

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

3  
4 DANIEL PEREIRA,  
5 *Petitioner,*

6  
7 vs.

8  
9 COLUMBIA COUNTY,  
10 *Respondent,*

11 and

12  
13 SBA TOWERS, INC.,  
14 *Intervenor-Respondent.*

15  
16 LUBA No. 2000-173

17  
18 FINAL OPINION  
19 AND ORDER

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21  
22 Appeal from Columbia County.

23  
24 Daniel Pereira, Portland, filed the petition for review and argued on his own behalf.

25  
26 No appearance by Columbia County.

27  
28 Steven P. Hultberg, Portland, filed the response brief and argued on behalf of  
29 intervenor-respondent. With him on the brief was Perkins Coie.

30  
31 HOLSTUN, Board Member; BRIGGS, Board Chair; BASSHAM, Board Member,  
32 participated in the decision.

33  
34 AFFIRMED

03/21/2001

35  
36 You are entitled to judicial review of this Order. Judicial review is governed by the  
37 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals a county decision granting conditional use approval for a personal communication service (PCS) cellular phone tower.

**MOTION TO STRIKE**

Intervenor moves to strike a number of documents that are attached to the petition for review and are not part of the record in this appeal. Intervenor also moves to strike certain arguments in the petition for review that are based on evidence outside the record. With exceptions that do not apply here, our review is limited to the record that was filed by the county in this matter. ORS 197.835(2)(a). Petitioner responds, correctly, that in two respects the motion to strike is directed at documents that are in the record or at argument that is based on documents in the record. Intervenor’s motion to strike is granted in part.<sup>1</sup>

**MOTION TO DISMISS**

The petition for review does not conform to our rules, and intervenor moves to dismiss. The most serious defect in the petition for review is petitioner’s failure to include separate assignments of error, with supporting argument, that articulate and support a legal theory for why the county’s decision should be reversed or remanded. OAR 661-010-0030(4)(d); *Lighthart v. Polk County*, 37 Or LUBA 787 (2000); *Scholes v. Jackson County*, 28 Or LUBA 407, 409 (1994). However, the petition for review includes a “Summary of Arguments” and “Summary of Material Facts,” both of which include challenges to the county’s decision. Intervenor and this Board have been able to determine from petitioner’s “Summary of Arguments,” and “Summary of Material Facts” that petitioner believes the

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<sup>1</sup>We do not consider the arguments set out in the following portions of the petition for review: (1) lines 11 through 18 on page 6; (2) lines 11-17 on page 7; and (3) lines 9-11 on page 8. *Hammack & Associates, Inc. v. Washington County*, 16 Or LUBA 75, 78, *aff’d* 89 Or App 40, 747 P2d 373 (1987). Intervenor’s motion to strike the extra-record material appearing at pages 21 through 27 and 30-31 of the petition for review is granted.

1 challenged decision violates a number of applicable criteria. Therefore, petitioner’s failure to  
2 include assignments of error, denominated as such, does not warrant dismissing this appeal.  
3 *Freels v. Wallowa County*, 17 Or LUBA 137, 141 (1988); *Standard Insurance Co. v.*  
4 *Washington County*, 16 Or LUBA 30, 33 (1987). The motion to dismiss is denied.<sup>2</sup>

5 **FACTS**

6 The disputed PCS facility includes a 246-foot tall lattice tower, a four-foot lightning  
7 rod and a related PCS cellular phone facility. The proposed facility is to be located on a  
8 leased 100-foot by 100-foot portion of a 78-acre parcel located in the county’s Primary  
9 Forest zone. The approved site is located on Butler Road, a narrow county gravel road.  
10 Nearby properties are used for woodland and pasture uses, and some are developed with  
11 rural dwellings.

12 In the challenged decision, the board of county commissioners rejects petitioner’s  
13 appeal of a planning commission decision granting the conditional use permit. The board of  
14 commissioners’ decision expressly adopts a number of specifically identified findings from  
15 an August 28, 2000 staff report, but does not adopt the remaining findings from that staff  
16 report. Record 11. In addition, the challenged decision specifically adopts a number of  
17 supplemental findings that appear at Record 22-25. *Id.*

18 **DECISION**

19 **A. Fire Siting Standards**

20 Columbia County Zoning Ordinance (CCZO) 510 establishes fire siting standards in  
21 the primary forest zone and, as relevant, provides:

22 “The following fire siting standards or their equivalent *shall apply to new*  
23 *dwellings* in this zone:

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<sup>2</sup>Our denial of the motion to dismiss does not mean we do not appreciate intervenor’s objection that, in attempting to respond to a petition for review that departs so profoundly from the requirements of our rules, intervenor runs the risk of making petitioner’s arguments for him. Although we recognize that danger, and might reach a different result in different circumstances, we do not believe intervenor’s brief in this case identifies arguments beyond those that are fairly presented in the petition for review.

