

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 JERRY CURL, DEBRAH CURL,
5 ANDREW SHOOKS, RICHARD MURPHY,
6 ELIZABETH MURPHY, TOM DANIELS,
7 MARTHA DANIELS, JON SHARPE,
8 JANIS SHARPE, RON FISHER,
9 HELEN FISHER, MARC LANDRY and
10 KATHY LANDRY,

11 *Petitioners,*

12
13 vs.

14
15 CITY OF BEND,
16 *Respondent,*

17
18 and

19
20 THE CHACKEL FAMILY LLC,
21 *Intervenors-Respondent.*

22
23 LUBA No. 2004-163

24
25 FINAL OPINION
26 AND ORDER

27
28 Appeal from City of Bend.

29
30 Daniel Kearns, Portland, filed the petition for review and argued on behalf of
31 petitioners. With him on the brief was Reeve Kearns, PC.

32
33 No appearance by the City of Bend.

34
35 Elizabeth A. Dickson, Bend, filed the response brief and argued on behalf of
36 intervenor-respondent. With her on the brief was Hurley, Lynch and Re, PC.

37
38 HOLSTUN, Board Chair; BASSHAM, Board Member; DAVIES, Board Member,
39 participated in the decision.

40
41 REMANDED

2/10/2005

42
43 You are entitled to judicial review of this Order. Judicial review is governed by the
44 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a city decision that grants “[t]emporary land use approval,” which in turn authorizes a building permit to construct a radio and television transmission tower while a declaratory ruling is issued concerning the location of a guy anchor. Record 7.

MOTION TO INTERVENE

The Chackel Family LLC, the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

A. The Underlying Conditional Use and Site Plan Decisions and the Decision to Proceed with Construction During a LUBA Appeal of those Decisions

The city hearings officer issued a decision on December 10, 2003 granting conditional use and site plan approval for a proposal to expand existing television, radio and wireless transmission and reception facilities on Awbrey Butte in the City of Bend. That decision was appealed to the city council by opponents, and the hearings officer’s decision was ultimately upheld by the city council on March 3, 2004.¹ The city council’s decision was appealed to LUBA on March 18, 2004.² In a November 8, 2004 opinion, we sustained one assignment of error and remanded the hearings officer’s decision. *Save our Skyline v. City of Bend*, ___ Or LUBA ___ (LUBA Nos. 2004-004, 2004-005 and 2004-048, November 8, 2004) (*SOS v. City of Bend*).³

¹ In this opinion we sometimes refer to the hearings officer’s December 10, 2003 conditional use and site plan approval decision as the city’s March 3, 2004 decision, since that is the date the city council affirmed the hearings officer’s decision and it became final for purposes of appeal.

² That appeal was consolidated with two previously filed appeals challenging an earlier city council decision regarding local appeals of the hearings officer’s decision.

³ We provided the following explanation for our decision to remand the hearings officer’s decision:

“[W]e agree with the SOS petitioners that the city’s decision must be remanded so that the hearings officer can consider their contention that the antennas that will be housed on the

1 While the *SOS v. City of Bend* appeal was pending before LUBA, intervenor in this
2 appeal (Chackel) decided to proceed with construction of one of the towers that was the
3 subject of the *SOS v. City of Bend* appeal. Specifically, Chackel sought to construct the tower
4 identified in the *SOS v. City of Bend* appeal as “a new 300-foot tower (Combined
5 Communications).” *SOS v. City of Bend* slip op at 5.

6 **B. The August 27, 2004 Memorandum of Understanding and the Parties’**
7 **Different Interpretations of the Hearings Officer’s Decision**

