BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CHRISTOPHER HILL,
*Petitioner,*

vs.

CITY OF PORTLAND,
*Respondent,*

and

VERIZON WIRELESS
*Intervenor-Respondent.*

LUBA No. 2012-036

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Christopher T. Hill, Portland, filed the petition for review and argued on his own behalf.

Linly F. Rees, Deputy City Attorney and Kathryn S. Beaumont, Senior Deputy City Attorney, Portland, filed a joint response brief and Kathryn S. Beaumont argued on behalf of respondent.

Phillip E. Grillo, Portland, filed a joint response brief and argued on behalf of intervenor-respondent. With him on the brief was Davis Wright Tremaine LLP.

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

AFFIRMED 09/20/2012

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

Opinion by Ryan.

**NATURE OF THE DECISION**

Petitioner appeals a city council decision granting a conditional use permit to construct a 45-foot tall monopole tower.

**MOTION TO INTERVENE**

Verizon Wireless, the applicant below, moves to intervene on the side of the respondent. There is no opposition to the motion and it is granted.

**FACTS**

The subject property is zoned General Commercial (GC) with a buffer overlay zone along the southern boundary that is approximately 80 feet wide. The northern boundary of the subject property is adjacent to SE Foster Road. The properties to the east of the subject property are zoned GC and are developed with commercial uses. The properties to the west and south of the subject property are zoned residential and developed with residences.

Intervenor applied for a conditional use permit to construct a 45-foot tall monopole cellular communications tower within 2,000 feet of an existing monopole tower.[1] The tower is proposed to contain between 9 and 12 antennas on which will be mounted a total of 16 transmitters that transmit signals in different directions in three frequency bands, the 700 MHz band, the 800 MHz cellular band, and the 1900 MHz PCS band. Record 259, 261, 1257. Intervenor's engineer estimated that a transmitter operating in the 750 MHz band would emit 759 watts of power, that the transmitters operating in the 800 MHz band would emit 301 watts, and the transmitters operating in the PCS band would emit 391 watts. Record 1257.

[1] PCC 33.274.035(B) requires a conditional use permit for the tower because it is proposed to be located within 2,000 feet of an existing tower. Otherwise, the communications tower would be a permitted use in the GC zone.

The hearings officer denied the application, and intervenor appealed the decision to the city council. The city council approved the application, and this appeal followed.

**FIRST ASSIGNMENT OF ERROR**

**A. Introduction**

Portland City Code (PCC) 33.815.225 provides approval criteria for Radio Frequency Transmission Facilities (RFTF). RFTF is not defined in the PCC. PCC 33.815.225(C) sets out the approval criteria for "facilities operating at 1,000 watts [Effective Radiated Power] ERP or less * * *." The approval criteria for "all other Radio Frequency Transmission Facilities" are set out at PCC 33.815.225(D). A key issue in this appeal is whether PCC 33.815.225(C) or (D) applies to the application. The approval criteria in PCC 33.815.225(C) and (D) are similar, except that (C)(1) requires the applicant to prove that the tower "is the only feasible way to provide the service, including documentation as to why the proposed facility cannot feasibly be located in a right-of-way," and (C)(2) through (4) include requirements relating to the design and appearance of the tower and accessory equipment. PCC 33.815.225(D) does not include those requirements, but includes a criterion not found in PCC 33.815.225(C): the city must determine "[b]ased on the number and proximity of other facilities in the area, the proposal will not significantly lessen the desired character and appearance of the area." The text of PCC 33.815.225(C) and (D) is set out in Appendix A.

PCC 33.910 defines "Effective Radiated Power" or ERP as "[a] calculation of the amount of power emitted from a radio frequency antenna." Federal Communications Commission (FCC) rules set limits on the ERP emissions for transmitters of different frequency bands, as follows: The ERP limit for 800 MHz cellular transmitters is 500 watts, and the ERP limit for 700 MHz and PCS transmitters is 1000 watts. Record 260; 47 CFR §22, §24, and §77. Each of the transmitters proposed to be mounted on the tower will emit power at levels below the FCC limits for the frequency band specified in the FCC rules.

