BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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

and

WESTERN RADIO, INC. and
RICHARD OBERDORFER,
Intervenors-Petitioners,

vs.

CITY OF BEND,
Respondent,

and

NPG OF OREGON, INC.,
Intervenor-Respondent.

LUBA No. 2007-165

FINAL OPINION
AND ORDER

Appeal from City of Bend.

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

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

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.

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

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2 HOLSTUN, Board Member, did not participate in the decision.
3
4 REMANDED 08/28/2008
5
6 You are entitled to judicial review of this Order. Judicial review is governed by the
7 provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a hearings officer's decision granting conditional use and site plan approval for a broadcast tower.

FACTS

The present appeal is one of a series of related appeals involving a number of new and expanded broadcast and communications towers on top of Awbrey Butte. The 19.5-acre site is zoned Urban Residential Standard Density (RS) with a Public Facilities overlay designation. One of the existing towers is a 200-foot tower owned by intervenor-respondent NPG of Oregon, Inc. (NPG), on land leased from Awbrey Towers, LLC.[1] Another existing tower is a 100-foot high tower owned by intervenors-petitioners 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, including a proposal to increase the height of NPG's existing tower from 200 feet to 300 feet. The towers approved in the 2003 decision involved a six-acre portion of the 19.5-acre property, which we refer to here as the Awbrey Towers site. 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 that addressed the visual impacts of antennas placed on the approved towers, and articulated so-called "safe harbor" 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

[1] The decision and the parties sometimes refer to NPG as "KTVZ" or "KTVZ/NPG."

1 LUBA, which again rejected most challenges but remanded under one assignment of error
2 for clarification on one point. *Save Our Skyline v. City of Bend*, __ Or LUBA ___ (LUBA
3 No. 2005-076, September 7, 2007) (*Awbrey Towers II*). However, the city has conducted no
4 further proceedings on remand of that decision.

5 At some point, the principals and lessees of Awbrey Towers LLC apparently decided
6 to pursue separate approvals for each tower, rather than continue to pursue the combined
7 application at issue in *Awbrey Towers I* and *II*. Accordingly, Chackel Family Trust, LLC
8 applied for approval of a new 300-foot tall tower, which the city approved. Several of the
9 same petitioners in this appeal challenged that decision. On June 6, 2008, LUBA remanded
10 the Chackel approval to clarify two matters. *Curl v. City of Bend*, __ Or LUBA __ (LUBA
11 No. 2007-156, June 6, 2008) (*Chackel*), *rev pending* (CA 139432).

12 NPG filed a new conditional use and site plan review application with the city,
13 proposing to remove its existing 200-foot tower and construct a new 300-foot tower within a
14 50 foot by 95 foot "box" where the existing tower is located.[2] The hearings officer
15 conducted several hearings and, on August 3, 2007, approved NPG's application. The
16 August 3, 2007 decision expressly states that it supersedes the approval of the expansion to
17 NPG's existing tower that was a component of the *Awbrey Towers I* decision. This appeal
18 followed.

19 **FIRST, SECOND AND ELEVENTH ASSIGNMENTS OF ERROR**

20 Petitioners argue that the hearings officer erred in failing to impose a condition of
21 approving requiring that, when NPG's 300-foot tall tower is constructed, the existing 200-
22 foot tower is removed. According to petitioners, absent such a condition, it is possible that

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[2] At the same time, GCC Bend, LLC, applied for approval of a new 300-foot tower, identical to the one approved in *Awbrey Towers I*. The city processed GCC's application on the same schedule as NPG's and issued decisions approving the applications on the same date. Petitioners appealed GCC's approval to LUBA, and we resolve that appeal in a separate final order and opinion issued this date. *Curl v. City of Bend*, __Or LUBA __ (LUBA No. 2007-166, August 28, 2008).

1 NPG might exercise its right under the *Awbrey Towers I* approval to increase the height of
2 the existing tower to 300 feet, and also construct the new 300 foot tower approved in this
3 decision. Petitioners contend that the hearings officer failed to evaluate the combined
4 impacts of two 300-foot tall towers under the applicable criteria. Relatedly, petitioners argue
5 that because NPG's application proposed removing the existing tower, the hearings officer
6 erred failing to consider and approve that component of the application. Petitioners contend
7 that because the hearings officer did not address that component of the application, it is
8 denied as a matter of law and therefore the existing 200-foot tall tower can remain.

9 Petitioners acknowledge that in Condition of Approval 2 the hearings officer
10 provided that approval of the new tower supersedes that portion of the *Awbrey Towers I*
11 decision that authorizes increasing the height of NPG's existing tower.[3] However,
12 petitioners argue, because the applicants in the present case and in *Awbrey Towers I* are not
13 identical the hearings officer had no authority to supersede portions of the *Awbrey Towers I*
14 decision, and that condition is therefore ineffective.

