BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JERRY L. CURL, DEBRAH J. CURL,
THOMAS L. DANIELS, MARTHA DANIELS,
HELEN FISHER, ANDREW SHOOKS
and JAMES E. SWARM,
*Petitioners*,

and

WESTERN RADIO, INC. and
RICHARD OBERDORFER,
*Intervenor-Petitioners*,

vs.

CITY OF BEND,
*Respondent*,

and

CHACKEL FAMILY TRUST LLC,
*Intervenor-Respondent.*

LUBA No. 2007-156

FINAL OPINION
AND ORDER

Appeal from the City of Bend.

Debrah J. Curl, Jerry L. Curl, Thomas L. Daniels, Martha Daniels, Andrew Shooks, James E. Swarm, Bend, filed a petition for review and Debrah J. Curl argued on her own behalf. Helen Fisher, Bend, represented herself.

Marianne Dugan, Eugene, filed a petition for review and argued on behalf of intervenor-petitioners.

No appearance by the City of Bend.

Jeffrey M. Wilson, Prineville, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Miller Nash LLP.

BASSHAM, Board Member; HOLSTUN, Board Member, participated in the

decision.

RYAN, Board Chair, did not participate in the decision.

REMANDED 06/20/2008

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

Opinion by Bassham.

**NATURE OF THE DECISION**

Petitioners appeal a hearings officer's decision approving a site plan and conditional use permit for a communications tower.

**FACTS**

The subject property is a 19.5-acre site located on top of Awbrey Butte, developed with a number of broadcast and communications towers. The site is zoned Urban Residential Standard Density (RS) with a Public Facilities overlay designation. One of the existing towers is a 100-foot high tower owned by intervenors-petitioner Western Radio, Inc. and Richard Oberdorfer (Western Radio).

In a 2003 decision, the city hearings officer approved an application by Awbrey Towers LLC for conditional use and site plan approval for construction of two new towers and increases in height to several existing towers. That 2003 decision was appealed to LUBA, which rejected most challenges but remanded for additional findings regarding the visual impacts of antennas to be placed on the approved towers. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004) (*Awbrey Towers I*). On remand, the hearings officer issued a new decision addressing the visual impacts of antennas placed on the approved towers, and articulating standards to determine whether siting additional antennas on those towers in the future will require conditional use review. The hearings officer's decision was appealed to LUBA, which again rejected most challenges but remanded under one assignment of error for clarification on one point. *Save Our Skyline v. City of Bend*, __ Or LUBA ___ (LUBA No. 2005-076, September 7, 2007) (*Awbrey Towers II*). However, the city has conducted no further proceedings on remand of that decision.

On October 1, 2004, while the appeal of the city's initial 2003 decision was pending before LUBA, intervenor-respondent (intervenor) applied to the city for a temporary use permit to construct a 300-foot tall tower located near the southwestern corner of the site.

That 300-foot tall tower had been approved in the 2003 decision that was the subject of the then-pending LUBA appeal. The city granted the temporary use permit without hearing or notice, and intervenor commenced construction of the tower. Opponents appealed the city's temporary use permit approval to LUBA. On February 10, 2005, LUBA remanded the decision to require the city to provide a hearing on the permit. *Curl v. City of Bend*, 48 Or LUBA 530, *aff'd* 199 Or App 628, 113 P3d 990 (2005). However, the city has conducted no further proceedings on remand of that decision.

On August 4, 2006, intervenor submitted a new conditional use and site plan application to approve the already constructed 300-foot tall tower.[1] The hearings officer conducted several hearings and, on July 6, 2007, approved the application. The July 6, 2007 decision supersedes the approval of the 300-foot tall tower that was a component of the *Awbrey Towers I* decision. This appeal followed.

