

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

JEFFREY DIEPHUIS and KELLY DIEPHUIS,  
*Petitioners,*

vs.

CITY OF BEAVERTON,  
*Respondent,*

and

CELLCO PARTNERSHIP,  
*Intervenor-Respondent.*

LUBA No. 2020-101

FINAL OPINION  
AND ORDER

Appeal from City of Beaverton.

Jeffrey Diephuis and Kelly Diephuis filed the petition for review. Kelly Diephuis argued on behalf of petitioners.

No appearance by City of Beaverton.

Richard J. Busch filed the response brief and argued on behalf of intervenor-respondent.

RUDD, Board Chair; RYAN, Board Member; ZAMUDIO, Board Member, participated in the decision.

REMANDED

01/25/2021

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

**NATURE OF THE DECISION**

Petitioners appeal a planning commission decision granting one-year extensions to approvals of a wireless facility and a related setback variance.

**MOTION TO INTERVENE**

Cellco Partnership (intervenor), formerly known as Verizon Wireless (VAW) LLC, the applicant below, moves to intervene on the side of respondent. The motion is unopposed and is granted.

**FACTS**

On March 15, 2018, the city approved intervenor's applications to construct an 80-foot tall cell tower with a setback variance on a 2.2-acre property. The approvals were valid for two years and were therefore due to expire on March 15, 2020.

On February 18, 2020, intervenor applied for extensions of the approvals. On July 10, 2020, the planning director approved the extensions. Petitioners appealed the planning director's decision to the planning commission. On September 18, 2020, the planning commission denied the appeal and approved the extensions, adopting its own findings of fact and incorporating the planning director's findings.

This appeal followed.

**SECOND ASSIGNMENT OF ERROR**

Beaverton Development Code (BDC) 50.93(6) provides:

1 “In order to approve an extension of time application, the decision  
2 making authority shall make findings of fact based on evidence  
3 provided by the applicant demonstrating that all of the following  
4 criteria are satisfied:

5 “A. It is not practicable to commence development within the  
6 time allowed *for reasons beyond the reasonable control of the*  
7 *applicant.*

8 “B. There has been no change in circumstances or the applicable  
9 regulations or Statutes likely to necessitate modification of  
10 the decision or conditions of approval since the effective date  
11 of the decision for which the extension is sought.

12 “C. The previously approved land use decision is not being  
13 modified in design, use, or conditions of approval.”  
14 (Emphasis added.)

15 Petitioners’ second assignment of error is that the planning commission  
16 misconstrued BDC 50.93(6)(A) because the planning commission incorporated  
17 by reference the planning director’s decision, and the planning director’s decision  
18 failed to apply the “beyond the reasonable control of the applicant” prong of the  
19 extension criteria.<sup>1</sup> Petition for Review 18. Intervenor concedes that the planning  
20 director failed to apply the “beyond the reasonable control of the applicant”  
21 prong. However, intervenor argues that such failure does not require reversal or  
22 remand because the planning director was not the final decision maker, and the  
23 planning commission adopted separate, supplemental findings applying the  
24 “beyond the reasonable control” requirement.

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<sup>1</sup> ORS 197.835(9)(a)(D) provides that LUBA shall reverse or remand a land use decision if the local government improperly construed the applicable law.

1       We agree with intervenor. The planning commission recognized and  
2 addressed in its findings petitioners' assertion that the planning director erred by  
3 failing to "explain why solving the problem was beyond the reasonable control  
4 of the applicant, as required in Section 50.93.6." Record 35. The planning  
5 commission then applied that standard and found that,

6       "[w]hile [intervenor] is a nationwide company, allocation of  
7 resources is done by region. [Intervenor] explains that construction  
8 of the facility was projected for 2017 but was not approved until  
9 2018. By 2018, [intervenor's] national management had taken the  
10 funds allocated to this region and repurposed it for use in other  
11 regions." *Id.*

12   The planning commission concluded:

13       "[B]ased on the Analysis and Findings in Director's Notice of  
14 Decision and the supplemental findings on August 10, 2020 that the  
15 Director did not err in fact or law in making the findings that it was  
16 not practicable to commence development within the time allotted  
17 due to reasons beyond the reasonable control of [intervenor.]"  
18 Record 35.

