BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MIKE TAPSCOTT, LINDA TAPSCOTT
and DEBRAH J. CURL,
*Petitioners,*

vs.

CITY OF BEND,
*Respondent,*

and

VERIZON WIRELESS (VAW) LLC,
*Intervenor-Respondent.*

LUBA No. 2008-033

FINAL OPINION
AND ORDER

Appeal from City of Bend.

Mike Tapscott, Linda Tapscott, Debrah J. Curl, Bend, filed the petition for review and Debrah J. Curl argued on her own behalf.

No appearance by City of Bend.

E. Michael Connors, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Davis Wright Tremaine LLP.

HOLSTUN, Board Member; RYAN, Board Chair; participated in the decision.

BASSHAM, Board Member, did not participate in the decision.

REMANDED 08/27/2008

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

Opinion by Holstun.

## NATURE OF THE DECISION

Petitioners appeal a city hearings officer decision that grants site plan approval for a wireless communication facility.

## FACTS

The decision that is before us in this appeal is the city's decision following our remand in *Skyliner Summit at Broken Top v. City of Bend*, 54 Or LUBA 316 (2007) (*Skyliner Summit*). The challenged decision includes the following description of the facility:

> "The applicant requested * * * site plan approval to establish a wireless communication facility within [a] 3,000-square-foot-lease area on a 36.85-acre parcel owned by the City of Bend and located atop Overturf Butte on the west side of Bend. The proposed facility would consist of a 70-foot-tall tower structure on which would be mounted cellular telephone, directional and broadband antennas, a 12' by 26' equipment shelter, perimeter security fencing, a gravel access drive, and an on-site fire suppression system." Record 18.

Bend Code Chapter (BCC) 10-10.25(12), which is set out in full later in this opinion, authorizes "utilities." As defined by the BCC, "utilities" may not include "buildings." In *Skyliner Summit*, we remanded the city's initial decision so that the hearings officer could respond to petitioners' argument that the proposed 12' by 26' equipment shelter is a building and therefore cannot be approved as part of a utility.

In *Skyliner Summit*, petitioners also argued that the proposed access road is part of the proposed use and that the hearings officer erred by not considering the proposed access road when she applied the site plan approval criteria. We sustained that assignment of error as well.

On remand the hearings officer considered both issues and affirmed her original decision. This appeal followed.

**FIRST ASSIGNMENT OF ERROR**

The application that led to the decision that is before us in this appeal was filed on February 24, 2006. *Skyliner Summit* Record 1632-84.[1] At that time, BCC 10-10.25(12) authorized "utilities" in all zoning districts and defined and limited the scope of the elements that a utility could include.[2] BCC 10-10.25(12) provides:

> "Utilities. The erection, construction, alteration, or maintenance by public utility or municipal or other governmental agencies of underground, overhead electrical, gas, steam or water transmission or distribution systems, collection, *communication*, supply or disposal *system*, including poles, *towers*, *wires*, mains, drains, sewers, pipes, conduits, cables, fire alarm boxes, police call boxes, traffic signals, hydrants and other similar equipment and accessories in connection therewith, *but not including buildings*, may be permitted in any zone. * * * As far as possible, transmission towers, poles, overhead wires, pumping stations, and similar gear shall be so located, designed, and installed as to minimize their effect on scenic values." BCC 10-10.25(12) (italics and underlining added).

There does not appear to be any serious dispute that the proposed cellular communication facility qualifies as a "communication" "system." Therefore the tower, the antennae, any wires or cables, the equipment that is to be housed in the equipment shed, and the on-site fire suppression system are all potentially allowable as part of a "communication" "system." The only dispute under the first assignment of error is whether the proposed equipment shed is properly viewed as a "building" and therefore may not be included as part of a utility under BCC 10-10.25(12).[3]

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[1] The one-volume record in this appeal (LUBA No. 2008-033) also includes the three-volume record in *Skyliner Summit* (LUBA No. 2006-228). Citations to the "Record" in this appeal are to the one-volume record the city compiled on remand. We cite to the three-volume record in *Skyliner Summit* as "*Skyliner Summit* Record."

[2] The Bend Zoning Ordinance was codified at BCC 10-10. The Bend Zoning Ordinance was repealed on July 5, 2006 and replaced with the Bend Development Code, which is also codified at BCC 10-10. However, the Bend Zoning Ordinance continues to apply to this application because the complete application in this matter predated repeal of the Bend Zoning Ordinance. ORS 227.178(3)(a).