**FIRST ASSIGNMENT OF ERROR (PETITIONERS)**

In the challenged decision, the hearings officer noted that in *Awbrey Towers I* LUBA had affirmed her ruling that distinguishes between "utilities" such as wireless communication facilities, which are permitted uses in all zones, and radio and television transmission towers, which are conditional uses in the RS zone. The hearings officer reiterated her conclusion that a radio and television facility such as the 300-foot tall tower proposed by intervenor remains a conditional use in the RS zone, even if the tower includes wireless communication antennas. The hearings officer then stated:

> "* * * I find the future siting of wireless communication antennas on Chackel's tower will be subject to the parameters for antenna size and

[1] At the same time, two other tower owners (NPG and GCC) filed separate applications to approve different components of the initial application that was at issue in *Awbrey Towers I* and *II*. The city subsequently approved the NPG and GCC applications, which were also appealed to LUBA. *Curl v. City of Bend*, LUBA No. 2007-165 (NPG) and *Curl v. City of Bend*, LUBA No. 2007-166 (GCC). Apparently, what was once a single proposal involving multiple towers is now being pursued as separate applications involving individual towers.

mounting location I established in my *Awbrey Towers II* decision." Record 57.

Petitioners argue that the hearings officer apparently intended that the above-quoted requirement that future siting of wireless facilities be subject to the parameters identified in the *Awbrey Butte II* decision would be implemented in a condition of approval. However, petitioners argue, the hearings officer imposed no such condition of approval. According to petitioners, even if that problem is overlooked, subsequent to the hearings officer's decision in this case LUBA remanded the *Awbrey Butte II* decision to the hearings officer for clarification of those same parameters, and the city has not yet (and may never) take any action on remand to clarify under what circumstances future antenna siting will require conditional use review.

Intervenor responds that the above-quoted language is sufficient to function as an effective condition of approval, even if it is not listed among the eight conditions explicitly imposed at the end of the hearings officer's decision. In the alternative, intervenor argues that no such explicit condition of approval is necessary, because it is reasonably clear under the other conditions imposed and under the city's current code that any future applications for wireless communications antennas on the tower will require conditional use review.[2]

In her *Awbrey Butte II* decision, the hearings officer articulated a "safe harbor" approach, under which future antennas may be installed on the approved towers without any land use review if the antennas did not exceed certain size and location parameters. We remanded the decision because it was unclear from the findings whether the hearings officer imposed a six-foot or eight-foot maximum antenna size to qualify for the safe harbor approach. __ Or LUBA __, slip op 11. The decision challenged in the present case was issued before our remand in *Awbrey Butte II*.

[2] The present application was filed shortly before the city adopted extensive code revisions involving conditional use applications.

In the present case, we agree with petitioners that remand is necessary for the hearings officer to clarify whether a condition of approval regarding future antenna siting on intervenor's tower is necessary and if so what that condition should require. As noted above, the present decision explicitly supersedes the *Awbrey Butte I* decision with respect to intervenor's tower, and arguably also supersedes the *Awbrey Butte II* decision, which was a decision rendered on remand from *Awbrey Butte I*. In other words, it is arguable that the *Awbrey Butte II* safe harbor parameters no longer govern future siting of antenna on intervenor's tower, absent an effective condition of approval in this decision requiring conformance with those parameters. Even if the above-quoted finding is understood to function as a condition of approval to that effect, as petitioners note LUBA remanded the *Awbrey Butte II* decision to the hearings officer to clarify an important ambiguity in those parameters. It is not clear that the *Awbrey Butte* applicants will ever request further action on remand, given that the applicants appear to have chosen to abandon the multiple tower application approved in *Awbrey Butte I* and *II* and are seeking new conditional use and site plan approvals for each individual tower. If no remand proceedings are held in *Awbrey Butte II*, then those parameters may never be clarified. Finally, it is not clear to us that the city's current code provisions will require that all new antenna installations of any size or location be subject to conditional use review.[3] If that is indeed the case, intervenor is probably correct that no particular conditions of approval regarding future antenna installation are necessary. However, that argument should be presented to the hearings officer in the first instance.

[3] Intervenor cites to new Bend Development Code (BDC) 10-10 Sec. 4.4, which sets out conditional use standards for conditional uses. However, nothing cited to us in that provision clearly indicates that it would govern installation of an antenna on an existing tower and intervenor does not explain why it believes that to be the case. As we explained in *Awbrey Butte I*, the city's practice for many years has been to allow new antennas to be installed on existing towers without any review at all. The hearings officer's "safe harbor" approach in *Awbrey Buttes II* represents a partial departure from that practice. It is not clear whether and how the new code changes that practice.

The first assignment of error is sustained.

