BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SAVE OUR SKYLINE, KEVIN ARCHER, NANCY ARCHER, STEVEN BERG, JENNIFER BERG, EARL BOWERMAN, LISA BOWERMAN, JERRY CURL, DEBRAH CURL, THOMAS DANIELS, MARTHA DANIELS, GEORGE EMMERT, VALERIE EMMERT, JASON EPPLE, RONALD FISHER, HELEN FISHER, JEFFREY KAPPLE, MARC LANDRY, KATHLEEN LANDRY, ELIZABETH MURPHY, MARK NEUMAN, JANICE NEUMAN, PERRY PATTISON, ANN PATTISON, DONALD ROWDEN, KAREN ROWDEN, JONATHAN SHARPE, JANIS SHARPE, ANDREW SHOOKS, MICHELLE SHOOKS, WILLIAM TAYLOR, DIANE TAYLOR, MARSHALL THOMAS, and LOUANN THOMAS,
Petitioners,

vs.

CITY OF BEND,
Respondent,

and

AWBREY TOWERS, LLC,
Intervenor-Respondent.

LUBA Nos. 2004-004 and 2004-048

WESTERN RADIO SERVICES COMPANY,
Petitioner,

and

SAVE OUR SKYLINE, KEVIN ARCHER, NANCY ARCHER, STEVEN BERG, JENNIFER BERG, EARL BOWERMAN, LISA BOWERMAN, JERRY CURL, DEBRAH CURL, THOMAS DANIELS, MARTHA DANIELS, GEORGE EMMERT, VALERIE EMMERT, JASON EPPLE, RONALD FISHER, HELEN FISHER, JEFFREY KAPPLE, MARC LANDRY, KATHLEEN LANDRY, ELIZABETH MURPHY, MARK NEUMAN, JANICE NEUMAN, PERRY PATTISON, ANN PATTISON, DONALD ROWDEN, KAREN ROWDEN, JONATHAN SHARPE, JANIS SHARPE, ANDREW SHOOKS, MICHELLE SHOOKS, WILLIAM TAYLOR, DIANE TAYLOR,

MARSHALL THOMAS, and LOUANN THOMAS,
Intervenors-Petitioner,

vs.

CITY OF BEND,
Respondent,

and

AWBREY TOWERS, LLC,
Intervenor-Respondent.

LUBA No. 2004-005

FINAL OPINION
AND ORDER

Appeal from City of Bend.

Daniel Kearns, Portland, filed the petition for review and argued on behalf of petitioners Save Our Skyline. With him on the brief was Reeve Kearns, PC.

Jim Petersen, Bend, filed the petition for review and argued on behalf of petitioner Western Radio. With him on the brief was Slothower and Petersen, PC.

No appearance by City of Bend.

Tamara E. MacLeod, Bend, filed the response briefs and argued on behalf of intervenor-respondent. With her on the brief was Karnopp Petersen, LLP.

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

REMANDED 11/08/2004

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a city hearings officer decision that grants conditional use and site plan approvals for a proposal to expand existing broadcast and wireless communication facilities and construct new facilities.

MOTION TO INTERVENE

Awbrey Towers LLC (Awbrey Towers), the applicant below, moves to intervene on the side of respondent in all of these consolidated appeals. There is no opposition to the motions, and they are allowed.

STANDING

Awbrey Towers challenges the standing of several of the individual petitioners, in LUBA Nos. 2004-004 and 2004-048, arguing that it could not confirm that those individual petitioners appeared during the proceedings below, as required by ORS 197.830(2)(b). Petitioners subsequently identified pages in the record, which establish that all but one of those individual petitioners appeared. The only individual petitioner who did not appear below is Earl Bowerman. Because all other individual petitioners and petitioner Save our Skyline (SOS) (hereafter the SOS petitioners) appeared and have standing, and all the SOS petitioners make the same arguments, we do not consider intervenor's standing challenge further. *Barton v. City of Lebanon*, 193 Or App 114, 118, 88 P3d 323 (2004).

FACTS

Awbrey Butte's elevation and location make it technically suitable for siting broadcast towers. A 19.5-acre ownership (the subject property) is located at the top of the butte. One of the tax lots that make up that ownership is tax lot 2300, which includes six acres. Tax lot 2300 is developed with seven towers. Those towers range in height from 95

feet tall to 300 feet tall and include both lattice and guyed monopole designs.[1] Each tower is capable of housing multiple antennas. The towers house microwave transmitters and receivers as well as antennas for television, FM radio and wireless communication "(cellular and wireless telephone, paging, and two-way radio repeaters)." Record 370. According to intervenor, the last tower to be approved was the Oregon Public Broadcasting (OPB) tower in 1983, but additional antennas have been placed on those towers since that date without land use review or approval. All transmission and reception (T&R) facilities on Awbrey Butte are licensed by the Federal Communications Commission (FCC). The remaining 13.5 acres of the subject property are not developed, and that area includes "prominent rock outcrops and native vegetation including mature ponderosa pine and juniper trees and a mixture of native brushes and grasses." Record 369. The subject property is accessed over a gated driveway at the end of N.W. Gill Court. The property is designated "Public Facilities" on the Bend Area General Plan (BAGP) and is zoned "Urban Residential Standard Density" (RS).

Awbrey Butte was annexed by the City of Bend in 1979. In 1982, the city approved the Awbrey Butte Master Plan for the 1,790 acres of Awbrey Butte that surround the subject property. At that time, the subject property was owned by Deschutes County and was not included in the property that was to be developed by the property owner who developed the Awbrey Butte Master Plan. A large residential area has been developed pursuant to that master plan and surrounds the subject property. Petitioner SOS is an organization of Awbrey Butte homeowners.

[1] The first transmission tower was built on the top of Awbrey Butte in 1960. According to intervenor, the facilities on Awbrey Butte now provide service to the City of Bend and surrounding areas, including "Redmond, Prineville, Madras, Sunriver and LaPine and even as far as Christmas Valley and Maupin. [O]ver 100,000 people benefit from the * * * facilities on Awbrey Butte." Response Brief of Awbrey Towers, LLC to Save our Skyline's Petition 4, n 5.

Intervenor Awbrey Towers is made up of the owners of some of the facilities on Awbrey Butte.[2] Awbrey Towers purchased the subject property from the county in 1998. A more limited tower expansion proposal was submitted by petitioner Western Radio Services Company, Inc. (Western Radio) and was denied by the city.[3] With the encouragement of city planning staff, Awbrey Towers submitted an application for a larger proposal to expand the existing transmission facilities on the top of Awbrey Butte in two phases over ten years. The hearings officer concluded that she lacked authority under the city's land use regulations to approve a proposal that would be phased over ten years, but she concluded that particular parts of the proposal could be approved. However, under the city's land use regulations, construction of those facilities would have to be initiated within two years, or the approvals will expire. Intervenor's proposal is set out below, with the parts that were approved by the hearings officer preceded by an asterisk:

> "Phase 1: Expand 2 existing towers, construct two new towers, and lower one existing tower:
>
> "● *Add 50 feet to [an] existing 300-foot tower for a total height of 350 feet (existing OPB TV antenna, 3 existing FM radio antennas and 9 new wireless antennas)
>
> "● *Add 100 feet to an existing 200-foot tower for a total height of 300 feet (Gross Communication)
>
> "● *Replace an existing 100 foot tower with a new 140-foot tower, and lower the existing tower to 40 feet (Western Radio Services existing personal wireless)
>
> "● *Build a new 300-foot tower (Combined Communications)
>
> "Phase 2:

---

[2] Awbrey Towers, LLC is made up of: "OPB, Cowen Broadcasting Co., American Tower Corporation, GCC Bend, LLC, The Chackel Family, LLC (aka Combined Communications), Bend Broadcasting, LLC (nka NPG of Oregon, Inc.) aka (KTVZ), and Western Radio Services Co." Response Brief of Awbrey Towers, LLC to Western Radio Petition 4, n 3.

