BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

REBECCA B. RAWSON,
*Petitioner,*

vs.

HOOD RIVER COUNTY,
*Respondent,*

and

VERIZON WIRELESS,
*Intervenor-Respondent.*

LUBA No. 2016-099

FINAL OPINION
AND ORDER

Appeal from Hood River County.

Scott N. Barbur, Milwaukie, filed the petition for review. Ann B. Oldfather, Louisville, Kentucky, argued on behalf of petitioner.

Wilford K. Carey, Hood River, filed a response brief and argued on behalf of respondent. With him on the brief was Annala, Carey, Thompson, VanKoten & Cleaveland, P.C.

Phillip E. Grillo, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Davis Wright Tremaine LLP.

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

REMANDED 03/15/2017

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**

Petitioner appeals a board of county commissioners' decision that rejects her local appeal and approves a permit for a wireless transmission tower.

**FACTS**

On November 12, 2014, intervenor-respondent Verizon Wireless (intervenor) applied for an industrial land use permit to construct a wireless transmission tower on approximately eight acres of land zoned Light Industrial (M-2). The county subsequently amended the Hood River County Zoning Ordinance (HRCZO) on April 18, 2016 to adopt new, much more detailed regulations for communications facilities and towers. HRCZO Article 74. Because the application that ultimately resulted in the board of county commissioners' decision that is before us in this appeal was submitted and became complete before April 18, 2016, the decision was not subject to the new regulations for communications facilities and towers that were enacted on April 18, 2016. ORS 215.427(3)(a).[1] All citations to the HRCZO in this

[1] ORS 215.427(3)(a) is commonly referred to as the "goal post statute," and provides:

> "If the application [for permit approval] was complete when first submitted or the applicant submits additional information, as described in subsection (2) of this section, within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based

opinion are to the version of the HRCZO as it existed prior to its amendment on April 18, 2016.

The subject property abuts land zoned exclusive farm use (EFU), to the north, and land zoned for rural residential use (RR) to the west and northwest. The EFU-zoned property is the site of Hood River Valley High School, and the RR-zoned land is owned by petitioner. The planning director tentatively approved the application on May 29, 2015. Petitioner appealed the planning director's decision to the planning commission, and the planning commission held a public hearing to consider the appeal on April 13, 2016. The planning commission denied petitioner's appeal and petitioner appealed that decision to the board of county commissioners. On September 8, 2016, the board of county commissioners adopted Order #16-002, which denied petitioner's appeal and sustained the planning commission's decision. Petitioner now appeals the board of county commissioners' decision to LUBA.

**POST-ORAL ARGUMENT MOTIONS**

**A. Motion to Allow Reply Brief**

At oral argument in this appeal on February 16, 2017, petitioner orally requested permission to file a reply brief within a week after oral argument. On February 21, 2017, intervenor-respondent Verizon Wireless (intervenor) filed a motion "Objecting to Petitioner's Oral Request to File a Reply Brief." On

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upon the standards and criteria that were applicable at the time the application was first submitted."

March 1, 2017, petitioner filed a response arguing that because respondent and intervenor declined to consent to the filing of a reply brief, petitioner "did not seek formal leave to file a Reply Brief[.]" Petitioner's Response 3. Petitioner argues the request to file a reply brief is therefore moot. We understand petitioner to be stating that she will not be filing a reply brief. Accordingly, we agree that the reply brief issue is moot.

**B. Motion to Find Land Use Decision Moot**

On March 1, 2017, thirteen days after oral argument, petitioner filed two other motions. The first of those motions is titled "Petitioner's Motion for the Board to Enter an Order Finding the Land-Use Decision of Hood River County Moot." This five-page motion requests that LUBA remand the decision for the county to enter an order in petitioner's favor and dismiss the land use application because the application was never finally approved and because HRCZO Article 74 specifically applies to the application and precludes approval of the application.

Petitioner's mootness motion is based on a number of faulty premises. First, petitioner contends that because the planning director's May 29, 2015 decision was tentative when it was issued, it has never become final. Therefore, petitioner argues, notwithstanding the ORS 215.427(3)(a) goal post statute HRCZO Article 74 applies, and the application as a matter of law does not comply with certain requirements in HRCZO Article 74. Petitioner also

contends the planning director's decision includes substantive errors that kept it from becoming final or rendered it void.

While the planning director's May 29, 2015 decision was tentative when issued, because it was subject to local appeal, there is nothing tentative about the board of county commissioners' decision that is before us in this appeal. The May 29, 2015 planning director's decision was appealed first to the planning commission and then to the board of county commissioners. The board of county commissioners' final decision is now before LUBA in this appeal. The fact that the May 29, 2015 decision was tentative when issued, or may contain substantive errors, does not mean the board of county commissioners' decision—which rejected petitioner's local appeal and made the county decision approving intervenor's permit application final—is something other than a final decision subject to LUBA review.

Petitioner's other legal theory for why the ORS 215.427(3)(a) goal post statute does not operate to make HRCZO Article 74 inapplicable to petitioner's application is similarly faulty. Petitioner relies entirely on *Pete's Mountain Homeowners Assn v. Clackamas Cnty*, 227 Or App 140, 204 P3d 802, *rev den* 346 Or 589, 214 P3d 821 (2009). A detailed discussion of *Pete's Mountain* is unnecessary. That case involved conflicting statutes (ORS 215.427(3)(a), Ballot Measure 37 and Ballot Measure 49 that the legislature enacted to replace Ballot Measure 37). The case stands for the unremarkable proposition that the goal post statute (which was enacted by the legislature) does not preclude the

legislature from adopting legislation that replaces previously adopted legislation. This appeal concerns conflicting *county* zoning ordinance requirements. There are no statutory conflicts to resolve, and the goal post statute precludes application of HRCZO Article 74 to intervenor's permit application that was submitted and made complete prior to the enactment of HRCZO Article 74. *Pete's Mountain* is simply inapposite.

