

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

3
4 JEFFREY BELLUSCHI,
5 MABEL WALTERS, STEVEN WALTERS,
6 THOMAS BUELL and JOAN STRONG BUELL,
7 *Petitioners,*

8
9 vs.

10
11 CITY OF PORTLAND,
12 *Respondent,*

13
14 and

15
16 KING BROADCASTING CO.,
17 *Intervenor-Respondent.*

18
19 LUBA No. 2006-204

20
21 FINAL OPINION
22 AND ORDER

23
24 Appeal from City of Portland.

25
26 Charles Swindells, Portland, filed the petition for review and argued on behalf of
27 petitioners.

28
29 Peter A. Kasting, Chief Deputy City Attorney, Portland, filed a response brief and
30 argued on behalf of respondent.

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

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

36
37 RYAN, Board Member, did not participate in the decision.

38
39 AFFIRMED

03/09/2007

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

NATURE OF THE DECISION

Petitioners appeal a City of Portland decision that approves an application to modify a condition of approval that Multnomah County imposed in approving a replacement radio and television broadcast tower in 1998.

FACTS

Intervenor-respondent King Broadcasting Company (King) owns an 18-acre site in unincorporated Multnomah County, near the City of Portland. The site is located west of NW Skyline Blvd. Willamette Stone Park adjoins the subject property to the south, and the property is approximately 1000 feet northwest of Mt. Calvary Cemetery and northwest of the intersection of W. Burnside Road and NW Skyline Blvd. The site is improved with various radio and television broadcast facilities. As relevant in this appeal, it is improved with two radio and television broadcast towers that are located approximately 30 feet from each other (the Old Tower and the Replacement Tower).¹ A variety of broadcast antennas and transmitters are located on those towers.² There are three other large broadcast towers and a number of single family residences on nearby properties.

King’s predecessor first constructed a broadcast tower on the site in 1957. That tower was destroyed by the 1962 Columbus Day storm. King constructed a tower in 1964 to replace the destroyed tower. The 1964 tower is the Old Tower.

¹ The parties and the challenged decision refer to the Replacement Tower as the New Tower. We refer to the New Tower as the Replacement Tower because, as approved, the New Tower was to replace the Old Tower.

² The applicant described the antennas and transmitters on the two towers as follows:

“The Old Tower supports the backup antennas for KINK, KKCW, KKRZ, and KVRO, as well as numerous antennas for two-way radio, point-to-point microwave, broadcast auxiliary and wireless communications services. * * * The [Replacement Tower] supports the main antennas for KGW-TV, KOPB-TV (analog television services), KGW-DT and KOPB-DT (digital television services), the Shively master combined FM antenna for five FM broadcast stations and numerous antennas for two-way radio, point-to-point microwave, broadcast auxiliary and wireless communications services.” Record 46.

1 The other tower on the property, the Replacement Tower, was approved by
2 Multnomah County in 1998. The Replacement Tower was approved as a “reconstruction” of
3 the Old Tower.³ Approval of the Replacement Tower as a “reconstruction” apparently had
4 two notable consequences. First, it allowed the county to process and approve the
5 Replacement Tower more quickly than would have been the case if it had not been approved
6 as a “reconstruction.” That allowed King to meet then existing FCC deadlines for
7 completing a changeover from analog transmitters to digital transmitters.⁴ Second, a number
8 of approval criteria that apply when approving a new tower do not apply when approving
9 reconstruction of an existing tower.⁵ Specifically, Multnomah County Code (MCC)
10 11.15.7035(B) sets out a number of approval standards that apply to new towers. For
11 example, MCC 11.15.7035(B)(1) requires that an applicant for a new tower show that no

³ The county’s 1998 decision explained:

“[King] is proposing to replace an existing antiquated tower. The building of a tower of the same height and of substantially similar width and location and the subsequent removal of the antiquated facility is within the Staff’s interpretation of reconstruction. * * * Staff finds it would not be reasonable to argue reconstruction under the code to mean strictly tearing something down and replacing it in the exact same manner as it previously existed when in the same sentence it allows for additions and modifications to such facilities.” Record 443-44.

⁴ The Old Tower was structurally inadequate to accommodate the new digital transmitters and the analog antenna and transmitters that were already sited on the Old Tower in 1998. Record 920.

⁵ The 1998 county decision approving “reconstruction” of the Old Tower was subject to Multnomah County Code (MCC) 11.15.7040, which provided as follows:

“Communication facilities, including radio and television transmission towers, common carrier and cellular telephone towers, microwave towers, satellite ground stations and accessories thereto (the Facilities) which were legally established prior to August 19, 1982, or any addition to, *reconstruction* or modification of the facilities shall be deemed conforming and not subject to the provisions MCC .8805 or MCC .7010 -.7035, provided that:

“A. The use shall comply with the NIER standard of MCC .7035(F)(1);

“B. The use shall comply with MCC .7035(B)(9), (12), and (14); and

“C. Any addition to or modification of the facilities shall not create an unusually onerous visual impact that would dominate and alter the visual character of the area when compared to the impact of other existing towers.” Record 443 (emphasis added).

1 already existing tower could accommodate the antennas and other transmitters proposed for
2 the new tower.⁶ MCC 11.15.7035(B)(3) prohibits siting a new tower in an urban residential
3 district if non-urban tower sites are not being used to capacity. MCC 11.15.7035(B)(4) and
4 (5) set out site size requirements and tower and tower guy setback requirements. MCC
5 11.15.7035(B)(6) requires that new towers “be designed to structurally accommodate the
6 maximum number of additional users technically practicable * * *.” MCC 11.15.7035(B)(7)
7 imposes visual impact limitations. MCC 11.15.7035(B)(8) requires that new facilities be
8 “automated to the greatest extent possible to reduce traffic and congestion.”