15 NPG responds, and we agree, that the intent and effect of Condition 2 is to ensure that
16 NPG can construct only one 300-foot tall tower, and cannot exercise both approvals.
17 Petitioners cite no authority prohibiting the hearings officer from conditioning the present
18 approval in a manner that prevents NPG from exercising an earlier approval affecting NPG's
19 existing tower. While the applicants in *Awbrey Towers I* and in the present case may not be
20 entirely identical, it is reasonably clear that in seeking to increase the height of NPG's
21 existing tower the applicants in *Awbrey Towers I* were acting on NPG's behalf and with its
22 authority.

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[3] The second condition of approval states:

> "The approval in this decision will supersede the approval of the KTVZ/NPG facility in the Hearings Officer's *Awbrey Towers I* decision issued December 10, 2003 when a certificate of occupancy is issued for the new 300-foot-tall tower approved in this decision." Record 77-78.

1 Petitioners are correct that nothing in the decision explicitly requires NPG to *remove*
2 the existing 200-foot tower, and it might be possible for NPG to construct the new tower
3 while retaining the existing tower.[4] However, the existing tower was approved long ago, and
4 petitioners have not demonstrated that the hearings officer was required to evaluate the
5 existing tower against conditional use and site plan criteria.

6 The first, second and eleventh assignments of error are denied.

7 **THIRD AND SEVENTEENTH ASSIGNMENTS OF ERROR**

8 Under the third assignment of error, petitioners argue that the site plan does not
9 depict the proposed location of the tower base, guy anchors, guy wires, and parking and
10 loading areas, and without a site plan that depicts these elements there is no basis for the
11 hearings officer to evaluate the proposed tower against the applicable criteria. Petitioners
12 argue that the hearings officer erroneously found that the site plan "meets the site plan
13 definition because it is drawn to scale and shows the location of all elements of KTVZ's
14 proposed use, including the tower base and guy anchors." Record 73.[5]

15 Under the seventeenth assignment of error, petitioners similarly argue that the
16 hearings officer erred in granting NPG post-approval "locational flexibility" in determining
17 exactly where the tower base and guy anchors will be located.

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[4] Because the hearings officer required NPG to construct the new tower within a 50 by 95 foot rectangular area where the existing tower is located, as a practical matter it is likely that construction of the new tower will necessitate removal of the existing tower, as the application proposed.

[5] The hearings officer found:

> "At the outset, opponents argue KTVZ's site plan is not adequate because it does not include some of the elements that the Hearings Officer had requested be included early in these proceedings, and because the elements that are included in the site plan are not sufficiently detailed to demonstrate KTVZ's compliance with the applicable approval criteria. Former Section 10-10-4 defines 'site plan' as 'a plan drawn to scale, showing accurately and with complete dimensions, all of the uses proposed for a specific parcel of land.' Moreover, Section 10-10.23 governing site plan approval does not specify the elements that must be included in a site plan. I find KTVZ's submitted site plan dated October 19, 2005 meets the site plan definition because it is drawn to scale and shows the location of all elements of KTVZ's proposed use, including the tower base and guy anchors. For these reasons, I find KTVZ's submitted site plan satisfies the applicable requirements for a site plan." Record 73.

1 NPG responds that the site plan adequately identifies the 50 by 95 foot building
2 envelope for the proposed tower base along with a detailed description of the components
3 within that envelope and the guy wires and guy anchors to be located outside the envelope.
4 According to NPG, the application explains that there are no changes proposed to the
5 existing gravel road and parking area serving the existing tower, and therefore no reason to
6 depict them on the site plan. NPG argues that the code definition of "site plan" and the
7 relevant code provisions do not require that the site plan show the exact location of the
8 proposed tower base or guy anchors, and in any case the hearings officer imposed a condition
9 of approval requiring that NPG submit a revised site plan showing the exact as-built
10 locations for the tower and anchors within 30 days of the issuance of an occupancy permit.
11 NPG explains that it did not depict or request precise locations for the tower base and guy
12 anchors, because the precise locations cannot be known with certainty until the neighboring
13 GCC tower is constructed, to avoid interference with that tower. However, NPG argues that
14 it provided sufficient information regarding the approximate locations of the base and
15 anchors within the lease area to allow the parties and hearings officer to evaluate the
16 proposal against the applicable criteria.
17 We agree with petitioners that the hearings officer's finding that the site plan "shows
18 the location of all elements of KTVZ's proposed use, including the tower base and guy
19 anchors," is erroneous. The site plan depicts the existing development on the site (with the
20 exception of the existing parking area), but does not depict the proposed tower at all. The
21 code definition of "site plan" indicates that a site plan must show "accurately and with
22 complete dimensions all of the uses proposed for a specific parcel of land," which certainly
23 suggests that the site plan must depict the proposed use, presumably so that it can be
24 evaluated against the site plan review criteria.
25 At oral argument, NPG argued that the hearings officer dealt with the uncertainty
26 over the exact location of the tower and anchors by essentially evaluating a worst-case

