

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 GUY HAMILTON, GLENN WOODBURY,
5 LORI WOODBURY and
6 ALTA M. ROBINSON,
7 *Petitioners,*

8
9 vs.

10
11 JACKSON COUNTY,
12 *Respondent,*

13
14 and

15
16 BRUCE FJARLI, MERLIN FJARLI
17 and JO ANN FJARLI,
18 *Intervenors-Respondents.*

19
20 LUBA No. 2010-112

21
22 FINAL OPINION
23 AND ORDER

24
25 Appeal from Jackson County.

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27 Guy Hamilton and Glen Woodbury, Medford, filed the petition for review and argued
28 on their own behalf.

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30 No appearance by Jackson County.

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32 Mark S. Bartholomew, Medford, filed the response brief and argued on behalf of
33 intervenors-respondents. With him on the brief was Hornecker, Cowling, Hassen and
34 Heysell LLP.

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

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38 RYAN, Board Member, did not participate in the decision.

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40 AFFIRMED

03/16/2011

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

NATURE OF THE DECISION

Petitioners appeal county approval of a 199-foot tall AM radio broadcast tower on a parcel zoned exclusive farm use (EFU).

FACTS

The subject property is a 44.67-acre parcel that is developed with a dwelling and used for farming. All adjoining lands are also zoned EFU, most of which are part of a large tract owned by intervenors-respondents (intervenors). Further to the east are urbanized areas within or near the City of Medford that are zoned for light industrial use. To the southeast are residentially-zoned and developed areas. Further to the north is land zoned for general industrial uses.

Intervenors applied to the county to approve a 199-foot tall broadcast tower and equipment shed on a four-acre portion of the subject parcel, located in the southwest quadrant of the parcel. The four-acre area is intended to provide sufficient room for the tower to collapse safely, in the event of a disaster. Intervenors' consultant conducted a coverage study to identify sites that could meet a Federal Communications Commission (FCC) requirement that the broadcast tower reach at least 80 percent of its target audience. The target audience is essentially the City of Medford. The study identified an area including a total of 9,459 tax lots. That area was reduced to four potential alternative sites not zoned EFU, by applying the following exclusions: location within city limits, less than four acres in size, government ownership, developed sites, proximity to an airport, unavoidable environmental features and inadequate structural setbacks. The study rejected each of the four alternative non-EFU zoned sites as infeasible for various reasons.

The county planning director administratively approved the application, and an opponent appealed to the hearings officer. The hearings officer conducted a hearing, and on

1 November 15, 2010, issued a decision denying the appeal and approving the application.
2 This appeal followed.

3 **FIRST ASSIGNMENT OF ERROR¹**

4 A transmission tower under 200 feet high is allowed as a conditional use in the EFU
5 zone, under ORS 215.283(1)(c), as a “utility facility necessary for public service.” Under
6 ORS 215.275, to demonstrate that it is necessary to site the utility facility in the EFU zone,
7 the applicant must show that reasonable alternatives have been considered and that the
8 facility must be sited in the EFU zone due to one or more enumerated factors.²

9 Petitioners cite to OAR 660-004-0020(2)(a), part of the administrative rules
10 governing exceptions to statewide planning goals, and appear to argue that the alternative
11 site study fails to identify “reasons” that justify an exception to Statewide Planning Goal 3

¹ The petition for review sets out a single assignment of error, with several sub-arguments mostly unrelated to each other. We follow intervenors in labeling the sub-arguments as separate assignments of error, but will address related arguments together where convenient.

² ORS 215.275 provides, in relevant part:

- “(1) A utility facility established under ORS 215.213 (1)(c) or 215.283 (1)(c) 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)(c) or 215.283 (1)(c) 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;
 - “(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.”

1 (Agricultural Land).³ Intervenor respond that no issue was raised below regarding the need
2 for an exception to Goal 3 under OAR 660-004-0020(2)(a) and therefore this issue is waived.
3 In any case, intervenors argue, a utility facility necessary for public service is a conditional
4 use allowed in the EFU zone, and therefore is not a use that requires an exception to Goal 3.

