BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SAVE OUR SKYLINE, JERRY CURL, DEBRAH CURL,
THOMAS DANIELS, MARTHA DANIELS,
ANDREW SHOOKS and MICHELLE SHOOKS,
Petitioners,

vs.

CITY OF BEND,
Respondent,

and

AWBREY TOWERS, LLC,
Intervenor-Respondent.

LUBA No. 2005-076

FINAL OPINION
AND ORDER

Appeal from City of Bend.

Daniel Kearns, Portland, represented petitioners.

Debrah J. Curl, Bend, filed the petition for review and argued on her own behalf.

No appearance by City of Bend.

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

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

REMANDED 09/07/2007

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

Petitioner appeals a city hearings officer decision that was adopted in response to our decision in *Save our Skyline v. City of Bend*, 48 Or LUBA 192 (2004) (*SOS I*).[1] That decision grants conditional use and site plan approval for certain communication facilities.

INTRODUCTION

A. *SOS I*

SOS I was a consolidated LUBA appeal in which a number of petitioners, including most of the petitioners in this appeal, separately appealed a hearings officer's decision that granted conditional use and site plan approvals for a proposal to construct some new broadcast and wireless communication facilities and enlarge some existing facilities.[2] That decision approved the following tower additions and modifications:

> "* adding 50 feet to the existing OPB [Oregon Public Broadcasting] tower (total height 350 feet)
>
> "* adding 100 feet to the existing Gross Communications tower (total height 300 feet)
>
> "* adding a new 300-fooot-tall tower for Combined Communications
>
> "* adding a new 140-foot-tall lattice tower for Western Radio
>
> "* lowering the existing 100-foot-tall Western Radio tower to a height of 40 feet.
>
> "* adding 100 feet to the existing KTVZ tower (total height 300 feet)." Record 51.

[1] Petitioner Curl filed a petition for review on her own behalf. No other petitioner in this appeal filed a petition for review.

[2] In *SOS I* we referred to the petitioners in this appeal as the SOS petitioners.

The above tower additions and modifications would allow a number of additional antennas to be added to the towers. Some additional wireless, radio and television antennas were included in the proposal and additional antennas would be added at a later time.

There were a large number of legal issues presented in *SOS I*. However, we rejected all but one assignment of error. That assignment of error concerned Bend City Code (BCC) 10-10-29(3) and BCC 10-10-25(12). Those sections of the BCC required that the hearings officer consider the visual impacts of the proposal.[3] The hearings officer found that the proposal complies with BCC10-10-29(3) and BCC 10-10-25(12). However, in doing so, it was not clear to LUBA on review whether the hearings officer considered the proposed additional antennas that were included in the proposal or the additional antennas that would be added to the new tower space later.

---

[3] As relevant, BCC 10-10-29(3) sets out the following general conditional use approval criteria:

> "General Conditional Use Permit Criteria. A Conditional Use Permit may be granted only upon findings by the Approval Authority that the proposal meets all of the criteria in this section, as well as all other applicable criteria contained in this ordinance. The general criteria are:
>
> "(a) That the location, size, design and operating characteristics of the proposed use are such that it will have a *minimal adverse impact on the property value, livability and permissible development of the surrounding area*. Consideration shall be given to compatibility in terms of scale, coverage, and density, to the alteration of traffic patterns and the capacity of surrounding streets, and to any other relevant impact of the proposed use.
>
> "(b) That the site planning of the proposed use will, as far as reasonably possible, provide an *aesthetically pleasing and functional environment to the highest degree consistent with the nature of the use and the given setting*." (Emphases added.)

BCC 10-10-25(12) imposes the following requirements on "utilities" as a "special use:"

> "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, * * * 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. * * *. 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*." (Emphasis added.)

