BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

THE CHACKEL FAMILY TRUST, LLC,
Petitioner,

vs.

CITY OF BEND,
Respondent,

and

AWBREY TOWERS, LLC,
Intervenor-Respondent.

LUBA No. 2006-104

SAVE OUR SKYLINE,
JERRY CURL, DEBRAH CURL,
THOMAS DANIELS, MARTHA DANIELS,
RONALD FISHER, HELEN FISHER,
JONATHAN SHARPE, JANIS SHARPE,
ANDREW SHOOKS, MICHELLE SHOOKS,
WILLIAM TAYLOR, DIANE TAYLOR,
KEVIN ARCHER, NANCY ARCHER,
JAMES E. DAVIS and DEANNA DAVIS,
Petitioners,

vs.

CITY OF BEND,
Respondent,

and

AWBREY TOWERS, LLC,
Intervenor-Respondent.

LUBA No. 2006-105

JAMES EDWIN SWARM,
Petitioner,

and

SAVE OUR SKYLINE,
JERRY CURL, DEBRAH CURL,
THOMAS DANIELS, MARTHA DANIELS,
RONALD FISHER, HELEN FISHER,
JONATHAN SHARPE, JANIS SHARPE,
ANDREW SHOOKS, MICHELLE SHOOKS,
WILLIAM TAYLOR, DIANE TAYLOR,
KEVIN ARCHER, NANCY ARCHER,
JAMES E. DAVIS and DEANNA DAVIS,
Intervenor-Petitioners,

vs.

CITY OF BEND,
Respondent,

and

AWBREY TOWERS, LLC,
Intervenor-Respondent.

LUBA No. 2006-107

FINAL OPINION
AND ORDER

Appeal from City of Bend.

Jeffrey M. Wilson, Prineville, Gregory Lynch, Bend, represented petitioner The Chackel Family Trust, LLC.

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

James Edwin Swarm, Bend, represented himself.

Peter M. Schannauer, Bend, represented respondent.

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

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

LUBA No. 2006-104	DISMISSED	02/20/2007
LUBA No. 2006-105	AFFIRMED	02/20/2007
LUBA No. 2006-107	DISMISSED	02/20/2007

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners challenge a hearings officer's decision that approves and denies several requested interpretations of or modifications to an underlying decision that approves a conditional use permit and site plan to expand existing broadcast tower and antenna facilities.

FACTS

Much of the underlying factual and procedural history of the present appeals is summarized in *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004) (*SOS I*). The decision at issue in *SOS I* was a hearings officer's decision (hereafter, PZ 02-508) approving a conditional use permit and site plan to expand a number of existing broadcast towers and antenna facilities on Awbrey Butte, within the City of Bend. For present purposes, it is sufficient to note that the subject property is a 19.5-acre tract the highest point of which includes an area approximately six acres in size referred to as the "6-acre tower site" that is developed with seven towers, each housing a variety of broadcast and other antennae.[1] The seven existing towers include both lattice and guyed monopole designs. At least some of the existing guyline anchors for the existing monopole towers within the "6-acre tower site" are located outside that six acre area. The remaining 13.5 acres of the subject property consists of two separate areas that are undeveloped and, as proposed, will function as open space areas separating the tower site from surrounding residential uses. The approved site plan describes one area in the southeast corner of the subject property as "Open Tower Space," and a large area that stretches across the northern and eastern portion of the subject property as "Open Space."

[1] The exact dimensions and location of the "6-acre tower site" were not defined in the PZ 02-508 decision. In the decision at issue in the present appeals, the hearings officer issued a declaratory ruling that determines more precisely the location of the "6-acre tower site," although the hearings officer also required intervenor to provide a survey. Although the precise location and dimensions of the "6-acre tower site" are apparently still somewhat unclear, petitioners do not challenge the hearings officer's declaratory ruling regarding the location of the tower site, and that ruling appears to be precise enough to resolve the issues raised in these appeals.

