

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 DEBRAH J. CURL, JERRY L. CURL,
5 THOMAS L. DANIELS, RONALD FISHER,
6 HELEN FISHER, ANDREW SHOOKS,
7 JAMES E. SWARM and JAMES E. DAVIS,
8 *Petitioners,*

9
10 and

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12 WESTERN RADIO, INC. and
13 RICHARD OBERDORFER,
14 *Intervenors-Petitioners,*

15
16 vs.

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18 CITY OF BEND,
19 *Respondent,*

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21 and

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23 GCC BEND, LLC,
24 *Intervenor-Respondent.*

25
26 LUBA No. 2007-166

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28 FINAL OPINION
29 AND ORDER

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31 Appeal from City of Bend.

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33 Debrah J. Curl, Jerry L. Curl, Thomas L. Daniels, Andrew Shooks, Ronald Fisher,
34 Helen Fisher, James E. Swarm and James E. Davis, Bend, filed a petition for review. Debrah
35 J. Curl argued on her own behalf.

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37 Marianne Dugan, Eugene, filed a petition for review and argued on behalf of
38 intervenors-petitioners.

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40 No appearance by City of Bend.

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42 Tamara E. MacLeod, Bend, filed the response brief and argued on behalf of
43 intervenor-respondent. With her on the brief was Karnopp Petersen, LLP.

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45 BASSHAM, Board Member; RYAN, Board Chair, participated in the decision.

1 HOLSTUN, Board Member, did not participate in the decision.

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 REMANDED

 08/28/2008

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

NATURE OF THE DECISION

Petitioners appeal a hearings officer’s decision granting conditional use and site plan approval for a broadcast tower.

INTRODUCTION

This appeal involves a proposal by intervenor-respondent GCC Bend, LLC (GCC) for a new 300-foot tall tower on top of Awbrey Butte. The present appeal is one of a series of related appeals involving a number of new and expanded broadcast and communications towers on the Butte. In a companion opinion issued this date, *Curl v. City of Bend*, ___ Or LUBA ___ (LUBA No. 2007-165), we remand a similar decision approving a similar new 300-foot tower on Awbrey Butte, proposed by NPG of Oregon, Inc. (NPG). With some exceptions, the assignments of error raised in the present appeal and in LUBA No. 2007-165 are identical. In most instances, GCC’s responses to the assignments of error in this appeal are similar to those that NPG offered in LUBA No. 2007-165, which is not surprising, given the virtually identical assignments of error and the fact that the same counsel represents both GCC and NPG.

Therefore, in this opinion, where an assignment of error is identical to one in LUBA No. 2007-165 and the response brief filed in this appeal does not warrant further discussion, we will simply cite to our resolution in LUBA No. 2007-165. In many ways our opinion in LUBA No. 2007-165 will control the resolution of issues in the present appeal.

FACTS

The Awbrey Butte site is a 19.5 acre parcel zoned Urban Residential Standard Density (RS) with a Public Facilities overlay designation. One of the existing towers is a 200-foot tower owned by GCC on land leased from Awbrey Towers, LLC. Another existing tower is a 100-foot high tower owned by intervenors-petitioners Western Radio, Inc. and Richard Oberdorfer (Western Radio).

1 In a 2003 decision, the city hearings officer approved an application by Awbrey
2 Towers LLC for conditional use and site plan approval for construction of two new towers
3 and increases in height to several existing towers, including a proposal to increase the height
4 of GCC's existing tower from 200 feet to 300 feet. The towers approved in the 2003
5 decision involved a six-acre portion of the 19.5-acre property, which we refer to here as the
6 Awbrey Towers site. That 2003 decision was appealed to LUBA, which rejected most
7 challenges but remanded for additional findings regarding the visual impacts of antennas to
8 be placed on the approved towers. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004)
9 (*Awbrey Towers I*). On remand, the hearings officer issued a new decision that addressed the
10 visual impacts of antennas placed on the approved towers, and articulated so-called "safe
11 harbor" standards to determine whether siting additional antennas on those towers in the
12 future will require conditional use review. The hearings officer's decision was appealed to
13 LUBA, which again rejected most challenges but remanded under one assignment of error
14 for clarification on one point. *Save Our Skyline v. City of Bend*, __ Or LUBA __ (LUBA
15 No. 2005-076, September 7, 2007) (*Awbrey Towers II*). However, the city has conducted no
16 further proceedings on remand of that decision.

17 At some point, the principals and lessees of Awbrey Towers LLC apparently decided
18 to pursue separate approvals for each tower, rather than continue to pursue the combined
19 application at issue in *Awbrey Towers I* and *II*. Accordingly, Chackel Family Trust, LLC
20 applied for approval of a new 300-foot tall tower, which the city approved. Several of the
21 same petitioners in this appeal challenged that decision. On June 6, 2008, LUBA remanded
22 the Chackel approval to clarify two matters. *Curl v. City of Bend*, __ Or LUBA __ (LUBA
23 No. 2007-156, June 6, 2008) (*Chackel*), *rev pending* (CA 139432).

