Kitsap County Department of Community Development

Notice of Hearing Examiner Decision – REVISED

05/27/2021

To: Interested Parties and Parties of Record

RE:

Project Name: **BR0297 Port Orchard Wildwood New Cingular Wireless (AT&T) Communications Facility**
& Goss SEPA Appeal (of Permit #20-02223 – BR0297 Port Orchard Wildwood CUP-Wireless)

Applicant: New Cingular Wireless PCS, LLC ("AT&T")
19801 SW 72nd Avenue Suite 200
Tualatin, OR 97062

Application: **Conditional Use Permit (CUP) – Wireless Facility**
Permit Number: **#20-02223** & #21-01971

The Kitsap County Hearing Examiner has **APPROVED** the land use application for **Permit #20-02223 BR0297 Port Orchard Wildwood New Cingular Wireless (AT&T) Communications Facility – Conditional Use Permit (CUP) – Wireless Facility**, subject to the conditions outlined in this Notice and included Decision. The **Motion for Reconsideration** is **DENIED**.

THE DECISION OF THE HEARING EXAMINER IS FINAL, UNLESS TIMELY APPEALED, AS PROVIDED UNDER WASHINGTON LAW.

The applicant is encouraged to review the Kitsap County Office of Hearing Examiner Rules of Procedure found at:
https://spf.kitsapgov.com/dcd/HEDocs/HE-Rules-for-Kitsap-County.pdf

Please note affected property owners may request a change in valuation for property tax purposes, notwithstanding any program of revaluation. Please contact the Assessor's Office at 360-337-5777 to determine if a change in valuation is applicable due to the issued Decision.

The complete case file is available for review by contacting the Department of Community Development, Monday through Thursday, 8:00 AM to 4:00 PM and Friday 9:00 AM to 1:00 PM, except holidays. If you wish to view the case file or have other questions, please contact Help@Kitsap1.com or (360) 337-5777.

CC: Owner: Alpine Evergreen Co Inc, 7124 ST HWY 3 SW BREMERTON, WA 98312-4974

Applicant: New Cingular Wireless: 17801 SW 72nd Avenue, Suite 200, Tualatin OR 97062
Authorized Representatives: Kim Allen – Wireless Policy Group LLC, kim.allen@wirelesspolicy.com; Nancy Sears – SmartLink LLC, nancy.sears@smartlinkllc.com; Sharon Gretch, sharon.gretch@smartlinkgroup.com; Katie Johnson, katie.johnson@smartlinkgroup.com
Health District
Public Works
Parks
Navy
DCD
DSE
South Kitsap Fire District
South Kitsap School District
Puget Sound Energy
Point No Point Treaty Council
Suquamish Tribe
Squaxin Island Tribe
Puyallup Tribe
WA Dept of Fish & Wildlife
WA Dept of Transportation/Aviation
WA State Dept of Ecology-SEPA
WA State Dept of Ecology-Wetland Review
Interested Parties:

Lindsie Goss, lindsiegoss@theclassytortoise.com; Will Dye, will@theclassytortoise.com; John & Linda Parrish, parrishlk@comcast.net

KITSAP COUNTY HEARING EXAMINER
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION
AND DENIAL OF RECONSIDERATION

Conditional Use Permit No. 20-02223 and SEPA Appeal No. 21-01971
Port Orchard Wildwood New Cingular Wireless (AT&T) Communications Facility

May 27, 2021

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1. FINDINGS OF FACT

1.1 Proposal. Construct a 150-foot monopole tower and automated telecommunications facility, supporting 12 antennas and 18 remote radio units. The facility will be erected inside a 60' x 60' footprint, within a 75.62 acre parcel.[1]

Applicant. Smartlink LLC on behalf of New Cingular Wireless PCS, LLC (AT&T), Nancy Sears, 11410 NE 122nd Way #102, Kirkland, WA 98034.

Property Owner. Alpine Evergreen Co. Inc., 7124 State Highway 3 SW, Bremerton, WA 98312-4974.

Appellants. Ms. Goss and Mr. Dye, 2650 SW Youwood Way, Port Orchard, WA 98367.

Location. SW Youwood Way and William Heights Lane SW, Port Orchard, WA 98367. Parcel No. 282301-2-007-2005.

1.2 Hearing. An open record public hearing was held April 8 and 22, 2021. Due to COVID-19 restrictions, the hearing was conducted remotely, with the Examiner, Kitsap County Department of Community Development ("DCD"), Applicant, and Appellants calling in. Access information was provided to the public to allow citizens to join via either video link or telephone call-in. There were no reported technical difficulties during the call or afterwards. The hearing was continued to address a notice issue and because the SEPA appeal period had not run.[2] The parties also required additional time to address the issues. At the hearing, DCD, through Mr. Smith, described the project. With conditions, DCD found it consistent with requirements and recommended approval. The Applicant, through Ms. Allen, provided additional detail, objecting to certain conditions. Appellants Ms. Goss and Mr. Dye presented the SEPA appeal, and commented on the CUP, along with Ms. Byrd-Rand.

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[1] Exhibit 13 (SEPA Checklist), p. 8 ("This is working forest land and less than .0001% of the land will be used for this site. ... The placement of the site will not affect business operations.").
[2] The MDNS issued March 25; the 14-day SEPA appeal period closed April 8 on the first day of the hearing. Exhibit 31 (MDNS); Exhibit 43 (Notice of Continued Hearing).

1.3 SEPA Appeal, Parties and Witnesses. The Department appeared through Ms. Zippel, with Mr. Smith and Mr. Heacock testifying. Ms. Allen represented the Applicant and testified on its behalf, along with Ms. Sears. Appellants Ms. Goss and Mr. Dye appeared and testified.

1.4 Administrative Record. The Hearing Examiner admitted Exhibits 1-56, which included the Staff Report, application materials, public notice documents, public comments, a DCD Power Point presentation, and SEPA appeal documents. As the exhibits cover both the permit and appeal, the record was combined. With one exception, admission was not objected to. Following the hearing, DCD submitted a revised condition (Exhibit 52) to address Applicant concerns. The Applicant objected. Due to the COVID-19 situation which requires that hearings be conducted remotely, the Emergency HE Rules require the record to be kept open for a week following the hearing.[3] The exhibit is admitted for CUP purposes.[4]

The Examiner may revise CUP conditions, but does not draft SEPA conditions. Thus, while not needed for the SEPA appeal, as the records were combined, and given the expedited nature of the proceeding, admission on the SEPA record as well is reasonable. There were notice issues requiring correction, and day one of the hearing was held on the day the SEPA appeal period ran. The Applicant preferred the approach, though the haste did put the Appellants at somewhat of a disadvantage.[5] The Applicant also submitted an objection to the proposed conditions (Exhibit 53) just before the Decision issued. It was admitted without objection.

1.5 Reconsideration. The Examiner issued a Decision on April 30. On May 7, the Applicant requested reconsideration. Following Examiner inquiry on decision issuance timing, on May 12 the Applicant agreed to an extension on final decision issuance, so its reconsideration motion could be considered. The following day, the Examiner provided the parties until May 20 to respond to reconsideration, so a decision could issue by May 27, consistent with HER 1.9.1.[6] The Department filed a response opposing reconsideration. With this final decision, the Examiner clarifies the legal framework including by adding Findings 1.5 and 1.20, and Conclusion 2.5, and clarifies footnote 58.

1.6 State Environmental Policy Act, Ch. 43.21C RCW ("SEPA"). DCD issued a Determination of Non-Significance on March 25, with four conditions:

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[3] HE-Emergency Rule (April 1, 2020); Exhibit 33, p. 32 ("Since COVID-19 measures have been implemented, the official record is also kept open for at least one week following the actual hearing, in order to allow for any other comments to be included.").

[4] The Examiner ruling states, "The Examiner will allow consideration of the revised exhibit. On the appeal, time has been extremely limited. Typically, for a SEPA appeal, a pre-hearing conference would have been held, with deadlines established for witness and exhibit disclosures. For a decision to issue by April 30, as the Applicant has requested, that could not occur. On the CUP, per the Examiner's Emergency Rule, the Record remains open for a week following the hearing. As such, please submit any additional materials/responses by Thursday, April 29. The Examiner may have a clarification question, if so, that will be issued as soon as feasible." Exhibit 54 (Ruling, April 28, 2021).