**B. First Assignment of Error**

Intervenor sought approval under PCC 33.815.225(C). The hearings officer denied the applications because he concluded that intervenor had not demonstrated that its proposed monopole tower is a "facility operating at 1000 watts ERP or less" under PCC 33.815.225(C).[2] Record 618. Intervenor appealed the decision to the city council.

The city council found that the phrase "facilities operating at 1000 watts ERP or less" in PCC 33.815.225(C) is ambiguous because the PCC does not define the term "facilities" and the dictionary definition of the word does not resolve the ambiguity. The city council also concluded that the PCC 33.810 definition of ERP, quoted above, does not resolve the ambiguity regarding how to calculate power for the purpose of applying PCC 33.815.225(C). *See* n 2. In order to resolve the ambiguity, the city council relied on evidence regarding the city's intent in enacting the current version of PCC 33.815.225(C) in 2004. The city concluded that legislative history of the 2004 enactments demonstrated that the city enacted PCC 33.815.225(C) in order to treat wireless facilities consistently with FCC emission thresholds for wireless facilities that had recently been enacted, which calculate emissions on a per transmitter basis.[3] Based on that evidence, the city council concluded:

> "[T]he City's 1,000 watt ERP threshold should be interpreted in a manner that is consistent with FCC power limits, which are calculated by channel, not by antenna as the hearings officer concluded, nor by adding together all of the power from all of the channels, from all of the antennas, in all directions, as argued by [petitioner].
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> " * * * * *
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> "In short, while there are three plausible interpretations of the phrase 'facilities operating at 1,000 watts ERP or less' in PCC 33.815.225(C), the

[2] The hearings officer relied on the PCC 33.810 definition of ERP to conclude that the proposed tower did not fall under the PCC 33.815.225(C) ERP threshold, by calculating the ERP of a single antenna. More than one transmitter will be mounted on each antenna.

[3] We understand intervenor and the city to use the word "transmitter" and "channel" synonymously to refer to a device that transmits a cellular or PCS signal.

> interpretation proposed by BDS staff and the applicant is the most plausible. It is the most plausible interpretation because computing ERP by channel, for purposes of determining compliance with FCC power limits, is consistent with standard engineering practices, it is consistent with federal law and it is consistent with the legislative history of the City's 1,000 watt ERP threshold." Record 18.

In his first assignment of error, Petitioner argues that the city erred in determining that PCC 33.815.225(C) rather than (D) applies and that the city erred in failing to adopt findings that PCC 33.815.225(D)(1) is satisfied. The crux of petitioner's argument is that because the aggregate of the ERP from all of the proposed transmitters to be located on the pole exceeds 1000 watts the proposed monopole tower is not, as the city council found, a "facilit[y] operating at 1000 watts ERP or less". Accordingly, petitioner argues, the city should have applied PCC 33.815.225(D) to the application. In support of his argument, petitioner focuses on the word "facility" in PCC 33.815.225(C) and argues that "facility" includes all devices that produce radio frequency emissions. Petitioner cites other provisions of the PCC that use the word "facility," "antenna," and "transmitter" and argues that the city knows how to use the word "transmitter" when it is referring to a single device that transmits a radio frequency signal.

Petitioner also challenges the city council's reliance on legislative history in the record regarding the intent of the city in enacting the 2004 version of PCC 33.815.225(C), and argues that the city is prohibited by PCC 33.700.070 from considering that legislative history.[4] PCC 33.700.070 provides general rules for application of the PCC. According to

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[4] Petitioner specifically relies on the following subsections of PCC 33.700.070:

> "**33.700.070 General Rules for Application of the Code Language**.
>
> "The rules of this section apply to this Title and any conditions of a land use approval granted under this Title.
>
> "**A. Reading and applying the code**. Literal readings of the code language will be used. Regulations are no more or less strict than as stated. Applications of the regulations

petitioner, PCC 33.700.070 does not list reference to legislative history of PCC provisions as a permissible way to apply the PCC and therefore the city is prohibited from considering the legislative history of the enactment of PCC 33.815.225(C).

