

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 DOROTHY TOLLEFSON, ARTHUR ALFINITO
5 and LEAH ALFINITO,
6 *Petitioners,*
7

8 vs.
9

10 JACKSON COUNTY,
11 *Respondent,*
12

13 and
14

15 VERIZON WIRELESS,
16 *Intervenor-Respondent.*
17

18 LUBA No. 2006-025
19

20 FINAL OPINION
21 AND ORDER
22

23 Appeal from Jackson County.
24

25 Mark S. Bartholomew, Medford, filed the petition for review and argued on behalf of
26 petitioners. With him on the brief was Hornecker Cowling Hassen and Heysell, LLP.
27

28 No appearance by Jackson County.
29

30 Christopher P. Koback, Portland, filed the response brief and argued on behalf of
31 intervenor-respondent. With him on the brief was Davis Wright Tremaine, LLP.
32

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

36 REMANDED

05/31/2006
37

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

1

2 **NATURE OF THE DECISION**

3 Petitioners appeal a hearings officer’s approval of a reduced setback for a cellular
4 tower adjacent to residential property.

5 **MOTION TO INTERVENE**

6 Verizon Wireless (intervenor), the applicant below, moves to intervene on the side of
7 respondent. There is no opposition to the motion, and it is allowed.

8 **FACTS**

9 The subject property is a 3.23-acre parcel zoned Rural Residential (RR-5), developed
10 with a residence, barn and other accessory structures. The parcel is roughly rectangular in
11 shape, with a narrow center portion that is only 180 feet wide. At the approximate center of
12 the parcel is an elevated bench on which intervenor proposes to place a 60-foot cellular
13 tower, with a three-foot flush-mounted antenna, for a total height of 63 feet. The subject
14 property is bordered on the east by property zoned exclusive farm use. Petitioner Tollefson
15 owns an adjacent RR-5-zoned parcel to the west, which is downhill from the subject property
16 and adjacent to Interstate Highway 5. The proposed tower location is 120 feet from
17 petitioner’s property line, and 180 feet from petitioner’s dwelling.

18 The RR-5 zone allows transmission towers up to 250 feet in height, subject to a
19 setback that is a minimum of 200 feet or the height of the tower, whichever is greater. Land
20 Development Ordinance (LDO) 6.3.6(A)(5)(c)(i).¹ Pursuant to LDO 6.3.6(A)(5)(c)(iii), the

¹ LDO 6.3.6(A)(5)(c) provides, in relevant part:

“(i) Transmission towers will be set back from all existing dwellings and residentially zoned property by a minimum of 200 feet, or the height of the proposed tower, whichever is greater.

“* * * * *

“(iii) The setbacks listed in this subsection may be increased or reduced upon consideration of circumstances that increase or reduce the off-site effects of the

1 setback may be increased or reduced, based on circumstances that “increase or reduce the
2 off-site effects of the tower[.]” *Id.* The LDO provides a non-exclusive list of considerations
3 in determining whether to reduce or increase the setback, such as topography, berms,
4 proximity of existing or potential uses, vegetation, and modifications to the tower height,
5 design, placement or other characteristics that result in a “less-intrusive impact.”

6 Intervenor requested reduction of the western setback from 200 feet to 120 feet,
7 pursuant to LDO 6.3.6(A)(5)(c)(iii).² County staff administratively approved the application
8 and setback, based on several modifications to the tower that reduced its visual impact.
9 Petitioners appealed the staff decision to the county hearings officer, arguing that the tower
10 will loom over petitioner Tollefson’s property and that, considering topography, the lack of
11 berms and obscuring vegetation, and other considerations that are relevant under LDO
12 6.3.6(A)(5)(c)(iii), the setback should if anything be increased not reduced. The hearings
13 officer conducted a hearing and, on February 10, 2006, approved the reduced setback. This
14 appeal followed.

15 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR**

16 Under these assignments of error, petitioners argue that the hearings officer
17 misinterpreted LDO 6.3.6(A)(5)(c)(iii), failed to adopt findings supported by substantial
18 evidence, failed to consider all of the required circumstances, and failed to address
19 petitioners’ arguments that no setback reduction is warranted.³

tower on adjacent properties, such as topography, berms, the proximity of existing or potential uses, existing vegetation and improvements made to the site to obscure or reduce the visibility of the tower from adjacent properties, the concentration of proposed towers in the area, and whether the height, design, placement or other characteristics of the proposed tower could be modified to have a less intrusive impact.”