[5] Testimony, Ms. Goss and Mr. Dye; Exhibit 28 (County and Applicant agreement to extend decision date to April 30); Exhibit 33 (Appellant request for continuance, given lack of time to prepare for the hearing), pp. 32 and 34.

[6] HER 2.12.1(e, f) addresses reconsideration for appeals. SEPA was not at issue in reconsideration. The Rules are the same for either matter type.

1. The proposed activity will be conditioned to use stealth paint schemes to reduce potential visual impacts on surrounding properties.
2. Using existing tree stands, the monopole will be consistent with the rural character surrounding the property owned by Alpine Evergreen Company.
3. There are wetlands and a seasonal creek on the property. The project will be conditioned per KCC Title 19.200 and 19.300. All associated critical buffers are met with the proposal.
4. The project is conditioned for stormwater control, per KCC Title 12.[7]

Ms. Goss and Mr. Dye timely appealed the SEPA decision, raising numerous issues.[8]

1.7 Notice. Mailed and published notice occurred for the hearing. The mailing list was sent to property owners within 800 feet, but should have also included those within 1,200 feet, meaning 11 property owners should have but did not receive the initial mailed notice. To allow this additional mailed notice to occur, the hearing was continued for two weeks, allowing the error to be corrected.[9]

The Appellants raised a SEPA notice concern. One related to a previous CUP application (19-01019), which the Applicant canceled. The Appellants were identified as interested parties on that permit, but not initially on the new application. As such, DCD did not consider the Appellants' comments as part of the SEPA review on the new application. Consequently, though the Appellants were mailed the notice of application and balloon test,[10] they were not notified of MDNS issuance. While not technically an error, given the new application, due to Appellants' interest and proximity, the better approach would have included notice.

Appellants also raised concerns over notifications specific to wireless facilities. Under wireless facility notification requirements, 14 days from submission of a complete application, notice shall be mailed to property owners within 1,200 feet and the property posted.[11] The notice of application was only mailed to property owners within 800 feet. As addressed above, the hearing was continued to allow the additional 11 property owners to receive mailed notice. The initial mailing was 20 days, rather than 14 after the notice of application, but this is a minor error which caused no harm.[12] Also, the notice of application was not posted at the site address, though hearing notice was.[13]

As raised in the appeal,[14] there were notification errors, but with the additional mailing and the hearing continuance, they were addressed. While time constraints have been challenging,

[7] Exhibit 31; Exhibit 32 (Staff Report), p. 2.
[8] Exhibit 31 (MDNS), p. 1, noting deadline; Exhibit 36 (appeal), filed April 7. *See also* Exhibit 32 (Comment from Appellants).
[9] Exhibits 41-43.
[10] Exhibit 45 (Appeal Staff Report), p. 2; Exhibit 16.
[11] KCC 17.530.030(G)(2)(a) and (b).
[12] Exhibit 45 (Appeal Staff Report), p. 3.
[13] Exhibit 30 (Certificate of Public Notice).
[14] The appeal combines SEPA and CUP issues. As the Examiner must address both, the appeal CUP issues are treated as public comment and addressed as part of the CUP. Had lack of SEPA comment been raised, presumably

the Appellants participated in the hearing and made their concerns known. This resulted in additional conditions being considered and proposed by DCD to the Examiner.[15] With the continuance and notice correction, hearing and application notice was provided substantially consistent with KCC requirements.[16]

1.8 Zoning/Plan Designations. The Comprehensive Plan and zoning designations are Rural Residential, allowing one unit per five acres.[17] The zone is designed to preserve rural character. "This zone promotes low-density residential development and agricultural activities that are consistent with rural character."[18]

The project is subject to the Ch. 17.530 KCC wireless communication facility review process, which requires a CUP.[19] The CUP is distinct from a variance, which is not required for the use, as the appeal asserts. The setting is a rural, forested area. Surrounding properties have the same zoning but are developed with single-family residences or undeveloped. CUP review is design to ensure the facility is consistent with the Plan and zoning, ensure it fits within the neighborhood character, and lacks material detriment to neighboring uses.[20]

1.9 Utility and Public Services.

- **Water**: Kitsap PUD #1
- **Power**: Puget Sound Energy
- **Sewer**: Kitsap County
- **Police**: Kitsap County Sheriff
- **Fire**: South Kitsap Fire & Rescue
- **Schools**: South Kitsap School District No. 401

1.10 Access. Gravel driveway off SW Youwood Way, a privately-maintained local access road. The appeal raises a concern about easement scope and whether access is authorized. While the Examiner reviews access road adequacy and project impacts from use and improvement of the road as part of CUP review, the KCC does not provide the Examiner review authority over private easement disputes.

1.11 Environmental. The vacant, forested site straddles two watersheds. Project review is required pursuant to the Kitsap County Critical Areas Ordinance, KCC Title 19, which among other natural resources, protects wetlands, and fish and wildlife habitat conservation areas. The Applicant did not initially disclose on site stream and wetland presence ("[t]he site has

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Appellants would have pointed to the notice issues and their earlier comments in defense. The issue was not raised so the Examiner need not address it.

[15] *See e.g.*, Exhibit 45 (Appeal Staff Report), pp. 4-5 ("In their appeal, the Appellants presented photos of their property demonstrating that approximately 50% of the 150-foot monopole would be exposed. Given this new information the Department is requesting additional conditions as outlined below.").

[16] Exhibits 18, 27, 30, Exhibits 41-43 (documenting additional mailing); Exhibit 32 (Staff Report), pp. 6-7; *see also* KCC 21.04.080, .210.

[17] Exhibit 32 (Staff Report), p. 3.

[18] KCC 17.130.010.

[19] KCC 17.530.030.

[20] KCC 17.550.030(A).

not been classified as a critical area by the City or County.")[21] However, after reviewing Kitsap County resource maps, DCD realized further analysis was necessary and asked the Applicant to verify CAO compliance. In response, Hamer Environmental conducted a site assessment and prepared a report,[22] delineating two on-site Category III wetlands subject to 150-foot buffers, and one stream. Wetland-A is 9,003 square feet; Wetland-B is 3,809 square feet. A seasonal stream tributary to Blackjack Creek, Type-N (non-fish bearing), requires a 50-foot buffer.[23] The project will comply with the CAO.

The Appellants raised an issue about the wetland, pond, and associated seasonal stream on their property. These are mapped critical areas and within 250 feet of the tower. However, they are separated by a previously constructed roadway, and the roadway truncates buffer functioning, so additional setbacks are not required.[24] Also, the species identified in the appeal are not listed species the critical areas ordinance protects.[25] However, access road mitigation is reasonable to ensure the new project does not adversely affect these resources, creating material detriment and compatibility issues.

1.12 Development Engineering/Stormwater. Development Services and Engineering reviewed the proposal and found the concept supportable in its approach to civil site development. The wireless facility ground equipment and tower will require a Site Development Activity Permit.

1.13 Lighting. The proposal is conditioned to require the structure to be unlighted, including daytime strobes or nighttime illumination, flashing beacons, or solid beacons (Condition 7). To meet KCC 17.105.110, lighting will be fully shielded from the side view and directed downward so no more than one foot-candle of illumination leaves property boundaries.

1.14 Noise. With mitigation, the Applicant documented it can and will meet County noise requirements.[26] This includes the back-up generator.

1.15 Parking. Consistent with KCC 17.490.030, three parking spaces will be provided within a 45' x 28' turnaround area in front of the compound.

