BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

05/17/18 PM 1:11 LUBA

REBECCA B. RAWSON,
Petitioner,

vs.

HOOD RIVER COUNTY,
Respondent,

and

VERIZON WIRELESS,
Intervenor-Respondent.

LUBA No. 2017-107

FINAL OPINION
AND ORDER

Appeal from Hood River County.

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

Diana L. McDougle, Hood River, filed a response brief and argued on behalf of respondent. With her on the brief was Annala, Carey, VanKoten, & Cleaveland, P.C.

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

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

1 AFFIRMED 05/17/2018

2

3 You are entitled to judicial review of this Order. Judicial review is
4 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 of a planning commission decision approving intervenor's application for a permit for a wireless transmission tower.

FACTS

The challenged decision is the board of county commissioners' decision following our remand of an earlier county decision in this matter in *Rawson v. Hood River County*, 75 Or LUBA 200 (2017) (*Rawson I*). Most of the basic underlying facts were set out in *Rawson I*, and are set out again below:

> "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). * * *
>
> "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." *Rawson I* at 203-04 (footnote omitted).

In remanding the board of county commissioners' initial decision in *Rawson I,* we sustained petitioner's first assignment of error in that appeal and agreed with petitioner that the county erred by interpreting HRCZO 32.15(F) to permit any use that falls within a broad dictionary definition of "[u]tilities." 75 Or LUBA at 216-17.

> "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."

In *Rawson I,* we also agreed that the board of county commissioners erred by failing to adopt findings that address HRCZO 60.10(A) and 60.10(D)(5) and (9), which respectively impose a "Public Interest" standard and "Property Values" and "Public Need" factors, and sustained petitioner's fourth assignment of error, in part. Prior to sustaining that assignment of error in part, we identified certain documents the board of county commissioners did and did not adequately identify and incorporate as findings to support the board of county commissioners' decision. 75 Or LUBA 208-210.

1 Following our remand, the board of county commissioners determined it
2 would respond to LUBA's remand in *Rawson I*, without reopening the
3 evidentiary record. After giving the parties opportunities to present legal
4 argument regarding the issues that formed the basis for LUBA's remand in
5 *Rawson I*, the board of county commissioners again denied petitioner's appeal.
6 In doing so the board of county commissioners rejected certain documents that
7 were included with petitioner's legal argument, concluding that they constitute
8 new evidence rather than legal argument. Intervenor's counsel was given an
9 opportunity to prepare detailed findings, and the board of county
10 commissioners adopted those findings as its decision on remand. This appeal
11 followed.

12 Petitioner's first assignment of error in the current appeal is nominally a
13 substantial evidence challenge. The second assignment of error argues the
14 county misconstrued the HRCZO to permit wireless transmission towers in the
15 M-2 industrial zone as a distribution plant or substation. The third assignment
16 of error alleges the county failed to adopt necessary findings. And finally, the
17 fourth assignment of error alleges the county improperly rejected documents
18 that petitioner submitted following LUBA's remand in *Rawson I* and in doing
19 so committed a procedural error that prejudiced petitioner's substantial rights.

20 Because petitioner's assignments of error are most logically addressed in
21 reverse order, we turn first to the fourth assignment of error.

1 **FOURTH ASSIGNMENT OF ERROR**

2 Petitioner presents several different arguments under this assignment of
3 error.

4 **A. Failure to Reopen the Evidentiary Record**

5 In her arguments under the fourth assignment of error, petitioner
6 recognizes that LUBA has determined that local governments have significant
7 discretion in determining how they will proceed following a remand from
8 LUBA and may limit consideration of issues to those issues that must be
9 addressed to respond to LUBA's remand:

