

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 CYNDE MORTON,
5 *Petitioner,*

6
7 vs.

8
9 CLACKAMAS COUNTY,
10 *Respondent,*

11 and

12
13
14 NEW CINGULAR WIRELESS PCS, LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2014-030

18
19 FINAL OPINION
20 AND ORDER

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22 Appeal from Clackamas County.

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24 Scott N. Barbur, Milwaukie, filed the petition for review and argued on
25 behalf of petitioner. With him on the brief was Barbur Law Office, LLC.

26
27 Nathan K. Boderman, Assistant County Counsel, Oregon City, filed a
28 response brief and argued on behalf of respondent.

29
30 Richard J. Busch, filed a response brief and argued on behalf of
31 intervenor-respondent. With him on the brief was Kristin J. Larson and Busch
32 Law Firm PLLC.

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

36
37 REMANDED 07/08/2014

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39 You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a county hearings officer’s decision that approves a conditional use permit for a telecommunications tower.

MOTION TO INTERVENE

New Cingular Wireless PCS, LLC, the successor of the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

INTRODUCTION

Wireless telecommunication facilities such as the proposed new tower and antennas are allowed as “conditional” uses in the county’s FF-10 zone. Clackamas County Zoning and Development Ordinance (ZDO) 310.06(A)(11). Collocation of antenna on previously approved towers, use of existing utility poles for wireless telecommunication facilities and “Essential Public Communication Services” are allowed in the FF-10 zone as “primary” uses. The proposed 150-foot tall tower would be located approximately in the middle of a 7.5-acre FF-10 zoned parcel. As conditioned the tower would be set back at least 150 feet from adjoining property lines. There are a number of rural residences in the vicinity of the proposed tower. The central issue in this appeal is whether the visual impacts of the proposed tower will be such that the tower will violate ZDO 1203.01(D), which requires the applicant to present evidence that substantiates that:

“The proposed use will not *alter the character of the surrounding area* in a manner that *substantially limits, impairs or precludes* the use of surrounding properties for the primary *uses* allowed in the zoning district(s) in which surrounding properties are located.” (Emphases added.)

1 The ZDO does not define “limit,” “impair,” or “preclude.”¹ The ZDO
2 does define “use” as follows: “[t]he purpose for which land or a building is
3 arranged, designed or intended, or for which either land or a building is or may
4 be occupied.” ZDO 202.

5 The primary uses that are at issue in this appeal are rural residential uses
6 in the vicinity of the proposed tower. The main impacts that were identified
7 below that might cause the proposed tower to violate ZDO 1203.01(D) were
8 visual impacts. ZDO 1203.01(D) seems to call for a fairly straightforward, but
9 highly subjective, determination: Will the visual impacts of the proposed tower
10 alter the character of the surrounding area in a manner that substantially limits,
11 impairs or precludes the nearby rural residential uses?

12 **FIRST ASSIGNMENT OF ERROR**

13 The scope and precise nature of the first assignment of error is not clear.
14 That is in large part due to a lack of clarity in the hearings officer’s decision.
15 Under the first assignment of error, there are really three issues. Did the
16 hearings officer improperly interpret and apply the word “use” in ZDO

¹ As relevant here, *Webster’s Third New International Dictionary* (unabridged ed. 2002) defines those terms as follows:

“**limit** * * * **2 a** : something that bounds, restrains, or confines[.]”
Id. at 1312.

“**impair** * * * to make worse : diminish in quantity, value, excellence, or strength : do harm to : DAMAGE, LESSEN[.]” *Id.* at 1131.

“**preclude** * * * **2** : to shut out or obviate by anticipation : prevent or hinder by necessary consequence or implication : deter action of, access to, or enjoyment of : make ineffectual * * *.” *Id.* at 1785.

1 1203.01(D)? Did the hearings officer apply all three prongs of the ZDO
2 1203.01(D) standard? Did the hearings officer import a common law nuisance
3 standard into ZDO 1203.01(D), and then fail to apply that standard?

4 **A. The Meaning of the Word “Use”**

5 ZDO 1203.01(D) requires that “primary uses” must not be substantially
6 limited, impaired or precluded by the proposed tower. Petitioner contends the
7 hearings office adopted an improperly narrow understanding of the scope of the
8 residential uses that are a primary use in the FF-10 zone. It is not clear to us
9 that the hearings officer in fact adopted the interpretation of “use” that
10 petitioner contends he did. In any event, we agree with respondent that the
11 starting place (and perhaps the ending place) is the ZDO 202 definition of use:
12 “[t]he purpose for which land or a building is arranged, designed or intended,
13 or for which either land or a building is or may be occupied.” Because this
14 decision must be remanded in any event, the hearings officer can determine on
15 remand whether any further elaboration on that definition is necessary to apply
16 ZDO 1203.01(D).