[3] Petitioner Western Radio is one of the members of Awbrey Towers, and owns one of the existing towers on Awbrey Butte. *See* n 2.

"● *Add 100 feet to an existing 200-foot tower for a total height of 300 feet (KTVZ – 1 television antenna and 7 FM radio antennas)

"● Add 100 feet to an existing 95-foot tower for a total height of 195 feet (American Tower – personal wireless with no identified service provider, a so-called 'spec tower')

"● Add 185 feet to an existing 115-foot tower for a total height of 300 feet (Cowan Broadcasting)." SOS Petition for Review 8.

The hearings officer's decision was appealed to the city council by the SOS petitioners, petitioner Western Radio and Deschutes County. The city council elected not to hear petitioners' appeals, but agreed to hear the Deschutes County appeal. Thereafter, the city council elected to dismiss the county appeal and "affirmed the decision of the Hearings Officer." Supplemental Record 2.

In this appeal, petitioner Western Radio challenges one part of the hearings officer's decision and the SOS petitioners challenge other aspects of the decision.

FIRST ASSIGNMENT OF ERROR (WESTERN RADIO)

Western Radio is a wireless land mobile service. Land mobile transmissions include "cellular, paging and specialized mobile radio and private business and government radio systems." Record 168. Western Radio contended below that the higher power radio and television transmitters on the subject property are already causing radio frequency electromagnetic interference (RFI) with the land mobile transmitters and receivers.[4] Western Radio believes the approved proposal will worsen current RFI on the subject property. To

[4] Awbrey Towers describes RFI as follows:

> "[RFI] refers to interference between (a) FCC licensees and (b) other licensees or neighboring properties. * * * '[RFI] arises when the signal radiation by a transmitter is picked up by an electronic device in such a manner that it prevents the clear reception of another and desired signal or causes malfunction of some other electronic device.' * * *" Response Brief of Awbrey Towers, LLC to Western Radio Petition 9.

address that concern, Western Radio argued the hearings officer should impose a number of conditions to avoid increasing RFI.[5]

Western Radio contends the city has both the authority and the obligation under its general conditional use approval criteria to impose such conditions. In particular, Western Radio cites the general conditional use criterion that appears at Bend City Code (BCC) 10-10-29(3)(a).[6] The hearings officer rejected Western Radio's request, concluding that federal law preempts whatever authority the city might otherwise have to impose conditions of

---

[5] Western Radio summarizes its suggested conditions as follows:

> "Mr. Oberdorfer requested that the hearings officer require that each Awbrey Towers member construct any new tower in the same location as its present tower, remove any old towers after the new one was constructed and that no new broadcast towers be allowed on the site. Western Radio also requested that the hearings officer not allow any further broadcast development until users of the site agreed how to address interference problems and that she condition approval of the application on the broadcasters installing filters to control interference. All of these conditions were requested in order to make the different communication uses of the site more compatible by reducing [RFI]." Western Radio Petition For Review 6 (record citations omitted).

[6] BCC 10-10-29(3) sets out the following general conditional use approval criteria:

> "General Conditional Use Permit Criteria. A Conditional Use Permit may be granted only upon findings by the Approval Authority that the proposal meets all of the criteria in this section, as well as all other applicable criteria contained in this ordinance. The general criteria are:
>
> "(a) That the location, size, design and operating characteristics of the proposed use are such that it will have a minimal adverse impact on the property value, livability and permissible development of the surrounding area. Consideration shall be given to compatibility in terms of scale, coverage, and density, to the alteration of traffic patterns and the capacity of surrounding streets, and to any other relevant impact of the proposed use.
>
> "(b) That the site planning of the proposed use will, as far as reasonably possible, provide an aesthetically pleasing and functional environment to the highest degree consistent with the nature of the use and the given setting.
>
> "(c) If the use is permitted outright in another zone, that there is substantial reason for locating the use in an area where it is only conditionally allowed, as opposed to an area where it is permitted outright.
>
> "(d) That the proposed use will be consistent with the purposes of this ordinance, the Comprehensive Plan, Statewide Goals, and any other statutes, ordinances or policies that may be applicable."

approval to prevent or reduce RFI. Record 393. In reaching that conclusion, the hearings officer relied on two federal circuit court decisions and an FCC administrative opinion.

The most recent of the two federal circuit court cases the hearings officer relied on is *Freeman v. Burlington Broadcasters, Inc*., 204 F3d 311 (2nd Cir 2000). The question presented in that case was whether the Federal Communications Act of 1934, as amended (FCA), and FCC regulations, preempt a local zoning board's authority to enforce a zoning permit condition of approval that required the permittee to correct RFI with appliances and devices in homes near the radio tower that was authorized by a zoning permit. The Second Circuit had not yet considered whether local regulation of RFI is preempted by federal law, and determined that "[o]f the various forms of federal preemption, the most pertinent to the pending inquiry is so-called 'field preemption': state law is preempted when the 'scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' * * *" 204 F3d at 320. The court turned first to the relevant statutes:

> "* * * Several statutory provisions indicate the extent of the FCC's authority and responsibility to regulate radio broadcasting. 47 U.S.C. § 151 states the purposes of the FCA, among them to 'centraliz[e]' authority heretofore granted by law to several agencies' in the FCC, and to 'grant[] additional authority with respect to interstate and foreign commerce in wire and radio communication' to the FCC. Section 301 provides that 'it is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission' under licenses granted by the FCC in accordance with the FCA. Subsection 307(b) requires the FCC to 'make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each.' Moreover, under subsection 302a(a)(1), the FCC has power to 'make reasonable regulations * * * governing the interference potential of devices which in their operation are capable of emitting radio frequency energy by radiation, conduction, or other means in sufficient degree to cause harmful interference to radio communications.' Section 303 grants extensive powers to the FCC to regulate radio broadcasting technology and RF interference phenomena. Among other powers, subsection 303(d) empowers the FCC to 'determine the location of classes of stations or individual stations.' Subsection 303(e) empowers the FCC to 'regulate the kind of apparatus to be used with respect to its external

> effects and the purity and sharpness of the emissions from each station and from the apparatus therein.' Subsection 303(f) allows the FCC to 'make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter.' Subsection 303(h) confers 'authority to establish areas or zones to be served by any station.'
>
> "These statutory provisions make it clear that Congress intended the FCC to possess exclusive authority over technical matters related to radio broadcasting. *See Head v. New Mexico Board of Examiners in Optometry*, 374 US 424, 430 n 6, 83 S Ct 1759, 10 L Ed 2d 983 (1963)*; Broyde v. Gotham Tower, Inc.,* 13 F3d 994, 997 (6th Cir. 1994). This authority is embedded in the FCC's broad authority to develop a comprehensive national regulatory system governing telecommunications. *See, e.g., National Broadcasting Co. v. United States*, 319 US 190, 219-20, 63 S Ct 997, 87 L Ed 1344 (1943)*; FCC v. Pottsville Broadcasting Co*., 309 US 134, 137, 60 S Ct 437, 84 L Ed 656 (1934)." 204 F 3d at 320-21 (footnote omitted).