> 10 "As a general matter, the scope of proceedings on remand from
> 11 LUBA is governed by the terms of the remand and any applicable
> 12 local requirements. *Fraley v. Deschutes County*, 32 Or LUBA 27,
> 13 36 (1996) (absent instructions from LUBA or local provisions to
> 14 the contrary, a local government is not required to repeat on
> 15 remand the procedures applicable to the initial proceeding). A
> 16 local government is entitled to limit its consideration on remand to
> 17 correcting the deficiencies that were the basis for LUBA's remand.
> 18 *Bartels v. City of Portland*, 23 Or LUBA 182, 185 (1992); *Von*
> 19 *Lubken v. Hood River County*, 19 Or LUBA 404, 419, *rev'd on*
> 20 *other grounds* 104 Or App 683 (1990). Conversely, while not
> 21 required to do so, a city may expand the scope of its remand
> 22 hearing beyond the scope of the remand. *Schatz v. City of*
> 23 *Jacksonville*, 113 Or App 675, 680, 835 P2d 923 (1992)." *Siporen*
> 24 *v. City of Medford*, 55 Or LUBA 29, 48-49 (2007) (quoting from
> 25 *CCCOG v. Columbia County*, 44 Or LUBA 438, 444 (2003)).

26 Our remand in *Rawson I* was based on the county's misconstruction of
27 HRCZO 32.15(F) and the county's failure to adopt *any* findings that addressed
28 a mandatory standard and two factors the county was at least required to
29 consider. While the county was entitled to reopen the evidentiary record to

1 correct those deficiencies if it wished, it was not required by LUBA's remand
2 or local law to do so. We reject petitioner's argument that the county's decision
3 to refuse to reopen the evidentiary record resulted in any fundamental
4 unfairness to petitioner, and nothing in our decision in *Siporen* supports
5 petitioner's argument that it did.

6 **B. November 7, 2014 Letter, Change in Inquiry, Cross-**
7 **Examination**

8 Petitioner argues:

9 "Here it is fundamentally unfair for the BOC [board of county
10 commissioners] to utilize a letter never introduced at the
11 evidentiary hearing as an indispensable basis of its conclusion
12 about the functioning and characteristics of a wireless cell tower.
13 Even more to the point, it is fundamentally unfair to change the
14 inquiry from those issues on which evidence was presented to
15 whether a cell tower is specifically a 'distribution plant and
16 substation,' and then prevent Petitioner from presenting evidence
17 and cross-examining witnesses on that issue." Petition for Review
18 27.

19 The above constitutes three loosely connected and largely undeveloped
20 arguments. We do not understand the first argument. The referenced letter is
21 apparently a November 7, 2014 letter from intervenor's employee Zimmerman
22 to a county planner that discusses the proposed tower and why intervenor
23 believes it is needed to fill current gaps in cellular phone service. Record I
24 209-215.[1] There can be no doubt that the disputed letter is included in the

[1] We cite to the record in this appeal, the record compiled by the county following our remand in *Rawson I*, as Record II. That record incorporates the record in *Rawson I*, which we cite as Record I.

original record in *Rawson I.* At oral argument petitioner suggested that although the letter may have been given to the board of county commissioners it is not properly viewed as part of the record because the board of county commissioners never formally admitted it as part of the record. Again, we do not understand the argument. Under OAR 661-010-0025(1)(b), documents that are "placed before, and not rejected by, the final decision maker" are part of the record. Because the disputed letter is in fact included in Record I, it apparently was placed before the board of county commissioners and was not rejected. Petitioner's contention that more was required for that letter to be considered part of the record in *Rawson I*, which was incorporated into the remand record in this appeal, is without merit.

Intervenor disputes that there has been any change in focus that requires reopening the evidentiary record and points out that petitioner never requested an opportunity to cross-examine witnesses. We agree with intervenor.

C. Error to Allow Intervenor to Submit "New Sources" While Denying Petitioner the Same Opportunity

As already noted one of the bases for our remand was for the county to determine if the disputed wireless transmission tower qualifies as a distribution plant or substation. To address that issue, intervenor's attorney submitted legal argument on remand. Record II 102-15. That legal argument included dictionary definitions. That is presumably the "new sources" petitioner

1 references. Petition for Review 27.[2] The "similar materials" petitioner claims
2 she attempted to submit to the county that petitioner contends the county
3 improperly rejected are before us pursuant to our February 12, 2018 Order in
4 this matter. We allowed petitioner to place those extra-record documents
5 before us so that we could determine whether the county improperly rejected
6 the documents.

