

**BEFORE THE LAND USE HEARINGS OFFICER
OF CLACKAMAS COUNTY, OREGON**

Regarding an Appeal of a Planning Director)	Case File No.
Decision Approving a Wireless Telecommunications)	Z0357-18-AACA
Facility in an Exclusive Farm Use Zone.)	(800 Radio Appeal)

A. SUMMARY

1. The owner is the McKenzie Family Land Holding LLC. The applicants are the Clackamas 800 Radio Group and Allen Greene.
2. The appellant is Johanna Oh.
3. The subject property is located at 17167 South Harding Road, Oregon City, Oregon 97045. The legal description is T2S R3E, Section 34, Tax Lot 700, W.M. The subject property is approximately 38.07 acres and is zoned EFU – Exclusive Farm Use.
4. On January 3, 2019, the Hearings Officer conducted a public hearing to receive testimony and evidence about the application. At the conclusion of the public hearing, the record was closed.

B. HEARING AND RECORD HIGHLIGHTS

1. The Hearings Officer received testimony at the public hearing on this application on January 3, 2019. All exhibits and records of testimony are filed with the Planning Division, Clackamas County Department of Transportation and Development. At the beginning of the hearings, the Hearings Officer made the declaration required by ORS 197.763. The Hearings Officer disclaimed any *ex parte* contacts, bias, or conflicts of interest. The Hearings Officer stated that the only relevant criteria were those identified in the Planning Director’s decision, that participants should direct their comments to those criteria, and failure to raise all arguments may result in waiver of arguments at subsequent appeal forums.
2. At the hearing, County planners Andrew Yaden and Lindsey Nesbitt discussed the Planning Director’s decision and recommended that the Planning Director’s decision be upheld.

3. Allen Greene argued in favor of the application.
4. Johanna Oh and Christine Bowen argued in opposition to the application, primarily due to the effect the proposed tower would have on residential views.
5. At the conclusion of the public hearing, the Hearings Officer closed the record.

C. FACTS

This case involves the appeal of a Planning Director decision approving a 180-foot lattice tower wireless communications facility, along with a 50 by 50 foot fenced area for equipment. The proposed tower would provide essential public communications services. In other words, the proposed tower is for emergency personnel use rather than commercial wireless services. The subject property is approximately 38.07 acres and is zoned EFU. The property is roughly square shaped with corners missing at the northeast and southwest corners. Currently, the property is vacant and being used to grow Christmas trees. There is a Bonneville Power Administration (BPA) easement that runs along the southern portion of the property, and there are BPA power lines running through the easement. The property is mostly flat and sits near a bluff to the east so the property is elevated over other properties in the area closer to the Clackamas River to the east. The property is surrounded by other EFU properties, although the EFU property to the north intends to develop three homesites pursuant to a Measure 49 claim. Approval of the proposed tower is subject to a type II procedure, whereby the decision is made by the Planning Director. The Planning Director approved the proposed tower.¹ This appeal followed.

D. DISCUSSION

The proposed tower is for the purpose of providing essential public communications services.² Pursuant to ZDO Table 401-1, “Essential public communications services, as defined in Subsection 835.03(D)” are permitted uses in EFU zones. Table 401-1 further provides; “The use is subject to ORS 215.275, if it includes a

¹ Under ZDO 1307.03(B), the Planning Director includes “any County staff member authorized by the Planning Director to fulfill the responsibilities assigned to the Planning Director by the [ZDO].”

² ZDO 835.03(D) defines “Essential Public Communication Services” as: “Police, fire and other emergency communications networks.” The ZDO has been amended subsequent to the current application being deemed complete. All citations are to the ZDO in effect when the application was deemed complete.

transmission tower less than or equal to 200 feet in height.” As the proposed tower is for essential public communication services and is less than 200 feet, the applicable approval criteria are found in ORS 215.275, which provides:

- “(1) A utility facility established under ORS 215.213 (1)(c)(A) or 215.283 (1)(c)(A) is necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service.
- “(2) To demonstrate that a utility facility is necessary, an applicant for approval under ORS 215.213 (1)(c)(A) or 215.283 (1)(c)(A) must show that reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:
 - “(a) Technical and engineering feasibility;
 - “(b) The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;
 - “(c) Lack of available urban and nonresource lands;
 - “(d) Availability of existing rights of way;
 - “(e) Public health and safety; and
 - “(f) Other requirements of state or federal agencies.
- “(3) Costs associated with any of the factors listed in subsection (2) of this section may be considered, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service. Land costs shall not be included when considering alternative locations for substantially similar utility facilities. The Land Conservation and Development Commission shall determine by rule how land costs may be considered when evaluating the siting of utility facilities that are not substantially similar.
- “(4) The owner of a utility facility approved under ORS 215.213 (1)(c)(A) or 215.283 (1)(c)(A) shall be responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility. Nothing in this section shall prevent the owner of the utility facility from requiring a bond or other security from a contractor or otherwise imposing on a contractor the responsibility

for restoration.

