

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

3
4 WESTON KIA and J.B. WESTON,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF GRESHAM,
10 *Respondent,*

11 and

12
13
14 NEW CINGULAR WIRELESS PCS, LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2014-085

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from City of Gresham.

23
24 Christopher P. Koback, Portland, filed the petition for review and argued
25 on behalf of petitioners. With him on the brief was Hathaway Koback Connors
26 LLP.

27
28 No appearance by City of Gresham.

29
30 Richard J. Busch, Seattle, filed a response brief. With him on the brief
31 was Kirsten J. Larson and Meridee E. Pabst. Meridee E. Pabst argued on
32 behalf of intervenor-respondent.

33
34 RYAN, Board Chair; BASSHAM, Board Member; HOLSTUN, Board
35 Member, participated in the decision.

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37 REMANDED 12/31/2014

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39 You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

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NATURE OF THE DECISION

Petitioners appeal a decision by the city approving a special use review application for an equipment shelter for wireless communication facility equipment.

MOTION TO INTERVENE

New Cingular Wireless PCS, LLC (intervenor) moves to intervene on the side of the city. The motion is granted.

FACTS

Intervenor submitted an application to the planning department to install a 297-square foot equipment shelter on private property. The proposed equipment shelter will contain equipment that will provide support for antennae to be placed on a 100-foot tall tower proposed to be located adjacent to the equipment shelter, in the city’s public right of way. The proposed tower was not included in the equipment shelter application for reasons we discuss in more detail below.¹ The property on which the equipment shelter and the tower are proposed to be located is zoned Community Commercial (CC). Two single family residences and a duplex are located to the west and north of the subject property. Petitioners Weston KIA and J.B. Weston (together, petitioner) own property across SE 223rd Avenue from the proposed shelter and tower.

¹ According to the decision, intervenor has applied for a utility license to replace an existing wood utility pole that is located in the public right of way adjacent to the proposed equipment shelter with a new 100 foot tall metal pole. At the time of the challenged decision, that application was pending before the city. Record 6.

1 The city’s planning manager approved the application, and petitioner
2 appealed the decision to the hearings officer. The hearings officer affirmed the
3 planning manager’s decision, and this appeal followed.

4 **INTRODUCTION**

5 The crux of the issue in this appeal is the extent of the applicability of
6 the special use review provisions of Gresham Community Development Code
7 (GDC) 8.0122 to intervenor’s proposal. During the proceedings below,
8 petitioner argued that the proposed tower is subject to the special use review
9 standards at GDC 8.0122(A)-(D). Petitioner argued that intervenor’s entire
10 “wireless communications facility” as that undefined term is used in GDC
11 8.0122 consists of the equipment shelter on private property and the WCF
12 tower in the public right of way, and that under the plain language of GDC
13 8.0122(A) intervenor’s proposal is “a wireless communications facility that
14 includes a WCF tower * * *.” Therefore, petitioner argued, the WCF tower is
15 subject to special use review standards.

16 The planning manager rejected that argument, concluding that the
17 proposal to site the WCF tower in the public right of way adjoining the
18 equipment shelter is exempt from special use review. The hearings officer
19 adopted the findings in the planning manager’s decision. On appeal, petitioner
20 challenges that conclusion.

21 Resolving the dispute requires consideration of other provisions of the
22 GDC, and provisions of the Gresham Revised Code that are not a part of the
23 GDC. We describe and in some cases set out all of the relevant subsections of
24 the GDC and the Gresham Revised Code before addressing petitioner’s two
25 assignments of error.

