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

DEBRAH J. CURL and JERRY L. CURL,
Petitioners,

vs.

CITY OF BEND,
Respondent,

and

CELLCO PARTNERSHIP,
DBA VERIZON WIRELESS,
Intervenor-Respondent.

LUBA No. 2020-103

FINAL OPINION
AND ORDER

Appeal from City of Bend.

Debrah J. Curl filed the petition for review and reply brief and argued on behalf of themselves. Also on the briefs was Jerry L. Curl.

No appearance by City of Bend.

E. Michael Connors filed a response brief and argued on behalf of intervenor-respondent. Also on the brief was Hathaway Larson LLP.

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

ZAMUDIO, Board Chair, did not participate in the decision.

AFFIRMED 07/21/2021

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 approving a conditional use permit and site plan review for a cellular communications tower.

FACTS

Intervenor-respondent (intervenor) applied to site a 60-foot-tall cellular communications tower, and a 20-foot-by-20-foot fenced equipment area at the base of the tower, on property zoned Commercial Convenience. The application describes the proposed tower as a "wireless communications stealth structure designed to mimic the look of a pine tree" with a 50-foot pole, an antenna tip 49 feet high, and a 10-foot tree cone above the pole. Record 549, 669. The tower is proposed to be located on a part of the property that includes several existing trees averaging 35 feet tall. Currently, a shipping container sits in the location of the proposed tower and equipment area.

The hearings officer held a hearing on the application and, at the conclusion of the hearing, left the record open for 21 days, in seven-day intervals. The first seven-day interval (First Open Record Period) was designated for the submission of written evidence and testimony. The second seven-day interval (Responsive Open Record Period) was designated for the submission of written evidence and testimony responding to evidence and testimony submitted during the First Open Record Period. The final seven-day interval was designated for the submission of intervenor's final argument. During the First Open Record

Period, petitioners and intervenor submitted evidence and testimony. During the Responsive Open Record Period, petitioners and intervenor also submitted evidence and testimony. After the record was closed, the hearings officer issued a decision approving the application with conditions. Petitioners appealed the decision to the city council. The city council declined to review the appeal. This appeal followed.

FIRST ASSIGNMENT OF ERROR

LUBA is authorized to reverse or remand the city's decision if petitioners demonstrate that the city "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[s]." ORS 197.835(9)(a)(B). Petitioners' first assignment of error is difficult to follow, but we understand petitioners to assert that the hearings officer committed procedural errors that prejudiced their substantial rights in three respects when, (1) during the Responsive Open Record Period, they accepted new evidence and testimony; (2) during the Responsive Open Record Period, they accepted new evidence and testimony that was not limited to responsive evidence and testimony; and (3) after the record was closed, they rejected petitioners' request to respond to the new evidence that was submitted by intervenor during the Responsive Open Record Period. Petition for Review 17.

Intervenor responds, initially, that petitioners had the opportunity but failed to object below to the hearings officer's consideration of materials submitted by intervenor during the Responsive Open Record Period on the

grounds that they were not limited to responsive evidence and testimony and that petitioners are therefore precluded from assigning error to that procedure at LUBA. Where a party has the opportunity to object to a procedural error before the local government, but fails to do so, that error cannot be assigned as grounds for reversal or remand of the resulting decision. *Torgeson v. City of Canby*, 19 Or LUBA 511, 519 (1990); *Dobaj v. Beaverton*, 1 Or LUBA 237, 241 (1980).[1]

Petitioners do not cite any record pages demonstrating that they raised this issue below. However, intervenor cites, and we have reviewed, petitioners' August 3, 2020 letter to the hearings officer at Record 180 to 189, which the hearings officer accepted. We agree with intervenor that petitioners' letter objected that the hearings officer committed error in accepting intervenors' submittals during the Responsive Open Record Period because those submittals included *new evidence*, but the letter did not object that the new evidence was not *responsive* to evidence submitted during the First Open Record Period. Accordingly, petitioners may not assign error on the basis that intervenor submitted new evidence that was not responsive to evidence submitted during the First Open Record Period.

