BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SKYLINER SUMMIT AT BROKEN TOP
HOMEOWNERS' ASSOCIATION,
GOLDEN BUTTE HOMEOWNERS' ASSOCIATION,
HARRY C. MILLER, MICHELLE A. MILLER,
TODD LIKENS, BETH LIKENS,
LINDA TAPSCOTT and MIKE TAPSCOTT,
Petitioners,

vs.

CITY OF BEND,
Respondent,

and

VERIZON WIRELESS, LLC,
Intervenor-Respondent.

LUBA No. 2006-228

FINAL OPINION
AND ORDER

Appeal from City of Bend.

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

No appearance by City of Bend.

E. Michael Connors, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Davis Wright Tremaine, LLP.

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

BASSHAM, Board Member, did not participate in the decision.

REMANDED 05/30/2007

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a city hearings officer decision that grants site plan approval for a wireless communication facility.

FACTS

The challenged decision includes the following description of the application for site plan approval:

> "The applicant is requesting * * * site plan approval to establish a wireless communication facility within [a] 3,000-square-foot lease area on a 36.85-acre parcel owned by the City of Bend and located at the top of Overturf Butte on the west side of Bend. The proposed facility would consist of a 70-foot-tall tower structure on which would be mounted cellular telephone, directional and broadband antennas, a 12' by 26' equipment shelter, perimeter security fencing, a gravel access drive, and an on-site fire suppression system." Record 26.

INTRODUCTION

The city repealed the Bend Zoning Ordinance on July 5, 2006 and replaced it with the Bend Development Code. The zoning ordinance was codified at Bend Code Chapter (BCC) 10.10 and the new development code is codified in its place at BCC 10.10. The application for site plan approval that is at issue in this appeal was filed before the zoning ordinance was replaced by the new development code. The citations in this decision to BCC Chapter 10.10 are to the zoning ordinance.

We briefly describe the structure of the zoning ordinance, because that structure has some bearing on our resolution of interpretive issues presented in petitioners' assignments of error. The first nine sections of BCC 10.10 provide definitions and general explanations for how the zoning ordinance works. BCC 10.10.01 through 10.10.09.[1] Following these

[1] The titles of those sections are: "Title," "Purpose," "Compliance with Ordinance Provisions," "Definitions," "Classification of Zones," "Application of Regulations to Zones Generally," "Zoning Map," "Interpretation of Zone Boundaries," and "Zoning of Annexed Areas."

sections are 14 sections that separately set out each of the city's fourteen zoning districts. Each of those fourteen zoning districts list uses that are "permited" and list uses that are allowed as "conditional uses." Each zone also separately imposes other requirements, including "[h]eight [r]egulations." The next group of BCC Chapter 10.10 sections address specific requirements that are not zoning district specific.[2] Two sections in this last group of BCC Chapter 10.10 sections are particularly relevant in this appeal. BCC 10.10.23 requires site plan review for most uses, and required site plan review in this case. BCC 10.10.25 sets out special standards for everything from "[a]utomobile [s]ervice [s]tations," to "[d]ay [c]are [f]acilit[ies]," to "[h]ydroelectric [f]acilities." BCC 10.10.25(1), 10.10.25(17), 10.10.25(20). The special standards for "[u]tilities" that appear at BCC 10.10.25(12) are relevant in this appeal.

With that brief overview of the Bend Zoning Ordinance, we turn to petitioners' assignments of error.

FIRST AND SECOND ASSIGNMENTS OF ERROR

The subject property is located in the Urban Standard Residential or RS Zone. BCC 10.10.10. The RS zone lists the following relevant conditional uses and imposes a height limitation.

> "(3) Conditional Uses. The following conditional uses may be permitted subject to a Conditional Use Permit and the provisions of [BCC 10.10.29].
>
> "* * * * *
>
> "(r) Radio and television transmission facilities.
>
> "* * * * *

[2] A few examples will suffice to provide a general idea of the subject matter that is addressed in these sections: 10.10.24 ("Off-street Parking and Loading"), 10.10.26A ("Solar Setbacks"), 10.10.27 ("Interpretations and Exceptions"), 10.10.28 ("Nonconforming Uses"), 10.10.29 ("Conditional Use Permits"), and 10.10.31 ("Variances").