19   The second assignment of error is denied.

## 20   **FIRST ASSIGNMENT OF ERROR**

21       Petitioners argue that the planning commission misconstrued BDC  
22 50.93(6)(A) and that its decision is not supported by substantial evidence in the  
23 record. For the reasons explained below, we agree with petitioners.

1           **A. The planning commission improperly construed BDC**  
2           **50.93(6)(A).**

3           LUBA reviews non-governing body interpretations of local code  
4 provisions under ORS 197.835(9)(a)(D) to determine whether the decision maker  
5 improperly construed the applicable law. *Waverly Landing Condo. Owners’*  
6 *Assoc. v. City of Portland*, 61 Or LUBA 448, 454 (2010). We do not afford  
7 deference to the planning commission’s interpretation of the BDC. *Derry v.*  
8 *Douglas County*, 132 Or App 386, 390, 888 P2d 588 (1995) (“[A]pplying the  
9 rationale expressed in *Gage [v. City of Portland]*, 319 Or 308, 877 P2d 1187  
10 (1994)], we conclude that where the planning commission’s interpretation is the  
11 final one rendered by the local government, it is not entitled to deference.”).

12           The planning commission concluded:

13           “[T]he funding mechanism through the national organization [is]  
14 outside the control of the regional offices that obtained the land use  
15 approval. The Commission finds that the reasoning is sufficient to  
16 satisfy Criterion 50.93.6.” Record 3.

17 In determining whether the planning commission properly construed the law, we  
18 consider the text and context of the code and give words their ordinary meaning.  
19 *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143  
20 (1993). Key terms are not defined in the BDC, and where terms are not defined  
21 in the code, the BDC directs us to *Webster’s Third New Int’l Dictionary* (1993)  
22 for definitions.<sup>2</sup> *Webster’s* defines “applicant,” in part, as “one who applies for

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<sup>2</sup> BDC 10.20(6) provides, in part:

1 something,” and defines “apply,” in part, as “to make an appeal or a request esp.  
2 formally and often in writing.” *Webster’s Third New Int’l Dictionary* 105  
3 (unabridged ed 2002). Intervenor explained below that (1) “[i]n building out and  
4 enhancing the wireless network, [intervenor’s] national headquarters team  
5 considers a number of factors that often do not align temporally with the land use  
6 approval process in a particular jurisdiction,” (2) internal priority decisions “are  
7 made quickly in real time to respond to a rapidly changing service environment,”  
8 and (3) “[intervenor’s] need to temporarily delay this project was based on  
9 revised priorities in order to deliver the best possible service to their customers.”  
10 Record 102-03. Intervenor testified that its projects are reevaluated throughout  
11 the budget year and sometimes reprioritized by intervenor’s national  
12 headquarters “based on changes in network needs, new demand and readiness to

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“[I]f terms or sections are ambiguous or vague, the following should be applied as warranted under the circumstances:

“A. Terms defined in Chapter 90 (Definitions) have specifically stated meanings unless the context clearly requires otherwise.

“B. Terms not defined in Chapter 90 (Definitions) shall have the meaning set forth in Webster’s Third New International Dictionary, 1993, copies of which are available for reference in the Community Development Department and Beaverton City Library.

“C. This Code shall be interpreted reasonably, reading questioned regulations in relation to other sections such that an interpretation most fully effectuates the intent and purpose of the regulations.” (Underline in original.)

1 build.” Record 22. For this project, intervenor explained that “the site is one that  
2 is an important build this year, as it is on a major route—Scholls Ferry Road.  
3 Keeping up with the ever-increasing demand on the network is challenging.”  
4 Record 144.

5 The planning commission erred in construing the term “the applicant.”  
6 Intervenor’s regional and national headquarter decision makers are part of the  
7 same legal entity and, therefore, the same “applicant.” The planning commission  
8 erroneously applied the term “applicant” used in BDC 50.93(6)(A) to distinguish  
9 intervenor’s regional office from intervenor’s national office. As far as we can  
10 tell, the regional office responsible for submitting the land use applications is the  
11 same company as the national headquarters responsible for allocating financial  
12 resources. Record 60. Accordingly, the assertion that financial investment  
13 decisions are made at the national rather than regional level is not substantial  
14 evidence that those investment decisions are beyond “the applicant’s” control.

