

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON  
3

4 JULIA JONES, PAUL FRANKLIN,  
5 TEFFANEY FRANKLIN and GRACE ANDERSON,  
6 *Petitioners,*  
7

8 vs.  
9 CITY OF GRANTS PASS,  
10 *Respondent,*  
11

12 and  
13

14 NEW CINGULAR WIRELESS PCS, LLC,  
15 *Intervenor-Respondent.*  
16

17 LUBA No. 2011-013  
18

19 FINAL OPINION  
20 AND ORDER  
21

22 Appeal from City of Grants Pass.  
23

24 William H. Sherlock, Eugene, filed the petition for review and argued on behalf of  
25 petitioners. With him on the brief was Hutchinson, Cox, Coons DuPriest, Orr and Sherlock  
26 PC.  
27

28 Mark Bartholomew, Medford, filed a joint response brief and argued on behalf of  
29 respondent.  
30

31 Richard J. Busch, Issaquah, Washington, filed a joint response brief and argued on  
32 behalf of intervener-respondent. With him on the brief was Busch Law Firm PLLC.  
33

34 RYAN, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member,  
35 participated in the decision.  
36

37 REMANDED

08/30/2011  
38

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

**NATURE OF THE DECISION**

Petitioners appeal a decision by the city approving a conditional use permit for a cellular communications tower.

**MOTION TO INTERVENE**

New Cingular Wireless, PCS, LLC, the applicant below, moves to intervene on the side of the respondent. There is no opposition to the motion and it is allowed.

**FACTS**

Intervenor applied to site a 90-foot tall monopole cellular communications tower and 230-square foot equipment shelter on a 4.18-acre property zoned Business Park. Petitioners live in a residential neighborhood located adjacent to the subject property's western boundary. An existing cellular tower is located approximately one-quarter mile from the subject property.

The planning commission approved the application for a 90-foot tall tower, and petitioners appealed the decision to the city council. The city council held a hearing on the appeal, and adopted a decision approving a 65-foot tall tower. This appeal followed.

**FIRST ASSIGNMENT OF ERROR**

In their first assignment of error, petitioners argue that the city committed a procedural error during the January 5, 2011 city council hearing when it allowed testimony from intervenor after the record closed, while the city council was deliberating on the application.

In their testimony during the January 5, 2011 city council hearing, petitioners argued to the city council that the proposed 90-foot tall tower would cause more than minimal visual impact when viewed from adjacent properties and public rights of way and that therefore the

1 application could not be approved.<sup>1</sup> During intervenor’s final argument and rebuttal,  
2 intervenor’s attorney, apparently in response to concerns from members of the council and  
3 the public over the visual impact of a 90-foot tall tower, stated that a shorter tower, no lower  
4 than 65 feet tall, could still meet intervenor’s coverage objectives but would not allow for  
5 collocation of additional carriers’ antennas due to spacing requirements for antenna levels.<sup>2</sup>

6 After the conclusion of the final evidentiary hearing and the close of the evidentiary  
7 record, the city council then began deliberations. One city councilor moved to approve the  
8 application but limit the tower’s height to 65 feet. That motion failed. Next, a councilor  
9 moved to deny the application, and that motion also failed.

10 At that point, a councilor asked intervenor’s attorney whether a 75-foot tall tower  
11 would allow collocation of additional carriers’ antennas. Intervenor’s attorney responded  
12 that a 75-foot tall tower might allow for one additional carrier, but not for more than one, due

---

<sup>1</sup> Grants Pass Development Code (GPDC) 16.360 contains the conditional use review criteria for cellular towers. As relevant here, GPDC 16.360(1) requires the city to determine that “[t]he proposal causes minimal visual impact when viewed from adjacent properties, public rights-of-way, public parks and the Rogue River.”

GPDC 16.371 contains development standards for new towers, one of which requires towers to be “designed to accommodate collocation of additional providers \* \* \*, unless the review body determines that collocation would have an adverse visible impact, and that the visual impacts cannot be mitigated through measures which may include stealth design.” GPDC 16.371(5).