"(u) A building or structure over 30 feet in height.

"* * * * *

"(4) Height Regulations. No building or structure shall be hereafter erected, enlarged or structurally altered to exceed 30 feet in height without a conditional use permit."

The hearings officer found that the proposed cellular communication facility could not be approved as a radio or television transmission facility in the RS zone, because the facility will not broadcast radio or television signals. The hearings officer then acknowledged petitioners' contention that the 70-foot tall facility could only be approved in the RS zone as a "building or structure over 30 feet in height," pursuant to BCC 10.10.10(3)(u). The hearings officer rejected that contention. The hearings officer apparently reasoned that BCC 10.10.10(3)(u) only allows buildings or structures that are over 30 feet tall if those buildings or structures are put to a use that is otherwise listed as a permitted or conditional use in the RS zone. We agree with that reasoning.

The hearings officer found that site plan approval could be granted for the proposed cellular communication facility because it constitutes a "utility." As we have already noted, BCC 10.10.25(12) authorizes and sets out special standards for utilities:

"Utilities. The erection, construction, alteration, or maintenance by *public utility* or municipal or other governmental agencies of underground, overhead electrical, gas, steam or water transmission or distribution systems, collection, *communication*, supply or disposal system, including poles, *towers*, *wires*, mains, drains, sewers, pipes, conduits, cables, fire alarm boxes, police call boxes, traffic signals, hydrants and other similar equipment and accessories in connection therewith, *but not including buildings*, *may be permitted in any zone*. *Utility transmission and distribution lines, poles and towers may exceed the height limits otherwise provided for in this ordinance*. However, in considering an application for a public utility use the Hearings Body shall determine that the site, easement, or right-of-way is located so as to best serve the immediate area, and in the case of a right-of-way or easement will not result in the uneconomic parceling of land. As far as possible, transmission towers, poles, overhead wires, pumping stations, and similar gear shall be so located, designed, and installed as to minimize their effect on scenic values." BCC 10.10.25(12) (emphases added).

The last two sentences of BCC 10.10.25(12) set out three substantive standards for approval of a utility ("best serve the immediate area," "not result in uneconomic parceling of land," and "minimize their effect on scenic values"). The first sentence establishes the scope of the term "[u]tilities" and provides that utilities "may be permitted in any zone." There does not appear to be any dispute that the proposed cellular transmission facility is for a "communication" system that includes "towers" and "wires." That aspect of the proposal qualifies as a "utilit[y]" if intervenor-respondent Verizon (hereafter Verizon) is a "public utility." In their first subassignment of error under the second assignment of error, petitioners challenge the hearings officer's conclusion that Verizon qualifies as a "public utility." At oral argument, petitioners conceded their first subassignment of error. Based on that concession, we will assume that Verizon is a "public utility," within the meaning of BCC 10.10.25(12).[3]

With petitioners' concession, two issues remain to be resolved under the first and second assignments of error. First, assuming the proposed facility qualifies as a utility within the meaning of BCC 10.10.25(12), does BCC 10.10(10) nevertheless require that Verizon be granted a conditional use permit under BCC 10.10.29? Second, is the equipment shelter a building, which may not be included in "utilities," as BCC 10.10.25(12) uses that term? For the reasons that follow, we conclude that if the proposed cellular facility is properly viewed as a utility, it does not require a conditional use permit in the RS zone. That conclusion requires that we deny the first assignment of error. However, we also conclude that the hearings officer has not established that the proposed facility can be viewed as a utility if it includes the equipment shelter. That conclusion requires that we sustain the second assignment of error.

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[3] Even if petitioners had not made that concession, we note that the hearings officer found that because Verizon is a Federal Communication Commission licensee, it is a regulated utility and accurately classified as a "public utility" within the meaning of BCC 10.10.25(12). Record 38. Petitioners make no attempt to explain why that finding is erroneous.