The court next cited the following legislative history from the 1982 Amendments to the FCA which also shows that the FCC was to have exclusive jurisdiction to regulate RFI and that local regulation was to be preempted:

> "The Conference Substitute is further intended to clarify the reservation of exclusive jurisdiction to the Federal Communications Commission over matters involving RFI. Such matters shall not be regulated by local or state law, nor shall radio transmitting apparatus be subject to local or state regulation as part of any effort to resolve an RFI complaint. The Conferees believe that radio transmitter operators should not be subject to fines, forfeitures or other liability imposed by any local or state authority as a result of interference appearing in home electronic equipment or systems. Rather, the Conferees intend that regulation of RFI phenomena shall be imposed only by the Commission.
>
> "H.R. Conf. Rep. No. 97-765, at 33 (1982), *reprinted* in 1982 U.S.C.C.A.N. 2261, 2277." *Id*. at 321.

The court also observed that FCC regulations, like the relevant statutes, also demonstrate federal preemption of the field of RFI regulation:

> "Federal regulations have the same preemptive force as federal statutes. *See Fidelity Savings and Loan Ass'n v. de la Cuesta,* 458 US 141, 153-54, 102 S Ct 3014, 73 L Ed 2d 664 (1983). The FCC has exercised its rule-making power to extensively regulate the technologies involved in FM broadcasting. *See, e.g., 47 C.F.R. §§ 73.201-73.333* (1998). These rules govern, among

other things, the power and height of antennas, *see id*. § 73.211, the use of common antenna sites, *see id*. § 73.239, and FM transmitter locations, *see id*. § 73.315. * * *" *Id*.

Finally, the Second Circuit rejected arguments that sections of the 1996 Amendments to the FCA, which preserved local zoning authority over wireless telephone facilities, left room for local regulation of RFI:

> "* * * Homeowners argue that the 1996 Amendments 'preserve' local zoning authority over [Radio Frequency] emissions. They point to two provisions: one provision concerns wireless telephones * * * and the other concerns common carrier regulations.
>
> "The Homeowners argue that the wireless telephone provisions in the 1996 Amendments affect the analysis whether the [local zoning authority] has the authority to regulate RF[I] * * *. They point to subsection 332(c)(7)(A), entitled 'Preservation of local zoning authority,' which states:
>
> > "'Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless services facilities.'
>
> "Thus, Congress did preserve some local zoning authority over the placement of wireless services transmitters * * *. However, we conclude that Congress did not intend by this provision to repeal the FCC's exclusive jurisdiction over RF[I] complaints. The statute's preservation of local power extends only to 'placement, construction and modification' of 'facilities.' In light of the FCC's pervasive regulation of broadcasting technology, this provision is most reasonably understood as permitting localities to exercise zoning power based on matters not directly regulated by the FCC. *Cf. AT&T Wireless PCS, Inc. v. City of Virginia Beach*, 155 F3d 423, 427 (4th Cir 1998) (upholding under this provision city's denial of building permit to wireless services provider, when that denial rested on 'traditional bases of zoning regulation: preserving the character of the neighborhood and avoiding aesthetic blight')." *Id.* at 323 (footnote omitted).

In concluding that local regulation of RFI through zoning ordinances is preempted, the Second Circuit noted that the Tenth Circuit had earlier reached the same conclusion.[7]

---

[7] The court also noted that a number of federal courts had reached similar conclusions in considering whether federal law preempted state common law nuisance actions based on RFI. 204 F3d at 325.

Southwestern Bell Wireless Inc. v. Board of County Commissioners of Johnson County, 199 F3d 1185 (10th Cir 1999).

In *Southwestern Bell*, Johnson County, Kansas approved a conditional use permit to allow construction of a 150-foot tower for wireless telephone transmissions. That conditional use permit included a condition, which was termed an "Interference Stipulation." 199 F3d at 1188. The condition was based on a zoning regulation (the "Interference Amendment") that provided "communication towers and antennae cannot operate in a manner that interferes with public safety communications." *Id*. Relying on many of the same cases and FCC rulings that were cited by the Second Circuit in *Freeman*, the court concluded that local regulation of RFI through zoning is preempted:

> "We agree with these courts and the district court in this case that based on statutes and agency regulations and adjudications, Congress intended federal regulation of RFI issues to be so pervasive as to occupy the field. Thus, the Interference Amendment and Interference Stipulation are void as preempted. Because we find field preemption, we need not address whether the Interference Amendment actually conflicts with federal law." *Id*. at 1193 (footnote omitted).

Awbrey Towers cites three FCC rulings that support the conclusions reached by the courts in *Freeman* and *Southwestern Bell*. *In the Matter of 960 Radio, Inc*., FCC 85-578 (1985) concerned conditions attached by the City of Klamath Falls, Oregon to a conditional use permit for an FM radio transmission facility. One of those conditions required that the permittee "must not operate its new facility so as to cause electronic interference to established translator sites on Stukel Mountain, and must aid KSYS (TV) and KSOR (FM) in retuning or recrystallizing their facilities[.]" The FCC concluded that the field of RFI regulation was preempted by federal law and that, in addition, the condition conflicted with FCC regulations.

In the Matter of Mobilecomm of New York, Inc., 2 FCCR 5519 (1987) concerned a zoning regulation that prohibited electromagnetic interference with normal radio and television reception and required that transmission facilities provide notice of any changes in

the power or frequency of the transmission. The FCC found that the city's attempt to enforce those provisions through a cease and desist order directed at a common carrier radio paging facility was preempted by federal law.

Finally, in a 2003 order, the FCC found that a City of Anne Arundle, Maryland zoning ordinance requirement that "users of commercial telecommunications facilities must show that their facilities will not degrade or interfere with the County's public safety radio systems" was preempted by federal law. *In the Matter of Petition of Cingular Wireless LLC for a Declaratory Ruling that Provisions of Anne Arundel County Zoning Ordinance are Preempted as Impermissible Regulation of Radio Frequency Interference Reserved Exclusively to the Federal Communication Commission, released July 7, 2003* (WT – Docket No. 02-100, July 7, 2003).

We agree with Awbrey Towers that the hearings officer did not err in concluding that the conditions that Western Radio sought to have the hearings officer impose to address its RFI concerns are preempted by federal law. Western Radio attempts to distinguish the zoning regulations of RFI that were found to be preempted in the cases discussed above, because here the regulation the city would be relying on, BCC10-10-29(3)(a), is a more traditional zoning standard rather than the explicit and more direct attempts to regulate RFI that were at issue in those cases. *See* n 6. Western Radio also contends that it is significant that in those cases the local governments were attempting to shut down an FCC licensed facility, while here Western Radio is simply seeking to have the city apply its general conditional use criteria at the approval stage to avoid RFI in the future.