7 As previously noted, the county elected not to reopen the evidentiary
8 record. Intervenor argues, and we agree, that the dictionary definitions that are
9 set out in intervenor's legal argument are not property considered to be
10 "evidence." The appellate courts of this state and LUBA frequently consult
11 dictionary definitions to resolve ambiguity in legislation, even if the parties do
12 not cite or rely on those definitions, and in almost all cases that consultation
13 occurs long after the evidentiary record has closed.

14 But the documents petitioner submitted, which the county rejected as
15 including new evidence, are not limited to dictionary definitions. Tab C is a
16 printout of a Google search of the term "distribution plant." While Tab C lists
17 links to Wikipedia, it includes links to evidentiary material as well. Intervenor-
18 Respondent's Brief Appendix 30-31. Similarly, Tab D is a printout of a Google

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[2] Petitioner's argument is set out below:

> "It is fundamentally unfair to allow Verizon to use new sources, and for the BOC to use new sources to determine the construction of a phrase, but then to strike all similar materials Petitioner has tendered." Petition for Review 27.

search for the term "substation." *Id.* at 32-33. It also includes links to Wikipedia, but also includes links to evidentiary materials. Tab E is an e-mail chain regarding requests petitioner made for information about prior land use applications. *Id.* at 34. It is evidentiary in nature. And finally, Tab G includes paper copies of pages from an online continuing education course for engineers regarding electrical transmission and distribution substations, as well as other documents. *Id.* at 35-61. It also is evidentiary in nature.

We conclude the board of county commissioners did not err by rejecting Tabs B, C, E and G, all of which included new evidence.

D. The Board of County Commissioners' Written Decision is Different From its Oral Deliberations

Finally, under the fourth assignment of error, petitioner argues:

> "It is fundamentally unfair to substitute in the place of the on-the-record findings of the Commissioners a twenty-eight (28) page treatise. Compare and contrast Rec II, Transcript at 181, line 1 through 183 * * * with Final Order II, Appendix TAB 1." Petition for Review 28.[3]

The requirement for written findings in Oregon land use traces to several Oregon Supreme Court cases decided in the late 1960s and 1970s. One of those cases is *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21, 569 P2d 1063 (1977), which included the following discussion of the

[3] The referenced transcript is a partial transcript of the September board of county commissioners' remand hearing in this matter and the referenced 28-page decision is the written decision the board of commissioners later adopted on October 16, 2017.

1 necessity for findings and the role they play in appellate review of land use

2 decisions:

> 3 "In *Roseta v. County of Washington*, 254 Or 161, 170, 458 P2d
> 4 405, 40 ALR3d 364 (1969), we pointed out that we 'cannot
> 5 properly exercise our function of judicial review without a record
> 6 of adequate findings * * *.' In *Fasano* [*v. Washington Co. Comm.*,
> 7 264 Or 574, 588, 507 P2d 23 (1973)], we reiterated that in a quasi-
> 8 judicial land-use proceeding, adequate findings were necessary. In
> 9 *Green v. Hayward*, 275 Or 693, 706-708, 552 P2d 815 (1976), we
> 10 discussed at some length the reasons for the requirement of
> 11 findings of fact and a reasoned decision, and quoted with approval
> 12 the following from *The Home Plate, Inc. v. OLCC*, 20 Or App
> 13 188, 190, 530 P2d 862 (1975):
>
>> 14 "'If there is to be any meaningful judicial scrutiny of
>> 15 the activities of an administrative agency not for the
>> 16 purpose of substituting judicial judgment for
>> 17 administrative judgment but for the purpose of
>> 18 requiring the administrative agency to demonstrate
>> 19 that it has applied the criteria prescribed by statute
>> 20 and by its own regulations and has not acted
>> 21 arbitrarily or on an ad hoc basis we must require that
>> 22 its order clearly and precisely state what it found to be
>> 23 the facts and fully explain why those facts lead it to
>> 24 the decision it makes. Brevity is not always a virtue. *
>> 25 * *.'
>
> 26 "In *Green*, because the hearing on the zone change had taken place
> 27 shortly after the publication of *Fasano*, and the governing body
> 28 had had little opportunity to become familiar with the procedural
> 29 requirements of a quasi-judicial decision process, we undertook, in
> 30 spite of the absence of adequate findings and reasons, to examine
> 31 the record to determine whether the evidence would support the
> 32 order. We indicated, however, that we were unwilling to make this
> 33 a practice. 275 Or at 705-706.
>
> 34 "It is true, as the Court of Appeals observed, that *Green* had not
> 35 been decided at the time of the Board proceedings which we are