9 Under MCC 11.15.7040(B), the only MCC 11.15.7035(B) criteria that King was
10 required to address in 1998 concern parking (MCC 11.15.7035(B)(9)), accessory uses (MCC
11 11.15.7035(B)(12) and agency coordination (MCC 11.15.7035(B)(14)). *See* n 5. Because
12 the 1998 tower was approved as a “reconstruction” of the Old Tower, under MCC
13 11.15.7040(B) King was not required to address the MCC 11.15.7035(B)(1), (3) – (8) criteria
14 in seeking approval for the Replacement Tower. .

15 In approving the Replacement Tower in 1998, the county imposed the following
16 condition of approval, presumably to reflect the county’s underlying legal theory that the
17 Replacement Tower could be approved as a reconstruction:

18 “4. The [Old Tower] shall be painted green at the base and grey on the
19 upper portions until it can be removed unless a letter from FAA is
20 submitted demonstrating the colors cannot be approved. Removal of
21 the [Old Tower] shall be take place prior to July 1, 2006 or when 90%
22 of the viewing public have HDTV receivers, whichever occurs first.
23 * * * The timeframe for removal of the existing structure may be

⁶ The text of MCC 11.15.7035(B)(1) is set out, in part, below:

“Shared use of existing towers - A new transmission tower shall not be permitted in an urban residential district unless the applicant makes a good faith effort to substantially demonstrate that no existing or planned tower approved after August 19, 1982, can accommodate the applicant’s proposed antenna/transmitter * * *.”

MCC 11.15.7035(B)(1) goes on to set out detailed requirements for showing existing towers cannot accommodate proposed antennas/transmitters.

1 extended upon submittal of evidence from the FCC prior to July 1,
2 2006 that the existing tower is necessary to comply with a Federal
3 Requirement. Modification would require additional opportunity to
4 comment and appeal.” Record 441.

5 In 2002, Multnomah County and the City of Portland entered into an
6 intergovernmental agreement whereby the county adopted city zoning for King’s site and the
7 city assumed responsibility for administering that city zoning. The site was zoned R10 in
8 2002, and under the city’s R10 zone, transmission towers are a conditional use. To satisfy
9 anticipated demand for tower space in the near future, King determined in 2006 that it
10 wished to retain the Old Tower. Therefore, on June 30, 2006, King applied to the city to
11 modify county Condition 4. The city decision that is before us in this appeal modified
12 Condition 4 to read as follows:

13 “The existing ‘Old Tower’ shall be painted green at the base and gray on the
14 upper portions and this two-tone scheme maintained unless a letter from FAA
15 is submitted demonstrating that this color scheme is deemed an air traffic
16 hazard. The tower must be removed per [Portland City Code (PCC)]
17 33.274.040(C)(12) when no facility on the tower has been in use for more
18 than six months.” Record 32.

19 The key effect of modified Condition 4 is to eliminate the county’s requirement that the Old
20 Tower be removed before July 1, 2006, and instead require that the Old Tower be removed
21 when all broadcast facilities on the Old Tower cease to be used for more than six months.
22 King sought the amendment so that additional antenna and transmitters can be approved for
23 the Old Tower in the future. Given those plans, it seems unlikely that the Old Tower will be
24 removed any time soon. In this appeal, petitioners challenge the city’s decision to eliminate
25 the 1998 county condition that the Old Tower be removed before July 1, 2006.

26 INTRODUCTION

27 The Portland Zoning Code appears at PCC Title 33. Before turning to the parties
28 arguments, we briefly review some of the relevant Portland Zoning Code terminology.

1 **A. Land Use Reviews**

2 The Portland Zoning Code employs a large number of nondiscretionary and
3 discretionary “land use reviews.” PCC 33.800. For example there are specific land use
4 reviews for: (1) adjustments (PCC 33.805), (2) comprehensive plan map amendments (PCC
5 33.810); (3) conditional uses (PCC 33.815), (4) design review (33.825), and 16 other
6 specified purposes. The “conditional use” land use review is the land use review that the city
7 applied in the challenged decision.

8 **B. Review Procedures**

9 The terms “land use reviews” and “review procedures” are sufficiently similar that
10 they invite confusion. Review procedures are the procedures the city follows in conducting a
11 land use review. For example, in this case the city followed its Type III *review procedure* in
12 conducting the conditional use *land use review*. PCC 33.730.030. The Type III review
13 procedure calls for a public hearing before the appropriate review body. In this case, that
14 review body was the city hearings officer. The hearings officer’s decisions in Type III
15 review procedures are final, subject to appeal to LUBA.

16 **C. Approval Criteria**

17 The applicable land use review also determines the approval criteria that must be
18 applied in that land use review. For conditional use review, different approval criteria are
19 applied in a large number of specified circumstances. PCC 33.815.100 to 33.815.310. As
20 relevant in this appeal, PCC 33.815.225 sets out approval criteria that apply when granting
21 conditional use approval for radio frequency transmission facilities. In addition, PCC 33.203
22 through 33.299 set out additional “Use and Development Regulations” that apply in various
23 circumstances and to various uses. PCC 33.274 sets out development standards for “Radio
24 Frequency Transmission Facilities.” The hearings officer applied the development standards
25 at PCC 33.274.040(C) and the conditional use criteria at PCC 33.815.225(D) in approving
26 the requested modification of Condition 4.

1 With that brief overview of “land use reviews,” “review procedures,” and “approval
2 criteria,” we turn to petitioners’ first and second assignments of error.