scenario, with the guy anchors placed as close as possible to neighboring properties, for example, and concluding that no matter where the anchors were placed the tower would comply with the site plan review criteria based on the vegetative screening and other measures imposed. However, while that approach might be an adequate substitute for evaluating the actual tower location against the applicable criteria, it is not clear that the hearings officer took that approach. Nothing cited to us in the findings suggests that the hearings officer evaluated a "worst-case scenario" in terms of tower and anchor location, or concluded that the tower and anchors satisfy the applicable criteria, no matter where they are located on the site.

The proposed tower may have very different impacts depending on its exact location, and therefore the location must be identified with sufficient precision on the site plan or elsewhere to allow the hearings officer (and participants) to accurately evaluate impacts. Because the site plan does not show the location of the proposed tower, and the findings do not adequately explain why the tower can be accurately evaluated against the applicable criteria notwithstanding the uncertainty regarding its eventual exact location, we agree with petitioners that remand is necessary to either require that NPG submit a site plan with the actual proposed location or adopt findings explaining why the tower can be accurately evaluated against the applicable criteria notwithstanding the uncertainty regarding its eventual exact location.

The third and seventeenth assignments of error are sustained.

FOURTH ASSIGNMENT OF ERROR

Petitioners contend that the hearings officer failed to adequately address applicable minimum landscaping standards at Bend Development Code (BDC) 10-10.23(9)(a)(1), (4) and (5), as well as BDC 10-10.23(9)(d).

BDC 10-10.23(9)(a) provides in relevant part that

> "[a]ll development subject to site plan approval shall meet the following minimum standards for landscaping:

> “1. A minimum of 15 percent of the area of a project shall be landscaped for multifamily, commercial, and industrial developments subject to site plan approval and the following requirements:
>
> “* * * * *
>
> “(B) All plant materials, except existing native plants not damaged during construction, shall be irrigated by underground sprinkler systems set on a timer in order to obtain proper water duration and ease of maintenance.
>
> “* * * * *
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> “* * * * *
>
> “4. Required landscaping shall be continuously maintained.
>
> “5. Vegetation planted in accordance with an approved site plan shall be maintained by the owner, any heir, or assign. Plants or trees that die or are damaged shall be replaced and maintained.”

In addition, BDC 10-10.23(9)(d) provides that “[s]urface drainage shall be contained on site.”

Petitioners argue that the hearings officer erred in allowing NPG to satisfy BDC 10-10.23(9)(a)(1) by retaining 15 percent native vegetation rather than plant new vegetation and further in applying the landscaping requirement only to the 50 by 95 foot box and the guy anchor locations rather than the entire “area of the project.” Petitioners do not identify what they consider to be the proper “area of the project,” but we understand petitioners to assert that it includes at least all of the triangle formed by the anchors. In addition, petitioners argue that while the hearings officer required that planted vegetation be irrigated, she failed to require that irrigation be conducted by an underground sprinkler system set on a timer, as required by BDC 10-10.23(9)(a)(1)(B). Finally, petitioners contend that the hearings officer entirely failed to address BDC 10-10.23(9)(a)(4) and (5) and BDC 10-10.23(9)(d).

Initially, NPG responds that the hearings officer questioned, correctly, whether BDC 10-10.23(9)(a)(1) applied at all to the proposed broadcast tower, because it is not a

1 "multifamily, commercial [or] industrial development[]."[6] As a precaution, the hearings
2 officer required that at least 15 percent of the existing native vegetation within the 50 by 95
3 foot box be retained. According to NPG, any error the hearings officer may have made in
4 applying BDC 10-10.23(9)(a)(1) is harmless, because that provision does not apply to the
5 proposed broadcast tower. NPG argues that because BDC 10-10.23(9)(a)(1) requires no
6 minimum landscaping, the requirements of BDC 10-10.23(9)(a)(4) and (5) also do not apply.
7 With respect to the BDC 10-10.23(9)(d) requirement that "[s]urface drainage shall be
8 contained on site," NPG argues that there is no evidence that surface drainage would not
9 contained on the site, or that surface drainage has ever been an issue. Further, NPG notes
10 that the hearings officer required that berms be constructed downslope of any anchors to
11 catch any runoff.
12 Petitioners cite to nothing in the BDC suggesting that a broadcast tower or similar
13 utility facility is a "multifamily, commercial, and industrial development[]" for purposes of
14 BDC 10-10.23(9)(a) minimum landscaping requirements, or any other code purpose.
15 Instead, petitioners argue that because NPG agreed below that the tower is subject to
16 Department of Environmental Quality (DEQ) regulations establishing maximum noise levels
17 for industrial and commercial noise sources the tower is therefore also an industrial or
18 commercial development for purposes of BDC 10-10.23(9)(a). However, that a particular