1 now reviewing. We do not believe, however, that that fact justifies
2 our overlooking the requirement of adequate findings which had
3 been clearly stated in both *Roseta* and *Fasano*. *Green* elaborated
4 somewhat on that requirement, and pointed out the need for a
5 statement of reasons as well. Its references to findings of fact were
6 not, however, an innovation.

7 "We wish to make it clear that by insisting on adequate findings of
8 fact we are not simply imposing legalistic notions of proper form,
9 or setting an empty exercise for local governments to follow. No
10 particular form is required, and no magic words need be employed.
11 What is needed for adequate judicial review is a clear statement of
12 what, specifically, the decisionmaking body believes, after hearing
13 and considering all the evidence, to be the relevant and important
14 facts upon which its decision is based. Conclusions are not
15 sufficient.

16 "*We do not believe the requirement of adequate findings and*
17 *reasons imposes an excessive burden on the governing body or its*
18 *staff. In contested land-use proceedings involving significant*
19 *changes and the presentation of large amounts of conflicting*
20 *evidence, the major proponents and opponents of the change will*
21 *frequently be represented by counsel. In such cases it would be*
22 *quite proper for the governing body to request the parties to*
23 *prepare and submit proposed findings which could be reviewed*
24 *and used, as appropriate, in preparing its own final order.*"
25 (Emphasis added).

26 Since *Sunnyside Neighborhood*, it has become common practice in this
27 state for local governments to close the evidentiary record at the conclusion of
28 the evidentiary phase of quasi-judicial land use proceeding and render a
29 tentative oral decision. Local governments then commonly request proposed
30 findings from the prevailing party or from planning staff. And finally, at a final
31 hearing for adopting a final decision, the local government adopts the written

1 decision and findings prepared by the prevailing party or planning staff, with or
2 without modifications.

3 While many of the findings of fact and the findings setting out a local
4 government's final decision reasoning may therefore be supplied by the
5 prevailing party or planning staff, the local government has all those findings
6 before it when it acts to adopt its final written decision and can either embrace
7 all those findings and adopt them as its own or have them removed and
8 replaced with findings that the local government agree with. This process, or
9 some variation on it, occurs in most quasi-judicial land use decisions. And we
10 have explained on numerous occasions that it is the final written decision that
11 is subject to LUBA review, not the oral statements that individual decision
12 makers may make during the local proceedings. *Lowery v. City of Portland*, 68
13 Or LUBA 339, 359 (2013); *Hale v. City of Beaverton*, 21 Or LUBA 249, 258
14 (1991); *McCoy v. Linn County*, 16 Or LUBA 295, 306 (1987); *Citadel*
15 *Corporation v. Tillamook County*, 9 Or LUBA 401, 404 (1983).

16 The board of county commissioners' decision is certainly subject to
17 review on its merits, but the board of county commissioners committed no error
18 in requesting proposed findings from intervenor and adopting those findings as
19 its own.

1 Petitioner's fourth assignment of error is denied.[4]

2 **THIRD ASSIGNMENT OF ERROR**

3 We quote petitioner's third assignment of error below:

> 4 "The evidentiary record is no different now than what was before
> 5 LUBA on the first appeal. LUBA determined then that the record
> 6 had no findings that adequately addressed the HRCZO 60.10(A)
> 7 public interest standard, and the HRCZO 60.10(D)(5) standard
> 8 (property values) and HRCZO [60.10(D)](9) standard ("public
> 9 need for healthful, safe, and aesthetic surroundings and
> 10 conditions") and the same is true now." Petition for Review 23.