1 **A. Gresham Development Code (GDC) Article 8 Special Use**
2 **Review**

3 GDC Article 8 identifies certain uses for which the city requires “special
4 use review” because of their potential for causing significant impacts to the
5 surrounding area or neighborhood in which they are located.² Those uses are
6 subject to the general standards set out at GDC 8.0103, and specific standards
7 for each identified use set out in Article 8. One of the identified categories of
8 uses that is subject to general and specific special use review standards is
9 “Wireless Communications Facilities.”³ GDC 8.0122. GDC 8.0122 provides
10 as follows:

11 “Wireless Communication Facilities

12 “In addition to the standards in Section 8.0103, the following
13 apply to wireless communications facilities where they are
14 allowed through the Type II Special Use Review procedure.
15 Additionally, the following standards apply to co-located facilities
16 that cannot meet the standards in Section 10.0600.

² GDC 8.0101 provides in relevant part that the purpose of special use review is:

“[T]o provide a method for evaluating uses that may be compatible in an underlying land use district, provide beneficial services, and serve important public interests, but require case-by-case review because of their size, operation, uniqueness, impact, or other characteristic. These uses are subject to the regulations in this section because they may, but do not necessarily, result in significant impacts upon the surrounding area, neighborhood, environment, or public facilities. This section provides the procedures under which uses subject to the Special Use Review process may be permitted, modified, enlarged or intensified.”

³ The GDC uses the term “wireless communications facilities” and the acronym “WCF” interchangeably.

1 “A. An applicant for a wireless communications facility that
2 includes a WCF tower must co-locate on an existing WCF
3 tower or other facility, unless it can be reasonably
4 demonstrated that such is not feasible, in which case the
5 new WCF tower shall be grouped at the same site or be
6 located no closer than 2,000 linear feet from another WCF
7 tower.

8 “B. No wireless communication facility shall be located within
9 the LDR-5, LDR-7, TLDR, TR, DRL-1, DLR-2, LDR-PV,
10 MDR-PV, HDR-PV, VLDR-SW, LDR-SW and THR-SW
11 districts unless such location is absolutely necessary for the
12 maintenance of wireless communications within that service
13 area.

14 “C. For all wireless communication facility [tower] proposals,
15 the facility shall be located at least 200 feet from the nearest
16 residence and must be constructed to allow co-location of
17 additional wireless communication facilities.

18 “D. Wireless communications facilities are exempt from floor
19 area ratio and maximum setback requirements.”⁴

20 **B. GDC Article 11, Development Permit Requirements**

21 GDC 11.0101 sets out the circumstances when a Development Permit is
22 required:

23 “A. Except as excluded by Section 11.0102, no person may
24 engage in or cause a development to occur, as defined in
25 Section 3.0103, without first obtaining a Development
26 Permit through the procedures set forth in this code.

27 “B. A building permit shall constitute a Development Permit,
28 and all use of the property and construction done under a

⁴ GDC 8.0122 quoted above is taken from the copy of GDC 8.0122 on the city’s website. We place the word “[tower]” in GDC 8.0122(C) in brackets for reasons we discuss in detail in our resolution of the second assignment of error.

1 valid building permit shall comply with all requirements of
2 this code.

3 “C. The Manager shall not issue a Development Permit that
4 does not meet the minimum requirements of this code. The
5 Manager shall not issue a Development Permit if the subject
6 land was divided or otherwise developed in violation of this
7 code, regardless of whether the permit applicant or its
8 predecessor created the violation, unless the violation can
9 be rectified as part of the development.”

10 GDC 11.0102 provides exclusions from the requirement to obtain a
11 Development Permit:

12 “The following activities do not require a Development Permit
13 except as noted.

14 “ * * * * *

15 “F. Wireless Communication Facilities located in the public
16 rights-of-way under the jurisdiction or control of the City of
17 Gresham.”

18 **C. GDC Article 3, General Terms and Land Use Classifications**

19 GDC 3.0103 contains definitions for terms used in the GDC. GDC
20 3.0103 defines “Development Permit” as “[a] permit issued by the Manager for
21 a development which is in compliance with the requirements of the Community
22 Development Code and the Comprehensive Plan.” “Wireless Communication
23 Facility Tower or WCF tower” is defined in GDC 3.0103 as “[a] monopole or
24 other unattached structure erected to support wireless communication facility
25 antennas and connecting appurtenances.” “Antenna” is defined as “[a]
26 structure designed for transmitting signals to a receiver or receiving station or
27 for receiving television, radio, data, communication, or other signals from other
28 antennas, satellites, or other services.” “Antenna Support Structure” is defined
29 as “[a] tower, pole, mast, building, or other structure that is intended to support

1 an antenna.”