8 The record in this appeal includes a “Memorandum of Understanding” (MOU) dated
9 August 27, 2004. Record 57-59. That MOU is signed by Chackel, the property owner
10 Awbrey Towers LLC and the city’s Community Development Director. The MOU was
11 entered into pursuant to City of Bend Land Use Review and Procedures Ordinance,
12 specifically Bend City Code (BCC) 10-16.8(1)(D). Under BCC 10-16.8(1)(D) a building
13 permit may be issued to allow construction of development that has been authorized by a land
14 use permit, while that permit is on appeal at LUBA, provided the applicant assumes the risks
15 that the underlying permit decision may be reversed or remand by LUBA and may ultimately
16 be denied by the city.⁴ In the August 27, 2004 MOU, Chackel and the property owner

proposed towers will increase the adverse visual and aesthetic impacts of the proposal such that the proposed Western Radio towers and antennas violate BCC 10-10-25(12) and the remainder of the proposal violates BCC 10-10-29(3)(a)&(b). We express no view on whether that is actually the case, but the hearings officer is not preempted by federal law from considering that question or from denying the application if she agrees with the SOS petitioners. To the extent she found that she was preempted, she erred.” *SOS v. City of Bend* at slip op 28.

⁴ BCC 10-16.8(1)(D) provides:

“Unless a temporary use permit has been issued, no building permit shall issue until a decision is final. Appeal of a final decision to LUBA does not affect the finality of a decision for purposes of issuing building permits. If an applicant elects at his or her own discretion to proceed under a land use action with a pending LUBA appeal, he or she shall proceed only if:

“a. The applicant accepts each and every risk of loss and damage that may result if the application is denied, and further agrees in writing to hold City, its officers, agents and employees harmless from such loss and damage.

1 accepted those risks and agreed to post security to guarantee that the site would be returned to
2 its original condition in the event the underlying conditional use and site plan approvals are
3 ultimately denied.

4 Apparently, at about the same time that August 27, 2004 MOU was entered,
5 opponents raised concerns about Chackel's construction plans for the 300-foot tower.⁵
6 Specifically, opponents take the position that the hearings officer's decision: (1) limits all of
7 the approved development to a six-acre portion of the larger 19.3 acre property owned by
8 Awbrey Towers LLC; (2) envisions that the 300-foot tower would be constructed as a free-
9 standing monopole, without anchored guys and (3) envisions that the 300-foot tower would
10 be constructed in a small designated portion of the six-acre area that is shown in green on a
11 map that was submitted by the applicant and included at Record 79.⁶

12 As Chackel proposed to construct the 300-foot tower, it was to be located
13 approximately 60 feet southwest of the green area on the map at Record 59 that is labeled
14 "Proposed Site for Combined Communications." It also was to be supported by anchored
15 cables, and at least one of those anchors apparently is outside the six-acre area referenced by
16 the hearings officer and very near the property line of an adjoining residence. Apparently due
17 to concerns about whether the tower and anchor locations are consistent with the underlying

"b. The applicant agrees in writing to restore the site to its original condition if the
 application for the land use approval is denied.

"c. The applicant posts a bond or other form of security acceptable to the Review
 Authority in an amount sufficient to cover the costs of restoration of the site to its
 pre-approval condition."

⁵ The record includes a letter from petitioners' attorney to the city. The first page of the letter is dated March 9, 2004, but the second page is dated August 19, 2004. We suspect the second date is the date the letter was actually sent. In any event, the letter takes the position that the disputed 300-foot tower must be a monopole and that all tower development is restricted to the six-acre area mentioned by the hearings officer.

⁶ We understand Chackel to dispute the last two opponent positions. We also understand Chackel to interpret the hearings officer's references to an approximate six-acre area and the condition in her decision limiting development to that six-acre area not to apply to tower guys and the anchors required to secure those guys to the ground.

1 conditional use and site plan approvals, the city issued the temporary land use approval that is
2 the subject of this appeal.

3 **C. The Temporary Land Use Approval**

4 Another section of the Bend Land Use Review and Procedures Ordinance, BCC 10-
5 16.5(6), goes further than the earlier cited BCC 10-16.8(1)(D) authority for issuing a building
6 permit for development while the land use permit that approves that development is on
7 appeal to LUBA. Provided the findings that are required by BCC 10-16.5(6) are made, BCC
8 10-16.5(6) authorizes the city to issue a building permit for development, administratively
9 and without any public notice or hearing, *before* the city has held hearings on or granted the
10 required discretionary land use permit for that development. The text of BCC 10-16.5(6) is
11 set out below:

12 **“Temporary approval.**

13 “A. The purpose of temporary land use approval is to allow an applicant in
14 certain hardship or emergency situations to proceed without notice to
15 those ordinarily entitled to notice with a land use action proposed in an
16 application made to the Planning Division before the Division
17 completes its review of the proposed use. In all cases, an applicant
18 receiving temporary approval must obtain final approval on the
19 submitted application pursuant to the procedures specified in this
20 ordinance.