Intervenor and the city (together, respondents) respond that the city council's interpretation of PCC 33.815.225(C) must be affirmed under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010).[5] As relevant here, ORS 197.829(1)(a) and (b) require LUBA to affirm the city council's interpretation of the PCC unless the interpretation is "inconsistent with the express language of the comprehensive plan or land use regulation;" or "inconsistent with the purpose for the comprehensive plan or land use regulation[.]" Under *Siporen*, where the city council plausibly interprets its land use

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that are consistent with the rules of this section are nondiscretionary actions of the Director of BDS to implement the code. The action of the Director of BDS is final.

"**B.** **Ambiguous or unclear language**. Where the language is ambiguous or unclear, the Director of BDS may issue a statement of clarification processed through a Type III procedure, or initiate an amendment to Title 33 as stated in Chapter 33.835, Goal, Policy, and Regulation Amendments.

"* * * * *

"**G.** **Applying the code to specific situations.** Generally, where the code cannot list every situation or be totally definitive, it provides guidance through the use of descriptions and examples. In situations where the code provides this guidance, the descriptions and examples are used to determine the applicable regulations for the situation. If the code regulations, descriptions, and examples do not provide adequate guidance to clearly address a specific situation, the stated intent of the regulation and its relationship to other regulations and situations are considered."

[5] As relevant, ORS 197.829(1) provides:

"(1) The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

"a) Is inconsistent with the express language of the comprehensive plan or land use regulation; [or]

"(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation[.]"

regulations, LUBA must affirm the interpretation unless it is inconsistent with all of the express language of the regulations or with the purpose of the regulation.

We agree with respondents that the city's interpretation of PCC 33.815.225(C) is not inconsistent with the express language of the PCC or with the purpose of the regulation and is required to be affirmed under ORS 197.829(1) and *Siporen*. The meaning of the key term used in PCC 33.815.225(C), "facility," is not clear, is not defined in the PCC, and the dictionary definition of the word is not particularly helpful in discerning the intent of the city in enacting the provision. Although petitioner presents a reasonably strong textual and contextual argument, we cannot say the city's interpretation is "inconsistent with the express language" of PCC 33.815.225(C), because the PCC does not define the term "facility." ORS 197.829(1)(a).

The legislative history in the record regarding the city's intent in enacting the current version of PCC 33.815.225(C) indicates that the purpose of the 1,000 watt ERP threshold in PCC 33.815.225(C) is to conform the PCC to the FCC's power limits for wireless facilities, and the record indicates that the FCC rules require ERP limits for wireless facilities to be calculated by transmitter. Record 150-51, 561-78. That legislative history supports a conclusion that the city's interpretation of the phrase "facilities operating at 1,000 watts ERP or less" is not "inconsistent with the purpose for the * * * land use regulation." ORS 197.829(1)(b). Because the city's interpretation is not inconsistent with either the "express language" or the "purpose" of the regulation, we must affirm the city's interpretation.

We also disagree with petitioner that the city is prohibited from considering that legislative history simply because PCC 33.700.070 does not specify that legislative history may be used in construing the PCC. While PCC 33.700.070(A), (B) and (G) all provide guidance in interpretation and applying the PCC, none of those subsections of PCC 33.700.070, nor any other subsection of PCC 33.700.070, prohibit consideration of relevant legislative history. Reference to competent legislative history can be a legitimate way to

ascertain the meaning of an ambiguous statute. ORS 174.020(3); *State v. Gaines*, 346 Or 160, 171-73, 206 P3d 1042 (2009). The same rules that govern construction of statutes apply to the construction of municipal ordinances. *Lincoln Loan Co. v. City of Portland*, 317 Or. 192, 199, 855 P2d 151 (1993). The city did not err in relying on the legislative history of PCC 33.815.225(C).