Finally, for the first time, in a reply that was filed with LUBA by mail on March 11, 2017, petitioner suggests that intervenor's permit application, which was approved by the planning director, the planning commission and the board of county commissioners, might not have been complete when filed or completed within the 180 days required by ORS 215.427(3)(a), *see* n 1. That reply was not received by LUBA until March 14, 2017, the day before the March 15, 2017 deadline to issue this final opinion. We reject petitioner's attempt to raise that issue for the first time at this late date.

Petitioner's mootness motion is denied.

**C. Motion to Supplement Petition for Review**

Petitioner's second March 1, 2017 motion requested permission to supplement her petition for review. Attached to that motion is a 10-page "supplement," that includes arguments that the county made factual assertions during oral argument that are not supported by the evidentiary record, and also includes continued legal argument regarding the validity of the county's

decision and responds to a LUBA decision that was cited by the county at oral argument.

Petitioner's petition for review was filed on January 10, 2017. Oral argument was held on February 16, 2017. On March 1, 2017, thirteen days after oral argument and fourteen days before the March 15, 2017 deadline for LUBA to issue the final opinion and order in this appeal, petitioner filed her motion to supplement the petition for review. The reasons petitioner gives for her unusual motion are to respond to a number of factual assertions the county's attorney made at oral argument and to respond to a LUBA decision that the county cited at oral argument. The ten-page supplement to the petition for review that was also filed on March 1, 2017 also elaborates on arguments previously presented in the petition for review.

The motion is denied. With regard to the factual assertions that petitioner claims are not supported by the record, the time that petitioners commonly reserve at oral argument for rebuttal is available to challenge material assertions of fact at oral argument by respondents, if those assertions of fact have no support in the record. And in any event, the disputed factual assertions, as well as the LUBA decision cited by county at oral argument, have played absolutely no role in our decision. We reject petitioner's attempts to enhance and expand upon arguments she made in her petition for review—attempts that in some respects rely on the facts asserted by the county's attorney at oral argument that petitioner claims are not supported by the record.

*Taylor v. City of Canyonville*, 55 Or LUBA 681 (2007) (*citing Fechtig v. City of Albany*, 27 Or LUBA 480, 483, *aff'd* 130 Or App 433, 882 P2d 138 (1994)).

Petitioner's motion to supplement the petition for review is denied.

**STANDARD OF REVIEW**

Before turning to petitioner's assignments of error, some of which concern interpretations of the HRCZO, we address respondent's and intervenor's (collectively respondents') arguments throughout their briefs that LUBA should review the board of county commissioners' interpretations of the HRCZO under the deferential standard of review that is required under *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010) and ORS 197.829(1).[2]

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[2] ORS 197.829(1) provides:

> "The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
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> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

Under *Siporen*, a local governing body's interpretations are entitled to deference when it

> "plausibly interprets its own land use regulations by considering and then choosing between or harmonizing conflicting provisions, * * * unless the interpretation is inconsistent with *all* of the 'express language' that is relevant to the interpretation, or inconsistent with the purposes of policies underpinning the regulations." 349 Or at 259 (emphasis in original).

Petitioner responds that the record shows that the only interpretations of the HRCZO in this matter were adopted by the planning staff, and that where local government officials other than the elected local governing body adopt interpretations of local land use laws like the HRCZO, the Oregon Supreme Court has held that such interpretations are not entitled to deference. *Gage v. City of Portland*, 319 Or 308, 316-318, 877 P2d 1187 (1994).

*Siporen* deference is only applied when a *local governing body* interprets its own land use laws. Therefore, to the extent the board of county commissioners directly interpreted the HRCZO or any other local land use laws or in considering the local appeal of the planning commission's decision adopted any interpretations that were initially expressed by planning staff or some other county decision maker, those board of county commissioner interpretations are entitled to deference under *Siporen* and ORS 197.829(1).

The more difficult proposition in this appeal is determining what interpretations that were expressed by the planning staff, planning director or planning commission were adopted by the board of county commissioners. The

board of commissioner's Order #16-002 is two pages long, and one of those pages includes only signatures. Record 2-3. That order denies petitioner's appeal, approves intervenor's use, and includes the following text:

> "Based upon the record before it, the staff report, and the arguments of the parties involved, and being fully advised in the premises, the Board accepted the Findings of Fact, Conclusions of Law, and Conditions of Approval provided in the record of the Planning Commission's decision, *dated August 4, 2016, attached hereto as Exhibit A and incorporated herein by this reference*." Record 2 (emphasis added).

The record initially submitted by the county included no attached "Exhibit A" or "Findings of Fact, Conclusions of Law." Based on the above-quoted language, it is exceedingly unclear which document or documents the county intended to incorporate into its decision as supporting findings and relatedly what interpretations that were expressed by others the board of county commissioners adopted as its own.

