March 7, 2011

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
King County Courthouse, Room 1200
516 3rd Avenue
Seattle, Washington 98104
Telephone (206) 296-4660
Facsimile (206) 296-0198
Email hearingexaminer@kingcounty.gov

ORDER ON RECONSIDERATION

SUBJECT: Department of Development and Environmental Services File No. **L09CU009**

T-MOBILE/BARBARA LITTLE
Conditional Use Permit Appeal
SEPA Appeal

Location: Adjacent to 16921 SE 144th Street, unincorporated Renton

Appellant: **Barbara Little**
16911 SE 144th Street
Renton, Washington 98059
Telephone: (425) 351-7941
Email: appellantbarbaralittle2010@gmail.com

Respondent: Department of Development and Environmental Services (DDES)
represented by **Cristy Craig**
King County Prosecuting Attorney's Office
516 3rd Avenue, Room W400
Seattle, Washington 98104
Telephone: (206) 296-9015
Facsimile: (206) 296-0191
Email: cristy.craig@kingcounty.gov

and

Kimberly Claussen
900 Oakesdale Avenue SW
Renton, Washington 98055
Telephone: (206) 296-7167
Facsimile: (206) 296-6728
Email: kimberly.claussen@kingcounty.gov

Applicant: T-Mobile
represented by **Linda Atkins**
Davis, Wright, Tremaine LLP
777—108th Avenue NE, Suite 2300
Bellevue, Washington 98004
Telephone: (425) 646-6115
Email: lindaatkins@dwt.com

1. On February 14, 2011, Appellant Barbara Little delivered a valentine to the Hearing Examiner's Office in the form of a 22 page request for reconsideration of the report and decision issued on February 3, 2011. A notice was issued on the reconsideration request allowing other parties to comment in writing thereupon through March 1, 2011, and timely briefs were received from King County DDES and from the Applicant T-Mobile.

2. Both DDES and T-Mobile have questioned whether Ms. Little's motion for reconsideration complies with the requirements of KCC 20.24.250. KCC 20.24.250 A. authorizes reconsideration of a final action by the County Council or the Hearing Examiner if the action was based on erroneous facts or information, failed to comply with laws or regulations in effect at the time the action was taken, or a procedural error occurred adversely impacting the interests of persons directly affected by the action. In addition, subsection C. provides that the Examiner "shall reconsider a final decision pursuant to the rules of the Hearing Examiner".

3. Like so many provisions of the King County Code, KCC 20.24.250 is an oddity that needs to be read in a discriminating manner. While subsection A. speaks in terms of reconsideration, the specific instances listed therein all point to a situation where the record would need to be reopened. One can seldom know whether an action was based on erroneous information, violated existing regulations or prejudiced the interests of persons directly affected unless one admits new facts or information to the record. And when engaged in a review based on additional information, one normally talks about reopening the record, not simply reconsidering what has already been admitted.

4. What is contemplated by the reconsideration notice issued by the Hearing Examiner's Office on February 14, 2011 is a reconsideration in the strict sense of the term, based solely on the matters already admitted to the record, as authorized by KCC 20.24.250 C. and Hearing Examiner Procedural Rule XI. G. Thus the instant review will not take into consideration any materials that were not admitted previously during the appeal proceeding.

5. Much of Ms. Little's reconsideration request is focused upon her strenuous assertion that the Examiner's February 3, 2011 decision fails to follow mandatory precedent set in prior Hearing Examiner proceedings regarding the evaluation of visual impacts. In particular, Ms. Little concentrates on a 1998 decision issued in the US West/Lake Sammamish Parkway proceeding under DDES file no. L97AC032. But as pointed out by both DDES and T-Mobile, administrative decisions such as the one documented in the L97AC032 report are not deemed legal precedent. This follows a basic general rule that distinguishes administrative decisions from those of courts of record, embodied locally within KCC 20.24.300. While one may certainly question the wisdom of a legal system that consigns to the dustbin of history such a vast array of learned administrative musings, the principle that Hearing Examiner decisions do not provide binding legal precedent unfortunately lies well beyond doubt or argument.