² Intervenor also requested, and the hearings officer approved, a reduction of the eastern setback to 60 feet. Petitioners do not challenge that setback.

³ Following oral argument petitioner Arthur Alfinito submitted several documents and photographs to the Board. The submitted material appears to consist of additional argument and evidence that is not included in the record that was filed by the county in this appeal. The material was not served on other parties, as our rules

1 The hearings officer summarized petitioners’ arguments that the considerations
2 required by LDO 6.3.6(A)(5)(c)(iii) supported a conclusion that no setback reduction was
3 warranted.⁴ The hearings officer conceded that petitioners’ arguments were “well-taken.”
4 Nonetheless, the hearings officer concluded that the reduced setback was warranted, based
5 primarily on the final consideration listed in LDO 6.3.6(A)(5)(c)(iii)—proposed
6 improvements or modifications to make the tower less-intrusive.⁵

require, and was not accompanied by a motion to submit additional briefing or a motion to take evidence not in the record under OAR 661-010-0045. Intervenor moves to strike those documents. We grant the motion, and do not consider the submitted material in reaching our decision in this matter.

⁴ The hearings officer’s findings state:

“Mrs. Tollefson analyzes each of the illustrative considerations of [LDC] 6.3.6(A)(5)(c)(iii) in turn, concluding with respect to each that the setback from Mrs. Tollefson’s dwelling should, at a minimum, have been held to the 200 foot minimum required by [LDC] 6.3.6(A)(5)(c)(i).

“[1] Topography: The generally sloping topography does not mitigate this impact from most neighboring residential parcels and actually compounds it on Mrs. Tollefson’s property;

“[2] Berms: There are no berms that would lessen the impact;

“[3] Proximity of Existing or Potential Uses: Residential uses exist to the north, west and south of the Tower. There are significant setbacks north and south, but it is limited on the west. * * * ;

“[4] Existing Vegetation: The sparseness of existing vegetation provides no screening which should result in increasing the setback.

“[5] Improvements Obscuring Tower Visibility: The ‘Applicant has done little to reduce the visibility of the tower,’ other than proposing to paint it brown which will do little to obscure it. Screening is being required at the base of the Tower, but it will do nothing to obscure the Tower itself.

“[6] Concentration of Proposed Towers in the Area: There are no other towers in the vicinity, leaving the Tower as an out-of-context utility feature of the ‘bucolic’ surroundings.

“[7] Whether the Height, Design, Placement, or other Characteristics of the Proposed Tower Could be Modified to Have Less Intrusive Impact: The topography and the lack of existing vegetation will prevent modification of any of these features from mitigating the intrusiveness of the Tower. Increasing the setback beyond the minimum 200 from dwellings is the only effective mitigation.” Record 11-12.

⁵ The hearings officer’s findings continue:

1 Petitioners challenge those findings on several grounds. Petitioners argue that the
2 hearings officer misconstrued LDO 6.3.6(A)(5)(c)(iii) as allowing a reduced setback
3 notwithstanding significantly increased off-site impacts, as long as the applicant mitigates
4 those increased impacts to some degree. According to petitioners, the only reasonable
5 interpretation of LDO 6.3.6(A)(5)(c)(iii) is that it allows a reduced setback only if any
6 increased off-site impacts are mitigated such that there is no net increase in impacts
7 compared to a 200-foot setback.

“All of these arguments are well taken. However, their force is not as great as Mrs. Tollefson states. She characterizes many of these factors as criteria, and they are not. They are considerations that the LDO requires to be taken into account as the issue of setbacks is determined. They are not criteria that have to be satisfied in order for a permit to be approved.

“Because the Property is located in a residential area and very close to the Interstate, visual impact is unavoidable. Efforts to minimize this impact are complicated by the irregular shape of the Property. Setback is only one of many features which must be considered. Determining what setbacks are appropriate is an inexact undertaking that boils down to balancing impacts and benefits among competing interests. While [LDO] 6.3.6(A)(5)(c)(iii) enables this exercise, it does not make it easy, and it is often impossible to eliminate all burdens. That is the case here.

“[LDO] 6.3.6(A)(5)(c)(iii) does not assure a reduction in setbacks any more than it assures their increase. It only requires the weighing of considerations, including ‘whether the height, design, placement or other characteristics of the proposed tower [can] be modified to have a less intrusive impact.’