3 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

4 **A. PCC 33.730.140 and PCC 33.815.030**

5 In their first assignment of error, petitioners allege that the Portland Zoning Code
6 does not authorize the city to modify a condition that was imposed by a Multnomah County
7 administrative decision in 1998 to ensure compliance with then applicable Multnomah
8 County land use regulations. Because the city lacks authority to modify county Condition 4,
9 petitioners argue in their second assignment of error that the city’s decision to modify county
10 Condition 4 leaves King in violation of the county’s 1998 decision, MCC 11.15.7040 and
11 ORS 215.416(4).⁷

12 Although the city’s explanation of its route to a contrary conclusion includes one
13 bump, we agree with the city that PCC 33.730.140 is correctly interpreted both to grant the
14 city authority to modify county Condition 4 and to identify the criteria that must be satisfied
15 before the city may approve the requested modification.

16 The hearings officer specifically relied on PCC 33.730.140 in rejecting petitioners’
17 allegation that the city lacks authority to modify the county’s condition. Record 3-4. As
18 relevant here, PCC 33.730.140 provides:

19 “Requests for changes to conditions of approval are processed using the
20 current *[review] procedure* assigned to the [original] *land use review* and the
21 current *approval criteria* for the original *land use review* * * *. In the case of
22 land use reviews that are no longer required by this Title, the most comparable
23 review and procedure applies. * * * See also Section 33.700.110, Prior
24 Conditions of Land Use Approvals.”⁸ (Emphases added.)

⁷ ORS 215.416 prohibits counties from approving applications for permits where the permit application is inconsistent with county land use regulations.

⁸ All parties apparently agree that under PCC 33.700.110 county Condition 4 continued to apply to the Replacement Tower after city zoning was applied. The dispute under the first assignment of error is whether

1 Although there is a slight ambiguity created by the separate references to “land use
2 review” and the “original land use review” in the first sentence of PCC 33.730.140, it is clear
3 that both references are to the original land use review.⁹ We have added the word “original”
4 in brackets in the second line of PCC 33.730.140 to clarify the reference. The original land
5 use review, therefore, dictates (1) the review procedure that must be followed to approve the
6 modification (the current review procedure for that original land use review) and (2) the
7 approval criteria that must be satisfied to approve the modification (the current approval
8 criteria for that original land use review). No party argues the situation specified in the
9 second sentence of PCC 33.730.140 (where “land use reviews * * * are no longer required by
10 this Title”) applies here.¹⁰

11 We reject petitioners’ contention that PCC 33.730.140 is merely procedural; it both
12 specifies the procedure to be followed to modify a condition of approval and specifies the
13 approval criteria that must be applied to approve a request to modify conditions of approval.
14 It is not important that PCC 33.730.140 does not also expressly say that the city is authorized
15 to employ those procedures to (1) entertain applications for modification of conditions, (2)
16 apply the relevant city approval criteria dictated by PCC 33.730.140, and (3) approve or deny
17 an application under PCC 33.730.140 depending on whether the applicable approval criteria
18 are satisfied. We agree with the hearings officer that the drafters of PCC 33.730.140
19 intended that the procedures and approval criteria identified under that section of the
20 Portland Zoning Code be used in reviewing requests to modify conditions of approval.

the first part of PCC 33.730.140 authorizes the city to consider a request to modify that condition and to grant the requested modification if the relevant city approval criteria are satisfied.

⁹ There would be no reason to specify that the change must be reviewed under the current review procedure if the first reference was intended to be to the *current* land use review, because the current review procedures already apply to current land use review.

¹⁰ We assume that no party argues that the second sentence applies because the county’s review procedure is not a procedure that “is no longer required by [the Portland Zoning Code].” That county procedure was *never* required by the Portland Zoning Code.

1 The more difficult question under PCC 33.730.140 arises from the particular zoning
2 and permitting history of the site. As a matter of fact, the “original land use review” that led
3 to approval of the Replacement Tower is whatever land use review Multnomah County
4 applied when it issued its administrative decision in 1998 to approve the Replacement
5 Tower. In the words of PCC 33.730.140, there is no current “review procedure” in the
6 Portland Zoning Code for that prior county “land use review” and there are no “current
7 approval criteria” in the Portland Zoning Code for that prior county “land use review.”

8 As we have already noted, the subject property now carries the city’s R10 zoning
9 designation, and it is undisputed that in that zone radio frequency transmission facilities are a
10 conditional use and require conditional use review. In its brief, the city relies primarily on
11 PCC 33.815.030, which appears in the “conditional use” section of the Portland Zoning
12 Code, and provides:

13 **“33.815.030 Automatic Conditional Use Status**

14 “Over time, the zoning regulations applicable to a specific site may change.
15 This may be a result of changes to the content of the zoning regulations for a
16 specific zone or from a change to the zoning map, including annexation
17 rezonings. After one of these changes, if an existing use was allowed by right
18 or was a nonconforming use, and is now listed as a conditional use, *the use is*
19 *considered an approved conditional use* and may continue to operate. Any
20 changes to the use are subject to the procedures of 33.815.040 and the
21 appropriate approval criteria.” (Emphasis added).

22 PCC 33.815.030 avoids the possibility that—following initial application of city
23 zoning to annexed property or application of city zoning to property outside the city under an
24 intergovernmental agreement—an existing use that is allowed only as a conditional use in the
25 new city zoning might be viewed as nonconforming use, because that use had never received
26 conditional use approval through a conditional use review by the city. *See Morse Bros., Inc.*
27 *v. Clackamas County*, 18 Or LUBA 188, 195 (1989) (under city code preexisting use that is
28 now listed as a conditional use but has not received conditional use approval is treated as a
29 nonconforming use). PCC 33.815.030 achieves that result by treating such a use as “an

1 approved conditional use,” *as a matter of law*, even though, *as a matter of fact*, the use has
2 not been “approved as a conditional use.”