<sup>2</sup> Intervenor’s attorney testified:

“Based on AT & T’s information in the file, they need the lowest [radial] center at 65 feet to meet the coverage objectives. If we can have a tower that looks like that with all of the antennas on mounting brackets so that we can fit 12 antennas on one array, on one [radial] center, then 65 feet is OK as long as there is no requirement for co-locators. If your Code requires co-locators, we need 90 feet if we are going to have 12 antennas on one row. If there are no co-locators and you want the antennas to be narrowly mounted, either in the structure or flush-mounted to the structure, then AT & T would need four [radial] centers to accommodate 12 antennas, with one set of antennas for every [radial] center.

“\* \* \* \* \*

“[T]he lowest [radial] center is 65 feet and then about 10 feet for every additional set of antennas we need to have. The drawings show four [sic] antennas per level, so we would be back at the 90 feet if they were all flush-mounted and all installed at the same time.” Supplemental Record 56-57.

1 to spacing requirements that require approximately 10 feet of separation between antenna  
2 installations.<sup>3</sup> At that point, petitioner Jones objected and asked for the opportunity to  
3 respond to intervenor’s attorney’s testimony, but petitioner Jones was not allowed to  
4 respond. Supplemental Record 71.

5 More discussion of the application then followed, and a councilor then asked a  
6 member of the planning staff a question regarding how often the city receives applications  
7 for cellular towers. The community development director did not respond to that particular  
8 question, but offered his view that the number of applications that the city receives in the  
9 future will increase. Supplemental Record 72. Further deliberation ensued, and a council  
10 member moved to approve the application but limit the height of the tower to 65 feet. That  
11 motion passed.

12 ORS 197.835(9)(a)(B) provides that LUBA must reverse or remand the land use  
13 decision under review if the board finds that the local government or special district “[f]ailed  
14 to follow the procedures applicable to the matter before it in a manner that prejudiced the  
15 substantial rights of the petitioner[.]” Petitioners argue that the city erred in allowing  
16 intervenor’s attorney’s testimony and the community development director’s testimony  
17 during the city council’s deliberations, and further erred in refusing petitioner’s request to  
18 respond to that testimony. Petitioners contend that these errors prejudiced their substantial  
19 rights, and seek remand of the city’s decision to allow them to respond to that testimony.

---

<sup>3</sup> Intervenor’s attorney testified:

“OK, we have to allow for height of the antennas, so when we have separation there is also the height of the antennas. \* \* \* AT&T antennas are generally 6 to 8 feet tall so we use 10 feet of separation at a center line. Let me take that back. The bottom of the antenna is at 65 feet, so the center line is around 69 feet, so the next one would be 79 and then 89 or the three tiers. \* \* \* What they do is they start at the top and work their way down and they can change the size of the antennas based upon which model they use. If we set it at a height of 90 then everything will follow from there. \* \* \*” Supplemental Record 70.

1 Intervenor and the city (respondents) first argue that petitioners are precluded from  
2 raising the issue on appeal to LUBA because petitioner Jones failed to specifically object to  
3 the city council's denial of her request to respond to the new testimony. However, petitioner  
4 Jones' objection and request to respond to the new testimony was sufficient to raise the issue  
5 and she was not also required to specifically raise an objection to the city council's denial of  
6 that request. *Horizon Construction, Inc. v. City of Newberg*, 114 Or App 249, 254, 834 P2d  
7 523 (1992) (petitioners are not required to object to procedural errors that occur at a stage in  
8 the proceedings where it is unlikely that the decision maker would entertain objections).

9 To show prejudicial error that warrants remand, petitioners must demonstrate that the  
10 local government accepted new evidence after the close of the evidentiary record, and offer  
11 some substantial reason to believe the new evidence had some effect on the ultimate  
12 decision. *City of Damascus v. Metro*, 51 Or LUBA 210, 228 (2006). Respondents next  
13 respond the testimony that was received after the record had closed does not contain new  
14 evidence, but rather simply restated testimony and evidence that was already in the record.  
15 However, we agree with petitioners that intervenor's attorney's testimony in response to the  
16 councilor's question about whether collocation could occur on a 75-foot tall tower was new  
17 testimony that provided the only evidence regarding the options for collocation that a 75-foot  
18 tall tower would provide, which presumably relates to the requirement in GPDC 16.371(5) to  
19 collocate unless the visual impacts resulting from collocation are too adverse. The city erred  
20 in accepting that new evidence after the close of the record without allowing other parties the  
21 opportunity to respond. *Gunzel v. City of Silverton*, 53 Or LUBA 174, 178 (2006). Although  
22 the city council ultimately voted to approve a 65-foot tall tower, it is not clear to us that  
23 intervenor's testimony regarding a 75-foot tall tower had no effect on the city's ultimate  
24 decision to approve a 65-foot tall tower.