6. A second fundamental misconception that underlies Ms. Little's reconsideration request is that her burden of proof only requires presentation of a *prima facie* case. This is incorrect. In a conditional use appeal the appellant as the moving party has the burden to demonstrate by a preponderance of the evidence that the essential elements of the appeal are met, and for the SEPA portion of the appeal the burden is elevated to the more demanding "clearly erroneous" standard (see Hearing Examiner Rule XI B,. subsections 8 and 9).

7. Ms. Little is also laboring under a third misconception, one which in this instance is more understandable. An important outcome of T-Mobile's pre-hearing summary judgment motion was that the issue of whether an alternative sites analysis is required by KCC

Chapter 21A.26 was deferred for later briefing. This meant prospectively that discovery of alternative site studies was authorized, hearing testimony on alternative sites would be entertained and the alternative sites analysis issue was not dropped from the pre-hearing order. But the February 3, 2011 report, after discussing and evaluating the code sections cited in the briefs, made the following determination:

"The regulatory scheme overall therefore supports a conclusion that a replacement pole that exceeds the height of an existing utility pole by more than 40 feet remains the preferred alternative in a residential neighborhood, as provided by KCC 21A.26.400 B. It is thus exempt from the alternative sites analysis provisions applicable to new free standing towers under KCC 21A.26.370."

8. Ultimately the February 3, 2011 decision reached the conclusion that, as a replacement utility pole in a public right-of-way, the T-Mobile proposal was not in fact subject to an alternative sites analysis. This in turn meant that all the detailed alternative sites discussion within the decision was in actuality unnecessary to the outcome. By extension, this recognition leads inexorably to the further conclusion that Ms. Little's equally detailed dissection in her reconsideration request of the Examiner's alternative sites analysis also is of no ultimate consequence. In other words, alternative sites testimony was permitted at the hearing but the eventual conclusion was that the code did not require that type of an analysis to be made.

9. This leaves us with the question of whether the SEPA review was properly conducted as to the adverse impacts of the T-Mobile application at the specific location proposed. Even though the visual impact review standards articulated in the US West/Lake Sammamish Parkway decision of 1998 do not supply binding legal precedent, obviously Hearing Examiner decisions should strive for some level of consistency - if only to provide guidance to county departments, applicants and the public generally. In the Examiner's view there were important factual distinctions separating the current application from the earlier Lake Sammamish decision that warranted the different outcomes. The Lake Sammamish decision involved a taller steel pole that adversely impacted the primary views of eight nearby condominium apartment units. In the instant case the proposed pole is shorter, made of wood and only would have a major visual impact on the view from one residence, that of the Cherbans. The rationale for different treatment thus lies primarily in the fact that the Lake Sammamish application significantly affected a substantially larger number of residential units. With aesthetic issues one can of course endlessly argue about exactly where the line should be drawn between significant and non-significant impacts. For better or worse, the Examiner's evaluation remains in the Lake Sammamish case that major visual effects on eight residential units was a significant neighborhood impact, whereas in the instant case a comparable level of effect on one residence is not.

10. Finally, as helpfully clarified by Examiner Donahue within his February 17, 2011 order, state law has been amended to provide for deferring the decision date for calculating a judicial appeal deadline to the date of issuance of the reconsideration order. Also, Ms. Little's email note to the Examiner requesting removal of the conduits to the north side of the pole needs to be directed to DDES.

ORDER

The request for reconsideration of the Hearing Examiner's February 3, 2011 decision filed by Appellant Barbara Little is DENIED. The February 3, 2011 decision is affirmed. For purposes of judicial review the date of decision within this proceeding shall be the date of this order.

ORDERED March 7, 2011.

Stafford L. Smith
King County Hearing Examiner *pro tem*

SLS:gao
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