1.16 EMF. The Applicant documented compliance with federal regulations through a licensed engineer. "[T]he proposed WCF will comply with current FCC and county guidelines for human exposure to radiofrequency electromagnetic fields."[27] The project must operate in compliance with federal regulations, with CUP approval based on this confirmation.[28]

[21] Exhibit 13 (SEPA Checklist), pp. 9 and 4.
[22] Exhibit 22; *see also* Exhibit 13 (SEPA Checklist), p. 2 (when the checklist was submitted the applicant had stated "[t]here is no environmental information directly related to the proposal at this time.").
[23] Exhibit 22 (Environmental Report), p. 20.
[24] KCC 19.100.120(C); Exhibit 45 (SEPA Staff Report), pp. 5-6.
[25] KCC 19.300.310(B)(3); Exhibit 45 (SEPA Staff Report), p. 6.
[26] Exhibit 7.
[27] Exhibit 6 (EMF Exposure Analysis), p. 3.
[28] Exhibit 10 (Project Narrative), p. 7.

1.17 Project Need, Alternative Locations, and Co-Location. The Applicant documented a need for the project to address coverage gaps.[29] It also summarized its consideration of alternative sites and co-location options. This analysis included notice to existing carriers on co-location and designing the facility to allow for co-location on the tower.[30] While views vary on assessment adequacy, the documentary evidence and procedures the Applicant followed addressed code requirements, and revisiting the analysis is not warranted.[31]

1.18 Comprehensive Plan. The Comprehensive Plan is structured to allow for wireless communication facilities, but in a way which minimizes their impacts on surrounding areas. It encourages their location within commercial and industrial areas, and within appropriate utility/transportation corridors, and promotes development of design standards to address visual impacts.

- **CapF and Utilities Goal 8**. Ensure facilities are provided in an efficient, coordinated and timely manner between Utility providers to meet the needs of the County's population.

- **CapF and Utilities Policy 25**. Encourage siting of large, above ground utilities (e.g. antennas, towers) in industrial or commercial areas or along appropriate transportation and utility corridors.

- **CapF and Utilities Policy 27**. Minimize the visual impact of utility facilities on view corridor, vistas and adjacent properties by developing design standards for cellular towers, antennas and other types of utility facilities.

These policies are coupled with Plan objectives to preserve the County's rural areas, which the facility is within. "As per the Growth Management Act, the rural area of Kitsap County is much less developed than the urban areas. This allows for the natural landscape to predominate over the built environment."[32] Several policies elaborate:

- **LU Goal 13**. Protect Kitsap County’s unique rural character.

- **LU Policy 50**. Limit the designated rural area to low residential densities that can be sustained by minimal infrastructure improvements, cause minimal environmental degradation, and that will not cumulatively create the future necessity or expectation of urban levels of service.

- **LU Policy 51**. Permit residential uses in rural areas consistent with the planned rural character of the surrounding area.

[29] Exhibit 11, for illustration, view coverage photographs.
[30] *See* Exhibits 10 and 11.
[31] *See* appeal comment and DCD response at Exhibit 45 (SEPA Staff Report), pp. 6-7.
[32] Comprehensive Plan, p. 1-13.

To accomplish these objectives, the wireless facility must blend within the rural, forested nature of this site, rather than disrupting the rural landscape and viewshed.

1.19 Surrounding Area/Visual Impacts. The area is heavily wooded, with RR zoning surrounding the site. Single-family residences are to the south and east.[33] Project setbacks on the west, north, and east are 671, 1,172, and 1,884 feet, respectively.[34] Setback width is more narrow on the property's southern front, at 165 feet,[35] the minimum setback required for a 150 foot tower.

At the hearing, the Applicant stressed its lease area is only 60' x 60' and it has no ability to do anything beyond that area (though according to the SEPA Checklist this area only takes up .0001% of the site).[36] This position covered both adjusting tower location and retaining trees within required setbacks.[37] Yet the Applicant must rely on an expanded portion of the larger 75+ acre property to meet the 165 foot setback requirements surrounding the use on all sides,[38] consistent with the Applicant's initial acknowledgement that additional screening may be required as part of CUP approval.[39] At the hearing, in response to an Examiner question on why this portion of the larger acreage was chosen for the facility, the Applicant stated that the location was chosen because the property owner plans to redevelop the site with residences, and that was the area he wished to lease.[40] The footprint area was not selected to minimize impacts on surrounding properties.

The Appellants are the nearest affected property owner, at 2650 SW Youwood Way, Port Orchard, WA 98367, on the south side where the setback is narrowest.[41] In reviewing the evidence the Appellants submitted, including photographs from their property of the balloon test (a test which uses an actual balloon to illustrate tower visibility), it is evident that the tower is not "barely visible," as the Applicant represented.[42] The tower would be, from neighboring residences, a prominent feature within the viewshed. Without further mitigation, the facility would have more than a moderate visual impact on neighboring residences.[43]

Appellants' photographs are taken from multiple angles, including from outside and inside their home.[44] One Appellant photograph is from almost the same location as an Applicant photograph, but the Applicant positioned the camera so a tree in the foreground presents a more

[33] Exhibit 32 (Staff Report), p. 3.
[34] Exhibit 32 (Staff Report), p. 3.
[35] Exhibit 32 (Staff Report), pp. 3 and 30.
[36] Exhibit 13 (SEPA Checklist), p. 8.
[37] Testimony, Ms. Allen.
[38] Exhibit 32 (Staff Report), p. 30.
[39] Exhibit 32 (Staff Report), p. 32.
[40] Testimony, Ms. Allen; Testimony, Ms. Goss (property owner has not collaborated with neighbors on locational and impact concerns, and did not appear in the proceeding).
[41] Exhibit 36 (SEPA Appeal).
[42] Exhibit 15 (Applicant Response to Staff Comment), p. 1.
[43] Exhibit 33 (Appellant Comment), pp. 12-17; Exhibit 45, pp. 4-5; Testimony, Ms. Goss and Mr. Dye.
[44] Exhibit 33 (Appellant Comment), pp. 12-17; Testimony, Ms. Goss and Mr. Dye.

obscured image of the facility.[45] In reviewing the Applicant's visual assessment photographs and comparing them with the Appellants', it is apparent that based on the angles photographs were taken from, impacts on the nearby properties, particularly of the Appellants', were downplayed.[46] A similar approach was taken with the Applicant's SEPA Checklist, which downplayed impacts on neighboring properties ("[t]here will be no obstructed views and minimal visual impact in the immediate vicinity," and "[t]here will be no views in the immediate vicinity altered or obstructed.")[47] This may explain why, although Ms. Goss and Mr. Dye submitted comment,[48] the project's actual aesthetic impacts were not fully appreciated until day one of the hearing. Upon considering the Appellants' submissions, the Department realized additional mitigation was in order.

> In their appeal, the Appellants presented photos from their property demonstrating 50% of the 150-foot monopole would be exposed. Given this new information the Department is requesting additional conditions….[49]

The forested nature of the site and area is a protected scenic resource. "The facility disrupts a largely intact and unobstructed view of visually sensitive areas."[50] The Applicant recognized the scenic forest resources present in initially applying for the facility,[51] and acknowledged the project would be visible from an "existing residential area."[52] "This is a rural resource zone with three houses within a 500' radius, all to the south…. Visibility is primarily from one residence property directly across the street - see photo simulation."[53] The application states that with supplemental planting, this will "naturally screen the site from surrounding areas."[54] The depiction includes reliance on both "existing and new trees" to screen the facility.[55] In subsequent application materials, the initially identified impacts were downplayed and additional mitigation not developed, though it is not unusual to use a variety of measures, including structure height reduction and tree retention surrounding the lease area, to address these issues.[56]

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[45] Exhibit 33 (Appellant Comment), pp. 18-21 (photographs illustrating how more much more prominent view impacts are without adequate tree screening); Exhibit 8 (Applicant Visual Analysis, photographs). Compare Appellants' photographs (Exhibit 33), pp. 14-15 with Applicant photograph (Exhibit 8), p. 3.
[46] Exhibit 8 (Applicant Visual Analysis, photographs); compared with Exhibits 33 (Comment), 36 (SEPA Appeal), and 47 (Appellant Supplement to the Record).
[47] Exhibit 13 (SEPA Checklist), pp. 9-10; Exhibit 15 (Applicant Response to Staff Comment), p. 1 ("The photo simulations submitted with the application do include the red balloon. It is barely visible but there.").
[48] Exhibits 19 and 33.
[49] Exhibit 45 (SEPA Staff Report), pp. 4-5.
[50] Exhibit 45 (SEPA Staff Report), p. 4.
[51] Exhibit 1 (Permit Questionnaire), p. 7 (in response to a question on the presence of scenic resources, the Applicant stated, "A Large Forested Area (over 20 acres in size).").
[52] Exhibit 1 (Permit Questionnaire), p. 7, capitalization removed.
[53] Exhibit 1 (Permit Questionnaire), p. 7.
[54] Exhibit 1 (Permit Questionnaire), p. 8.
[55] Exhibit 1 (Permit Questionnaire), p. 9.
[56] Exhibit 44 (example CUP, providing for tree retention for 50 feet around the perimeter of the leased area, and 15 foot height reduction), p. 9; Testimony, Mr. Smith. (The reconsideration motion attached an administrative CUP decision approving a cell tower. Although not an Examiner decision, so there was no public hearing, and it was permitted under a different code, with no SEPA appeal, 25 foot perimeter buffering was used for a shorter tower).

