

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CITIZENS FOR ENVIRONMENTALLY
5 RESPONSIBLE DEVELOPMENT,

6 *Petitioner,*

7
8 vs.

9
10 CITY OF BEAVERTON,

11 *Respondent,*

12
13 and

14
15 SALEM COMMUNICATIONS
16 CORPORATION,

17 *Intervenor-Respondent.*

18
19 LUBA No. 2003-076

20
21 FINAL OPINION
22 AND ORDER

23
24 Appeal from City of Beaverton.

25
26 Michael G. Andrea, Portland, filed the petition for review and argued on behalf of
27 petitioner. With him on the brief was Heller, Ehrman, White and McAuliffe, LLP.

28
29 William J. Scheiderich, Assistant City Attorney, Beaverton, and Steven P. Hultberg,
30 Portland, filed a joint response brief and argued on behalf of respondent and intervenor-
31 respondent. With them on the brief was Theodore R. Naemura, Beaverton, Mark D.
32 Whitlow, Portland, and Perkins Coie, LLP.

33
34 HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member,
35 participated in the decision.

36
37 REMANDED

09/16/2003

38
39 You are entitled to judicial review of this Order. Judicial review is governed by the
40 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a city decision that approves two conditional use permits and a tree preservation plan, which collectively authorize construction of a 196-foot tall AM radio broadcast tower.

FACTS

Intervenor-respondent Salem Communications Corporation (SCC) was the applicant below. SCC owns a 12.8-acre Urban Standard Density (R7) zoned parcel. There is an existing 264-foot tall radio broadcast tower on the property that was constructed in the 1950s and predates city land use regulations. The city planning commission considered SCC's request for conditional use and tree preservation plan approval at a public hearing on October 30, 2002 and on November 21, 2002 denied the request. On December 2, 2002, the city's Community Development Director appealed the planning commission's decision to the city council. After a public hearing on March 31, 2003, the city council issued a decision that reverses the planning commission decision and grants SCC's request. This appeal followed.

SECOND ASSIGNMENT OF ERROR

The challenged decision sets out the following Beaverton Comprehensive Plan (BCP) Residential Objective and Policy:

“Objective 3.4.2.1

“The primary focus of residential development should be towards maintaining or creating maximum livability and promoting quality living areas.” Record 23.

“Policy 3.4.3.C. Residential development should be coordinated with other land use elements and community facilities which are consistent with projected housing densities.” Record 29.

Petitioner argues that the city erroneously concluded that Objective 3.4.2.1 and Policy 3.4.3.C apply only to “residential development,” and therefore those policies do not apply to the siting of the proposed radio broadcast tower. Petitioner contends that the city's

1 interpretation of this objective and policy is absurd and inconsistent with the underlying
2 policy expressed in the objective and policy, since the city’s interpretation means that non-
3 residential development in residentially zoned areas receives less regulatory scrutiny than
4 residential uses. Petitioner also challenges the city’s suggestion that the objective and policy
5 might apply in this case if they referred to “all residential developments” rather than to
6 “residential development.”¹ Finally, petitioner argues that the city’s interpretation here is
7 inconsistent with the city’s decision in a separate unrelated decision to apply BCP
8 Residential Objective 3.4.2.1 to an application for a zoning map amendment.

9 **A. Absurd Result—Inconsistency With Underlying Policy**

10 The city and intervenor dispute petitioner’s contention that the city’s interpretation
11 means nonresidential development proposals receive less stringent review than residential
12 development proposals. The city and intervenor point out that the disputed radio broadcast
13 tower is reviewed under the city’s conditional use criteria, whereas residential development
14 is reviewed as a permitted use. The city and intervenor contend that petitioner fails to
15 demonstrate that the city council’s interpretation of the cited objective and policy is
16 inconsistent with either the language or underlying policy of those provisions and for that
17 reason the city’s interpretation must be affirmed under ORS 197.829(1).² We agree with the
18 city and intervenor.

¹ Although the city expressed some doubt about whether a different BCP Policy, which applies to “all residential developments,” applied to the proposed radio broadcast tower, it ultimately applied the policy. Record 30.