A. Conditional Use Approval

Petitioners advance two somewhat overlapping legal theories for their position that the proposed cellular communication facility must receive conditional use approval. Petitioners first argue that BCC 10.10.10(4) unambiguously states that a "building or structure" that will "exceed 30 feet in height" requires "a conditional use permit." Petitioners also argue that BCC 10.10.25(12) does not specifically state that utilities must be allowed *as an outright permitted use.* Rather, the first sentence of BCC 10.10.25(12) merely provides that utilities "may be permitted in any zone." We first turn to petitioners' second argument in favor of requiring conditional use approval.

1. Utilities are Permitted Outright

Petitioners argue that the BCC 10.10.25(12) language that utilities "may be permitted in any zone" need not be interpreted to authorize utilities *outright* in any zone. Petitioners contend that the word "permitted" in BCC 10.10.25(12) anticipates that the city must approve a conditional use permit.

We reject petitioners' contention that the choice of the word "permitted," in BCC 10.10.25(12) supports a conclusion that a conditional use permit is required for the utilities that BCC 10.10.25(12) permits in "any zone." If anything, the city's choice of the word "permitted" in BCC 10.10.25(12), as opposed to the words "conditionally permitted," supports the opposite conclusion. As the city's zoning ordinance is structured, each of the city's 14 zones specifically lists permitted and conditional uses. Those 14 zones are followed by provisions that are not zoning district specific and operate in more than one zoning district. Some of those more general provisions allow other uses in some or all zones, even though those other uses are not listed as a permitted or conditional uses in those zones. Viewed in that context, we think it is highly unlikely that the city would have drafted BCC 10.10.25(12) to say utilities "may be permitted in any zone" if it intended instead that utilities be "conditionally permitted" in any zone. As Verizon correctly notes, the Oregon

Supreme Court construed a statute that is worded like BCC 10.10.25(12) to provide that the listed uses were allowed outright. *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995).[4]

We agree with the hearings officer's conclusion that BCC 10.10.25(12) authorizes utilities outright in any zone.

2. Utilities that Exceed 30 Feet in Height

Although we interpret BCC 10.10.25(12) to authorize utilities as permitted uses in all zones, rather than uses that require a conditional use permit, petitioners argue that BCC 10.10.10(4) unambiguously provides that "[n]o building or structure shall * * * exceed 30 feet in height without a conditional use permit." We understand petitioners to contend that even though BCC 10.10.25(12) may authorize utilities that are *less than* 30 feet tall in all zones as outright permitted uses, where a utility is proposed for the RS zone and that utility is *more than* 30 feet tall, which is the case here, BCC 10.10.10(4) unambiguously requires that the utility seek and obtain conditional use approval.

Petitioners' argument is textually plausible. But for the second sentence of BCC 10.10.25(12), we would almost certainly agree with petitioners. As relevant, the second sentence of BCC 10.10.25(12) provides "[u]tility * * * towers may exceed the height limits otherwise provided for in this ordinance." The issue turns on the meaning of the words "may exceed the height limits otherwise provided for in this ordinance."

With one exception, the city's 14 zones all include a section worded almost identically to the BCC 10.10.10(4) height regulation in the RS zone.[5] Of those thirteen

[4] One of the statutes at issue in *Brentmar* was ORS 215.283(1), which provides "the following uses may be established in any area zoned for exclusive farm use." The Oregon Supreme Court held in *Brentmar* that the uses listed following that language are uses that are allowed "as of right," notwithstanding the "may be established" language in ORS 215.283(1). 321 Or at 496.

[5] The exception is the city's Floodplain Combining Zone.

zones, three impose an absolute 30-foot height limit.[6] But for the second sentence of BCC 10.10.25(12), a proposed utility that would be more than 30 feet tall would have to seek and receive a variance from that 30 foot height limit in those three zones. The second sentence of BCC 10.10.25(12) has the legal effect of authorizing utility towers that are taller than 30 feet in those three zones, without the necessity of seeking a variance.