2 “Wireless communications facilities” is not among the defined terms.⁵

3 However, GDC 3.0200 *et seq.* classifies land uses and activities into use
4 categories on the basis of common functional or physical characteristics.

5 “Wireless communication facilities” land uses are described in GDC 3.0293,
6 which describes the characteristics of a wireless communication facility, an
7 example wireless communication facility use, accessory uses, and exceptions to
8 the use (there are none listed):

9 “3.0293 Wireless Communication Facilities

10 “A. Characteristics. An unmanned facility located on a structure
11 or tower for the transmission of radio frequency (RF)
12 signals for wireless communication.

13 “B. Example Uses. Wireless Communication Facility tower.

14 “C. Accessory Uses. Antennas, cabinets, other enclosed
15 structures containing electronic equipment, cables, wires,
16 conduits, or other transmission and reception devices.

17 “D. Exceptions.”

18 Under GDC 3.0293, then, a WCF tower is an example of a wireless
19 communication facility “use,” and equipment shelters are “accessory uses,” but
20 they are both “wireless communication facilities.”

⁵ GDC 3.0101 provides that “[t]erms not defined here shall have their ordinary accepted meaning as identified in the latest edition of Webster’s Dictionary of the English Language.” “Wireless communication facility” is not defined in Webster’s, although each word used in the phrase is defined.

1 **D. Gresham Revised Code (GRC) Article 6.30.300: Utility**
2 **Licenses and Regulations for Wireless Communication**
3 **Facilities in the Public Right of Way**

4 GRC Chapter 6, as noted earlier, is not part of the GDC. GRC Chapter 6
5 includes a subsection entitled “Utility Licenses.” GRC 6.30.⁶ GRC 6.30.300
6 contains “Regulations for Wireless Communication Facilities in the Public
7 Rights-of-Way.” GRC 6.30.0300(2) provides that “[n]o person shall construct,
8 install, operate, or maintain a wireless communication facility in the public
9 right-of-way without first obtaining a utility license as provided by GRC
10 Article 6.30. Each wireless communication facility shall obtain a separate
11 utility license.”

12 GRC 6.30.300(1) contains definitions “for purposes of GRC 6.30.300[.]”
13 including a definition for “Wireless Communication Facility:”

14 “Wireless Communication Facility. An unmanned facility located
15 on or near a single utility pole for the transmission of radio
16 frequency signals for wireless communication, including but not
17 limited to cellular telephone and broadband services, usually
18 consisting of an antenna, cabinet or other enclosed structure
19 containing electronic equipment, cables, wires, conduits, or other
20 transmission and reception devices.”⁷

⁶ GRC 6.30 provides that one of its purposes is to “comply with the provisions of the 1996 Telecommunications Act as they apply to local governments, telecommunications carriers and the services they offer; promote competition on a competitively neutral basis in the provision of telecommunications services; and encourage the provision of advanced and competitive telecommunications services on the widest possible basis to business, institutions and residents of the city[.]” GRC 6.30.020(5).

⁷ “Utility Pole” is defined in GRC 6.30.300(1) as “[a] pole or structure in the public right-of-way that carries transmission or distribution lines of a utility

1 As we explain in more detail below, GRC 6.30.300(6)(b) subjects equipment
2 shelters located on private property abutting the public right of way to the
3 requirements of the GDC, and equipment shelters located in the public right of
4 way to dimensional standards set out in GRC 6.30.300(6)(a) and (c).⁸

5 Petitioner’s first assignment of error takes the position that GDC 8.0122
6 requires the city to apply the special use review standards in GDC 8.0122 both
7 to intervenor’s proposed equipment shelter located on private property and to
8 intervenor’s proposed WCF tower that is located in the public right of way.