24 On August 4, 2006, GCC filed a new conditional use and site plan review application
25 with the city, proposing to remove its existing 200-foot tower and construct a new 300-foot
26 tower where the existing tower is located. The hearings officer conducted several hearings

1 and, on August 3, 2007, approved GCC's application. The August 3, 2007 decision states
2 that it supersedes the approval of the expansion to GCC's existing tower that was a
3 component of the *Awbrey Towers I* decision. This appeal followed.

4 **FIRST, SECOND AND ELEVENTH ASSIGNMENTS OF ERROR**

5 Petitioners' first, second and eleventh assignments of error are identical to the first,
6 second and eleventh assignments of error in LUBA No. 2006-165, and are denied for the
7 reasons set out in *Curl v. City of Bend*, __ Or LUBA __ (LUBA No. 2007-165), slip op 6.

8 **THIRD ASSIGNMENT OF ERROR**

9 Petitioners withdrew the third assignment of error.

10 **FOURTH ASSIGNMENT OF ERROR**

11 The fourth assignment of error is identical to the fourth assignment of error in LUBA
12 No. 2006-165, and is denied for the reasons set out in *Curl v. City of Bend*, __ Or LUBA __
13 (LUBA No. 2007-165), slip op 11.

14 **FIFTH ASSIGNMENT OF ERROR**

15 The fifth assignment of error is identical to the fifth assignment of error in LUBA No.
16 2006-165, and is denied for the reasons set out in *Curl v. City of Bend*, __ Or LUBA __
17 (LUBA No. 2007-165), slip op 13.

18 **SIXTH AND TWELFTH ASSIGNMENTS OF ERROR**

19 The sixth and twelfth assignments of error, and the responses to those assignments of
20 error, are identical to their counterparts in LUBA No. 2006-165. For the reasons set out in
21 *Curl v. City of Bend*, __ Or LUBA __ (LUBA No. 2007-165), slip op 14-15, the sixth and
22 twelfth assignments of error are sustained.

23 **SEVENTH ASSIGNMENT OF ERROR**

24 The seventh assignment of error is identical to the seventh assignment of error in
25 LUBA No. 2006-165, and is denied for the reasons set out in *Curl v. City of Bend*, __ Or
26 LUBA __ (LUBA No. 2007-165), slip op 16.

1 **EIGHTH AND SIXTEENTH ASSIGNMENTS OF ERROR**

2 The eighth and sixteenth assignments of error are identical to the eighth and
3 nineteenth assignments of error in LUBA No. 2006-165, and are denied for the reasons set
4 out in *Curl v. City of Bend*, __ Or LUBA __ (LUBA No. 2007-165), slip op 17.

5 **NINTH AND TENTH ASSIGNMENTS OF ERROR**

6 The ninth and tenth assignments of error are identical to the ninth and tenth
7 assignments of error in LUBA No. 2006-165, and are denied for the reasons set out in *Curl v.*
8 *City of Bend*, __ Or LUBA __ (LUBA No. 2007-165), slip op 18.

9 **THIRTEENTH ASSIGNMENT OF ERROR**

10 The thirteenth assignment of error is identical to the thirteenth assignment of error in
11 LUBA No. 2006-165, and is denied for the reasons set out in *Curl v. City of Bend*, __ Or
12 LUBA __ (LUBA No. 2007-165), slip op 19.

13 **FOURTEENTH ASSIGNMENT OF ERROR**

14 The fourteenth assignment of error is identical to the fourteenth assignment of error
15 in LUBA No. 2006-165, and is denied for the reasons set out in *Curl v. City of Bend*, __ Or
16 LUBA __ (LUBA No. 2007-165), slip op 20.

17 **FIFTEENTH ASSIGNMENT OF ERROR**

18 The fifteenth assignment of error is identical to the fifteenth assignment of error in
19 LUBA No. 2006-165, and is denied for the reasons set out in *Curl v. City of Bend*, __ Or
20 LUBA __ (LUBA No. 2007-165), slip op 21.

21 **WESTERN RADIO'S FIRST ASSIGNMENT OF ERROR**

22 Western Radio argues that GCC's lease agreement with the property owner Awbrey
23 Towers LLC provides that improvements cannot be constructed on any portion of the site
24 that is not specifically leased to the LLC member that owns the improvements. According to
25 Western Radio, some of GCC's proposed construction is on a portion of the site leased to

1 Western Radio, and therefore GCC has not shown that it has the right to build the proposed
2 tower.

3 The hearings officer rejected that argument, finding that she lacks authority to resolve
4 disputes among Awbrey Towers LLC members regarding their leases or operating
5 agreements. We agree with the hearings officer and GCC that the city has no authority to
6 approve or deny GCC's application based on disputes over private contractual agreements
7 among the Awbrey Towers LLC members. See *Chackel*, slip op 16 (rejecting similar
8 argument with respect to the Chackel tower).