In *SOS I*, we remanded PZ 02-508 on a limited basis to address an issue regarding the proposed new broadcast antennas, and rejected all other assignments of error directed at the proposed towers and other aspects of the proposed facilities. Following our remand, however, several events occurred that considerably complicated matters.

First, prior to the city's remand proceedings held following our decision in *SOS I*, one of the original applicants, Combined Communications, constructed one of the new towers that was approved in the initial PZ 02-508 decision. However, the tower was constructed in a different location than approved in the PZ 02-508 decision. Combined Communications is owned by petitioner The Chackel Family Trust LLC (hereafter, Chackel). Chackel applied for and obtained from the city a temporary use permit, as a "Type I" decision. The city does not provide notice or hearing or opportunity for a local appeal when issuing Type I decisions. Some of the *SOS I* petitioners appealed the temporary use permit to LUBA, which remanded the permit to the city to provide notice and an opportunity to request a hearing. *Curl v. City of Bend*, 48 Or LUBA 530 (2005), *aff'd* 199 Or App 628, 113 P3d 990 (2005). To date, Chackel has not reactivated the temporary use permit application, and the city has conducted no proceedings on remand of that decision.

Meanwhile, in January 2005 the city issued an enforcement citation against intervenor for failure to comply with a condition of approval in PZ 02-508 requiring construction of one or more perimeter fences. The municipal circuit court ordered intervenor to comply with the condition, and intervenor subsequently constructed a fence around most, but not all, of the 19.5-acre property.

At roughly the same time, the hearings officer conducted a series of hearings on remand from *SOS I* that culminated in a new decision that again approves the requested antenna facilities. The SOS petitioners appealed the remand decision to LUBA.[2] That

[2] We follow the parties in referring to petitioners/intervenor-petitioners Save Our Skyline, Jerry Curl, Debrah Curl, Thomas Daniels, Martha Daniels, Andrews Shooks, Michelle Shooks, Ronald Fisher, Helen

appeal (LUBA No. 2005-076) was suspended pursuant to the parties' stipulation and is not consolidated with the present appeals.

Turning to the present appeals, at some point following issuance of the remand decision at issue in LUBA No. 2005-076, Chackel and intervenor-respondent Awbrey Towers, LLC (intervenor) filed applications with the city requesting (1) declaratory rulings or interpretations of the original PZ 02-508 decision, and (2) modifications to that decision, with respect to the siting and construction of the proposed towers and the location of a perimeter fence. The hearings officer held more hearings and, on May 12, 2006, issued the decision challenged in these appeals, which (1) adopts a number of declaratory rulings or interpretations and (2) approves in part and denies in part the requested modifications of the PZ 02-508 decision.

The hearings officer issued the May 12, 2006 decision shortly before the expiration of the 120-day period provided by ORS 227.178, in which the city must issue a final decision and complete all local appeals. Rather than risk violation of the 120-day deadline if a local appeal were filed, the City Council called up the hearings officer's decision and summarily adopted that decision as the city's final decision. Three sets of parties appealed the hearings officer's decision to LUBA, and all three appeals were consolidated for review.

LUBA NOs. 2006-104 and 2006-107

LUBA No. 2006-104 was filed by Chackel. LUBA No. 2006-107 was filed by James Edwin Swarm. However, neither party filed a petition for review. Accordingly, LUBA Nos. 2006-104 and 2006-107 are dismissed. OAR 661-010-0030(1).

Fisher, Jonathan Sharpe, Janis Sharpe, William Taylor, Diane Taylor, Kevin Archer, Nancy Archer, James E. Davis and Deanna Davis collectively as the "SOS petitioners" or "SOS."

LUBA No. 2006-105

The SOS petitioners filed a petition for review in LUBA NO. 2006-105, raising four assignments of error challenging the hearings officer's May 12, 2006 decision. We now resolve those assignments of error.