Given the amount of tower exposure Appellants identified, the Examiner asked the Applicant towards the close of hearing day one to consider approaches to addressing the aesthetic impact issues raised. The Applicant instead objected to additional buffering, stating that its "stealth design" and the planting of "fast growing" trees which will mature in fifty years is sufficient:

> Applicant will still plant fast growing trees within its own lease area [3,600 square foot portion of the larger parcel] to add trees to the viewspace over time, as proposed in its landscape plan in the drawings. In consulting with the landscape firm, it was confirmed that planting trees more than the proposed 10-12 feet in height significantly reduces their chance of survival over time. The arborist report in the record provides uncontroverted evidence that the tree line at 50 years referencing the Site Potential Tree Height (SPTH) is 115 feet to 145 feet, so a 150 foot monopine will not look out of place and will not create more than a moderate visual impact, as defined by code.[57]

As the Applicant notes, tree maturation will take a half century. The Appellants pointed out that no one in the virtual hearing room may then be alive.[58] To avoid significance in the more immediate present, additional buffering is required. To accomplish this, the Department identified additional conditions. The Department proposed tree retention within the 165 foot required setback. The approach follows the KCC, but the Applicant objected. To address the Applicant's objection, the Department suggested modified language, which while still offering protection, also addressed Appellants' concerns.

> [T]he Department submitted additional conditions to reduce the visual impact of the project including a vegetation buffer with the existing trees. The Applicant objected to the condition noting that the Applicant believed it to be too large and impossible to accommodate. Based on the discussion at the hearing, the Department reviewed the proposed buffer, existing trees, and topography around the project site. Based on the topography and trees around the site, the department submits this modified buffer for the Hearing Examiner's consideration. This modified buffer is designed to match the topography to minimize the visual impacts of the tower while also reducing the potential impact on the landowner and Applicant.
>
> The modified tower buffer is oval-shaped, generally 165 feet from tower center to NE direction and generally 120 feet at E, SE, S, SW, and W, and approximately 135 feet at NE and NW from tower center. Approximate acreage is 1.12 acres (See attachment below). The buffer includes screening components for future tree maturation to reach max site index in the south and east, and incorporates existing mature background stands to the north and west of the proposed tower. The proposed modified buffer is depicted below for illustrative purposes. The

[57] Exhibit 46 (Applicant's Supplemental Memo), p. 2.
[58] Testimony, Ms. Goss and Mr. Dye. The decision originally noted party acknowledgement of the sentiment. On reconsideration, the Applicant objected as it had not made the statement. True, but the testimony was not contested.

proposed monotower is depicted as the red square dot. The modified oval buffer is the dotted red line.[59]

The Applicant objected to the modified language. "**[A] no cut buffer of any size,** especially on a tree farm that cuts and sells trees as its business, is unnecessary to screen a well designed and built monopine in this rural area."[60] The DCD proposed condition does not impact the vast majority of the 75-acre property (98% of the parcel). To mitigate for the impacts of the height increase far over what most, if any other uses are allowed, a buffer directly correlated to tower height, and which takes up a minimal portion of the 75-acre property, allows the use to avoid material detriment and achieve compatibility with neighboring uses, which is necessary for a CUP to issue. The added language creates no more of a setback distance than already required.

The Applicant stated in its SEPA Checklist that "placement of the site will not affect business operations."[61] Requiring tree retention within already required setbacks, on a small portion of the property, does not change this assessment. No evidence was submitted to support the assertion that tree retention would significantly impact the forestry operation. Rather, the Applicant's position, based on the above statement, appears to be that even retaining a single tree within the required setback is objectionable.

If the County lacks authority to retain trees within a required setback to address visual impacts, then it would similarly lack authority to require vegetation retention in wetland or stream buffers. The Applicant did not provide citation to any legal authority to support such a position. The Applicant has made blanket statements before regarding the property which have proven to be incorrect. These included representations on the lack of visual impacts and on the absence of critical areas, although two wetlands and a stream are present on the property. Yet, despite this history, to support its objections, the Applicant provided no documentation on tree harvest volumes, harvest timing, or harvest locations. DCD did address likely harvest times, emphasizing the need to provide a visual screen if the parcel is logged.[62] The property owner, who would be more familiar with its forestry operation than the Applicant, did not take a position or appear at the hearing, though afforded the opportunity to do so.

While the Applicant's above objection relates only to forestry use, at the hearing, Applicant testimony noted that ultimately the property would be redeveloped with homes.[63] DCD pointed out that if this is the nature of the objection, the RR zoning is rural. With or without mitigation, the maximum development capacity is 15 units.[64] Tree retention does not reduce this figure. On reconsideration the Applicant, inexplicably and without record support, suggests the Department is attempting to limit future development capacity.[65] This is incorrect.

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[59] Exhibit 52 (DCD Revised Condition Memo). Compare with figure at Exhibit 50.
[60] Exhibit 53 (Applicant's April 29 objection, which followed the April 28 objection), emphasis added
[61] Exhibit 13 (SEPA Checklist), p.8.
[62] Testimony, Mr. Heacock.
[63] Testimony, Ms. Allen.
[64] Exhibit 32 (Staff Report), p. 3; Testimony, Mr. Smith and Mr. Heacock.
[65] Applicant's Motion for Reconsideration, p. 2 ("County staff has stated that the county is not in favor of the owner of the property developing the parcel in future."). There is no record citation provided for this assertion, and the evidence at the hearing was to the contrary. The Department took care to emphasize that even with the proposed mitigation, the site's development capacity is unchanged. Testimony, Mr. Smith.

Utilizing tree retention to screen the facility visually mitigates impacts consistent with code, does not reduce development capacity, is necessary, and is proportional to project impacts.

1.20 Reconsideration Motion. The Applicant objects not to the 165 foot setback, but to the requirement to retain trees within the setback area. In other words, only buffering was objected to. A setback requires a structure to be set away or back from the property line; a buffer includes such a separation, but couples this with vegetation retention.

Tree retention is utilized to screen the 150 foot tall tower, located outside the County's urban growth area, and within the County's rural area. The buffer area, which is less than the setback area, ranges from 125-165 feet in width, and comprises 1.6 acres, or 2%, of the 75-acre property. Originally, the buffer area was larger, at 2.14 acres, but the Department tailored the retention requirements to existing topography to reduce tree retention requirements.[66] At no point does the buffer extend beyond the setback, which the Applicant does not object to.

Buffers are commonly used to address view impacts, protect wetland functions, ensure no net loss of shoreline ecological functions, and address other impacts on natural resources. They are a dominant feature in critical areas and shoreline regulations, promulgated under Ch. 36.70A RCW and Ch. 90.58 RCW, the State's Growth Management Act and Shoreline Management Act.

There are limits on regulations, including from the Washington State Constitution, which provides simply: "No private property shall be taken or damaged for public or private use without just compensation having been first made."[67] There are also statutory limitations. RCW 82.02.020 has separate requirements for fees and land dedications, requiring that they be "reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply."

The Examiner does not have jurisdiction over constitutional questions, but case law interpreting these provisions provides a useful guide and any decision should be mindful of both the constitutional and statutory structures. The two separate lines of analysis (constitutional takings and statutory dedication requirements) are briefly addressed here. The parties conflated the analysis in their motions, but the two doctrines are distinct.

