BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JUDITH GETZ, MELVILLE GETZ,
DEBORAH McMAHON and ROBERT McMAHON,
Petitioners,

and

JANE STRELL,
Intervenor-Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

U.S. CELLULAR OPERATING COMPANY OF MEDFORD,
Intervenor-Respondent.

LUBA No. 2008-192

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Bruce W. White, Bend, filed the petition for review and argued on behalf of petitioners and intervenor-petitioner.

No appearance by Deschutes County.

Erik J. Glatte, Medford, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief were John Blackhurst and Kellington, Krack, Richmond, Blackhurst & Glatte LLP.

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

BASSHAM, Board Chair, did not participate in the decision.

AFFIRMED 04/07/2009

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 decision that authorizes U.S. Cellular to construct a 60-foot monopine cellular tower and associated equipment on a 79-acre parcel that is zoned for exclusive farm use (EFU).

INTRODUCTION

In the area southeast of the City of Bend, some of U.S. Cellular's customers currently experience dropped calls and other inadequacies in their cell phone service. U.S. Cellular sought county approval for a new cell tower to address those inadequacies. To secure county approval for the disputed cell tower on EFU-zoned land, under applicable state and local law, U.S. Cellular was required to consider reasonable alternatives to the EFU-zoned site.

A. Utility Facilities Necessary for Public Service

Utility facilities that are necessary for public service are a permitted use in EFU zones. ORS 215.283(1)(d). However, following the Court of Appeals' decision in *McCaw Communications, Inc. v. Marion County*, 96 Or App 552, 773 P2d 779 (1989) and subsequent amendments to the statutory EFU zone, reasonable alternatives to EFU-zoned sites must be considered. ORS 215.275(1) and (2).[1] Only if one or more of the factors

[1] As relevant, ORS 215.275 provides:

> "(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;

specified in ORS 215.275(2) make use of an EFU-zoned site necessary, notwithstanding the identified reasonable alternatives, can an EFU-zoned site be used for a utility facility.

B. U.S. Cellular's Original Burden of Proof

In its original burden of proof document, U.S. Cellular identified areas southeast of the City of Bend that need improved cell phone signal strength. Record 654. U.S. Cellular also took the position in its initial burden of proof that the requested facility must also provide a collocation opportunity for another user and not "create overlapping coverage with or interference to [U.S. Cellular's] other existing wireless communication facilities." *Id*. U.S. Cellular's initial burden of proof provided the following description of how it went about selecting alternative sites for analysis to determine whether use of the EFU-zoned site is necessary to provide the desired increased cell phone signal strength:

> "1. Identify other zoning classifications adjacent to the EFU zone where the proposed utility facility [would be] located[.]
>
> "2. Review these areas for impact of existing tree heights on the height of the monopine[.]
>
> "3. Identify areas that would serve given the unique features (both physical and existing development) of each area[.]
>
> "4. Computer modeling of alternative locations to determine a tower height that would meet the applicant's signal propagation objectives[.]
>
> "5. In the modeling in #4 above, use a sufficient facility height to clear the tops of trees in the vicinity and accommodate collocation * * *[.]
>
> "6. Evaluate any locations (and heights) deemed suitable by the Approval Criteria for a conditional use permit for a wireless communication facility (in the RR10 [zone]) * * * and specifically for intrusiveness,

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> "(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."

> visual impact and impact on scenic views as [required by the Deschutes County Code to site a cell tower in the RR10 zone]." Record 655.

The proposed EFU-zoned cell tower site is located approximately in the middle of the area where U.S. Cellular desires to improve signal strength. Other properties in that middle area are also zoned EFU, so those properties would not provide an alternative non-EFU-zoned site. However there are RR10-zoned areas to the northwest, northeast, east and south of the EFU-zoned proposed site. U.S. Cellular identified alternative sites in each of these RR10-zoned areas. Alternative No. 1 is located in the RR10-zoned area to the northwest. Alternative 2 is located in the RR10-zoned area to the northeast. Alternative No. 3 is located in the RR10-zoned area to the east. Alternatives Nos. 4 and 5 are located in the RR10-zoned area to the south.[2] Record 656.

In its original burden of proof, U.S. Cellular determined that the proposed 60-foot tower on the EFU-zoned parcel would provide the desired signal strength to the identified underserved areas. In its original burden of proof, U.S. Cellular also determined that to provide improved signal strength in the underserved areas that would be comparable to the signal strength that would be provided by the proposed 60-foot tower on the EFU-zoned parcel, a taller cell tower would be required for all alternative sites. Those taller cell tower heights ranged from a low of 90 feet to a high of 150 feet. Cell towers in the RR10 zone require conditional use approval. In its initial burden of proof, U.S. Cellular took the position that the additional visual impacts from the taller towers would likely preclude conditional use approval for towers on those alternative sites. Record 658-72.

