

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

3
4 AMERICAN TOWER CORPORATION,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF TUALATIN,
10 *Respondent,*

10/30/18 PM 2:39 LUBA

11 and

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14 LENDLEASE (US) TELECOM HOLDING, LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2018-062

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19 FINAL OPINION
20 AND ORDER

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22 Appeal from City of Tualatin.

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24 Alan M. Sorem, Salem, filed the petition for review and argued on behalf
25 of petitioner. With him on the brief was Saalfeld Griggs PC.

26
27 Sean T. Brady, City Attorney, Tualatin, filed a joint response brief and
28 argued on behalf of respondent. With him on the brief were E. Michael Connors
29 and Hathaway Larson LLC.

30
31 E. Michael Connors, Portland, filed a joint response brief and argued on
32 behalf of intervenor-respondent. With him on the brief were Sean T. Brady and
33 Hathaway Larson LLC.

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

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AFFIRMED

10/30/2018

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

NATURE OF THE DECISION

Petitioner appeals a decision by the city council approving a variance to separation distance requirements for a wireless communication facility.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to new matters raised in the response brief. There is no objection to the reply brief and it is allowed.

FACTS

Intervenor-respondent (intervenor) applied for architectural review for a 100-foot monopole wireless communication facility (WCF) tower to be located on property zoned Light Manufacturing. Intervenor’s tower will accommodate facilities for two wireless carriers, T-Mobile and Verizon, each of which have coverage and capacity deficiencies in the area in which the tower is proposed.

Petitioner operates an existing 130-foot monopole tower (ATC tower) that is located approximately 750 feet from intervenor’s proposed site. The ATC tower is located on property owned by the city and leased to petitioner, and is surrounded by over 50 Douglas fir trees that are approximately 100 to 150 feet tall.

Tualatin Development Code (TDC) 73.470(9) requires that the minimum distance between wireless communication facilities be at least 1,500 feet, unless a variance is obtained pursuant to TDC 33.025(1). We discuss TDC 33.025(1)

1 later in this opinion. Intervenor applied for a variance to the minimum distance
2 requirement. Intervenor submitted documentation that the trees surrounding the
3 existing ATC tower prevented co-location on the ATC tower and that the ATC
4 tower could not be extended in height. Record 634, 638. Petitioner appeared
5 during the proceedings before the planning commission and argued that the ATC
6 tower could be extended in height by 20 feet to 150 feet, and with the extension
7 could “structurally accommodate” T-Mobile and Verizon. Record 270-71. In
8 response, intervenor submitted a revised usage and facility justification that
9 concluded that the ATC tower could not satisfy Verizon’s coverage and capacity
10 objectives even at the 150 foot level due to an inability to provide improved
11 coverage to the residential area north of SW Tualatin Road. Record 252, 254-59.

12 The planning approved the variance application, and petitioner appealed
13 the planning commission’s decision to the city council. The city council approved
14 the application, and this appeal followed.

15 **SECOND ASSIGNMENT OF ERROR**

16 TDC 33.025(1) sets out the criteria for granting a variance to separation
17 requirements for a WCF, and provides for a variance on the basis of either
18 “coverage and capacity” (TDC 33.025(1)(a)) or “site characteristics” (TDC
19 33.025(1)(b)). TDC 33.025(1)(a) provides in relevant part:

20 “(1) The City may grant a variance from the provisions of TDC
21 73.470(9), which requires a 1500-foot separation between
22 WCFs, providing the applicant demonstrates *compliance with*
23 *(a) or (b) below.*

1 “(a) coverage and capacity.

2 “(i) It is technically not practicable to provide the
3 needed capacity or coverage the tower is
4 intended to provide and locate the proposed
5 tower on available sites more than 1,500 feet
6 from an existing wireless communication
7 facility or from the proposed location of a
8 wireless communication facility for which an
9 application has been filed and not denied. The
10 needed capacity or coverage shall be
11 documented with a Radio Frequency report;

12 “(ii) The collocation report, required as part of the
13 Architectural Review submittal, shall document
14 that the existing WCFs within 1500 feet of the
15 proposed WCF, or a WCF within 1500 feet of
16 the proposed WCF for which application has
17 been filed and not denied, cannot be modified to
18 accommodate another provider; and

19 “(iii) There are no available buildings, light or utility
20 poles, or water towers on which antennas may be
21 located and still provide the approximate
22 coverage the tower is intended to provide.”
23 (Emphasis added.)

24 In its second assignment of error, petitioner argues that the city’s conclusion that
25 intervenor satisfied the requirements of TDC 33.025(1)(a)(ii) improperly
26 construes the applicable law. Petition for Review 24.

27 The city council concluded that intervenor had documented, as required by
28 TDC 33.025(1)(a)(ii), that the existing ATC tower cannot be modified to
29 accommodate additional facilities. Record 5 (“The applicant demonstrated that

1 the existing ATC tower cannot be modified to accommodate the Verizon and T-
2 Mobile wireless facilities and satisfy their capacity and coverage needs”).