FIRST ASSIGNMENT OF ERROR

PZ 02-508 approved two new towers on the subject property, and authorized increasing the height of several existing towers. Condition 1 of the PZ 02-508 decision stated that:

> "This approval is based on the applicant's submitted burden of proof and supporting documents and written and oral testimony. *This approval is limited to the following components of the applicant's proposal to be constructed or modified entirely on the 6-acre tower site:*
>
> "a. adding 50 feet to the existing OPB [Oregon Public Broadcasting] tower for a total height of 350 feet;
>
> "b. adding 100 feet to the existing 200-foot tall Gross Communications tower for a total height of 300 feet;
>
> "c. adding a new 300-foot tall tower for Combined Communications;
>
> "d. adding a new 140-foot tall lattice tower for Western Radio;
>
> "e. lowering the existing 100-foot tall Western Radio tower to a height of 40 feet; and
>
> "f. adding 100 feet to the existing 200-foot tall KTVZ tower for a total height of 300 feet.
>
> "Any substantial change to this approved proposal will require a new land use application and approval." *SOS I* Record 112 (emphasis added).

Among other things, intervenor Awbrey Towers requested a declaratory ruling or interpretation of Condition 1, to the effect that the requirement that all "components of the applicant's proposal to be constructed or modified entirely on the 6-acre tower site" requires only that the towers themselves be located on the "six-acre tower site," and that Condition 1 does not require that guyline anchors attached to the towers be located on the six-acre site.

After first determining what constituted the "6-acre tower site," the hearings officer declared that the phrase "components of the applicant's proposal to be constructed or modified entirely on the 6-acre tower site" was not intended to include the guyline anchors for the proposed towers. That determination was based on review of the applicant's original submittals, which the hearings officer concluded proposed that some of the towers may have guyline anchors located outside the tower site.[3] In particular, the hearings officer relied on a footnote in the applicant's narrative stating that:

> "In the event the [tower] facilities are fully developed as outlined in this Master Plan, the guy anchor foundations for some of the tower structures may be placed slightly into the lower, undeveloped thirteen acres of Applicant's property. This would occur if deemed necessary for tower stability." Record 46, quoting from *SOS I* Record 3868.

The hearings officer also cited to a site plan that appears to depict the southern guy anchor of one of the proposed new towers outside a line demarcating the 6-acre tower site.[4]

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[3] The hearings officer's findings state, in relevant part:

> "* * * I find that Awbrey Towers' 2002 burden of proof—and Exhibits 1-A and 1-C in particular—show Awbrey Towers proposed that all new and expanded towers and accessory buildings—but excluding guy wires and anchors pursuant to footnote 13 on page 15 [of the PZ 02-508 decision]—would be constructed within the declared '6-acre tower site.' This is the meaning I intended by the phrase 'to be constructed or modified entirely on the 6-acre tower site.'
>
> "Based on the above-described elements of Awbrey Towers' 2002 burden of proof, including its text and Exhibits 1-A and 1-C, the Hearings Officer hereby declares the phrase 'to be constructed or modified entirely on the '6-acre tower site' means construction of all new towers, tower expansions and accessory buildings approved by my December 10, 2003 decision, but excluding guy anchors, must occur entirely within the boundaries of the '6-acre tower site' declared in the findings above—i.e., those portions of the subject property owned by Awbrey Towers that are not labeled 'Open Tower Space' or 'Open Space.' * * *" Record 48.