² Under ORS 197.829(1):

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

“(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

“(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

1 **B. Inconsistency With Prior Precedent**

2 **1. Motion to Strike**

3 In support of its argument that the challenged decision should be remanded because it
4 is inconsistent with prior city precedent, petitioner attaches to its brief an unrelated city
5 decision that grants an application for a zoning map amendment. In the process of approving
6 that application, the decision applies BCP Residential Objective 3.4.2.1. That decision was
7 the subject of an unrelated LUBA appeal. *Neighbors for Livability v. City of Beaverton*, 40
8 Or LUBA 52, *aff'd* 178 Or App 185, 35 P3d 1122 (2001). The city decision that is attached
9 to petitioner’s brief was not submitted to the city council below and is not included in the
10 record in this appeal.

11 The city and intervenor move to strike the attached city decision. Petitioner concedes
12 that LUBA may not take official notice of that city decision and that the city’s and
13 intervenor’s motion to strike the attached city decision should be granted. *Rochlin v. City of*
14 *Portland*, 29 Or LUBA 609, 610-11 (1995); *Mental Health Division v. Lake County*, 17 Or
15 LUBA 1165, 1168-69 (1989). That portion of the motion to strike is granted.

16 Petitioner objects, however, to the city’s and intervenor’s motion that LUBA should
17 also strike the part of the petition for review in which petitioner argues that the city’s
18 decision in this case not to apply BCP Residential Objective 3.4.2.1 to the proposed radio
19 broadcast tower is inconsistent with the city’s decision to apply that same objective in the
20 above noted decision. Petitioner contends the inconsistency can be determined by examining
21 LUBA’s opinion in *Neighbors for Livability*, 40 Or LUBA at 60 n 8. We agree with
22 petitioner that its argument may be reviewed on the merits, and we deny the motion to strike
23 its argument regarding prior precedent from the petition for review.

“(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]”

1 **2. The Parties’ Arguments on the Merits**

2 Turning to petitioner’s argument that the city’s interpretation is inconsistent with the
3 city decision that LUBA describes in *Neighbors for Livability*, and should be remanded for
4 that reason, the city and intervenor contend that petitioner fails to demonstrate that the
5 challenged decisions are similar to the city decision in *Neighbors for Livability* and point out
6 differences in the two decisions. Respondents’ Brief 9-10. Given the different nature of the
7 two decisions, the city and intervenor contend that petitioner fails to establish that the
8 challenged decision and the cited unrelated decision are actually inconsistent. The city and
9 intervenor also contend that petitioner failed to raise this issue below and therefore have
10 waived their right to raise this issue before LUBA.

11 Arbitrary and inconsistent interpretation of approval criteria in deciding applications
12 for land use permits may provide a basis for remand. *See Friends of Bryant Woods Park v.*
13 *City of Lake Oswego*, 26 Or LUBA 185, 191 (1993), *aff’d* 126 Or App 205, 868 P2d 24
14 (1994) (although local legislation may be susceptible of more than one interpretation, local
15 government may not “arbitrarily * * * vary its interpretation”). However, we agree with the
16 city and intervenor that petitioner fails to demonstrate that the city’s rezoning decision, as
17 described in *Neighbors for Livability*, and its conditional use permit decision in this case
18 demonstrate the kind of inconsistency in decision making that might warrant remand. On a
19 most fundamental level, the different nature of the decisions themselves—one involving
20 approval of a particular use and the other changing the property’s zoning map designation—
21 could easily explain the different applications of the cited BCP provisions.

22 Because we reject petitioner’s argument on the merits, it is unnecessary that we
23 consider the city’s and intervenor’s waiver argument.

24 The second assignment of error is denied.

1 **FIRST ASSIGNMENT OF ERROR**

2 **A. The City Council’s Interpretation**

3 The challenged decision recognizes that radio broadcast towers are not expressly
4 listed as either a permitted or conditional use in the R7 zone, or in any other zone in the city.
5 The challenged decision then considers whether a radio broadcast tower may fall within a
6 more general category of permitted or conditional use in the R7 zone. The city council’s
7 decision approaches that question by first considering whether a radio broadcast tower is
8 properly characterized as a “public utility” or as a “private utility,” as the Beaverton
9 Development Code (BDC) defines those terms.³ The challenged decision concludes that the
10 proposed radio tower is properly viewed as a “private utility.”

11 “The proposed broadcast tower constitutes a ‘Private [U]tility.’ The word
12 ‘utility’ whether of a public or private nature, connotes a facility that provides
13 *something useful, or capable of being used.* The proposed radio station
14 provides a useful thing, namely a broadcast, which is available for reception
15 by the general public. In furtherance thereof, the Council notes, that as a
16 matter of common knowledge and in accordance with their license from the
17 FCC, the applicant, as operator of a radio station and as part of the nationwide
18 emergency broadcast system, is required to broadcast public service
19 announcements. The city is also not responsible for operating or maintaining
20 the radio station, which indicates the proposed use is more ‘private’ than
21 ‘public.’ Furthermore, the broadcast use is a form of communication, and the
22 City Council finds that such a communications use falls appropriately under
23 the open-ended list of communication related activities found in the definition
24 for ‘private utility.’” Record 11 (emphasis added).

