April 23, 2013

OFFICE OF THE HEARING EXAMINER
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REPORT AND DECISION

SUBJECT: Department of Permitting and Environmental Review File No. **L11CU006**

T-MOBILE/PORTER
Conditional Use Permit Appeal

Location: 15340 92nd Street

Appellant: **Carol Porter**
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Applicant: T-Mobile
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King County: Department of Permitting and Environmental Review
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SUMMARY OF RECOMMENDATIONS/DECISION

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Deny appeal, but amend conditions of CUP approval

EXAMINER PROCEEDINGS

Hearing Opened:	April 18, 2013
Hearing Closed:	April 18, 2013

FINDINGS, CONCLUSIONS AND DECISION

Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS AND CONCLUSIONS

1. The process in unincorporated King County for citing a cell tower over a certain height involves two steps. To promote early discussion, prior to even submitting an application, a would-be applicant must convene a community meeting. The party next applies for a conditional use permit (CUP). The Department of Permitting and Environmental Review's (DPER's) evaluation in turn involves two steps: a threshold SEPA determination of whether the project would create significant, adverse environmental impacts, and a review pursuant to the standards generally applicable to a CUP and specifically applicable to minor communication facilities.

2. In the instant case, T-Mobile held a community meeting in March 2011, and applied for a CUP the following month. It sought to locate a cell tower on Lisa Bennett's property. In October 2012, DPER issued a joint SEPA determination of non-significance and CUP. Carol Ann Porter, a neighbor directly to the north, timely appealed both decisions. In February 2013, the *pro tem* examiner then handling the case dismissed two of her grounds (discussed below), clarified the remainder of the issues, and set those for last week's hearing.

3. Ms. Porter first alleges that she did not receive notice of the pre-application community meeting. We find her testimony credible. However, that does not mean that we should remand for a "do over."

4. T-Mobile explained and documented its process for advertising the community meeting, including working with a title company to identify all properties within 1,000 feet and then FedExing postcards to those property owners. Proof that notice was actually received is not a constitutional due process requirement. *Marriage of McLean*, 132 Wn.2d 301, 309-311, 937 P.2d 602 (1997). Due process sets a floor, not a ceiling. *State v. Sieyes*, 168 Wn.2d 276, 292, 255 P.3d 995 (2010). Thus, KCC 21A.27.010 could set some higher standard, such as actual receipt or certified mail; its "[m]ailed notice shall be provided" does not do so. We thus conclude that where the required mailing was sent to a

valid address – and Ms. Porter's valid mailing address actually appeared twice on the list – T-Mobile satisfied the notice requirement.[1]

5. In addition, the pre-application meeting provision is relatively toothless. The purpose of the meeting is to "promote early discussion"; the would-be applicant has to attend, listen, and provide feedback and a report, but no more. KCC 21A.27.010. Whatever incentive a would-be-applicant has to modify its proposal based on early citizen input (such as to avoid opposition during the later application review process or an even later appeal to the examiner) is starkly absent where DPER has *already* granted the permit. At this stage, remanding for another meeting would be, to quote *Macbeth*, "full of sound and fury, signifying nothing." It would simply create a false hope for Ms. Porter that the substantive outcome would be different.

6. However, we do not agree with T-Mobile's position that the community meeting process is a mere "public courtesy." Toothless as KCC 21A.27.010 may be about the ability of community meetings to influence the substance of the CUP process, its procedures are mandatory, employing "shall" language no less than eleven times. If the record demonstrated that T-Mobile – or any other applicant – was not diligently following the requirements for providing advance notice for, meeting the content of, and reporting on the meeting, we would not hesitate to send the matter back. Failing to remand under such facts would create the "capable of repetition and yet evading review" scenario we are counseled to avoid. *Cf. In re Marriage of Horner*, 151 Wn.2d 884, 893 & n.8, 93 P.3d 124 (2004). An applicant could always argue (with some force) that requiring (at the appeal stage, after a permit was already applied for and granted) a community meeting would not be reasonably calculated to lead to a different end result. We would not accept that argument in such a scenario, but here T-Mobile has documented its due diligence.