The first assignment of error is denied.

**SECOND ASSIGNMENT OF ERROR**

PCC 33.815.225(C)(1) requires that "[t]he applicant must prove that a tower that is * * * within 2,000 feet of another tower is the only feasible way to provide the service, including documentation as to why the proposed facility cannot feasibly be located in a right-of-way." In his second assignment of error, petitioner argues that there is not substantial evidence in the record to support the city's conclusion that intervenor satisfied its burden to show that the proposed tower "is the only feasible way to provide the service" under PCC 33.815.225(C)(1) and that the city's findings are inadequate to explain why PCC 33.815.225(C)(1) is satisfied. According to petitioner, during the proceedings below, petitioner and others proposed alternative sites for locating the tower that are within intervenor's *coverage* area, and intervenor did not analyze those sites or explain why locating the tower at the proposed location is the only feasible way to provide the service. Petitioner argues that remand is required for the city to address the alternative sites.

Respondents point to evidence in the record explaining that petitioner's proposed alternative sites are not feasible sites because they are located outside of the search area identified by intervenor for meeting its coverage objectives, and the fact that the sites are located within intervenor's coverage area is not relevant in determining where to locate a tower in order for transmitters to meet identified coverage objectives. Respondents also point to findings adopted by the city council that conclude that intervenor satisfied its burden to show that co-location is not feasible because: (1) the heights of existing towers are

inadequate, and (2) co-location on an existing rooftop facility is not feasible due to structural integrity of the rooftop. The city council also concluded that location within the existing right of way is not feasible because there is not sufficient area within the right of way to locate all of the necessary equipment. Record 22-23. Petitioner does not acknowledge either the evidence or the findings or otherwise explain why the city's findings are inadequate to explain why the city council found that PCC 33.815.225(C)(1) is satisfied.

The second assignment of error is denied.

**THIRD AND FOURTH ASSIGNMENTS OF ERROR**

In his third assignment of error, we understand petitioner to argue that there is not substantial evidence in the record to support the city's decision because the city relied on evidence provided by an engineer who is not licensed in Oregon. Petitioner argues that the evidence provided by that engineer is the "only evidence in the record that the proposed project would meet the project purpose of better in-building coverage * * *." Petition for Review 10. However, none of the applicable approval criteria cited to us by petitioner require the city to determine whether the proposal meets a "project purpose." In addition, petitioner does not identify any approval criteria that require that proof of compliance with the criteria must be supplied by an engineer licensed in the State of Oregon. Where none of the applicable approval criteria require that evidence must be provided by an engineer licensed in Oregon or require the city's decision to be based solely on the testimony of a licensed engineer, the fact that the engineer is not licensed in Oregon, by itself, is not a basis to reverse or remand the decision.

PCC 33.815.225(C)(5) requires the city to determine that "[p]ublic benefits of the use outweigh any impacts which cannot be mitigated[.]" In his fourth assignment of error, petitioner repeats arguments under the third assignment of error, contending that the city's conclusion that PCC 33.815.225(C)(5) is satisfied is not supported by substantial evidence

because some of the evidence in the record that the city relied on was provided by the engineer who is not licensed in Oregon.

As a review body, we are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes County*, 21 Or LUBA 188, *aff'd* 108 Or App 339, 815 P2d 233 (1991). We have no trouble concluding that the city could reasonably rely on testimony and evidence provided by an engineer who is not licensed in Oregon in determining that the public benefit of the proposed tower outweigh any impacts which cannot be mitigated, absent any challenge to the accuracy of the evidence, or any countervailing evidence in the record that calls into question the engineer's calculations, assumptions, or technical conclusions. Moreover, as respondents point out, when the unlicensed status of one of intervenor's engineers was raised as an issue, intervenor subsequently provided additional testimony from a different engineer, who is licensed in Oregon, that corroborated the previous testimony and evidence. We agree with respondents that there is substantial evidence to support the city's conclusion that PCC 33.815.225(C)(5) is met.