The State Constitution's single sentence on takings has been the subject of many cases, and considerable confusion, which the Washington State Supreme Court only recently resolved. With this resolution, our Court issued two cases on the same day abrogating a long line of cases and outlining a considerably less confusing analytic framework for addressing both takings and due process claims. With this updated approach, which by the Court's own list, 59 cases were identified as utilizing an outdated legal framework,[68] including *Isle Verde*,[69] our Court recognized:

[66] Exhibits 50 and 52.
[67] Wash Const. Art. I, section 16
[68] *Yim v. City of Seattle*, 194 Wn.2d 682 (2020), Appendix ("Yim II").
[69] *Id.*, listing *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740 (2002).

> Regulatory takings may be either "per se" or "partial." A per se regulatory taking is found where a regulation's impact is necessarily so onerous that the regulation's mere existence is, from the landowner's point of view, the equivalent of a physical appropriation. As a matter of federal law, such categorical treatment is appropriate for only two relatively narrow categories of regulations—regulations that require an owner to suffer a permanent physical invasion of her property and regulations that completely deprive an owner of *all* economically beneficial use of her property.[70]
>
> One per se category applies where government requires an owner to suffer a permanent physical invasion of her property. The other applies to regulations that completely deprive an owner of all economically beneficial use of her property. Any other alleged regulatory taking must be analyzed on a case-by-case basis according to the *Penn Central* factors. The United States Supreme Court has since consistently applied these standards when defining regulatory takings, such that *Chevron U.S.A.* is clearly the Court's final, definitive statement on this issue at this time.[71]

Though preceding this long needed corrective analysis,[72] in other recent cases our courts have increasingly taken care to correctly characterize buffers and setbacks and the legal framework for assessing their legality. This requires distinguishing between constitutional takings analysis and the more limited analysis used for fees and dedications.

> The Vans argue that the requirement to maintain a 20–foot distance between piers constitutes a regulatory taking, relying on our opinion in *Isla Verde International Holdings., Inc. v. City of Camas*. However, *Isla Verde* concerned an ordinance that required a property developer to set aside a portion of its property as open space to preserve areas for wildlife and recreational purposes. We characterized that ordinance as an "exaction," because it required a private party "to dedicate a significant portion of its property for a public benefit." The state Supreme Court affirmed, but on other grounds. It concluded that the open space condition violated RCW 82.02.020 and did not reach arguments on its constitutionality.
>
> … [T]he Vans do not contend that they have been required to set aside part of their land for the public's use, but rather that the County's regulations have deprived them of the use of part of their property. Division One of this court has explained that a regulatory taking occurs when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. Therefore, by arguing that the County has engaged in

[70] *Yim v. City of Seattle*, 194 Wn. 2d 651, 660–61 (2019), cert. denied, *Yim v. City of Seattle*, 140 S. Ct. 2675 (2020), internal citations omitted ("Yim I").
[71] *Id.* at 670–71.
[72] This retrenchment in takings/due process analysis came with a recognition of judicial limits in a tripartite structure. "The doctrine that prevailed in Lochner … has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. Our precedent has routinely applied … [the] rational basis rule…." *Yim v. City of Seattle*, 194 Wn. 2d 682, 697–98 (2019), internal citations omitted ("Yim II").

> a taking by operation of its regulations, the Vans have raised a regulatory taking claim, not an exaction claim, and their reliance on *Isla Verde* is misplaced.[73]

In *Verjee-Van*, the court addressed a setback. However, the question of buffering arose in the shoreline context in *Olympic Stewardship Foundation*, where 150-foot shoreline buffering was challenged.

> CAPR argues that the Master Program 150-foot buffer and permit provisions violate applicants' substantive due process rights. We disagree. … [I]f a state action does not affect a fundamental right, the proper standard of review is a rational basis test, under which a challenged law must be rationally related to a legitimate state interest. Second, the court assumed that any necessary state of facts that it could reasonably conceive of existed when it determined whether a rational relationship existed between the challenged law and a legitimate state interest.[74]

In earlier Washington cases, exceptionally large set asides (grading prohibition on 50% of property;[75] 30% public open space set aside)[76] were addressed not through the constitutional *Penn-Central* takings framework, but a Ch. 82.02 RCW/*Isle Verde* analysis.[77] The analysis is limited to provision to the public of fees or easements.

> *Koontz* extended the *Nollan*/*Dolan* rule to certain "monetary exactions." In *Koontz*, the government refused to issue water permits to a land owner unless the landowner either deeded to the government an easement over land not being developed, or paid for improvements to noncontiguous government owned land. … In applying the *Nollan*/*Dolan* test to this scheme, the court stressed that it was not expanding *Nollan* and *Dolan* much beyond its narrow confines, stating: *Koontz's* claim rests on the ... *limited proposition* that when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a per se takings approach is the proper mode of analysis under the Court's precedent.[78]

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[73] *Verjee-Van v. Pierce Cty. through Dep't of Plan. & Land Servs*., 2 Wn. App. 2d 1046, p. 6 (Div. II, 2018), unpublished opinion, internal citations omitted (upholding condition, concluding "[p]roperty owners do not have a right to use and enjoy their property so as to create a nuisance or interfere with the general welfare of the community.").

[74] *Olympic Stewardship Found. v. State Env't & Land Use Hearings Off. through W. Washington Growth Mgmt. Hearings Bd.*, 199 Wash. App. 668, 719–20 (2017), internal citations omitted. While referencing a now defunct due process framework, the analysis is consistent with the two recent Supreme Court *Yim* cases.

[75] *Citizens' All. for Prop. Rts. v. Sims*, 145 Wn. App. 649 (2008).

[76] *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn. 2d 740, 752 (2002), abrogated by *Yim v. City of Seattle*, 194 Wn. 2d 682 (2019).

[77] The statutory framework may have been utilized as a matter of expediency, to avoid the then existing incoherent substantive due process/taking analysis. The difference between a takings framework and illegal exaction framework need not be detailed here, but in essence, illegal exactions are designed for when a condition is used to prevent the exercise of a constitutionally protected right. In land use, the analysis has been applied in the context of. land and fee dedications. The doctrine was not designed to take the place of interpreting constitutional language.

[78] *Douglass Properties II, LLC v. City of Olympia*, 16 Wn. App. 2d 158, 169–70 (2021), internal citations omitted.

There is nothing exceptional about the tree retention requirements here, where neither money nor land is being provided to government. With the reconsideration motion, the Applicant does not address this more recent case law, assuming *Ch. 82.02/Isle Verde* is the correct legal framework. For simplicity, the Examiner originally reviewed the condition to ensure its direct necessity from project impacts and rough proportionality to those impacts. That is because if this test is met, *Penn-Central* would be as well. But, given recent case law, and because all that is at issue is a modest buffer requirement, well within an unobjectionable setback, on reconsideration, the Examiner further considered the matter, and it is clear this is not the correct legal framework.

As with *Verjee-Van* and *Olympic Stewardship*, what is at issue is tree retention within a setback. No property is being set aside for public use. Tree retention is required only for the life of the project. No right to use or right to enter the property is extended to the public. In short, there is no fee, no public right-of-entry, no public use, and no title transfer. The Applicant is simply required to retain vegetation to screen the tower until it is decommissioned, at which point the property owner may elect to harvest the trees. This is not the "in perpetuity" requirement the Applicant describes in reconsideration. The buffer functions no differently from the larger setback it is located within. Under the 2018 *Verjee-Van* and the 2017 *Olympic Stewardship Fund* cases, this vegetation retention requirement would not be considered an exaction, and would not be subject to a Ch. 82.02 RCW/*Isle Verde* analysis, but instead to a constitutional takings analysis under the *Penn-Central* test.