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[1] The obligation to object to procedural errors overlaps with, but exists independently of, ORS 197.763(1) and ORS 197.835(3). *Confederated Tribes v. City of Coos Bay*, 42 Or LUBA 385, 393 (2002); *Simmons v. Marion County*, 22 Or LUBA 759, 774 n 8 (1992).

To the extent that petitioners argue that the hearings officer erred in accepting new evidence of any type during the Responsive Open Record Period, intervenor responds that the hearings officer's acceptance of new evidence was proper because the post-hearing process adopted by the hearings officer clearly allowed for the submission of new evidence and testimony during both the First Open Record Period and the Responsive Open Record Period, and because that process is consistent with ORS 197.763(6)(c) and its local implementation at Bend Development Code (BDC) 4.1.885(D).[2] We agree. *Grahn v. City of Yamhill*, 76 Or LUBA 258, 266-67 (2017) (citing *Van Nalts v. Benton County*, 42 Or LUBA 497, 506 (2002)) (a local government can adopt a post-hearing open record procedure that deviates from ORS 197.763 so long as the process does not deprive a party of a right that it has under that statute).

In response to petitioners' argument that the hearings officer erred in failing to allow petitioners the opportunity to further respond to new responsive evidence submitted by intervenor during the Responsive Open Record Period, intervenor cites *Rice v. City of Monmouth*, 53 Or LUBA 55 (2006), *aff'd*, 211 Or App 250, 154 P3d 786 (2007), for the proposition that petitioners do not have a right to respond to that evidence. In *Rice*, we explained that "there is no unlimited right to rebut rebuttal evidence, and *Fasano* [*v. Washington Co. Comm.*, 264 Or

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[2] Intervenor also notes, correctly, that petitioners and others submitted new evidence and testimony during the Responsive Open Record Period, which the hearings officer accepted.

574, 507 P2d 23 (1973),] does not require endless opportunities to rebut rebuttal evidence." 53 Or LUBA at 60; *see also Wetherell v. Douglas County*, 56 Or LUBA 120, 127 (2008). Petitioners were not entitled to respond to the new responsive evidence submitted by intervenor during the Responsive Open Record Period.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In their second assignment of error, petitioners argue that the city's conclusion that it was not required to apply site plan review criteria to the relocation of the shipping container on the property is not supported by adequate findings or substantial evidence. According to petitioners, the shipping container is depicted on the approved site plan and, therefore, is approved to remain on the property. Petitioners argue that either the shipping container must comply with the applicable approval criteria or the decision must include a condition of approval requiring that the shipping container be removed from the property.

The hearings officer responded to that argument and concluded, based on intervenor's representations, that the shipping container is not a part of the proposal and "will need to be removed to construct the proposed wireless facility." Record 138. Intervenor responds, and we agree, that the findings are adequate to explain why the shipping container is not part of the proposal and are supported by substantial evidence in the record. Record 186-87, 352 (explaining that intervenor is not requesting approval of the shipping container and that the

shipping container is not associated with the proposed tower). As such, it was not necessary for the hearings officer to impose a condition of approval requiring the shipping container to be removed prior to development.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

BDC 3.7.400(R) provides, in part, that, for wireless communication facilities, "[c]abinets and other equipment must not impair pedestrian use of sidewalks or other pedestrian paths or bikeways on public or private land." During the proceedings below, petitioners argued that a dirt path shown on the site plan as extending from a sidewalk on the east side of the property, through the property, to a convenience store parking lot and coffee stand on the west side of the property, is a "pedestrian path," the use of which would be impaired by the tower and improvements.