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[6] The hearings officer noted that in her *Awbrey Towers I* decision she had questioned whether BDC 10-10.23(9)(a)(1) applied to the towers proposed in that case, but found that to the extent it did, the 15 percent landscaping requirement was satisfied by the fact that the six acre area at issue in that application was largely covered with native vegetation. The hearings officer then found:

> "The Hearings Officer continues to question whether this criterion is applicable to wireless communication and broadcast facilities on the subject property. Nevertheless, assuming again that this requirement does apply, I find that for purposes of this criterion the 'area of the project' required to meet the landscaping requirements of this section includes the proposed 50' by 95' area in which the new tower would be constructed as well as the guy anchor locations. I find that to comply with this requirement for these areas, KTVZ will be required as a condition of approval to retain at least 15 percent of the existing vegetation within the 50' by 95' tower site area. In addition, as discussed above, I have found KTVZ will be required as a condition of approval to plant evergreen trees outside the required screening fences around guy anchors to the north and east of the tower. * * *." Record 145-46.

noise source is subject to DEQ's industrial and commercial noise standards does not necessarily mean it *is* an industrial or commercial use for purposes of DEQ's rules; still less does it mean that it is an industrial or commercial use for purposes of city regulations entirely unrelated to DEQ's administrative rules. Because petitioners have not established that BDC 10-10.23(9)(a)(1) minimum landscaping requirements are applicable, any error the hearings officer made in addressing (a)(1) is harmless.

It is less clear whether BDC 10-10.23(9)(a)(4) and (5) apply independently of BDC 10-10.23(9)(a)(1) to vegetation planted to satisfy code provisions other than BDC 10-10.23(9)(a)(1), but to the extent it does the hearings officer imposed conditions requiring that all vegetation planted in disturbed areas or to screen the guy anchors be maintained continuously and replaced if necessary. Record 149. Petitioners do not explain what more is required.

With respect to the BDC 10-10.23(9)(d) requirement that "[s]urface drainage shall be contained on site," petitioners do not explain why the condition requiring berms downslope of the anchors is inadequate, or what more is necessary to ensure compliance with BDC 10-10.23(9)(d). Petitioners do not argue that surface drainage has or is likely to be an issue that requires much in the way of explanatory findings. Absent a more focused challenge, petitioners have not demonstrated that the hearings officer's findings regarding BDC 10-10.23(9) are inadequate or that any inadequacy warrants remand.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

To satisfy the conditional use BDC 10-10.29(3)(a) adverse impacts standard, the hearings officer required NPG to plant evergreen trees around the fence surrounding the guy anchors, in order to screen the anchors from view. Record 70. The hearings officer also required NPG to provide an on-site water source to irrigate the planted trees, and to also screen that water source from view. *Id.* The hearings officer found that such an on-site water

source was feasible, because the hearings officer had required a similar system in the *Chackel* decision. Further, in addressing the minimum landscaping standard at BDC 10-10.23(9)(a)(1), the hearings officer imposed a condition requiring that NPG submit a landscaping plan identifying all existing native vegetation and all introduced vegetation. Record 77.

Petitioners argue, first, that the hearings officer erred in deferring review of the landscaping plan required by BDC 10-10.23(9)(a)(1)(A) to a subsequent staff review that does not provide the same notice and participatory rights as site plan approval. *See Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-48 (1992). However, we concluded above that the minimum landscaping requirements of BDC 10-10.23(9)(a)(1), including the requirement to submit a landscaping plan, did not apply to the proposed development. Petitioners do not cite to any other code provision requiring a landscape plan, so the condition requiring later submission of a landscape plan cannot possibly defer consideration of a mandatory applicable approval criterion.

Petitioners argue, next, that there is no evidence that NPG has authority from the property owner, Awbrey Towers LLC, to install an on-site water system. NPG responds, and we agree, that whether the current agreement between NPG and Awbrey Towers LLC permits NPG to install a water system is an irrelevant consideration. As we explained in *Chackel*, the city lacks the authority under its code to approve or deny an application based on the terms of a lease agreement between the applicant and a third party. Slip op at 16.

Petitioners next challenge reliance on the similar condition imposed in *Chackel* to determine that it is feasible to install an on-site water system, arguing that there is no indication that that condition in fact satisfied the adverse impacts standard in *Chackel*. Further, petitioners argue that the feasibility finding is undermined by photographs in the record showing dying trees near the Chackel tower's guy anchors, indicating that whatever system Chackel has used is not working well.

