

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

3
4 OREGON COAST ALLIANCE, JEFF BRYNER,
5 CANDACE CHURCHLEY, DAVID CHURCHLEY,
6 TOM ROGERS, PATRICIA ROGERS,
7 DON OLSON, JOANN OLSON,
8 MARIE COOK, TED MINSHALL,
9 MARY VOBORIL, KURT LEIPZIG, JACKIE LEIPZIG,
10 ED RUTTLEDGE, LYNNAE RUTTLEDGE,
11 MIKE SEARS, RON BOURKE, GERRIE BOURKE,
12 ELIZABETH STURTEVANT, LYNDA STEINER,
13 RON BAKER, LISA MACY-BAKER,
14 JIM SPRING, and RITA SPRING,
15 *Petitioners,*

16
17 vs.

18
19 TILLAMOOK COUNTY,
20 *Respondent,*

21
22 and

23
24 EDGE CABLE HOLDINGS USA, LLC,
25 *Intervenor-Respondent.*

26
27 LUBA No. 2020-014

28
29 FINAL OPINION
30 AND ORDER

31
32 Appeal from Tillamook County.

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34 Sean T. Malone, Eugene, filed the petition for review and a reply brief, and
35 argued on behalf of petitioners.

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37 No appearance by Tillamook County.
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1 Phillip E. Grillo, Portland, filed a response brief and argued on behalf of
2 intervenor-respondent. With him on the brief was Elaine Albrich, Olivier Jamin,
3 and Davis Wright Tremaine LLP.

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5 ZAMUDIO, Board Member; RUDD, Board Chair; participated in the
6 decision.

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

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10 AFFIRMED

08/20/2020

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

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NATURE OF THE DECISION

Petitioners appeal a board of county commissioners decision approving a conditional use permit and similar use determination for the installation of an underground fiber-optic cable system and beach manhole on property zoned Rural-Residential 2-Acre (RR-2).

FACTS

The subject property is located within the Tierra del Mar area, north of the Pacific City/Woods unincorporated community. The Tillamook County Comprehensive Plan describes Tierra Del Mar as “a seasonal residential community with approximately 500 part-time residents living at densities of 4 to 12 dwellings per acre.” Record 44. The subject property is located on a relatively flat section of a mostly developed dune and beach complex that is vegetated with dune grass, shrubs, and trees. The subject property is comprised of approximately 0.67 acres, is rectangular in shape, and is vacant. Sandlake Road, a county road, abuts the eastern boundary of the subject property. A beach leading to the Pacific Ocean abuts the western boundary of the subject property. Adjacent properties to the north and south are developed with dwellings. Record 31–34.

Intervenor-respondent Edge Cable Holdings USA, LLC (intervenor) is a subsidiary of Facebook, a global online social media platform. Record 445. The development is proposed as part of the Jupiter Submarine Cable, which is planned to be a trans-Pacific undersea fiber-optic cable system linking multiple locations

1 on the west coast of the United States to Japan and the Philippines. Record 624.
2 Intervenor applied to the county for a conditional use permit and a concurrent
3 similar use determination to install an underground fiber-optic cable line and
4 beach manhole (collectively, the facility) on the subject property. No above-
5 ground structures are proposed as part of the facility.

6 Intervenor plans to install the cable using horizontal direct drilling to
7 minimize impacts to the natural environment and the neighborhood. Record 49.
8 The construction activities are expected to last approximately 35 days and will
9 create noise, vibration, and traffic. After construction is complete, intervenor is
10 required to restore the site with native vegetation and the facility will not generate
11 ongoing noise, vibration, dust, or traffic other than nominal amounts from routine
12 maintenance, which will typically be limited to daytime site access by light duty
13 pick-up trucks or automobiles. Record 43–44.

14 The planning commission approved the applications with conditions and
15 opponents appealed. After a local appeal and de novo hearing, the board of
16 county commissioners (board) upheld the planning commission’s approval. This
17 appeal followed.