³ BDC Chapter 90 is the definition section of the BDC. BDC Chapter 90 includes the following definitions of “public utility” and “private utility:”

“Utility, Public. Utilities that are subject to City acceptance for operation and maintenance. For purposes of this code, public utilities include water lines, sanitary sewer lines, storm sewer lines, and their appurtenances and any component part(s) thereof.

“Utility, Private. Utilities that are not subject to City acceptance for operation or maintenance. For purposes of this code, private utilities include natural gas lines, power lines, telephone lines, cable television lines and other communication lines, their appurtenances and any component part(s) thereof, and the utility companies’ operation, maintenance, repair and replacement of same.”

1 After the city council concludes that the proposed radio broadcast tower is properly
2 viewed as a “private utility,” it considers whether the radio broadcast tower is properly
3 viewed as a “utility.”⁴ The city council appears to determine that the proposed radio tower is
4 not properly viewed as a “utility,” as that term is defined by BDC chapter 90.⁵ The city
5 council then concludes that the tower is allowed in the R7 zone under BDC
6 20.05.15.2.B(10), which authorizes the following as a conditional use in the R7 zone:

7 “Utility substations and related facilities other than transmission lines.^[6] (See
8 also Special Use Regulations Section, Uses Requiring Special Regulations –
9 Utilities.)⁷ BDC 20.05.15.2.B(10).

⁴ BDC Chapter 90 defines “utility” as follows:

“**Utility.** Infrastructure that is primarily underground. For purposes of this code, utilities include but are not limited to water lines, sanitary sewer lines, storm sewer lines, culverts, natural gas lines, power lines and communications lines, and their appurtenances above and below ground, and/or any component part(s) thereof.”

⁵ We say the city council “appears” to reach that conclusion, but it is not entirely clear that it adopts that conclusion. In the part of the decision where the city council first considers the question, it concludes:

“The City Council does not believe the term ‘utility’ is related as closely to the tower proposal as other terms. The term ‘utility’ standing alone primarily refers to devices that can be placed underground, in accordance with the City’s ordinances and policies requiring utility undergrounding. A radio tower, by design is incapable of being placed underground. Though a tower is a utility use, it is not a ‘utility’ designed for underground placement. Accordingly, the term ‘private utility’ fits the present application better than the term ‘utility.’” Record 12.

Although the above language does not clearly reach a conclusion that the proposed radio tower is not properly viewed as a “utility,” within the meaning of BDC chapter 90, the city council states that conclusion later in its decision:

“[T]he proposed radio tower is not a ‘utility’ as that term is defined in BDC chapter 90, because the term ‘utility’ relates to utilities that can be placed underground in accordance with the City’s scheme for placing private utilities underground.” Record 15-16.

⁶ BDC Chapter 90 includes the following relevant definition:

“**Utility Stations or Installations.** Installations, stations or *substations* which provide electrical, gas, steam, water or *other utility services*. This Use Classification includes, but is not limited to: sewer or water supply installations, water conservation or flood control installations, or other similar uses.” (Emphases added.)

⁷ The referenced Special Use Regulations Section of the BDC includes BDC 60.50.25(11), which provides as follows:

1 In response to petitioner’s arguments below that the disputed radio tower does not
2 qualify as a utility station or installation under BDC 20.05.15.2.B(10), the city council
3 adopted the following additional findings:

4 “* * * The City Council concurs with staff’s belief that the phrase ‘other
5 utility services’ [in the BDC Chapter 90 definition of ‘[u]tility stations or
6 installations,’ *see* n 6] contemplates radio, cable and other similar uses. A
7 radio tower provides a utility use, namely the broadcast signal. The only real
8 difference between a cable transmission and a radio transmission is the
9 medium in which the broadcast travels. One travels by wire, while the other
10 via radio waves. The actual service provided, however, is very similar, i.e., a
11 broadcast signal that provides information to the recipient. A radio tower also
12 possesses attributes of a ‘private utility’ as discussed above, and as the
13 Commission specifically concluded. The City Council believes the listed
14 conditional use, for ‘substations and related facilities,’ is open-ended and
15 captures both substation uses and other private utility uses. * * *” Record 15.