15 Dictionary definitions of “practicable” include “feasible.” *Webster’s Third*  
16 *New Int’l Dictionary* 1780 (unabridged ed 2002). Dictionary definitions of  
17 “control” include the “power or authority to guide or manage.” *Id.* at 496.  
18 Dictionary definitions of “beyond” include “in a degree or amount surpassing.”  
19 *Id.* at 210. Considering all of these definitions together, we interpret BDC  
20 50.93(6)(A) to require that an applicant seeking an extension demonstrate that it  
21 was not feasible for the applicant to commence development within the permit  
22 life for reasons surpassing the applicant’s reasonable power to guide or manage.

1           **B. The planning commission’s decision is not supported by**  
2           **substantial evidence.**

3           With the understanding that BDC 50.93(6)(A) is not met simply because  
4           funding decisions are made at a different corporate level than decisions to submit  
5           a land use application, we turn to whether there is substantial evidence that it was  
6           “not practicable [for intervenor] to commence development” within the permit  
7           life due to reasons beyond intervenor’s reasonable control. We conclude that the  
8           planning commission’s decision is not supported by substantial evidence in the  
9           record.

10          Intervenor testified that it identified the subject property in late 2016 for  
11          its 2017 build plan but did not obtain final land use approval until April 2018.  
12          Record 102. Intervenor initially explained its delay in commencing development  
13          as follows:

14                “[Intervenor] put all of their projects in the Pacific Northwest on-  
15                hold in early 2018 and into 2019 due to money issues within  
16                [intervenor]. Projects that were brought back first in the Pacific  
17                Northwest were expanded coverage sites, which expands the  
18                footprint of the network, followed by capacity sites where increased  
19                network traffic makes building the site imperative to increase the  
20                capacity of the site. The site is one that is an important build this  
21                year, as it is on a major route—Scholls Ferry Road. Keeping up with  
22                the ever-increasing demand on the network is challenging.” Record  
23                144.

24          Petitioners argue that intervenor’s evidence regarding the reasons for its delay  
25          establish only internal business choices and do not provide substantial evidence  
26          of reasons “beyond the reasonable control of [intervenor].” BDC 50.93(6)(A).



1 We agree with petitioners. The reasons that intervenor explained for the delay  
2 and on which the planning commission relied in making its decision were not  
3 beyond intervenor’s reasonable ability to control, but rather resulted from  
4 intervenor’s financial difficulties and the resulting internal prioritization of  
5 investments, considering competing customer needs.

6 Petitioners and intervenor both cite *Bard v. Lane County*, 63 Or LUBA 1  
7 (2011), as support for their respective positions. In *Bard*, the county board of  
8 commissioners affirmed a hearings officer’s conclusion that an applicant’s failure  
9 to commence construction of a six-bed hospice facility within the permit term  
10 was due to a lack of funding that was “for reasons for which the applicant was  
11 not responsible,” *i.e.*, the Great Recession. 63 Or LUBA at 17. We concluded:

12 “It is well within the county’s interpretive discretion to interpret [the  
13 local code provision] to be satisfied in this case if a prudent  
14 developer faced with the funding shortfall [the applicant] faced  
15 would have delayed construction of the six-bed hospice facility. The  
16 county’s decision can be read simply to interpret [the code  
17 provision] to allow [the applicant] to determine the sources of  
18 income that it will rely on to finance construction of the six-bed  
19 hospice, without having to explain why it could not as an  
20 organization have altered that decision or reallocated funds from  
21 other planned activities. While other interpretations of [the code  
22 provision] are certainly possible, that interpretation is not  
23 inconsistent with the text of [the code provision] and is plausible.  
24 We defer to that interpretation.” *Id.* at 18.

25 The hearings officer’s decision in *Bard* was adopted by the county board of  
26 commissioners and, therefore, we were required to accord that interpretation  
27 deference under ORS 197.829(1). *Id.* at 15 (“Under *Siporen* [*v. City of Medford*,

1 349 Or 247, 243 P3d 776 (2010)], that interpretation must be affirmed if it is  
2 ‘plausible.’”). As we expressly recognized in *Bard*, other interpretations of the  
3 code were plausible. *Id.* at 18.