**SECOND ASSIGNMENT OF ERROR (PETITIONERS)**

BDC 10-10.29 is a general conditional use permit standard requiring that the "location, size, design and operating characteristics of the proposed use" have "minimal adverse impacts" on development in the surrounding area, with consideration given to "compatibility in terms of scale, coverage and density." The hearings officer adhered to her previous rulings that this standard required consideration of the visual impacts on the overall Bend area from viewing the tower at a distance, as well as close by. The hearings officer found that the proposed tower and its existing antenna complied with BDC 10-10.29, noting that the tower currently supports "a variety of FM radio and low-power television antennas, the largest of which are 6-foot wide dish antennas." Record 78.

Petitioners challenge the finding that the largest existing antennas on the tower are six-foot wide dish antennas. According to petitioners, all antennas on the tower are less than six feet wide and none are round "dish" antennas. Therefore, petitioners argue, the hearings officer's findings with respect to visual impacts are not supported by substantial evidence.

Intervenor responds that the largest antennas on the tower are oblong dish antennas that are 68 inches across and 36 inches tall, and these are the antennas that the hearings officer referred to. Intervenor argues that the four inch difference between 68 inches and six feet is immaterial from a distant view, and the hearings officer's misstatement in referring to a six-foot wide antenna does not mean that the findings are not supported by substantial evidence.

We agree with intervenor. From the pictures cited to us in the record, the oblong antenna can accurately be characterized as a "dish" antenna, and further we agree that describing a 68-inch wide antenna as "6-feet wide" is at most an immaterial error, particularly when discussing distant views of the tower.

The second assignment of error is denied.

**THIRD ASSIGNMENT OF ERROR (PETITIONERS)**

BDC 4.1.545 requires that a "modification of application" as defined by BDC 1.2 will require the applicant to submit a new application.[4] BDC 1.2 in turn defines "modification of application" in relevant part as

> "* * * the applicant's submittal of new information after an application has been deemed complete and prior to the close of the record on a pending application that would modify a development proposal by changing one or more of the following previously described components: proposed uses, operating characteristics, intensity, scale, site lay out (including but not limited to changes in setbacks, access points, building design, size or orientation, parking, traffic or pedestrian circulation plans), or landscaping in a manner that requires the application of new criteria to the proposal or that would require the findings of fact to be changed. It does not mean an applicant's submission of new evidence that merely clarifies or supports the pending application."

Petitioners explain that in response to concerns raised at the public hearings, intervenor submitted additional information, including a new irrigation plan with an above-ground storage tank to correct problems with the existing landscaping irrigation scheme.[5] Petitioners argue that this additional information constituted a "modification of application,"

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[4] BDC 4.1.545 provides, in relevant part:

> "* * * * *
>
> "B. The Review Authority shall not consider any evidence submitted by or on behalf of an applicant that would constitute modification of an application (as that term is defined in Chapter 1.2, Definitions) unless the applicant submits an application for a modification, pays all required modification fees and agrees in writing to restart the 120-day time clock as of the date the modification is submitted. * * *
>
> "C. The Review Authority may require that the application be re-noticed and additional hearings be held.
>
> "D. Up until the day a hearing is opened for receipt of oral testimony, the Planning Director shall have sole authority to determine whether an applicant's submittal constitutes a modification. After such time, the Hearings Body shall make such determinations. The Review Authority's determination on whether a submittal constitutes a modification shall be appealable only to LUBA and shall be appealable only after a final decision is entered by the City on an application."

[5] We address petitioners' other challenges to the storage tank below, under the fifth assignment of error.

which triggers the obligation to file a modification application and comply with BDC 4.1.545.

The hearings officer disagreed, finding that the additional information is not a "modification of application," because it does not require "the application of new criteria to the proposal," and the new findings necessary to address the new irrigation plan do not rise to a level that requires a modification application. Record 84. Intervenor argues that the proposal has always been the same—to approve the existing tower—and that the new information submitted during the hearings falls within the exception for "submission of new evidence that merely clarifies or supports the pending application." BDC 1.2.

Petitioners do not identify any new criteria triggered by submission of the irrigation plan or other new information, and do not challenge the hearings officer's finding that the new findings necessary to address the new information does not rise to a level that requires a modification application. Absent some challenge to those determinations, petitioners' arguments under this assignment of error do not provide a basis for reversal or remand.

The third assignment of error is denied.