16 The city council ultimately concluded as follows:

17 “[T]he city council concludes that the proposed AM radio broadcast tower is
18 classified under the BDC as a private utility and is permitted in the R-7 zone
19 under BDC 20.05.15.2.B.10 as a utility substation and related facilities other
20 than transmission lines.” Record 16.

21 **B. Petitioner’s Challenge**

22 Petitioner challenges the city’s interpretation of “private utility” as being
23 “inconsistent with the express language” of the BDC and inconsistent with the “apparent
24 purpose and policy of the [BDC].” Petition for Review 7, 10. In particular, petitioner

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- A. The erection, construction, alteration, or maintenance by public utility or municipal or other governmental agencies of any electrical, gas, steam or water transmission or distribution systems, collection, communication, supply or disposal system, including poles, towers, wires, mains, drains, sewers, pipes, conduits, cables, fire alarm boxes, police call boxes, traffic signals, hydrants and other similar equipment and accessories in connection therewith, but not including buildings, shall be permitted in any district.
 - “B. Private utility services to all structures, residential, commercial, and industrial, on private property *shall be placed underground* and meet the standards specified by the City Engineer. *This requirement may be waived* where the Director and City Engineer determine that the requirement is impractical or would cause undue hardship.” (Emphases added.)

1 challenges the city’s conclusions that although the radio broadcast tower is not a “utility,” the
2 radio tower is nevertheless properly viewed as a “private utility.”

3 In the first part of the city council’s decision quoted above, it interpreted “utility” as
4 including “a facility that provides something useful, or capable of being used.” Record 11.
5 That interpretation would appear to be broad enough to include *any* facility that produces
6 *anything*, since is hard to imagine a “facility” output that is not “capable of being used” in
7 some way. A commercial shirt factory or retail automobile sales lot arguably would qualify
8 as a “utility” under that definition. More importantly, the city council’s interpretation of
9 “utility” in the disputed decision bears no resemblance to the BDC chapter 90 definition of
10 “utility.” We cannot tell why the city council decided that the proposed radio broadcast
11 tower does not fall within the BDC Chapter 90 definition of “utility.” Whatever its reasons,
12 its decision to apply an expanded definition for the term “utility” when it is paired with the
13 adjective “private” is even more difficult to understand. First, BDC 20.05.15.2.B(10), which
14 the city council found to be the dispositive section of the BDC, uses the term “utility” but
15 does not use the term “private utility.” Second, there is simply no basis for assigning a
16 different meaning to the word “utility” when it is used alone and when it is used in the BDC
17 with the word “private.” While there may be an explanation for why private utilities are not
18 a subclass of the larger universe of “utilities” under the BDC, as petitioner argues, the city
19 council provides no such explanation, and we cannot see one based on our review of the
20 BDC. Because the city council’s interpretation is inconsistent with the language of the BDC,
21 it cannot be sustained under ORS 197.829(1).

22 It may be that the city council is concerned with arguments advanced below that if
23 the proposed radio broadcast tower falls within the BDC chapter 90 definition of “utility,” it
24 would have to be placed underground under city policies that favor placing certain utilities
25 underground. Record 13; *see* n 4. Or, it may be that the city is concerned with arguments
26 advanced below that those policies support interpreting the BDC chapter 90 definition of

1 “utility” narrowly to exclude a facility, like a radio broadcast tower, that for functional
2 reasons cannot be placed underground. As noted below, we question the validity of both of
3 those arguments. However, if the city believes that the term “utility,” as defined by BDC
4 Chapter 90, is not broad enough to encompass a radio broadcast tower, it may not create a
5 new and broader category of “utility” via its interpretation of “private utility” in this
6 decision. There is absolutely no support in the language of the BDC to support this new and
7 more expansive category of utility based on the facility’s capacity to make something that “is
8 useful or capable of being used,” and the city’s interpretation to the contrary is inconsistent
9 with the language of the BDC.

10 There are a number of other problems with the city council’s decision.⁸ However,
11 rather than discuss those problems at length or discuss other parts of the city’s rationale that
12 seem questionable, we return to what appears to be the relatively straightforward interpretive
13 question that is presented in this case.