[2] Two additional alternative sites (Alternatives Nos. 6 and 7) were also considered. Those sites are zoned for forest use, and under relevant state and local law the parties assign no legal significance to those alternative sites.

C. Supplemental Burden of Proof

On April 15, 2008, U.S. Cellular supplemented its burden of proof. U.S. Cellular explained that in its original burden of proof U.S. Cellular assumed that its business preference to construct a 60-foot monopine tower and the undesirable visual impacts that would result from the taller towers that would be needed at the alternative locations were sufficient to demonstrate that the alternatives were not feasible alternatives. Based on questions that had been raised by opponents and the county planning department, U.S. Cellular supplemented its burden of proof to add an analysis of Pilot Pollution Interference (PPI) to its reasonable alternatives analysis. Record 572-76. Simply stated, U.S. Cellular took the position in its supplemental burden of proof that towers on the alternative sites would cause undesirable interference with the existing towers, due to (1) the closer proximity of Alternative No. 1 to U.S. Cellular's existing towers that serve the City of Bend and (2) the required additional height of all the alternatives. U.S. Cellular took the position that while a certain amount of signal overlap with the existing towers is necessary to provide the desired cell phone service, this excessive additional overlap is not desirable and results in interference—PPI or noise. According U.S. Cellular:

> "The ability of a receiver (phone) to handle this noise is limited. This condition erodes the signal dramatically, and the system suffers from dropping of ongoing calls, blocking of originating fresh calls, coverage shortage/gaps and a decrease in system capacity." Record 573.

D. The Hearings Officer's Decision

Based on the first three factors in ORS 215.275(2) (technical and engineering feasibility, locational dependence, and lack of available urban and nonresource lands) the hearings officer found that the proposed cell tower must be sited on the proposed EFU-zoned site, notwithstanding the reasonable alternatives identified by U.S. Cellular. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners divide their first assignment of error into three subassignments of error, which we address separately below.

A. Hearings Officer Failed to Adopt Independent Findings

This subassignment of error and the argument in support of the subassignment of error are set out below:

> "a. The Hearings Officer failed to make her own independent findings on compliance with the reasonable alternatives requirement.
>
> "In this case, the Hearings Officer did not make any findings at all as to what her process was for determining that 'reasonable alternatives' had been identified, but merely recited the evidence provided by the Applicant. Such recitation of the evidence rather than making findings do not constitute adequate findings." Petition for Review 9 (underlining in original; citation omitted).

It is reasonably clear from the hearings officer's decision that she reviewed and found U.S. Cellular's explanation of the methodology it employed to identify reasonable alternatives was acceptable and supported by the evidentiary record. We are not sure we completely understand what petitioners mean by independent hearings officer findings, but we conclude that the hearings officer's findings are adequate.

This subassignment of error is denied.

B. Failure to Establish That the Identified Alternatives are Reasonable

The next subassignent of error and the first paragraph of argument in support of that subassignment of error are set out below:

> "b. The Hearings Officer failed to analyze and make findings on what is required for a reasonable alternatives analysis, why the particular alternatives were chosen and why they represent a reasonable range of alternatives under ORS 215.275.
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> "Even if the Hearings Officer's decision can be construed to indicate that she made her own findings as to the methodology used to identify reasonable alternatives, her findings do not interpret and make findings as to what is required under ORS 215.275(2) to show that reasonable alternatives were

> identified and reviewed nor did they analyze whether or why the alternatives chosen were 'reasonable'." Petition for Review 10 (underlining in original).

We understand petitioners to argue under this subassignment of error that the hearings officer should have required U.S. Cellular to provide a better explanation for why the five alternative sites were selected and why they are the best of potential alternative sites. Without this demonstration that the selected alternative sites are the best of the alternatives available, petitioners contend applicants for approval of cell towers on EFU-zoned land can set up "strawmen" alternative sites that can be easily struck down when the factors set out in ORS 215.275(2) are applied. Here, petitioners argue, the applicant did not even identify the area where the proposed tower needed to be located to provide the desired service (the search ring), and did not explain how potential alternative "non-EFU lands were reviewed for elevation, topography existing development and tree heights * * *."

Although petitioners appear to be correct that the record does not include a map that shows the precise boundaries of the search ring, the record does include a map showing the areas that the proposed facility is designed to serve. Record 654. We conclude that map is sufficient to identify the general area where the new cell tower needs to be located.