It is reasonably clear that the board of county commissioners intended to adopt the planning commission's decision that was the subject of appeal, although that decision is dated April 20, 2016, not the August 4, 2016 date referenced in the above-quoted text. The April 20, 2016 planning commission decision adopts an April 6, 2016 staff report. Record 22 ("[T]he * * * Planning Commission * * * voted [to approve] a motion to deny the appeal and uphold the Planning Department's decision to approve the application with two additional conditions based on the findings of fact and conclusions of law provided in the staff report, dated April 6, 2016.") Because the board of county

commissioners adopted the planning commission decision, which in turn adopted the April 6, 2016 staff report, any interpretations included in the documents that appear at Record 2-3 (board of county commissioners' order), Record 21-23 (planning commission decision), and Record 25-28 (April 6, 2016 planning staff report) are entitled to deference under *Siporen* and ORS 197.829(1). *CRAW v. City of Warrenton*, 67 Or LUBA 263, 266 (2013).

We conclude the board of commissioners' decision adopted one additional document to support its decision. A two-page August 4, 2016 staff report to the board of commissioners regarding petitioner's appeal of the planning commission decision appears at Record 6-7. In the supplemental record submitted by the county, the county pasted a label at the top of Record 6 to label it "Exhibit A." Although the board of county commissioners' reference to August 4, 2016 without specifically mentioning the staff report could be clearer, we conclude the reference to the date of the staff report is sufficient to allow a reasonable person to locate the August 4, 2016 staff report and recognize it as part of the city's decision. *Gonzalez v. Lane County*, 24 Or LUBA 251, 258-59 (1992). Therefore, any interpretations of the HRCZO in the August 4, 2016 staff report at Record 6-7 are entitled to deference under *Siporen* and ORS 197.829(1).

Respondents argue the board of commissioners adopted as part of its decision, not only the April 6, 2016 staff report to the planning commission but also the planning commission and planning director decisions as well as all the

documents that were submitted to the planning director and planning commission. Those pages of the record include a large number of documents and essentially constitute the entire record. Record 6-260. Intervenor-Respondent Verizon Wireless Response Brief 4. That argument is not even remotely plausible under the reasonable person standard for incorporating findings that we adopted in *Gonzalez*. A reasonable person would not have understood that the board of county commissioner intended to adopt the entire evidentiary record as its findings in support of its decision in this matter. Even if we were inclined to agree with respondents' "wholesale incorporation of the entire record" theory that would undoubtedly result in remandable error, since the record includes documents submitted by opponents, which take positions that are at odds with the board of commissioners' decision. *See Spiro v. Yamhill County*, 38 Or LUBA 133, 140 (2000) (explaining that incorporating other documents as findings runs the risk of adopting inconsistent findings).

To summarize, because the board of commissioners decision at Record 2-3 adopted the planning commission decision at Record 21-23, which in turn adopted the April 6, 2016 staff report at Record 25-28, those documents are part of the board of county commissioners' decision, and interpretations of the HRCZO in those documents are entitled to *Siporen* deference, as are interpretations in the August 4, 2016 staff report to the board of county commissioners, which the board of county commissioners adequately identified and incorporated under the standard set out in *Gonzalez*.

Before turning to the next preliminary issue, we note that petitioner's frustration at identifying the scope of the board of county commissioners' decision and its findings is warranted. The governing body that renders the final land use decision after local appeals is by far in the best position to sort through and clearly identify the documents or portions of documents that it wishes to rely on as findings to support its ultimate decision. A local government's reluctance to attempt to do so is perhaps somewhat understandable in cases where a number of documents may have been submitted that take contrasting positions regarding correct interpretations of applicable land use laws. But the local government's failure to clearly do so, if it chooses to rely on other documents for supporting findings, invites the kind of confusion over the scope and nature of the final decision that we have faced in this case.

We also note a local government has a second chance to clarify what it believes constitutes all the adopted findings when it submits the record. In fact our rules require that the record includes "[t]he final decision including any findings of fact and conclusions of law." OAR 661-010-0025(1)(a). Rather than force the parties to engage in a process that resembles a scavenger hunt to locate any findings that the governing body adopted by incorporation, the decision and all supporting findings that the local government believes constitute all the adopted findings could be compiled and placed together as the first item in the record. The county did not do so here and most local

governments do not do so either. These failures on the part of local governments lead to frequent and entirely avoidable disputes over the scope of the adopted decision and findings.

**WAIVER**

A second recurring issue in this appeal is whether petitioner waived the issues presented in her six assignments of error. Respondents respond to the petition by arguing that the majority of petitioner's arguments have been waived under *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), *rev den* 336 Or 615, 90 P3d 626 (2004). ORS 197.825(2)(a) limits LUBA's jurisdiction "to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]" In *Miles*, the Court of Appeals held that ORS 197.825(2)(a) operates to limit LUBA's review to the issues that are actually listed or identified in the appeal document that initiates a local appeal. We generally refer to this type of waiver as *Miles* waiver to distinguish it from waiver under ORS 197.763(1) and ORS 197.835(3), discussed below, which we generally refer to as "statutory waiver" or statutory raise it or waive it. In *Miles* waiver, the focus is on the content of the document that a petitioner files to initiate a local appeal. Respondents argue that petitioner did not raise the bulk of the issues in the petition for review in her notice of local appeal to the board of county commissioners that appears at Record 9-10 or in any written or oral testimony provided by petitioner during

her appeal to the board of commissioners, and accordingly, those arguments are waived under *Miles*.

"Statutory waiver" is distinct from "*Miles* waiver," as statutory waiver addresses a petitioner's initial statutory obligation to raise issues at the local level under ORS 197.763(1) and ORS 197.835(3), orally or in writing, prior to the close of the evidentiary record following the final evidentiary hearing.[3] Respondents concede that the majority of petitioner's arguments were raised below, orally or in writing, at some point prior to the close of the evidentiary record, and therefore petitioner satisfied the statutory raise it or waive it requirements of ORS 197.835(3) and ORS 197.763.