14 The city council ultimately concludes in the challenged decision that the disputed
15 radio broadcast tower qualifies as a conditional use under BDC 20.05.15.2.B(10). Beginning
16 with the words of BDC 20.05.15.2.B(10) itself and the BDC Chapter 90 definition of “utility
17 stations or installations,” the central question appears to be whether the radio tower is
18 properly viewed as a “[u]tility substation or related facilit[y].” The BDC does not appear to
19 assign particular significance to the terms “stations,” “substations,” “installations,” and
20 “services.” We can see no reasonable argument that a radio broadcast tower is not properly
21 viewed as a station, substation, installation or a related facility. The only debatable question

⁸ For example, the city council took the position that if it were to agree with petitioner that a radio broadcast tower is not a utility or private utility, that would “lead to an unprecedented result—that private utilities are forbidden [and] cable television, cellular towers, telephones, natural gas, and all related equipment, would be prohibited.” Record 15. As petitioner correctly points out, “[t]he unprecedented result referred to by the City does not logically follow from [petitioner’s] arguments [because] telephone lines, natural gas lines, cable television lines, and their appurtenances, are all expressly included in the definition of ‘utility, private’ and, therefore, are uses that may be permitted through the conditional use process.” Petition for Review 9, n 5.

1 is whether it is properly viewed as a *utility* station, *utility* substation, *utility* installation, or a
2 *utility* related facility. That question would seem to be answered by BDC chapter 90. *See n*
3 4.

4 Returning to the BDC Chapter 90 definition of “utility,” while there may be
5 considerations that are not mentioned in the decision or in the parties’ briefs, that definition
6 would appear to be reasonably susceptible to an interpretation that would include a radio
7 broadcast tower. A radio tower admittedly is not among the specifically listed utilities in the
8 definition, but that list expressly does not purport to be *exclusive*. The radio tower also
9 admittedly is not “infrastructure” that will be installed “underground.” However, the
10 definition states that the referenced “infrastructure” is only “primarily” located underground.
11 That expressly leaves open the possibility that some utility infrastructure might be above
12 ground.⁹ Accordingly, as far as we can tell, it would not be inconsistent with the language of
13 the BDC Chapter 90 definition of “utility” to interpret that definition to encompass particular
14 examples of infrastructure that must be placed above ground.

15 A much closer question is presented with the relatively consistent references in the
16 definitions of “public utility,” “private utility,” and “utility” to “lines.” *See ns* 3 and 4.
17 Those references seem to embrace utility services of a more traditional nature that employ a
18 physical line of some sort, rather than a service that is broadcast without such lines.¹⁰
19 However, it is reasonably clear from language in the city’s decision quoted earlier in this
20 opinion that the city does not adopt this narrow view of utilities. Slip op at 8; Record 15. In

⁹ Indeed, under BDC 60.50.25(11)(B), while private utility services must be placed underground in certain circumstances, that section of the BDC expressly provides that “this requirement may be waived where the Director and City Engineer determine that the requirement is impractical or would cause undue hardship.” *See n* 7. If there is an absolute city requirement that utilities, public or private, be placed underground, no party has called such a provision to our attention.

¹⁰ Relatedly, petitioner notes that while it may be necessary to allow water, sewer, stormwater, telephone, and electric lines in residential areas to provide those services, there is no corresponding need to locate the disputed broadcast tower in a residential area to provide radio service to that area.

1 addition, the arguably most important BDC provision, BDC 20.05.15.2.B(10), does not refer
2 to “lines” except where it expressly excludes “transmission lines.” While the BDC chapter
3 90 definition of “utilities” probably could be interpreted narrowly to embrace only utilities
4 that are connected to their customers by lines, the language and structure of that definition
5 does not, in our view, compel that narrow construction.

6 LUBA is authorized to adopt its own interpretation of the BDC when the city has not
7 adopted a reviewable interpretation. ORS 197.829(2). The city has adopted a reviewable
8 interpretation in this case. Although we reject that interpretation as inconsistent with the
9 language of the BDC, it is not appropriate for LUBA to adopt the apparently more
10 straightforward interpretation that we suggest above might be possible to support the same
11 ultimate conclusion regarding the applicability of BDC 20.05.15.2.B(10). As we have noted,
12 there may be reasons why the city council did not adopt that interpretation, and there may be
13 problems with that suggested interpretation that we cannot see as this case is presented. We
14 set it out primarily because it seems to present a much more direct approach to the
15 interpretive question as we understand it and to more directly confront the parties’
16 interpretive disagreement.