Given recent cases, it is evident the courts are paying closer attention to properly characterizing mitigation and identifying the correct legal framework for analysis. So it is important to correctly do so here. Nevertheless, the Examiner need not resolve the issue as to whether the analysis proceeds under the *Penn-Central* ad-hoc analysis, or a Ch. 82.02 RCW exactions analysis, because the required tree retention satisfies either approach.[79]

Only a limited portion of the total property is impacted with no reduction in its ultimate development potential. The tree retention is necessary as a direct result of project impacts and the retention requirement is roughly proportional to those impacts. In fact, the mitigation is less than this metric allows for. No party ever argued the tower will be completely obscured. It is not. Even with screening, it will be visible from adjoining properties, and it is a use which conflicts with the forested character of the area. However, complete screening is not necessary to meet the permitting criteria, and that is not what the condition requires.

The buffer takes up a fraction of the larger 75-acre parcel, and does not diminish its development capacity. The retained trees presumably have value at harvest, though the Applicant provided no documentation on their value. They are a small part of the larger property, and the area is within the setbacks the Applicant had no objection to. The screening is roughly proportional to the impact the project directly causes in this rural, forested setting, and to its residential neighbors. No documentation supports the assertion that the condition cannot be easily complied with. To the contrary, the Applicant can readily comply with the larger setback. Given the common use of shoreline and wetland buffers with vegetation retention requirements,

[79] The Examiner also need not address the fact that the property owner did not appear in the proceeding and did not take a position on the buffer. This is not relevant to the permitting criteria the Examiner evaluates, though presumably highly relevant to the two lines of analysis addressed above.

if buffering were not available, it is not clear how wetlands and shorelines could be effectively protected, or routine use compatibility questions resolved.

Regarding the criteria the Examine must evaluate, the Plan discourages this commercial use in this setting, but consistency can be achieved with screening. Without buffering, the CUP, cell tower criteria, and SEPA requirements are not met. As detailed in other areas of the Decision, the project would have more than a moderate environmental impact, cause material detriment to its neighbors, be inconsistent with the Comprehensive Plan, and would violate Title 17. In its reconsideration motion, the Applicant does not address how to resolve these issues. The SEPA issue in particular was not addressed. With more than a moderate environmental impact, SEPA requires an EIS. The modest tree retention requirements avoid an EIS, and resolve the other compliance issues.

On SEPA, it is troubling that the Applicant initially downplayed project impacts in its SEPA Checklist and in responding to Department questions. These impacts should have been addressed up front, with adequate time and improved notice to ensure full and fair disclosure to the neighbors. As addressed in Finding 1.7, there were review process flaws. While efforts to correct the errors allowed the Examiner to determine there was substantial conformance, the push to permit the project without a lack of full disclosure is troubling. However, once the impacts were finally disclosed at the hearing, the Department carefully designed mitigation to address them, even tailoring the tree retention area to topography to address Applicant concerns.[80] This mitigation allows the CUP to issue. The reconsideration request should be denied.

1.21 Conditions. The Staff Report proposed 25 conditions. No concerns were raised or revisions proposed with these conditions. To ensure code compliance and mitigate the project consistent with these findings, these conditions should be imposed without substantive revision. During the hearing, DCD proposed additional conditions in Exhibit 48 and Exhibit 45 (with Condition 3 modified by Exhibit 52).

On the Exhibit 48 Conditions 1-5, the Applicant did not object to Conditions 1-4, but objected to Condition 5. On Exhibit 45 Conditions 1-4 (with Condition 3 revised in Exhibit 52), the Applicant objected to Conditions 3 and 4. The Applicant had no objection to Condition 1 if the language providing for mutual agreement on tower design between the Applicant and Appellants was removed, which the Examiner has done. While the language provides the Applicant additional flexibility, so would presumably have been acceptable, there are no metrics for DCD review, so removal is reasonable.

The Exhibit 48, 45, and 52 Conditions primarily address project visual impacts. The Applicant did not object to setback width, which is governed by code, but to the tree retention aspect. In hearing testimony, the Applicant stated that tree retention within the setbacks should be addressed later, when the property is platted and developed.[81] However, that defers project impact mitigation to an unknown date.

[80] Inexplicably, the Applicant objected to Department submission of a document which reduced the retention area.
[81] Testimony, Ms. Allen.

The Applicant also objected to a condition requiring confirmation that the access road is maintained consistent with Best Management Practices and Title 12 during the Site Development Activity Permit review process. Given the immediately adjacent critical areas, the condition is reasonable. While the project will not generate significant traffic following construction, sensitive areas are adjacent. The approach is consistent with Title 12, and with the County's environmental protection objectives outlined in code and the Comprehensive Plan.[82]

Excepting the minor modification noted above, and correcting the reference to Ch. 17.385 to Ch. 17.500 KCC (Condition 27-5), the Examiner added the conditions proposed by the Department to address inconsistencies with the KCC, including criteria specific to the use and the CUP criteria. The conditions are imposed through the Examiner's CUP authority, rather than SEPA. On SEPA, the Examiner is not the original decision maker, so does not draft SEPA conditions. With these additional conditions, the SEPA Decision need not be remanded, though the Department may elect to recognize the conditions by addendum.

2. CONCLUSIONS OF LAW

2.1 Hearing Examiner Review Authority. This new wireless communications facility requires Hearing Examiner Conditional Use Permit review.[83] The Hearing Examiner may approve, approve with conditions, or deny a CUP.[84]

2.2 Wireless Communication Facility Permitting Criteria.

2.2.1 Purpose. The County has adopted wireless communication siting criteria. The criteria are designed to:

- Allow for a variety of facility types in many locations.
- Reduce, preferably eliminate, the visual impact of facilities to surrounding properties.
- Encourage creative approaches to locating facilities in ways that are compatible with the surroundings.
- Encourage and facilitate collocation of antennas, support structures and related equipment on existing tower-based facilities or other structures that already support at least one nontower facility.
- Provide a process to locate and identify new site locations in a comprehensive manner with substantial public participation.
- Require the use of stealth technology.[85]

The ordinance places a particular emphasis on compatibility with the surrounding area, and creative approaches to location to achieve this. The goal is "preferably eliminat[ion]" of a tower's visual impacts. Permitting criteria provide detail on how to address such issues. These criteria, which are specific to wireless communication facilities, must be met for a CUP to issue.

[82] Plan, Ch. 3 and Chs. 19.200 and 19.300 KCC.
[83] KCC 17.410.010(C) and 21.04.100 (*see* permit type #18); KCC 17.530.030.
[84] KCC 17.550.030.
[85] KCC 17.530.010(A)(1-6).

2.2.2 KCC 17.530.040(B), Visual Impacts Analysis. The KCC requires visual compatibility and a blending of facilities with existing surroundings.

> All facilities shall employ the most current stealth technology to be the least visually and physically intrusive. All facilities shall also be aesthetically and architecturally compatible with the surrounding environment and shall be designed to blend with the existing surroundings.[86]

To assess visual impacts, a visual impact analysis is required, and "[w]hen more than a moderate visual impact is likely," a visual demonstration, utilizing a balloon, is completed.[87]

> A facility shall not be considered aesthetically compatible with the surrounding land uses if, within a one-mile radius, it results in more than a moderate visual impact. A "more than moderate" visual impact occurs when one or more of the following exist:
>
> - The facility becomes a predominant feature in the viewscape.
> - The facility disrupts a largely intact and unobstructed view of visually sensitive areas, which are those locations that provide views of one or more of the following: Puget Sound, lakes, large wetland complexes, major streams, valleys and ravines, large tracts of forested land, Mount Rainier, the Cascade mountain range or the Olympic mountain range. These views are particularly sensitive from certain places of the county, including residential areas, commercial areas, major transportation corridors and arterials in rural areas.
> - The facility is not designed and painted to blend in with the surrounding environment.
> - The facility is sited above visually predominant ridge lines.
> - The facility extends forty feet or more above the tree line determined by an analysis of site potential tree height at fifty years (SPTH (50)), based on soil types.[88]

Under these criteria, the project has a more than a moderate visual impact. The facility disrupts largely intact and unobstructed views of large tracts of forested land. From the neighboring property, it would be a predominant feature in the viewscape. A stealth design is proposed, but the tower will remain quite visible, and will not blend in with the surrounding environment without buffering. The tower would extend well above the tree line and be a dominant visual feature of the landscape, including from the residences, and from inside the Appellants' home and throughout their property.