18 **FIRST ASSIGNMENT OF ERROR**

19 The board found that the underground fiber-optic cable line and manhole
20 are “public utility facilities, including substations and transmission lines,” which
21 are conditional uses in the RR-2 zone. Tillamook County Land Use Ordinance
22 (TCLUO) 3.010(3)(n). The board concluded that the manhole is a broadband

1 substation and the fiber-optic cable is a communications transmission line.
2 Record 39–40.

3 The TCLUO does not define the terms “public utility facilities,”
4 “substations,” or “transmission lines.” In construing “public utility facilities,” for
5 purposes of TCLUO 3.010(3)(n), the board referred to the definition of “utility
6 facilities” in TCLUO 11.030:

7 “UTILITY FACILITIES: Structures, pipes, or transmission lines
8 which provide the public with electricity, gas, heat, steam,
9 communication, water, sewage collection, or other similar service.”

10 The board reasoned that the defined term “utility facilities” is “substantially
11 similar” to the undefined term “public utility facilities, including substations and
12 transmission lines” and “broadly include[s] the type of utility facility proposed
13 in this case.” Record 36. The board observed that the facility “is comprised of
14 structures, pipes and transmission lines which provide the public with
15 communication or other similar service,” and therefore concluded that the facility
16 is a “utility facility.” Record 37.

17 Petitioners argue that the board’s interpretation is inconsistent with the text
18 of TCLUO 3.010(3)(n). Petitioners argue that the board’s interpretation does not
19 give effect to the term “public” because the facility will be used by Facebook,
20 which is a private company. The board rejected the argument that the term
21 “public” requires that the facility be publicly owned. The board concluded that

1 communication facilities are a type of public facility so long as they are necessary
2 for the public health, safety, and welfare.¹ Record 38. The board found:

3 “There is substantial evidence in the record indicating that the State
4 of Oregon, the County, and its planning agency the Community
5 Development Department, have determined that broadband
6 telecommunication facilities, including fiber-optic cable facilities
7 such as this one, are critical public facilities that are essential to the
8 public health, safety and welfare of the County and the State of
9 Oregon. The Board of Commissioners hereby adopts those
10 determinations as its own.” *Id.*

11 The board’s interpretation of its code is entitled to deference as long as that
12 interpretation is consistent with the code’s express language, purpose, and
13 underlying policy. ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247 261,
14 243 P3d 776 (2010) (applying ORS 197.829(1)). We conclude that the board’s
15 interpretation of “public” that includes a privately owned facility is not
16 inconsistent with the term “public.” We affirm the board’s interpretation.

17 Petitioners also argue that the board erred in concluding that the “public”
18 referred to in TCLUO 3.010(3)(n) is the public generally, and that term is not
19 limited to the residents of Tierra del Mar. The board found that “public” in
20 TCLUO 3.010(3)(n) is not limited to residents in the general area served by the
21 facility. The board explained that its interpretation of “public” is supported by

¹ “Public facilities and services” are defined in the Oregon Statewide Planning Goals as: “Projects, activities and facilities which the planning agency determines to be necessary for the public health, safety and welfare.”

1 the text of TCLUO 3.010(3)(n), which includes “transmission lines” as an
2 example of “public utility facilities.”

3 “Transmission lines are specifically designed (and defined) as
4 metallic circuits used to send energy over a considerable distance.
5 * * * In other words, transmission lines are not primarily designed
6 or intended to serve the public in the immediate area in which they
7 are located. They are designed and intended to carry signals or
8 energy over longer distances to deliver the signals or energy
9 elsewhere. Likewise, a substation is designed and intended to
10 connect, re-energize and re-send signals or energy from one station
11 to another, over a considerable distance.

12 “Therefore, the public benefit to the local community in which a
13 transmission line and substation are located, is usually not the
14 primary beneficiary of the service being provided. The benefit to the
15 immediate community is typically an improvement in the overall
16 system or network, usually resulting in greater capacity and
17 redundancy within the system, much in the way in which a new road
18 or bypass would improve the overall capacity and redundancy of an
19 existing roadway.