11 Petitioner recognizes that the board of county commissioners adopted
12 extensive findings addressing the above HRCZO standards and factors. Record
13 II 23-27. But petitioner's apparent legal theory under this assignment of error
14 is that because the board of county commissioners elected not to reopen the
15 evidentiary record it could not adopt those additional findings. Petitioner
16 apparently contends that the *findings* that were prepared following LUBA's
17 remand in *Rawson I* are *evidence*, which could only be adopted by the board of
18 county commissioners if it reopened the evidentiary record. That contention is
19 erroneous. The board of county commissioners' findings must be supported by
20 substantial evidence in the record. ORS 197.835(9)(a)(C). But findings of fact
21 and law are the decision; they are not evidence.

22 The third assignment of error is denied.

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[4] Petitioner repeats some arguments under the fourth assignment of error that are also raised in other assignments of error that we address later in this decision.

SECOND ASSIGNMENT OF ERROR

As we have already noted, the interpretive issue we identified in *Rawson I* concerned HRCZO 32.15(F). We explained:

> "* * * 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).'" *Rawson I*, 75 Or LUBA at 214.

As we explained in *Rawson I*, one of the issues for the board of county commissioners to resolve on remand was whether a wireless communication tower qualifies as a distribution plant, substation or a service yard.

On remand the board of county commissioners concluded the HRCZO 32.15(F)(1) authorization for "[d]istribution plants and substations" is broad enough to authorize the disputed wireless transmission tower:

> "The Board [of County Commissioners] finds that the proposed wireless communication tower qualifies as a distribution plant and substation for purposes of HRCZO 32.15(F)(1). The proposed wireless communications tower qualifies as a 'distribution plant' for purposes of Section 32.15(F)(1) because it receives, broadcasts and distributes radio frequency (RF) signals and in doing so, distributes RF signals to other receivers and transmitters in the larger wireless communication system. Likewise, the proposed

1 wireless communication tower qualifies as a 'substation' for
2 purposes of Section 32.15(F)(1) because it receives, broadcasts,
3 and distributes RF signals, and in doing so, serves as a subordinate
4 or subsidiary station supporting the larger wireless communication
5 system." Record II 10-11.

6 Petitioner faults the above findings, arguing that there is "no evidence of what
7 a cell tower is or what it does," and that the board of county commissioners
8 provided "no citation or record reference." Petition for Review 15-16.

9 The above findings about the basic characteristics of a wireless
10 transmission tower—that it receives and broadcasts radio frequency signals as
11 part of a larger wireless communication system—is consistent with the
12 description of the facility in the September 8, 2017 planning staff report, which
13 in turn is consistent with letters submitted by intervenor. Record II 125
14 (planning staff report); Record 1 126-28 (Cully April 11, 2016 letter) and
15 Record 1 209-15 (Zimmer November 7, 2014 letter). The record supports the
16 above characterization of the basic characteristics of a wireless transmission
17 tower.

18 Before turning to the several criticisms petitioner directs at the above
19 interpretation and the other interpretive findings the board of county
20 commissioners adopted to support the above interpretation, we believe there is
21 little doubt that had the county decided that "[d]istribution plants and
22 substations" should be interpreted to include only electrical substations and
23 water and sewer facilities needed to distribute water and collect sewage, and
24 any similar utility facilities that were common in 1984 when the "[d]istribution

1 plants and substations" language was adopted—and to not include cellular
2 wireless transmission towers which apparently were nonexistent in Hood River
3 County in 1984—that interpretation would have to be affirmed under ORS
4 197.829 and *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010)
5 (local governing body plausible interpretations must be affirmed "unless the
6 interpretation is inconsistent with *all* of the 'express language' that is relevant
7 to the interpretation, or inconsistent with the purposes or policies underpinning
8 the regulations.").[5] But that is not the question that must be answered in this
9 appeal. The relevant question is whether the board of county commissioners'
10 contrary decision to interpret HRCZO 32.15(F) broadly or liberally—and
11 according to the plain meaning of "substation" and the words "distribution"

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[5] 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:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(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
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

1 and "plant" and focusing on the function of the facility—is inconsistent with
2 the "express language" or underlying purposes or policies of HRCZO 32.15(F).
3 For the reasons explained below, we conclude that it is not.