“(5) The governing body of the county or its designee shall impose clear and objective conditions on an application for utility facility siting under ORS 215.213 (1)(c)(A) or 215.283 (1)(c)(A) to mitigate and minimize the impacts of the proposed facility, if any, on surrounding lands devoted to farm use in order to prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on the surrounding farmlands.

“(6) The provisions of subsections (2) to (5) of this section do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by the Federal Energy Regulatory Commission.”

1. ORS 215.275 Approval Criteria

The Planning Director’s decision addresses the subsections of ORS 215.275 and concludes that ORS 215.275 is satisfied. Opponents do not challenge many of the Planning Director’s findings. It would be a waste of the County’s money and resources to review and repeat the Planning Director’s findings. I have reviewed the Planning Director’s findings, and I agree with those findings. Therefore, the Planning Director’s findings are adopted and incorporated into this decision, except as discussed further.

As ORS 215.275(2) provides, in order to demonstrate that it is necessary to site the tower on EFU land, the applicant must demonstrate that reasonable alternatives have been considered and the tower must be sited on EFU land due to one or more of six factors. The Planning Director found that the applicant had considered reasonable alternatives and found that three of the factors require the tower to be sited on EFU land. Under 215.275(2)(a), the Planning Director found:

“The applicant has provided justification and mapping of coverage options to show the need of the system within this area and for the site specifically. The applicant’s narrative states that the C800 group is upgrading to digital technologies that provide more consistent signals and greater data to be exchanged, but travel shorter distances. For this reason, more towers are necessary for effective communications and higher elevations are needed to compensate for physical barriers to effective transmission of radio- and microwaves, such as topography, trees and structures.

“Also included in the submittal materials is an existing coverage map, showing the gaps in coverage from Carver and running roughly southeast

along the Clackamas River. A propagation study of coverage shows how and where the proposed tower will improve emergency signal service coverage.

“The design of the proposed tower will also allow for microwave communications to occur between two other towers utilized by the C800 group. As demonstrated in the submittal materials, the proposed location will allow for microwave antennas to be placed lower on the tower and still provide direct communications with existing towers. The lower height of the antennas provides for less wind load on the antennas, and therefore less shaking and a more consistent line of communication.

“Staff believes that the applicant has demonstrated that the specific location, under these circumstances, is the best location for the project. This criterion is satisfied.” Planning Director Decision 9.

As the Planning Director explains, due to new digital technology the applicant needs more towers and higher elevations to provide the required essential public communications service. The Planning Director further explains that the proposed site would allow for shorter towers while still providing the needed elevation for wireless communication. Opponents do not challenge this finding. I agree with the Planning Director.

Under 215.275(2)(c), the Planning Director found:

“The applicant provides that an exhaustive search for potential site candidates within the search areas has been conducted. The applicant has found only one tower in proximity that has the height and available capacity for collocation. That tower, owned by American Tower, has capacity for collocation and sits north of Springwater Rd., west of S Gerber, to the east and slightly north of the proposed tower site. However, that tower is built to a lower structural standard than is required of emergency communications facilities and is significantly lower in elevation than the proposed site and would therefore not provide the necessary coverage. Staff has confirmed the above findings with a review of tower approvals in the area along with a search on AntennSearch.com.

“Other non-resource lands were investigated as potential sites. The applicant provided info on a number of properties in the RRFF-5 zoning district, the closest site lying 1325 feet to the north. The majority of RRFF-5 properties in the vicinity are located below the bluff and as such, would not provide the coverage provided by a site located on top of the bluff. The applicant further provided a propagation study of the highest RRFF-5 property with a 150’ tower. The applicant would be restricted to

a 150' tower in the RRFF-5 zone under the Clackamas County Zoning and Development Ordinance Section 835. The maps show a higher level of coverage with the proposed site than on the RRFF-5 property. The 150 foot high tower would not provide the needed coverage due to the height limitations imposed in the RRFF-5 zoning district and the lower elevation of the RRFF-5 site.