20 “In essence, by adding a new transmission line and substation at this
21 location, Facebook increases the overall capacity and redundancy
22 within the larger broadband system, which in turn produces
23 significant public health, safety and welfare benefits, as detailed in
24 the record. These broad benefits, along with the specific benefits
25 realized by Facebook users, which include many local residents and
26 visitors, provide necessary health, safety and welfare benefits to the
27 public.” Record 42–43.

28 We conclude that the board’s interpretation of “public” that is not limited
29 to the residents of Tierra del Mar is not inconsistent with the term “public.” We
30 affirm the board’s interpretation.

1 Petitioners argue that the board’s interpretation and decision are contrary
2 to Goal 11 (Public Facilities and Services). Petitioners do not assert that Goal 11
3 applies directly, but rather that the board’s interpretation of what constitutes a
4 public utility and facility must be consistent with Goal 11. According to
5 petitioner, Goal 11 requires any public facility or service located in a rural area
6 to serve only the needs of the rural area in which the public facility or service is
7 located, unless the local government takes an exception to Goal 11. Petitioners
8 argue that the record does not demonstrate that the facility will serve a purely
9 local need of owners of property in Tierra Del Mar. Petitioners also argue that, to
10 the extent that the facility does serve the residents of Tierra Del Mar with
11 broadband cable internet, it is redundant and, thus, not necessary.

12 Petitioners’ arguments rest on the underlying premise that the county may
13 approve the facility only if it finds that the facility is necessary for the public
14 health, safety, and welfare of owners of property in Tierra Del Mar, rather than
15 the broader public. The board rejected that premise and reasoned:

16 “The opponents’ argument seems to be based on the mistaken
17 premise that Statewide Planning Goal 11 only allows public
18 facilities and services, such as the proposed fiber optic cable and
19 associated beach manhole, to be located in a ‘rural’ area if that
20 facility provides service to property owners in that specific location.
21 This mistaken premise is apparently based on the misreading and
22 conflation of two separate provisions in Goal 11 which read as
23 follows:

24 “1) ‘Urban and rural development shall be guided and supported
25 by types and levels of urban and rural public facilities and
26 services appropriate for, but limited to, the needs and

1 requirements of the urban, urbanizable and rural areas to be
2 served.’ (See Statewide Planning Goal 11 and Tillamook
3 County Comprehensive Plan Goal 11), and

4 “2) The definition of Rural Facilities and Services which is found
5 in a different section Goal 11, and reads as follows: ‘Rural
6 Facilities and Services – refers to facilities and services
7 suitable and appropriate solely for the needs of rural lands.’

8 “There is substantiated evidence in the record which shows that
9 communication facilities like the proposed fiber optic cable and
10 associated beach manhole are part of a system of broadband
11 communication facilities and services that are interconnected at the
12 local, regional, state, national, and international level. The proposed
13 public utility facility is therefore part of a larger communication
14 system that does not meet the narrow definition of a ‘Rural Facility
15 and Service’ for purposes of Goal 11. Furthermore, there is nothing
16 in Goal 11 that prevents the interconnection of communication
17 facilities and services that serve both urban and rural areas, or limits
18 the use of communication facilities and services to the needs of the
19 rural area in which the proposed communication facility is located.”
20 Record 41–42 (emphasis omitted).

21 We agree with the board’s reasoning and reject petitioners’ Goal 11
22 argument for the same reasons.

23 Finally, petitioners argue that the fact that the facility may create a
24 redundancy in the overall broadband system demonstrates that the facility is not
25 necessary. The board specifically found that redundancy improves the overall
26 system, “much in the way in which a new road or bypass would improve the
27 overall capacity and redundancy of an existing roadway,” “which in turn
28 produces significant public health, safety and welfare benefits.” Record 43. We

1 reject the argument that redundancy itself undermines the board’s finding that the
2 facility is necessary for the public health, safety, and welfare.