[3] Apparently the equipment that will be housed in the equipment shelter will be encased inside one or more equipment cabinets and both the equipment and cabinet(s) will be housed in the equipment shelter. One of the opponents below took the position that the equipment cabinets also qualify as a "building," within the meaning

The BCC 10-10.4 definitions of "building," "structure" and "accessory structure" are set out below:

> "Building. Any structure built and maintained for support, shelter, or enclosure of persons, animals, chattels, or property of any kind."

> "Structure. Anything constructed or built, any edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner, which requires location on the ground or is attached to something having a location on the ground, including swimming and wading pools and covered patios, excepting outdoor areas such as paved areas, driveways or walks."

> "Accessory Structure or Use. A structure or use incidental, appropriate and subordinate to the main structure or use on the same lot."

Both the hearings officer and petitioners point out that the above authorization for utilities in BCC 10-10.25(12) predated today's common use of cellular communication devices, so BCC 10-10.25(12) likely was not written with cellular communication facilities specifically in mind. Record 34, n 7; Petition for Review 12-13. Nevertheless, if the proposed cellular communication facility qualifies as a "utility," as BCC 10-10.25(12) defines and uses that term, there is no reason that we can see why the proposed facility could not be allowed as a utility.

**A. BCC 10-10.25(12)**

BCC 10-10.25(12) effectively provides a four-part definition to determine what may and may not be allowed as a utility. First, a number of identified "systems" may qualify as "utilities." As we have already noted, "communication" "systems" like the proposed cellular communication system may qualify. The proposal qualifies under the first part of the definition.

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of BCC 10-10.25(12). As we note below, the definition of "building" is quite broad. To read that definition broadly enough to make an equipment cabinet a "building" requires a very broad reading of the definition of "building." Whatever the merits of that position, the position was abandoned on appeal and the only question that remains under the first assignment of error is whether the equipment shelter qualifies a building that may not be included as part of the proposed utility facility.

Under the second part of the definition, BCC 10-10.25(12) lists 13 specific elements that a "utility" may include: "poles, towers, wires, mains, drains, sewers, pipes, conduits, cables, fire alarm boxes, police call boxes, traffic signals, [and] hydrants." The proposal includes a tower, wires and cables, so at least some parts of the proposal qualify under the second part of the definition.

The third part of the definition provides a more general and non-specific category of elements that may be included in a "utility:" "similar equipment and accessories in connection therewith." From the context of the third part of the definition, it is reasonably clear that the "similar equipment and accessories in connection therewith" must be similar to one or more of the 13 specific elements identified in the second part of the definition. Although it is not entirely clear to us whether petitioners dispute whether the equipment that would be housed in the shelter qualifies as either "similar equipment" or "accessories" and the shelter qualifies as an accessory, we agree with the city that the equipment necessary to operate the cellular communication facility and the shelter for the equipment qualifies as "similar equipment and accessories in connection therewith," under the third part of the definition.

The fourth part of the definition is a prohibition: "but not including buildings." Given the very broad definition of the word "building," ("[a]ny structure built and maintained for support, shelter, or enclosure of property of any kind") and "structure" ("[a]nything constructed or built, any edifice or building of any kind"), the fourth part of the definition appears to at least partially conflict with the second part, so that some of the elements that the second part specifically allows at least arguably are prohibited by the fourth part prohibition against buildings.[4] The fourth part prohibition also appears to operate as a

[4] For example, telephone and electric poles and fire alarm and police call boxes would all appear to come within the broad definition of "structure." Since the function of the poles is to "support" wires and the boxes enclos[e]" "property" of some kind, they also fall within the broad definition of "building."

significant limitation on what may be allowed under the general and non-specific category of elements that are allowed by the third part of the definition. "[S]imilar equipment and accessories in connection therewith" may be included in a utility facility, but not if they also qualify as a "building."