25 Similarly, the community development director's testimony regarding his opinion  
26 that the city will receive more applications for cellular communications towers in the future

1 is the only evidence about the expected level of future applications, information that  
2 presumably had a bearing on the city council’s decision whether or not to authorize a tower  
3 tall enough to allow for future collocation. It was error for the city to accept that testimony  
4 after the close of the record without allowing other parties the opportunity to respond.  
5 *DLCD v. Umatilla County*, 39 Or LUBA 715, 733 (2001) (it was error for the county to  
6 accept a staff report into the record after the close of the record without allowing other  
7 parties an opportunity to respond to it). Again, it is not clear to us that that evidence had no  
8 effect on the city’s ultimate decision to approve a 65-foot tall tower.

9 On remand, the city must allow petitioners the opportunity to respond to intervenor’s  
10 new evidence regarding the options for collocation that a 75-foot tall tower would provide,  
11 and to the community development director’s testimony regarding the expected number of  
12 future applications for wireless communications towers.

13 The first assignment of error is sustained.

14 **SECOND ASSIGNMENT OF ERROR**

15 According to petitioners, the city council “relies on Robert’s Rules of Order, 10<sup>th</sup>  
16 Edition (Robert’s Rules), as its procedural rules in circumstances where the GPDC [is] silent  
17 with respect to voting.” Petition for Review 8. In their second assignment of error,  
18 petitioners argue that the city committed a procedural error that prejudiced their substantial  
19 rights when the council voted on a motion that was identical to a motion that had previously  
20 been made during the meeting and failed. According to petitioners, such a motion is not  
21 allowed by Rule 38 and 37 of Robert’s Rules.<sup>4</sup>

---

<sup>4</sup> The petition for review sets out Rule 38:

“Rule 38, in relevant part, states:

“If a motion is made and disposed of without being adopted, and is later allowed to come before the assembly after being made again by any member in essentially the same connection, the motion is said to be *renewed*. Renewal of motions is limited by the basic principle that an assembly cannot be asked to decide the same, or

1 Respondents answer that petitioners have not demonstrated that the city’s alleged  
2 failure to adhere to Rule 38 and Rule 37 amounted to a procedural error, and additionally  
3 have not established that any procedural error that resulted from the city’s failure to adhere to  
4 Robert’s Rule prejudiced their substantial rights under ORS 197.835(9)(a)(B). We agree.  
5 Petitioners do not argue that Robert’s Rules are incorporated as part of the city’s charter, the  
6 GPDC, or any other provision of local or state law, and do not otherwise explain the source  
7 of the city’s alleged obligation to “rely” on those rules during city council meetings.  
8 Accordingly, absent any allegation that the city council is required by the GPDC, other  
9 provisions of the city’s code or charter, or state law to adhere to Robert’s Rules in voting on  
10 matters before it, failure to adhere to Robert’s Rules does not amount to a procedural error  
11 under ORS 197.835(9)(a)(B).

12 In addition, even if a failure to adhere to Robert’s Rules in the conduct of the meeting  
13 could result in procedural error, petitioners do not explain how that error resulted in  
14 prejudiced to their substantial rights. The entirety of petitioners’ argument that their  
15 substantial rights were prejudiced is set out below:

16 “This irregular voting procedure substantially prejudiced petitioners’ rights.  
17 The deliberations and allowance of new testimony that led to a final improper  
18 vote and approval of the application failed to provide for any rebuttal  
19 testimony prior to the motion that reversed the Council’s prior vote on the  
20 identical resolution.” Petition for Review 9.