Finally, in the fourth assignment of error, petitioner argues that the city's findings are inadequate where they fail to address impacts of the tower on nearby property values. Petitioner and others testified regarding their concerns about potential impacts to property values from the proposed tower, and submitted a study into the record that relied on data from Florida and New Zealand gathered more than five years ago regarding the effect of telecommunications towers on property values. Record 1081-88. Intervenor responded with testimony that called into question the reliability of petitioner's evidence, given that the study was not performed by an appraiser and is not specific to the area where the tower is proposed

but studies impacts of cellular towers on property values in a different state and a different country. Record 83.

Petitioner does not identify any approval criterion that requires evidence or findings regarding the impact of the tower on property values, but appears to presume that such evidence is an essential consideration under the "public benefits" criterion at PCC 33.815.225(C)(5). Petitioner faults the applicant for failing to provide its own evidence of impacts on property values, and the city for failing to adopt findings addressing the issue. However, the city adopted detailed findings regarding the public benefit of the proposed tower under PCC 33.815.225(C)(5), and it is reasonable to conclude that the city chose not to rely on petitioner's evidence about potential impacts on property values because that evidence was speculative and was not specific to the area where the proposed tower would be located, in determining that the public benefits of the use outweigh any impacts that cannot be mitigated. In that circumstance, and without more concrete and specific evidence or an approval criterion that requires the city to specifically consider whether the tower will impact property values, we do not think it was error for the city to fail to adopt findings addressing the potential impact of the tower on property values. *See Clark v. Coos County*, 53 Or LUBA 325, 342-3 (2007) (a local government is not required to adopt findings specifically addressing the impacts of a cell tower on property values where an applicable approval criterion requires the local government to determine whether the cell tower is "compatible" with surrounding properties but does not specifically require consideration of impacts on property values, and the evidence that property values will be affected is not overwhelming).

The third and fourth assignments of error are denied.

**FIFTH ASSIGNMENT OF ERROR**

PCC 33.274.040(C)(6) requires that the antennae on the tower maintain a minimum distance from habitable structures as shown in Table 274-2. As explained above, the properties to the west and south of the subject property are developed with residences. In its

decision, the city imposed Condition D in order to increase the distance between the adjacent residences and the proposed tower and equipment. Condition D provides:

> "The applicant shall relocate the facility from the originally proposed area behind the adjacent building, to around the corner and along the southeast façade of that building. Alternatively, any location on the site that is closer to SE Foster Road, farther away from residences, and east of the southeast façade of the adjacent building, will satisfy this condition." Record 36.

In his fifth assignment of error, we understand petitioner to argue the city's findings are inadequate because Condition D makes the final location of the tower uncertain. According to petitioner "[b]ecause some [of the] approval criteria are location dependent or distance dependent, factual findings are required for a specific location on the site." Petition for Review 12.

Respondents respond that the only criterion that is location dependent is PCC 33.274.040(C)(6) and that the city specifically found that "[b]ecause Condition D requires the facility to be located farther from adjacent residential structures, the minimum siting distance requirements in Table 274-2 will continue to be met." Record 28. Absent a more developed argument from petitioner, we do not agree that the city's findings are inadequate merely because Condition D requires the tower to relocated farther away from residential development.

The fifth assignment of error is denied.

**SIXTH ASSIGNMENT OF ERROR**

PCC 33.258.070(D)(2) requires that nonconforming development on the subject property be brought into compliance with the development standards for landscaping and screening when the value of proposed alterations on the site, as determined by the Bureau of Development Services (BDS), exceeds the threshold set out in PCC 33.258.070(D)(2)(a).[6] In

[6] PCC 33.258.070(D)(2) provides in relevant part:

his sixth assignment of error, we understand petitioner to argue that the city erred in failing to require in its decision that the subject property to be brought into compliance with the development standards, where there is evidence in the record that the cost of the project is $150,000. Citing *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992), petitioner argues that the city's decision impermissibly deferred making a determination regarding whether nonconforming development upgrades are required to the building permit stage where there is no opportunity for public participation.