Western Radio's attempt to distinguish the decision at issue in this case is not persuasive. Presumably Western Radio would expect the conditional use permit conditions it seeks to have the city impose on Awbrey Towers to be enforced if necessary. Under BCC 10-10-32(2), a conditional use permit "may be revoked if any of the conditions or terms of such permit * * * are violated." In that event, the city would be in the same position that the

local governments were in, in the cases discussed above. It is not improper for the hearings officer to refuse to impose conditions that the city would be preempted from enforcing. Neither is it legally significant that Western Radio asked that the hearings officer rely on a more traditional conditional use permit criterion to regulate RFI. It is local regulation of RFI that is preempted by federal law, and the conditions that Western Radio urged the hearings officer to adopt were offered for the purpose of regulating RFI. We do not believe it matters whether those conditions are based on a local law that regulates RFI forthrightly, as opposed to a more general and traditional zoning regulation. It is the purpose for the condition that is important, and there is no dispute here that those conditions were suggested to reduce RFI.

Western Radio's first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR (WESTERN RADIO)

In these assignments of error Western Radio challenges the adequacy of the hearings officer's findings and the evidentiary support for those findings. To the extent those arguments are directed at the hearings officer's federal preemption findings, we reject the arguments. To the extent those arguments are directed at the hearings officer's findings that the proposed new and expanded facilities will not result in increased RFI, our resolution of the first assignment of error renders those findings unnecessary to support the hearings officer's decision. Even if the proposal will result in increased RFI, any regulation to address that increase is exclusively within the purview of the FCC, not the City of Bend. It follows that even if the hearings officer's findings that the proposal will not increase RFI are inadequate or lack evidentiary support, they would provide no basis for reversal or remand. *Bonner v. City of Portland*, 11 Or LUBA 40, 52 (1984).

Western Radio's second and third assignments of error are denied.

FIRST ASSIGNMENT OF ERROR (SOS)

The fourth of the city's general conditional use criteria, BC 10-10-29(3)(d), requires that a proposed conditional use must "be consistent with the purposes of this ordinance, the

Comprehensive Plan, Statewide [Planning] Goals, and any other statutes, ordinances or policies that may be applicable." *See* n 6. Before the hearings officer, the SOS petitioners argued that the proposal is inconsistent with the following BAGP Policies and Goals:

> "Private and public nonresidential uses are necessary and should be permitted within residential areas for the convenience and safety of the people. Such facilities shall be compatible with surrounding developments, and their appearance should enhance the area." BAGP Housing and Residential Lands—Residential Compatibility Policy 4.

> "Above-ground installations, such as water and sewer pumping stations, power transformer substations or natural gas pumping stations, shall be screened and designed to blend with the character of the area in which they are located." BAGP Housing and Residential Lands—Neighborhood Appearance Policy 13.

> "[The citizens and elected officials wish t]o ensure that public services will not have negative impacts on the environment or the community[.]" BAGP Public Facilities and Services Goal.[8]

> "The community appearance section of this Plan has * * * been prepared in conformance with the following general goals:
>
> "* * * * *
>
> "□ To significantly improve the appearance along the state highways and other transportation corridors as one means of recapturing the individual and distinct identity of the Bend area." BAGP Community Appearance Goals.

The SOS petitioners argue that, under the fourth general conditional use criterion, the city is obligated to consider the above BAGP Goals and Policies. In rejecting that argument below, the hearings officer explained:

> "Opponent SOS argues policies in the [BAGP] apply to review of the applicant's proposal and support its arguments. The Hearings Officer disagrees. The [BAGP] includes the following language in the preface at page P-4:

[8] Although the BAGP assigns numbers to policies, it does not assign numbers to its Goals.

> "'At the end of each chapter are policies that address issues discussed in the chapter. The policies in the General Plan are statements of public policy, and are used to evaluate any proposed changes to the General Plan. Often these statements are expressed in mandatory fashion using the word 'shall'. These statements of policy shall be interpreted to recognize that the actual implementation of the policies will be accomplished by land use regulations such as the city's zoning ordinance, subdivision ordinance and the like. The realization of these policies is subject to the practical constraints of the city such as availability of funds and compliance of all applicable federal and state laws, rules and regulations, and constitutional limitations. * * *'
>
> "In previous decisions * * * this Hearings Officer has held the underscored language signifies comprehensive plan policies are *not* approval criteria for quasi-judicial land use applications. Rather, they provide guidance in interpreting and applying the provisions of the zoning ordinance. I adhere to that holding here and find the plan policies relied upon by opponent SOS are not approval criteria." Record 379 (underscoring and emphasis in original).

Simply stated, the hearings officer concluded that because BAGP Policies were not adopted for use as approval criteria in reviewing applications for quasi-judicial land use approval, the cited BAGP Policies and Goals need not be considered in reviewing Awbrey Towers' application for conditional use approval.

A recurring problem that local governments face in reviewing quasi-judicial permit applications is identifying the relevant approval standards, if any, in the local government's comprehensive plan. The comprehensive plan is a potential source of standards for review of a quasi-judicial land use permit application, because ORS 197.175(2)(d) expressly provides that where a local government's comprehensive plan and land use regulations have been acknowledged by LCDC, the local government is required to "make land use decisions and limited land use decisions in compliance with the acknowledged plan and land use regulations[.]" *Donivan v. City of La Grande*, 43 Or LUBA 477, 479-80 (2003); *Durig v. Washington County*, 35 Or LUBA 196, 202-03 (1998), *aff'd* 158 Or App 36, 969 P2d 401 (1999). Many local governments also impose a local requirement that the comprehensive

plan be considered in approving a land use permit application. As far as we can tell, the fourth general conditional use criterion at BC 10-10-29(3)(d) is such a local requirement.

As intervenor correctly points out, local and statutory requirements that land use decisions be consistent with the comprehensive plan do not mean that all parts of the comprehensive plan necessarily are approval standards. *McGowan v. City of Eugene*, 24 Or LUBA 540, 546 (1993); *Neuenschwander v. City of Ashland*, 20 Or LUBA 144, 154 (1990); *Bennett v. City of Dallas*, 17 Or LUBA 450, 456, *aff'd* 96 Or App 645, 773 P2d 1340 (1989). Local governments and this Board have frequently considered the text and context of cited parts of comprehensive plans and concluded that the alleged comprehensive plan standard was not an applicable approval standard. *Stewart v. City of Brookings*, 31 Or LUBA 325, 328 (1996); *Friends of Indian Ford v. Deschutes County*, 31 Or LUBA 248 258 (1996); *Wissusik v. Yamhill County*, 20 Or LUBA 246, 254-55 (1990). Even if the comprehensive plan includes provisions that can operate as approval standards, those standards are not necessarily relevant to all quasi-judicial land use permit applications. *Bennett v. City of Dallas*, 17 Or LUBA at 456. Moreover, even if a plan provision is a relevant standard that must be considered, the plan provision might not constitute a separate mandatory approval criterion, in the sense that it must be separately satisfied, along with any other mandatory approval criteria, before the application can be approved. Instead, that plan provision, even if it constitutes a relevant standard, may represent a required *consideration* that must be balanced with other relevant *considerations*. *See Waker Associates, Inc. v. Clackamas County*, 111 Or App 189, 194, 826 P2d 20 (1992) ("a balancing process that takes account of relative impacts of particular uses on particular [comprehensive plan] goals and of the logical relevancy of particular goals to particular uses is a decisional necessity").