[4] In a later finding, the hearings officer's findings concluded:

> "For the foregoing reasons, the Hearings Officer finds Awbrey Towers' burden of proof—specifically Exhibits 1-A, 23A and 23B—proposed placement of at least the most southerly guy wires and anchor for the new Combined tower outside both the 'green box' and the declared '6-acre tower site.' Accordingly, I find my reference to the 'applicant's submitted burden of proof and supporting documents' in my December 10, 2003 decision necessarily signified that I approved construction of at least the most southerly guy wires and anchor for

Bend City Code (BCC) 10-16.13(1)(A)(2) authorizes the hearings officer to issue a declaratory ruling in cases that require "[i]nterpreting a provision or limitation in a land use permit issued by the City * * * in which there is doubt or a dispute as to its meaning or application." BCC 10-16.13(1)(C) states that "[d]eclaratory rulings shall not be used as a substitute for an appeal of a decision in a land use action or for a modification of an approval," and further provides that a declaratory ruling is not available "until 60 days after a decision in the land use action is final." In addition, BCC 10-16.13(5) provides that "[i]nterpretations made under this chapter shall not have the effect of amending the interpreted language. Interpretation shall be made only of language that is ambiguous either on its face or in its application."

Petitioners argue that the hearings officer lacked authority to issue a declaratory ruling or interpretation of Condition 1 under BCC 10-16.13(1)(C), because Condition 1 is unambiguous, and plainly requires that all components of the towers be located *entirely* within the 6-acre tower site. Therefore, petitioners contend, no "interpretation" of Condition 1 is permissible, and any attempt to interpret it to allow guyline anchors to be placed outside the tower site is a modification of Condition 1 in the guise of an interpretation, and hence prohibited by BCC 10-16.13(1)(C). Petitioners also contend that a declaratory ruling of Condition 1 is prohibited, because intervenor could have appealed Condition 1, but did not, and thus the requested declaration is an impermissible "substitute for an appeal." BCC 10-16.13(1)(C).

Intervenor responds that the hearings officer correctly concluded that the application contemplated from the beginning that some guyline anchors would be located outside the tower site, and that intervenor had no idea that Condition 1 could be interpreted to prohibit guyline anchors outside the tower site until the SOS petitioners argued for that interpretation,

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the new Combined tower outside the '6-acre tower site' boundary and within the 'Open Tower Land.'" Record 54.

during proceedings long after the time to appeal the PZ 02-508 decision had passed. Intervenor argues that there is sufficient "doubt or a dispute" as to the meaning or application of Condition 1 to authorize a declaratory ruling under BCC 10-16.13. Intervenor also argues that the ambiguity in Condition 1 is not the word "entirely," which petitioners emphasize, but rather what "components" of the towers listed in Condition 1 must be placed entirely within the 6-acre tower site.

We agree with intervenor that there is sufficient "doubt or a dispute" as to the meaning or application of Condition 1 to authorize a declaratory ruling under BCC 10-16.13. As the hearings officer noted, the application proposed guyed towers and did not propose that the guyline anchors or anchor foundations be located entirely within the 6-acre tower site. In fact, the application proposed that at least some guyline anchors could be placed outside the tower site. Condition 1 clearly reflects the hearings officer's decision to approve the proposed towers and modifications based on the submitted burden of proof, but Condition 1 does not specify what tower components must be located entirely within the 6-acre tower site. Condition 1 does not state that "all" tower components must be located on the tower site, as petitioners suggest; instead, it states that "*the following* components of the applicant's proposal" must be located on the tower site, followed by a list of new and expanded towers without any reference to guylines, guyline anchors or anchor foundations. It is sufficiently unclear under Condition 1 whether guyline anchors or anchor foundations must be located within the "6-acre tower site" that the hearings officer properly exercised her authority to render a declaratory ruling under BCC 10-16.13(1)(A)(2).

Petitioners do not directly dispute the hearings officer's conclusion that the application contemplated locating at least portions of the guyline anchors or foundations for some towers outside the tower site, and that the hearings officer did not intend Condition 1 to prohibit that aspect of the proposal, and in fact specifically intended to approve at least the

most southerly guy wires and anchor for one new tower outside the "6-acre tower site."[5] While Condition 1 could certainly be interpreted as petitioners do, the text of Condition 1 does not compel that interpretation. Petitioners have not demonstrated that the hearings officer misconstrued Condition 1 as not prohibiting location of guyline anchors outside the 6-acre tower site.