4 **A. Dictionary Definitions**

5 The board of county commissioners first looked at dictionary definitions:

6 "The term 'Distribution plants and substations' is not defined in
7 the HRCZO. Under *PGE v. BOLI*, 317 Or 606, 859 P2d 1143
8 (1993), when a term is not defined in the HRCZO, the Board may
9 look to the plain meaning of the term as a key first step in
10 determining what the term means in the context of the County's
11 zoning code. Verizon Wireless offered the following definitions
12 from Merriam-Webster's dictionary, which defines 'distribution'
13 as the 'act or process of distributing.' In turn, 'distributing' is
14 defined as (1) 'to spread out so as to cover something [or] to give
15 out or deliver especially to members of a group,' or (2) 'to place or
16 position so as to be properly apportioned over or throughout an[]
17 area.' A 'plant' is defined as (1) 'the land buildings, machinery,
18 apparatus, and fixtures employed in carrying on a trade or an
19 industrial business," (2) 'the total facilities available for
20 production or service,' and (3) 'the buildings and other physical
21 equipment of an institution.' A 'substation' is defined as 'a
22 subordinate or subsidiary station.' A look at the definition of
23 'subsidiary' provides further guidance as it is defined as
24 'furnishing aid or support.' Further, 'station' can be defined as 'a
25 place established to provide a public service' or 'a complete
26 assemblage of radio or television equipment for transmitting and
27 receiving." Record II at 11.

28 The decision goes on to analyze additional dictionary definitions of the
29 same words from a 1984 dictionary. Petitioner's primary criticism of the board
30 of county commissioners use of dictionary definitions are (1) that the term
31 "distribution plants" is not defined and the county instead relied on definitions

1 of the component words "distribution" and "plant" and (2) that in 1984, when
2 the language "distribution plants and substations" was adopted, the county has
3 conceded there were few if any cell towers.

4 The county cannot be faulted for looking at dictionary definitions of
5 "distribution" and "plant" if there is no available definition of "distribution
6 plant." And the more apt term would appear to be "substation" in any event, a
7 term for which there are dictionary definitions. That there may have been few if
8 any cell towers in 1984 is not particularly important. The issue is whether the
9 use category "substation" as a subspecies of the use category "utilities" in 1984
10 was broad enough to include a wireless transmission tower. It is not unusual
11 over time for new uses to come into existence and fall into existing broad use
12 categories. There were certainly radio transmission and communication towers
13 in 1984, and a wireless transmission tower is functionally similar.

14 The board of county commissioners' conclusion that the general category
15 of utility "[d]istribution plants and substations" adopted in 1984 is broad
16 enough to include a wireless transmission tower is not inconsistent with
17 contemporary and other dictionary definitions of "distribution," "plant" and
18 "substation."[6]

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[6] That conclusion is also not inconsistent with the final example in the *Webster's Third New Int'l Dictionary* definition of substation:

> "**sub.station** * * * : a station subordinate or subsidiary to another station: as **a** : a station which is subsidiary to a central station and at which high-tension electricity from the central station is

1 **B. Technical Term**

2 Citing *Pacificorp v. Deschutes County*, 70 Or LUBA 89 (2014),
3 petitioner contends the term "[d]istribution plants and substations" is a
4 technical term and the county therefore should have considered the evidence
5 she submitted regarding its meaning as a technical term. The county rejected
6 that argument, opting instead to rely primarily on the plain meaning of the
7 term, based on dictionary definitions.

8 We have already concluded the county did not err by rejecting
9 petitioner's evidentiary submittal following our remand in *Rawson I.* In
10 *Pacificorp*, the issue was whether a hydroelectric facility's "penstock" included
11 an attached wooden flume or only included the metal pipe that the flume was
12 attached to. We recognized in *Pacificorp* that when legislation includes terms
13 with specialized meanings and are recognized as terms of art, Oregon's
14 appellate courts have determined they should be given that specialized
15 meaning. *Pacificorp*, 70 Or LUBA at 96 (*citing Karjalainen v. Curtis Johnston*
16 *& Pennywise, Inc.*, 208 Or App 674, 681-82, 146 P3d 336 (2006)).

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transformed to electricity lower in potential and converted if desired to continuous current or to alternating current of a different frequency **b** : a small post-office station (as a contract station in a drug store or a station set up at a convention for handling philatelic mail) **c** : a subordinate station that rebroadcasts messages from a primary station of a communication system[.]" *Webster's Third New Int'l Dictionary* 2280 (unabridged ed. 2002).