9 Petitioner’s second assignment of error takes the position that GDC 8.0122(C)
10 applies to intervenor’s equipment shelter and to the tower. We address each
11 assignment of error below.

12 **FIRST ASSIGNMENT OF ERROR**

13 The planning manager relied on GDC 11.0102(F)’s exclusion of wireless
14 communication facilities located in the public right of way from the
15 requirement to obtain a Development Permit and concluded that the WCF
16 tower, which is indisputably proposed to be located in the public right of way,
17 is excluded from special use review.⁹ The hearings officer adopted the findings
18 in the planning manager’s decision. Record 5A.

that is subject to either a license issued pursuant to GRC Article 6.30 or a franchise agreement.”

⁸ GRC 6.30.300(6)(a) limits a cabinet on the road side of a utility pole to 30 inches in height, 30 inches parallel to the street and 24 inches perpendicular to the street. GRC 6.30.300(6)(c) limits a cabinet that is located to allow the maximum width for pedestrians to 42 inches high, 42 inches parallel to the street and 30 inches perpendicular to the street.

⁹ The planning manager found:

1 In its first assignment of error and in a portion of its second assignment
2 of error, we understand petitioner to argue that even if GDC 11.0102(F)
3 excludes the tower from special use review, the hearings officer did not base
4 his decision on GDC 11.0102(F). But as noted above, the planning manager
5 relied on GDC 11.0102(F) to conclude that the tower, which is indisputably
6 proposed to be located in the public right of way, is excluded from the special
7 use review standards, and the hearings officer adopted those findings.

8 Petitioner also argues that the WCF tower is subject to special use review
9 under GDC 8.0122(A) because intervenor is proposing is “a wireless
10 communications facility that includes a WCF tower” within the meaning of
11 GDC 8.0122(A), whether or not the WCF tower is included in the application
12 submitted by intervenor. According to petitioner, to read GDC 11.0102(F) as
13 exempting the WCF tower from special use review would violate the statutory

“Under [GDC 11.0102(F)] – Exclusions from Development Permit – the Gresham Community Development Code specifically exempts ‘Wireless Communication Facilities located in the public rights of way under the jurisdiction or control of the City of Gresham.’ As the ‘cell tower’ is located in the right of way, the review of the ‘cell tower’ is exempt from a Development Permit, and as SE 223rd Ave. is a public right of way under the jurisdiction or control of the City of Gresham, the proposed ‘cell tower’ is exempt from the standards of Section 8.0122 (and all other standards located in the Gresham Community Development Code).

“For the review of the ‘cell tower’ within the right of way, it is required to receive a separate permit under the provisions of the [GRC]. This permit is not a land use permit, and the arguments as to whether it complies with the requirements of the GRC provisions are not relevant to this land use permit.” Record 401.

1 prohibition in ORS 174.010 on adding text to GDC 8.0122, because GDC
2 8.0122 does not cross reference or otherwise refer to GDC 11.0102(F)'s
3 exclusion.¹⁰

4 Intervenor responds that GDC 8.0122(A) and GDC 11.0102(F) must be
5 read together and that GDC 11.0102(F) provides context for interpreting GDC
6 8.0122(A). Intervenor argues that requiring a WCF tower that is located in the
7 public right of way to undergo special use review if it functions with an
8 equipment shelter that is not located in the public right of way, and therefore is
9 subject to special use review, would render the exclusion in GDC 11.0102(F)
10 meaningless. According to intervenor, the city has chosen to regulate wireless
11 communication facilities (and their component parts) that are located in the
12 public right of way under GRC 6.30.300, and not under the GDC.