Petitioners are also correct that U.S. Cellular did not provide a particularly detailed explanation for precisely how it went about selecting the five sites and offered no explanation regarding any sites that U.S. Cellular may have considered as candidates for the list of reasonable alternatives but were rejected. However, we conclude that the provided explanation is adequate. The most important limiting factor in selecting non-EFU-zoned alternative sites is that the site must not be zoned EFU. That requirement appears to eliminate all or nearly all properties except the properties in the previously mentioned RR10 zoned areas to the northwest, northeast, east and south. Record 547.[3] As we have already

[3] The map that appears at page 547 of the bound record is a reduced copy of an oversized exhibit. The oversized exhibit clearly shows the zoning and the locations of the alternatives and the subject property.

noted, U.S. Cellular selected alternatives in each of the RR10-zoned areas. As we understand it from U.S. Cellular's original burden of proof, in addition to their non-resource zoning designations, those alternatives were selected based on their (1) elevation, (2) natural screening and (3) lack of nearby physical obstructions or natural features that might complicate or block cell tower transmission and reception. These factors in turn will influence the required height of a tower at those alternative sites, its performance and its approvability under the county's conditional use standards.

Our cases concerning ORS 215.275(2) have held that the statute "requires that an applicant make a reasonable effort to identify feasible non-EFU-zoned alternative utility facility sites, and where another party 'identifies an alternative site with reasonable specificity to suggest that it is a feasible alternative,' that site must also be considered." *Van Nalts v. Benton County*, 42 Or LUBA 497, 499 (2002) (quoting from *Jordan v. Douglas County*, 40 Or LUBA 192 (2001)). In the present case petitioners did not identify any additional possible alternative sites in the four RR10-zoned areas or elsewhere that might have fared better when the applicant applied the factors set out in ORS 215.275(2). Petitioners' belated attempt to fault U.S. Cellular for not providing a more detailed explanation for why the five sites were selected and why other possible sites were not included is unavailing. We believe the criteria that U.S. Cellular identified for selecting alternative sites provided a sufficient basis for petitioners to propose additional alternative sites in those RR10-zoned areas or other areas, if they exist.

This subassignment of error is denied.

C. The Five Alterantive Sites Did Not Result From the Analysis

Finally, petitioners contend that the hearings officer's finding that "'the applicant's alternative sites analysis *resulted* in the identification of five alternative sites located between .8 and 2.4 miles from the subject property'" is not supported by the evidentiary record. Petition for Review 14 (petitioners' emphasis). We are not sure this subassignment of error

adds anything to the subassignment of error just discussed above. The applicant's burden of proof explains what factors were used to select alternatives and includes written testimony that the five sites were selected based on those factors. That burden of proof and the testimony that U.S. Cellular provided in support of that burden of proof are a sufficient answer to petitioners' substantial evidence challenge. Record 654-72; Petition for Review Appendix 34-35; 83-86.

This subassignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Under their second assignment of error, petitioners first recognize that the application was supported by a number of documents in the record:

> "● A March 21, 2008 burden of proof, with attached alternatives analysis (Rec 646-680);
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> "● An April 15, 2008 supplemental submittal with additional technical information to update the reasonable alternatives analysis (Rec. 571-578);
>
> "● A May 16, 2008 supplemental existing coverage map (Rec 566);
>
> "● A June 3, 2008 supplemental coverage map, including the proposed wireless facility (Rec. 548);
>
> "● Oral testimony at the June 3, 2008 hearing ([Petition for Review] App. 34-46);
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> "● Oral testimony at the July 22, 2008 hearing ([Petition for Review] App. 79-88);
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> "● July 28, 2008 rebuttal (Rec 253-306);
>
> "● July 29, 2008 rebuttal (Rec 243-246); and
>
> "● August 5, 200[8] surrebuttal (Rec 98-102)." Petition for Review 16-17.

After acknowledging the above evidence, petitioners argue "[t]he applicant's evidence was based upon inappropriate assumptions, was contradictory both internally and externally and was conclusory in nature. * * *." Petition for Review 17.

Petitioners must do more than offer broad generic criticisms of the evidence the county relied on. We will consider the specific evidentiary arguments that petitioners sufficiently develop under the second assignment of error.