17 **B. The Three Pronged Inquiry under ZDO 1203.01(D) and the**
18 **Test for Common Law Nuisance**

19 The hearings officer’s findings addressing ZDO 1203.01(D) are set out
20 below:

21 “[1] The other major argument is that the visual impact of the
22 monopole will ruin the nearby residents’ views and their
23 enjoyment of their land. While the Hearings Officer is
24 sympathetic to these arguments, ZDO 1203.01(D) does not require
25 that a new proposal have ‘no new impacts.’ What ZDO
26 1203.01(D) strictly requires is that the proposal ‘will not alter the
27 character of the surrounding area in a manner that substantially
28 limits, impairs or precludes the use of surrounding properties for

1 the primary uses allowed in the zoning districts in which
2 surrounding properties are located.

3 “[2] The ‘primary uses’ in the FF-10 zone are set forth in ZDO
4 310.03 and they generally include residential uses, and small scale
5 farming and forestry uses. Importantly, ZDO 310.03(I) calls out
6 ‘wireless telecommunication facilities’ as a primary use in the FF-
7 10 zone – when the antenna are collocated. Wireless
8 telecommunication facilities, including towers, are called out as
9 conditional uses in the FF-10 zone under ZDO 310.06(A)(11).
10 This context is a strong indication that the ZDO considers rural
11 residential uses and telecommunications facilities can be
12 compatible ‘primary uses’ in the zone.

13 “[3] The surrounding uses in this case are typical of rural
14 residentially zoned lands. They consist of residences, pasture and
15 small hobby farm type uses. *All of those uses can continue, albeit*
16 *in a less desirable form, if the monopole is allowed. In the past*
17 the Hearings Officer has found that ZDO 1203.01(D) can prohibit
18 a proposed use, but only where the impacts approach a common
19 law nuisance (Z0348-10-C Thomas). Short of that threshold, some
20 visual impacts as well as minor noise, dust and odor impacts are
21 anticipated, and cannot form the basis of denial because the
22 ‘primary uses’ on the surrounding lands can continue in their
23 essential form (Z0199-13-C Victory Academy). Here, while the
24 existence of the monopole will have some impact on views for
25 some property owners, its presence will not prevent those
26 residential uses from continuing.” Record 6 (paragraph 2
27 underlining in original; paragraph 3 italics, underlining, and
28 double underlining added).

29 The findings in paragraph #1 do not address ZDO 1203.01(D). The only
30 finding with any substance is the finding that ZDO 1203.01(D) does not
31 impose a “no new impacts” standard. The hearings officer is clearly right about
32 that, but that finding does not really address whether the proposed tower will
33 “alter the character of the surrounding area in a manner that substantially limits,

1 impairs or precludes the use of surrounding properties for the primary uses
2 allowed in the zoning district(s) in which surrounding properties are located.”

3 The findings in paragraph 2 were likely adopted to address arguments
4 below that the proposed tower is inherently incompatible with the existing
5 nearby rural residences. Record 50-51. If so, the point the hearings officer
6 makes seems to be a valid one. If other telecommunications facilities that
7 likely could have as much of a visual impact on the existing primary use
8 residences as the proposed tower are allowed as primary uses themselves, that
9 suggests the authors of the ZDO do not view telecommunications towers as
10 inherently incompatible with the primary uses in the FF-10 zone. But the
11 question that must be answered under ZDO 1203.01(D) is whether the
12 proposed 150-foot tower will “alter the character of the surrounding area in a
13 manner that substantially limits, impairs or precludes the use of surrounding
14 properties for the primary uses allowed in the zoning district(s) in which
15 surrounding properties are located.” The findings in paragraph #2 do not
16 directly address that question.

17 The findings in paragraph 3 are the hearings officer’s first attempts to
18 apply the standard set out in ZDO 1203.01(D). In the italicized finding, the
19 hearings officer finds those nearby primary “uses can continue, albeit in a less
20 desirable form, if the monopole is allowed.” That may have been the hearings
21 officer’s attempt to find that those residential uses will not be substantially
22 precluded by the tower. If so, we agree with the hearings officer that it is
23 highly unlikely that the visual impacts of a 150-foot tower constructed in the
24 middle of a 7.5-acre parcel could “preclude” continued use of nearby
25 residences. Of course that does not necessarily mean the tower will not
26 substantially limit or impair those residential uses. The hearings officer never

1 actually addresses these two prongs of ZDO 1203.01(D). On remand the
2 hearings office must address those two prongs of ZDO 1203.01(D), in addition
3 to the prong he already addressed.