**FOURTH ASSIGNMENT OF ERROR (PETITIONERS)**

Petitioners argue that the hearings officer may have based her approval on a revised site plan dated December 31, 2006 that is not in the record and that no participant had the opportunity to review below. According to petitioners, on December 7, 2006, intervenor submitted a revised site plan that bears a received stamp of December 7, 2006. However, in the lower right corner of the site plan the surveyor's stamp states that the surveyor's registration "Renews 12-31-2006." Petitioners argue that while it may be reasonable to assume that the hearings officer simply misidentified the dates and considered only the site plan in the record received on December 7, 2006, in her findings the hearings officer describes the tower depicted on the "December 31, 2006" site plan in terms that suggest she may have been viewing a different site plan. Petitioners note that her findings refer to a

"west guy anchor" that is located 20 feet from the subject property's western boundary and the Swarm property, whereas the December 7, 2006 site plan shows that the existing tower has no west guy anchor, and no anchor near the Swarm property at all. Record 72.

Intervenor responds that no site plan dated December 31, 2006 was submitted to the hearings officer, and that any erroneous references in the findings to dates or the identification of guy anchors is harmless. According to intervenor, the December 7, 2006 site plan shows the existing tower with three guy anchors—labeled north, south and east—and that the hearings officer clearly was referring to the north anchor, which is located 20 feet from the western property boundary, adjacent to property owned by US West. Record 4794. We agree with intervenor that petitioners have not established either that the hearings officer reviewed a different site plan than that found at Record 4794 or that any mistaken references in her findings are more than harmless error.

The fourth assignment of error is denied.

**FIFTH ASSIGNMENT OF ERROR (PETITIONERS)**

Petitioners contend that the hearings officer failed to subject the 500-gallon water storage tank proposed on the landscape irrigation plan to applicable approval criteria.

The existing landscape vegetation required by previous approvals had been watered by a surface irrigation system, supplied by a neighbor's garden hose. As noted, to correct identified problems with that system, intervenor proposed an underground irrigation system fed by a 500-gallon storage tank. The hearings officer discussed the new system and imposed a condition of approval requiring intervenor to maintain an operational irrigation system and to irrigate the screening vegetation as necessary to keep it alive and healthy. Record 94.

Petitioners argue, however, that the hearings officer did not actually subject the proposed system, including the storage tank, to applicable site plan review criteria. Petitioners cite to BDC 10-10.23(8)(e) and (f), part of the site plan criteria, and (9), which

sets forth the minimum landscaping standards.[6] In addition, petitioners argue that the hearings officer appears to have believed that the underground irrigation system and storage tank had already been installed at the time of her decision, when in fact it had not.

Intervenor responds that petitioners have not established that any of the cited standards apply to require approval of the underground system and above-ground storage tank. In any case, intervenor argues that the conditions of approval are sufficient to ensure that buffer and screening vegetation is irrigated and maintained. With respect to installation of the irrigation system, we understand intervenor to argue that the system was installed after the hearings officer's decision, and that her apparent understanding that it was installed prior to her decision is harmless error.

We agree with intervenor that petitioners have not demonstrated that the hearings officer's apparent belief that the system had already been installed at the time of her decision is more than harmless error. However, we disagree with intervenor that the underground and above-ground components of the system do not require review and approval under BDC 10-10.23(8) and (9). There are no findings addressing whether the above-ground storage tank will be "designed, located, buffered, or screened to minimize adverse impacts on the site and neighboring properties," for example, and intervenor cites to no evidence that such is the case or to conditions of approval requiring measures sufficient to ensure that the tank and

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[6] BDC 10-10-23(8) provides that approval of the site plan shall be based on the following criteria:

> "(e) Buffering and Screening. Area, structures, and facilities for storage, machinery and equipment * * * shall be designed, located, buffered, or screened to minimize adverse impacts on the site and neighboring properties.
>
> "(f) Utilities. All utility installations above ground, if such are allowed, shall be located so as to minimize adverse impacts on the site and neighboring properties."

BDC 10-10.23(9) requires in relevant part that "[a]ll plant materials * * * shall be irrigated by underground sprinkler systems set on a timer in order to obtain proper water duration and ease of maintenance." BDC 10-10.23(9)(a)(1)(B).

system comply with BDC 10-10.23(8) and (9). We agree with petitioners that remand is necessary to correct these deficiencies.

The fifth assignment of error is sustained, in part.