Before considering whether particular plan provisions must be applied as approval standards when considering individual land use permit applications, it is appropriate, as the hearings officer did in this case, to consider first whether the comprehensive plan itself

expressly assigns a particular role to some or all of the plan's goals and policies. *Downtown Comm. Assoc. v. City of Portland*, 80 Or App 336, 339, 722 P2d 1258 (1986); *Eskadarian v. City of Portland*, 26 Or LUBA 98, 103 (1993); *Schellenberg v. Polk County*, 21 Or LUBA 425, 429 (1991); *Miller v. City of Ashland*, 17 Or LUBA 147, 167-69 (1988). We review the hearings officer interpretation of the BAGP to determine if her interpretation is correct. *McCoy v. Linn County*, 90 Or App 271, 275-76, 752 P2d 323 (1988).

As petitioners correctly note, the BAGP text cited by the hearings officer does not say that all BAGP Policies are to be used *exclusively* in the manner suggested by the text. However, the text cited by the hearings officer, viewed in isolation, strongly supports her interpretation. The text quoted by the hearings officer appears in the section of the BAGP Preface entitled "Format of the Plan." There is additional text in that same section of the BAGP Preface that appears below the text quoted by the hearings officer, which states:

> "These same [BAGP] community policies serve individual property owners and private interest groups as a means of evaluating their individual decisions in light of community objectives. They are able to determine how their individual interests can best be served in a manner that is consistent with the Bend Area General Plan." BAGP Preface.

The above text is not cited by the hearings officer or any of the parties in this appeal, but it can be read to say the BAGP Policies might play some role in evaluating individual development decisions. However, the text refers to the decisions of "individual property owners and private interest groups" rather than *city* quasi-judicial permit decisions. Given the relatively clear role the text cited by the hearings officer seems to assign to the BAGP Polices, we agree with the hearings officer's interpretation of that text to support her conclusion that the BAGP Policies do not apply as approval standards that she was obligated to consider directly in reviewing conditional use permit applications.

Turning to the two BAGP Goals cited above, the hearings officer's reasoning for why BAGP Policies do not apply as approval criteria does not directly address the potential applicability the these BAGP Goals. It does not necessarily follow that if BAGP *Policies* are

not potential conditional use approval standards, that the BAGP *Goals* also are not potential conditional use approval standards. However, it is relatively clear that in the hierarchy established by the BAGP the Goals operate at a higher and even more general level than the BAGP Policies.[9] Having adopted text to make it clear that BAGP Policies are not to be viewed as potential approval criteria for applications for conditional use approval, we believe it is highly unlikely that the city could have intended that BAGP Goals operate as potential approval criteria for such applications. Moreover, even if BAGP Goals could be viewed as potential approval standards, the two BAGP Goals cited by the SOS petitioners are not worded as mandatory requirements. Rather, they are worded as "aspirational declarations." *Stewart v. City of Brookings*, 31 Or LUBA at 328.

For the reasons explained above, we do not agree with the SOS petitioners that the city erred in not applying the cited BAGP Goals and Polices as approval standards in this case. It may be that there are other parts of the BAGP that are implicated by BCC 10-10-29(3)(c), but the cited BAGP Goals and Policies are not.

The SOS petitioners' first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR (SOS)

A. Subassignments of Error 1, 2, 3 and 4.

Under BCC 10-10-29(3)(c), if a proposed conditional use is "permitted outright in another zone," the applicant must show that there is a "substantial reason" for approving the proposal where it is allowed conditionally as opposed to requiring that the use be sited where it would be allowed outright.

---

[9] The first chapter of the BAGP offers the following description of the function of the BAGP Goals:

> "Goals in the General Plan express what our residents hope and want Bend to be like in the future. These goals were created through a process using citizens' advisory committees and public hearings during the first major update of the General Plan in 1995-1998. The goals set forth below provide general guidance for improving the character and quality of the Bend area as growth occurs. In addition to these goals, most of the other chapters in the Plan include goals that are specific to the chapter topic."

The hearings officer found that this criterion was satisfied. The hearings officer appears to have assumed that at least some aspects of the proposal could be allowed outright in three city commercial zones: Limited Commercial (CL), Highway Commercial (CH) and General Commercial (CG). The hearings officer then considered whether the applicant adequately demonstrated that there was a substantial reason to site the proposed facility on the subject property:

> "[T]he hearings officer finds the applicant has identified a 'substantial reason for locating the [towers] in an area where [they] are only conditionally allowed.' As discussed above, the record indicates Awbrey Butte was chosen as a tower site over 40 years ago because of its elevation and central location in Bend and Central Oregon. The parties appear to agree that cellular telephone, two-way radio, paging, television and FM radio signals all require 'line of sight' to effectively transmit and receive signals, therefore requiring a high, unobstructed location to provide the highest quality signal. Opponents have not identified any locations for the proposed broadcast facilities that provide the unobstructed elevation required *and that are located in the CL, CH or CG Zones.* I have reviewed the city's zoning map, and based on this map and my personal knowledge of the topography within the Bend city limits, I have found no sites within any of these three zones that are at an elevation anywhere near the elevation of Awbrey Butte.
>
> "Opponent SOS argues that in applying this criterion the Hearings Officer must look outside the Bend city limits to zones within the county on which radio and television broadcast facilities are permitted outright. SOS asserts that 'transmission towers over 200 feet in height' are permitted outright in the Exclusive Farm Use Zone, and therefore the applicant must demonstrate that there are no locations in that zone that would * * * be suitable for the proposed broadcast facility expansions. I disagree. First, opponent SOS has cited no authority for the proposition that the city's zoning ordinance provisions extend beyond its jurisdictional boundaries. Second, under ORS 215.283(2)(L) [sic 215.283(2)(m)] and Section 18.16.030(N) of the Deschutes County Zoning Ordinance, 200-foot-tall transmission towers are a *conditional use* and *not* an outright permitted use in the EFU Zones." Record 403 (emphasis in original).

We agree with the hearings officer that BCC 10-10-29(3)(c) does not require that she consider zones outside the City of Bend where the proposal might be allowed as a use that is permitted outright. Admittedly, BCC 10-10-29(3)(c) does not expressly limit the required analysis to city zones. However, we do not agree with the SOS petitioners that so limiting

the analysis impermissibly reads language into BCC 10-10-29(3)(c). Because BCC 10-10-29(3)(c) does not specify whether it is limited to city zones or encompasses zones in the surrounding county, throughout Oregon, or in other states and countries for that matter, it is ambiguous. The more limited reading the hearings officer adopted is not inconsistent with the text of BCC 10-10-29(3)(c). We think it is far more likely that had the city intended to require that zones outside the city be considered as alternatives, it would have said so expressly and imposed some geographic limit on how far ranging that consideration would have to be.

Even if the hearings officer is wrong, and the hearings officer was obligated to consider the sites the SOS petitioners identified on EFU-zoned and unzoned federal forest land, we agree with the hearings officer that those sites do not allow proposals such as the one at issue in this appeal as a use that is "permitted outright," within the meaning of BCC 10-10-29(3)(c). It is reasonably clear that "permitted outright in another zone," within the meaning of BCC 10-10-29(3)(c), means a zone where a use is allowed without a requirement for discretionary review that could result in the application for a permit for the use being denied.

Regarding the sites on federal forest lands, petitioners concede those lands are not zoned at all. Therefore, those federal forest lands are not "zoned" to permit the use "outright." Moreover, intervenor points to evidence that federal approvals for towers on federal forest lands are not as freely given as petitioners suggest and certainly approval of one or more of the proposed towers is not something that intervenor has any right to obtain from the federal government. Response Brief of Intervenor to Petitioners SOS 18-19.