21 The above-quoted language does not provide any explanation of the rights that were  
22 prejudiced in the city’s failure to follow Robert’s Rules. Nothing cited to us in Robert’s  
23 Rules suggests that participants to a hearing would be entitled to provide “rebuttal  
24 testimony” had the city council complied with Rules 37 or 38. Absent such an explanation,

---

substantially the same, question twice during one session – except through a motion  
to reconsider a vote (37) or a motion to rescind and action (35), or in connection  
with amending something already adopted.” Petition for Review 8 (italics in  
original).

According to petitioners, Rule 37 that is referenced in Rule 38 provides that a motion to reconsider a prior  
motion can only be made by a voting member who was on the winning side of the previous vote.

1 any failure to follow Robert’s Rules in its voting procedures does not provide a basis for  
2 reversal or remand under ORS 197.835(9)(a)(B).

3 The second assignment of error is denied.

4 **THIRD ASSIGNMENT OF ERROR**

5 **A. First Subassignment**

6 GPDC Section 16.300 to 16.390 set out the submittal requirements, criteria and  
7 standards, and definitions applicable to an application for a conditional use permit for a  
8 telecommunication facility. GPDC 16.310 sets out the purpose of GPDC 16.300 *et seq*, and  
9 provides:

10 “16.310 Purpose. The purpose of this section is to provide design and siting  
11 standards for telecommunication facilities, within the framework of the  
12 Federal Telecommunications Act, that:

13 “(1) Recognize the need of telecommunication providers to build out their  
14 systems over time;

15 “(2) Reduce visual impacts of towers and ancillary facilities through  
16 careful design, siting, and screening; and

17 “(3) Encourage the collocation of telecommunication facilities and  
18 maximize the use of any new transmission towers, or existing suitable  
19 structures, to reduce the need for additional towers.”

20 GPDC 16.360 sets out the conditional use permit review standards for the towers, and GPDC  
21 16.370 sets out development standards for the towers.

22 In the first subassignment of error under their third assignment of error, petitioners  
23 argue that the city erred in failing to adopt findings addressing GPDC 16.310(3). According  
24 to petitioners, GPDC 16.310(3) is a mandatory approval criterion because the word  
25 “maximize” used in that section requires the city to take steps to reduce the need for new  
26 transmission towers.

27 Respondents respond that the text and context of GPDC 16.310 demonstrates that  
28 GPDC 16.310 does not contain mandatory permit approval criteria. Respondents point out



1 that GPDC 16.310(3) begins with the word “encourage,” which is aspirational rather than  
2 mandatory language, and point to the language of subsections (1) and (2), which also contain  
3 motivational or aspirational language (i.e., “recognize the need”). Respondents contend that  
4 when all of GPDC 16.310 is read together, it is clear that the city did not intend the purpose  
5 statement to function as an approval criterion.

6 We agree with respondents that GPDC 16.310 does not contain mandatory approval  
7 criteria. Purpose statements that set out objectives to be achieved through other provisions in  
8 a chapter, or that contain language that is merely aspirational, are not mandatory approval  
9 criteria. *Bennett v. City of Dallas*, 96 Or App 645, 649, 773 P2d 1340 (1989); *Burlison v.*  
10 *Marion County*, 52 Or LUBA 216, 218-219 (2006). GPDC 16.310 explains that the purpose  
11 of GPDC 16.300 *et seq* is to provide design and siting standards for the facilities. Other  
12 provisions of GPDC 16.300 *et seq* implement the objectives that are set out in the purpose  
13 statement. As relevant here, GPDC 16.360(1) implements GPDC 16.310(2) and requires the  
14 city to determine that “[t]he proposal causes minimal visual impact when viewed from  
15 adjacent properties, public rights-of-way, public parks and the Rogue River,” and GPDC  
16 16.371(5) implements GPDC 16.310(3) and requires towers to be “designed to accommodate  
17 collocation of additional providers \* \* \*, unless the review body determines that collocation  
18 would have an adverse visible impact, and that the visual impacts cannot be mitigated  
19 through measures which may include stealth design.” Those sections of the GPDC are the  
20 city’s attempt at balancing the competing purposes set out in GPDC 16.310: to allow  
21 providers to build out their systems, reduce visual impacts, and also encourage collocation.  
22 In adopting those approval standards, the city has chosen to fulfill the purposes set out in  
23 GPDC 16.310 by requiring collocation unless the city determines the visual impact of  
24 collocation is too significant. Given that context, it is clear that the purposes set out in  
25 GPDC 16.310 do not function as independent, mandatory approval criteria applicable to

1 permit applications for telecommunication facilities, and the city did not err in failing to  
2 adopt findings addressing the GPDC 16.310 purpose statement.