> "Awbrey Towers offers no reason to dispute the assertion by the SOS petitioners that when antennas are added to the towers that are approved by the city's decision they could increase the visual impact of the tower in a way that would violate BCC 10-10-29(3)(a)&(b) or BCC 10-10-25(12), even if the towers *without* antennas would not have visual and aesthetic impacts that would violate BCC 10-10-29(3)(a)&(b) or BCC 10-10-25(12). It is not at all clear to us that the hearings officer limited her consideration of the visual impacts under BCC 10-10-29(3)(a)&(b) or BCC 10-10-25(12) to the towers themselves. Neither is it clear that the hearings officer agrees with Awbrey Towers that her consideration of the aesthetic and visual impacts of the proposed antennas or any additional antennas that apparently could be sited on the towers in the future is preempted by federal law. However, it also is not clear that the hearings officer considered the potential visual and aesthetic impacts of the antennas." 48 Or LUBA at 220 (emphasis in original; footnote omitted.)

We concluded in *SOS I* that federal law did not preempt city consideration of the visual impacts of the antennas that would be placed on the disputed towers:

> "[The cited] cases do not stand for the proposition that federal law preempts local regulation of visual and aesthetic impacts of the antennas that the FCC comprehensively regulates regarding technical concerns and certain environmental impact concerns. The cases cited by the SOS petitioners stand for the opposite proposition. The fact that the FCC will ultimately decide how many antennas can be placed on the towers and where they must be sited on the towers does not mean that the city must approve the requested towers and antennas, even if they will have visual and aesthetic impacts that violate BCC 10-10-29(3)(a)&(b) or BCC 10-10-25(12)." *Id.* at 221.

We next rejected petitioners' argument that the new and enlarged tower facilities could not be approved without knowing in advance the precise location and makeup of the antenna arrays that would ultimately be sited on those towers and attempted to suggest some approaches the city might take to perform the review that is required by BCC10-10-29(3) and BCC 10-10-25(12):

> "Although we agree with the SOS petitioners that the city has authority to review the visual and aesthetic impacts of both the towers and the antennas that will ultimately be housed on those towers, *we do not agree with the SOS petitioners that the city must know the precise number and location of every antenna in advance to perform that review, or that the city's approval must be limited to a particular configuration of towers and antennas. It may be that a case can be made that nearly all of the visual and aesthetic impacts of the proposal are properly attributable to the towers and that any additional*

> *visual impact that can be attributed to the antennas themselves will be so slight that the antennas need not be considered separately from the towers. Even if that is not the case, we do not see why assumed 'worst case' or 'reasonably likely case' scenarios for ultimate antenna placement on the towers could not be developed to allow the hearings officer to consider whether the antennas would have additional visual and aesthetic impacts that, considered with the towers, would violate BCC 10-10-29(3)(a)&(b) or BCC 10-10-25(12). Following such a review, we also see no reason why the city could not condition its decision so that additional city land use review would only be required if the numbers and locations of antennas ultimately approved by the FCC deviated from the assumed scenarios in a way that could materially affect the visual and aesthetic impacts of the towers and antennas*." *Id*. at 221-22. (Emphasis added).

Although the distinction did not come through clearly in our decision in *SOS I*, the antennas that the tower additions and modifications will accommodate in the future can be divided into two categories: (1) antennas that were included in the *SOS I* proposal, and (2) antennas that were not included in the *SOS I* proposal, but are anticipated and would be added to the towers at a later time through review and approval by the FCC. With regard to the first category of antennas, we concluded that the hearings officer could consider the impacts of those antennas and that such consideration is not preempted by federal law.

With regard to the second category of antennas, apparently the city has allowed antennas to be added to towers on Awbrey Butte and elsewhere in the past, without city land use permits or land use review. Because the propriety of that practice was not before us in *SOS I*, we expressed no position on the propriety of that practice one way or the other. However, petitioners argued in *SOS I* that since approval of the proposed tower additions and modifications would necessarily lead to additional antennas being sited on the new and enlarged towers, the city must consider the visual impact of those towers now. No party argued that the city would consider the visual impact of the additional antennas that would be sited on the new and enlarged towers at the time the antennas are sited in the future. The above emphasized language in our decision in *SOS I* was simply intended to suggest a couple of ways the city might anticipate and address the visual impact of these anticipated future

antennas in its decision on remand, so that it would be clear that the anticipated additional antennas could be sited in the future without the necessity of modifying the conditional use and site plan approvals granted in the decision on remand. Siting such additional antennas in the future would require FCC approval, but would not necessitate future amendments to the conditional use and site plan approval, because the visual impact would already have been anticipated and found to comply with BCC 10-10-29(3)(a)&(b). With that clarification of our remand in *SOS I*, we turn to the hearings officer's decision on remand.