7. Ms. Porter next challenges the proposed cell tower and associated concrete slab as being less than 100 feet from the Bennett well that serves the entire short plat. If so, it could potentially run afoul of the private well-covenant. As the covenant prohibits only "cesspools, sewers, privies, septic tanks, drainfields, or any other receptacles for the disposal of sewage" within 100 feet, the project likely would not violate the covenant, no matter how close to the well head the facility was. It could potentially violate the Board of Health Code (BHC) 12.24.010's somewhat broader 100-foot well setback.[2] Moreover, the proposal that DPER approved apparently would have run the facility's utility lines directly through the well radius, in apparent violation of BHC 12.24.010's radius restriction for "power utility or gas lines." DPER approving that layout raises a concern, but it is a moot concern now. Before the hearing, T-Mobile submitted a revised proposal that reroutes the conduits to avoid the 100-foot radius entirely. Under this revised

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[1] According to T-Mobile's documentation, a handful of mailings were *not* sent to valid mailing addresses. Had one of them appealed, our analysis might be different. But they are not parties to this appeal.

[2] The cell tower/slab itself may or may not come within BHC 12.24.010(C)'s list of setbacks, namely for animal enclosures, public roads, sewers, septic, manure piles, chemical storage, surface water, railroad tracks and power utility or gas lines, underground storage tanks, and landfills. A garage is probably the closest, but is also distinguishable. A garage houses parked vehicles for long periods of time, and such vehicles may drip auto fluids, something a cell facility likely does not. As discussed below, because the facility will be entirely outside the radius, it is an academic question in this case.

proposal, no part of the project – not the tower/slab, not the access road, and none of the conduits – will touch the protected circle.

8. Ms. Porter makes two cogent arguments that even if the project is entirely outside the radius, it still poses a threat to the well. First, she notes that there may be a need to upgrade the well at some indeterminate future date. It is not clear how such repairs or enhancements would change the well circle, given that the radius is measured from the well itself, not the edge of any expanded well house. And we have to decide the case on something more concrete than speculation about possible future activity. Second, she believes that a cement slab beyond 100 feet could affect water flows. BHC 12.24.010(C)'s well setback requirements are aimed at "possible contaminants," not flows. In addition, the health officer may require a setback greater than 100 feet, but only if "geological and hydrological data supports such a decision"; such data is absent from the current record.

9. Ms. Porter next asserts that T-Mobile does not have the right to access the Bennett property along the private road (39th Street) benefitting the short plat. The relevant terms of the private road easement are that "the purpose of said easement is for ingress, egress, and utilities," and that the road will "be subject to a utilities easement in favor of any [utility] company, public or private."

10. In interpreting an easement, we attempt to identify the intent of the parties at the creation of the easement. *Lawson v. State*, 107 Wn.2d 444, 462, 730 P.2d 1308 (1986). There is a legitimate argument that the utilities being contemplated were only utilities *serving* the lots themselves – *i.e.*, only for utility lines and access bringing utility service to parcels in the short plat, not for broader utility uses serving the larger community. However, the easement contains no such limiting language. In the face of a blanket approval for "utilities" and a "utilities easement," we cannot graft on such a constraint, even if we suspect that the original drafters, had they better thought through the possibilities, might have wished to clarify the scope of the easement.[3]

11. The penultimate appeal issue involves a setback from the facility to the property line. As a 150-foot tall tower, the default setback would be 150-feet. KCC 21A.27.030 ("one foot setback for every one foot in height"). Waivers are allowed "in order to achieve greater levels of screening than would be available by using the stated setback." KCC 21A.27.040(C). Here DPER allowed reduction of the southern setback to 59 feet. The southern property was a church at the time of application and is now-County owned. Ms. Porter lives to the north. There is no dispute that moving the cell installation south, further away from Ms. Porter's property, reduces the impact to her (discussed below). Looking not at personalities but the properties themselves, having the installation further south puts an additional strand of trees between the tower and the short plat residences. The property to the south was not and is not residential, and the code places a premium