2.2.3 KCC 17.530.060 Siting Criteria. The code allows towers above the standard zoning height limits only to the "minimum functional height necessary for a tower-

[86] KCC 17.530.040(B).
[87] KCC 17.530.040(B)(1)(b).
[88] KCC 17.530.040(B)(2)(a-e).

based facility to fill a gap in coverage or capacity," and the tower may "[n]ot exceed forty feet taller than surrounding tree height."[89] There are also restrictions based on whether the tower is the "sole use" on the parcel, or is part of a "combined use." The Applicant took the position that the project is the parcel's "sole use" so the combined use provisions do not apply.[90] "A tower-based facility may be allowed as the only use on a parcel if," the parcel "is at least six thousand square feet," and "[t]he distance between the base of the tower-based facility and the nearest property line is at least one hundred ten percent of the proposed height of the tower-based facility."[91]

The wireless communications facility is the only proposed use on the 75-acre parcel. At over 75 acres, the parcel exceeds 6,000 square feet, with facility placement within a 3,600 foot area. The tower height must be separated from all property lines by 110% of its height, requiring a 165 foot setback on all sides. A facility using stealth technology, which is "compatible with its surroundings" and complies with KCC 17.530.040(B), need not also comply with KCC 17.530.060(A)(7)(b) and (d),[92] but all other .060(7) requirements apply. The Applicant has agreed to stealth technology, and with conditions, as detailed above, compatibility and KCC 17.530.040(B) consistency can be achieved. As conditioned, the project meets the requirement that "existing trees, shrubs, and other vegetation shall be preserved to the maximum extent possible" and is consistent with the code, which states "[t]he department may require additional screening to adequately screen adjacent residential properties based on site-specific conditions."[93]

2.2.4 Other Ch. 17.530 Wireless Communication Facility Requirements. There are additional criteria governing the facility, including maintenance and repair (KCC 17.530.070) and decommissioning requirements (KCC 17.530.080). The project must comply with these provisions. With the proposed conditions, Ch. 17.530 KCC requirements can be met.

2.3 Conditional Use Permit Requirements. A CUP must comply with:

1. The proposal is consistent with the Comprehensive Plan;

2. The proposal complies with applicable requirements of [Title 17];

3. The proposal will not be materially detrimental to existing or future uses or property in the immediate vicinity; and

4. The proposal is compatible with and incorporates specific features, conditions, or revisions that ensure it responds appropriately to the existing character, appearance, quality or development, and physical characteristics of the subject property and the immediate vicinity.[94]

[89] KCC 17.530.060(A)(3)(a)(i) and (ii).
[90] Exhibit 32 (Staff Report), p. 31 ("The proposed site will be on a vacant parcel and this code subsection does not apply.").
[91] KCC 17.530.060(A)(6)(a)(i-ii).
[92] KCC 17.530.060(A)(7)(a).
[93] KCC 17.530.060(7) (c and e, *see also* f, and g).
[94] KCC 17.550.030(A).

The facility is not located within a Comprehensive Plan identified preferred location, but in a rural forested area, proximate to several residences. For there to be Comprehensive Plan consistency, the tower must blend into and be compatible with the setting. Without additional mitigation, 50% of the tower becomes a dominant feature of the landscape, creating significant visual impacts. It is only with the additional tree retention, as DCD has proposed, that this impact can be addressed and Comprehensive Plan consistency achieved.

Title 17 requirements are addressed in the Findings. With the conditions DCD has proposed, including the ones submitted in Exhibits 45, 48, and 52, these requirements can be met. Without the added conditions, consistency with Ch. 17.530 KCC would not be achieved.

The project can avoid material detriment to existing and future uses, including property within the immediate vicinity, but only if adequate mitigation is imposed, including adequate buffering and tree retention to reduce visual impacts. Without DCD's added mitigation, the project would be materially detrimental to the neighboring residences. The proposed conditions are required to render the project compatible with the surrounding rural, forested low density area. Without conditions, the tower starkly contrasts with the heavily wooded setting and creates a materially detrimental impact for neighbors in immediate proximity. Only if conditioned as DCD has proposed, should the CUP be granted.

While federal statutes address certain issues in wireless communication facility siting, such as EMF impacts and facility need due to coverage gaps,[95] local jurisdictions exercise their land use authority to review and mitigate project impacts so that a wireless communications facility meets code (and the Comprehensive Plan, where the code requires consistency, as here).[96] As mitigation has been proposed in line with code, Plan, and state land use practices, the project should be approved.

2.4 SEPA Appeal. The Examiner has jurisdiction over the SEPA appeal. An MDNS may be issued when environmental impacts are reduced to below a level of probable significance. Significant is defined as "a reasonable likelihood of more than a moderate adverse impact on environmental quality."[97] The MDNS is afforded substantial weight.[98] The KCC defines significance for code review, so is useful in evaluating SEPA impacts. Under the KCC, as elaborated on in the findings, without additional mitigation, the project has more than a moderate visual impact.

The Appellants' photographs depicted the prominent views they would have of the facility from their bedroom, driveway, and other areas of their property.[99] However, with the additional conditions detailed in the Findings, the KCC criteria are met, and the project would no

[95] *T-Mobile USA Inc. v. City of Anacortes,* 572 F.3d 987 (2009).
[96] *Id., and see e.g., Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275 (2008) (Energy Facility Site Evaluation Council and Governor relied on minimum four times tower height setback to address visual impacts); *Timberlake Christian Fellowship v. King County,* 114 Wn. App. 174 (2002) (upholding balanced approach to siting church outside urban area).
[97] WAC 197-11-794(1).
[98] KCC 21.04.290(E)(7).
[99] Exhibits 33 and 47; Testimony, Ms. Goss and Mr. Dye.

longer have more than a moderate visual impact. As the CUP Decision incorporates these conditions, it is unnecessary to remand the MDNS to DCD to withdraw and reissue a revised MDNS or prepare an EIS. However, to clarify the record, DCD may elect to issue an addendum to the SEPA determination to identify the CUP conditions.

2.5 Reconsideration. Reconsideration is addressed at Finding 1.20. The analysis combines fact and law, and is incorporated here. Based on that analysis, the Examiner concludes that excepting various clarifications, including on the legal framework, reconsideration should be denied.

DECISION

The Hearing Examiner, pursuant to the above Findings of Fact and Conclusions of Law, denies the Motion for Reconsideration (except for the identified clarifications) and approves the requested CUP, provided the below conditions are adhered to.

Based on the added CUP conditions, the SEPA appeal is denied. Without these conditions, including Conditions 26 and 27 below, the project would have more than a moderate adverse impact, as defined under SEPA and the County's Code, and either additional conditions or preparation of an Environmental Impact Statement would be required. It is only with the conditions that a remand for further SEPA review is rendered unnecessary. Based on compliance with the below conditions, the MDNS is upheld and the SEPA appeal denied.

Planning/Zoning

1. [reserved]

2. All required permits shall be obtained prior to commencement of land clearing, construction and/or occupancy.

3. The sound level from the proposed emergency generator with the proposed muffler cannot exceed 59-dBA at the nearest receiving property during test cycle operation, to be consistent with the 60-dBA code limit.

4. The uses of the subject property are limited to the uses proposed by the Applicant and any other uses will be subject to further review pursuant to requirements of the KCC. Unless in conflict with the conditions stated and/or any regulations, all terms and specifications of the application shall be binding conditions of approval. Approval of this project shall not be, and is not to be, construed as approval for more extensive or other utilization of the subject property.

5. Landscaping shall be installed and maintained in conformance with the requirements of KCC 17.500. Landscaping shall be installed and inspected prior to requesting a final inspection or guaranteed by means of an assignment of funds or bonded in the amount of 150 percent of the cost of installation.

6. The Applicant and property owner shall comply with the Native Vegetation Buffer Easement to ensure that all existing significant natural vegetation remains. The native buffer vegetation easement shall remain in effect for the life of the facility to provide a functional screen from the adjacent residential properties.