**B. LUBA's Decision in *Skyliner Summit***

One part of our explanation for sustaining petitioners' assignment of error concerning the equipment shelter in *Skyliner Summit* is set out below:

> "Verizon * * * argues that the BCC 10.10.25(12) prohibition is against 'buildings,' which the BCC defines as 'any structure.' Verizon points out that the BCC distinguishes between 'structures,' and 'accessory structures.' We understand Verizon to argue that the BCC 10.10.25(12) prohibition against 'buildings' should be limited to primary 'structures' and should not be applied to 'accessory structures.' Verizon argues the equipment shelter is properly viewed as an 'accessory structure.'
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> "Verizon's argument that given the BCC 10.10.4 definition of 'buildings,' the BCC 10.10.25(12) prohibition should be applied only to structures, and should not be applied to accessory structures, strikes us as a pretty good argument. It also appears that the equipment shed might reasonably be considered an accessory structure. But the hearings officer has not taken a position regarding either petitioners' argument that the equipment shed is a building or Verizon's argument that it is not. Although ORS 197.829(2) authorizes LUBA to interpret the BCC in the absence of a hearings officer interpretation, there is sufficient question in our mind regarding whether petitioners' or Verizon's interpretation is correct that we believe a remand to the hearings officer to address this interpretive question in the first instance is appropriate. *St Johns Neighborhood Assoc. v. City of Portland*, 38 Or LUBA 275, 282 (2000)." 54 Or LUBA 326-27.

The argument that we stated "strikes us as a pretty good argument" in *Skyliner Summit* now strikes us as a pretty poor argument for an interpretation that almost certainly could not be sustained. The BCC 10-10.25(12) definition of "utilities" prohibits "buildings." As defined by BCC 10-10.4, a "building" includes "structures" and makes no distinction between primary and accessory structures. As defined by BCC 10-10.4, an accessory structure is a "structure." Because the BCC 10-10.4 definition of "building" includes "structures" and makes no distinction between "primary" and "accessory" structures, limiting the prohibition

against buildings to prohibit only primary structures would almost certainly run afoul of ORS 174.010, by inserting limiting language into the definition that is simply not present.[5] The hearings officer apparently recognized this weakness in the applicant's argument and did not rely on the interpretive argument that is discussed in the above-quoted text from our decision in *Skyliner Summit*.

The hearings officer relied on a different interpretation to find that the equipment shelter may be included under the BCC 10-10.25(4) definition of "utiltities," notwithstanding the prohibition against including "buildings:"

> "[T]he Hearings Officer agrees, that under *PGE v. BOLI*, 317 Or 606[, 859 P2d 1143] (1993), my task is to determine the intent of the drafters of the 'utilities' description in former [BCC] 10-10.25(12), and that the starting point for that analysis is the language of the section itself. This section includes both * * * 'other similar equipment and accessories in connection therewith' and prohibition on 'buildings.' To give meaning to both of these provisions, I find it is appropriate to interpret the prohibition language as excluding that which is expressly authorized. In other words, I agree with the applicant that to the extent a component of a utility constitutes a 'building' that is accessory to the main utility use, it is permitted as 'other similar equipment and accessories in connection' with the utility. And finally, I agree with the applicant that its proposed equipment shelter clearly falls within the definition of 'accessory' to the proposed wireless communication facility because it is 'incidental, appropriate and subordinate to the main structure or use on the same lot.' There is no dispute the applicant's wireless communication tower and antennas approved in the original decision cannot function without the equipment that would be sheltered within the building, and the equipment building and equipment sheltered therein have no use or function independent of the approved tower and antennas.
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> "For the foregoing reasons, the Hearings Officer finds the proposed equipment shelter is part of the approved 'utility' because it constitutes 'other similar equipment and accessories in connection' with the proposed utility –

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[5] Under ORS 174.010:

> "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."

> the wireless communication tower and antennas – and therefore is not a 'building' prohibited under former [BCC] 10-10.25(12)." Record 34.

We agree with the hearings officer in part and disagree in part. As we have already indicated, the prohibition on buildings in the fourth part of the BCC 10-10.25(12) definition of "utility," if applied literally to prohibit poles and towers that carry wires, fire alarm boxes, police call boxes, and perhaps some other uses that are specifically authorized in the second part of the BCC 10-10.25(12) definition of "utility," would result in at least a partial conflict between the fourth part and the second part of the definition. If such poles, towers and boxes also necessarily fall within the broad definition of "buildings," as appears to us to be the case, there is a partial conflict between the fourth part and second part of the definition. Unless that conflict can be avoided in some way, the poles, towers and boxes that are expressly and specifically authorized by the second part would be prohibited by the more general prohibition on buildings in the fourth part. Therefore, we believe it is appropriate to interpret the more general prohibition in the fourth part not to apply to specific elements listed in the second part, if those specific elements are of a nature that will always fall within the broad definition of buildings. Both the hearings officer and LUBA are "required, if possible, to avoid construing [laws] in a way that renders any provision meaningless." *EQC v. City of Coos Bay*, 171 Or App 106, 110, 14 P3d 649 (2000). Giving this more limited interpretation and application of the fourth part of the definition to avoid an actual conflict with the second part is consistent with ORS 174.010. *See* n 5.