3 We understand the city to argue that when the Replacement Tower was approved by
4 the county it was allowed by right, in the sense the Replacement Tower was not a
5 nonconforming use and did not require conditional use approval under the county’s land use
6 regulations. Therefore, the city argues, under PCC 33.815.030, the Replacement Tower “is
7 considered an approved conditional use” as a matter of law. The city argues:

8 “King Broadcasting initiated the current proceeding in possession of a radio
9 frequency transmission facility that was ‘considered an approved conditional
10 use’ pursuant to PCC 33.815.030. That radio frequency transmission facility
11 was subject to a condition that King Broadcasting wanted changed. Because
12 the radio frequency transmission facility is considered an approved
13 conditional use, PCC [33.730].140 requires that requested changes to the
14 condition be processed using the conditional use review process and the
15 current approval criteria for conditional use reviews. The Hearings Officer
16 did that, ultimately approving a change to Condition 4.” Respondent’s Brief
17 4-5 (footnote and record citation omitted).

18 We understand the city to argue that because PCC 33.815.030 legally makes the
19 Replacement Tower an “approved conditional use” even though the Replacement Tower, in
20 fact, was not approved as a conditional use, it is appropriate to read PCC 33.815.030 together
21 with PCC 33.730.140 with the effect that, as a matter of law, the “original land use review”
22 that approved that use is also deemed to be a conditional use review.

23 The city’s interpretation and application of PCC 33.815.030 and PCC 33.730.140
24 represents a reasonable reading and application of those sections. The alternative
25 interpretation of PCC 33.815.030 and PCC 33.730.140 is petitioners’ theory—that the city is
26 without power to *consider* requests to modify conditions of approval that are attached to uses
27 that were originally approved by the county. That would leave the city powerless to approve
28 modifications of such conditions, even if the requested modification is consistent with the
29 city’s current approval criteria. Because we do not believe PCC 33.815.030 and PCC
30 33.730.140 must be interpreted in that way, and we have no reason to believe the drafters of

1 PCC 33.815.030 and PCC 33.730.140 intended that result, we reject petitioners’
2 interpretation.

3 **B. Petitioners’ Remaining Arguments**

4 Petitioners make additional arguments under their first assignment of error that merit
5 comment.

6 **1. Portland’s Zoning Code Does Not Have Approval Standards for**
7 **Reconstruction of Towers**

8 After pointing out that Multnomah County has criteria by which it may approve a
9 tower as a “reconstruction” of an existing tower, petitioners argue:

10 “The Portland [Zoning] Code, by contrast, does not provide for replacement
11 or reconstruction of a tower. The [Portland Zoning Code] allows for
12 modification of an existing tower * * * but makes no provision for
13 ‘reconstruction’ of an existing tower that is accomplished by construction of a
14 new tower in conjunction with removal of an existing tower.” Petition for
15 Review 8.

16 Even if the Portland Zoning Code provisions for modification do not apply in this
17 case to allow a proposal to reconstruct an existing tower, we fail to see how that means the
18 city could not consider King’s request to modify county Condition 4. The Portland Zoning
19 Code clearly does have criteria for approval of radio and television broadcast towers. If the
20 city does not have criteria that authorize tower reconstruction, that would simply mean that
21 the criteria that apply to approval of new towers would have to be satisfied to approve the
22 requested condition modification. PCC 33.730.140 expressly anticipates that the city’s
23 current approval criteria may differ from the original approval criteria. That difference in
24 approval criteria has no bearing on whether PCC 33.730.140 authorizes the city to entertain
25 requests to modify a condition of approval, and approve such requests if currently applicable
26 city approval criteria are satisfied.

27 **2. Modified Condition 4 is Inconsistent with the Legal Theory Under**
28 **Which the County’s 1998 Approval was Granted**

29 Petitioners present the following argument under their first assignment of error:

1 “In this case, imposition of Condition 4 was necessary to ensure that
2 construction of the [Replacement Tower] could lawfully occur as merely a
3 reconstruction of an existing facility under MCC 11.15.7040, * * * and not as
4 construction of a new facility subject to very different and significantly more
5 rigorous criteria under MCC 11.15.7035. * * * Under [the county’s 1998
6 decision], it is legally impossible for [King] to construct its [Replacement
7 Tower] as an MCC 11.15.7040 ‘reconstruction’ without removing its [O]ld
8 [T]ower. * * *

9 “PCC 33.730.140 and the rest of Title 33 are entirely consistent with this
10 fundamental principle of land use law and do not support the challenged
11 decision’s determination that respondent has authority to nullify [King’s]
12 compliance with the criteria by which the [Replacement Tower] was approved
13 eight years after the [Replacement Tower] has been constructed and after all
14 the communications facilities for which the [Replacement Tower was]
15 approved have become operational on the [Replacement Tower].

16 “LUBA has ruled that a condition of approval can be modified to allow
17 alteration of previously approved development, but only when the alteration
18 was consistent with the underlying approval. * * *” Petition for Review 12-
19 13.