The remaining ten city zones do not impose an absolute height limit.[7] Those zones, including the RS zone, all require a conditional use permit if a building or structure will be taller than a specified number of feet.[8] In those zones the "height limits" that are imposed in those zones, within the meaning of the second sentence of BCC 10.10.25(12), are a requirement for a conditional use permit if the specified height is to be exceeded. It is that requirement for a conditional use permit that the second sentence of BCC 10.10.25(12) eliminates. Under petitioners' reading of BCC 10.10.25(12), which would leave the requirement for a conditional use permit in place, the second sentence of BCC 10.10.25(12) would have no effect in those 10 zones, because the way petitioners interpret the BCC those zones do not have "height limits." Even if that reading is textually plausible, petitioners offer no reason why the city might have intended to waive the more stringent absolute height regulations while leaving in place the less stringent requirement for a conditional use permit to exceed the specified height limit. Construing the reference in the second sentence of BCC 10.10.25(12) to "height limits" to encompass both the absolute height limits in three zones

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[6] Those three zones are the Urban Area Reserve Zone, the Neighborhood Commercial Zone and the Convenience Commercial Zone.

[7] In addition to the Urban Area Reserve Zone and the Floodplain Combining Zone, the city has three residential zones, six commercial zones and three industrial zones. If there is any pattern that would explain the city's decision to impose a numerical height limit in three zones and require a conditional use permit to exceed a numerical height limit in ten zones, we cannot see the pattern.

[8] A conditional use permit is required in four zones if the building or structure will be more than 30 feet tall. Two zones require a conditional use permit if the structure or building will be more than 35 feet tall. Three zones require a conditional use permit if the structure or building will be more than 45 feet tall.

and the requirement for a conditional use permit to exceed specified height limits in the remaining zones gives meaning to BCC 10.10.25(12) in all zones. We conclude that interpreting the second sentence of BCC 10.10.25(12) in that manner is far more likely to give effect to the city's intent in adopting the second sentence of BCC 10.10.25(12).

The first assignment of error is denied.

B. The Equipment Shelter is a Building

The first sentence of BCC 10.10.25(12) provides that communication systems like the one proposed here may qualify as utilities. However, the first sentence of BCC 10.10.25(12) goes further and specifically lists features that utilities may include and one feature that utilities may not include. Utilities may not include "buildings." BCC 10.10.4 defines "building" as "[a]ny structure built and maintained for support, shelter or enclosure of persons, animals, chattels, or property of any kind." The proposal includes an equipment shelter. Record 1684. The hearings officer included a condition of approval to require that the equipment shed have a pitched roof and an earth tone exterior surface "that resembles wood siding." Record 56. The equipment shelter appears to be a "structure * * * for support, shelter or enclosure of * * * property[.]" If so, it may not be included as part of a utility that is authorized under BCC 10.10.25(12). This issue was raised below, but the hearings officer did not address the issue.

Verizon offers a number of responses. First, citing *Dierking v. Clackamas County*, 38 Or LUBA 106, 115-16, *aff'd* 170 Or App 683, 13 P3d 1018 (2000), Verizon argues the equipment shelter is properly viewed as part of the communication facility itself rather than as a building.

The critical question in *Dierking* was whether a utility cabinet associated with a wireless communication tower could be approved as part of that wireless communication tower under ORS 215.283(2)(L), which did not impose a "necessary for public service" approval standard, or whether the utility cabinet had to be analyzed separately and could only

be approved if it met the "necessary for public service" approval standard in ORS 215.283(1)(d). We concluded that the utility cabinet was properly viewed as part of the tower. However, the statutes at issue in *Dierking* did not include a prohibition against including "buildings" as part of a utility facility, such as the prohibition in the first sentence of BCC 10.10.25(12). The relevant question in this appeal appears to be whether the equipment shed is a "building, as the BCC defines that term, without regard to whether the equipment shed is properly viewed as part of the cellular transmission facility. Stated differently, the equipment shed could be both a building and viewed as part of the communication facility.