4 The underlined findings are potentially problematic. The hearings
5 officer seems to say the proposed tower would violate ZDO 1203.01(D) only if
6 its impacts “approach a common law nuisance.” The record does not include
7 either of the hearings officer’s decisions that he says applied that common law
8 nuisance approach. However, the Thomas decision is attached to the county’s
9 brief. The Thomas decision concerned a proposed park in the county’s
10 AG/Timber zone that would have included a motocross race course. One of the
11 issues was whether noise impacts from the race course would violate ZDO
12 1203.01(D). In Thomas, the hearings officer determined the race track would
13 violate ZDO 1203.01(D) if it had the impacts of a common law nuisance:

14 “* * * Even at levels less than 60 [decibels], ambient noise could
15 be so constant and annoying as to interfere with the residential use
16 of surrounding lands. Stated another way, if the nature and
17 duration of noise impacts is such that it would approximate a
18 public or private nuisance, then the residential use allowed on
19 surrounding lands in the AG/Timber zone will be ‘impaired.’

20 “* * * The standard for determining whether a use of property
21 constitutes a nuisance is whether the use ‘substantially and
22 unreasonably interferes with the use and enjoyment’ of another
23 property owner’s land. *Penland v. Redwood Sanitary Sewer*
24 *Service District*, 156 Or App 311, 314 (1998). The test of
25 substantial interference looks at: ‘1) the location of the claimed
26 nuisance, 2) the character of the neighborhood, 3) the nature of the
27 thing complained of, 4) the frequency of the intrusion, and 5) the
28 effect upon the plaintiff’s enjoyment of life, health, and property.’
29 While the requirements of ZDO 1203.01(D) are not entirely
30 analogous to the prohibitions of common law nuisance, the two
31 provisions of law seek to avoid significant impacts emanating
32 from the use of one piece of land from adversely affecting nearby

1 property owners. It is certainly true that it would be irrational and
2 inconsistent with the purposes of the ZDO to find a proposed use
3 to be compliant with ZDO 1203.01(D) which in all likelihood
4 constitutes a common law nuisance.” Respondent’s Brief
5 Appendix 24-25.

6 Although the hearings officer’s Thomas decision is not clear, the hearings
7 officer appears to have based his conclusion that the proposed race track would
8 not comply with ZDO 1203.01(D), at least in part, on his conclusion that the
9 race track would qualify as a common law nuisance.

10 We are not sure why the hearings officer would want to import one
11 highly subjective inquiry (does the proposed tower qualify as a common law
12 nuisance?) when making another highly subjective inquiry (would the proposal
13 substantially limit, impair or preclude use of nearby residences?). But that
14 appears to be what the hearings officer did in his Thomas decision. There are
15 two possibilities in this case. The hearings officer may have intended in the
16 underlined findings to find that the proposed tower would only violate ZDO
17 1203.01(D) in this case if it constitutes a common law nuisance. The other
18 possibility is that the hearings officer did not intend to substitute the common
19 law nuisance test for direct application of ZDO 1203.01(D). In that case the
20 underlined findings are irrelevant surplusage about what the hearings officer
21 did in the Thomas case and are of no assistance in determining whether the
22 tower complies with ZDO 1203.01(D).

23 If the hearings officer had actually applied the common law nuisance test
24 that is outlined in the Court of Appeals’ *Penland* decision that is cited in the
25 hearings officer’s Thomas decision, we likely would agree with petitioner that
26 the first possibility is what happened here. But since the hearings officer did
27 not apply the common law nuisance test and likely would err if he substituted

1 that test for the applicable standard in ZDO 1203.01(D), we treat the hearings
2 officer’s common law nuisance findings as surplusage.

3 Finally, the double underlined finding that the tower “will not prevent
4 those residential uses from continuing” is, at best, another finding that
5 addresses the “preclude” prong of ZDO 1203.01(D) without addressing the
6 “limit” or “impair” prongs.

7 The first assignment of error is sustained. On remand the hearings
8 officer must apply the two prongs of ZDO 1203.01(D) (limit or impair) that he
9 failed to apply in determining whether the proposed tower will “alter the
10 character of the surrounding area in a manner that substantially limits, impairs
11 or precludes the use of surrounding properties for the primary uses allowed in
12 the zoning district(s) in which surrounding properties are located.”

13 **SECOND ASSIGNMENT OF ERROR**

14 Petitioner next contends that diminution of property values must be
15 considered under ZDO 1203.01(D) and that the hearings officer erred in
16 determining otherwise. The hearings officer found that decrease in property
17 values is not a relevant consideration under ZDO 1203.01(D). Record 3.

18 In *Tylka v. Clackamas County*, 34 Or LUBA 14, 29 (1998), we
19 concluded that the county was not required to consider possible property value
20 diminution in applying ZDO 1203.01(D). We adhere to that conclusion here.

21 The second assignment of error is denied.

22 The county’s decision is remanded.