21 “B. Subject to subsection (E) of this section, the City Council or the
22 Planning Director may authorize a temporary land use approval,
23 provided:

24 “1. An application for the land use approval has been accepted as
25 complete.

26 “2. A fee for review of the temporary approval has been paid.

27 “3. The applicant has demonstrated good and sufficient cause for
28 such a temporary approval.

29 “4. It appears that the application will be given final approval in
30 substantially the form submitted by the applicant.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

“* * * *⁷”

- “C. For the purposes of this section, ‘good cause’ shall include only hardship or emergency situations arising due to factors that, through the exercise of ordinary diligence, the applicant could not have foreseen. ‘Good cause’ does not include an applicant’s request for a temporary permit for reasons of convenience only.
- “D. A temporary use approval shall not be granted for variances, zone changes or plan amendments.
- “E. The scope of the temporary approval shall be limited to allow the applicant to proceed only with that portion of the proposed use justifying the applicant’s claim of hardship or emergency.
- “F. A temporary use approval shall expire as follows:
 - “1. Six months from the date of approval, if no decision has been reached on the underlying application.
 - “2. On the date the appeal period runs on the decision on the underlying application.
 - “3. On the date that all appeals of the decision on the underlying application are decided and final.
- “G. A decision to approve a temporary use application is not appealable.”

On October 1, 2004, the Community Development Director granted “Temporary Land Use Approval” for the disputed 300-foot guyed tower. In that decision, the Community Development Director states that “the southwest guy anchor for the proposed tower * * * may be located outside of the 6-acre tower site within which the Hearings Officer limited all new development.” Record 8. The Community Development Director’s decision goes on to opine that “[t]here is an ambiguity in the [Hearings Officer’s decision] as to the extent and location of the 6-acre tower site that requires resolution through a concurrently filed request

⁷ The omitted provisions, BCC 10-16.5(6)(B)(5)-(7), impose the identical assumption of risk requirements that are imposed under BCC 10-16.8(10)(a) through (c) for successful permit applicants who wish to proceed with construction while their permit is on appeal to LUBA. See n 4.

1 for a Declaratory Ruling.” According to the Community Development Director’s decision, a
2 public hearing was tentatively scheduled for October 27, 2004.

3 The Community Development Director’s October 1, 2004 decision includes the
4 following findings regarding the BCC 10-16.5(6) criteria for temporary land use approval:

5 “The applicant has submitted an application for a Declaratory Ruling * * *
6 with the City of Bend Planning Division seeking clarification of certain
7 provisions of the Hearings Officer’s decision on site plan and conditional use
8 permit * * *. That application has been accepted by the Planning Division as
9 complete. The applicant has submitted the appropriate application fee for the
10 temporary permit.

11 “The City of Bend Planning Division finds that there is good and sufficient
12 cause, based on circumstances beyond the Applicant’s control, to issue a
13 Temporary Permit to allow construction of the new broadcast tower for
14 Combined Communications.

15 “The applicant has submitted a copy of an eviction letter from the owner of Z-
16 21, the owner of the tower where radio station KMTK is currently located,
17 requiring those facilities to be removed within 15 days from the date of the
18 letter, August 13, 2004. The applicant has since negotiated a brief lease
19 extension with Z-21 to allow the applicant to construct a new tower to
20 accommodate the KMTK antennae. That lease expires on October 18, 2004.

21 “The applicant has also submitted a copy [of] a Federal Communications
22 Commission construction permit for a new low power television station that
23 would also be located on this new tower. That permit expires without
24 opportunity for extension if the station is not in operation by October 17,
25 2004. Without approval of this temporary use permit, the community would
26 lose a new television station and the approximately 40 employees of KMTK
27 would lose their jobs.