**SIXTH ASSIGNMENT OF ERROR (PETITIONERS)**

BDC 10-10.29(4) requires that an application for a conditional use may be initiated by the property owner or his authorized agent. The conditional use and site plan application was submitted and signed by intervenor's representative and a representative of Awbrey Towers, LLC, owner of the relevant portions of the site. Record 4459. For reasons petitioners fail to explain, petitioners argue that the application is inconsistent with BDC 10-10.29(4). Petitioners appear to believe that all applicants must be either the owner or an authorized representative of the owner and that it is error for someone who is not an owner or an owner's authorized representative to sign the application. Intervenor responds, and we agree, that the signature of the authorized agent of the site owner is sufficient to satisfy BDC 10-10.29(4), even if other applicants sign the application.

The sixth assignment of error is denied.

**SEVENTH ASSIGNMENT OF ERROR (PETITIONERS)**

The hearings officer imposed a condition of approval requiring that intervenor install a screening mechanism on a residential neighbor's skylight, if the neighbor requests one. Petitioners argue, however, that this condition is inadequate because it fails to provide for the continued maintenance of the screening mechanism.

Intervenor responds, initially, that this issue is waived because it was never raised below. ORS 197.763(1); 197.835(3). Petitioners do not respond to the waiver argument, and we agree with intervenor that this issue is waived.

The seventh assignment of error is denied.

**EIGHTH ASSIGNMENT OF ERROR (PETITIONERS)**

In addressing noise impacts from the tower, the hearings officer evaluated several competing expert analyses, and ultimately chose to rely on testimony submitted by intervenor that noise generated from the site stems from multiple sources that include intervenor's tower, other existing towers and natural vegetation such as pine trees, and that any noise in excess of state standards cannot be attributed to intervenor's tower. The hearings officer was not persuaded by testimony from petitioners' expert, who attributed excess noise to intervenor's tower as the "last source added," in part because petitioners' expert failed to recognize that a recent addition to a taller tower on the site post-dated construction of intervenor's tower.

Petitioners challenge the hearings officer's reliance on intervenor's experts, noting first that one expert evaluated conditions when wind speeds exceeded 20 miles per hour, whereas state standards require evaluation when wind speeds are less than 10 miles per hour. Petitioners also dispute the hearings officer's finding that intervenor's tower is not the "last source added," arguing that there is no evidence that the addition to the taller tower is the most recent noise source added. Finally, petitioners argue that their expert has superior credentials to intervenor's experts, and the hearings officer should therefore have chosen to believe their expert.

Intervenor responds that any issue regarding state standards that require evaluation when wind speeds are less than 10 miles per hour was not raised below and is therefore waived. On the merits, intervenor cites to evidence that intervenor's tower was constructed in 2004 and the addition to the taller tower was made in 2006. Intervenor contends that the testimony of their experts is substantial evidence and the hearings officer is entitled to rely on that evidence, even if petitioners' expert has superior credentials.

Petitioners do not cite to any place in the record where any issue was raised regarding wind speed measurements under state noise standards. We agree with intervenor that that

issue is waived. Further, we agree that the record includes substantial evidence that supports the hearings officer's findings regarding noise, and that a reasonable person could rely upon intervenors' experts. While the hearings officer might instead have chosen to rely on petitioners' expert, the choice between conflicting, expert opinions is up to the hearings officer, as long as a reasonable person could rely on the evidence the hearings officer relied upon.

The eighth assignment of error is denied.

**NINTH ASSIGNMENT OF ERROR (PETITIONERS)**

In addressing the BDC 10-10.29 "minimum adverse impacts" standard, the hearings officer considered radio frequency (RF) emissions from the tower and concluded, based on several studies, that intervenor's tower as well as the 19-acre site as a whole will meet federal public and occupational RF exposure standards, and therefore comply with BDC 10-10.29. The hearings officer relied in part upon the existence of a perimeter fence around the 19-acre site to prevent excess exposure to the general public, and internal fencing around individual towers and RF training to employees on the site to ensure compliance with federal occupational exposure standards.

Petitioners challenge those findings, arguing first that there is no condition of approval requiring intervenor to continue to comply with federal exposure standards. Second, petitioners argue that, while the perimeter fence and locked gate restrict general public access to the site, they do not prevent non-employees or other persons who may not have RF training from visiting the site. Petitioners note that the site includes two small parcels owned by governmental entities that are accessible by deeded easement, and that non-employees of the tower owners (such as subcontractors or persons such as the hearings officer) have visited the site. Therefore, petitioners argue, the entire 19-acre site must comply with the more stringent public exposure standards, not the less stringent occupational

exposure standards. Western Radio advances a similar, more developed argument, which we address below.