Finally, petitioners contend that the proposal to place guyline anchors outside the 6-acre tower site was essentially a request for an "exception" or variance to the 6-acre tower site, and that the hearings officer effectively denied that request for an exception by not explicitly approving it. Petitioners argue that intervenor could have challenged that "denial" by appealing Condition 1, and therefore intervenor's subsequent request for a declaratory ruling to interpret Condition 1 as allowing anchor placement outside the tower site is an impermissible "substitute for an appeal," prohibited by BCC 10-16.13(1)(C).

Intervenor responds, and we agree, that intervenor did not, and was not required to, request an "exception" or variance in order to place anchors outside the 6-acre tower site. As far as we are informed, the "6-acre tower site" is an artifact of the way the evidence was discussed below and has no significance under the city's code. For example, there is no city code requirement that we are cited to that requires that tower anchors or anchor foundations be located within a "tower site" of any size or shape. Condition 1 did not explicitly disapprove placing anchors outside the tower site and, as discussed above, the hearings

[5] Petitioners do appear to dispute what parts of the anchor can be placed outside the tower site and how far outside the tower site. Petitioners point out that the footnote in the application the hearings officer relies on refers to "guy anchor foundations" placed "slightly into the lower, undeveloped thirteen acres of Applicant's property." According to petitioners, the foundation is a large concrete block placed underground, while the anchor itself is set into the foundation and protrudes above ground. Petitioners argue that the cited footnote at best contemplates that the *foundation*, not the anchor or the guylines, might be placed outside the site, and then only "slightly." However, the footnote appears to contemplate that the entire anchor foundation, which would seem to necessarily include the anchor embedded in it, may be located outside the tower site. Because the guywire is necessarily attached to the anchor, it seems obvious that the footnote the hearings officer relied upon also contemplated that at least a portion of the guywires for some towers might be located outside the tower site. It is difficult to know what was meant by "slightly," but in the context of a 13-acre open space area we disagree with petitioners' apparent view that the application proposed only the least possible physical intrusion into the open space area, *e.g.*, only a portion of the anchor foundation.

officer did not intend Condition 1 to implicitly prohibit anchor placement outside the tower site. No party apparently recognized that Condition 1 could be interpreted to implicitly prohibit placement of anchors outside the tower site until petitioners advanced that interpretation more than six months after local appeal period had expired. Consequently, we disagree with petitioners that intervenor should have appealed Condition 1 or that intervenor's request to resolve the interpretational dispute between the parties should be viewed as a "substitute for an appeal" for purposes of BCC 10-16.13(1)(C).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Condition 9 of the PZ 02-508 decision required that:

> "To assure the communication and broadcast facilities approved in this decision comply with the [federal] radiation safety standards for uncontrolled areas, the applicant/owner shall maintain perimeter fencing of the tower site and subject property, including the additional fencing identified in James Hatfield's February 10, 2003 report (applicant's Exhibit 38)." *SOS I* Record 113.

The "additional fencing identified in James Hatfield's February 10, 2003 report" apparently refers to security fencing that surrounds each individual tower. There is no dispute that that aspect of Condition 9 has been complied with. However, at the time of the PZ 02-508 decision there was no perimeter fencing around either the six-acre tower site or the entire 19.5-acre subject property. Condition 9 can be read to require that two sets of perimeter fencing be installed, first around the six-acre tower site and a second one around the 19.5-acre subject property. On January 20, 2005, at the instigation of the SOS petitioners, the city issued a code enforcement citation to intervenor for failure to comply with Condition 9, and the city municipal court subsequently ordered intervenor to comply with Condition 9. In response, intervenor constructed a single perimeter fence that encompasses most of the 19.5-acre subject property, with the exception of the northeastern corner of the parcel, which is crossed by a public access trail easement.