B. The Hearings Officer's Decision on Remand

1. Proposed New and Modified Towers and Proposed Wireless, Radio and Television Broadcast Antennas

In her decision in *SOS I*, the hearings officer found that the proposed wireless, radio and television broadcast tower additions and modification satisfied the visual impact standards imposed by BCC 10-10-25(12) and BCC 10-10-29(3)(a). In that decision she analyzed visual impacts from both distant and near views. Our remand in *SOS I* did not require that the hearings officer revisit those findings. With regard to the wireless, radio and television antennas that were included in the application, the hearings officer found on remand that those antennas complied with BCC 10-10-25(12) and BCC 10-10-29(3)(a). In doing so, the hearings officer recognized that different types of antennas had different visual impacts. Those antennas with open designs resemble the tower they are attached to, particularly at a distance. With regard to those open-design antennas, the hearings officer concluded they do not add materially to the visual impact of the towers and therefore comply with BCC 10-10-25(12) and BCC 10-10-29(3)(a). Other antennas such as microwave antennas are of a closed design. The hearings officer ultimately concluded that the proposed open design wireless, radio and television antennas satisfied the visual impact standards because the open design and placement of those antennas made them difficult to distinguish from the towers themselves. The hearings officer concluded that the applicant's proposed

"solid microwave antenna dishes" would be mounted below the tree line and therefore would be screened.

We do not understand petitioner to challenge the hearings officer's findings concerning the proposed antennas that were included in the application that led to our decision in *SOS I*. Petitioner's challenge concerns the hearings officer findings which support conditions that were imposed to allow the conditional use and site design approval to allow additional antennas to be added in the future, without revisiting BCC 10-10-25(12) and 10-10-29(3)(a) and (b) to modify the disputed conditional use and site design approval. This is what the parties referred to below as the "safe harbor."

2. The Safe Harbor

On remand the hearings officer found:

> "* * * I find it is appropriate for me to consider on remand the visual and aesthetic impacts from future antenna scenarios through the creation of a 'safe harbor' that establishes clear and objective parameters for the installation of future antennas without additional land use review. Record 72-73.

As relevant in this appeal, the hearings officer ultimately concluded that additional wireless antennas and other open-design antennas, within certain parameters, could be sited on the towers without violating the visual impact standards in BCC 10-10-25(12) and 10-10-29(3)(a) and (b). Such antennas could be sited on the towers in the future with FCC approval, without any additional land use review by the city. However, with regard to solid microwave dish antennas, the hearings officer concluded only a more limited safe harbor could be provided due to the potential that such antenna may increase the visual and aesthetic impacts of the towers. The hearings officer ultimately imposed the following condition:

> "3. Because the Hearings Officer has found that solid microwave dish antennas exceeding 8 (eight) feet in diameter and located above 150 feet on a tower structure may increase the visual and aesthetic impacts from the towers and antennas such that they cannot comply with the approval criteria under [BCC] 10-10-25(12) and/or [BCC] 10-10-29(3)(a) and (b), any new solid microwave dish antennas exceeding 8

> (eight) feet in diameter and located above 150 feet on a tower require further land use review and approval." Record 77.

Petitioner's first and second assignments of error challenge the hearings officers "safe harbor" findings and the conditions of approval that the hearings office imposed to implement that safe harbor.

FIRST ASSIGNMENT OF ERROR

The parties have very different views about what the photographic evidence in the record shows regarding the potential visual impact of solid microwave dish antennas. Because we agree below that the hearings officer's findings are inadequate in two particulars, we need not resolve that evidentiary dispute. We note however, that both petitioner and the applicant seem to be able to confidently draw from the photographic evidence much more precise estimates about antenna size than we can. In view of the nature of the sometimes poor quality of that photographic evidence, the hearings officer will be entitled to a fair amount of discretion in sorting through that evidence, if we are ultimately called upon to resolve substantial evidence challenges to her findings.