1 Nothing cited to us in the BDC or elsewhere requires a finding that it is "feasible" to
2 install an on-site water system. That being the case, the hearings officer's citation to or
3 reliance on the similar condition in *Chackel* appears to be surplusage. In any case, even if
4 such a finding were required, as we discussed in LUBA's *Chackel* opinion, the requirement
5 to provide an on-site water source (a water tank) in that case was imposed to replace a
6 different, ineffective system involving periodic use of a residential neighbor's garden hose.
7 *Chackel*, slip op 10.[7] It seems likely, and petitioners do not argue otherwise, that the
8 photographs pre-date the new water tank and the dying trees were irrigated, if at all, under
9 the superseded system. Petitioners cite no other reason to believe that an effective on-site
10 water source such as a water tank is not feasible with respect to NPG's tower. Absent some
11 indication to the contrary, we agree with NPG that it is reasonable to rely on a condition
12 imposed in a nearly identical companion case on the same property, to determine whether an
13 on-site water source is feasible.
14 The fifth assignment of error is denied.
15 **SIXTH AND TWELFTH ASSIGNMENTS OF ERROR**
16 In her *Awbrey Towers II* decision, the hearings officer developed a "safe harbor"
17 approach to be applied regarding the future siting of antennas on the towers approved in that
18 decision, under which certain types and sizes of antennas will not require discretionary
19 conditional use review. As noted, LUBA remanded the *Awbrey Towers II* decision to clarify
20 whether the safe harbor provisions applied to antennas under six feet or under eight feet in
21 diameter. Specifically, the decision was remanded to reconcile a conflict between findings
22 that appear to subject antennas more than six feet in diameter to conditional use review and
23 conditions of approval that provide that antennas eight feet and less in diameter are subject to

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[7] We remanded the decision in *Chackel* in part because the hearings officer failed to evaluate the water tank under the applicable site plan review criteria. In the present case, there is no contention of error in that respect.

the safe harbor provisions. As far as we are informed, the city has conducted no proceedings on remand of *Awbrey Towers II* and that conflict has not yet been resolved.

In the present case, the hearings officer imposed Condition 5, which states that future siting of antennas on NPG's proposed tower shall be subject to the safe harbor provisions established in the *Awbrey Towers II* decision, and incorporates by reference several exhibits from that decision. The hearings officer then sets out in detail the specific safe harbor provisions that will apply to NPG's tower. Petitioners assert that, with immaterial differences, those specific conditions are identical to those imposed in the *Awbrey Towers II* decision, providing that eight-foot diameter antennas are subject to the safe harbor provisions.

Petitioners argue that because the hearings officer subjected NPG's tower to the safe harbor provisions established in the *Awbrey Towers II* decision, the precise safe harbor provisions that will apply to NPG's tower remains unclear until the hearings officer takes up the *Awbrey Towers II* remand and clarifies the scope of those provisions, *i.e.*, whether the safe harbor provisions apply to antennas six feet in diameter or less or eight feet in diameter or less. Petitioners contend that it is error to incorporate by reference conditions in a decision that is on remand to clarify those conditions.

Relatedly, petitioners argue that while the findings in *Awbrey Towers II* subjected six foot diameter antennas to the applicable criteria, the decision did not evaluate eight foot diameter antennas against those criteria. In the present decision, petitioners argue, the hearings officer did not independently evaluate eight foot diameter antennas (or any size antenna) under the applicable review criteria, but simply incorporated and repeated the conditions of approval imposed in *Awbrey Towers II*, providing that eight foot or less diameter antennas do not need conditional use review.

We agree with petitioners that remand is necessary to clarify whether the safe harbor provisions apply to six foot or less diameter antennas or eight foot or less diameter antennas.

1 If that clarification occurs on remand of this decision, instead of on remand in *Awbrey*
2 *Towers II*, and the hearings officer determines that eight foot diameter antenna are subject to
3 the safe harbor provisions, the hearings officer should ensure that eight foot diameter
4 antennas have been evaluated under the applicable review criteria, either by demonstrating
5 that such review occurred in *Awbrey Towers II* (contrary to petitioners' understanding) or by
6 conducting that evaluation in the present case, if necessary.

7 The sixth and twelfth assignments of error are sustained.

8 **SEVENTH ASSIGNMENT OF ERROR**

9 BDC 10-10.29(3)(b), a conditional use permit criterion, requires a finding that "the
10 site planning of the proposed use will, as far as reasonably possible, provide an aesthetically
11 pleasing and functional environment to the highest degree consistent with the nature of the
12 use and the given setting."

13 The hearings officer found that "given the nature of the tower site and its existing
14 uses as well as KTVZ's proposed use, there are few opportunities to provide an 'aesthetically
15 pleasing' environment."[8] Nonetheless, the hearings officer found that the six-acre Awbrey
16 Towers site surrounding the proposed tower retains much of its native vegetation and,
17 combined with conditions requiring additional screening vegetation, the hearings officer
18 found that the site provides an aesthetically pleasing environment "as far as reasonably
19 possible."