To demonstrate in a petition for review that issues were initially raised at the local level, OAR 661-010-0030(4)(d) requires a petitioner to:

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[3] ORS 197.835(3) provides that "[i]ssues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

> "Set forth each assignment of error under a separate heading. Each assignment of error must demonstrate that the issue raised in the assignment of error was preserved during the proceedings below. Where an assignment raises an issue that is not identified as preserved during the proceedings below, the petition shall state why preservation is not required. * * * "

Petitioner provided a single preservation section for her entire brief, which provides:

> "Petitioner repeatedly raised the issue of allowance of a wireless transmission tower at this location in her arguments below, along with arguments of height and setback as addressed in Assignments of Error Nos. 2 and 3, *infra*. As a non-exhaustive list, *see* Rec. 6; Rec 135-136 (at 16:00 et seq.); Rec. 63-68 (with measured height of proposed tower); Rec. 17-18; Rec 31-33 with simulated photo; Rec. 29." Petition for Review 10, n 5.

To the extent respondents argue that any particular assignment of error was not preserved under ORS 197.835(3), we consider those statutory waiver arguments below.

Regarding *Miles* waiver, at oral argument petitioner argued that *Miles* is limited to its facts and that there is a factual difference in this appeal that renders the holding in *Miles* inapplicable here. In *Miles*, the court explained that the City of Florence Code required "a written 'petition on appeal' that included a statement of '[t]he specific errors, if any, made in the decision of the initial action and the grounds therefore.'" *Miles*, 190 Or App at 503. In contrast, petitioner argues, the HRCZO does not require that a person filing a local appeal must list the issues they intend to raise on appeal.

We agree with petitioner. *Miles* involved a multi-stage local appeal process, where an appellant contested a conditional use permit for a gas station. In that case, LUBA rejected the applicant's argument that the appellant waived an issue regarding minimum street frontage, by not raising it in the document that initiated appellant's appeal to the city council, as the issue had already been raised earlier before the planning commission. 44 Or LUBA at 417-18 (2003). The Court of Appeals disagreed with LUBA, and determined that the appellant was required to raise that issue in the notice of local appeal that initiated the appeal of the planning commission's decision to the final decision maker. The court noted that the principles of exhaustion serve four purposes:

> "First, by requiring a petitioner to pursue an available local remedy, we permit the county decisionmaking process to run its course without interruption. Second, we make it possible for the governing body, which is the legislative source of the ordinances initially applied by the hearings officer, to clarify and determine factual and policy issues presented by land use controversies. Third, we open the door to the increased possibility of compromise and the avoidance of land use litigation. Finally, by [requiring exhaustion of all available local remedies], we promote the opportunity for development of a more complete, well-organized record." *Miles*, 190 Or App at 506, *quoting Lyke v. Lane County*, 70 Or App 82, 87, 688 P2d 411 (1984).

The court then concluded that in order to satisfy the principles of exhaustion, an appellant is required to both follow the procedural appeal process and present the particular claims that form the basis of the appeal. The court concluded in summary that "failure to exhaust a remedy by presenting the agency or local government with the substance of a claim waives the issue for

further review." 190 Or App at 507. The court noted that its conclusion was reinforced by the local code requirement that the appellant shall specify issues for its local appeal. The court posited that "[e]ven when an ordinance does not expressly limit the local body's review, such a limitation may be inherent in the requirement that the issues for the local appeal be specified in advance. *See Johns v. City of Lincoln City*, 146 Or App 594, 601-03, 933 P2d 978 (1997)." *Id*. at 509-10.

Although *Miles* contains some language that lends some support to respondents' position, we decline to extend *Miles* to the appeal at hand. We agree with petitioner that she was not limited to only the issues that she listed on her appeal form that was filed with the board of commissioners under *Miles,* because unlike the City of Florence local appeal requirements the HRCZO does not require a petitioner to specify the issues it intends to raise before the board of county commissioners. The document that initiated the local appeal to the final decision maker, along with the local requirement to specify the issues on appeal, was the focus of the Court of Appeals' analysis in *Miles*. Extending *Miles* waiver to a case where the local code does not require that a notice of local appeal specify the issues to be presented on appeal would represent a significant extension of *Miles* waiver. The Court of Appeals, not LUBA, is the appropriate tribunal to adopt such an extension if it is warranted. Because *Miles* waiver does not apply, petitioner appropriately exhausted her local remedies, and petitioner is free to raise any issue to LUBA, so long as she

raised that issue below prior to the close of the final evidentiary hearing, as required under ORS 197.763.

Finally, we note that the purposes that the Court of Appeals identified for *Miles* waiver were satisfied here. The issues raised before the board of commissioners had been raised at earlier stages of the proceedings. Moreover, petitioner contends the board of commissioners was well aware of the issues petitioner intended to raise on appeal, pointing to the August 4, 2016 staff report, which included the following listing of issues to be resolved on appeal:

> "As part of [petitioner's appeal to the planning commission], four main issues were raised initially:
>
> "1. Cell towers are not listed as an allowed use in the M-2 zone;
>
> "2. The visual effects of the proposed tower qualify as a 'nuisance,' which is not allowed in the M-2 zone. The tower will also result in adverse impacts to nearby property values;
>
> "3. The proposed tower does not comply with applicable property setback requirements and height limitations of the M-2 zone; and
>
> "4. The tower location will result in a significant safety hazard to adjacent uses, including the school, baseball hitting cage, and park." Record 6.