Verizon next argues that the BCC 10.10.25(12) prohibition is against "buildings," which the BCC defines as "any structure." Verizon points out that the BCC distinguishes between "structures," and "accessory structures."[9] We understand Verizon to argue that the BCC 10.10.25(12) prohibition against "buildings" should be limited to primary "structures" and should not be applied to "accessory structures." Verizon argues the equipment shelter is properly viewed as an "accessory structure."[10]

Verizon's argument that given the BCC 10.10.4 definition of "buildings," the BCC 10.10.25(12) prohibition should be applied only to structures, and should not be applied to accessory structures, strikes us as a pretty good argument. It also appears that the equipment

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[9] BCC 10.10.4 includes the following definitions:

> "Accessory Structure or Use. A structure or use incidental, appropriate and subordinate to the main structure or use on the same lot."
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> "Structure. Anything constructed or built, any edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner, which requires location on the ground or is attached to something having a location on the ground, including swimming and wading pools and covered patios, excepting outdoor areas such as paved areas, driveways or walks."

[10] Verizon also argues that petitioners' interpretation, if correct, will have the ironic effect of requiring that the equipment shelter be eliminated, thus leaving the equipment exposed and increasing the visual impacts that BCC 10.10.25(12) otherwise seeks to minimize.

shed might reasonably be considered an accessory structure. But the hearings officer has not taken a position regarding either petitioners' argument that the equipment shed is a building or Verizon's argument that it is not. Although ORS 197.829(2) authorizes LUBA to interpret the BCC in the absence of a hearings officer interpretation, there is sufficient question in our mind regarding whether petitioners' or Verizon's interpretation is correct that we believe a remand to the hearings officer to address this interpretive question in the first instance is appropriate. *St Johns Neighborhood Assoc. v. City of Portland*, 38 Or LUBA 275, 282 (2000).

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

With one irrelevant exception, BCC 10.10.23(3) provides that "all new uses, buildings, outdoor storage or sales areas and parking lots or alterations thereof shall be subject to" site plan approval. Among other things, site plan approval requires that an applicant demonstrate that the proposal complies with the site plan approval criteria at BCC 10.10.23(8).[11]

Petitioners argued below that the proposed access road is part of the proposed new use and therefore should have been subject to site plan approval, either separately from the tower and equipment shed or as "part of (accessory to) the underlying wireless

[11] Among the site plan criteria are BCC 10.10.23(8)(c) and (d), which provide:

> "(c) Preservation of Natural Landscape. The landscape and existing grade shall be preserved to the maximum practical degree, considering development constraints and suitability of the landscape or grade to serve the applicant's functions. Preserved trees and shrubs shall be protected during construction.
>
> "(d) Pedestrian and Vehicular Circulation and Parking. The location and number of points of access to the site, the interior circulation patterns, designs of parking areas, and the separation between pedestrians and moving and parked vehicles shall be designed to promote safety and avoid congestion on adjacent streets."

communication facility use." Petition for Review 20. The hearing officer rejected that argument:

> "* * * I also find the proposed access drive is not a building or structure, and is not a 'new use.' That is because [BCC 10.10.4] defines 'use' as '[t]he purpose for which land or a structure is designed, arranged, or intended, or for which it is occupied or maintained.' I find this definition encompasses the *underlying land use* – a wireless communication facility – and not access roads or other elements of the use. Therefore, I find the access drive is not subject to site plan review. * * *" Record 51 (emphasis in original).

Although the access road was redesigned to avoid many of the adverse impacts that were associated with the initially proposed access road, we agree with petitioners that construction and maintenance of an access road can have impacts that are potentially as significant as construction and maintenance of the tower and equipment shed. As BCC 10.10.4 defines "use," it encompasses the "purpose for which land * * * is * * * intended." One of the purposes for which the subject property is intended is the access road. We agree with petitioners that the hearings officer's partition of the use into "the underlying land use" and other elements of the proposed use has no support in BCC 10.10.23(3) or in the BCC 10.10.4 definition of use. The access road is part of the new use, and the hearings officer erred in concluding otherwise.