Before the city, petitioners submitted a photograph in which solid microwave dish antennas are artificially superimposed on the existing 300-foot Chackel Tower. Record 161. Petitioners claimed the photograph depicts antennas that are approximately three to six feet in diameter. Record 505. Petitioners submitted that photograph to demonstrate that a tower with such an array of six-foot diameter solid microwave dish antennas would violate BCC 10-10-25(12) and 10-10-29(3)(a) and (b).

Intervenor rebutted petitioners' evidence in a number ways. Intervenor offered the following response to that photograph, to rebut petitioners' contention that the photograph accurately depicts three foot to six foot diameter antennas:

> "* * * SOS takes a photograph of the towers on Awbrey Butte then superimposes what it claims to be 3 – 6 foot dishes on the [Chackel] tower.

> "What SOS fails to recognize in this photo simulation, however, is that next to the [Chackel] tower is the presently existing, non-simulated, OPB tower that already has 6 foot dishes located on that tower. In fact, there are [a] number of dishes on the OPB tower, ranging from 4 feet in diameter to 6 feet in diameter. * * *
>
> "The 'shadow' that appears on SOS's photo simulation is a 6 foot dish on the OPB tower and it clearly is much, much smaller than any of the computer generated dishes on the simulated photograph of the [Chackel] tower.
>
> "Bottom line is that there is no way the dishes simulated on the SOS [photo] are 3 to 6 feet in diameter.
>
> "In Awbrey Tower's estimate, based on a comparison to the photographs of what actually exists on Awbrey Butte, the simulated photograph * * * likely depicts dishes ranging from 10-20 feet in diameter.
>
> "It should also be noted when examining [the] SOS [photograph] and comparing it to the actual OPB tower, it is an established fact that the OPB tower has a number of 4-6 foot solid dishes on it. Nevertheless, even in SOS's [photo], only one dish is visible. This supports Awbrey Towers' contention throughout that dishes 6 feet and under (and likely 8 feet and under) have very little visual impact (especially when compared to the impact of the tower itself) and that whether the antenna is solid or opaque makes little difference when considering the antennas' visual impact (as demonstrated by the fact that only one of the many solid dish antennas on the OPB tower is even visible from this and other photograph exhibits)." Record 379-80 (underlining in original).

The hearings officer's findings concerning the safe harbor for solid microwave dish antenna are unclear regarding one of the safe harbor parameters and inadequate regarding another parameter. The following is our understanding of what the hearings officer found. The hearings officer first found that the applicant's proposal includes a number of safe harbor parameter proposals, including two that the hearings officer *does not* entirely agree with. As described in the hearings officer's findings those two proposals are (1) that the applicant proposes that solid microwave dish antennas "be allowed at any tower height up to 150 feet as long as the dish diameter does not exceed 6 feet," and (2) that they be allowed to

replace existing antennas with antennas that are as much as 25 percent larger.[4] Record 75. The hearings officer states that with the exception of those two proposals, "the applicant's proposed parameters are appropriate." *Id*.

With regard to the second proposal, the hearings officer then explains that allowing a 25% increase could have visual and aesthetic impacts that violate BCC 10-10-25(12) and 10-10-29(3)(a) and (b). The hearings officer imposed a condition of approval to allow replacement of antenna, but to require that the replacement antenna "not exceed the overall size of the original antenna * * *." Record 77. The hearings officer's condition with regard to replacement antennas is consistent with her findings on replacement antennas.

But with regard to the first proposal, as explained above, the hearings officer seems to find that she *does not agree* with the proposal to allow solid microwave dish antenna that are up to six-feet in diameter to be sited as high as 150 feet on the towers to fall within the safe harbor. But then, in the next paragraph, the hearings officer agrees with that proposal.[5]

---

[4] We cannot tell what applicant proposal the hearings officer was referring to, and the parties do not point to any document in the record where the applicant made that proposal. Record 353-91 is the applicant's final written rebuttal. In that rebuttal, the applicant proposes that the safe harbor solid microwave dish antenna parameter be set to include antenna cited below 150 feet if they are not more than *eight feet* in diameter, not *six feet*. Record 356, 365-66.