7. The structure shall be unlighted, including any daytime strobes or nighttime illumination, including flashing or solid beacons. Should the FAA require such lighting for the purpose of aircraft safety, the facility shall be redesigned to meet FAA regulations without the need for lighting of the structure.

8. The Applicant shall meet all requirements of the Federal Communications Commission (FCC) and the Telecommunications Act of 1996 regarding Electromagnetic Field/Radio–Frequency Standards.

9. Prior to issuance of a Building Permit, the Applicant shall provide a fully executed lease agreement with the owner of the property. (Note: Any proprietary information regarding lease rates may be excluded.)

10. The recipient of any CUP shall file a Notice of Land Use Binder with the county auditor prior to any of the following: initiation of any further site work, issuance of any development/construction permits by the county, or occupancy/use of the subject property or buildings thereon for the use or activity authorized. The Notice of Land Use Binder shall serve both as an acknowledgment of an agreement to abide by the terms and conditions of the CUP and as a notice to prospective purchasers of the existence of the permit. The Binder shall be prepared and recorded by the Department at the Applicant's expense.

11. This CUP approval shall automatically become void if no development permit application is accepted as complete by DCD within four years of the Notice of Decision date or the resolution of any appeals.

12. The decision set forth herein is based upon representations made and exhibits contained in the project application. Any change(s) or deviation(s) in such plans, proposals, or conditions of approval imposed shall be subject to further review and approval of the County and potentially the Hearing Examiner.

13. The authorization granted herein is subject to all applicable federal, state, and local laws, regulations, and ordinances. Compliance with such laws, regulations, and ordinances is a condition to the approvals granted and is a continuing requirement of such approvals. By accepting this/these approvals, the Applicant represents that the development and activities allowed will comply with such laws, regulations, and ordinances. If, during the term of the approval granted, the development and activities permitted do not comply with such laws, regulations, or ordinances, the Applicant agrees to promptly bring such development or activities into compliance.

14. Any violation of the conditions of approval shall be grounds to initiate revocation of this CUP.

15. Existing native vegetation shall be retained on the site except for areas to be cleared for the construction of the new tower and associated infrastructure, as depicted on the proposed site plan (Exhibit 35).

16. Prior to issuance of a Building Permit, the Applicant shall provide an executed lease agreement with Native Vegetation Buffer Easement with the owner of the property. (Note: Any proprietary information regarding lease rates may be excluded.)

Development Engineering

17. Construction plans and profiles for all roads, storm drainage facilities and appurtenances prepared by the developer's engineer shall be submitted to Kitsap County for review and acceptance. No construction shall be started prior to said plan acceptance.

18. The information provided demonstrates this proposal is a Small Project as defined in KCC Title 12, meets the criteria for an Abbreviated Drainage level of review, and is required to provide a design demonstrating compliance with Minimum Requirements #1-5, as outlined in the Kitsap County Stormwater Design Manual. As such, after Land Use approval, a SDAP from Development Services and Engineering is required.

19. On-site stormwater management, and erosion and sedimentation control, shall be designed in accordance with KCC Title 12 effective at the time the CUP application was deemed complete, August 28, 2020. The fees and submittal requirements shall be in accordance with Kitsap County Ordinances in effect at the time of SDAP application

a. Soil amendment is required for all areas disturbed during construction that are not covered by hard surface at project completion. The SDAP shall include soil amendment details.

20. If the project proposal is modified from that shown on the submitted site plan accepted for review February 23, 2021, Development Services and Engineering will require additional review and potentially new conditions.

Environmental

21. Permit approval subject to Chapter 19.150.170 of KCC, which states that critical area ordinance (CAO) buffers shall remain undisturbed natural vegetation areas except where the buffer can be enhanced to improve its functional attributes. Refuse shall not be placed in buffers.

22. Permit approval subject to Chapter 19.300.315 of KCC, which states that buffers or setbacks shall remain undisturbed natural vegetation areas except where the buffer can be enhanced to improve its functional attributes. Refuse shall not be placed in buffers.

23. A 150-foot native vegetation buffer must be maintained along the delineated wetland boundary as depicted on the approved site plan. In addition, a building or impervious surface setback line of 15 feet is required from the edge of the buffer.

Traffic and Roads

24. All rights of access for adjoining properties currently in existence shall be preserved. Any amendment to the existing easement rights of adjoining property owners shall be properly executed and recorded prior to SDAP acceptance.

25. Any work within the County right-of-way shall require a Public Works permit and possibly a maintenance or performance bond. This application to perform work in the right-of-way shall be submitted as part of the SDAP process. The need for and scope of bonding will be determined at that time.

Additional Conditions
Exhibit 45 (April 20 Memo) and Exhibit 52 (April 23 Memo)

26-1. To reduce the facility from more than a moderate visual impact, the Applicant shall use stealth design such as a Mono-fir tree [*see* Exhibit 48 photograph] or move the tower to another location on the Alpine Evergreen property.

26-2. If the WCF is moved, the tower shall be consistent with KCC 17.530.040.B.1-2, providing a maximum buffer up to 75%, and secure a native growth protection easement (under control of the Applicant, tower owner, or landowner). If the trees within screening buffer are less than 75% tree coverage of the tower, the trees should instead mature consistent with the USDA Site Potential Tree Height site-index [SPTH (50)] within a more reasonable period of 5 to 10 years.

26-3. The required tower buffer should be oval-shaped, generally 165 feet from tower center to NE direction and generally 120 feet at E, SE, S, SW, and W, and approximately 135 feet at NE and NW from tower center. Approximate acreage is 1.12 acres. The buffer must include screening components for future tree maturation to reach max site index in the south and east, and incorporates existing mature background stands to the north and west of the proposed tower.

26-4. With the increase in traffic after tower construction, the Department will require the Applicant to demonstrate through the Site Development Activity Permit how the private roadway will be maintained consistent with Best Management Practices to protect water quality. A pre-construction video of the roadway, and post video survey will assure that road damage is repaired and brought back to pre-work condition. In accordance with Title 12 Stormwater Drainage and other applicable code as necessary, the Applicant shall implement Best Management Practices for project development and maintenance and through the lifespan of the project.

Additional Conditions

Exhibit 48 (April 21 Memo)

27-1. The applicant's proposal for a tower-based facility disguised through stealth technology as a mono-pine/fir tree shall be consistent with KCC 17.530.030 Permitting, and demonstrate the proposal meets the requirements of a stealth designed, WCF pursuant to KCC 17.530.040.B Visual Appearance.

27-2. The WCF design shall be consistent with a Douglas fir tree. The limbs creating the crown shall taper from the top of the tower and longer limbs down towards the base. The limb density should be dense enough to simulate a healthy growing Douglas fir. As documented by the applicant the WCF shall have a similar appearance to the WCF in the photographs submitted by the applicant (*See* AT&T example). Tree limbs shall be installed down to approximately 75 feet to increase compatibility and maintain an appearance as a tree.

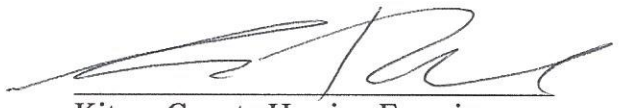
27-3. Prior to Building Permit Issuance, the applicant shall submit an operation and maintenance plan to maintain the wireless communication facility and the appearance as a tree. Include a name and telephone number with AT&T to contact on a placard onsite if issues occur.

27-4. Prior to Final Inspection, the applicant shall submit a construction As-built design of the stealth designed WCF to the Department to demonstrate compliance with the Hearing Examiner's and SEPA conditions of approval to demonstrates the tower creates less than a moderate visual impact per KCC 17.530.040.B.

27-5. Consistent with the applicant's discussion on the proposed tower height and Arborist report, retain trees within a native growth protection easement consistent with KCC 17.500 Landscaping, on the Building Permit site plan, retain planted and existing vegetation outside the fence of the ground equipment compound used for landscaping to provide a functional screen of the base of the tower and ground equipment.

Absent a timely appeal, this Decision is final.[100]

DECISION entered May 27, 2021.



Kitsap County Hearing Examiner
Susan Elizabeth Drummond

[100] Ch. 36.70C RCW (appeal to superior court must be made within 21 days).