3 The first assignment of error is denied.

4 **SECOND ASSIGNMENT OF ERROR**

5 The board found, in the alternative, that if the facility is not a “public utility
6 facilit[y], including substations and transmission lines,” for purposes of TCLUO
7 3.010(3)(n), then it is “of the same general character or has similar impacts on
8 nearby properties” as other public utility facilities, such as electrical and other
9 utility transmission lines and substations, and therefore qualifies as a similar
10 conditional use in the RR-2 zone. TCLUO 2.040, 1.060.²

11 Electrical substations and transmission lines are public utility facilities
12 under TCLUO 3.010(3)(n). The board found that “there is little, if any, difference
13 between the character of and the impacts from an electrical transmission line and

² TCLUO 1.060(1) provides:

“Where a proposed use is not specifically identified by this Ordinance, or the Ordinance is unclear as to whether the use is allowed in a particular zone, the Director may find the use is similar to another use that is permitted, allowed conditionally, or prohibited in the subject zone and apply the Ordinance accordingly.”

TCLUO 2.040 provides:

“The Director may permit a use not listed in a particular zone, provided that it is of the same general character, or has similar impacts on nearby properties, as do other uses permitted in the zone.”

1 substation, versus the character of and impact from a fiber-optic transmission line
2 and substation.” Record 42. The board found that the impacts from the proposed
3 manhole and underground fiber-optic cable will be less than impacts from an
4 electric transmission line and related substation. First, the board found that the
5 development will have lesser lasting physical impacts as compared to an
6 electrical transmission line and substation because the manhole and cable will not
7 result in any above-ground structures or elevated high voltage lines. Second, the
8 board found that the temporary construction impacts would be shorter, as
9 compared to an electrical transmission line and substation, because the expected
10 35-day construction period needed to install the manhole and cable would be
11 much shorter than the estimated three to six months needed to construct an above-
12 ground electrical substation. Third, the board found that the anticipated
13 construction noise levels for the manhole and cable installation would be less
14 than the average noise level for construction. Therefore, the board found that the
15 development is of the same general character and will have similar or fewer
16 impacts on nearby properties as other public utility facilities, including
17 substations and transmission lines, and determined that the use is a similar
18 conditional use in the RR-2 zone.

19 Petitioners argue that the board misconstrued TCLUO 2.040 because the
20 board found that the proposed cable and manhole will have *lesser* impacts
21 compared to electrical substation and transmission line conditional uses.
22 Petitioners do not develop that argument or explain why the board’s decision is

1 not affirmable under the deferential standard of review in ORS 197.829(1). We
2 affirm the board’s interpretation that a facility with lesser negative impacts to the
3 surrounding community is of “the same general character, or has similar impacts
4 on nearby properties” as facilities that are permitted as conditional uses in the
5 zone.

6 Petitioners also reiterate their Goal 11 argument under the first assignment
7 of error. We reject that argument for the same reasons explained above.

8 The second assignment of error is denied.

9 **THIRD ASSIGNMENT OF ERROR**

10 TCLUO 6.040 sets out six approval criteria for conditional uses. TCLUO
11 6.040(3) requires the county to consider whether the “parcel is suitable for the
12 proposed use considering its size, shape, location, topography, existence of
13 improvements, and natural features.” The board found that the subject property
14 is suitable for the proposed use based on the factors in TCLUO 6.040(3). Record
15 48–49.

16 Petitioners argue that the findings misconstrue applicable law and are
17 inadequate because the board’s findings that TCLUO 6.040(3) is satisfied fail to
18 address whether the subject property is suitable for the proposed use “from the
19 neighbors’ perspective in light of the conceded impacts” to adjacent residential
20 uses. Petition for Review 29. For example, petitioners challenge the board’s
21 finding that the rectangular shape of the property is suitable for the use because
22 the property “is a narrow rectangle, which results in the proposed use and

1 construction impacts in close proximity to the adjacent residences.” Petition for
2 Review 28 (emphasis omitted).