5 Petitioners do not cite to any place in the record where any issue was raised
6 concerning whether the proposed tower requires a reasons exception, and therefore the issue
7 is waived. Further, we agree with respondents that no reasons exception is necessary for a
8 utility facility authorized in the EFU zone under ORS 215.283(1)(c) and 215.275.

9 To the extent the arguments under the first assignment of error are intended to
10 challenge the adequacy of the alternative site study conducted to address ORS 215.275,
11 petitioners' argument is insufficiently developed for review. *Deschutes Development*
12 *Company v. Deschutes County*, 5 Or LUBA 118 (1982). Petitioners do not cite or discuss
13 ORS 215.275, and with the limited exceptions below do not articulate a cognizable challenge
14 to the alternative site study or the county's findings.⁴

15 Elsewhere in the petition for review, petitioners appear to argue that the alternative
16 sites study erroneously rejected the possibility of locating the tower in the developed light
17 industrial area to the east of the subject property. However, petitioners do not argue, or cite
18 to any evidence, that the light industrial area can accommodate the proposed tower under the
19 considerations used to exclude alternative sites in the study, which petitioners do not
20 challenge. For example, petitioners cite to no indication that the light industrial complex has

³ OAR 660-004-0020(2)(a) is one of the standards that must be satisfied to approve an exception under OAR 660-004-0020(2) and requires a showing that “[r]easons justify why the state policy embodied in the applicable goals should not apply.”

⁴ At oral argument, petitioners argued that the county erred in failing to consider the testimony of Bob Johnson, a local tower owner, who argued that the proposed AM broadcasting facility could be co-located on existing broadcasting towers in the area or a new tower constructed at the site of existing towers. Record 188-89. However, petitioners did not make this argument in the petition for review, and under OAR 661-010-0040(1) LUBA cannot consider issues raised for the first time at oral argument. In addition, the hearings officer's decision considers and rejects Johnson's arguments. Record 6.

1 a vacant location of the size and dimensions deemed necessary to site the tower without risk
2 of damaging other structures if the tower collapsed.

3 Petitioners also appear to argue that the county erred in failing to evaluate as
4 alternative sites other EFU-owned sites in the vicinity owned by the applicants. However,
5 under ORS 215.275, the focus of the alternative site analysis is on non-EFU land; an
6 applicant for a utility facility on EFU land is not required to evaluate alternative sites that are
7 also zoned EFU.

8 The first assignment of error is denied.

9 **SECOND ASSIGNMENT OF ERROR**

10 Petitioners next argue that the county erred in failing to require the applicant to
11 demonstrate that a “joint-venture” relationship exists between the applicants and the church
12 that apparently intends to lease the tower to provide religious AM radio broadcasting.
13 Petitioners appear to be concerned that the applicant will instead lease the tower to a “for-
14 profit” commercial use. However, petitioners do not cite to any approval standard that
15 requires that the tower be owned by or leased to non-profit entities. Communication and
16 broadcast towers allowed on EFU land as “utility facilities necessary for public service” are
17 commonly owned or leased to for-profit entities. Because petitioners do not connect their
18 concerns about the ultimate lessee of the tower to any mandatory approval standard, their
19 concerns provide no basis for reversal or remand.

20 The second assignment of error is denied.

21 **THIRD ASSIGNMENT OF ERROR**

22 A portion of the subject 44.67-acre property, and other nearby EFU-zoned parcels,
23 are apparently leased to a local organic farmer, Stahlbush Farm. Petitioners argue that the
24 county erred in not requiring the applicants to solicit Stahlbush Farm’s comments regarding
25 the proposed tower.

1 Intervenors respond that the county provided required notice to area property owners
2 and petitioners do not cite any authority that would require the county to notify lessees or
3 that would require the applicant to obtain comments from specific local farmers. We agree
4 with intervenors that petitioners' arguments under this assignment of error do not provide a
5 basis for reversal or remand.

6 The third assignment of error is denied.

7 **FOURTH ASSIGNMENT OF ERROR**

8 Petitioners finally argue that the county's decision ignores an on-going regional
9 planning process addressing future growth within the City of Medford urban growth
10 boundary. However, petitioners cite no authority or applicable approval criterion that would
11 require the hearings officer to consider the regional planning process, in the context of
12 approving a conditional use application such as the present one.

13 The fourth assignment of error is denied.

14 The county's decision is affirmed.