“The Staff considered what mitigation is possible to achieve on this shaped parcel. The required setback to the east was substantially reduced. The height was limited by eliminating the possibility of co-location, and it may be further reduced pursuant to Condition 7. The antenna array has been modified dramatically reducing the intrusiveness of the Tower as proposed. The Staff Report also requires the Applicant to produce engineering studies that will limit the Tower width to the minimum necessary to support the antennas (Condition 8). The height of the enclosure around the building envelope has been increased and landscaping has been specified (Condition 6). The Equipment Building has been required to comply with the design standards of [LDO] 6.3.6(A)(5)(d)(ii)(a). These are all modifications that reduce the intrusiveness of the Tower.

“Consistent with [LDO] 6.3.6(A)(5)(c)(iii), the western setback was maximized within the limits of the dimensions of the Property, and the height, design and other characteristics were ‘modified to have a less intrusive impact’ on the surrounding properties. The LDO does not require that the impacts be eliminated, only balanced and, to the extent possible, minimized. That has been achieved.” Record 12-13.

1 In addition, petitioners contend that the hearings officer erred in considering
2 circumstances he should not have considered, specifically the size and shape of the subject
3 property, and in failing to consider circumstances he was required to consider, such as
4 topography, the absence of berms, the proximity of existing or potential uses, existing
5 vegetation, the absence of other cell towers in the area, etc.

6 According to petitioners, the only appropriate considerations in determining whether
7 to reduce or increase a setback under LDO 6.3.6(A)(5)(c)(iii) are “circumstances that
8 increase or reduce the off-site effects of the tower.” *See* n 1. The hearings officer erred,
9 petitioners argue, in relying on the size and shape of the property—and intervenor’s
10 consequent inability to site any tower at all without a reduced setback—as an additional,
11 critical consideration. Had the county intended the size and shape of the parcel to be a
12 consideration under LDO 6.3.6(A)(5)(c)(iii), petitioners argue, it would have said so.

13 Petitioners further argue that the hearings officer erred in failing to in fact consider or
14 weigh all of the pertinent considerations. Other than a comment that petitioners’ arguments
15 regarding the considerations listed in LDO 6.3.6(A)(5)(c)(iii) were “well-taken,” petitioners
16 argue that as far as the findings reflect the hearings officer never actually weighed those
17 considerations against the proposed design modifications to determine whether to reduce (or
18 increase) the setback. Instead, petitioners contend that the hearings officer focused
19 exclusively on the last consideration, modifications to the tower, without any explanation
20 why that consideration outweighed the other considerations cited by petitioners. According
21 to petitioners, the findings are inadequate because they fail to address the issues petitioners
22 raised under the other considerations or explain why a reduced setback is warranted,
23 notwithstanding the increased off-site impacts indicated by those considerations.

24 Intervenor disputes petitioners’ view that LDO 6.3.6(A)(5)(c)(iii) allows a reduced
25 setback only if the setback results in no net increase in off-site impacts, compared to the
26 code-required 200-foot setback. According to intervenor, if the county had intended to

1 require a comparison between the impacts generated by a reduced (or increased) setback and
2 the code-required setback, it would have made that intent explicit in the code. On the
3 contrary, intervenor argues, LDO 6.3.6(A)(5)(c)(iii) grants the hearings officer considerable
4 discretion under LDO 6.3.6(A)(5)(c)(iii) in weighing the non-exclusive set of “circumstances
5 that increase or reduce the off-site effects of the tower.” According to intervenor, LDO
6 6.3.6(A)(5)(c)(iii) does not require that the county give equal weight to all circumstances,
7 and under the code the hearings officer may place more weight on one circumstance than on
8 others.

9 With respect to the findings, intervenor argues that the hearings officer adequately
10 considered petitioners’ arguments regarding the circumstances listed in
11 LDO 6.3.6(A)(5)(c)(iii), and weighed the circumstances petitioners cited to against the
12 design modifications that intervenor cited to. According to intervenor, the hearings officer
13 simply disagreed with petitioners’ view of the evidence, and after considering all the factors
14 including design modifications, rejected petitioners’ argument that a reduced setback was not
15 warranted.

16 Intervenors are correct that LDO 6.3.6(A)(5)(c)(iii) does not explicitly require a
17 comparison of off-site impacts generated by a proposed cell tower at the code-required 200-
18 foot setback and a reduced (or increased) setback, and does not require denial of a request to
19 reduce the setback if it would result in a net increase in impacts compared to the 200-foot
20 setback. While LDO 6.3.6(A)(5)(c)(iii) might be interpreted to in that way, the hearings
21 officer clearly did not view the code provision to include an implicit “no net increase”
22 standard. While the hearings officer must in fact consider the listed circumstances and other
23 appropriate circumstances, LDO 6.3.6(A)(5)(c)(iii) does not include an express ultimate legal
24 standard that governs the hearings officer’s consideration of those circumstances. We
25 therefore disagree with petitioners that LDO 6.3.6(A)(5)(c)(iii) *must* be interpreted to include

1 a “no net increase” standard, or that the hearings officer erred in declining to interpret the
2 code to that effect.