But the more limited interpretation of the fourth part of the definition that the hearings officer adopted to give meaning to both the third part and the fourth part is not necessary to avoid a conflict between the third part and the fourth part. At least the hearings officer does not establish that such is the case. The "other similar equipment and accessories in connection therewith" that are authorized by the third part of the BCC 10-10.25(12) definition of "utility" may be "expressly authorized," as the hearings officer found, but they are a general category of additional elements that may be included in a utility facility. They

are not a list of specific elements like those listed in the second part. As far as we can tell, some elements that apparently would be allowed within the general category of elements allowed under the third part (for example the broadcast antenna and on-site irrigation equipment) would not qualify as buildings and therefore would not be prohibited by the fourth part of the definition. But other elements that would be allowed by third part (such as the disputed equipment shelter) clearly could qualify as "buildings," as that term is defined by BCC 10-10.4. The "other similar equipment and accessories in connection therewith" that are not "buildings" are permissible, whereas the "other similar equipment and accessories in connection therewith" that are "buildings" are prohibited by the fourth part of the definition. That limitation appears to significantly limit the scope of elements that are authorized by the third part, but there is no inherent conflict between those parts of the definition and therefore it is not necessary to interpret the fourth part of the definition to give way to the third part in all cases. A general law only must be construed to give way to a more specific law "when there is an irreconcilable conflict between [the two]." *Palmquist v. Flir Systems, Inc.*, 207 Or App 365, 371 142 P3d 94 (2006). As far as we can tell, the hearings officer's interpretation of the building prohibition in the fourth part of the definition was not necessary to avoid an irreconcilable conflict with the third part, and the hearings officer's interpretation seems to have entirely written the prohibition on buildings out of the BCC 10-10.25(12) definition of "utility."[6]

Finally, it may be that the BCC 10-10.25(12) definition of "utilities," which predates the proliferation of cellular transmission facilities, fails to anticipate those facilities adequately and limits them in ways that the county would not want to limit them today. If

[6] The hearings officer gives no example of when her interpretation of BCC 10-10.25(12) would give effect to the fourth part of the definition. It is hard to see when the fourth part could ever have effect under the hearings officer's interpretation. An element could only be allowed as part of a utility under the definition if that element qualifies under the second or third part, and under the hearings officer's interpretation, the fourth part would never apply if the second or third part applies.

so, the appropriate course is to amend that definition. As we noted earlier, the city has done precisely that, and any new application would be governed by the current Bend Development Code. Intervenor also pointed out in *Skyliner Summit* that the interpretation which we adopt in this appeal "will have the ironic effect of requiring that the equipment shelter be eliminated, thus leaving the equipment exposed and increasing the visual impacts that BCC 10-10.25(12) otherwise seeks to minimize." *Skyliner Summit*, 54 Or LUBA at 326-27 n 10. Be that as it may, the general directive in the last sentence of BCC 10-10.25(12) definition of "utility," which requires that the facility "be so located, designed, and installed as to minimize their effect on scenic values," does not authorize the county to allow buildings that the fourth part of the BCC 10-10.25(12) definition of "utility" prohibits.[7]

The first assignment of error is sustained.

**SECOND ASSIGNMENT OF ERROR**

As conditioned, the proposal must "satisfy all requirements of the Bend Fire Department, including requirements for emergency vehicle access." *Skyliner Summit* Record 56. The 12-foot wide access drive that is proposed is acceptable to the Bend Fire Department if brush is cleared within four feet on each side of that 12-foot wide access road. BCC 10-10.23(8) sets out site plan review criteria.[8] In applying BCC 10-10.23(8)(c) and (e),

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[7] It is somewhat unclear to us whether the equipment shelter is necessary to protect the sheltered equipment or whether the equipment shelter is optional and was included mainly or entirely to visually screen the needed equipment. If the shelter was included for aesthetic reasons, and if eliminating the shelter would not run afoul of the last sentence of BCC 10-10.25(12) or other applicable standards, the equipment shelter presumably could be eliminated and the proposal could be approved without the equipment shelter, even if the irony intervenor notes would result.