Intervenor requested that the hearings officer (1) declare that Condition 9 requires only a single perimeter fence around the 19.5-acre property, and (2) modify Condition 9 to allow the existing fence that excludes the northeastern corner of the parcel to satisfy the condition. The hearings officer granted both requests.

Petitioners challenge the hearings officer's dispositions, but we have some difficulty understanding those challenges. Petitioners first complain that the perimeter fence cuts off surrounding landowners from most of the 13-acre open space, and appear to argue that Condition 9 should be read to require only a fence around the 6-acre tower site, leaving the 13-area open space available for public use. Petitioners concede that intervenor has the legal right to fence its entire property, but petitioners contend that a perimeter fence around the entire property is not necessary to protect the public from radiation exposure, and that federal regulations preempt the city from imposing a requirement for a perimeter fence around the entire property.

The hearings officer interpreted Condition 9 to require installation of "perimeter fencing around the entire subject property." Record 57. Petitioners do not explain why that interpretation of Condition 9 is error, and it is consistent with the text of Condition 9. Condition 9 plainly requires at least a perimeter fence around the "subject property." Moreover, the real thrust of the hearings officer's declaratory ruling is that Condition 9 did *not* require intervenor to *also* construct a separate fence around the 6-acre tower site. Petitioners do not challenge that interpretation. If Condition 9's requirement to construct a perimeter fence around the entire subject property is preempted by federal law, a claim that petitioners make no effort to substantiate, petitioners do not explain how that requirement of Condition 9 can now be challenged in this appeal of a declaratory ruling that concerns but does not adopt Condition 9.

Petitioners also appear to challenge the modification to allow the perimeter fence to exclude the northeastern corner of the subject property. Although not clear, we understand

petitioners to argue that there is no evidence that the need to protect the public from tower radiation justifies placement of the fence to exclude the northeastern corner of the property. However, the hearings officer cites to evidence that the northeastern corner is furthest from the towers and that radiation levels subject to federal regulations occur only very close to the towers. Record 80.

Finally, petitioners complain that the fence as constructed encroaches onto private property. The hearings officer addressed this issue in her findings, citing contrary evidence but concluding that she lacked authority to resolve the encroachment issue. Petitioners do not challenge that finding or explain why the encroachment issue has any relevance to the modification of Condition 9.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners contend that the hearings officer's decision includes two "gratuitous" rulings on matters that were not requested by the applicants, not properly before her, and not within her authority to resolve under the city's code.

First, petitioners challenge a footnote to the decision, in which the hearings officer comments:

> "The Hearings Officer notes the temporary use permit for the new Combined tower and accessory building remains in place because the city's decision approving this permit was remanded by LUBA for further city proceedings, and Chackel has not requested that the remand be activated." Record 70, n 17.

Petitioners contend that footnote 17 is erroneous, and that LUBA's remand of the temporary use permit means that that permit is *not* "in place."

Second, petitioners challenge a passage in the decision that rejects Chackel's request for a modification to the PZ 02-508 decision to approve the Combined Communications tower at its as-built location, which differs from the location approved in the PZ 02-508 decision. The hearings officer concluded that Chackel must file a new conditional use and

site plan application to authorize the as-built location. However, the hearings officer commented that:

> "* * * While those approval criteria [for a conditional use and site plan approval] are rigorous, there is evidence in *this* record that supports Chackel's argument [that] the as-built locations of the new Combined tower and accessory building satisfy those criteria." Record 70 (emphasis in original).

Petitioners argue that the above-quoted comment improperly prejudges Chackel's conditional use and site plan application, which is currently pending before the same hearings officer.