28 “The temporary permit will allow the applicant to commence construction of
29 the new 300-foot tall Combined Communications Tower approved [by the
30 Hearings Officer]. It appears from preliminary review that the application will
31 be approved in substantially the form submitted, as the tower base is located in
32 the area specified [by the Hearings Officer]. At question is the location of the
33 southwest guy anchor, the location of which was not specified [by the
34 Hearings Officer]. Hearings Officer Karen Green, the review authority who
35 issued the original approval, has agreed that the decision was ambiguous with
36 regard to this guy anchor location, and this issue will be resolved through the
37 pending Declaratory Ruling process. Staff believes it is reasonable to
38 conclude that the proposed guy anchor location will be approved in its
39 proposed location.” Record 10-11.

1 The Community Development Director goes on to explain that Chackel has accepted
2 the risk of loss and has posted the security required by BCC 10-16.5(6)(B)(5)-(6). The
3 Community Development Director then granted the requested Temporary Land Use
4 Approval.

5 Following the October 31, 2004 Temporary Land Use Approval, the tower was
6 constructed. The radio and television antenna mentioned in the Community Development
7 Director's temporary land use approval decision have been sited on the tower, as have three
8 others. While the October 1, 2004 decision states that the location of the tower base is
9 consistent with the hearings officer's decision, the Community Development Director states
10 in an e-mail message that was sent the same day "the developer is going to submit an
11 application to modify the previously approved site plan to adjust the location of a tower base
12 – this will also be scheduled for public hearing and will be held concurrently with the
13 Declaratory Ruling item as they are related." Record 5. Chackel subsequently submitted that
14 application to modify the site plan.⁸

15 The parties inform us that as a result of LUBA's November 8, 2004 decision
16 remanding the hearings officer's decision in *SOS v. City of Bend*, the originally scheduled
17 declaratory ruling hearing was cancelled. Petitioner advises that a multi-purpose hearing on
18 LUBA's remand in *SOS v. City of Bend*, the declaratory ruling request concerning the
19 permissibility of citing guy anchors outside the 6-acre area and the application to modify the
20 site plan to authorize the tower location was scheduled for January 27, 2005. As of the date
21 of this opinion, we do not know whether that hearing was held; and, if it was held, we do not
22 know the results of that hearing.

⁸ At oral argument, Chackel stated that this modification application is precautionary and does not in any way affect its position that the tower and guy anchor have both been sited and constructed consistently with the hearings officer's conditional use and site plan approval decision.

1 **INTRODUCTION**

2 Although the parties disagree on a number of points, our resolution of two of those
3 points requires that we remand the city’s decision, and we limit our discussion to those two
4 points.⁹

5 We would normally turn first to Chackel’s challenge to our jurisdiction to review the
6 temporary land use approval decision. Chackel contends that the October temporary land use
7 approval is not a land use decision because it is not a “final” decision. Petitioners argue that
8 Chackel confuses the admittedly *temporary* nature of the October 1, 2004 temporary land use
9 approval with its *finality*. ORS 197.015(10)(a) expressly requires that a land use decision be
10 a “final” decision. *CBH Company v. City of Tualatin*, 16 Or LUBA 399, 405 n 7 (1988).
11 That statutory requirement for finality works together with the ORS 197.825(2)(a)
12 requirement that local administrative remedies be exhausted to ensure that the decision on
13 review is the “final outcome of the proceedings below.” *Id.* The relevant question in this
14 appeal is whether the October 1, 2004 temporary land use approval decision is merely an
15 interlocutory (non-final) decision in the city’s proceedings that will ultimately lead to a
16 “final” declaratory ruling by the hearings officer. If the October 1, 2004 decision is correctly
17 viewed in that way, this appeal must be dismissed.

18 While it may be that the October 1, 2004 decision can plausibly be viewed as an
19 interlocutory decision in the declaratory ruling proceeding, we do not view it in that way.
20 Because our conclusion in this regard is related to our resolution of petitioners’ assignment of
21 error, we turn first to that assignment of error.

⁹ As previously noted, one of the important underlying disagreements appears to be whether the city could have issued building permits for the disputed 300-foot guyed tower in the location proposed without issuing temporary land use approval under BCC 10-16.5(6). The city did not approve the building permits based on that legal theory, and we therefore do not consider whether it could have done so.