The hearings officer rejected petitioners' arguments, finding no evidence in the record that visitors to the site do not have appropriate RF training or knowledge. Record 71. The hearings officer concluded, based on the studies in the record, that the site including intervenor's tower will comply with federal public and occupational exposure standards.

Intervenor responds that federal regulations preempt the city's ability to regulate public and occupational exposure standards. *See Awbrey Towers I*, 48 Or LUBA at 206 (local regulation of radio frequency interference is preempted by federal regulations). Further, intervenor argues that, because intervenor must comply with those federal standards in any event, there is no need for a condition of approval to that effect. Finally, intervenor argues that the hearings officer correctly rejected petitioners' unsupported arguments that the site within the perimeter fence must comply with the federal public exposure standards instead of the occupational exposure standards.

We need not decide whether federal regulations preempt city regulation of public and occupational RF exposure, because we agree with intervenor that petitioners have not established that a condition of approval is necessary to ensure compliance with city or federal standards, and that the hearings officer's findings regarding RF exposure are supported by substantial evidence. The federal standards are relevant only for purposes of complying with the BDC 10-10.29 "minimal adverse impact" on the surrounding area standard, as it might pertain to RF exposure. Petitioners do not explain why a condition of approval is necessary to require intervenor to comply with federal standards that intervenor must comply with in any event. As to whether visitors to the site have RF training or similar protections, petitioners cite to no evidence supporting their assertion that some visitors may not have such training or that, even assuming they do not, the consequence under federal law is that the entire site must comply with public exposure standards.

The ninth assignment of error is denied.

**FIRST ASSIGNMENT OF ERROR (WESTERN RADIO)**

Western Radio argues that intervenor does not have the right under the site management plan of the Awbrey Towers LLC operating agreement to lease part of the property on which the tower is constructed.

Intervenor disputes that argument, but contends in any case that lease agreements are private civil matters and not regulated as a use under the city's development code. We agree with intervenor that Western Radio has not demonstrated that the city has any authority under its code to approve or deny the application based on the terms of lease agreements between intervenor and other members of Awbrey Towers LLC.

The first assignment of error (Western Radio) is denied.

**SECOND ASSIGNMENT OF ERROR (WESTERN RADIO)**

Western Radio argues that intervenor failed to demonstrate that the 300-foot tall tower will have "minimal adverse impacts," for purposes of BDC 10-10.29. According to Western Radio, there is no evidence that intervenor needs a new, 300-foot tall tower for its antennas, and there is no reason that intervenor could not employ a shorter tower, or co-locate its antennas on other existing towers. In addition, Western Radio argues that intervenor has not done all it could to reduce radio interference with Western Radio's antennas.

Intervenor responds that the record shows that in 2004 intervenor received an eviction notice from the tower on which its antennas were located, in order to facilitate new digital television technology improvements for that tower and the other existing broadcast tower on the site. For that reason, intervenor argues, co-location on existing towers was not an option. Intervenor cites to findings by the hearings officer that the new 300-foot tall tower is the minimum height and location required to achieve intervenor's operational objectives while minimizing visual and other impacts. Record 51. With respect to interference with Western

Radio's antennas, intervenor cites to evidence that intervenor's tower complies with applicable federal regulations, and argues further that local regulation of radio interference is preempted by federal law.

We agree with intervenor that Western Radio has not demonstrated any error with respect to the hearings officer's findings under the minimal adverse impact standard. Further, we agree that the hearings officer did not err in failing to require intervenor to take steps to reduce interference with Western Radio's antennas. As we held in *Awbrey Towers I*, and discuss further below, county regulation of radio interference is preempted by federal regulation.

The second assignment of error (Western Radio) is denied.

**THIRD ASSIGNMENT OF ERROR (WESTERN RADIO)**

Western Radio argues that federal law does not preempt city regulation of radio interference with wireless services, and therefore that the city should require intervenor to place filters on its transmitters to reduce interference with Western Radio's wireless transmitters.