17 For the reasons explained above, petitioner’s first assignment of error is sustained.

18 **THIRD ASSIGNMENT OF ERROR**

19 Petitioner challenges the city’s finding that the proposed radio broadcast tower is
20 consistent with the requirement of BCP Residential Objective 3.4.2.11, which requires that
21 “[v]arious residential uses should be protected from the intrusion of incompatible uses in
22 order to preserve and stabilize values and the character of the area.” Record 24. In
23 concluding that the proposed radio tower does not represent the kind of “intrusion of
24 incompatible uses” from which neighboring residential uses should be protected under the
25 cited objective, the city council explained:

1 “Neighbors opposing the tower argue that the proposal would create [more]
2 negative visual, natural resources and radio interference impacts [than] are
3 experienced already, because the proposal would establish a second tower on
4 the site. Currently there are few structures in the neighborhood that approach
5 the height of [the] proposed tower, except for the existing radio tower. The
6 site contains an existing radio broadcast tower of 260 feet in height that,
7 according to the applicant, was placed on the site during the late [1950s].
8 Evidence was provided that indicates that the tower was first constructed in
9 1947. Consequently, the City Council finds that the tower predates most of the
10 development in the immediate vicinity of the existing and proposed tower. As
11 a result, the proposed tower does not constitute an ‘intrusion of incompatible
12 uses’ because the residential uses and the tower use have been co-existing for
13 many years. Were the tower an entirely new use for the area, it might be
14 possible that such a new tower could be considered ‘an intrusion of’ * * *
15 incompatible uses, but because the two uses have been co-existing for years
16 and because the existing tower predates much of the nearby development, the
17 City Council finds that the proposed tower is not an intrusion of a use.”
18 Record 25.

19 Citing BDC 30.05.1, petitioner first argues that, as a matter of law, the city may not
20 rely on the existing nonconforming radio broadcast tower to justify placing a second tower on
21 the subject property.¹¹ Petitioner next argues that the city’s finding that the proposed radio
22 tower will not negatively affect area property values is not supported by substantial evidence.

23 The city and intervenor respond in two ways to petitioner’s first argument concerning
24 the permissibility of considering the impacts that the existing radio tower may have already
25 had on property values. First, they rely on BDC 30.45 to argue that it was proper for the city
26 council to consider the existing radio tower.¹² The city and intervenor reason that the

¹¹ BDC 30.05.1 provides:

“Within the districts established by [the BDC] there may exist lots, structures, uses of land and structures, and characteristics of use which were lawful before the effective date of this ordinance, but which would be prohibited, regulated, or restricted under the terms of this ordinance or future amendments. It is the intent of this ordinance to permit these nonconformities to continue until they are removed, but not to encourage their perpetuation. It is further the intent of this ordinance that nonconformities shall not be enlarged, expanded or extended, *nor be used as grounds for adding other structures or uses not permitted elsewhere in the same district except as specifically provided elsewhere in this ordinance.*” (Emphasis added.)

¹² BDC 30.45 provides:

1 *existing* radio tower is properly viewed as a “conforming” use under BDC 30.45 and that it is
2 therefore entirely proper to consider that existing tower. Moreover, the city and intervenor
3 contend that the *proposed* radio tower is the kind of use that is “specifically provided [for]
4 elsewhere in [the BDC],” because the city found that radio towers are a conditional use under
5 BDC 20.05.15.2.B(10). Respondents’ Brief 14.

6 The city and intervenor’s arguments would appear to be good arguments if the city
7 had adequately established that radio broadcast towers are properly viewed as a utility
8 substation or related facility under BDC 20.05.15.2.B(10). However, in sustaining
9 petitioner’s first assignment of error above, we conclude that the city has not yet adequately
10 established that they are. Unless and until the city does so, it appears that petitioner is
11 correct that the city may not consider the past and existing impacts of the radio tower that is
12 already located on the subject property in applying BCP Residential Objective 3.4.2.11.

13 The city’s decision that the addition of the proposed radio broadcast tower will not
14 violate BCP Residential Objective 3.4.2.11 appears to rely in large part on the impact of the
15 existing radio tower. Because we conclude that the city has not established that it is proper
16 to consider the impact of the existing tower, the third assignment of error must be
17 sustained.¹³

18 The city’s decision is remanded.

“A permitted use existing before the effective date of this ordinance which is permitted only upon receiving a Conditional Use Permit under the terms of this ordinance shall not be deemed a nonconforming use in such district, but shall without further action be considered a conforming use.”

¹³ Petitioner also contends that the city council improperly shifted the burden of proof concerning impacts on property values in applying BCP Objective 3.4.2.11. We need not and do not address that issue.