3 During the proceedings before the planning commission, petitioner
4 appeared and argued that the ATC tower at an increased height could
5 “structurally accommodate” additional antennae. Record 271, 281. In response
6 to petitioner’s arguments, the city council adopted findings that such an increase
7 would require petitioner to obtain a height variance from the city, and rejected
8 petitioner’s argument that petitioner is entitled under federal law to increase the
9 height of the ATC tower to 150 feet without city involvement. In its first
10 subassignment of error, petitioner argues that the city council’s conclusion that a
11 height variance approved by the city is required and not preempted by federal law
12 improperly construes federal law.

13 The city council also adopted alternative findings that interpreted TDC
14 33.025(1)(a)(ii) as not requiring an applicant to consider an existing tower that is
15 not already tall enough, unless applications to increase the height of that existing
16 tower have been submitted when a variance is sought. Record 6. In its second
17 subassignment of error, petitioner argues that the city’s interpretation in those
18 findings is inconsistent with the express language of the provision.

19 The city and intervenor (respondents) respond that a finding that the city
20 council adopted that is not challenged by petitioner is dispositive, and that finding
21 renders any other errors in other findings that are responsive to petitioner’s
22 arguments below harmless. Response Brief 29-30. Respondents argue that

1 “[p]etitioner cannot establish the extension of the ATC Tower obviates the need
2 for [i]ntervenor’s tower.” Response Brief 30.

3 The city council found:

4 “Additionally, ATC cannot accommodate Verizon’s coverage and
5 capacity objectives because Verizon already rejected a 150-foot
6 tower. The Applicant submitted a RF Usage and Facility
7 Justification analysis prepared by a Verizon RF engineer. *The*
8 *Verizon RF engineer’s analysis concluded that, even if the height of*
9 *the ATC Tower was increased, it still would not satisfy Verizon’s*
10 *coverage and capacity objectives, in particular the residential area*
11 *north of SW Tualatin Rd which is the primary area of concern for*
12 *this new facility.” Record 7 (Emphasis added).*

13 The city council’s finding regarding TDC 33.025(1)(a)(ii), quoted above,
14 assumed that (1) intervenor was in fact required to consider whether the ATC
15 tower could be modified, even without a pending application for a height
16 variance; and (2) the ATC tower height could be increased under either a city
17 variance or federal law, and concluded that the evidence demonstrated that the
18 ATC tower “cannot be modified to accommodate another provider.” Record 5.
19 Petitioner does not challenge that finding, or otherwise challenge the evidentiary
20 basis for the city council’s conclusion that a modified 150-foot tall ATC tower
21 cannot accommodate Verizon. Record 254-59.

22 We agree with respondents. Evidence in the record documents that
23 intervenor considered whether the existing ATC tower can be modified to
24 accommodate an additional provider and concludes that even a modified 150-
25 foot ATC tower would not satisfy Verizon’s coverage and capacity needs. Based

1 on that evidence, the city council concluded that intervenor had demonstrated
2 that the existing ATC tower “cannot be modified to accommodate another
3 provider.” Record 5. Absent any challenge to that finding, petitioner’s other
4 challenges in its second assignment of error to other findings and interpretations
5 the city council adopted provide no basis for reversal or remand of the decision.

6 The second assignment of error is denied.

7 **FIRST ASSIGNMENT OF ERROR**

8 TDC 33.025(1)(b) provides a second basis for granting a variance, based
9 on “site characteristics:”

10 “(1) The City may grant a variance from the provisions of TDC
11 73.470(9), which requires a 1500-foot separation between
12 WCFs, providing the applicant demonstrates *compliance with*
13 *(a) or (b) below.*

14 “ * * * * *

15 “(b) [s]ite characteristics. The proposed monopole location
16 includes tall, dense evergreen trees that will screen at
17 least 50 [percent] of the proposed monopole from the
18 RL District or from a small lot subdivision in the RML
19 District.” (Emphasis added.)

20 TDC 33.025(1) sets out independent grounds for granting a variance to the 1,500
21 foot separation requirement. The city council concluded that both TDC
22 33.025(1)(a) and (b) were met, and petitioner’s two assignments of error
23 challenge those conclusions. However, because we deny above petitioner’s
24 second assignment of error that challenges the city council’s conclusion that TDC
25 33.025(1)(a) was met, we need not determine whether the city council’s

1 conclusion that TDC 33.025(1)(b) was also met is correct. *See Jaffer v. City of*
2 *Monmouth*, 51 Or LUBA 633, 641 n 6 (2006) (explaining that where only one of
3 three rezoning criteria must be met in order to grant a rezoning, and the city
4 adequately demonstrated that one criterion was satisfied, LUBA need not
5 consider arguments relating to the other two criteria); *Doyle v. Coos County*, 51
6 Or LUBA 402, 413 n 6 (2006) (same).

7 We do not reach the first assignment of error.

8 The city's decision is affirmed.