[3] The idea of a cell phone tower might not have been reasonable to anticipate at the time of granting, but something like a regional pipeline or electric transmission line could have been. Yet the easement provides no utility-related limits.

on screening residential properties. KCC 21A.27.040(B-C). We cannot conclude that the setback is inappropriate.

12. That brings us to the main event, the visual impact of the tower and its ground level housing. The analysis involves two related but separate components, whether DPER's SEPA determination of non-significance was clearly erroneous, and whether DPER's permit decision violated the standards pertinent to cell tower CUPs.

13. "'Significant' as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality," and "does not lend itself to a formula or quantifiable test." WAC 197-11-794(1). The examiner's office has consistently held that a tower's visibility from neighboring properties does not constitute in itself a "significant" adverse impact. We will find significance only where a view of specific importance (like a view corridor to a lake) is impaired or where the facility is so close to the viewer that it dominates the perspective.

14. It is unlikely, that our facts would rise to impairment of a view of sufficient importance or a perspective-dominating facility even if, as Ms. Porter presumed, the cell tower and base station would be in the foreground of her view south. The evidence, however, shows the installation will actually sit on the other side (from her property) of several trees, eighty feet and higher. Those trees will at least partially obscure both the tower top and the facility base.[4]

15. Because of the presence of grazing animals on the Bennett property, DPER has decided to modify the normal Type I landscaping requirement and require the "alternative landscaping vegetation" KCC 21A.26.060(E)(2) provides for, with the exact nature of the screening to be required at the building permit review stage. Thus, in addition to the existing trees, the screening DPER will require at the building permit stage will further obscure Ms. Porter's view of the facility base.

16. In sum, even on a preponderance of the evidence standard, we could not conclude that project will likely create a severe enough impact to trigger additional SEPA inquiry. Given that our review standard on SEPA questions is not a mere preponderance of the evidence standard, but clear error, *Chuckanut Conservancy v. Washington State Dept. Nat. Res.*, 156 Wn. App. 274, 286, 232 P.3d 1154 (2010), our conclusion is even firmer.

17. The above analysis relates to, but does not entirely overlap with, the general CUP review criteria of KCC 21A.44.040 and detailed visual impact/compatibility standards of KCC 21A.27.040-.050.

18. KCC 21A.27.040(B) requires a review of "alternative site placement" – meaning locations on the applicant's preferred site and alternative sites as well – to achieve visual compatibility with adjacent lands, especially residences. T-Mobile's testimony and documentation about the inadequacy of current coverage in the area, the need for an additional tower of approximately 150 feet, and its site selection process (including the

[4] The third and fourth photos in Ms. Porter's hearing brief, Exhibit 16, appears to match up neatly with T-Mobile's Exhibit 16, tab 7, Photo #2, sketching in the location of the proposed monopole.

technical inadequacy of several alternative sites, the unwillingness of owners of other potentially feasible sites to house a structure, and the lack of viable industrial/commercial properties) was not seriously contested. The only real bone of contention involves the former church property south of the Bennett property (discussed above in relation to the setback).

19. T-Mobile's consultant explained that he had negotiated with the church, but the church ultimately refused because the congregation was undecided about their plans for the property. Ms. Porter pointed out that, apparently unbeknownst to DPER and T-Mobile, in May 2012, over a year after T-Mobile applied for its permit and less than five months before DEPR granted the CUP, the County came into ownership of that southern parcel. Ms. Porter in a sense argues that even if the southern property was not a viable alternative at the time of initial application, the County should require T-Mobile to relocate to what is now County property, further away from her and others in the short plat.