1 **ASSIGNMENT OF ERROR**

2 Under ORS 227.160(2), a city decision that grants discretionary approval of a
3 proposed development of land is defined as a “permit.”¹⁰ ORS 227.175(3) generally requires
4 that the city hold at least one public hearing before approving an ORS 227.160(2) “permit.”¹¹
5 Petitioners contend that the challenged temporary land use approval constitutes discretionary
6 approval of a proposed development of land and, therefore, is a “permit” within the meaning
7 of ORS 227.160(2). In support of that argument petitioners point to BCC 10-16.5(6), quoted
8 earlier in this opinion, which they contend includes discretionary land use approval criteria.
9 Petitioners contend the city’s temporary land use approval must therefore be remanded so
10 that the city can provide the statutorily required public hearing or opportunity for local appeal
11 and *de novo* hearing.

12 There can be no serious dispute that in applying the “good cause” standard at BCC
13 10-16.5(6)(B)(3) and BCC 10-16.5(6)(C), the Community Development Director was
14 required to exercise significant discretion. *See Kirpal Light Satsang v. Douglas County*, 18
15 Or LUBA 651, 662-63 (1990) (exercise of discretion is required to determine whether a
16 proposal qualifies as a private school where no standards are provided to guide that
17 determination). Those criteria require that the Community Development Director find that
18 there is a “hardship or emergency” and that the factors that give rise to the hardship or

¹⁰ As relevant, ORS 227.160(2) provides:

“‘Permit’ means discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation.”

ORS 227.215(1) provides the following definition of “development:”

“As used in this section, “development” means a building or mining operation, making a material change in the use or appearance of a structure or land, dividing land into two or more parcels, including partitions and subdivisions as provided in ORS 92.010 to 92.285, and creating or terminating a right of access.”

¹¹ Under ORS 227.175(3) and (10) a city may approve a permit without a public hearing, so long as the city gives the notice of decision that is required by the statute, provides an opportunity for a local appeal and provides a *de novo* hearing if a local appeal is filed.

1 emergency could not have reasonably been foreseen. The only serious question is whether
2 the October 1, 2004 Community Development Director decision is properly viewed as
3 “approval of a proposed development of land” or whether that decision is merely an
4 interlocutory decision in the larger declaratory ruling proceedings that will lead to the
5 ultimate decision concerning whether the disputed tower may remain where it has been
6 constructed.

7 We earlier discussed the city’s procedure that allows a successful permit applicant to
8 secure building permits and proceed with construction while the underlying permit that grants
9 discretionary approval is on appeal to LUBA. *See* n 4 and related text. That procedure is not
10 unusual. Although there are obvious risks associated with pursuing such a course of action,
11 we are aware of no statute that precludes an applicant from pursuing that course of action if
12 the applicant is willing to accept the risks. To the contrary, ORS 197.845, which authorizes
13 LUBA to issue a stay of a local permit decision while an appeal is pending at LUBA, would
14 be unnecessary if such a course of action were not permissible. *See also* ORS 197.625(3)(c)
15 (permit issued under unacknowledged plan or regulation may not be relied on to retain
16 improvements if the plan or regulation ultimately “does not gain acknowledgement”). On the
17 surface, it might be possible to equate the permit applicant who has received approval of a
18 discretionary land use permit and wishes to proceed immediately with that development
19 while a LUBA appeal of the discretionary land use permit is pending, with a permit applicant
20 who wishes to proceed with development as soon as the application is filed and before the
21 discretionary land use permit has been approved. However, there is an important difference.
22 In the first circumstance, the permit applicant has already received discretionary approval of
23 the proposed development of land. That discretionary approval may be upset on appeal, but
24 in that circumstance the building permit is issued pursuant to that effective, albeit at risk,
25 discretionary approval of a proposed development of land. In the second circumstance, the
26 permit applicant has not yet received discretionary approval of the proposed development of

1 land. That the permit applicant is willing to incur the risk that the permit may ultimately be
2 denied and the risk that the development may ultimately have to be removed does not change
3 that fact.¹²