“The applicant submitted a report by 3bD Communications on October 25, 2018 providing additional information on the technical details about the design and height requirements of a new wireless telecommunication facility, and the identification of indoor and outdoor coverage requirements. The report also compares the two potential sites and lays out the advantages provided to emergency personnel in utilizing the EFU zoned property over the RRFF-5 property.

“Staff finds that the applicant has demonstrated that the EFU zoned property provides the best location to meet the needs of emergency communications and that there is a lack of available non resource lands. This criterion is met.” Planning Director Decision 10.

Opponents argue that it is not necessary to build more towers in the first place. The applicant has provided expert testimony from its engineering firm explaining why another tower is necessary. This evidence is more persuasive than opponents' bare assertion that more towers are not necessary. I agree with the Planning Director that the tower is justified under this criterion.

Opponents also argue that the tower could be sited on non-EFU land. The applicant's engineering firm conducted an alternatives analysis that compared the proposed site to non-EFU sites. The applicant's expert explained that even the best non-EFU site (a Rural Residential Farm Forest (RRFF-5) site to the northeast) was inferior to the proposed site. Opponents do not really challenge the expert's findings other than to argue that the analysis only considered a 150-foot tower on the RRFF-5 site versus the 180-foot tower on the proposed EFU site. As the Planning Director's decision explains, however, the maximum tower height that could be allowed in the RRFF-5 zone is 150 feet. Therefore, the analysis did not err in considering a 150-foot tower on the RRFF-5 site. Given that the analysis used the proper height of potential towers, opponents have no persuasive arguments against the applicant's expert's conclusions.³ I agree with the Planning Director

³ To the extent opponents argue that the tower should be sited on another EFU site, ORS 215.275 only requires that an applicant demonstrate that a facility be sited in “an exclusive farm use zone” – not the specific proposed EFU property. Even if that were the case, the applicant's expert persuasively explains why the

that that the tower is justified under this criterion.

Under 215.275(2)(e), the Planning Director found:

“The applicant provides that public health and safety are the main reason for the proposed tower. The purpose of the tower is to fill gaps in key target areas and provide consistent emergency communications throughout the County. The applicant states that the elevated location will provide uninterrupted emergency communications to key areas along Highway 224 and recreational areas in the Clackamas River drainage that could not be well served by a lower elevation site. The elevated position also provides clear lines of sight between other towers in the C800 network for microwave communications to occur in event of an emergency.

“Staff finds that the applicant has demonstrated that the need for public health and safety establishes the facility as in the EFU zone. This criterion is met.” Planning Director Decision.

While I am not entirely sure that “[p]ublic health and safety” refers to the *reason* for the tower rather than the reason the tower must be sited on EFU land as opposed to the reasonable alternatives, opponents do not challenge this finding. Therefore, I agree with the Planning Director that the tower is justified under this criterion. In any event, only one of the criteria must be satisfied in order to satisfy ORS 215.275(2). I agree with the Planning Director that ORS 215.275(2) is satisfied.

ORS 215.275(5) requires the County to “impose clear and objective conditions * * * in order to prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on the surrounding farmlands.” The Planning Director found:

“The applicant provides that C800 will comply with reasonable siting objectives that will minimize the impact of the proposed facility on surrounding lands devoted to farm use.

“Beyond visual and aesthetic impacts, staff finds that there will be no additional impacts on surrounding properties and the proposed tower will not limit the ability of surrounding properties to conduct farm uses.

“A number of residents expressed concerns that the location of the tower poses a risk to health due to the increase in radio waves. The health impacts of a cell tower on surrounding properties and residents is not a criteria for approval. It is not the place of this application and decision to

proposed site is the best EFU-zoned property.

debate the public health effects of siting new towers.

“This criterion is addressed in the adopted conditions of approval intended to minimize the limited impacts on surrounding properties. The area of the project is generally surrounded by a Christmas tree farm with adjacent residential uses to the north, east and west and active farms to the north, south and east of the project site. In order to reduce the visual impacts of the proposed tower, conditions of approval have been adopted requiring the tower and associated equipment be painted a neutral earth tone color and the fence enclosing the facility shall include earth tone slats, also of a neutral earth tone. This criterion can be satisfied.”
Planning Director Decision 11-12.