3 Intervenor responds, and we agree, that the board permissibly construed
4 TCLUO 6.040(3) to require that it analyze whether the parcel is suitable for the
5 use based on the physical features and existing improvements on the subject
6 property. That construction is consistent both with the text of TCLUO 6.040(3)
7 and the context of other conditional use criteria. In particular, TCLUO 6.040(4),
8 addressed in the fourth assignment of error, specifically requires the county to
9 evaluate the potential impacts of the proposed use on the character of the
10 surrounding area.

11 The third assignment of error is denied.

12 **FOURTH ASSIGNMENT OF ERROR**

13 TCLUO 6.040(4) requires the county to find that a conditional use will
14 “not alter the character of the surrounding area in a manner which substantially
15 limits, impairs or prevents the use of surrounding properties for the permitted
16 uses listed in the underlying zone.” The character of the surrounding area is a
17 high-density rural residential ocean-front community. The proposed facility
18 would not satisfy TCLUO 6.040(4) if it would alter the high-density rural
19 residential character of the area in a manner which substantially limits, impairs,
20 or prevents the residential use of surrounding properties.

21 The board found that the facility will not alter the character of the
22 surrounding area. The board quoted and agreed with the following testimony:

1 ““What we’re talking about * * * is simply a beach manhole and an
2 undersea conduit that’s installed with a horizontal directional drill
3 technique. That is a common practice for installing undersea cable,
4 and contrary to testimony which you’ve heard, there is no cable
5 landing station being proposed * * *. Everything that’s there will be
6 underground. When they’re all done, I’m certain it will be restored
7 with native vegetation so that it’s barely visible. * * * So when it
8 comes to this particular site, I think that when they’re all done, there
9 will be very little taking place that changes the character of the area.
10 There’s been testimony here that says this is going to change our
11 neighborhood forever, and I have to say I just don’t buy that
12 argument. * * * So I understand people’s concerns, I really do, but
13 I think if you take your time to go look at these sites, you’ll see there
14 is really no lasting [impact]—sure, there’s [going to] be some noise
15 here, and construction for a brief period, but once the cables are in,
16 there’s no noise, there’s no activity, and it’ll just be a vacant lot. The
17 lot will actually be a pretty good neighbor.” Record 49 (quoting
18 Testimony, Tillamook County Planning Commission, Sept 5, 2019
19 (statement of Scott McMullen)).

20 The board found that the proposed use will not “alter the character of the
21 surrounding area.” The board found that “virtually all” of the impacts opponents
22 alleged “are construction-related impacts, not use related impacts.” Record 49.
23 The board observed that temporary, construction-related impacts do not alter the
24 character of the surrounding area in a manner that substantially limits, impairs,
25 or prevents the use of surrounding properties from being used for the permitted
26 uses listed in the underlying zone. The board observed that construction of other
27 uses permitted in or adjacent to the RR-2 zone, such as residential, utility, and
28 road construction, all have construction-related impacts and that the estimated 35
29 days of construction to install the manhole and cable “will be much shorter than
30 what would normally be expected from the construction of a single family home

1 (approximately 6–9 months).” Record 49. The board found that there will be no
2 lasting impacts after construction is completed because the subject property will
3 essentially be a vacant, vegetated lot.

4 Petitioners argue that the board’s findings misconstrue TCLUO 6.040(4).
5 Petitioners argue that the board improperly reduced three separate inquiries—
6 whether the proposed use substantially limits, impairs, or prevents the use of
7 surrounding properties for permitted uses—into one inquiry: whether the
8 proposed use is worse than residential construction. Petitioners cite *York v.*
9 *Clackamas County*, 79 Or LUBA 278 (2019), where we remanded a hearings
10 officer’s decision based on a similarly worded conditional use standard because
11 the hearings officer erred in failing to separately inquire whether the proposed
12 10-acre solar power generation facility substantially limits or impairs rural
13 residential uses on surrounding lands and, instead, collapsed those inquiries into
14 a single inquiry whether the proposed use makes the rural residential use of
15 nearby properties “substantially worse.”