3 That said, we agree with petitioners that LDO 6.3.6(A)(5)(c)(iii) limits the
4 considerations used to determine whether to increase or reduce a setback to “circumstances
5 that increase or reduce the off-site effects of the tower,” circumstances such as topography,
6 vegetation, etc. Nothing in LDO 6.3.6(A)(5)(c)(iii) suggests that other kinds of
7 circumstances, for example the applicant’s desire to site a tower at a particular location, or
8 the size and shape of the subject property, are permissible considerations. We note that, as
9 far as we are informed, the narrow dimensions of the subject property are the only reasons
10 prompting intervenor’s request for a reduced setback. There is no indication cited to us that
11 line of sight or similar considerations require that the cell tower be located within 200 feet of
12 the western property line. It seems relatively clear that no reduced setback would be
13 requested or necessary if the subject property were wider, and it is undisputed that without
14 significantly reduced setbacks from both the eastern and western boundaries no cell tower
15 can be approved anywhere on the subject property.

16 The hearings officer was presumably aware of these considerations, and in the
17 findings the hearings officer discusses at several points the constraints posed by the
18 dimensions of the subject property. *See* Record 12-13 (“[e]fforts to minimize this impact are
19 complicated by the irregular shape of the Property”; “[s]taff considered what mitigation was
20 possible to achieve on this shaped parcel,” and “[c]onsistent with [LDO] 6.3.6(A)(5)(c)(iii),
21 the western setback was maximized within the limits of the dimensions of the Property”). At
22 least nominally, these references to the property’s dimensions appear to relate to what kind
23 of mitigations are possible, which is certainly a permissible consideration in determining
24 whether “the height, design, *placement* or other characteristics of the proposed tower could
25 be modified to have a less intrusive impact.” However, if the shape of the property makes it
26 impossible to site the tower on a less-intrusive location on the property, that consideration is

1 either neutral or, if anything, would tend to support a conclusion that the setback should *not*
2 be reduced, because the placement of the tower cannot “be modified to have a less-intrusive
3 impact.” Instead, the hearings officer appeared to view the inability to site the tower at a
4 less-intrusive location as a circumstance that supports the requested reduced setback, because
5 no other “less-intrusive” location is available to the applicant. In other words, the hearings
6 officer appeared to view LDO 6.3.6(A)(5)(c)(iii) as allowing a reduced setback as long as the
7 applicant had minimized impacts “to the extent possible,” given the dimensional constraints
8 of the property, even if the other pertinent circumstances point toward an unchanged setback
9 or an increased setback. However, LDO 6.3.6(A)(5)(c)(iii) does not say that a reduced
10 setback is warranted as long as the applicant minimizes impacts “to the extent possible,” and
11 the hearings officer erred to the extent he interpreted LDO 6.3.6(A)(5)(c)(iii) to that effect.

12 As petitioners correctly note, the hearings officer’s justification for the reduced
13 setback focuses almost exclusively on proposed improvements to obscure the visibility of the
14 tower and proposed or imposed modifications to height, design and other characteristics.
15 While LDO 6.3.6(A)(5)(c)(iii) lacks an express objective standard, it requires actual
16 “consideration of circumstances that increase or reduce the off-site effects of the tower” and
17 an ultimate determination whether a setback should be reduced, increased, or remain
18 unchanged. If a setback is to be reduced or increased, the hearings officer must explain why
19 that reduction or increase is warranted, based on consideration of *all* relevant factors. In
20 many cases, as in the present case, different circumstances can point in different directions,
21 some indicating that the setback should not be reduced (or that it should be increased) and
22 others indicating that the setback may be reduced to some extent. Such circumstances may
23 offset each other, in which case presumably no reduction or a lesser reduction might be
24 warranted. But the ultimate determination whether (and to what extent) to reduce the setback
25 under LDO 6.3.6(A)(5)(c)(iii) can be made only if the relevant circumstances are in fact
26 considered and weighed against each other.