[5] The complete text of the findings we have just described are set out below:

> "Both staff and the applicant submitted proposals for defining the 'safe harbor' parameters. The Hearings Officer finds both sets of proposals represent thoughtful attempts to address potential visual impacts while giving the applicant needed flexibility. I further find that with two exceptions the applicant's proposed parameters are appropriate. The exceptions concern [(1)] the tower height at which solid microwave antenna dishes may be installed, and [(2)] the extent to which the applicant may replace existing antennas with larger antennas without further land use review and approval. With respect to the tower height for solid microwave dishes, the applicant proposed that they be allowed at any tower height up to 150 feet as long as the dish diameter does not exceed 6 feet.
>
> "The Hearings Officer has found that solid microwave antenna dishes have greater visual impacts than the linear antennas because they are round and solid. However, I also found that smaller microwave antenna dishes will have minimal visual and aesthetic impacts inasmuch as they are dwarfed by the mass of the tower structure. Therefore, I find appropriate the applicant's proposal to allow smaller solid microwave antenna dishes – i.e., no larger than 6 feet in diameter – up to a tower height of 150 feet. With respect to antenna *replacement*, the applicant proposed that it be allowed without further land use review and approval to replace

Those findings are inconsistent. The hearings officer includes condition of approval number 3, quoted earlier in this opinion, which includes within the safe harbor solid microwave dish antenna that are sited no higher than 150 feet on the towers, so long as they do not exceed *eight feet* in diameter. That condition is inconsistent with the above-described hearings officer's findings. We are not sure how to resolve the inconsistency in the hearings officer's findings and between those findings and condition of approval number 3. Stated simply, we cannot tell whether the hearings officer believed a six-foot maximum or an eight-foot maximum should apply with regard to the safe harbor for solid microwave dish antennas.

Petitioner argues that the dispute during the local remand proceedings centered on whether the antenna that were superimposed on petitioners' photograph accurately depicted six-foot diameter antenna or depicted antenna with a much greater diameter. Petitioner contends there is not an adequate explanation for why the hearings officer, following that debate about six-foot diameter antennas, ultimately allowed solid microwave dish antennas of up to eight feet in diameter to fall within the safe harbor. We agree with petitioner. On remand, the hearings officer must explain why she ultimately allowed eight-foot maximum rather than a six-foot maximum for solid microwave dish antennas to qualify for the safe harbor.[6] If the hearings officer instead intended to reduce the applicant's proposed eight-foot parameter to six-feet, she may adopt findings to explain that decision and correct condition 3.

Under her first assignment of error, petitioner also disputes a finding that she attributes to the hearings officer. Petitioner contends that the hearings officer found that so long as solid microwave dish antenna are not placed higher than 150 feet on the towers, they

---

> existing antennas with new antennas as long as the new antennas are of 'like kind' and are not more than 25% larger than the replaced antennas. I agree the applicant should be allowed to replace existing antennas with new antennas. However, depending on the type and location of the antenna, an increase in size of as much as 25% could produce visual and aesthetic impacts requiring additional land use review. Therefore I find replacement antennas will be limited to the same overall size as the original antennas." Record 75.

[6] We do not mean to limit the hearings officer's ability to further explain her findings if necessary.

will be screened by existing trees. However, the finding that petitioner believes takes that position appears at Record 70. That finding appears to be addressing the solid microwave dish antennas that are currently proposed in the application. We read the findings at Record 70 to find that those currently proposed antennas will be sited below the tree line. That finding does not appear to have been adopted to address the 150-foot safe harbor parameter. That said, the basis for the 150 foot parameter is not clear to us. Petitioner appears to be correct that the existing trees are significantly shorter than 150 feet tall. But even if the trees are not 150 feet tall, they will offer significant screening when towers are viewed from vantage points close to the towers and will offer at least partial screening of the towers below 150 feet from all vantage points. It may be that the hearings officer believed that although the trees are shorter than 150 feet tall, they would nevertheless significantly screen the towers and antenna from close-by houses and that so long as the antennas were sited on the lower portion of the tower (i.e., below 150 feet) they would comply with the visual impact and aesthetic standard, even though they may not be completely screened by existing trees from views further away from the towers. Whatever the case, the hearings officer must better explain the basis for that 150-foot parameter on remand.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

In the decision before us in *SOS* I, the hearings officer took the position that she lacked authority under the BCC to approve a ten-year master plan for communication facilities on Awbrey Butte and could only grant conditional and site plan approvals that could not extend beyond two years. Under her second assignment of error, petitioner argues the hearings officer's safe harbor has the effect of granting the applicant open-ended approval to place antenna on the towers for a period of time that is unlimited.