The staff report then addresses concerns regarding each of those issues. We agree with petitioner.

**FIRST ASSIGNMENT OF ERROR**

Petitioner first argues that the county misconstrued HRCZO Article 32 when it authorized petitioner's wireless tower in the M-2 zone as a permitted

use. HRCZO Article 32 governs the M-2 Light Industrial Zone, and HRCZO 32.15 lists "Uses Permitted" and states that "[i]n the M-2 zone, the following uses and their accessory uses are permitted subject to the standard set forth in a land use permit." HRCZO 32.15 then lists seven allowed use categories: "Commercial," "Manufacturing and Assembly," "Processing," Fabrication," "Wholesaling and Warehousing of All Types," "Utilities," and "Other." The "Utilities" category provides:

> "F. Utilities
>
> "1. Distribution plants and substations
>
> "2. Service yards." HRCZO 32.15(F).

The August 4, 2016 staff report includes the following interpretation of HRCZO 32.15(F):

> "* * * the Planning Commission found that the proposed cell tower is an outright allowed use in the M-2 zone. Although not explicitly listed, the Planning Commission found that a cell tower falls under the category of "utilities," which are allowed per Section 32.15(F) of the [HRCZO]. As provided in the Black['s] Law Dictionary, the definition of 'utility' includes 'the distribution of telecommunications to the public.' For these reasons, the Planning Commission concluded that the proposed cell towers are an allowed use in the M-2 zone as long as they operate and are constructed in compliance with applicable site development standards and use limitations requirements of the zoning ordinances." Record 6.

As previously noted, because the board of county commissioners adopted the April 4, 2016 staff report, it adopted the above interpretation, and that

interpretation is entitled to deference under *Siporen* and ORS 197.829(1) unless the interpretation is implausible.

Petitioner argues that because HRCZO 32.15(F) explicitly lists only two types of "Utilities," as permitted uses, neither of which petitioner understands to include wireless communication towers, the county adopted an implausible interpretation of HRCZO 32.15(F) when approving intervenor's application. Petitioner argues that HRCZO 32.15(F) provides an exclusive list of the utilities that are allowed in the M-2 zone, and does not permit the county to use a dictionary definition of the category "Utilities" to sweep any other type of utility into the "Utilities" category.

Intervenor asserts that the county's interpretation that the proposed wireless communication tower is a utility permitted in the M-2 zone is not reversible under the deferential "plausibility" standard in *Siporen*. Intervenor also argues that it is plausible for the county "to interpret the proposed [tower] as a type of 'distribution plants and substation', under HRCZO 32.15(F)(1)." Intervenor's Brief 14. Intervenor supports that argument by quoting the language used in intervenor's application that described the project as "*Section 32.15 – Uses Permitted F. Utilities 1. Distribution plants and substations*[.]" Record 73.[4] The county argues a variation of this position, noting that the

[4] Intervenor's land use permit application provided in relevant part:

"PROJECT DESCRIPTION: (also complete site plan attached)

application was filed as a permitted use under HRCZO 32.15(F)(1), and that such a request was "consistent with the County's interpretation that the proposed use was a 'utility' for 31.15(F) purposes." County Brief 3. The county concludes that the board's interpretation is entitled to deference under *Siporen*, and is not inconsistent with the zoning ordinances or comprehensive plan, and is not inconsistent with the purpose or policy of any applicable land use regulation.

We reject intervenor's argument that deference should be accorded to an interpretation that the tower is "a type of 'distribution plants and substation'," because the board of commissioners did not adopt that interpretation. The board of commissioners relied on the Black's Law Dictionary definition of the term "Utilities." The county's position does address the county's interpretation, but the county's interpretation does not directly address whether HRCZO 32.15(F) broadly authorizes anything that qualifies as a "Utility" or whether HRCZO 32.15(F) only authorizes the two types of utilities identified at HRCZO 32.15(F)(1) and (2).

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> "Per **Article 32- LIGHT INDUSTRIAL ZONE (M-2)**
>
> "*Section 32.15 – Uses Permitted F. Utilities 1. Distribution plants and substations*
>
> "Applicant is applying for the installation of a Utility Facility, specifically a 120' monopole type communications tower, related equipment and back up diesel generator. * * *." Record 73.

In addition, the county's interpretation does not consider the relevant context provided by other subsections of HRCZO 32.15. For example HRCZO 32.15(E) identifies as a category "Wholesaling and Warehousing of All Types[.]" As petitioner points out, if the county intended "Utilities" as broadly defined to be a catch-all category not limited by its listed components "Distribution plants and substations," and "Service yards," the county could have included language similar to HRCZO 32.15(E) to state "Utilities [of all types,]" which presumably would include wireless communication towers.

Unlike HRCZO 32.15(E), HRCZO 32.15(A), (B), (C), (D), (F) and (G) all list general categories, followed by examples of uses under those categories.[5] The clearest indication that the listed examples are the authorized uses in HRCZO 32.15(A), (B), (C), (D), (F) and (G), rather than all uses that may fall under a general dictionary definition of the listed general category itself, is HRCZO 32.15(G). HRCZO 32.15(G) authorizes "Other" as a category of uses, followed by six listed uses ranging from "[r]esearch and development facilities" to "[r]ecycling center." It is simply not plausible to argue that HRCZO 32.15(G) authorizes anything that falls within a dictionary definition of "Other," without regard to the specific uses authorized at HRCZO 32.15(G)(1) – (6).