[8] As relevant, BCC 10-10.23(8) provides:

> "Site Plan Criteria. Approval of a site plan shall be based on the following criteria:
>
> "* * * * *
>
> "(c) Preservation of Natural Landscape. The landscape and existing grade shall be preserved to the maximum practical degree, considering development constraints and suitability of the landscape or grade to serve the applicant's functions. Preserved trees and shrubs shall be protected during construction.

petitioners contend the hearings officer erred by not specifically addressing the significance of this brush clearing requirement.

**A. BCC 10-10.23(8)(c)**

BCC 10-10.23(8)(c) requires preservation of the "landscape and existing grade" "to the maximum practical degree, considering development constraints." *See* n 8. Intervenor-respondent argues:

> "On remand, the Hearings Officer noted that BCC 10-10.23(8)(c) does not require Intervenor to demonstrate that the access drive will not have *any* impacts on the existing natural landscape, but rather it requires only that Intervenor preserve the natural landscape 'to the maximum practical degree.' The Hearings Officer reiterated the fact that the access drive is the minimum width legally possible and will only require the removal of two (2) trees. Once again, the Hearings Officer specifically noted that her original decision required Intervenor to 'meet all requirements of the Bend Fire Department for emergency vehicle access (except the 20-foot width).' The Hearings Officer noted again that based on Intervenor's site plan and her visit to the site, 'vegetation on the portion of the subject property on which the access drive would be constructed consists of scattered trees and relatively sparse high desert vegetation including low-growing native brush and grasses that do not provide a significant amount of screening.' Based on these factors, the Hearings Officer concluded:
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> > "'For the foregoing reasons, the Hearings Officer finds that the proposed access drive will preserve the natural landscape and existing grade to the maximum practical degree considering development constraints and the suitability of the landscape and grade to serve the applicant's function * * *.'"

Intervenor-Respondent's Brief 22 (record citations omitted).

We understand intervenor to argue that the hearings officer's findings, which specifically recognized that the access road must comply with the Bend Fire Department's requirements for emergency vehicle access, are adequate to demonstrate why the hearings

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"* * * * *

"(e) Buffering and Screening. Area, structures, and facilities for storage, machinery and equipment, services (main, refuse, utility wires, and the like), loading and parking, and similar accessory areas and structures shall be designed, located and buffered, or screened to minimize adverse impacts on the site and neighboring properties."

officer believed the BCC 10-10.23(8)(c) standard is satisfied, even though the hearings officer's findings include no specific discussion of the requirement that brush be cleared within four feet of each side of the 12-foot wide access road. We agree with intervenor.

**B. BCC 10-10.23(8)(e)**

BCC 10-10.23(8)(e) requires that certain elements of the proposal must be "designed, located and buffered, or screened to minimize adverse impacts on the site and neighboring properties." On remand, the hearings officer adopted findings addressing BCC 10-10.23(8)(e). Some of those findings are set out below:

> "* * * I did not address in [*Skyliner Summit*] whether [BCC 10-10.23(8)(e)] applies to the proposed access drive[]. Although the language and sentence structure of this criterion is somewhat ambiguous, I find the phrase 'area, structures, and facilities for storage, machinery and equipment, services (main, refuse, utility wires, and the like), loading and parking' does not apply to the proposed access drive because that facility is not for the purpose of 'storage, machinery, equipment services * * * loading and parking.' For the same reason, I find the proposed access drive also does not constitute 'similar accessory areas, and structures.'
>
> "However, even assuming the language of this criterion could be read to include the proposed access drive, the Hearings Officer finds it satisfies this criterion. As discussed in the findings [addressing other subsections of BCC 10-10.23(8)], the access drive would require minimal grading, cutting and filling and the removal of only two trees. Remaining existing vegetation would be retained on the subject property.
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> "Opponents's attorney * * * argues in his December 6, 2007 memorandum:
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> > "'From a practical perspective, the access road * * * will be * * * unlike anything that is there now. * * *'
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> "* * * Overturf Butte is almost fully developed with urban uses. These include many large dwellings and paved streets, two very large city water reservoirs and accessory structures and equipment accessed by a paved driveway, and an improved pedestrian trail that leads to the tower and equipment shelter site. Consequently, it is not reasonable to state that the proposed access drive is 'unlike anything that is' currently on Overturf Butte." Record 40.

Intervenor argues that petitioners' second assignment of error must be denied because (1) petitioners do not assign error to the hearings officer's finding that BCC 10-10.23(8)(e)

does not apply to the proposed access road and (2) the hearings officer's findings are adequate to explain why the access road complies with that standard even if it does apply. On both points, we agree with intervenor.

The second assignment of error is denied.

The city's decision is remanded.