13 We review the hearings officer's interpretation of the relevant provisions
14 of the GDC to determine whether it is correct. *Gage v. City of Portland*, 133
15 Or App 346, 349-50, 891 P2d 1331 (1995). The lack of a GDC definition for
16 "wireless communications facility" creates an ambiguity regarding the extent of
17 the exclusion in GDC 11.0102(F).¹¹ That is so because it is unclear if the GDC

¹⁰ ORS 174.010 provides:

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

¹¹ A previous version of the GDC apparently included a definition for "wireless communication facility" that was deleted in a recent amendment to the GDC, because the city took the position that the prior definition is

1 11.0102(F) exclusion requires all parts of the proposed facility to be located in
2 the public right of way in order to apply the exclusion, or if the exclusion
3 exempts the parts of a wireless communication facility located in the public
4 right of way from Development Permit requirements. However, GDC 3.0293’s
5 land use category of “Wireless Communication Facilities” provides context that
6 lends some support the hearings officer’s interpretation. GDC 3.0293
7 describes wireless communication facilities in terms of its component parts,
8 including the parts that are a tower or structure and the parts that are an antenna
9 or an equipment shelter.

10 More importantly, the utility licensing provisions found in GRC
11 6.30.300 provide context to support the city’s reading of GDC 8.0122 and
12 GDC 11.0102(F), by addressing the situation that is presented in this appeal:
13 the location of an equipment shelter on private property that is adjacent to a
14 “Utility Pole” as defined in the GRC that is in the public right of way. GRC
15 6.30.300(6)(a) and (c) provide dimensional standards for an equipment shelter
16 located in the public right of way, either “on the road side of the utility pole
17 and at right angles to the street” or “at right angles to the street, on the ground
18 in the public right of way[.]” But an equipment shelter can also be located on
19 private property “abutting the public right of way,” “subject to the applicable
20 requirements of the [GDC].” GRC 6.30.300(6)(b). GRC 6.30.300(6) supports
21 the hearings officer’s interpretation of GDC 8.0122 and GDC 11.0102(F), that
22 the equipment shelter component of a proposed facility is subject to GDC
23 requirements, but a tower component that is located within a public right of
24 way that qualifies as a utility pole is not subject to GDC requirements.

“incorporated into the Wireless Communication Facility land use classification,
3.0293.” Record 6A.

1 Finally, we understand petitioner to argue that GDC 11.0102(F) excludes
2 the tower only from any requirement to obtain a Development Permit, but does
3 not exclude the tower from GDC 8.0122's requirement to obtain special use
4 review. In that argument we understand petitioner to argue that special use
5 review and a Development Permit are different types of reviews, and an
6 exemption from the requirement to obtain a Development Permit does not
7 necessarily also relieve an applicant from the obligation to obtain special use
8 review approval.

9 Intervenor responds, and we agree, that special use review is a category
10 of development review, so that issuance of a special use review approval is also
11 issuance of a Development Permit. Accordingly, GDC 11.0102(F)'s exemption
12 from the requirement to obtain a Development Permit for certain uses is an
13 inartful way of exempting those uses from the special use review that may
14 result in issuance of a Development Permit.

15 For the reasons set forth above, we agree with intervenor that the
16 hearings officer was correct in concluding that GDC 11.0102(F) excludes the
17 WCF tower from the special use review standards at GDC 8.0122.

18 The first assignment of error and a portion of the second assignment of
19 error are denied.

20 **SECOND ASSIGNMENT OF ERROR**

21 GDC 8.0122(C) is one of the special use review approval standards that
22 apply to wireless communication facilities. In 2013, the city adopted
23 Ordinance 1725. In relevant part, Ordinance 1725 amended the GDC by
24 replacing *former* GDC 8.0114(F) with current GDC 8.0122, quoted above.
25 *Former* GDC 8.0114 provided "Design Review and Approval Criteria for
26 Community Services," and former GDC 8.0114(F) provided in relevant part:

1 “ * * *For all WCF *tower* proposals, the facility shall be located at
2 least 200 feet from the nearest residence and must be constructed
3 to allow co-location of additional wireless communication
4 facilities.” Record 323 (emphasis added).