[5] For example HRCZO 32.15(C) lists "Processing" as a general category and then lists four examples: "Creameries," "Laboratories," "Cleaning, laundry and dyeing plants," and "Tire Retreading."

Given the text and context of the subsections of HRCZO 32.15, with the exception of HRCZO 32.15(E) ("Wholesaling and Warehousing of All Types"), HRCZO 32.15 does not authorize all uses that fall within the dictionary definition of the broad categories identified by HRCZO 32.15(A), (B), (C), (D), (F) and (G), without regard to the listed uses that are set out below those broad categories of uses. The board of commissioners' contrary interpretation of HRCZO 32.15(F) to authorize any use that falls within the broad dictionary definition of the category "[u]tilities" renders the listed examples meaningless. *See State v. Cloutier*, 351 Or 68, 98, 261 P3d 1234 (2011) ("[A]n interpretation that renders a statutory provision meaningless should give us pause."). The board of county commissioners' interpretation of HRCZO 32.15(F) does not "plausibly account[] for the text and context" of HRCZO 32.15(F) and therefore is not consistent with the "express language" of HRCZO 32.15(F). *Siporen* 349 Or at 262; ORS 197.829(1)(a).

On remand the county must determine whether the proposed wireless communication tower qualifies as either of the two utility uses authorized by HRCZO 32.15(F)(1) or (2): "Distribution plants and substations," or "Service yards." If not, the proposed wireless communication tower is not allowed in the M-2 zone as a permitted use under the version of the HRCZO that applies to the disputed application.

The first assignment of error is sustained.

**SECOND ASSIGNMENT OF ERROR**

Petitioner argues that the county misconstrued building separation and maximum height requirements in the M-2 zone when the county approved the tower. Petitioner asserts that the Dimensional Standards of Section 32.35 of the HRCZO apply to the tower. HRCZO 32.35 provides in relevant part:

> "D. No *building* shall be closer to a residential or farm zone than the height of the building in the M-2 zone.
>
> "E. Maximum height: Two (2) stories or 30 feet, whichever is less, if not equipped with a sprinkler system. Three (3) stories or 45 feet, whichever is less, if equipped with a sprinkler system approved by the Fire Marshall." (Emphasis added.)

**A. The HRCZO 32.35(D) Building Separation Standard**

Petitioner asserts that planning staff erred when it determined that the HRCZO 32.35(D) building separation standard only applies to buildings' not to structures, and erred in determining that because the tower is not a building, the HRCZO 32.35(D) building separation standard does not apply to the disputed cell tower. Petitioner relies on the HRCZO "Article 3 definition of "building," which is set out below:

> "BUILDING: A structure built for the support, shelter, or enclose of persons, animals, chattels, or property of any kind."

Petitioner argues that because the term "building" is defined as a structure, it is implausible to conclude that a tower is a structure rather than a building.

Respondents respond, and we agree, that the county did not err in concluding that HRCZO 32.35(D) does not apply to the disputed cell tower.

That separation standard applies specifically to "building[s]." It is entirely plausible and consistent with the text of the definition of the term "building" to conclude that while the disputed tower is a "structure," it is not "built for the support, shelter, or enclose of persons, animals, chattels, or property of any kind." While HRCZO defines "buildings" as being structures, all structures are not necessarily buildings. As intervenor contends, a "structure" is only a "building" under that definition, if it is "built for the support, shelter, or enclose of persons, animals, chattels, or property of any kind." Petitioner does not address this part of the definition. The challenged decision does not really address that language specifically either. However, we agree with intervenor that the board of county commissioners did not err in interpreting the HRCZO 32.35(D) building separation standard not to apply to the disputed cell tower, because while it is a structure, it is not "built for the support, shelter, or enclose of persons, animals, chattels, or property of any kind."

Finally, citing the HRCZO Article 3 definition of "Setbacks," petitioner argues the county erred in concluding the HRCZO 32.35(D) building separation standard does not apply to all structures.[6] Respondents answer that

[6] HRCZO Article 3 includes the following definition of "setbacks:"

> "SETBACKS: A horizontal distance measured at a right angle from adjacent property lines, intended to provide sufficient open area to help prevent non-farm and non-forest uses from conflicting with farm and forestland uses. Within this area, dwellings intended for human occupancy shall be prohibited."

the HRCZO 32.35(D) building separation standard is not a setback because it requires separation from adjoining residential and farming zones, whereas setbacks are "[a] horizontal distance measured at a right angle from adjacent property lines * * *." We agree with respondents. We also note that another subsection of HRCZO 32.35, HRCZO 32.35(B) does impose a "Minimum front yard setback." Petitioner does not argue the county erred in applying the HRCZO 32.35(B) minimum front yard setback.

This subassignment of error is denied.

**B. The HRCZO 32.25(E) Maximum Height Standard**

Regarding the HRCZO 32.25(E) maximum height standard, we also agree with respondents that the maximum height standard does not apply to all structures. The county determined that the general exception to HRCZO 32.25(E) at HRCZO 55.50 applies to the disputed tower. HRCZO 55.50 provides:

"General Exception to Building Height Limitation

> "The following type of structure or structural parts are not subject to the building height limitations of this ordinance: chimneys, tanks, church spires, belfries, domes, monuments, fire and hose towers, observation towers, masts, aerials, cooling towers, elevator shafts, *transmission towers,* smoke-stacks, flagpoles, *radio or television towers, and other similar projections*. * * *" (Emphasis added.)