Respondents respond that the city did not defer making a determination regarding PPCC 33.258.070(D)(2) because no determination regarding upgrades is required during the

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> "Nonconforming development with an existing nonconforming use, allowed use, limited use, or conditional use. Nonconforming development associated with an existing nonconforming use, an allowed use, a limited use, or a conditional use, must meet the requirements stated below. When alterations are made that are over the threshold of Subparagraph D.2.a., below, the site must be brought into conformance with the development standards listed in Subparagraph D.2.b. The value of the alterations is based on the entire project, not individual building permits.
>
> "a. Thresholds triggering compliance. The standards of Subparagraph D.2.b., below, must be met when the value of the proposed alterations on the site, as determined by BDS, is more than $141,100. The following alterations and improvements do not count toward the threshold:
>
> "(1) Alterations required by approved fire/life safety agreements;
>
> "(2) Alterations related to the removal of existing architectural barriers, as required by the Americans with Disabilities Act, or as specified in Section 1113 of the Oregon Structural Specialty Code;
>
> "(3) Alterations required by Chapter 24.85, Interim Seismic Design Requirements for Existing Buildings;
>
> "(4) Improvements to on-site stormwater management facilities in conformance with Chapter 17.38, Drainage and Water Quality, and the Stormwater Management Manual; and
>
> "(5) Improvements made to sites in order to comply with Chapter 21.35, Wellfield Protection Program, requirements.
>
> "(6) Energy efficiency or renewable energy improvements that meet the Public Purpose Administrator incentive criteria."

conditional use process. Rather, the city explains, the calculation of the value of the proposed alterations and the determination as to whether nonconforming development is required to be brought into compliance is made by BDS when the applicant requests building permits, and final drawings and specifications are submitted. If the value of the proposed alterations exceeds the threshold, after excluding certain alterations and improvements from the calculation under PCC 33.258.070(D)(2)(a)(1) – (6), then the city will require non-conforming development upgrades as part of the building permit process.

We disagree with petitioner that the city was required to determine, during the conditional use phase of the proposed development, whether non-conforming development upgrades will be required or that the city impermissibly deferring finding compliance with PCC 33.258.070(D). The city's explanation of how PCC 33.258.070(D)(2) is applied to nonconforming development is consistent with the text of PCC 33.258.070(D)(2)(a), which refers to a determination by BDS regarding the value of proposed alterations on the site.

The sixth assignment of error is denied.

The city's decision is affirmed.

Appendix A

**33.815.225 Radio Frequency Transmission Facilities**

"These approval criteria allow Radio Frequency Transmission Facilities in locations where there are few impacts on nearby properties. The approval criteria are:

" * * * * *

"C. Approval criteria for facilities operating at 1,000 watts ERP or less, proposing to locate on a tower in a C or EX zone more than 50 feet from an R zone:

"1. The applicant must prove that a tower that is taller than the base zone height standard allows or is within 2,000 feet of another tower is the only feasible way to provide the service, including documentation as to why the proposed facility cannot feasibly be located in a right-of-way;

"2. The tower, including mounting technique, must be sleek, clean and uncluttered;

"3. Accessory equipment associated with the facility must be adequately screened. If a new structure will be built to store the accessory equipment, the new structure must be designed to be compatible with the desired character of the surrounding area;

"4. The visual impact of the tower on the surrounding area must be minimized;

"5. Public benefits of the use outweigh any impacts which cannot be mitigated; and

"6. The regulations of Chapter 33.274, Radio Frequency Transmission Facilities are met.

"D. Approval criteria for all other Radio Frequency Transmission Facilities:

"1. Based on the number and proximity of other facilities in the area, the proposal will not significantly lessen the desired character and appearance of the area;

"2. Public benefits of the use outweigh any impacts which cannot be mitigated; and

"3. The regulations of Chapter 33.274, Radio Frequency Transmission Facilities are met."