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[8] The hearings officer found, in relevant part:

> "[T]his criterion addresses the aesthetics *only on the tower site and the subject property* and not on neighboring properties. * * * KTVZ argues, and I agree, that given the nature of the tower site and its existing uses as well as KTVZ's proposed use, there are few opportunities to provide an 'aesthetically pleasing' environment. Nevertheless, I find the retention of much of the native vegetation on the 6-acre tower site, coupled with installation of a wood fence and introduced screening vegetation around any guy anchors to the north and east of the tower, will to the degree practical soften the appearance of the facility as viewed from the rest of the subject property. And based on photos in the record and my own site visit observation, I find the KTVZ tower base will be highly similar in appearance to the existing KTVZ and Gross tower bases. For these reasons, I find KTVZ's proposal satisfies this criterion." Record 72 (emphasis in original.)

Petitioners contend that there is no evidence in the record indicating that NPG controls the retention of native vegetation within the six-acre Awbrey Towers site that includes most of the existing and proposed towers, most of which area NPG does not lease or control. Without such evidence, petitioners argue, there is no basis to conclude that the proposed tower complies with BDC 10-10.29(3)(b).

The focus of BDC 10-10.29(3)(b) is on the "site planning of the proposed use," not areas beyond the site of the proposed use that are not owned or leased by the applicant and not within the applicant's control. While the hearings officer cited the existence of native vegetation within the surrounding six-acre Awbrey Towers site as a partial basis to find compliance with BDC 10-10.29(3)(b), that finding is arguably surplusage. It is doubtful that the hearings officer could have denied NPG's application under BDC 10-10.29(3)(b), simply because neighboring tower owners had denuded the surrounding landscape or otherwise rendered it aesthetically unpleasing. Therefore, the fact that NPG does not control the entirety of the six-acre Awbrey Towers site and cannot ensure that native vegetation is retained within that area is not a basis to reverse or remand the decision.

The seventh assignment of error is denied.

EIGHTH AND NINETEENTH ASSIGNMENTS OF ERROR

BDC 10-10.29(3)(b) requires a finding not only that the site planning will provide an aesthetically pleasing environment, but also a "functional" environment. Petitioners argue under these assignments of error that the hearings officer failed to adopt any findings related to the "functional environment." Specifically, petitioners note that in her *Awbrey Towers I* decision the hearings officer had discussed an event several years ago when a tower on the Awbrey Towers site collapsed when one of its guy wires was broken by a colliding truck.

Petitioners do not explain what the collapsing tower event several years ago has to do with whether the site planning for the NPG tower provides, as far as possible, a "functional environment," for purposes of BDC 10-10.29(3)(b). Petitioners appear to believe that the

1 "functional environment" refers to the safety of the site, but do not explain why. While the
2 hearings officer made no specific finding regarding whether the site plan demonstrates a
3 "functional environment," absent a more focused argument from petitioners we cannot say
4 that any inadequacy in the hearings officer's finding of compliance with BDC 10-10.29(3)(b)
5 warrants reversal or remand.

6 The eighth and nineteenth assignments of error are denied.

7 **NINTH AND TENTH ASSIGNMENTS OF ERROR**

8 The existing NPG tower site includes a gravel off-street parking area, for the
9 occasional service vehicle that visits the existing NPG tower. NPG proposed to use the same
10 parking site for the new tower. BDC 10-10.24(4) sets out the minimum parking
11 requirements for various uses, none of which include a communications or broadcast facility.
12 BDC 10-10.24(4)(h) provides that for "[o]ther uses not specifically listed above shall furnish
13 parking as required by the Planning Commission. The Planning Commission shall use the
14 above list as a guide for determining requirements for said other uses."

15 The hearings officer applied BDC 10-10.24(4)(h) to find that the existing parking site
16 is sufficient to satisfy the off-street parking need generated by the proposed tower.[9]
17 Petitioners do not dispute the finding, or argue that additional parking spaces are needed, but
18 argue instead that BDC 10-10.24(4)(h) authorizes only the planning commission to
19 determine the number of required parking spaces, not the hearings officer. According to
20 petitioners, the hearings officer lacks jurisdiction under BDC 10-10.24(4)(h) to determine the

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[9] The hearings officer found, in relevant part:

> "The list of uses set forth in [BDC 10-10.24(4)] does not include communication and/or broadcast facilities. Therefore, the Hearings Officer finds this section authorizes me to determine the appropriate number of off-street parking spaces for KTVZ's proposal considering the characteristics of the proposed use and consulting the tables in this section for guidance. The record indicates only an occasional service vehicle will come to the KTVZ site, which is not open to the public. For these reasons, I find the existing gravel off-street parking area provided adjacent to the existing tower base and equipment building will be sufficient to satisfy the city's off-street parking requirements for this unique use." Record 77.

number of required parking spaces. In the absence of a planning commission-determined number of parking spaces, petitioners argue, the hearings officer is in no position to determine compliance with the BDC 10-10.23(8)(d) site plan requirements for pedestrian and vehicular circulation and parking, or with the BDC 10-10.29(3)(b) conditional use "aesthetically pleasing and functional environment" standard.

