,*

6
7 vs.

8
9 YAMHILL COUNTY,
10 *Respondent,*

11 and

12
13 T-MOBILE USA,
14 *Intervenor-Respondent.*

15
16 LUBA No. 2008-027

17
18 FINAL OPINION
19 AND ORDER

20
21
22 Appeal from Yamhill County.

23
24 Jerry C. Seeberger, Oregon City, filed the petition for review and argued on his own
25 behalf.

26
27 No appearance by Yamhill County.

28
29 Carrie Richter, Portland, filed the response brief and argued on behalf of intervenor-
30 respondent. With her on the brief were Edward J. Sullivan and Garvey Schubert Barer.

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

34
35 AFFIRMED

05/27/2008

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

NATURE OF THE DECISION

Petitioner appeals a county decision approving a cell tower on land zoned for exclusive farm use (EF-20).

FACTS

The challenged decision is on remand from LUBA. *T-Mobile USA v. Yamhill County*, __ Or LUBA __ (2007-105, October 1, 2007). In that decision, we remanded the county’s denial of intervenor-respondent’s (intervenor’s) application for a cellular communication tower on a parcel zoned EF-20, holding that the county had erred in (1) applying county site design standards and (2) failing to apply the governing ORS 215.275 standards for allowing a utility facility on agricultural land.

On remand, the board of county commissioners conducted an evidentiary hearing to consider whether the proposed facility qualifies as a “utility facility necessary for public service” under ORS 215.275. Opponents argued that a different parcel also zoned EF-20 is at a higher elevation and would be a better location than the preferred site. At a continued hearing, intervenor submitted evidence that the alternative site would not fulfill intervenor’s service objectives as well as the preferred site. The board of county commissioners voted to approve the application to locate the facility at intervenor’s preferred site. This appeal followed.

ASSIGNMENT OF ERROR

Petitioner argues that (1) the county failed to apply the county site design standards at Yamhill County Zoning Ordinance (YCZO) 1102 in approving the proposed tower, and (2) the county failed to analyze impacts of the proposed tower on farm and forest practices, as required by ORS 215.275(5).

1 **A. YCZO 1102**

2 Petitioner argues that, while LUBA held in *T-Mobile USA* that the county cannot
3 *deny* the proposed tower under the site design standards at YCZO 1102, the county must
4 apply those standards if it *approves* the application. Because the county approved the
5 application on remand, petitioner argues, it erred in failing to apply the site design standards.

6 Intervenor responds that no issue was raised on remand below that the county must
7 apply YCZO 1102 if it approves the application, and thus that issue is waived.
8 ORS 197.763(1). Alternatively, intervenor argues that the question of whether the county
9 can apply the YCZO 1102 site design standards *at all* to the application was resolved in *T-*
10 *Mobile USA* and petitioner cannot ask LUBA to revisit that issue. *Beck v. City of Tillamook*,
11 313 Or 148, 153-54, 831 P2d 678 (1992) (LUBA’s review of a remand decision is generally
12 limited to the remanded issues or new issues raised on remand, and does not include
13 reconsideration or revival of old, resolved issues).

14 In *T-Mobile USA* we concluded that “state law precludes the county from applying
15 the YCZO 1101.02 site design standards to deny the proposed utility facility.” Slip op 6.
16 While we did not explicitly go on to state that state law would also preclude the county from
17 applying the site design standards to *approve* the application, under the reasoning that
18 precedes the above-quoted conclusion it is clear that the gist of our holding is that the county
19 cannot apply the site design standards at all to the proposed utility facility. We agree with
20 intervenor that the issue of whether the county can apply the site design standards to the
21 proposed facility was resolved in *T-Mobile USA*. Because our decision to that effect was not
22 appealed, petitioner cannot now ask us to revisit that issue on appeal of the county’s decision
23 on remand.

24 In any case, we also agree with intervenor that to the extent this issue is a “new issue”
25 that could have been raised in the initial proceedings or the initial appeal to LUBA, petitioner

1 has failed to demonstrate that it was raised during the remand proceedings below.
2 Accordingly, this issue is waived. ORS 197.763(1).

3 **B. ORS 215.275(5)**

4 ORS 215.275(5) requires that the county impose conditions on an application for a
5 utility facility to “mitigate and minimize the impacts of the proposed facility, if any, on
6 surrounding lands devoted to farm use * * *.”¹

7 The county adopted the following finding regarding ORS 215.275(5):

8 “* * * Opponents have argued that tourism must be viewed as a farm and
9 forest practice requiring placing limits and/or denial of this application.
10 ‘Farm use’ is defined in ORS 215.203(2) and this Board finds that it
11 specifically does not include tourism. Further, there is no evidence in the
12 record to suggest that this tower will have any impact on farm and forest
13 practices or the suitability of the subject property for farm practices in the
14 future. * * *.” Record 6-7.

15 Petitioner paraphrases the last sentence of the above finding, and then argues “[t]he
16 County did not do any analysis of impacts on such practices.” Petition for Review 3. The
17 argument is not further developed. Petitioner does not identify any farm or forest practices
18 that the county should have considered, challenge the finding that there is no evidence of
19 impacts on farm or forest practices, or cite to any evidence of such impacts. Instead,
20 petitioner appears to argue that, despite the lack of any evidence of impacts on farm or forest
21 practices, the county must nonetheless engage in a *pro forma* “analysis of impacts” on farm
22 or forest practices.

23 If that is petitioner’s position, we reject it. ORS 215.275(5) requires conditions of
24 approval and, by inference, supporting findings, only with respect to the “impacts of the

¹ ORS 215.275(5) provides:

“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.”

1 proposed facility, if any, on surrounding lands devoted to farm use[.]” By implication, if the
2 facility has no identified impacts on farm or forest practices, the county may simply make a
3 finding to that effect, without further analysis.

4 To the extent petitioner challenges the county’s finding that tourism is not a “farm
5 use” as defined at ORS 215.203(2), petitioner makes no attempt to explain why that finding
6 is erroneous.

7 The assignment of error is denied.

8 The county’s decision is affirmed.