Petitioners are also wrong about whether the proposal would be allowed outright on EFU-zoned lands in Deschutes County, or other Oregon counties with EFU zones. Because the proposal includes towers over 200 feet tall, that aspect of the proposal would be allowed,

if at all, under ORS 215.283(2)(m) or ORS 215.438.[10] The uses allowed under ORS 215.283(2) are not uses that are allowed outright. *See Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995) (concluding that the uses listed under ORS 215.283(1) are uses that are allowed "as of right" whereas the uses allowed under ORS 215.283(2) are not uses allowed "as of right"). ORS 215.438 says counties "*may* allow a transmission tower over 200 feet," it does not direct counties to do so. ORS 215.438 also makes it clear that if counties choose to allow towers under that section of the statute, they may be allowed conditionally.

Even if other aspects of the proposal might be approvable under ORS 215.283(1)(d), we do not believe it is accurate to characterize the utility facilities authorized by that statute as outright permitted uses.[11] *Brentmar* used the short hand description "as of right" to distinguish between those uses in the EFU zone that are subject to supplemental county regulation, and those that are not subject to supplemental county regulation because under the statute they are allowed "as of right." In *Brentmar*, the court was not concerned with whether there might be discretionary statutory standards that apply to uses allowed under ORS 215.283(1) that might make approval of particular uses difficult or impossible in particular cases. The facilities allowed by ORS 215.283(1)(d) are clearly not "allowed outright" in the EFU zone, in the sense those words are generally used in zoning ordinances. ORS 215.283(1)(d) expressly requires that the uses authorized by that section must be reviewed and approved under ORS 215.275. ORS 215.275(2) requires that an applicant for a utility facility under ORS 215.283(1)(d) must show that it is necessary to site that facility on EFU-

---

[10] ORS 215.283(2)(m) authorizes "[t]ransmission towers over 200 feet in height." ORS 215.438 provides that "[t]he governing body of a county or its designate may allow a transmission tower over 200 feet in height to be established in any zone subject to reasonable conditions imposed by the governing body or its designate.

[11] As relevant, ORS 215.283(1)(d) authorizes "[u]tility facilities necessary for public service, * * * but not including * * * transmission towers over 200 feet in height. A utility facility necessary for public service may be established as provided in ORS 215.275."

zoned land. The standards that must be satisfied to make that showing are exacting and could easily result in denial of a request to build a utility facility on EFU-zoned land.[12] Ironically, one of those standards requires that the applicant show that urban lands, like the subject property, are unavailable.

In applying BCC 10-10-29(3)(c), the hearings officer was not required to consider lands that are not zoned by the City of Bend. Moreover, even if the hearing officer were required to consider the unzoned federal forest lands and county EFU-zoned lands that were identified by the SOS petitioners, the proposal would not be "permitted outright" on those lands. Our conclusions above resolve the SOS petitioners' first subassignment of error ("[t]he search for alternative sites does not stop at the city limits"), second subassignment of error ("[a]lternative sites on federal forest land"), and third subassignment of error ("[a]lternative sites on EFU land in unincorporated Deschutes County").

Our resolution of the SOS petitioners' first three subassignments of error also appears to resolve their fourth assignment of error ("[t]here is no 'substantial reason' for siting this use on Awbrey Butte"). We do not understand the SOS petitioners to challenge the hearings

---

[12] ORS 215.275(2) provides:

> "To demonstrate that a utility facility is necessary, an applicant for approval under ORS * * * 215.283 (1)(d) must show that reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:
>
> "(a) Technical and engineering feasibility;
>
> "(b) The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;
>
> "(c) Lack of available urban and nonresource lands;
>
> "(d) Availability of existing rights of way;
>
> "(e) Public health and safety; and
>
> "(f) Other requirements of state or federal agencies."

officer's findings that the applicant has shown there is a substantial reason to site the proposal on the subject property as compared to sites within the city that are zoned to allow the proposal outright. Even if they do, they make no attempt to explain why the hearings officer's findings to the contrary are inadequate. We understand the SOS petitioners to contend that there is no substantial reason to site the proposal on the subject property when compared to the higher elevation sites they identified on EFU-zoned land and federal forest land. Because we have concluded that the city was not obligated under BCC 10-10-29(3)(c) to consider those EFU-zoned and federal forest land sites, the fourth subassignment of error provides no basis for reversal or remand.

The first through fourth subassignments of error are denied.

B. Fifth Subassignment of Error

The SOS petitioners' final subassignment of error under the second assignment of error is that the city erred by not considering alternatives that might have been available if the applicant had been forced to split the proposal into smaller components that might have opened up more alternative locations as possible sites. It is not entirely clear whether this argument is simply an elaboration on the SOS petitioners' contention that the EFU-zoned or federal forest land sites they identified should be considered. If it is, it does not affect our view that the hearings officer was not obligated to consider those sites under BCC 10-10-29(3)(c). If petitioners' argument under this subassignment of error is that additional city-zoned sites would become available if the proposal is split into smaller pieces, petitioners make no attempt to explain why that might be so.

Finally, we disagree with the SOS petitioners' basic thesis under this subassignment of error. Intervenor is not obligated to disaggregate a coordinated and related application that was presented in that manner at the city's urging, simply because it might allow part of the proposal to be approved in a zone that would allow that part outright. *Frewing v. City of Tigard*, ___ Or LUBA ___ (LUBA No. 2003-194, August 20, 2004) slip op 30-31. Even if a

different result might be warranted in a case where an applicant cobbled together a multifaceted proposal with unrelated parts to require a unique site and thereby avoid confronting a code requirement that suitable alternative sites be considered, this is not such a case.

The fifth subassignment of error is denied.

The SOS petitioners' second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR (SOS)

The hearings officer found that most of the proposal is properly viewed as a conditional use, and therefore subject to BCC 10-10-29(3)(a) and (b). *See* n 6. The hearings officer found that the Western Radio part of the proposal qualifies as a utility, which is a permitted use, and applied BCC 10-10-25(12) to that part of the proposal. BCC 10-10-25 identifies a large number of "Special Uses" and applies specific requirements to those uses.[13] Under the third assignment of error, the SOS petitioners argue that the hearings officer improperly applied BCC 10-10-29(3)(a) and (b) and BCC 10-10-25(12) in considering the proposal's livability and aesthetic impacts and effects on scenic values.

A. Failure to Consider Antennas

The SOS petitioners allege that the hearings officer "looked only at towers and tower height; she failed to analyze the impact of the antennas or to apply the 'minimal impacts' requirement of BCC 10-10-29(3)(a)&(b) or BCC 10-10-25(12) to the proposed or possible

[13] As potentially relevant here, BCC 10-10-25(12) requires:

> "Utilities. The erection, construction, alteration, or maintenance by public utility or municipal or other governmental agencies of underground, overhead electrical, gas, steam or water transmission or distribution systems, collection, communication, supply or disposal system, including poles, towers, wires, * * * and other similar equipment and accessories in connection therewith, but not including buildings, may be permitted in any zone. Utility transmission and distribution lines, poles and towers may exceed the height limits otherwise provided for in this ordinance. * * *. As far as possible, transmission towers, poles, overhead wires, pumping stations, and similar gear shall be so located, designed, and installed as to *minimize their effect on scenic values*." (Emphasis added.)

antennas." SOS Petition for Review 26 (underscoring in original). The SOS petitioners go on to elaborate on that argument:

> "* * * Multiple large antennas, microwave dishes and other broadcast and personal wireless antennas will also have a much greater visual impact on the immediate area * * *."