The hearings officer clearly has authority to review the site plan and conditional use applications, and to apply the parking standards of BDC 10-10.24(4), at least for listed uses. It is not the case, then, that the hearings officer lacks "jurisdiction." For whatever reason, BDC 10-10.24(4)(h) requires that the planning commission determine the number of parking spaces for other uses not listed. Nothing in the code cited to us suggests that only the planning commission can make that determination, and no other review body. In any case, assuming without deciding that only the planning commission has that authority, the hearings officer's error if any in making that determination in place of the planning commission is a procedural one. As such, that error provides a basis for remand only if petitioners demonstrate prejudice to their substantial rights. ORS 197.835(9)(a)(B). Petitioners have not done so, and it is difficult to imagine what prejudice there could be, given the lack of dispute over the number of required spaces. As noted, petitioners do not argue that the proposed tower requires more than one parking space, or that the planning commission, if it had considered the issue, would have required more.

The ninth and tenth assignments of error are denied.

THIRTEENTH ASSIGNMENT OF ERROR

In addressing the parties' disputes regarding the necessary specificity of the application, the hearings officer found that:

> "*with one exception* KTVZ's proposal provides sufficient detail for me to approve it subject to conditions of approval that identify specific parameters within which its facility may be sited and constructed while satisfying the city's conditional use and site plan approval criteria." Record 39 (emphasis added).

Petitioners argue that the hearings officer failed to identify the "one exception" referred to that does not comply with the applicable criteria, and requests remand for the hearings officer to clarify that point.

NPG responds that in a summary paragraph several pages earlier in the decision the hearings officer explained that she determined that she could not approve the proposed relocation of the antennas on the existing tower to the new tower, and therefore did not approve those antennas. Record 34. Later in the decision the hearings officer addresses the proposed antenna relocation and denies it. NPG contends that it is clear from the context that when at Record 39 the hearings officer refers to the "one exception" she did not approve, she was referring to the proposed antenna relocation that was denied.

NPG correctly summarizes the context of the statement at Record 39. The most likely referent to the "one exception" language is the rejected proposal to relocate the existing antennas. Petitioners suggest no other possible referent. The thirteenth assignment of error is denied.

FOURTEENTH ASSIGNMENT OF ERROR

As noted, the hearings officer required that NPG create berms downslope of all three guy anchors, "constructed of dirt, straw bales and/or other natural materials, of sufficient size and height to catch any runoff generated from the guy anchor locations." Record 81. That condition was imposed to ensure compliance with BDC 10-10.23(8)(d) requirement to preserve the natural landscape. Petitioners argue that the hearings officer erred in authorizing NPG to use combustible straw bales as part of the berm, and failed to adopt findings that city fire department comments regarding the use of combustible materials on the site during construction could be met. Further, petitioners contend that the hearings officer erred in failing to subject the potential use of straw bales to the minimal impact standard of BDC 10-10.29(3)(a) or the aesthetically pleasing standard of BDC 10-10.29(3)(b).

NPG responds that the hearings officer merely suggested the use of straw bales among other natural materials such as dirt, and was not required to review the possible use of straw bales against the standards of BDC 10-10.29(3)(a) or (b). NPG further argues that fire department comments are not approval criteria, and the hearings officer is not required to impose or modify conditions based on those comments.

NPG did not propose use of straw bales for a berm, or any berm at all. The hearings officer suggested, but did not require, that NPG construct the berms from straw bales or other natural materials. Accordingly, we agree with NPG that the hearings officer was not required to evaluate whether the potential use of straw bales to construct a berm might violate the minimal impact or aesthetically pleasing standards, even assuming those standards could be meaningfully applied to the required berm. We also agree with NPG that the hearings officer was not required to adopt findings that city fire department comments regarding use of combustible materials during construction be met.

The fourteenth assignment of error is denied.

FIFTEENTH ASSIGNMENT OF ERROR

Condition 5(b)(vi) provides:

> "Subject to the limitations of Condition 4(b) (i), (ii), (iii), (iv) and (v), the side-mounted antennas and small top-mount whip antennas found in significant quantity on all of the existing towers on the site create minimal, if any, visual impacts either from distant or nearby views and therefore satisfy the approval criteria in Sections 10-10.25(12) and 10-10.29(3)(a) and (b) of City of Bend Ordinance NS-1178. Therefore, these antennas are permitted without further land use review and approval." Record 79-80.