5 The version of GDC 8.0122(C) that replaced *former* GDC 8.0114(F) and was
6 adopted by Ordinance 1725 provides:

7 “For all wireless communication facility proposals, the facility
8 shall be located at least 200 feet from the nearest residence and
9 must be constructed to allow co-location of additional wireless
10 communication facilities.”

11 Thus, notwithstanding the version now on the city’s website, we understand it
12 to be undisputed that the adopted language of GDC 8.0122(C) imposes setback
13 and co-location requirements on “all wireless communication facility
14 proposals.” Petitioner argued below that GDC 8.0122(C) applies to the
15 proposed equipment shelter, even if the shelter is reviewed separately from the
16 tower proposed in the adjoining public right-of-way.

17 The planning manager rejected that argument, taking the position that the
18 legislative history of Ordinance 1725 demonstrates that the language that was
19 proposed to replace *former* GDC 8.0114(F) with GDC 8.0122(C)
20 unintentionally omitted the word “tower” after the word “facility” in the first
21 line of GDC 8.0122(C). It is that language, which omitted the word “tower,”
22 that was initially proposed to the city council and that was eventually adopted
23 when the city council adopted Ordinance 1725. The planning manager relied
24 on the commentary to the GDC revisions that explained that no change was
25 being proposed to the language of former GDC 8.0114(F), and concluded that
26 GDC 8.0122(C)’s setback and co-location requirements apply only to WCF
27 towers, and do not apply to the proposed equipment shelter.

1 The hearings officer concluded, based on the legislative history provided
2 by the city, that GDC 8.0122(C) contains a “scrivener’s error” and should
3 include the word “tower” after the word “facility” in the first line. Record 7.
4 Accordingly, the hearings officer concluded that because the proposal is not a
5 proposal for a WCF tower, GDC 8.0122(C)’s setback and co-location
6 requirements do not apply. Record 6-7.

7 In a portion of its second assignment of error, petitioner argues that the
8 hearings officer’s interpretation of GDC 8.0122(C)’s 200-foot setback and co-
9 location requirements as only applying to a WCF tower is incorrect and
10 inconsistent with the express language of the provision, and violates ORS
11 174.010’s prohibition on inserting words into a statute. *See* n 10. Intervenor
12 responds that the hearings officer properly relied on legislative history to
13 resolve an ambiguity over GDC 8.0122(C)’s intended meaning and application.

14 We agree with petitioner that the hearings officer erred in reading GDC
15 8.0122(C) to include the word “tower” after the word “facility” in the first line.
16 The adopted text of GDC 8.0122(C) does not include that language. The
17 immediate context of GDC 8.0122(C) indicates that the city knows how to
18 distinguish between wireless communications facilities that include a tower,
19 and those that do not. GDC 8.0122(A) provides standards for “a wireless
20 communications facility that includes a WCF tower.” By contrast, GDC
21 8.0122(B), (C) and (D) refer simply to “wireless communication facilit[ies]”
22 with no similar qualification. The legislative history cited by respondents does
23 suggest that the city council intended that GDC 8.0122(C) apply only to
24 wireless communication facility proposals that include a tower. However, even
25 if the city unintentionally omitted the word “tower” when the city council
26 adopted Ordinance 1725 that amended GDC 8.0122(C), it is not within the

1 hearings officer’s or LUBA’s authority to correct it by “insert[ing] what has
2 been omitted[.]” ORS 174.010; *see also Halperin v. Pitts*, 352 Or 482, 287
3 P3d 1069 (2012) (“[l]egislative history may be used to identify or resolve
4 ambiguity in legislation, not to rewrite it”), *citing US West Communications v.*
5 *City of Eugene*, 336 Or 181, 188, 81 P3d 702 (2003); *Dilger v. School District*
6 *24 CJ*, 222 Or 108, 112, 352 P.2d 564 (1960).

7 The second assignment of error is sustained, in part.

8 The city’s decision is remanded.