> "BCC 10-10-29(3)(a)&(b) and BCC 10-10-25(12) apply to all of the potential aesthetic impacts from all aspects of this proposal and require all of them to be addressed and minimized. It is well established that failure to comply with local aesthetic requirements is a valid and legally justifiable basis for denying telecommunications towers and antennas. What the tower facilities look like and how they comply the aesthetic criteria and impact minimization requirements of BCC 10-10-29(3)(a)&(b) and BCC 10-10-25(12) will be affected by what antenna structures are eventually placed on the towers. Therefore, all proposed towers and antennas should have been subject to review under BCC 10-10-29(3)(a)&(b) and BCC 10-10-25(12)" SOS Petition for Review 26-27 (citations omitted; underscoring in original).

One of the cases petitioners cite in support of their contention that the city retains authority to review the disputed proposal against aesthetic and visual impact zoning criteria like BCC 10-10-29(3)(a)&(b) and BCC 10-10-25(12) is *Voice Stream PCS, LLC v. City of Hillsboro*, 301 F Supp 2d 1251 (D Or 2004). In that case the federal district court held that the City of Hillsboro had authority to review a proposed cellular tower under zoning criteria that regulated aesthetics and to deny the proposed tower based on its aesthetic impacts. Other federal courts have similarly concluded that cellular towers may be regulated in that way, based on traditional zoning standards. *360º Communication Co. v. Board of Supervisors of Albemarle County*, 211 F3d 79, 86 (4th Cir 2000); *Aegerter v. City of Delafield*, 174 F3d 886, 887-88 (7th Cir 1999); *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F3d 490, 494 (2nd Cir 1999); *AT&T Wireless v. City Council of Virginia Beach*, 155 F3d 423, 427 (4th Cir 1998).

Awbrey Towers does not appear to dispute that the city has authority to review the proposed towers, but it does dispute petitioners' contention that the city is obligated to consider the visual impacts of the antennas that will be placed on those towers. Based on the

extensive FCC regulation of the antennas that will be placed on the proposed towers, Awbrey Towers contends city consideration of the visual impacts of the antennas, as opposed to the visual impacts of the towers, is preempted by federal law.

Awbrey Towers offers no reason to dispute the assertion by the SOS petitioners that when antennas are added to the towers that are approved by the city's decision they could increase the visual impact of the tower in a way that would violate BCC 10-10-29(3)(a)&(b) or BCC 10-10-25(12), even if the towers *without* antennas would not have visual and aesthetic impacts that would violate BCC 10-10-29(3)(a)&(b) or BCC 10-10-25(12).[14] It is not at all clear to us that the hearings officer limited her consideration of the visual impacts under BCC 10-10-29(3)(a)&(b) or BCC 10-10-25(12) to the towers themselves. Neither is it clear that the hearings officer agrees with Awbrey Towers that her consideration of the aesthetic and visual impacts of the proposed antennas or any additional antennas that apparently could be sited on the towers in the future is preempted by federal law. However, it also is not clear that the hearings officer considered the potential visual and aesthetic impacts of the antennas.

Southwestern Bell Wireless, Inc. v. Board of County Commissioners of Johnson County, 17 F Supp 2d 1221 (D Kan 1998), *aff'd* 99 F3d 1185 (10th Cir 1999) is the only case Awbrey Towers cites in support of its position that city review of the proposal under BCC 10-10-29(3)(a)&(b) or BCC 10-10-25(12) may only take into consideration the visual and aesthetic impacts of the proposed towers. That case does not support that position, and neither do any of the other cases the parties have cited to us.

It is not disputed that the reason the towers are being proposed is to provide vertically separated tower space where antennas will be attached. In addition, Awbrey Towers appears to be correct that the final decision about how many antennas can be sited on those towers,

[14] We hasten to add that although we are given no reason to dispute that assertion, that does not mean that there may not be a reason to dispute the assertion.

and precisely where on those towers the antennas must be located, is within the exclusive jurisdiction of the FCC. However, that does not mean that in applying BCC 10-10-29(3)(a)&(b) or BCC 10-10-25(12) to consider the visual and aesthetic impacts of the proposal the city cannot consider the visual impacts of the proposed antennas and the additional antennas that will almost certainly be placed on the towers. *Southwestern Bell Wireless, Inc. v. Board of County Commissioners of Johnson County* and the other cases that we discussed in rejecting petitioner Western Radio's first assignment of error hold that federal law preempts local regulation of RFI. Those cases do not stand for the proposition that federal law preempts local regulation of visual and aesthetic impacts of the antennas that the FCC comprehensively regulates regarding technical concerns and certain environmental impact concerns. The cases cited by the SOS petitioners stand for the opposite proposition. The fact that the FCC will ultimately decide how many antennas can be placed on the towers and where they must be sited on the towers does not mean that the city must approve the requested towers and antennas, even if they will have visual and aesthetic impacts that violate BCC 10-10-29(3)(a)&(b) or BCC 10-10-25(12).

Although we agree with the SOS petitioners that the city has authority to review the visual and aesthetic impacts of both the towers and the antennas that will ultimately be housed on those towers, we do not agree with the SOS petitioners that the city must know the precise number and location of every antenna in advance to perform that review, or that the city's approval must be limited to a particular configuration of towers and antennas. It may be that a case can be made that nearly all of the visual and aesthetic impacts of the proposal are properly attributable to the towers and that any additional visual impact that can be attributed to the antennas themselves will be so slight that the antennas need not be considered separately from the towers. Even if that is not the case, we do not see why assumed "worst case" or "reasonably likely case" scenarios for ultimate antenna placement on the towers could not be developed to allow the hearings officer to consider whether the

antennas would have additional visual and aesthetic impacts that, considered with the towers, would violate BCC 10-10-29(3)(a)&(b) or BCC 10-10-25(12). Following such a review, we also see no reason why the city could not condition its decision so that additional city land use review would only be required if the numbers and locations of antennas ultimately approved by the FCC deviated from the assumed scenarios in a way that could materially affect the visual and aesthetic impacts of the towers and antennas.

For the reasons explained above, we agree with the SOS petitioners that the city's decision must be remanded so that the hearings officer can consider their contention that the antennas that will be housed on the proposed towers will increase the adverse visual and aesthetic impacts of the proposal such that the proposed Western Radio towers and antennas violate BCC 10-10-25(12) and the remainder of the proposal violates BCC 10-10-29(3)(a)&(b). We express no view on whether that is actually the case, but the hearings officer is not preempted by federal law from considering that question or from denying the application if she agrees with the SOS petitioners. To the extent she found that she was preempted, she erred.

The first subassignment of error is sustained.

B. Failure to Apply BCC 10-10-25(12) to the Entire Proposal

The hearings officer categorized different parts of the proposal differently. Part of the proposal was analyzed as a proposal for radio and television transmission facilities.[15] The balance of the proposal (Western Radio's proposed tower) was analyzed as a wireless transmission facility. "[R]adio and television transmission facilities" are expressly permitted as conditional uses in the RS zone, but wireless transmission facilities are not. BCC 10-10-10(3)(r). As previously noted, BCC 10-10-025(12) authorizes "utilities" as an outright permitted use in all zones, subject to certain requirements. *See* n 13 and related text.