Eric and Christine Bowen (Bowens), who live to the north of the property argue that the proposed tower, and in particular the facilities associated with the tower, would pose a danger to their property. According to the Bowens, a propane tank could be a potential hazard because people sometime fire guns in the area. Initially, the Bowens do not explain how this would cause a significant change in accepted farm practices or a significant increase in the cost of farm practices on their farmlands. On the contrary, the Bowens primary (and understandable) concern is the potential effect of the tower on their Measure 49 homesites rather than farm activities.

Johanna Oh (Oh) argues that the proposed tower would interfere with a nearby lavender farm to the west. According to Oh, the lavender farm relies on scenic views to entice customers to the farm and an unsightly tower would harm that attribute of the farm. Initially, I am not sure that allegedly un-scenic structures could have the effect of causing a significant change in accepted farm practices or a significant increase in the cost of farm practices on the surrounding farmlands. Secondly, there is no testimony from the owners of the lavender farm that there would be any adverse effects upon their farm. Any speculation by Oh that such adverse effects would occur is just that – speculation. Furthermore, the applicant explained that the proposed tower is sited on the eastern portion of the property specifically to keep the tower further away from the lavender farm. I agree with the Planning Director that the proposed tower would not cause a significant change in accepted farm practices or a significant increase in the cost of farm practices on the surrounding farmlands. ORS 217.275(5) is satisfied.

ORS 215.275 is satisfied.

2. Other Issues

Opponents raise a number of other issues regarding the proposed tower. Although opponents do not cite any specific ZDO provisions, they argue the proposed tower is too close to the north property line. The proposed tower is approximately 73 feet from the north property line. The EFU setback requirements are 30 feet front lot setback, 30 feet rear yard setback, and 10 feet side yard setbacks. ZDO 839.09(A)(3) provides that in addition to satisfying the setback requirements of the underlying zone, “* * * the wireless telecommunication tower shall be set back a distance not less than its height from all property lines.” ZDO 835.02(C), however, provides that “[w]ireless telecommunication facilities located in the Exclusive Farm Use District when the wireless telecommunication tower is less than or equal to 200 feet tall * * *” are not subject to the provisions of ZDO 835. The tower is proposed to be located in an EFU zone and is under 200 feet. Therefore, the height of the tower setback requirement is not applicable to the proposed tower.

Opponents argue that the electromagnetic field (EMF) from the proposed tower could cause health problems for people in the area. The applicant explained that the proposed facilities would generate much less powerful EMFs than allowed under federal regulations. In any event, any impacts from EMF have been preempted by the federal government and cannot be a basis for denial of such towers.

Opponents argue that the proposed tower could interfere with animal migration. Initially, I do not see how the tower could interfere with any animal migration. On a nearly 40-acre property, the enclosed area would be only approximately 50 by 50 feet. Furthermore, the area is not a Goal 5 resource and there is no requirement to address any potential impacts on wildlife.

Opponents argue that there are no conditions of approval requiring the applicant to restrict the proposed tower to essential public communications services and to prevent lighting on the tower. The proposed conditional use permit is for an essential public communications service tower. Any attempt to expand the use of the tower to include private commercial facilities would require a new or amended permit. Therefore, no condition of approval is necessary. Similarly, the FAA stated that no lights are required for the proposed tower, and the applicant stated that it does not want to put lights on

the tower. Therefore, no condition of approval is necessary.⁴

Opponents argue that the County failed to notice the proper Community Planning Organization (CPO). Although, the Planning Director's decision mentions the wrong CPO, staff explained at the public hearing that the decision inadvertently included the name of the wrong CPO and that the proper CPO was in fact given notice of the application. Even if the proper CPO had not been given notice of the application, opponents may not raise alleged procedural errors to other parties. While the failure to notice the proper CPO might provide a basis to obtain a remand from LUBA, it does not provide a basis to deny the application.

Finally, opponents argue that the proposed tower would lower surrounding property values. In particular, the Bowens argue that the proposed tower would significantly affect the value of and even the ability to develop their Measure 49 parcels. While I certainly sympathize with the Bowens plight, unfortunately for them any effect on property values is not a basis to deny the application.

All of the approval criteria are satisfied.

F. DECISION

Based on the findings, discussion and conclusions provided or incorporated herein and the public record in this case, the Hearings Officer hereby **AFFIRMS** the Planning Director's decision in Z0357-18-AACA and approves the proposed telecommunications tower, with the following conditions of approval.