Although we agree with petitioners that the hearings officer erred by viewing the "new use" too narrowly, the practical effect of that error is less than obvious. The hearings officer in fact considered the new access road when she applied the BCC 10.10.23(8)(d) criterion. *See* n 11. Petitioners do not explain how BCC 10.10.23(8)(d) would have been applied any differently if the access road had been considered part of the new use. Nevertheless, we will not assume the hearings officer's too narrow view of the "new use" was harmless error. For example, in applying BCC 10.10.23(8)(c), *see* n 11, the hearings officer does not appear to have considered the access road. Record 52. That criterion could

easily have some bearing on the siting and design of the access road.[12] On remand the hearings officer must include the access road as part of the "new use" and if adding that access road implicates any of the BCC 10.10.23(8) site plan criteria in ways that were not addressed in her findings, those findings must be expanded to address those impacts.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

As we pointed out earlier, BCC 10.10.23(8)(d) requires that an applicant for site plan approval demonstrate how access will be provided. *See* n 11. Verizon originally proposed access from the north, from Skyliner Summit Loop. Verizon had an easement from the city to access the property from that direction. After opposition to the proposal arose, in part due to impacts the access road would have on existing trails on the property, Verizon proposed to access the property from the south instead, from Gleneagles way. That access is somewhat longer and at the time of the hearings officer's decision, Verizon did not yet have an easement from the city that would allow that access to be constructed across city property. Petitioners argued below that Verizon cannot comply with the BCC 10.10.23(8)(d) site plan access criterion unless it secures the needed easement from the city first. The hearings officer responded to that argument as follows:

> "Because the proposed access drive will cross city-owned property, the applicant must obtain permission from the city for its construction and use. The original lease between the city and the applicant includes a right of access over the subject property from Skyliner Summit Loop. For this reason, both the applicant's and the city's representatives testified the city likely would amend the applicant's lease agreement to reflect the new access drive location. Although legal access to the proposed lease area is not a 'utility' siting requirement, the Hearings Officer finds the applicant's proposal cannot be approved without proof that the applicant either has legal access to the proposed facility or can obtain it. Therefore, I find the applicant will be

[12] Elsewhere in her decision, the hearings officer noted that the relocated and redesigned access road would only require removal of two trees and avoid impacting any park district trails. Those findings suggest that the hearing officer may be able to find that the access road complies with BCC 10.10.23(8)(c), but they are not by themselves sufficient to demonstrate compliance with BCC 10.10.23(8)(c).

> required as a condition of approval to obtain from the city legal access to the proposed lease area as depicted on the submitted access drive survey, through an easement, amendment to the lease agreement, or other means acceptable to the parties. * * *" Record 49-50.[13]

Although the above findings could have been worded a little more precisely, we agree with Verizon that the hearings officer effectively found that it is feasible for Verizon to obtain the permission it will need from the city to access the subject property. *See Rhyne v. Multnomah County*, 23 Or LUBA 442, 447 (1992) (local government may find that it is feasible to satisfy mandatory approval criterion and impose condition to ensure compliance, where evidentiary record supports such a finding). Verizon argues that finding is supported by substantial evidence:

> "The City Public Works Department, the City agency that operates the water facility on the Property, indicated that it supports the new access road and the lease amendment. This memorandum was provided by Mike Miller, Assistant Public Works Director, the same City representative that signed the Letter of Authorization to file the Application on behalf of the City and has been working with [Verizon] on this project. Therefore, the Hearings Officer's finding that it is feasible for [Verizon] to comply with * * * condition [4] is appropriate and supported by substantial evidence." Intervenor-Respondent's Brief 27 (record citations omitted).