9 Western Radio's first assignment of error is denied.

10 **WESTERN RADIO'S SECOND ASSIGNMENT OF ERROR**

11 Western Radio's second assignment of error is similar to Western Radio's first
12 assignment of error in LUBA No. 2006-165, although not entirely identical. We have
13 considered the additional or different arguments Western Radio makes under this assignment
14 of error, and see no basis for a different disposition. For the reasons we rejected Western
15 Radio's first assignment of error in LUBA No. 2006-165, we deny Western Radio's second
16 assignment of error in this appeal.

17 **WESTERN RADIO'S THIRD ASSIGNMENT OF ERROR**

18 Western Radio's third assignment of error is identical to Western Radio's second
19 assignment of error in LUBA No. 2007-165, and is denied for the reasons set out in *Curl v.*
20 *City of Bend*, __ Or LUBA __ (LUBA No. 2007-165), slip op 22.

21 **WESTERN RADIO'S FOURTH ASSIGNMENT OF ERROR**

22 Western Radio's fourth assignment of error is similar to Western Radio's third
23 assignment of error in LUBA No. 2007-165, although not entirely identical. We have
24 considered the additional or different arguments Western Radio makes under this assignment
25 of error, and see no basis for a different disposition. For the reasons we rejected Western

1 Radio's third assignment of error in LUBA No. 2006-165, we deny Western Radio's fourth
2 assignment of error in this appeal.

3 **WESTERN RADIO'S FIFTH ASSIGNMENT OF ERROR**

4 Western Radio argues that GCC's application is too vague and nonspecific to allow
5 meaningful evaluation against the applicable criteria. According to Western Radio, the exact
6 location of GCC's tower and its guy anchors is not known, and therefore it is difficult to
7 evaluate possible impacts on Western Radio's tower, such as the possibility of guy anchor
8 failure and collapse of GCC's tower onto Western Radio's. Similarly, Western Radio argues
9 that if GCC had disclosed what broadcast stations it plans to operate from the tower, Western
10 Radio could have calculated radio frequency levels. Finally, Western Radio argues that GCC
11 failed to consider other feasible alternatives to the proposed tower, such as combining the
12 GCC and NPG towers into a single 300 foot tall tower, or two shorter towers, or using
13 monopole instead of guyed towers, to reduce impacts on surrounding tower owners.

14 GCC responds, and we agree, that Western Radio has not demonstrated that the
15 application is too vague or nonspecific to allow meaningful evaluation against the criteria.
16 GCC's site plan depicts and the hearings officer approved the proposed locations of the GCC
17 tower and guy anchors. The hearings officer evaluated a number of safety concerns,
18 including tower collapse, and Western Radio has not explained why those findings are
19 inadequate. Similarly, Western Radio does not explain why the applicable criteria require
20 that GCC identify the specific broadcast facilities it will place on the tower in the future.
21 Finally, Western Radio has not explained what approval criteria require GCC to consider co-
22 locating facilities or alternative designs. *See Chackel*, slip op 16-17 (rejecting similar
23 argument).

24 Western Radio's fifth assignment of error is denied.

1 **CROSS-ASSIGNMENT OF ERROR**

2 In the event that the Board sustains any of the petitioners’ or intervenor-petitioner’s
3 assignments of error and remands the decision, GCC sets out a cross-assignment of error
4 requesting that the Board remand the decision for the hearings officer to correct alleged
5 “technical or clerical errors” in several conditions of approval.

6 Petitioners object to the cross-assignment of error, arguing that GCC can assign error
7 to the decision under LUBA’s rules only by filing a cross-petition for review. However,
8 petitioners are incorrect. *Copeland Sand & Gravel, Inc. v. Jackson County*, 46 Or LUBA
9 653 (2004) (it is consistent with LUBA’s rules to include a cross-assignment of error in a
10 response brief).

11 We agree with GCC that the alleged errors *appear* to be mere clerical or inadvertent
12 errors that could be easily corrected or clarified on remand. Because the decision must be
13 remanded in any event, on remand the hearings officer should consider the arguments raised
14 under GCC’s cross-assignment of error and, if the hearings officer agrees with those
15 arguments, adopt any findings and/or corrections or clarifications to the conditions of
16 approval that the hearings officer believes to be warranted.

17 GCC’s cross-assignment of error is sustained.

18 The city’s decision is remanded.