The hearings officer addressed that argument and interpreted the undefined phrase "pedestrian paths" in BDC 3.7.400(R) by reference to the phrase "pedestrian facilities," which are defined in BDC chapter 1.2 as "improvements and provisions made to accommodate or encourage walking, including sidewalks, pathways, walkways, access ways, crosswalks, ramps, paths, and trails." The hearings officer relied on BDC 3.1.300(B)(2), which requires "pedestrian facilities" to meet minimum width, lighting, and accessibility requirements, among other things, to conclude that the dirt path on the property

is not a "pedestrian facility" and, therefore, not a "pedestrian path" within the meaning of BDC 3.7.400(R).

As noted, the city council declined to review petitioners' appeal. BDC 4.1.1140(B)(1) provides that "[a] decision by the City Council to not grant discretionary review of the appeal is the final determination of the City *and will be considered to be an adoption by the Council of the decision being appealed, including any interpretations of this code or of the Bend Comprehensive Plan included in the decision.*" (Emphasis added.) Accordingly, the city council adopted the hearings officer's interpretation of BDC 3.7.400(R) as its own. We are required to affirm the city council's interpretation unless it is inconsistent with the express language, purpose, or underlying policy of the BDC provision, or with a state statute or administrative rule that the BDC provision implements. ORS 197.829(1); *Green v. Douglas County*, 245 Or App 430, 438 n 5, 263 P3d 355 (2011) (deference under ORS 197.829(1) is due where a governing body declines review of a decision but incorporates that decision as the governing body's own decision).

In their third assignment of error, petitioners first argue that the hearings officer's interpretation of BDC 3.7.400(R) is not correct because nothing in that provision limits its application to officially recognized or BDC 3.1.300(B)(2)-compliant paths. Intervenor responds that, by operation of BDC 4.1.100(B), the city council adopted the hearings officer's interpretation as its own and,

accordingly, that interpretation must be affirmed because it is not inconsistent with the express language, purpose, or underlying policy of BDC 3.7.400(R).

Petitioners do not develop any argument that ORS 197.829(1) does not require us to affirm the city's interpretation. Rather, petitioners argue that BDC 4.1.100(B) has no bearing on our review of the city's interpretation and that the only reviewable interpretation is the one adopted by the hearings officer. We agree with intervenor that, by operation of law—specifically BDC 4.1.100(B)—the city council adopted the hearings officer's interpretation as its own and, accordingly, it must be affirmed.

In the alternative, the hearings officer reviewed the evidence in the record and concluded that the proposed development would not impair the use of the path. Record 163. Also in their third assignment of error, petitioners argue that the city's conclusion that BDC 3.7.400(R) is met is not supported by substantial evidence in the record. LUBA may remand a decision that is not supported by substantial evidence in the whole record, *i.e.*, evidence that a reasonable person would rely upon to reach a decision. ORS 197.835(9)(a)(C); *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 60, 752 P2d 262 (1988). The hearings officer adopted the following findings:

> "The Hearings Officer reviewed the Proposed Enlarged Site Plan and the photographs submitted by Curl and Hamilton. The Hearings Officer finds the construction of the proposed facility on property described as the lease land would not impede the informal cut-

through 'path.'

> "The Hearings Officer finds that the proposed wireless communication facility will not impair use of any sidewalks or other BD[C] 3.7.400(R) pedestrian path." Record 163 (citations omitted).

Petitioner has not established that the city's decision is not supported by substantial evidence.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

In their fourth assignment of error, petitioners argue that the city's conclusion that BDC 3.7.400(H), (J), and (M) are met is not supported by substantial evidence in the record. BDC 3.7.400(H) and (J) require that the visual impact of wireless facilities be minimized and that camouflaged facilities be designed to blend into the surrounding area.[3] BDC 3.7.400(M) requires that the

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[3] BDC 3.7.400(H) provides:

> "All facilities must be designed to minimize the visual impact to the greatest extent practicable by means of placement, screening, landscaping, and camouflage. All facilities must also be designed to be compatible with existing architectural elements, building materials, and other site characteristics. The applicant must use the least visible antennas reasonably available to accomplish the coverage objectives. All high visibility facilities must be sited in such a manner as to cause the least detriment to the viewshed of adjoining properties, neighboring properties, and distant properties.
>
> "1. Exemption.
>
> "a. Small wireless facilities on an existing or replacement utility pole, light pole or structure."