20. There is no direct testimony in the record as to the impacts locating a tower on that southern parcel would have on anyone further to the south. More fundamentally, the question is one of timing. It might (or might not) have been within DPER's prerogative, had it been aware of the ownership change, to require T-Mobile to re-consider the southern property as an "alternative site placement," even though the southern property had been unavailable at the time of application and T-Mobile was over a year into the application process for the Bennett property. But we cannot hold that DPER erred in not requiring a re-start or in granting approval for the Bennett property.

21. Within the Bennett property itself, KCC 21A.27.040 requires an attempt to blend the structure with the existing surroundings and screen it from adjacent properties, while .050 sets visual impact-reducing standards for "on-site location," the most relevant being reducing the silhouette of the tower portion extending higher than the surrounding trees.[5] The installation location is fairly circumscribed by the need to avoid the well radius (as Ms. Porter's appeal demonstrates) and the on-site septic system. As discussed above, T-Mobile is modifying the setback from the southern property to place the facility on the other side (from her property) of several trees, eighty feet and higher. And DPER intends to require landscaping to further screen the facility base. We cannot conclude that those cumulative efforts are insufficient.

22. Ms. Porter has, for the most part, not met her burden of proof regarding visual impacts. However, we make two findings that amend the conditions of the CUP somewhat.

23. First, the language in the CUP regarding the required facility base screening is too conditional – it requires T-Mobile (at the building permit stage) to consider and provide landscape alternatives but not if "otherwise determined infeasible." Even if, per KCC 21A.26.060(F), Type I screening may be infeasible because of grazing animals, we refuse

[5] KCC 21A.27.050(C). Subsection (A) and (B) are not relevant because T-Mobile is not proposing to remove any existing vegetation and the Bennett property has no pertinent natural land-forms (such as a hill). Subsection (D) allows tower height reduction if it would still provide the applicant's proposed level of coverage. As discussed above, there was no serious challenge to T-Mobile's documentation for why a shorter tower would not achieve its proposed level of coverage.

to accept that there is *no* screening alternative that would provide additional visual relief to the neighbors and yet would be compatible with the site and with the animals. We amend that condition below to remove the infeasibility caveat.

24. Second, we found credible the testimony of T-Mobile's certified arborist concerning the current and likely future health of the existing grove of tall trees screening the northern properties from the facility. He opined that the current tree health raised no serious concern and that if T-Mobile laid down hog fuel, cordoned off certain root areas to keep construction equipment away, and took other compaction mitigation steps before construction, and then if, post-construction, T-Mobile took any necessary mitigation steps (such as air spading) to ameliorate any unacceptable root compaction, those trees would likely suffer no permanent injury from construction. Given that the CUP here (especially the setback waiver) and our decision today are at least partially based on the screening those trees north of the facility provide, we will add a condition formalizing the above as a requirement.

25. Finally, we do not ignore the two issues Ms. Porter raised in her appeal and again at the hearing that were dismissed on summary judgment – the facility's potential to reduce her property values and to impact her (and even more so her vulnerable brother's) health. The cold reality is that neither one of those are criteria DPER is allowed to consider in review; thus they are not criteria on which we can evaluate DPER's approval or reverse its decisions. Property values are not within the zone of interests SEPA protects, *Snohomish Co. Property Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 52, 882 P.2d 807 (1994), nor are they listed criteria for CUP consideration. And the federal government explicitly bars a local government from regulating wireless facilities "on the basis of the environmental effects of radio frequency emissions," so long as they comply with federal regulations. 47 U.S.C. § 332(c)(7)(B)(iv). We are sympathetic to Ms. Porter's concerns, but without authority to consider those impacts further.

DECISION

1. Ms. Porter's appeal is denied as to the SEPA determination of non-significance and to the CUP itself. DPER's CUP approval is sustained, with three additional criteria.