Petitioner asserts that the HRCZO 55.50 exception does not apply to the tower, but only applies to appurtenances attached to buildings, not structures independent of buildings. Intervenor responds that petitioner's argument finds

no support in the text of the exception, which specifically lists transmission towers as "not subject to the building height limitations[.]" We agree with intervenor. Transmission towers are explicitly excluded from the building height limitation. The county's interpretation and application of the HRCZO 55.50 exception to height standards is well within the board of commissioners' interpretive discretion under *Siporen*. Petitioner's interpretation would require inserting qualifying text that is not present in HRCZO 55.50, and thus runs afoul of ORS 174.010.[7]

The second assignment of error is denied.

**THIRD ASSIGNMENT OF ERROR**

Petitioner briefly argues the county erred by not requiring that the disputed cell tower be approved as a conditional use. Petitioner asserts that the county should have required conditional use approval because "a conditional use permit under M-2 criteria should have been the only route [intervenor] could pursue for approval under Article 32 of the HRCZO[.]" Petition for Review 18.

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[7] ORS 174.010 provides:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

The county responds that the M-2 zone lists conditional uses at HRCZO 32.20, and HRCZO 32.20 does not list cell towers as a conditional use. The county in this case interpreted HRCZO 32.15(F) to allow the disputed cell tower as a permitted use in the M-2 zone. Therefore, the county argues, approval as a conditional use was not required.

As explained above, we have already decided that the county's decision must be remanded to further address the question of whether intervenor's tower qualifies as a permitted use in the M-2 zone under HRCZO 32.15(F)(1) or (2). Until that issue is resolved it was not error for the county to fail to require conditional use approval. If the county correctly determines the disputed cell tower can be approved as a use that falls within "Distribution plants and substations," or as "Service yards," conditional use approval, and application of the additional standards that apply to conditional uses, will be unnecessary. If the disputed cell tower cannot be approved as a permitted use under HRCZO 32.15(F)(1), the county can consider whether it may qualify for approval as a conditional use. As this appeal now stands, the county did not commit error by failing to address whether the disputed cell tower may be approved as a conditional use.

The third assignment of error is denied.

**FOURTH ASSIGNMENT OF ERROR**

Petitioner argues that the record does not show that intervenor carried its burden of proof under Section 60.10 of the HRCZO. Article 60 of the HRCZO

is titled “Administrative Procedures” and Section 60.10 is titled “The Burden of Proof,” and provides in relevant part:

> “The Burden of Proof is placed on the applicant seeking an action pursuant to the provisions of this ordinance. Unless otherwise provided for in this article, such burden shall be to prove:
>
> “A. Granting the request is in the public interest; the greater departure from present land use patterns, the greater the burden of the applicant.
>
> “B. The public interest is best carried out by granting the petition for the proposed action, and that interest is best served by granting the petition at this time.
>
> “C. The proposed action is in compliance with the Comprehensive Plan.
>
> “D. The factors set forth in applicable Oregon Law were consciously considered. Also, consideration will be given to the following factors:
>
> “1. The characteristics of the various areas of the County.
>
> “2. The suitability of the subject area for the type of development in question.
>
> “3. Trends in land development.
>
> “4. Density of development.
>
> “5. Property values.
>
> “6. The needs of economic enterprises in the future development in the County.
>
> “7. Access.
>
> “8. Natural resources.
>
> “9. Public need for healthful, safe and aesthetic surroundings and conditions.

> "E. Proof of change in a neighborhood or community or mistake in the planning or zoning for the property under consideration are additional relevant factors to consider. In all cases, the hearings body or officer shall enter findings based upon the record before it, to justify its decision."

Petitioner's discussion of HRCZO 60.10 on page 19 of the petition for review does not adequately articulate a legal theory or basis for remand under HRCZO 60.10. The argument that begins with last sentence on page 19 carries over to page 21 is not much better, but we set out the issues below that we believe are adequately raised in the petition for review, along with the HRCZO 60.10 criterion or factor that is presumably implicated by that issue:

1. Intervenor failed to carry its burden of proof with regard to the "Public Interest" standard at HRCZO 60.10(A).

2. Intervenor inadequately addressed the "Property Values" factor at HRCZO 60.10(D)(5).

3. Intervenor inadequately addressed the "Public need" factor at HRCZO 60.10(D)(9).

4. Intervenor did not establish that the proposed cell tower is the least intrusive alternative.

5. The proposal is inconsistent with Goal 5 of the Hood River Comprehensive Plan Goal 5.[8]

We address the above issues separately below.

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[8] Petitioner also makes passing, undeveloped references to changes in the community and the intervenor's failure to consider the possible impacts on planned improvements to nearby Golden Eagle Park. Those references are neither developed nor obviously tied to any of the HRC 60.10 standards, and for that reason we do not consider them further.

**A. "Public Interest" standard at HRCZO 60.10(A).**

Intervenor correctly points out the planning director's decision adopted a finding addressing the public interest standard at HRCZO 60.10(A). Record 45. We understand intervenor to take the position that the planning director's unchallenged finding is an adequate response to petitioner's argument regarding HRCZO 60.10(A). Intervernor likely would be correct had the board of commissioners actually adopted the planning director's finding as its own. But as we earlier concluded, the board of commissioners did not adequately express an intent to adopt the planning director's findings as its own. The board of commissioners' failure to adopt findings addressing the HRCZO 60.10(A) public interest standard was error.