application include photo simulations of the proposed facility.[4] As part of the application, intervenor submitted photo simulations of the proposed monopine tower. Record 699-704. In response to concerns raised during the proceedings below about the potential for long-term visual deterioration of the proposed tower from sun and weather damage, intervenor submitted a photo of an existing monopine tower in Vail, Colorado (Vail Photo), to demonstrate that its proposed tower will not fade in five to six years. Record 683-84. The design of that tower is different from the design of intervenor's proposed tower, but it is made by the same manufacturer.

In their fourth assignment of error, petitioners argue that a letter from intervenor's tower designer that was submitted during the Responsive Open Record Period changed the proposed design to the design of the tower depicted

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BDC 3.7.400(J) provides, "All camouflaged facilities must be designed to visually and operationally blend into the surrounding area in a manner consistent with existing development on adjacent properties. The facility must also be appropriate for the specific site. In other words, it should not "stand out" from its surrounding environment."

[4] BDC 3.7.400(M) provides:

> "As a condition of approval and prior to final inspection of the facility, the applicant must submit evidence, such as photos, to the satisfaction of the City sufficient to prove that the facility is in substantial conformance with photo simulations provided with the application. Nonconformance requires modification to compliance within 90 days or the structure must be removed."

in the Vail Photo and that the tower depicted in the Vail Photo does not satisfy BDC 3.4.700(H) or (J).

Intervenor responds, and we agree, that the tower depicted in the Vail Photo is not the photo simulation of the tower that the hearings officer approved and that the hearings officer understood that the tower that they were approving was the tower depicted in the photo simulations included with the application. Although they could be clearer, we conclude that the hearings officer's findings are adequate to support a conclusion that they understood that the purpose of the Vail Photo was to demonstrate the long-term visual viability of the color of the proposed tower and not to provide a "photo simulation" of the proposed tower.[5]

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[5] The hearings officer adopted the following findings:

> "Staff, in the *Staff Recommendation to the Hearings Officer*, noted that Staff requested [intervenor] to address the long-term visual impacts of the sun and weather damage that monopines experience over time. [Intervenor] responded to Staff by stating that the monopine fabricator to be Valmont Structures ('Valmont'). According to [intervenor], unique features like branches and matching antenna 'socks' make the antennas virtually invisible. [Intervenor] indicated that Valmont conveyed to [intervenor] that the branches/leaves tend to get grayer over time. Valmont indicated that the speed at which this happens depends on the climate (strength of sun, amount of snow, etc). [Intervenor] supplied a picture [Vail Photo] of a Valmont monopine in Vail, Colorado at a ski resort that is 6 or 7 years old. Valmont indicated to [intervenor] that its monopine facilities are typically maintained on an as-needed basis.
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> "* * * * *

Stated differently, the Vail Photo was not introduced or presented to the hearings officer as a "photo simulation" of the proposed tower within the meaning of BDC 3.4.700(M) and, accordingly, it is not the design that the hearings officer approved.

The fourth assignment of error is denied.

The city's decision is affirmed.

"One opponent * * * argued that [intervenor] had not provided a 'color palette'[] or provided meaningful assurances that the photo simulations submitted were (1) consistent with plans/drawings and (2) representative of the appearance of the monopine wireless facility that would actually be constructed. The Hearings Officer finds that [intervenor] provided a letter confirming that the monopine tower used in the photo simulation is a real monopine tower that has been built and is currently in use. The Hearings Officer also finds that [intervenor] provided a photo of an existing monopine located in Vail, Colorado that shows the design of the monopine to be used at the Subject Property. The Hearings Officer finds [intervenor] supplied substantial evidence to demonstrate the photo simulation is representative of the monopine to be constructed at the Subject Property." Record 140, 159-60 (emphasis in original; citations omitted).