20 Whatever may be the case generally when modifying conditions of approval,
21 petitioners’ above argument does not demonstrate error in the appealed decision. The above
22 argument might provide a basis for arguing that the disputed *city* modification of county
23 Condition 4 does not satisfy the city’s current approval criteria at PCC 33.274 and
24 33.815.225(D). If so, the modification might not be “approvable” under the city’s “current
25 approval criteria.” But the “approvability” of the requested modification is a different issue
26 from whether the city has “authority” to consider the requested modification under PCC
27 33.730.140 and the applicable “current approval criteria.” Nothing in the above argument
28 persuades us that the city lacks “authority” to consider the requested modification and to
29 approve the request if that request is consistent with the city’s “current approval criteria.”
30 Even if petitioners’ above-argument could be read also to take the position that the requested
31 modification is not “approvable” under the city’s “current approval criteria,” petitioners
32 make no attempt in the above argument to demonstrate why that is the case.

1 **3. County Condition 4 Itself Does not Authorize Elimination of the**
2 **Condition**

3 County Condition 4 was set out earlier in our discussion of the facts. That condition
4 first requires that the old tower be painted green and grey until it is removed. The condition
5 next establishes a July 1, 2006 deadline for removal of the Old Tower. Then the condition
6 specifies that the removal deadline can be extended based on certain evidence from the FCC.
7 The final sentence of Condition 4 provides: “[m]odifications would require additional
8 opportunity to comment and appeal.” Record 411.

9 The hearings officer adopted the following finding based on the above language in
10 Condition 4:

11 “[C]ondition 4 states, in part, that ‘the timeframe for removal of the existing
12 structure may be extended upon submittal of evidence from the FCC prior to
13 July 1, 2006 that the existing tower is necessary to comply with a Federal
14 Requirement. Modification would require additional opportunity to comment
15 and appeal.’ * * * The Hearings Officer finds that Multnomah County, in [its
16 1998] decision contemplated the possibility of revision of [C]ondition 4. The
17 hearings officer finds that the present application is consistent with the intent
18 of [C]ondition 4.” Record 5.

19 Petitioners argue the “text of Condition 4 * * * does not support a conclusion that
20 respondent is acting consistently with Condition 4 by eliminating it.” Petition for Review 15.

21 The precise meaning of the last sentence of Condition 4 is not clear to us. We agree
22 with petitioners that the last sentence of Condition 4 does not state that modification of
23 Condition 4 to allow the Old Tower to remain is *necessarily* consistent with Condition 4, as
24 King suggests is the case. But we do not agree with petitioners that the sentence must be
25 interpreted to refer only to further modification in the Old Tower and not to anticipate
26 possible future requests for modifications to Condition 4 itself. We understand the hearings
27 officer simply to have found that Condition 4 itself anticipated that Condition 4 might be
28 modified in the future, making a request to modify Condition 4 consistent with that
29 anticipation in Condition 4. The reference in the last sentence of Condition 4 to “additional
30 opportunity to comment and appeal” makes it clear that any requested modifications would

1 be required to demonstrate that the requested modification (whatever it is) is consistent with
2 whatever standards governed the requested modification.

3 We are not sure what bearing if any the last sentence of county Condition 4 could
4 have on a city decision to approve the modification that is before us in this case, since that
5 city modification is governed by city “current approval criteria” under PCC 33.730.140. But
6 the challenged hearings officer’s findings do not appear to play much of a role in his decision
7 and simply recognize that Condition 4 itself contemplated the possibility that Condition 4
8 might be modified in the future. We see no error in those findings.

9 **4. The Purposes for the Delay in Removing the Old Tower Have All**
10 **Been Met**

11 We are not sure we understand petitioners’ last argument under the first assignment
12 of error. The argument is presented under an assignment of error in which petitioners allege
13 the city is without authority to modify Condition 4. Petitioners appear to be correct that the
14 purposes that motivated Multnomah County to delay requiring removal of the Old Tower
15 until July 1, 2006, at the latest, have now all been fulfilled. But for the requested
16 modification, it seems clear that King must remove the Old Tower. However, we fail to see
17 what bearing this argument has on whether the requested modification is consistent with the
18 city’s “current approval criteria,” which must be applied to determine whether the condition
19 can be modified to allow the Old Tower to remain.

20 For the reasons explained above, petitioners’ first and second assignments of error are
21 denied.

22 **THIRD AND FOURTH ASSIGNMENTS OF ERROR**

23 **A. Introduction**

24 In their third assignment of error petitioners challenge the adequacy of and
25 evidentiary support for the city’s findings concerning the conditional use criterion at PCC
26 33.815.225(D)(2). In their fourth assignment of error, petitioners challenge the adequacy of

1 and evidentiary support for the city’s findings concerning PCC 33.274.040(C)(5), which is
2 one of the development standards for radio frequency transmission facilities.

3 Before turning to petitioners’ arguments under the third and fourth assignments of
4 error, as our earlier discussion has already disclosed, there is a recurring theme in the petition
5 for review. That recurring theme is that King should not be allowed to secure approval of the
6 Replacement Tower under less demanding 1998 county criteria that apply to reconstruction
7 of existing towers (by agreeing to remove the Old Tower) and then later be allowed to keep
8 the Old Tower. At least in the abstract, and depending on the criteria that govern any
9 subsequent city decision to allow the Old Tower to remain and how those criteria are applied,
10 we tend to agree with petitioners that now allowing the Old Tower to remain could allow
11 King to have its cake (expedited county approval of the Replacement Tower in 1998 under
12 less demanding approval criteria as a reconstruction of the Old Tower) and eat it too (later
13 keep the Old Tower that allowed the Replacement Tower to be approved as a Replacement
14 Tower).¹¹ We do not know how the county would have viewed and analyzed King’s
15 proposal to modify Condition 4 under MC 11.15.7035 and MC 11.15.7040, and we do not
16 know whether the county would have approved the requested modification. However the
17 county would have viewed the request, the county has now adopted the city’s R10 zoning
18 and the requested modification must be judged against the relevant criteria in the Portland
19 Zoning Code. Notwithstanding any seeming inconsistency in allowing King to secure
20 county approval of the Replacement Tower under a legal theory that seems antithetical to the
21 requested modification of Condition 4, given that the county has adopted the Portland Zoning
22 Code for the subject property and the city administers the Portland Zoning Code on behalf of

¹¹ Of course whatever criteria apply to a decision to modify Condition 4 to allow the Old Tower to remain, if King were required to demonstrate that either the Old Tower or the Replacement Tower satisfies the criteria that govern siting of new towers, there would be no issue regarding whether a decision to modify Condition 4 to allow the Old Tower to remain allows King to have its cake and eat it too.