4 As explained above, we do not defer to the planning commission’s  
5 interpretation of the BDC. That lack of deference notwithstanding, our decision  
6 here is consistent with our decision in *Bard*. In *Bard*, the county did not conclude  
7 that all investment decisions within a company qualify as decisions beyond the  
8 reasonable control of that company. Rather, the county concluded that the  
9 “unprecedented decline in the economy in the past 1 – 1 ½ years,” “a matter of  
10 national, in fact, international, attention and concern,” resulted in fundraising  
11 lagging behind original projections. *Id.* at 17. The county held that “[t]he  
12 Applicant explained the reason for the delay as lack of funds and adequately  
13 explained that they were impacted by, but not responsible for, the decline in the  
14 economy.” *Id.* at 18. Thus, contrary to intervenor’s argument, *Bard* does not stand  
15 for the proposition that lack of funding alone necessarily justifies approval of an  
16 extension as beyond an applicant’s control.

17 Further, we explained that the county must consider

18 “whether the reason the extension is needed is the downturn in  
19 donations or [the applicant’s] decision to seek approval of [a  
20 different,] 12-bed hospice facility. Based on the current record, the  
21 county’s finding that the requested extension is ‘for reasons for  
22 which the applicant was not responsible’ is not supported by

1           substantial evidence.”<sup>3</sup> *Id.* at 19.

2       Thus, *Bard* supports a conclusion that an internal decision by a company to  
3       allocate scarce funds towards a different project or projects may not qualify as a  
4       delay beyond the reasonable control of the company.

5           There is no evidence in the record that intervenor’s financial decisions to  
6       allocate scarce resources resulted from economic forces outside its control.  
7       Accordingly, we agree with petitioners that the planning commission’s  
8       conclusion that “[i]t is not practicable to commence development within the time  
9       allowed for reasons beyond the reasonable control of the applicant” is not  
10      supported by substantial evidence. *City of Portland v. Bureau of Labor and Ind.*,  
11      298 Or 104, 119, 690 P2d 475 (1984) (substantial evidence is evidence on which  
12      a reasonable person would rely in reaching a decision).

13           The first assignment of error is sustained.

14      **DISPOSITION**

15           Petitioners request that we reverse or remand the decision. OAR 661-010-  
16      0071(2)(b) and (d) provide that we will remand a decision when it “is not  
17      supported by substantial evidence in the whole record” or when it “improperly  
18      construes the applicable law, but is not prohibited as a matter of law.” OAR 661-  
19      010-0071(1)(c) provides that we will reverse a land use decision when it “violates

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<sup>3</sup> We explained in *Bard* that the county erred in failing to consider the “petitioners’ evidence that the real reason the extension is needed is that [the applicant] chose to pursue approval of a 12-bed hospice” facility instead of proceeding with the already-approved, smaller project. 63 Or LUBA at 19.

1 a provision of applicable law and is prohibited as a matter of law.” *Seitz v. City*  
2 *of Ashland*, 24 Or LUBA 311, 314 (1992) (“A reversal of a land use decision by  
3 this Board, unlike a remand, means that a local government will not be able to  
4 correct all of the identified errors by adopting new findings, by accepting  
5 additional evidence, or both.”).

6 The planning commission improperly construed the term “applicant” as  
7 used in BDC 50.93(6)(A) to differentiate intervenor’s regional and national  
8 divisions when the “applicant” for the project is the same entity. Intervenor  
9 provided evidence that the reason it did not proceed with its project during the  
10 initial approval period is because it elected to prioritize other projects due to  
11 financial issues within the company. As explained above, that evidence is not  
12 evidence on which a reasonable person would rely to conclude that “[i]t is not  
13 practicable to commence development within the time allowed for reasons  
14 beyond the reasonable control of the applicant.” BDC 50.93(6)(A). However,  
15 because it is at least theoretically possible for intervenor to submit additional  
16 evidence on remand demonstrating that its financial decisions were driven by  
17 external factors, at this point we cannot conclude that the decision is “prohibited  
18 as a matter of law.” OAR 661-010-0071(1)(c).

19 The city’s decision is remanded.