F. CONDITIONS OF APPROVAL

General Conditions:

1. This approval is granted on the basis of the site plan and associated exhibits submitted with the application. Any location for the lattice tower, compound area, fencing and landscaping that differs substantially from that shown on the submitted site plan shall require a modification of this approval.
2. **Prior to Planning approval of a Building Permit:**
 - a. The applicant's development plan shall comply with all Fire Code requirements of the Clackamas County Fire District #1. A stamped and signed plot plan of the project from the CCFD#1 indicating compliance is met shall be submitted by the applicant to this Planning File. It shall be the responsibility of the

⁴ Furthermore, I do not see that even if there were lights on the tower – for instance if the FAA *had* required lighting – that it would run afoul of any approval criteria.

applicant to contact the CCFD #1 to determine the applicable requirements.

- b. The applicant shall file an FAA form 7460-1 to the Oregon Department of Aviation and submit a copy of said form to this file.
 - c. The applicant shall sign, notarize and record in the deed records of the County a document binding the applicant as the responsible entity for restoring any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility, as nearly as possible, to its former condition
 - d. The applicant shall provide a landscape plan to the Clackamas County Planning Division for approval. The applicant can employ existing Christmas trees but must ensure that a perimeter of minimum 6 ft tall trees are in place. It is the wireless facility's owners that shall be responsible for maintaining landscaping around the perimeter of the leased area.
3. It is the responsibility of the applicant to obtain any necessary development and building permits prior to any construction. For more information on relevant permits, the applicant shall contact:
 - a. Transportation Engineering: (503) 742-4691
 - b. Building Codes Division: (503) 742-4240
 4. The colors of all structures, such as the tower and equipment shelters, shall be pre-approved by the Planning Division, and shall be earth tone colors, taking into account industry standards of such equipment.
 5. The equipment shelter area shall be entirely enclosed by a six (6) foot chain link fence with privacy slats to match the earth tone colors of the equipment shelters and lattice tower.
 6. All utilities shall be placed underground.
 7. The approval of the application granted by this decision concerns only the applicable criteria for this decision. The decision does not include any conclusions by the County concerning whether the activities allowed will or will not come in conflict with the provisions of the federal Endangered Species Act (ESA). This decision should not be construed to or represented to authorize any activity that will conflict with or violate the ESA. It is the applicant, in coordination if necessary with the federal agencies responsible for the administration and enforcement of the ESA, who must ensure that the approved activities are designed, constructed, operated and maintained in a manner that complies with the ESA.
 8. Approval is subject to the above stated conditions. Failure to comply with all conditions of approval may be cause for revocation of this permit pursuant to the provisions of ZDO Subsection 1307.16(L).

9. This approval is valid for four (4) years from the date of this final approval, December 3, 2018, or if appealed, the date of final written decision from the Planning and Zoning Hearings Officer/Land Use Board of Appeals. If a building permit is not approved by the Planning Department and submitted to the County Building Department within the four year period, this approval will automatically become void.
 - If the approval is not implemented within the initial 4 year period, a two year time extension may be approved, pursuant to Section 1310.

DATED this 22nd day of January, 2019.



Fred Wilson
Clackamas County Hearings Officer

ENDANGERED SPECIES ACT NOTICE

The federal **Endangered** Species Act (ESA) is not a criterion for approval of this application. The County has reviewed the approval standards in light of the requirements of the ESA, believes that the criteria for approval are consistent with the terms of the ESA and has submitted the Development Ordinances for consideration for a "4(d)" programmatic limitation. However, the analysis included in this decision does not include an evaluation by the County of the applications for consistency with the ESA nor does the decision reach any conclusions concerning that federal law. The applicant are responsible for designing, constructing, operating and maintaining the activities allowed by an approval of this application in a manner that ensures compliance with the ESA. Any question concerning this issue should be directed to the applicant, their consultants and the federal agencies responsible for administration and enforcement of the ESA for the affected species.

APPEAL RIGHTS

ZDO 1307.10(F) provides that, with the exception of an application for an Interpretation, the Land Use Hearings Officer's decision constitutes the County's final decision for purposes of any appeal to the Land Use Board of Appeals (LUBA). State law and associated administrative rules promulgated by LUBA prescribe the period within which any appeal must be filed and the manner in which such an appeal must be commenced. Presently, ORS 197.830(9) requires that any appeal to LUBA "shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final." This decision will be "final" for purposes of a LUBA appeal as of the date of mailing (which date appears on the last page herein).