1 Unlike Deschutes County, whose code expressly required that the county
2 give technical words their technical meaning, Hood River County has no such
3 requirement in the HRCZO. The decision also points out that the HRCZO
4 generally describes uses in a "functional" rather than a "technical" way. Under
5 the deferential review that is required under *Siporen* and ORS 197.829(1), the
6 county in this case operated within its interpretive discretion to rely on the
7 plain meaning of the operative words, and to reject petitioner's contention that
8 "[d]istribution plants and substations" must be considered a technical term with
9 a technical meaning. Moreover, we seriously question whether "[d]istribution
10 plants and substations" is accurately described as a technical term or term of
11 art, rather than a general category of "utilities." It is one thing to argue an
12 "electric substation" or "sewer substation" is a term of art with a specialized
13 meaning, it quite another to say a more general "[d]istribution plants and
14 substations" subcategory of the general "utilities" category is a term of art.
15 The board of county commissioners did not err by refusing to view
16 "[d]istribution plants and substations" as a technical term or term of art.
17 **C. Reliance on HRCZO 1.060(A)**
18 HRCZO 1.060(A) provides, in part:
19 "Interpretation: The provisions of this ordinance shall be liberally
20 construed to effect the purpose of this ordinance. * * *"

1 Citing HRCZO 1.060(A), the board of county commissioners cited three
2 purposes that it found to be furthered by its liberal construction of HRCZO
3 32.15(F)(1).[7]

4 Petitioner first argues it was "plain error" to rely on HRCZO 32.15(F)(1),
5 "when that ordinance was not even in effect when Article 32.15(F) was
6 enacted." Petition for Review 18 (emphasis omitted). If petitioner is taking the
7 position that when a county adopts a rule regarding how the HRCZO should be
8 interpreted that rule of interpretation can only be applied to subsequently
9 enacted legislation, she cites no authority for that proposition, and we are
10 aware of none.

11 And under ORS 197.829(1) it is certainly not improper to consider the
12 purposes that underlie ambiguous legislation, since the interpretation cannot be
13 "inconsistent with the purpose" of the legislation. ORS 197.829(1)(b), *see* n 5.
14 On the merits, petitioner criticizes the board of commissioners' liberal
15 interpretation of HRCZO 32.15(F) to carryout the purposes set out in HRCZO
16 1.030 as a "model exhibition of *ipsi dixit* * * *." Petition for Review 19.

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[7] Those three purposes are:

> "To facilitate adequate provisions for community utilities, such as transportation, water, sewage, schools, parks and other public requirements." HRCZO 1.030(I).
>
> "To protect the stability of existing land uses and to protect them from incompatible and harmful intrusions." HRCZO 1.030(K).
>
> "To protect and enhance real property values." HRCZO 1.030(J).

1 Beyond that characterization petitioner points out there were no cell towers in
2 Hood River County when HRCZO 32.15(F) was enacted in 1984 and there is
3 no "record of community need for a cell tower." Petition for Review 19.

4 As we have already explained, the fact that there may not have been any
5 cell towers in 1984 when the county adopted the "utilities" use category and
6 adopted "[d]istribution plants and substations" as a general subcategory of that
7 use category does not mean the "[d]istribution plants and substations"
8 subcategory is not broad enough to include cell towers. Petitioner's argument
9 that there is no "record of community need for a cell tower" is simply not
10 sufficiently developed to review. *Deschutes Development v. Deschutes Cty.*, 5
11 Or LUBA 218, 220 (1982).

12 Finally, we understand petitioner to contend that the county erred in
13 liberally construing "[d]istribution plants and substations" under HRCZO
14 1.060(A) because doing so is inconsistent with HRCZO 1.030(N) which is
15 "[t]o promote aesthetic values." While the board of county commissioners did
16 not identify HRCZO 1.030(N) as one of the purposes that HRCZO 32.15(F)(1)
17 must be "liberally construed to effect," the board of county commissioners in
18 addressing other criteria found that as modified the proposal has adequately
19 addressed aesthetic concerns. Record 11 27-28.