4 In the present case, for whatever reason, the Community Development Director did
5 not feel that a building permit for the tower that Chackel proposed to build could be issued
6 solely on the strength of the March 3, 2004 conditional use and site plan approval decision.
7 In other words, until a discretionary declaratory ruling is issued by the hearings officer, the
8 Community Development Director apparently did not believe that the March 3, 2004
9 decision, by itself, provided the necessary “discretionary approval of a proposed development
10 of land” that was necessary to approve the requested building permits.¹³ As far as we can
11 tell, as things stand today, the temporary land use approval is the only “discretionary approval
12 of a proposed development of land” that authorizes the proposed 300-foot tower as it has now
13 been constructed. Accordingly, the city was required by ORS 227.175(3) and (10) to either
14 hold a public hearing before it issued that temporary land use approval or provide notice of
15 its decision and the opportunity for a *de novo* appeal. The city did neither, and its decision
16 must therefore be remanded.

17 We return finally to Chackel’s contention that the temporary land use approval is
18 properly viewed as an interlocutory decision that was rendered as part of the declaratory
19 ruling proceeding. The city issued a building permit for the disputed tower and that tower

¹² That willingness on the part of the permit applicant also does not mean it will always be possible to restore the property to its predevelopment condition. For example the property contain protected improvements or natural resources that might be difficult or impossible to restore if the required discretionary approval is ultimately denied.

¹³ As noted earlier, additional questions concerning the scope of the March 4, 2004 decision have now led to an application for a modification of that decision. The hearings officer’s decision on that modification request presumably will resolve whether the March 3, 2004 decision gives Chackel land use approval for a tower of the type that has been constructed and in the location where it has been constructed. If it did not, the hearing officer will either grant Chackel’s requested modification, in which case the tower development will have the city’s approval, or deny the request, in which case the tower development will not have the city’s approval.

1 has been constructed or developed on the subject property. The building permit that allowed
2 construction of the disputed tower is authorized by the October 1, 2004 temporary land use
3 approval. The declaratory ruling did not authorize that building permit because that
4 declaratory ruling had not been issued when the building permit was issued. The declaratory
5 ruling may never authorize that building permit if the hearings officer agrees with petitioners'
6 understanding of the conditional use and site plan approval decision. In that event, the
7 temporary land use approval will be the *only* city approval of the now constructed 300-foot
8 tower that has been developed on the subject property. The fact that the tower may ultimately
9 have to be removed or moved at the conclusion of any appeals of the declaratory ruling and
10 any other discretionary permits will not change the fact that for the period of those appeals
11 the subject property will have been developed with a 300-foot tower of the type that was
12 constructed and in the location where it was constructed.

13 We do not agree that the temporary land use approval is not a final decision simply
14 because it is a decision that will expire in six months or on the date a decision on a
15 discretionary permit is rendered and the appeal period runs or any appeal is ultimately
16 resolved. It is not unusual for a land use permit to include an expiration date. While we are
17 not prepared to say the temporal nature of a decision could never have any bearing on
18 whether the decision is properly viewed as a "final" decision, we agree with petitioners that
19 the statutory requirement for "finality" is governed primarily the form of the decision and
20 whether all local appeals have been exhausted regarding that decision. There is no dispute
21 that the temporary land use approval was reduced to writing and signed by the requisite
22 decision maker. OAR 661-010-0010(3).¹⁴ Similarly there is no dispute that BCC 10-

¹⁴ OAR 661-010-0010(3) provides:

“Final decision’: A decision becomes final when it is reduced to writing and bears the necessary signatures of the decision maker(s), unless a local rule or ordinance specifies that the decision becomes final at a later date, in which case the decision is considered final as provided in the local rule or ordinance.”

1 16.5(6)(G) expressly provides that “[a] decision to approve a temporary use application is not
2 appealable.” Because the October 1, 2004 temporary land use approval was reduced to
3 writing and signed by the required decision maker and no further local appeal was available,
4 it is a “final” city decision. Because it required that the city apply discretionary land use
5 criteria in the city’s land use regulations, the temporary land use approval is a land use
6 decision that is subject to our review.

7 For the reasons explained above, we reject Chackel’s challenge to our jurisdiction and
8 the city’s decision is remanded so that the city may (1) provide the required public hearing
9 prior to adopting the temporary land use approval or (2) provide notice of that temporary land
10 use approval and an opportunity for a *de novo* local appeal.