3 The first subassignment of error is denied.

4 **B. Second Subassignment**

5 In the second subassignment of error, petitioners argue that the city’s decision  
6 violates GPDC 16.371(4), which provides:

7 “Separation Between Transmission Towers. No transmission tower may be  
8 constructed within 2,000 feet of an existing transmission tower. Tower  
9 separation shall be measured by following a straight line from the footprint of  
10 the proposed tower which is closest to the footprint of any pre-existing tower.  
11 For purposes of this paragraph, an existing tower shall also include any  
12 transmission tower for which an application has been filed and not denied.  
13 Transmission towers constructed or approved prior to adoption of this section  
14 may be modified to accommodate additional providers consistent with  
15 provisions for collocation in this section. The review body may allow or  
16 require the tower separation standard to be modified if one of the following  
17 applies:

18 “(a) A reduced separation will better camouflage the proposed facility,

19 “(b) The proposed tower does not exceed the maximum height limit of the  
20 zone, or

21 “(c) The applicant has sufficiently demonstrated that technical or capacity  
22 issues require an additional tower to be located within 2,000 feet of an  
23 existing tower. The submittal of radio frequency propagation maps or  
24 other technical studies may be required.”

25 Although an existing tower is located within 2000 feet of the proposed tower, the city  
26 modified the tower separation standard set forth in GPDC 16.371(4) and allowed the  
27 proposed tower to be constructed closer than 2000 feet to an existing tower pursuant to  
28 GPDC 16.371(4)(c), because it concluded that intervenor had sufficiently demonstrated that  
29 collocation on that existing tower was infeasible because the existing tower is not large  
30 enough to accommodate all of intervenor’s required equipment and is not tall enough to meet  
31 intervenor’s coverage objectives.

1           The entirety of petitioners’ argument in support of this subassignment of error is set  
2 out below:

3           “For the reasons described in the first subassignment of error above, this  
4 reasoning is flawed as a matter of law. The technical and capacity issues are  
5 real, but due to intervenor’s failure to demonstrate they cannot be overcome,  
6 respondent’s failure to ensure the plain language and intent of GPDC  
7 16.371(4) are adhered to constitutes further grounds for remand or reversal.”  
8 Petition for Review 12.

9 To the extent petitioners’ argument under this subassignment of error is intended to argue  
10 that the city misconstrued GPDC 16.371(4) in modifying the separation standard, that  
11 argument is insufficiently developed for review. *Deschutes Development Company v.*  
12 *Deschutes County*, 5 Or LUBA 218 (1982). Petitioners do not explain how the city’s  
13 conclusion that “technical or capacity issues” supported a modification of the separation  
14 standard misconstrued applicable law, and we also do not understand petitioners to argue that  
15 the city’s decision was not supported by substantial evidence in the record.

16           The second subassignment of error is denied.

17           The third assignment of error is denied.

18 **FOURTH ASSIGNMENT OF ERROR**

19           In their fourth assignment of error, petitioners argue that the city’s decision is not  
20 supported by substantial evidence in the record. Unlike the third assignment of error, which  
21 is directed at GPDC provisions that will not be implicated on remand, the fourth assignment  
22 of error challenges the evidence in support of the city’s decision that GPDC 16.360(1) is met.  
23 GPDC 16.360(1) is presumably one of the criteria to which testimony on remand will be  
24 directed in discussing possible collocation on a 75-foot tower.<sup>5</sup> Therefore, it would be  
25 premature to resolve the fourth assignment of error.

---

<sup>5</sup> As set out in n 1, GPDC 16.360(1) provides one of the conditional use criteria for approving a cellular transmission tower:

- 1 We do not reach the fourth assignment of error.
- 2 The city's decision is remanded.

---

“The proposal causes minimal visual impact when viewed from adjacent properties, public rights-of-way, public parks and the Rogue River.”