Petitioner's legal theory under the second assignment of error is an extension or refinement of the hearings officer's analysis of a related but different question in her decision

in *SOS I*. To the extent we understand petitioner's legal theory, we cannot say it is totally without merit. But there are two significant problems with the second assignment of error.

First, petitioner does not cite or discuss the underlying BCC provisions that led the hearing officer to find that she lacked authority under the BCC to grant conditional use and site plan master plan approval that would be effective for ten years. Neither does she make any attempt to explain why those BCC provisions would apply similarly to the safe harbor the hearings officer adopted in her decision on remand. Petitioner's argument under the second assignment of error is not sufficiently developed to allow review. *Deschutes Development v. Deschutes Cty*., 5 Or LUBA 218, 220 (1982).

A second problem with the second assignment of error is petitioner's characterization of the safe harbor. While petitioner's characterization of the safe harbor as indefinite conditional and site plan approval for yet to be requested antennas is possible, it is not the only possible characterization. The safe harbor can also be characterized as simply recognizing that the large towers that are proposed in the application are by far the feature of these communication and broadcast facilities that produces the majority of impacts that warrant requiring conditional use and site plan review in the first place. The towers are hosts for antennas, but if those antennas are limited appropriately, they will not have impacts that materially add to the impacts of the host tower. Presumably, review with or without that limited category of antennas added would produce the same result under the applicable criteria. If the antennas are limited in that way, it may be possible to assume that those antennas could have been approved with the towers in the first place, consistently with BCC 10-10-25(12) and 10-10-29(3)(a) and (b). If the safe harbor is viewed in that way, it may be proper to include such a safe harbor in conditional use and site plan approval of the wireless, radio and television towers. In our decision in *SOS I,* we suggested to the city that such an approach, if properly justified, is permissible. Our decision in *SOS I* was not appealed. The city's decision to follow our suggestion in *SOS I* was not error.

THIRD ASSIGNMENT OF ERROR

In her third assignment of error, petitioner argues that under BCC 10-10-25(12) and 10-10-29(3)(a) and (b) the city was obligated to impose a condition to require removal of antennas as they become obsolete, in order to minimize the visual impacts those antennas will otherwise have as additional antennas are added.

In our decision in *SOS I*, we rejected arguments that the city is barred by federal preemption from considering the visual impacts of antennas. However, beyond regulation of visual impacts under BCC 10-10-25(12) and 10-10-29(3)(a) and (b), it is the FCC, not the city, that reviews applications for antennas to determine whether antennas are needed in the first place, whether they are obsolete and whether they should be shut down and removed. We agree with intervenor that imposing a condition that required the city to determine if FCC approved antennas have become obsolete and, if so, to require that the obsolete antenna be removed would almost certainly intrude on the FCC's exclusive jurisdiction. Just as importantly, we see no reason to believe the owner of obsolete antennas would not have economic reasons to remove any obsolete antennas and replace them with antennas that are not obsolete. Petitioner has not established that the condition would accomplish anything that the owner would not do voluntarily.

FOURTH ASSIGNMENT OF ERROR

In her final assignment of error, petitioner alleges the city erred by not requiring the "Awbrey Tower LLC members to consolidate their multiple antennas into a few combined 'community antennas.'" Petition for Review 18.

Intervenor argues that this argument was raised in petitioner SOS's third subassignment of error under their third assignment of error in *SOS I*. Intervenor argues LUBA rejected the argument in *SOS I* and that petitioner may not raise that argument again in their appeal of the hearings officer's decision on remand. We agree. *See Beck v. City of*

Tillamook, 313 Or 148, 153-54, 831 P2d 678 (1992) (discussing waiver when land use decision is remanded and LUBA's decision is not appealed).

The fourth assignment of error is denied.

The city's decision is remanded based on our resolution of the first assignment of error.