Intervenor responds, and we agree, that both of the above-quoted passages are *dicta* with no binding or presumptive effect. As far as we can tell or petitioners have established, neither of the challenged passages play any role in the decision before us. Neither passage has anything to do with the declaratory rulings or modification requests before the hearings officer.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

BCC 10-16.12(4) provides, in relevant part:

> "A. An applicant may apply to modify an approval at any time after a period of 60 days has elapsed from the time a land use action approval has become final.
>
> "B. Unless otherwise specified in a particular zoning ordinance provision, the grounds for filing a modification shall be that a change of circumstances since the issuance of the approval makes it desirable to make changes to the proposal, as approved. *A modification shall not be filed as a substitute for an appeal* or to apply for a substantially new proposal or one that would have significant additional impacts on surrounding properties." (Emphasis added.)

Intervenor requested five modifications of the PZ 02-508 decision. The hearings officer denied four proposed modifications and approved one, with respect to Condition 9 and the perimeter fencing, discussed above under the second assignment of error. Under this assignment of error, petitioners challenge the hearings officer's authority to consider the

requested modifications, arguing that each of the five modifications involved matters that could have been addressed in an appeal of the PZ 02-508 decision, and thus the hearings officer should have rejected all five requested modifications. Petitioners contend that the hearings officer misconstrued BCC 10-16.12(4) to allow modification requests for issues that could have been raised on appeal as long as the modification request is made after the appeal period has expired.[6]

Intervenor responds, initially, that any error the hearings officer might have made in applying BCC 10-16.12(4) to consider the four modifications that were denied is at best harmless error. We agree. Because no party challenges those four denials, our review of the hearings officer's interpretation of BCC 10-16.12(4) with respect to those modifications would be advisory.

With respect to the approved modification to Condition 9, intervenor argues that that modification—to approve the perimeter fence at its as-built location—arose out of the municipal court proceedings and involved a "change of circumstances" following approval of PZ 02-508. According to intervenor, the issue of whether Condition 9 should be modified to approve the perimeter fence constructed in 2005 could not possibly have been the subject of an appeal of PZ 02-508, which was issued in December 2003.

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[6] The hearings officer's findings state, in relevant part:

> "A more difficult question is whether the 'substitute for an appeal' limitation applies in circumstances where issues *could have been raised on appeal*. The applicants argue it does not have that meaning *once the time period for appeal has expired*. In other words, by definition a modification cannot be a substitute for an appeal when an appeal can no longer be filed. In addition, the applicants argue the issues raised in the modification applications could not have been raised in an appeal because they were not apparent until construction of the new Combined tower and the perimeter fence had commenced well after the appeal period expired. Even assuming none of the issues presented through the modification applications could have been raised on appeal, the Hearings Officer agrees with the applicants' interpretation that the 'substitute for an appeal' limitation applies only in cases where the appeal period has not yet expired. Therefore, I find the submitted modification applications are not being used as a substitute for an appeal of the December 2003 decision." Record 59 (emphasis in original).

Again, we agree. Petitioners do not explain why the requested modification of Condition 9 could have been the subject of an appeal of PZ 02-508. Presumably, in order to constitute a basis for an appeal, there must be some allegation of legal error. The requested modification of Condition 9 was not based on legal error, and intervenor did not argue that Condition 9 is erroneous. In relevant part, intervenor simply requested that Condition 9 be modified to no longer require a perimeter fence around the entire 19.5 acre property, but instead to require a perimeter fence that encompasses most of the 19.5-acre property, to reflect the as-built location of the fence following the municipal court order. Petitioners do not dispute that the requested modification arose out of a change in circumstances that post-dated PZ 02-508, or explain why that modification is properly viewed as a "substitute for an appeal." Because petitioners have failed to establish that the requested modification involved an issue that could have been the subject of an appeal of PZ 02-508, there is no point in reviewing petitioners' challenges to the hearings officer's interpretation that modification requests may be filed any time after the expiration of the appeal period. Any error the hearings officer might have made in interpreting BCC 10-16.12(4) is harmless and not a basis to reverse or remand the challenged decision.

The fourth assignment of error is denied.

The city's decision is affirmed.