1 the county, petitioners must demonstrate that the city committed legal error in applying the
2 Portland Zoning Code “current review criteria” to King’s application to modify Condition 4.

3 We note that PCC 33.274.040(C)(1), one of the development standards that the
4 hearings officer found the disputed modification of Condition 4 must satisfy, imposes a
5 tower sharing requirement that is similar to MCC 11.15.7035(B)(1).¹² The MCC
6 11.15.7035(B)(1) tower sharing criterion is one of the criteria that King avoided having to
7 address in 1998, because the Replacement Tower was approved as a reconstruction of the
8 Old Tower with the condition that the Old Tower would be removed on or before July 1,
9 2006. One of the permit opponents below argued that because the original purpose for
10 imposing Condition 4 was to ensure that the approved Replacement Tower is in fact a
11 reconstruction of the Old Tower, if the Old Tower is now to be allowed to remain, the Old
12 Tower should be analyzed as a new tower under PCC 33.274.040(C)(1). That would require
13 that the hearings officer deny the requested modification unless King demonstrated that the
14 antenna and other transmitters that are currently located on the Old Tower, and any future
15 demand for antennas and transmitters that King is relying on to justify modification of
16 Condition 4, could not be located on other existing towers. Had the hearings officer accepted
17 that argument, that would have undercut any contention that King was being allowed to have
18 its cake and eat it too. However, the hearings officer specifically rejected that argument as
19 follows:

20 “Opponent Hicks argues that [PCC 33.274.040(C)(1)] is not met. * * * The
21 essence of Opponent Hicks’ argument seems to the Hearings Officer to be that
22 since the ‘Old Tower’ was to be removed under [C]ondition 4 * * * the ‘Old
23 Tower’ cannot be considered an existing tower. Or further simplified,

¹² The text of MCC 11.15.7035(B)(1) is set out at n 6. PCC 33.274.040(C)(1) provides:

“Tower sharing. Where technically feasible, new facilities must co-locate on existing towers or other structures to avoid construction of new towers. Requests for a new tower must be accompanied by evidence that application was made to locate on existing towers or other structures, with no success; or that location on an existing tower or other structure is infeasible.”

1 Opponent Hicks appears to the Hearings Officer to take the position that the
2 ‘Old Tower’ must be considered as a proposed new tower.

3 “The Hearings Officer disagrees with opponent Hicks’ argument. The ‘Old
4 Tower’ does in fact presently exist and the application subject to this decision
5 is to modify a condition of approval which would require the removal of the
6 ‘Old Tower.’ The Hearings Officer, therefore, reviews this approval
7 criteri[on] under the assumption that the ‘Old Tower’ exists.” Record 24.

8 Petitioners’ do not assign error to the above findings concerning PCC
9 33.274.040(C)(1). We therefore do not consider whether the hearings officer erred in
10 analyzing and applying PCC 33.274.040(C)(1) in approving the requested modification of
11 Condition 4.

12 **B. Public Benefits Outweigh Impacts (Third Assignment of Error)**

13 PCC 33.815.225(A) through (D) sets out conditional use criteria for radio frequency
14 transmission facilities. PCC 33.815.225(D) applies where PCC 33.815.225(A) through (C)
15 do not. The hearings officer applied the criteria at PCC 33.815.225(D).¹³ Under PCC
16 33.815.225(D)(2) the hearings officer was required to find that the “[p]ublic benefits of the
17 use outweigh any impacts which cannot be mitigated[.]” Under their third assignment of
18 error, petitioners allege that the hearings officer erroneously found that the public benefits of
19 retaining the Old Tower outweighed impacts that are associated with that tower that cannot
20 be mitigated. Petitioners also suggest that the hearings officer erroneously applied the
21 criteria in PCC 33.274 and 33.815. Petitioners contend that PCC 33.274 and 33.815 are
22 criteria that govern approval of new facilities whereas the Old Tower is an existing tower.

¹³ The three PCC 33.815.225(D) conditional use criteria are as follows:

- “1. Based on the number and proximity of other facilities in the area, the proposal will not significantly lessen the desired character and appearance of the area;
- “2. Public benefits of the use outweigh any impacts which cannot be mitigated; and
- “3. The regulations of Chapter 33.274, Radio Frequency Transmission Facilities are met.”

1 We turn to that suggestion first before considering petitioners’ arguments concerning the
2 public benefit criterion at PCC 33.815.225(D)(2).