Petitioners first argue that the alternatives analysis is based on a faulty premise that a 60-foot tall monopine tower is needed. We understand petitioners to contend that if it is technically feasible to provide the desired service with a taller or non-monopine tower on a non-EFU zoned parcel, U.S. Cellular must do so. While U.S. Cellular initially seems to have taken the position that a 60-foot monopine tower is an integral part of the desired service, that position changed during the local proceedings. While U.S. Cellular took the position that a 60-foot monopine tower on the subject EFU-zoned tower would meets its cell coverage objectives, it ultimately took the position that taller towers would be needed on the alternative sites and that those taller towers in turn resulted in unacceptable interference (PPI) problems. If U.S. Cellular began with a faulty premise, it did not adhere to that premise throughout the local proceedings, and the hearings officer's decision is not based on the faulty premise that petitioners identify here.

Petitioners next argue that different maps in the record show different levels of existing coverage in the area U.S. Cellular hopes to serve with the disputed tower. However, petitioners do not establish that any inconsistencies in the identified maps provide a basis for reversal or remand.

Petitioners also argue that U.S. Cellular's initial burden of proof made no mention of interference or PPI, whereas the supplemental burden of proof relies on PPI to show the alternative sites are not feasible. It is accurate to say that the focus of U.S. Cellular's explanation or theory for why the alternative sites are not feasible changed between its initial

burden of proof and its supplemental burden of proof. But it is not accurate to say that the initial burden of proof did not mention interference as a concern.[4] Just as importantly, we see no error in a change in the focus of the analysis of the feasibility of alternative sites, so long as the analysis that is ultimately accepted by the county is legally defensible.

Petitioners next argue that U.S. Cellular's analysis in the present case is inconsistent with its 2007 proposal to expand service by increasing the height of its existing tower on Ward Road from 35 feet to 65 feet. The Ward Road tower is 2.25 miles northwest of the subject property.[5] U.S. Cellular offers no response to this apparent inconsistency. That lack of response notwithstanding, there could be any number of explanations for that apparent inconsistency. In fact, for all we know, the potential for PPI at the Ward Road tower could be why the 2007 application was abandoned and the current proposal was submitted. If that is the case, there is no inconsistency. We do not agree that the apparent inconsistency, in and of itself, warrants remand of the challenged decision.

Petitioners argue that U.S. Cellular entered into a lease for the subject property before it made inquires about the availability of the other alternative sites. Petitioners appear to be correct, but we fail to see what legal significance that lease has with regard to the issues that must be resolved under the second assignment of error.

Finally, petitioners contend that U.S. Cellular did not provide the underlying scientific analysis and data for its alternative site selections and that the testimony of its experts during the hearings below was not sufficient to allow a reasonable decision maker to conclude that U.S. Cellular fulfilled its statutory obligation to establish that none of reasonable alternatives are a technically feasible alternative to constructing the disputed

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[4] As we noted earlier, the initial burden of proof stated that the proposed facility should not "create overlapping coverage with or interference to [U.S. Cellular's] other existing wireless communication facilities." Record 654.

[5] Presumably petitioners believe the 2007 proposal would have resulted in the same kind of PPI problems that U.S. Cellular cited in rejecting Alternative 1, which is located to the northwest of the subject property.

tower on EFU-zoned land. As petitioners recognize, LUBA has decided in other cases that an expert's testimony may be substantial evidence, notwithstanding that the evidentiary record does not include the scientific studies upon which the expert's opinion is based. *ODOT v. Clackamas County*, 27 Or LUBA 141, 146 (1994); *Citizens for Resp. Growth v. City of Seaside*, 26 Or LUBA 458, 465-66 (1994); *Miller v. City of Ashland*, 17 Or LUBA 147, 170 (1988). With the explanation that was provided by U.S. Cellular's experts, a reasonable decision maker could have concluded that, based on the interference that could be expected from the non-EFU-zoned tower sites, the proposed tower must be sited on the EFU-zoned subject property. Record 572-76; Petition for Review Appendix 34-36; 83-85.

The second assignment of error is denied.

THIRD AND FOURTH ASSIGNMENTS OF ERROR

Petitioners' remaining assignments of error challenge the hearings officer's findings that the proposed cell tower must be sited on the subject EFU-zoned site because the cell tower is "locationally dependent" (third assignment of error) and there is a "lack of available urban and nonresource lands" (fourth assignment of error). ORS 215.275(2)(b) and (c); *see* n 1.

Because we have already rejected petitioners' challenge to the hearings officer's decision under the "[t]echnical and engineering feasibility" factor, and a finding that the proposed facility must be sited on EFU-zoned land need only be based on one of the ORS 215.275(2) factors, petitioners' challenge under the ORS 215.275(2)(b) and (c) factors would not provide a basis for remand even if we sustained those assignments of error. We therefore do not consider petitioners' remaining assignments of error.

The county's decision is affirmed.