20 Petitioner has not established that the board of county commissioners
21 erred in its consideration of HRCZO 1.060(A) or the HRCZO 1.030 purposes it
22 identified to liberally construct HRCZO 32.15(F)(1) to effect those purposes.

1 **D. Issues the Board of County Commissioners Failed to Consider**

2 Finally, petitioner faults the board of county commissioners for failing to
3 consider a number of issues.

4 **1. Failure to Consider Subsequent Legislation**

5 In 2016 the county adopted amendments to the HRCZO to more
6 expressly address communication facilities and towers. Petitioner contends
7 this legislation would not have been necessary if HRCZO 32.15(F)(1) already
8 authorized such facilities.

9 As intervenor correctly points out, it is not unusual for land use codes to
10 be amended to regulate uses in a more particular way. That is particularly the
11 case where ambiguities in land use codes are identified. We see no error in the
12 county's failure to specifically address this subsequent legislation when it
13 interpreted HRCZO 32.15(F)(1).

14 **2. M-1 vs M-2 Zone**

15 Petitioner's entire argument is as follows:

16 "[The board of county commissioners] does not consider that M-1
17 [zoning] is meant to be 'more restrictive' than M-2 [zoning], yet it
18 nowhere allows a wireless cell tower, *see* Appendix TAB 8
19 compared to Appendix TAB 10." Petition for Review 20.

20 Intervenor responds that the M-2 zone is the county's Light Industrial
21 zone and "its 'development standards' are intended to be 'more stringent than
22 those of the M-1 zone,' not the other way around, as asserted by petitioner."
23 Intervenor-Respondent's Brief 20. Intevenor also points out TAB 8 and TAB
24 10 of the petition for review are the *current* M-1 and M-2 zones, both of which

1 allow "Communication Facilities and Towers, subject to Article 74" as
2 conditional uses.

3 Petitioner then argues somewhat inconsistently that the "standards of the
4 M-2 zone are more stringent than those of the M-1 zone" and that the M-1 zone
5 "has no permitted use for a cell tower." Petition for Review 20. Simply
6 because it may be possible to describe the former M-2 zone standards as more
7 restrictive than the former M-1 zone standards, it does not follow that the
8 former M-2 zone could not allow a wireless transmission tower, simply because
9 the former M-1 zone did not.

10 Petitioner's M-1 vs. M-2 zone comparison argument is inadequately
11 developed to provide a basis for remand.

12 **3. Impact of Interpretation on Other Zoning Districts**

13 Petitioner argues the board of county commissioners' interpretation of
14 HRCZO 32.15(F)(1) will have unintended consequences for other zones that in
15 include similar language.

16 Even if we agreed that the cited language in the other zones is
17 sufficiently similar to the language in HRCZO 32.15(F)(1) that the board of
18 county commissioners' interpretation of HRCZO 32.15(F)(1) might have a
19 significant bearing on how the similar language in those other zones would
20 have to be interpreted in the future, something petitioner makes no attempt to
21 establish, as we have already explained the HRCZO has been amended with
22 regard to how the county regulates wireless transmission towers. It now

regulates communication facilities and towers much more explicitly and comprehensively. As far as we can tell, any precedential value the disputed interpretation may have is questionable.

The board of county commissioners did not err by failing to consider the impact of its interpretation of HRCZO 32.15(F)(1) on other zoning districts.

E. Conclusion

Notwithstanding petitioner's numerous criticisms of the board of county commissioner's interpretation of HRCZO 32.15(F)(1), that interpretation is plausible and therefore not reversible under the deferential standard of review required by ORS 197.829(1) and *Siporen.*

The second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

The first assignment of error is nominally a substantial evidence challenge. But the argument that is included under the first assignment of error appears to assert, as petitioner does under the third assignment of error, that the lengthy *findings* the board of county commissioners adopted following our remand in Rawson I, Record II 2-28 are *evidence*, which cannot be considered since the board of county commissioners decided not to reopen the evidentiary record following our remand in *Rawson I.* For the reasons explained in our discussion of the third assignment of error, that assertion is simply incorrect.

The first assignment of error is denied.

The county's decision is affirmed.