3 **1. Application of Criteria Governing New Facilities to an Existing**
4 **Tower**

5 As we have already noted, there was some confusion below concerning how to apply
6 the city’s “current approval criteria,” to a proposal to modify Condition 4 to allow the Old
7 Tower to remain alongside the Replacement Tower on King’s property. Specifically, given
8 the past permitting history of the Old Tower and Replacement Tower, in considering whether
9 the city’s “current approval criteria” authorize modifying Condition 4 to allow the Old
10 Tower to remain, should the Old Tower be analyzed as a new tower or an existing tower?
11 With that analytical confusion noted, we are not sure what to make of the argument that
12 begins on the bottom of page 17 of the petition for review and carries over to the bottom of
13 page 18 of the petition for review. Petitioners argue:

14 “Although [King’s] request to eliminate Condition 4 does not concern a new
15 transmission facility, the challenged decision attempts to evaluate that
16 request—retention of the [O]ld [T]ower—against criteria written for approval
17 of new facilities. The purpose of the approval criteria for facilities contained
18 in PCC Chapters 33.815 and 33.274 is to:

19 “reduce the number of towers that are built in or near
20 residential and open space zones [and] ensure that towers in or
21 near residential or open space zones are only sited when
22 alternative locations or building mounts are not feasible.’ PCC
23 33.274.010 * * *.

24 “The code specifically provides for new facilities:

25 “where technically feasible, new facilities must co-locate on
26 existing towers or other structures to avoid construction of new
27 towers. Requests for a new tower must be accompanied by
28 evidence that application was made to locate on existing
29 towers or other structures, with no success; or that location on
30 an existing tower or other structure is infeasible.’ PCC
31 33.274.040(C)(1). * * *

32 “These code sections articulate a code purpose to promote collocation of the
33 maximum number of transmission facilities on individual towers whenever

1 feasible. Towers are allowed only to accommodate facilities, so the policy of
2 Title 33 is therefore to avoid unnecessary proliferation of towers.” Petition
3 for Review 18 (underline emphasis in original).

4 Even if PCC 33.274 and 33.815 do “promote collocation” and seek to avoid
5 “unnecessary proliferation of towers,” petitioners do not sufficiently develop an argument
6 that modifying Condition 4 in the way that the city did here necessarily runs afoul of those
7 purposes in a way that warrants reversal or remand. It is not even clear that petitioners
8 present the above argument as a basis for remand, since petitioners refer to the above
9 argument as “contextual backdrop” for their challenge to the hearings officer’s findings
10 concerning the PCC 33.815.225(D)(2) public benefit criterion. Petition for Review 18. We
11 will consider the above argument and the PCC Title 33 sections cited therein as context, but
12 we do not otherwise consider the above arguments further.

13 **2. Public Benefits of the Use and Impacts that Cannot be Mitigated**

14 As we noted above, under PCC 33.815.225(D)(2) the hearings officer was required to
15 find that the “[p]ublic benefits of the use outweigh any impacts which cannot be mitigated[.]”
16 Petitioners appear to contend that to satisfy the PCC 33.815.225(D)(2) “public benefits”
17 criterion, King should have been required to demonstrate a present need or demand to cite
18 high powered television or radio broadcast antennas, which must be sited on tall towers. The
19 hearings officer’s decision discusses the “public benefits” prong of PCC 33.815.225(D)(2),
20 acknowledges petitioners’ view of the meaning of “public benefits,” rejects that view and
21 adopts a somewhat different view:

22 “‘Public benefit’ is not defined in the Portland Zoning Code. * * * BDS Staff
23 states that the ‘public benefit’ test, for this case, is ‘what is the public benefit
24 of allowing the Old Tower to remain on site to provide additional collocation
25 capacity for installment of additional, future antennas[.] BDS Staff concludes
26 that the ‘public benefits of having the Old Tower remain and the collocation
27 capacity it represents is significant.’

28 “Opponents focus their arguments on the ‘speculative’ nature of possible
29 future uses to be made of the ‘Old Tower’ * * * and assert that ‘future private
30 economic gain does not constitute public benefit.’ * * * [Opponents state] that

1 'in this application, the applicant is likewise clear that speculative future uses
2 may be able to be accommodated on [the Old Tower], but there is no industry
3 consensus what transmission needs, if any, will present themselves in coming
4 years. There is no indication that any need for high-powered facilities like the
5 applicant's regional television transmitter—the sort of facility that must be
6 supported on major towers—will arise.' * * *

7 "The Hearings Officer finds that the 'public benefit' portion of this approval
8 criteri[on] is not a 'needs analysis.' In other words, the Hearings Officer finds
9 that to satisfy the 'public benefit' portion of this approval criteri[on], an
10 applicant is not required to prove a specific service is needed at the site; the
11 applicant is not required to identify specific users/companies/individuals who,
12 in this case, are committed to locating one or more antenna on the [Old
13 Tower]. What must be shown is that the proposed use of the site provides
14 public benefits. The opponents' arguments, as discussed above, that the
15 applicant's proposed uses are speculative because the applicant has not
16 identified a specific current need or quantified a present/current demand for
17 tower space is not, in the opinion of the Hearings Officer, relevant to this
18 approval criteri[on]." Record 19.

19 To the extent petitioners are arguing that the PCC 33.815.225(D)(2) public benefit
20 criterion must be read together with the PCC 33.274.040(C)(1) tower sharing requirement to
21 require that a public benefit include a current market need for tower space, we do not agree.
22 Given the undefined and subjective nature of the PCC 33.815.225(D)(2) public benefits
23 requirement, such an interpretation might be possible. But nothing in the text of PCC
24 33.815.225(D)(2) and PCC 33.815.225(D)(2), viewed alone or in context, mandates limiting
25 the PCC 33.815.225(D)(2) public benefits criterion in that way. We reject petitioners'
26 contention that the hearings officer misconstrued the PCC 33.815.225(D)(2) public benefits
27 criterion.

28 Turning to petitioners' evidentiary challenge to the hearings officer's finding
29 regarding potential future need for tower space, King cites evidence that appears at Record
30 858, 861-63, 867, 872 and 875. Intervenor-Respondent's Brief 15. Although that evidence
31 does seem to suggest that much of the future demand for tower space may be for wireless
32 antenna that require more numerous but lower elevation antenna sites, we do not agree with

1 petitioners that the evidence only supports a conclusion that future demand will be limited to
2 wireless antenna sites.