Western Radio acknowledges that in *Awbrey Towers I* we held that federal law preempts local government regulation of radio frequency interference (RFI), rejecting Western Radio's arguments to the contrary. 48 Or LUBA at 206. However, Western Radio argues that our decision did not address 47 USC 332(c)(7)(B)(i)(II), which provides that local government regulation of the placement, construction, and modification of personal wireless service facilities "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." Western Radio contends that, by not requiring as a condition of approval that intervenor place filters on its transmitters to reduce interference with Western Radio's wireless transmitters, the city has effectively "prohibited the provision of personal wireless services," contrary to 47 USC 332(c)(7)(B)(i)(II).

We do not see that 47 USC 332(c)(7)(B)(i)(II) adds anything to the arguments we rejected in *Awbrey Towers I*. The federal statute does not state, explicitly or implicitly, that local governments have authority to resolve issues of RFI between operators of wireless facilities. It simply prohibits local governments from prohibiting wireless service facilities. For the reasons set out in *Awbrey Towers I*, we conclude that even if some city regulation authorized the hearings officer to impose conditions requiring filters to reduce RFI, federal law would preempt application of such a city regulation in the present case. Accordingly, Western Radio's arguments under this assignment of error do not provide a basis for reversal or remand.

The third assignment of error (Western Radio) is denied.

**FOURTH ASSIGNMENT OF ERROR (WESTERN RADIO)**

Like petitioners, Western Radio challenges the hearings officer's finding that intervenor's tower and the site as a whole complies with federal public and occupational exposure standards. As noted, the hearings officer found that there was no evidence in the record that visitors to the site are not aware of the risk of exposure and do not have the ability to remove themselves from the site. Record 71. Western Radio argues that there is such evidence in the record, and therefore the 19-acre site is not a "controlled environment" subject only to less stringent occupational exposure standards, but an area subject to more stringent public exposure standards.

The evidence Western Radio cites to is a letter from an acknowledged expert in RF exposure standards, a lengthy excerpt of which the hearings officer quotes in her decision. In relevant part, the letter states:

> "* * * [A]ccording to FCC rules, a controlled environment, presumably the region within the fenced boundaries of the Awbrey Butte site, wherein exposure may rise to the upper set of FCC [limits] for occupational/controlled exposure, implies that the individuals who are so exposed are (a) in that area because of their work, (b) have been made fully aware of their exposure to RF fields exceeding the general public [limits], (c) and have the ability to remove themselves from the higher exposure area. Unless these conditions actually

> exist at the site, then RF exposures within the site must also comply with the more stringent public [limits]. Physical restriction to access at the site, in and of itself, is insufficient to classify the region as a controlled environment if RF fields within the site actually exceed the general public [limits]. This is important for subcontractors and other non-broadcast personnel since they often are not aware of the RF situation at the site." Record 1761-62.

In apparent reliance on that letter, the hearings officer found that there is no evidence in the record that "non-broadcast personnel who have been allowed on the tower site have not been made aware of the risk of RF exposure above public exposure limits and/or were not able to remove themselves from the site." Record 71. In a footnote, the hearings officer rejected intervenor-petitioner Richard Oberdorfer's argument that whether an area qualifies as a controlled environment or a public area depends on whether all persons with access to the site are actually "trained to work in RF radiation controlled environments." *Id.* The hearings officer found that there is no support in the record for Mr. Oberdorfer's interpretation of federal regulations.

Western Radio repeats the assertion that whether an area qualifies as a controlled environment or a public area depends on whether all persons with access to the site have RF training. However, Western Radio does not cite to any support for that assertion, other than the statement by Mr. Oberdorfer that the hearings officer rejected. The expert's letter relied upon by the hearings officer does not support that position. Instead, it indicates that whether an area qualifies as a controlled environment or a public area depends on whether persons with access to the site are aware of exposure beyond public limits and have the ability to remove themselves from the site. The hearings officer noted elsewhere that the perimeter fence and the locked gate have signs informing entrants that RF exposures inside the fence may be higher than public exposure limits. The hearings officer concluded that there is no evidence in the record that non-employees visiting the site are not aware of the possibility of exposure beyond public limits and do not have the ability to remove themselves from the

site. Western Radio cites to no evidence to the contrary, and has not demonstrated that the hearings officer erred in so finding.

The fourth assignment of error (Western Radio) is denied.

The city's decision is remanded.