This subassignment of error is sustained.

**B. The "Property Values" and "Public Need" Factors at HRCZO 60.10(D)(5) and (9)**

Intervenor takes the general position that HRCZO 60.10(D) does not include mandatory approval standards, but rather constitutes factors which the county is directed to consider, citing *Frankton Neighborhood Assoc. v. Hood River County*, 25 Or LUBA 386 (1993). Intervenor is correct. But although HRCZO 60.10(D) does not set out mandatory approval criteria, it nevertheless sets out factors that must be considered. The findings that intervenor attempts to rely on are the planning director's findings, which we have already determined the board of county commissioners failed to adopt as their own.

The board of commissioners' failure to adopt findings considering the HRCZO 60.10(D)(5) and (9) factors was error.

This subassignment of error is sustained.

**C. The Least Intrusive Alternative**

The county responds that there are no relevant approval criteria requiring that the proposed site must be the least intrusive alternative. The city and intervenor further note that petitioner incorrectly claims that the federal "least intrusive standard" is applicable to this approval. Intervenor asserts that the federal standard is only applicable to federal cases brought under the Telecommunications Act of 1996, 47 USC § 332(c).

We agree with respondents that the "least intrusive" standard is not a relevant approval criterion for intervenor's permit application under the HRCZO, and petitioner's argument under that standard therefore provides no basis for reversal or remand.

This subassignment of error is denied.

**D. Hood River Comprehensive Plan Goal 5**

Petitioner argues that Hood River Comprehensive Plan Goal 5 applies within the Mt. Hood Planning Area and provides: "All development within the Planning Area shall take into consideration protection of the scenic value of the area."

The county responds that while Goal 5 does require the stated "consideration" when developing in the Mt. Hood Planning Area, "the M-2

zoned property is not in the Mt. Hood planning area * * *." Petitioner does not respond to the county's argument.

This subassignment of error is denied.

On remand the county must adopt findings addressing the HRC 60.10(A) public interest standard and the HRCZO 60.10(D)(5) and (9) factors. Petitioner's other arguments under the fourth assignment of error are either inadequately stated or developed, or we reject them on their merits.

Petitioner's fourth assignment of error is sustained, in part.

**FIFTH ASSIGNMENT OF ERROR**

Petitioner argues that the county "has a stated intent to provide a reasonable separation between allowed uses * * * on industrial property and adjacent EFU and RR properties[.]" Petition for Review 21. Petitioner argues that because the new tower is 28 feet from the boundary of EFU-zoned property, that there is no way to conclude anything other than that "adequate separation" has not been required.

Intervenor argues that petitioner does not cite to any relevant approval standard that requires a finding that a proposed use provides "reasonable separation." While the county may have attempted to achieve adequate separation of certain uses in the past, intervenor believes there is no such applicable standard. Intervenor also asserts that the issue was not raised below. Intervenor posits that petitioner maybe abstracting such a standard for HRCZO 32.10, which provides the purpose and intent of Article 32 and states that

> "[t]he purpose of this zone is to provide for types of manufacturing or other industries which, because of their characteristics, can be permitted in relatively close proximity to residential, commercial and farm zones. * * *"

Intervenor argues that to the extent petitioner argues that this purpose statement provides an applicable criterion for the application, petitioner is wrong. Both intervenor and county suggest that petitioner is taking a statement made by a county planner and erroneously assuming it is an applicable mandatory approval standard.

We conclude the assignment of error was not preserved below, because petitioner cites to no place in the record where the issue was raised. Even if it is not waived, we agree with intervenor and the county that petitioner has not demonstrated that there is an adequate separation standard that applies to this application.

Petitioner's fifth assignment of error is denied.

**SIXTH ASSIGNMENT OF ERROR**

Petitioner argues that the county failed to "list all applicable criteria from the ordinance and the plan that apply to the application at issue" under ORS 197.763(3)(b). Because HRCZO 55.50 was not listed as an applicable approval

criterion, petitioner contends she may raise new issues based on HRCZO 55.50 for the first time on appeal to LUBA, under ORS 197.835(4)(a). [9]

It is not clear to us what new issue petitioner is attempting to raise under HRCZO 55.50 in the sixth assignment of error. We assume petitioner is arguing that the county's failure to list HRCZO 55.50 as an applicable approval criterion was a procedural error that warrants remand.

Intervenor argues that although HRCZO 55.50 was not included on the list of applicable approval criteria in the county's notice, petitioner is precluded from challenging its absence from the notice for the first time at LUBA, under the last sentence in ORS 197.835(4)(a) (LUBA may refuse to consider an issue based on a notice's failure to list applicable criteria if "it finds the issue could have been raised before the local government[.]"). As petitioner herself states,

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[9] ORS 197.835(4) provides:

> "A petitioner may raise new issues to the board if:
>
> "(a) The local government failed to list the applicable criteria for a decision under ORS 197.195 (3)(c) or 197.763 (3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, the board may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government; or
>
> "(b) The local government made a land use decision or limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final action."

HRCZO 55.50 was frequently cited and analyzed throughout the local proceedings. Petitioner could have raised the notice omission below. Accordingly, we agree with intervenor that petitioner's argument that the county's failure to list HRCZO 55.50 as an applicable approval criterion is procedural error is waived. ORS 197.835(3). *Van Dyke v. Yamhill County*, 35 Or LUBA 676, 687-88 (1999).

Petitioner's sixth assignment of error is denied.

The county's decision is remanded in accordance with our resolutions of petitioner's first and fourth assignments of error.