3 Finally the hearings officer considered whether the public benefits “outweigh any
4 impacts which cannot be mitigated.” The hearings officer explained that the required
5 weighing process “involves a large dose of subjectivity.” Record 22. The hearings officer
6 concluded that the main visual impacts from the towers on King’s property are properly
7 attributable to the larger Replacement Tower. The evidentiary record supports that
8 conclusion. Record 388. The hearings officer also acknowledged that falling ice from the
9 towers is an unmitigated impact, but found that it is “an infrequent occurrence.” Record 22.
10 King argues there is only one documented case of falling ice affecting a nearby property.
11 Intervenor-Respondent’s Brief 24; Record 796-97. We agree that the evidentiary record
12 supports the hearings officer’s finding that falling ice is an infrequent problem. The hearings
13 officer also noted that the Old Tower and Replacement Tower generate noise, which is an
14 unmitigated impact on adjoining residential uses. However, the hearings officer noted that
15 the noise attributable to the taller Replacement Tower is not relevant under this criterion,
16 since that noise would continue whether Condition 4 is modified to allow the Old Tower to
17 remain or not. The hearings officer ultimately concluded that “on balance, the ‘public
18 benefits’ outweigh the negative impacts upon the ‘area.’” Record 23.

19 The requirement that the hearings officer determine whether the identified “public
20 benefits outweigh any impacts which cannot be mitigated” is, as the hearings officer noted, a
21 subjective determination. That another hearings officer or LUBA might have weighed those
22 considerations differently based on the evidence in the record is not the question. The
23 question is whether the evidentiary record is such that the hearings officer’s weighing of
24 public benefits and impacts is (1) inadequately explained (necessitating a remand for
25 additional findings) or (2) unreasonable (and therefore not supported by substantial
26 evidence). We conclude the hearings officer’s findings are adequate to explain why he

1 weighed those public benefits and adverse impacts as he did. We also conclude that those
2 findings are supported by substantial evidence, *i.e.*, evidence a reasonable person would
3 believe. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City*
4 *of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988).

5 The third assignment of error is denied.

6 **C. Radio Frequency Emissions Standards (Fourth Assignment of Error)**

7 PCC 33.274.040(C)(5) limits radio frequency emissions:

8 “Radio frequency emission levels. All existing and proposed Radio
9 Frequency Transmission Facilities are prohibited from exceeding or causing
10 other facilities to exceed the radio frequency emission standards specified in
11 Table 274-1, except as superseded by Part 1, Practice and Procedure, Title 47
12 of the Code of Federal Regulations, Section 1.1310, Radio Frequency
13 Radiation Exposure Limits.”

14 To establish that the proposed modification of Condition 4 is consistent with PCC
15 33.274.040(C)(5), King submitted a March 2003 study that was prepared the last time
16 additional antennas were placed on the Replacement Tower. Record 119-72. That 2003
17 study concluded that “the combined operation of the analog television, digital television, and
18 FM radio facilities on the KGW/KOPB tower will result in ground level power densities
19 which are 17.4% or less of the Maximum Permissible Exposure (MPE) described in Table
20 274-1.” Record 120.

21 Petitioners contend PCC 33.274.040(C)(5) imposes an ongoing obligation and
22 requires that the hearings officer consider the cumulative emissions of all radio frequency
23 emission facilities on King’s property “and other nearby facilities.”

24 King agrees with petitioners that PCC 33.274.040(C)(5) imposes a continuing
25 obligation, but points out that ongoing obligation has no obvious bearing on the challenged
26 decision. King also responds that the 2003 study did examine radio frequency emissions
27 from all facilities on King’s site and that consideration of emissions from other sites that are
28 not under King’s control is not required under PCC 33.274.040(C)(5).

1 We need not resolve whether petitioners’ limited reference to “other nearby facilities”
2 is sufficient to raise an issue concerning whether PCC 33.274.040(C)(5) requires that King
3 consider emissions that are emitted on sites beyond King’s 18-acre site. The 2003 study was
4 submitted in support of King’s application for approval of the last four radio frequency
5 emitting facilities that King added to the Replacement Tower in 2003. No more radio
6 frequency emitting facilities have been added to either the Old Tower or the New Tower
7 since 2003.¹⁴ The disputed decision has the legal effect of allowing the Old Tower to
8 remain. The decision that is before us in this appeal adds no radio frequency emitting
9 facilities to either tower. When and if any additional radio frequency emitting facilities are
10 added to the Old Tower or New Tower, King presumably will be required to demonstrate
11 that adding such facilities will not result in a violation of PCC 33.274.040(C)(5).¹⁵ Given
12 these circumstances, we conclude that the hearings officer committed no error in relying on
13 the 2003 study to conclude that the requested modification will not result in violation of PCC
14 33.274.040(5).

15 The fourth assignment of error is denied.

16 The city’s decision is affirmed.

¹⁴ One opponent speculated that additional radio frequency emitting antennas may have been added to the Replacement Tower. Record 385. The hearings officer concluded that such speculation was not sufficient to require that the 2003 study be updated. Record 26. Petitioners offer no reason why it was unreasonable for the hearings officer to discount unsupported speculation that additional antenna have been added since 2003 without required city approvals and without consideration of PCC 33.274.040(C)(5).

¹⁵ If there remains a dispute about whether PCC 33.274.040(C)(5) requires that radio frequency emissions from other off-site facilities must be considered, that dispute can be resolved when King actually proposes to add more antenna or other transmitters.