Petitioners argue that Condition 5(b)(vi) appears to authorize side-mounted and top-mounted whip antennas on *all* towers on the site, not just the proposed NPG tower. If so, petitioners argue, the hearings officer had no authority to do so, as only the NPG tower proposal was before her.

NPG argues that the apparent intent of Condition 5(b)(vi) is to find that use of small side and top mount antennas on other towers demonstrates that NPG's tower complies with

applicable criteria, based on the existence of such antennas on other towers, and that the intent was not to approve such antennas on other towers. We agree. As NPG notes, Condition 5(b)(vi) repeats nearly verbatim a similar finding in the hearings officer's *Awbrey Towers II* decision. In considering NPG's application, the hearings officer frequently employed or incorporated findings and conditions from the earlier decisions involving Awbrey Butte. There are obvious pitfalls in that approach. Nonetheless, while Condition 5(b)(vi) could be worded more carefully, it is reasonably clear that the hearings officer was addressing NPG's tower and did not intend to authorize use of antennas on any other tower. With that understanding, this assignment of error does not provide a basis for reversal or remand.

The fifteenth assignment of error is denied.

SIXTEENTH AND EIGHTEENTH ASSIGNMENTS OF ERROR

Petitioners challenge the hearings officer's finding that the existing parking area is gravel, arguing that there is no substantial evidence in the record supporting that finding. Petitioners assert that the existing parking area is composed of dirt, and argue that the hearings officer failed to evaluate the adequacy of a dirt parking area.

In her site visit report, the hearings officer states that she observed a gravel parking area adjacent to NPG's existing tower and equipment building. Petitioners question the accuracy of that observation, but cite to no evidence in the record to the contrary, or any evidence that the existing parking lot is composed of dirt rather than gravel. Further, even if that finding is erroneous, petitioners have not established that whether the existing parking area is composed of dirt or gravel has any significance for a finding of compliance with any applicable criteria.

The sixteenth and eighteenth assignments of error are denied.

WESTERN RADIO'S FIRST ASSIGNMENT OF ERROR

Western Radio argues that NPG failed to demonstrate that the proposed tower will have "minimal adverse impact" on the permissible development of the surrounding area, as required by BDC 10-10.29(3)(a). According to Western Radio, NPG has not shown that it cannot continue to use its existing 200-foot tower, or that it needs the proposed 300-foot tower instead of some other tower of lesser height or different design. Further, Western Radio argues that NPG has failed to install filters on the proposed tower to reduce interference with Western Radio's tower.

The arguments under this assignment of error are similar to those we rejected in *Chackel*, under the second assignment of error. We agree with NPG that the minimal adverse impact standard does not require NPG to demonstrate why it needs the proposed tower. Further, as we explained in *Awbrey Towers I*, the city has no authority to regulate radio interference issues between broadcast sources.

The first assignment of error is denied.

WESTERN RADIO'S SECOND AND THIRD ASSIGNMENTS OF ERROR

Under the second assignment of error, Western Radio argues that the city is not preempted from regulating radio frequency interference with Western Radio's tower that, Western Radio alleges, has the effect of prohibiting the provision of personal wireless services. Under the third assignment of error, Western Radio argues that the radio frequency levels allowed by the hearings officer do not take into account exposure to persons who may visit the site who are not trained to avoid the dangers of radio frequency emissions.

Western Radio's arguments under these assignments of error are virtually indistinguishable from arguments we rejected in *Chackel*, at slip op 17-18. For the reasons stated in *Chackel*, these arguments do not provide a basis for reversal or remand.

Western Radio's second and third assignments of error are denied.

CROSS-ASSIGNMENT OF ERROR

In the event that the Board sustains any of the petitioners' or intervenors-petitioners' assignments of error and remands the decision, NPG sets outs a cross-assignment of error requesting that the Board remand the decision for the hearings officer to correct alleged "technical or clerical errors" in several conditions of approval. NPG explains that it sought reconsideration of the hearings officer's decision below to address the alleged errors, but before the city could act on the reconsideration request, the city council "called up" the hearings officer's decision and summarily adopted that decision as the city's final decision.

Petitioners object to the cross-assignment of error, arguing that NPG can assign error to the decision under LUBA's rules only by filing a cross-petition for review. However, petitioners are incorrect. *Copeland Sand & Gravel, Inc. v. Jackson County*, 46 Or LUBA 653 (2004) (it is consistent with LUBA's rules to include a cross-assignment of error in a response brief).

We agree with NPG that the alleged errors *appear* to be mere clerical or inadvertent errors that could be easily corrected or clarified on remand. Because the decision must be remanded in any event, on remand the hearings officer should consider the arguments raised under NPG's cross-assignment of error and, if the hearings officer agrees with those arguments, adopt any findings and/or corrections or clarifications to the conditions of approval that the hearings officer believes to be warranted.

NPG's cross-assignment of error is sustained.

The city's decision is remanded.