1           “\* \* \* \* \*

2           “(3) All roads in this zone, except private roads and bridges for commercial  
3 forest uses, shall be constructed so as to provide adequate access for  
4 fire fighting equipment, according to the standards provided by the  
5 local rural fire protection district or State Department of Forestry.”  
6 (Emphasis added).

7 Petitioner argues the county erred by failing to apply CCZO 510(3) to require that Butler  
8 Road be improved to comply with CCZO 510(3).

9           As intervenor correctly notes, CCZO 510(3) by its terms applies to “new dwellings.”  
10 Therefore, CCZO 510(3) does not apply to the application challenged in this appeal, and  
11 petitioner’s arguments under this criterion provide no basis for reversal or remand.

12           **B. Character of the Surrounding Area**

13           Another of the applicable criteria in this matter is CCZO 1503.5(E), which provides  
14 as follows:

15           “The proposed use will not alter the character of the surrounding area *in a*  
16 *manner which substantially limits, impairs, or precludes the use of*  
17 *surrounding properties for the primary uses listed in the underlying*  
18 *district[.]”* (Emphasis added.)

19 The August 28, 2000 staff report includes a finding that the disputed tower will not alter the  
20 character of the area because “it will occupy a very small area.” Record 18. Petitioner  
21 disputes that finding, arguing that the tower is just as out of character in a forested area of  
22 rural Columbia County as it would be in a desert.

23           The staff report finding that petitioner challenges was not adopted by the board of  
24 county commissioners. The findings adopted by the board of commissioners address the  
25 emphasized language of CCZO 1503.5(E), while petitioner neither acknowledges nor  
26 addresses that language in his arguments. CCZO 1503.5(E) prohibits conditional uses that  
27 will alter the character of the neighborhood if such alteration “substantially limits, impairs, or  
28 precludes the use of surrounding properties for the primary uses listed in the underlying  
29 district.” The primary uses listed in the county’s Primary Forest zone do not include

1 residential uses, and therefore any impacts the tower may have on the views from such  
2 residential uses would not violate CCZO 1503.5(E). The unchallenged county findings  
3 explain that the tower will not substantially limit, impair or preclude the forest and farm uses  
4 that are listed as primary uses in the zone. Record 24-25. In the absence of some attempt by  
5 petitioner to challenge those findings, we conclude they are adequate to demonstrate  
6 compliance with CCZO 1503.5(E).

7 **C. Hazardous Conditions**

8 To grant a conditional use permit, the county must find “[t]he proposal will not create  
9 any hazardous conditions.” CCZO 1503.5(G). Petitioner argues the proposed tower is  
10 located on the top of a hill and exposed to weather. According to petitioner, if the tower falls  
11 it is close enough to a nearby Bonneville Power Administration (BPA) power line right of  
12 way to fall across BPA’s power lines.

13 Again, petitioner fails to challenge the findings the county adopted to address CCZO  
14 1503.5(G). Those findings explain that even if the tower were to fail in high winds, it is  
15 designed to “collapse in on itself, rather than falling to the side and potentially falling onto  
16 the BPA power lines[.]” Record 25. Petitioner appears to question the evidence the county  
17 relied upon to adopt those findings.

18 The evidence the county relied on is a letter from an engineer employed by the  
19 company that will construct the proposed tower. That letter indicates that the company has  
20 never had one of its towers fail. It goes on to explain that in cases where other companies  
21 have experienced failures, the towers generally fall on themselves and rarely fall outside an  
22 area equal to one-half of the tower’s height. Record 125. We conclude the county’s findings  
23 regarding CCZO 1503.5(G) are adequate and supported by substantial evidence.

24 **D. Petitioner’s Remaining Arguments**

25 Some of petitioner’s remaining arguments challenge findings that were not adopted  
26 by the county and fail to challenge the relevant findings that were adopted by the county.

1 Other arguments challenge “Comments” adopted by the board of commissioners without  
2 explaining why those comments have any bearing on an approval criterion or are legally  
3 significant for some other reason. These arguments do not warrant separate discussion and  
4 are rejected.

5 The county’s decision is affirmed.