1 Here, although the hearings officer *listed* the circumstances cited by petitioners that
2 point in the direction of an unchanged or even increased setback, the findings do not *discuss*
3 those circumstances, much less explicitly weigh or balance them against other circumstances
4 that point toward a reduced setback. Other than commenting that petitioners’ arguments with
5 respect to the listed circumstances are “well-taken,” as far as the findings reflect the hearings
6 officer thereafter ignored most of those considerations, and apparently gave them no weight
7 at all.

8 Intervenor is correct that LDO 6.3.6(A)(5)(c)(iii) does not require equal weighting of
9 each circumstance, but it also does not allow the hearings officer to assign conclusive weight
10 to one consideration while apparently ignoring other pertinent considerations. To the extent
11 the hearings officer so interpreted LDO 6.3.6(A)(5)(c)(iii), we reject the interpretation.
12 While LDO 6.3.6(A)(5)(c)(iii) lacks an express, objective ultimate standard, there is no
13 reasonable dispute that it requires actual consideration of pertinent circumstances, reflected
14 in findings, and an explanation why consideration of those circumstances support a particular
15 conclusion. If some circumstances (the arguments regarding which are apparently well-
16 taken) point toward one conclusion, and other circumstances point in the opposite direction,
17 as in the present case, it is incumbent on the hearings officer to explain what weight is given
18 to each circumstance and why, and to give some explanation as to why evaluation and
19 weighing of *all* the pertinent circumstances supports the ultimate conclusion. The hearings
20 officer may have implicitly conducted that evaluation, as intervenor suggests, but the
21 findings show little sign of it. For that reason, the findings are inadequate for review.

22 The first, second and third assignments of error are sustained.

1 **FOURTH ASSIGNMENT OF ERROR**

2 LDO 3.2.3(E) requires site development review where “proposed development”
3 involves “projects with multiple principal structures on one tract.”⁶ Petitioners argued to the
4 hearings officer that LDO 3.2.3(E) applied in this case, based on two theories. First,
5 petitioners argued that the tower and its equipment shed constitute “multiple principal
6 structures.” Second, petitioners contended that the tower and shed in combination with the
7 existing structures on the subject property constitute “multiple principal structures on one
8 tract.” The hearings officer rejected the first argument, interpreting LDO 3.2.3(E) to apply
9 only to *proposals* for “multiple principal structures,” and concluding that the equipment shed
10 is an accessory structure, not a principal structure.⁷ The hearings officer did not explicitly
11 address the second argument, regarding existing structures. On appeal, petitioners argue that
12 the hearings officer erred in failing to address the second argument.

⁶ LDO 3.2.3 provides, in pertinent part:

“New uses * * * require a site development plan review if the proposed development exceeds one or more of the thresholds listed below:

“* * * * *

“(E) Projects with multiple principal structures on one tract.”

⁷ The hearings officer’s findings state, in relevant part:

“An issue on appeal is whether the Project should be required to comply with the Site Development Review requirements of [LDO] 3.2.3(E). [Petitioners] argue that because there will be more than one principal structure on the Property, Site Development Review is required. The Applicant resists this interpretation of [LDO] 3.2.3(E) and cites a recent decision by another Jackson County Hearings Officer in a very similar matter. It is not necessary to rely on that decision in order to address this issue.

“[LDO] 3.2.3(E) * * * is clear with respect to the Project. The Application is for a new use of the currently residentially developed land, but it does not propose ‘multiple principal structures.’ The Tower is the only principal structure. The Equipment Building is an accessory structure.” Record 4-5.

1 Intervenor responds that the hearings officer clearly interpreted LDO 3.2.3(E) to
2 apply only to applications that *propose* multiple principal structures, and that interpretation
3 implicitly disposes of petitioners’ arguments regarding *existing* structures.

4 We agree with intervenor that the hearings officer understood LDO 3.2.3(E) to be
5 triggered by “proposed development” that involves “multiple principal structures.” That
6 interpretation is reasonable and we affirm it. There is no dispute that the application does not
7 propose any new structures other than the tower and its accessory shed, or even any changes
8 to the existing dwelling and barn. Petitioners do not explain why the existing structures must
9 be understood to be part of the “project” or “proposed development” for purposes of
10 LDO 3.2.3(E), and under the hearings officer’s interpretation they clearly are not. Because
11 the hearings officer’s interpretation adequately disposes of the issue petitioners raised
12 regarding whether the existing structures are part of the “proposed development,” the
13 hearings officer’s failure to adopt explicit findings addressing that issue is at most harmless
14 error.

15 The fourth assignment of error is denied.

16 The county’s decision is remanded.