We agree with Verizon.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners' fifth and final assignment of error alleges the hearings officer's findings are inadequate to demonstrate the proposal satisfies three approval criteria. BCC 10.10.29(3)(a) and 10.10.29(3)(b) are conditional use approval criteria. Based on our denial of the first assignment of error, the hearings officer was not required to apply those

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[13] The hearings officer imposed the following condition of approval:

> "4. The applicant shall obtain from the City of Bend legal access for the access drive to the lease area * * * through a recorded easement, amendment to the January 26, 2006 lease agreement, or other method acceptable to the parties, and shall provide to the Planning Division a copy of the recorded access document." Record 56.

conditional use criteria, and we do not consider petitioners' arguments concerning those criteria. The third criterion is set out in the final sentence of BCC 10.10.25(12). BCC 10.10.25(12) authorizes "utilities" and was set out earlier in this opinion. The criterion that is included in the final sentence of BCC 10.10.25(12) is set out below:

> "* * * As far as possible, transmission towers, poles, overhead wires, pumping stations and similar gear shall be located, designed and installed to minimize their effect on scenic values." BCC 10.10.25(12)

As an initial point, we note that most of petitioners' arguments under this assignment of error appear to focus on feared adverse effects of the access road. As relevant to the proposal that is at issue in this appeal, BCC 10.10.25(12) requires consideration of the tower, any overhead wires and any "gear" that is implicated by the reference to "similar gear." BCC 10.10.25(12) is not concerned with any impacts the access road might have.[14] In finding that the proposal complies with the BCC 10.10.25(12) requirement that the tower "minimize [its] effect on scenic values," the hearings officer adopted 11 single-spaced pages of findings addressing a variety of potential impacts on scenic values. Record 40-50. Initially, the hearings officer disagreed with petitioners' characterization of the existing scenic values, upon which impacts must be minimized:

> "* * * The record indicates that with the exception of the 35.86-acre city-owned subject property, virtually the entire butte has been platted with public streets and residential subdivision lots, most of which have been developed with dwellings. Many of those dwellings are large two-story structures located on the slopes of the butte, including areas just below the summit, and are clearly visible from many distant and close-in vantage points. In addition, photographs in the record show the two city water tanks located on the northern half of the butte are visible from many locations on the higher elevations of Awbrey Butte. I observed during my site visit that the city's water tanks and many nearby dwellings are visible from multiple points along the park district's trail, including portions of the trail nearest the proposed lease area. For these reasons, I cannot agree with opponents' characterization

[14] Based on our resolution of the third assignment of error, the access road must be considered under the site plan criteria.

> of the subject property and the summit of Overturf Butte as 'pristine' and 'unblemished.' * * *" Record 42-43 (footnotes omitted).

In addressing the tower itself, the hearings officer appears to have been persuaded that two changes the applicant made in response to opposition to the initial application were particularly significant in minimizing the effect of the proposal on scenic values. The initial proposal was for a 100 foot tower. The proposed height of the tower was later reduced to 70 feet. Verizon also offered two alternatives to the original monopole design—a tower that resembles a fire lookout tower and a tower that is designed to look like a pine tree. Illustrations demonstrating how towers with those designs might appear are included at Record 259-60. The hearings officer ultimately selected what is referred to as a mono-pine design. The hearings officer found although the 70-foot tall mono-pine tower "would be taller than any of the trees surrounding the proposed lease area, * * * the presence of a solitary tall pine tree among shorter trees is not at all unusual in a natural forested site." Record 44. The hearings officer went on to recognize that the mono-pine design has at least two shortcomings, but ultimately concluded that it was the design with the least impacts.[15] The hearings officer's findings address the scenic impacts of other aspects of the proposal, including the access drive.

Verizon argues that given the subjective nature of the BCC 10.10.25(12) requirement to minimize the effect of the proposal on scenic values, the hearings officer's lengthy findings are sufficient and LUBA should defer to the hearings officer's judgment that the proposal, as modified and conditioned, adequately minimizes the effect of the proposed facility on scenic values. We agree with Verizon.

The fifth assignment of error is denied.

The city's decision is remanded.

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[15] The hearings officer noted the mono-pine would look more like a man-made structure the closer the viewer is to the tower. As second shortcoming is that co-location of additional antenna on a mono-pine tower is more difficult than on a conventional monopole tower.