2. First, the project shall be constructed according to T-Mobile's revised plans, Exhibit 16, tab 12, not the plans in place at the time of the October 2012 approval. No part of the project, including the facility itself, the facility access road, or any of the conduits running to the facility shall impinge on the 100-foot well radius.

3. Second, the language in CUP Action # 11 that T-Mobile shall provide landscape screening alternatives "unless otherwise determined infeasible" is amended to remove the "unless otherwise determined infeasible" language.

4. Third, as part of its building permit application, T-Mobile shall re-submit a certified arborist's assessment of what specific steps, pre-construction, T-Mobile should take to

protect the existing trees in the vicinity of the access road and facility.[6] Post-construction, and prior to DPER finalizing the building permit, T-Mobile shall submit another arborist report analyzing the construction and any necessary mitigation necessary to undo any tree-health impairing impacts from construction.

ORDERED April 23, 2013.

David W. Spohr
Interim Deputy King County Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Pursuant to King County Code Chapter 20.24, the King County Council has directed that the Examiner make the final decision on behalf of the county regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are property commenced in superior court within 21 days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

[6] We say "re-submit," because the Exhibit 16, tab 13 is the arborist's letter assessment. That letter, however, does not discuss the desirability of cordoning off certain root areas to keep construction equipment away (a topic at the hearing), and does not appear to be quite at the level of detail necessary to provide clear direction for construction.

MINUTES OF THE APRIL 18, 2013, PUBLIC HEARING ON DEPARTMENT OF PERMITTING AND ENVIRONMENTAL REVIEW FILE NO. L11CU006.

David W. Spohr was the Hearing Examiner in this matter. Participating in the hearing were Kimberly Claussen representing the Department; Linda Atkins, Michael Cady, and Lisa Bennett representing the Applicant; Carol Porter the Appellant; and Tom Quigley.

The following exhibits were offered and entered into the record:

Exhibit no. 1	DPER file no. L11CU006
Exhibit no. 2	DPER Report and Decision on CUP application L11CU006 dated October 2, 2012
Exhibit no. 3	Land Use application L11CU006 submitted April 19, 2011
Exhibit no. 4	State Environmental Policy Act (SEPA) Checklist submitted April 19, 2011
Exhibit no. 5	DPER Mitigated Determination of Nonsignificance for L11CU006 issued October 2, 2012
Exhibit no. 6	Affidavit of Posting
Exhibit no. 7	Revised site plan for L11CU006 submitted April 1, 2013
Exhibit no. 8	Appeal of DPER decision on CUP L11CU006, filed October 26, 2012
Exhibit no. 9	DPER report to the Hearing Examiner for the appeal hearing, dated April 18, 2013
Exhibit no. 10	CUP application L11CU006 submitted April 19, 2011
Exhibit no. 11	Acoustical report by SSA Acoustics submitted on April 19, 2011
Exhibit no. 12	Applicant's report for a March 29, 2011 community meeting
Exhibit no. 13	T-Mobile's Visual Impact Analysis report, submitted April 19, 2011
Exhibit no. 14	T-Mobile's (site) Alternative Analysis report, submitted April 19, 2011
Exhibit no. 15	T-Mobile's Radio Frequency Engineer Site Analysis report, submitted April 19, 2011
Exhibit no. 16	T-Mobile's additional hearing exhibits
Exhibit no. 17	T-Mobile's hearing brief
Exhibit no. 18	Carol Porter's hearing brief
Exhibit no. 19	Photographs of subject area, taken April 14, 2013
Exhibit no. 20	Printout of King County Department of Assessments web search results for parcel number 1324069035, date accessed not listed
Exhibit no. 21	Printout of web search results for 1324069038 title "King County Districts and Development Conditions"

The following exhibit was entered into the record on April 25, 2013:

Exhibit no. 22	T-Mobile's reproduction of Department file no. L11CU006

DWS/gao