16 Here, the board’s findings of compliance with TCLUO 6.040(4) did not
17 separately analyze whether the proposed facility substantially limits, impairs, or
18 prevents the residential use of surrounding properties. However, we disagree that
19 the board’s decision suffers from the same analytical error identified in *York*. In
20 *York*, the hearings officer did not independently address whether the proposed
21 use “alters” the rural residential character of the surrounding area. *York*, 79 Or
22 LUBA at 288. Differently, here, the board adopted findings that the facility will

1 not alter the rural residential character of the surrounding area because
2 construction impacts are temporary and will result in essentially a vacant lot
3 covered by native vegetation. Petitioners do not contend that a vacant lot covered
4 by native vegetation will alter the residential character of the area. Given the
5 board’s finding that the facility itself will not alter the character of the
6 surrounding area, the board did not err by further finding that the construction
7 and final development will not substantially limit, impair, or prevent the
8 residential use of surrounding properties without separately analyzing each
9 element. The board did not misconstrue TCLUO 6.040(4).

10 Petitioners argue that the adopted findings that TCLUO 6.040(4) is met
11 conflict with the board’s findings, under the similar use determination, that post-
12 construction site maintenance will entail some level of noise, vibration, and
13 traffic impacts. The board found:

14 “[T]he character of the area will be maintained after construction of
15 the proposed public utility facility. No structures will be built above
16 ground on [the subject property], and a fiber-optic manhole cover
17 will be the only visible indication of a utility facility on the site. As
18 noted earlier, after construction there will no ongoing noise,
19 vibration, dust or traffic associated with this utility facility, other
20 than nominal impacts from routine maintenance. The overall
21 number of residents and the overall density of development will not
22 change as a result of the proposed underground public utility facility
23 on [the subject property] and after a short construction period of
24 approximately 35 days, there will be no significant impacts from the
25 proposed use on the community.” Record 44.

1 The board found that maintenance noise, vibration, and traffic would be
2 “nominal” and limited to daytime site access by light duty pick-up trucks or
3 automobiles. Record 43–44. The board’s finding that the development will not
4 result in any lasting impacts that would alter the character of the surrounding
5 residential area is not inconsistent with its finding that that the use will include
6 maintenance noise, vibration, and traffic that will be “nominal” and limited to
7 daytime site access by light duty pick-up trucks or automobiles.

8 Petitioners argue that the board’s findings that TCLUO 6.040(4) is
9 satisfied are inadequate because the board limited its analysis to construction-
10 related impacts. Intervenor responds, and we agree, that the board’s findings are
11 not limited to construction-related impacts. As explained above, the board found
12 that the facility will not result in any lasting impacts that would alter the character
13 of the surrounding residential area because the subject property will essentially
14 be a vacant lot with vegetation. Record 49.

15 Finally, petitioners argue that the board’s findings fail to address security
16 concerns that opponents raised that, because the facility is important
17 communication infrastructure, it could be a target of vandalism or terrorism,
18 which would “alter the character of the surrounding area in a manner which
19 substantially limits, impairs or prevents the [residential] use of surrounding
20 properties.” Those concerns are based on petitioners likening the facility to other
21 fiber-optic cable “landing stations” that include security measures such as fences.
22 The board found that “there is no cable landing station being proposed” and did

1 not further address opponents' security-related concerns that were predicated on
2 the cable landing station comparison. Record 49. Thus, contrary to petitioners'
3 findings challenge, the findings do address and reject petitioners' premise, and
4 the findings need not address specific arguments based on that premise. The
5 findings are adequate.

6 The fourth assignment of error is denied.

7 The county's decision is affirmed.