[15] These are the towers that will include radio and television transmission antennas exclusively and those towers that will include radio, television and wireless transmission antennas.

The hearings officer found that Western Radio's proposed wireless transmission facilities are allowable as a "utility." Under this subassignment of error, the SOS petitioners contend the city erred in not viewing the entire proposal as a "utility" and applying the BCC 10-10-25(12) requirement that the proposal "minimize [its] effect on scenic values" to the entire proposal.[16]

We are not sure we completely understand the hearings officer's reasoning for distinguishing between radio transmission facilities and wireless transmission facilities. Record 379-82. She appears to have concluded that while a wireless transmission facility such as the one proposed by Western Radio should be viewed as a "utility," the radio and television towers that are allowed conditionally do not become a "utility," simply because wireless antennas may also be sited on those towers. The hearings officer apparently also did not believe that the wireless antennas that will be sited on the radio and television towers must be analyzed separately as a utility. Given the similarity of the "minimal adverse impact on * * * livability" and "aesthetically pleasing" standards imposed by BCC 10-10-29(3)(a)&(b) and the "minimize * * * effect on scenic values" criterion imposed by BCC 10-10-25(12) it is not at all clear that any different result could be expected even if the proposal had been analyzed as petitioners suggest under this subassignment of error. In any event, we do not agree with petitioners that the hearings officer erred in characterizing and analyzing the proposal in the manner that she did.

The second subassignment of error is denied.

C. Failure to Consider Alternatives that Would Minimize Visual Impacts

Under their final subassignment of error under their third assignment of error, the SOS petitioners contend that "[t]he impact minimization requirements of BCC 10-10-

[16] The SOS petitioners make no attempt to explain how this subassignment of error is consistent with the previous subassignment of error. Petitioner appear to be arguing that the entire proposal is properly viewed as a "utility," which is a permitted use, whereas in the previous subassignment of error petitioners do not appear to challenge the hearings officer's characterization of the proposal as part "utility" and part "radio and television transmission facilities."

29(3)(a)&(b) and BCC 10-10-25(12) are comprehensive and rigorous." SOS Petition for Review 31. Petitioners contend "the Hearings Officer was obligated to also explore whether there was a need for all of the new vertical tower space requested, and whether some different antenna design alternative would minimize the need for additional tower space and thus the impacts of this proposal." *Id.*

The hearings officer acknowledged petitioners suggested alternatives but rejected them:

> "[O]pponent Debrah Curl suggested several on-site alternatives. These include: (a) combining multiple users antennas onto a single antenna; (b) lowering the proposed DTV antenna on the OPB tower into the 'empty space' that would be created when the analog TV antenna is removed in a few years; (c) modifying the OPB DTV antenna to a 'side mount' antenna like KTVZ's DTV antenna; and (d) removing all wireless communication antennas from OPB's [tower] to reduce the weight being supported by the tower.
>
> "The applicant responded that its proposal includes combining FM antennas to the greatest degree possible considering the impracticality of forcing multiple owners to combine their antennas, and the physical inability to combine wireless and broadcast antennas. The applicant noted that FM antennas will be combined on the Combined Communications tower. In addition, the applicant's engineers stated the types and heights of the DTV antennas were chosen for engineering reasons in order to assure an adequate signal, and adequate separation from other antennas – i.e. the 'empty space' to which Ms. Curl refers.
>
> "* * * * *
>
> "The Hearings Officer appreciates opponent Debrah Curl's efforts to identify alternative antenna configurations. However, I find she simply is not qualified to design antennas and towers to meet FCC regulations, antenna and tower specifications, and industry standards for antenna separation. I find the applicant has demonstrated by substantial, credible evidence that the tower heights proposed by the OPB, KTVZ, Combined Communications and Gross Communications towers are the minimum necessary to achieve the applicant's goals. * * *" Record 392.

From the above language in the hearings officer's decision, it appears that the hearings officer did consider the alternatives suggested by the SOS petitioners, but she rejected them, finding that the applicant had adequately shown that the proposal was "the

minimum necessary to achieve the applicant's goals." *Id.* Aside from disagreeing with the hearings officer, the SOS petitioners provide no explanation for why they believe the hearings officer erred in reaching that conclusion. The SOS petitioners' disagreement with the hearings officer is not a basis for reversal or remand.

The third subassignment of error is denied.

Based on our resolution of the first subassignment of error, the SOS petitioners' third assignment of error is sustained in part.

FOURTH ASSIGNMENT OF ERROR (SOS)

Under their final assignment of error, the SOS petitioners contend that the hearings officer erroneously concluded that the subject property is not subject to the Awbrey Butte Master Plan. The Awbrey Butte Master Plan is a relatively detailed plan for the residential development that now surrounds the subject property. At the time the Awbrey Butte Master Plan was prepared and submitted to the city, Brooks Resources owned the land that was proposed for residential development and the subject property was owned by Deschutes County. The county property apparently was not part of the proposal. However, some of the maps in the Awbrey Butte Master Plan appear to include the subject property. Record 4211, 4218, 4226, 4228. Other maps in the Awbrey Butte Master Plan appear to exclude the subject property. Record 4221, 4233. One of the maps that appears to include the subject property applies shading to the subject property that is designated "Critical Area" for "Visual Sensitivity." Record 4218. Petitioner argues:

> "The Hearings Officer's decision acknowledges the Master Plan, but erroneously concludes that 'The Awbrey Butte Master Plan development maps in the record depict a network of streets and residential lots surrounding the subject property, but exclude the subject property.' Petitioners asserted that the proposal violates, or is at least incompatible with, the visual sensitivity protections of the Master Plan, especially in light of the requirements of BCC 10-10-29(3)(a)&(b) and BCC 10-10-025(12) to minimize impacts on scenic views. The Hearings Officer acknowledged those arguments but dismissed them out of hand[.]" SOS Petition for Review 33 (original emphasis and record citations omitted).

It would seem somewhat unusual for county-owned land, which Brooks Resources did not own, to be included in the proposed master plan that was submitted to the city in 1982. The legal effect of the city's approval of that plan on the county-owned property and the legal effect of the city's subsequent decision to adopt that master plan as part of the BAGP are not clear to us. However, even if that designation and subsequent city adoption of the Awbrey Butte Master Plan means the subject property is identified in that plan as a "Critical Area" for "Visual Sensitivity," petitioners do not explain what that designation means. Just as importantly, neither do they make any attempt to explain why that designation necessarily adds anything of substance to the visual impact standards that we have already found are imposed by BCC 10-10-29(3)(a)&(b) and 10-10-25(12).

We have already considered petitioners' contentions that the hearings officer inadequately addressed the visual impact and aesthetic standards imposed by BCC 10-10-29(3)(a)&(b) and 10-10-25(12). Without a more focused argument to establish what petitioners believe the Awbrey Butte Master Plan "Critical Area" for "Visual Sensitivity" designation requires, above and beyond BCC 10-10-29(3)(a)&(b) and 10-10-25(12), we do not agree with the SOS petitioners that the hearings officer's failure to consider the Awbrey Butte Master Plan "Critical Area" for "Visual Sensitivity" designation provides an additional basis for remand.

The SOS petitioners' fourth assignment of error is denied.

The city's decision is remanded.